



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

VALENTINE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Shazia Akhtar

**Counsel for Respondent:**

Kara D. Nottingham, HRLU/HRMS, UNOG

## **Introduction**

1. By application filed on 4 March 2015, the Applicant contests the decision not to select him for the position of Chief of Transport Section (P-5), United Nations Conference on Trade and Development (“UNCTAD”), advertised under Job Opening Number 13-ECO-UNCTAD-28179-R-Geneva (“JO 28179”).

## **Facts**

2. The Applicant joined UNCTAD on 1 February 2007, as an Economic Affairs Officer (P-4), Transport Section, Trade Logistics Branch (“TLB”), Division of Technology and Logistics (“DTL”). On 1 January 2010, he was temporarily designated Officer-in-Charge (“OiC”) of the Transport Section.

3. On 6 February 2013, the position of Chief of Transport Section (P-5) was advertised in *Inspira* under Job Opening No. 13-ADM-UNCTAD-26288-R-GENEVA (R) (“JO 26288 or first job opening”). The Applicant applied for it.

4. On 10 April 2013, the Applicant requested management evaluation of the “implied decision” not to grant him a special post allowance (“SPA”) while acting as OiC of the Transport Section for the previous 39 months and of the decision to issue JO 26288, alleging that it had been classified under the wrong occupational group and that it unlawfully added fluency in French as a language requirement for the post.

5. On 24 May 2013, the Chief, Management Evaluation Unit (“MEU”), Office of the Under-Secretary-General for Management, informed the Applicant that JO 26288 “would be cancelled and that a revised [job opening] for the Post, *inter alia*, based on changes in the occupational group that it is placed in and its language component, would be issued”.

6. On 19 June 2013, a second job opening was issued for the post of Chief of Transport Section, namely JO 28179. The fluency in French requirement had been modified and the post had been moved from the “Administration” to the

“Economic” occupational group. The responsibilities, competencies and work experience required had also been substantially changed.

7. On 24 July 2013, the Applicant applied for a temporary vacancy announcement (“TVA”) for the post of Chief of Transport Section. He was interviewed for it on 29 August 2013 by two colleagues from TLB, DTL, UNCTAD, namely the then Head, TLB (D-1), and the Chief of Trade Facilitation Section (P-5), together with another external panel member. The Applicant was selected for the TVA on 18 September 2013.

8. On 13 August 2013, the Applicant applied for JO 28179. On 1 December 2013, he received an invitation to a written test, which stated: “your answers will be anonymously assessed by the members of the panel: [the Senior Economic Affairs Officer, Technical Cooperation Service, UNCTAD (P-5), the Chief of Trade Facilitation Section and the then Head, TLB]” and that “the passing grade will be 60% and the weight of the questions is respectively 40-30-30”.

9. On 9 December 2013, the Applicant took the written test and scored 52 out of 100 points, which was below the passing grade of 60. He was therefore not invited to an interview. Eight other candidates passed the test and were invited to a competency-based interview.

10. On 29 August 2014, the Applicant was notified that he had not been selected for JO 28179 and, on 15 September 2014, he learned that the selected candidate, who had worked under his supervision (as P-4) for the past three years and 11 months, had been appointed.

11. On 24 October 2014, the Applicant requested management evaluation of his non-selection for JO 28179. His request was dismissed by the MEU on 29 January 2015, on the ground that he had not demonstrated any irregularity in the selection process or bias.

## Parties' submissions

12. The Applicant's principal contentions are:

- a. There is evidence of bias in favour of the selected candidate as:
  - i. The Applicant's relationship with both the Chief of Trade Facilitation Section and the then Head, TLB, deteriorated since the Applicant initiated administrative proceedings to be awarded an SPA for performing functions as OiC for the post of Chief of Transport Section and challenged JO 26288, the first job opening for the contested post. The Applicant's tense relationships with the two internal panel members for JO 28179 adversely influenced the selection process;
  - ii. The vacancy announcements for the contested post were written in a way to favour the eventually selected candidate;
  - iii. The selected candidate did not possess the required experience for the post;
  - iv. Question three of the written test was tailor made for the selected candidate and assessed as "desirable criteria" for the post rather than as a requirement; and
  - v. There is evidence of systematic failures in the recruitment procedures in DTL, UNCTAD;
- b. The principle of anonymity for the written test was subverted as:
  - i. The then Head, TLB, who acted as *de facto* hiring manager, was in a position to ascertain the identity of the candidates as he knew when each of them would take the test and received their answers as they came in;

- ii. Question one was identical to a question the Applicant had been asked by the two internal panel members in a previous interview he had had for a TVA for the same post, so they could easily recognise his answer to the written test; and
  - iii. Question one asked the candidates to identify the recipient of the policy advice, which allowed the two internal panel members to easily identify the Applicant and served no evaluation purpose;
- c. There were also other significant procedural errors in the selection process, which vitiated the selection decision and constituted further evidence of bias in favour of the selected candidate:
- i. Two candidates who did not apply for JO 28179 within the set deadline, including the selected candidate, were unlawfully included in the shortlist of candidates;
  - ii. The panel's composition for the written test was unlawful, as the external panel member did not mark Question one;
  - iii. The marking criteria for the written test were set after the Applicant submitted his answers, they were deficient and they were not applied consistently; and
  - iv. The collated scores for the written test, which were signed over six months later, are not reliable as they could not be verified against the original marking sheets, which were no longer available for two of the panel members. Furthermore, the collated scores recorded for the third panel member do not accurately reflect his original marking sheets;
  - v. The then Head, TLB, acted as "*de facto* hiring manager" without any proper delegation of authority;

d. Since the Applicant filed his application and previously challenged the denial of his request for an SPA, he has been subject to treatment which amounts to victimisation and/or harassment;

e. Consequently, the Applicant requests:

- i. Rescission of the contested decision;
- ii. Compensation for loss of earnings;
- iii. Compensation for moral and material damages resulting from “loss of reputation and injury to feelings”; and
- iv. Award of costs in the amount of £14,000 plus VAT, totalling £16,800.

13. The Respondent’s principal contentions are:

a. The Applicant was given full and fair consideration and the proper procedure, as set out in ST/AI/2010/3/Amend. 1 (Staff Selection System), was adhered to. Accordingly, the presumption of regularity with regard to the selection decision should stand. The Applicant’s failure to pass the written test is the only reason for his non-selection and, therefore, the sole issue relevant to the present case;

b. The written test was properly administered, as:

- i. It was designed to assess the “professionalism” and “communication” competencies set forth in the job opening, including transport policy advice, technical assistance projects and fundraising for a transport related activity;
- ii. It was anonymous. Contrary to the Applicant’s assertion, there is no evidence that the answers from the various candidates were sent by the test administrator to the then Head, TLB, as they came in;

- iii. The assessment panel was properly composed as there is no requirement that all three panel members mark each question. Furthermore, the Applicant failed to show how this method, which was applied to all candidates, unfairly prejudiced him;
  - iv. The Applicant's assertion that the then Head, TLB, could have amended the marking criteria following the receipt of his answers is unsubstantiated, and there is no evidence that the marking criteria were not set out prior to his taking the test. Rather, the marking criteria were objective and applied consistently to all candidates;
  - v. The evidence shows that the panel members agreed on the scores awarded to each candidate immediately after the assessment took place, although they signed the collated scoring sheet six months later;
- c. The allegations of bias are unfounded as:
- i. The SPA matter has already been settled, hence it is *res judicata*;
  - ii. Any issue related to the first vacancy announcement, namely JO 26288, is moot as it was cancelled. In any event, the Respondent provided clear and objective justifications for its cancellation, namely to change the occupational group and include economics in the "education" requirements in an effort to better reflect the Organization's needs and to open the position to a larger group of candidates;
  - iii. Any allegations of bias in respect of the subsequent JO 28179 are unsubstantiated as the Applicant was considered to meet the requirements for the post, and the Respondent properly exercised his discretion in drafting the job opening, to reflect the Section's current work that focusses increasingly on emerging issues;

- iv. The selected candidate met the requirements for the contested post;
  - v. Question three on fundraising was permissible as it reflects the desirable experience set forth in the vacancy announcement and, also, allowed testing other competencies such as communication, organisational and strategy skills; and
  - vi. The Applicant did not present any evidence of systematic failures in the recruitment process at UNCTAD;
- d. As to remedies, the Applicant was not demoted as he claims, but simply returned to his level prior to his temporary appointment as OiC. Furthermore, the Applicant failed to prove any compensable harm.

### **Consideration**

14. It is well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Tribunal shall examine “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Ljungdell* 2012-UNAT-265).

15. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed. Accordingly, in a recruitment procedure, if the Administration is able to even minimally show that a staff member’s candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must then be able to show through clear and convincing evidence to have been denied a fair chance.

16. The Tribunal notes that in selection cases, most of the relevant evidence is in the possession of the Administration. Prompt and full disclosure of the relevant documents by the Respondent is key to a fair determination of the case. Likewise, the Respondent shall ensure that relevant witnesses are made available to testify if their appearance before the Tribunal is required.

17. The Respondent's disclosure obligation is twofold. Firstly, the Respondent shall produce evidence to satisfy his own burden to minimally show that the staff member's candidature was given full and fair consideration. For instance, when the Respondent claims that a certain procedure was followed, he must produce the relevant evidence to support his statement. As the Appeals Tribunal stated, "argument is not evidence" (*Hepworth* 2015-UNAT-503, para. 43; *Hushiyeh* 2014-UNAT-435, para. 34). Secondly, the Respondent shall disclose any document in his possession that is relevant to the determination of the Applicant's case, as presented in his or her application. This duty of candour that falls on the Respondent is necessary to ensure that staff members have access to justice. It goes without saying that it would be virtually impossible for staff members to rebut the presumption of regularity and prove their case if they are not provided access to relevant documents and witnesses.

18. To ensure respect of disclosure obligations, the Tribunal may, pursuant to art. 9 of its Statute, order production of documents and appearance of witnesses. When the Respondent fails to abide by these orders without any proper justification, the Tribunal is entitled to draw appropriate conclusions. As the Appeals Tribunal previously held, "it could, depending on the circumstances, go so far as to find that, by virtue of its refusal, the Administration, whatever the scope of its discretionary power, must be regarded as having accepted the allegations made by the other party regarding the facts" (*Bertucci* 2011-UNAT-21, para. 51).

19. In this case, the Tribunal issued a number of orders for the production of evidence by the Respondent, upon request from the Applicant. The Respondent deployed extensive efforts to produce a large volume of documents, but some key documents, nevertheless, remained missing without any justification or explanation being provided.

20. The Tribunal also requested the appearance of seven witnesses to testify at the hearing on the merits. After three retired witnesses expressed reluctance to appear, the Tribunal, by Order No. 210 (GVA/2016) of 27 October 2016, summoned them. Two witnesses appeared; one of them, Mrs. Anne Miroux,

former Director, DTL, UNCTAD, who was the designated hiring manager for JO 28179, did not as “she did not desire to participate in the hearing”. Mrs. Miroux could therefore not be heard, which meant that some factual issues could not be elucidated, as will be more amply discussed below. It is regrettable that Mrs. Miroux, a former senior staff member, did not regard her ties with the Organization and her professionalism to be such so as to assist the Tribunal and answer the summons. The Tribunal notes that it could not sanction Mrs. Miroux for her failure to answer the summons as she had retired.

21. The Tribunal could not go any further in its attempt to ascertain the truth and will, in accordance with *Bertucci*, draw the appropriate inferences when necessary. However, contrary to the Applicant’s submissions, it is not authorised to reverse the burden of proof, as set out above in the jurisprudence of the Appeals Tribunal.

22. Against this background, the Tribunal will now turn to examine:

- a. The Applicant’s allegations that the *de facto* hiring manager was biased against him and predisposed to hire the eventually selected candidate; and
- b. The alleged irregularities in the selection procedure.

*Allegations of bias*

23. The crux of the Applicant’s case is that the *de facto* hiring manager, the then Head, TLB, disliked him and was predisposed to hire the eventually selected candidate, who was also a staff member of the Transport Section. The Applicant claims that this bias is evidenced by the fact that he had to bring an administrative challenge to be awarded an SPA for his performing functions as OiC for the post of Chief, Transport Section, and that the vacancy announcements for the contested post were designed to favour the selected candidate. The Applicant argues that the then Head, TLB, manipulated the whole selection process to ensure that the selected candidate be appointed. The Respondent argues that the issue of the Applicant’s SPA is moot as it was resolved through a settlement agreement, and

that objective and clear justifications were provided for the changes in the vacancy announcements for the contested post.

24. The Tribunal recalls the Appeals Tribunal's finding in *Finniss* 2014-UNAT-397 that:

The guidelines in paragraph 9 of ST/AI/2006/3 provide that candidates need to be evaluated against pre-approved evaluation criteria. *It is reasonable to expect that the selection process is not only fair but also seen to be fair.* Thus, as a matter of fair process, there is no room for extraneous considerations such as bias, prejudice and discrimination. (emphasis added)

25. As pointed out in *Simmons* UNDT-2013-050:

Allegations of bias and prejudice are easy to make and usually extremely difficult to prove because of the absence of affirmative evidence. Accordingly, the Tribunal must be prepared to draw inferences from the primary facts. If the facts established do not reasonably point to the possibility of bias or prejudice that will normally be the end of the matter. However, where they may tend to show that the possibility of bias, prejudice or improper considerations may possibly have infected the process the onus shifts to the Respondent to show that bias or prejudice did not in any sense whatsoever taint the selection process and final outcome.

26. In this case, there is not one single fact, but rather an accumulation of facts that leads the Tribunal to infer that the selection process for the contested post was not conducted with the required level of impartiality. Both the Applicant and the selected candidate were well-known to the then Head, TLB, who acted as *de facto* hiring manager in the selection process for the contested post (see paras. 39 to 51 below). The then Head, TLB, was the Applicant's first reporting officer and the selected candidate's second reporting officer. Whilst it has not been established that the then Head, TLB, was biased *against* the Applicant, there are strong indications that the selection process was designed to *favour* the selected candidate.

27. At the outset, the Tribunal rejects the Applicant's argument that issues related to awarding him an SPA are indicative of bias against him from the then Head, TLB. Given that this issue was resolved through a settlement agreement,

the Tribunal can draw no conclusion in respect of the Applicant's entitlement to said SPA or the reasons for the alleged delay in granting it to him. The alleged statement by the then Head, TLB, that "life is unfair" in response to the Applicant's request for an SPA does not, in and of itself, support the Applicant's assertion that the then Head, TLB, "disliked him". Furthermore, there is no direct evidence that the administrative proceedings launched by the Applicant concerning his request for an SPA triggered animosity between him and the then Head, TLB.

28. However, a number of actions and decisions taken by the then Head, TLB, in the selection process benefited the selected candidate's candidacy, to the detriment of the Applicant's. This can hardly be a coincidence given that the then Head, TLB, was well acquainted with the qualifications and professional experience of both them.

29. Firstly, the then Head, TLB, introduced French as a language requirement for the contested post in the first job opening, JO 26288. The post, for which the Applicant had acted as OiC for over four years, did not previously require fluency in French. The selected candidate was fluent in French whilst the Applicant had only a basic level. When the Applicant challenged JO 26288 arguing that the addition of fluency in French as a requirement for the post excluded him from the selection process, said requirement was withdrawn and included as an "advantage" in the second job opening, JO 28179. The then Head, TLB, explained in his testimony that there was an increasing need for the incumbent of the post of Chief of the Transport Section to be fluent in French to liaise with representatives of African francophone countries. He added that the requirement for French was also justified by the fact that the post is located in Geneva.

30. The Tribunal does not question the legality of the addition of fluency in French as a requirement for the contested post nor the reasonableness of the justifications provided by the Respondent to support it. However, the Tribunal finds that taking into consideration the context of this case—where at least one of the panel members knew the Applicant's and the selected candidate's level of fluency in French—the Administration's argument for first "requiring" and

subsequently “desiring” fluency in French is contradictory. Either, from the outset, fluency in French was to be a legitimate requirement for the post, and it should not have been removed from the advertised job opening, or it was to be a desirable skill. As the qualification of fluency in French was modified following the Applicant’s challenge to the first job opening, it can be inferred that, in this case, it was initially included as a requirement to favour the selected candidate.

31. Secondly, very particular changes were introduced by the then Head, TLB, in the second job opening to move the focus of the position from transport policy experience to economic research and analysis experience. Indeed, the initial requirement of “[a] minimum of ten years progressively responsible experience in economic analysis, policy formulation in the area of international freight transport, and proven experience in managing transport technical assistance programmes” was replaced by “a minimum of ten years progressively responsible experience in economic research and analysis, policy formulation, application of economic principles in development programmes or related work”. Also, under the competency of professionalism, the requirement of “[k]nowledge of international freight transport development policies and of specific emerging transport-related issues affecting developing countries” was replaced by “[a]bility to apply economic theories and concepts in different sectors of Transport and sustainable Transport development” and “[a]bility to develop Transport policies and make recommendation on their implementation”.

32. The selected candidate’s PHP shows that she only started to work in the area of international freight transport on 1 November 2010, when she joined the Transport Section. When the second job opening was advertised on 19 June 2013, she had no more than two and a half years of experience in this field. She would not have qualified for the post if the transport experience requirement set out in the first job opening was still in place. The requirement of economic policy experience better fitted her profile.

33. The Respondent provided no reasonable justification for the significant changes made to the experience requirements. Moreover, the then Head, TLB, even stated in his testimony, under cross-examination, that the first job opening

better reflected the work requirements for the position. This admission was contrary to the Respondent's assertions in his Reply. Equally concerning, the designated hiring manager, Mrs. Miroux, did not mention the changes in her 19 April 2013 request to the Chief, Human Resources Management Section ("HRMS"), United Nations Office at Geneva ("UNOG"), to cancel the first job opening and to reissue a new one. Mrs. Miroux merely stated that cancellation of the first job opening was being requested "on the grounds that the occupancy group or job family for [the] job opening as advertised under ADM and not under the ECO one may have misled potential candidates", and that she sought approval to "reissue the job opening for this Chief of Transport Section position under the correct ECO occupancy group and include economics in the *education requirements* which would better reflect our needs and would open the position to a larger group of potential candidates" (emphasis added). Nowhere is it mentioned that there was a need to change the experience requirement. Furthermore, the evidence shows that the cancellation of the first job opening was triggered by the administrative proceedings initiated by the Applicant, who challenged the language requirements and pointed out that the post had been advertised under the wrong job family.

34. The then Head, TLB, denied in his testimony that he was at the origin of the changes made to the experience requirements in JO 28179. However, he could not identify who made these changes, and the Respondent provided no further explanation nor document allowing to clearly identify the author of the changes, although he was requested to provide "[a]ll emails in respect of the drawing up of the second vacancy announcement for JO 28179". The Tribunal finds that the testimony of the then Head, TLB, is not credible in this respect given that it is undisputed that he drew up the first job opening, and that the evidence shows that he led the whole selection process (see para. 43 below) and was involved in the approval seeking process for the changes introduced in the second job opening. Absent any evidence presented by the Respondent establishing that someone else other than the then Head, TLB, changed the first job opening, it can reasonably be concluded that these were made by him or upon his instructions.

35. Thirdly, it appears that the selection process was considered to be “a special case”, and that additional efforts were made to ensure that the selected candidate be notified of the cancellation of the first job opening. In an email of 30 May 2013, concerning notification of the cancellation of the first job opening to the candidates, a staff member of the Talent Management Team, Human Resources Management Section, UNCTAD, wrote: “[T]his is a special case. It is important to notify all the eligible candidates for this JO. There might be some internal candidates whose applications are pending HR assessment”. This was the case for the selected candidate, whose candidacy had not been released to the hiring manager by HRMS for JO 26288. The reference to “a special case”, for which the Respondent provided no explanation, creates a reasonable apprehension that it was given different treatment from a normal job opening.

36. Fourthly, the scores for the written test given by the then Head, TLB, to the selected candidate and the Applicant, respectively, may further indicate, in the circumstances of the present case, that he had a preference for the selected candidate. The then Head, TLB, gave the selected candidate a score of 95/100, which was rather above her average score of 76/100. In contrast, the then Head, TLB, gave the Applicant a score of 50/100, whose average score was 52/100.

37. The Tribunal finds that the above-mentioned facts reasonably add to the possibility that bias in favour of the selected candidate may have tainted the selection process. In turn, the Respondent failed to show that the selection process was conducted in an objective and impartial manner. As is more amply discussed below, there were significant procedural errors in the selection process that not only constitute a departure from the applicable rules but, also, lend support to the conclusion that the selection process had the appearance of being manipulated to favour the selected candidate.

*Alleged irregularities in the selection procedure*

38. The Applicant alleges that the selection procedure for JO 28179 was vitiated in a number of ways, which renders the whole process unlawful and further indicates bias on the part of the *de facto* hiring manager. These will be examined in turn.

Authority of the then Head, TLB, to act as hiring manager

39. The Applicant asserts that the then Head, TLB, *de facto* acted as hiring manager for the contested selection process, and that he had no authority to do so. The Respondent argues that, under sec. 6.3 of the Manual for the Hiring Manager on the Staff Selection System (*Inspira*) of October 2012 (“Hiring Manager Manual”), it was permissible for the hiring manager, namely the Director, DTL, UNCTAD, to designate an alternate hiring manager.

40. The term “hiring manager” is defined in sec. 1(m) of ST/AI/2010/3/Amend. 1 (Staff selection system) as follows:

*Hiring manager*: the official responsible for the filling of a vacant position. The hiring manager is accountable to his/her head of department/office to ensure the delivery of mandated activities by effectively and efficiently managing staff and resources placed under his or her supervision and for discharging other functions listed in section 6 of ST/SGB/1997/5 (as amended by ST/SGB/2002/1).

41. ST/AI/2010/3/Amend. 1 does not provide for the hiring manager to delegate his or her authority over the selection process that he or she has been mandated to conduct. On the contrary, this administrative instruction specifically assigns a number of responsibilities to the hiring manager in respect of the selection process, as recalled in *Hubble* UNDT-2014-069:

[I]t results from various provisions of ST/AI/2010/3/Amend. 1 that the Hiring Manager plays an important role at all the stages of the selection process, from the initiation of the job opening to the recommendation to the head of department: the Hiring Manager is responsible for creating the job opening (sec. 4.4); once eligible candidates have been pre-screened/pre-approved, they are released to the Hiring Manager for consideration for selection (sec. 7.2); moreover, the Hiring Manager prepares a reasoned and documented record of the evaluation of the proposed candidates for review by the central review body and for selection by the head of department (sec. 7.6); under sec. 7.7, the Hiring Manager transmits his/her proposal of one or several (unranked) candidates to the appropriate central review body; sec. 9.2 provides that once candidates are “approved” by the central review body, the selection decision shall be made by the head of department on the basis of proposals made by the responsible Hiring Manager, whereas

sec. 9.3 states that the Hiring Manager shall support the recommendation of candidates for selection by a documented record. Finally, sec. 9.5 provides with respect to eligible and suitable roster candidates on occupational rosters that “the hiring manager may recommend his/her immediate selection to the head of department ... without reference to the central review body”.

42. The hiring manager is assisted by an assessment panel in conducting a selection process. Pursuant to sec. 1(c) of ST/AI/2010/3/Amend. 1, the role of this panel is to “undertake the assessment of applicants for a job opening”. Pursuant to sec. 1(b), the assessment conducted by the assessment panel is “the substantive process of evaluating applicants to determine whether they meet all, most, some or none of the requirements of the position under recruitment”. No decision-making or recommendation power is vested to the assessment panel.

43. In this case, it is not disputed that the Director, DTL, UNCTAD, was the designated hiring manager for JO 28179. However, the evidence shows that the then Head, TLB, led the selection process for this job opening and took most of the decisions in respect of such, notably: the shortlisting of candidates; the design, conduct and evaluation of the assessment exercise; the conduct of the interviews; and the selection of the candidates to be recommended.

44. During his testimony, the then Head, TLB, vaguely asserted that he had been delegated authority over the selection process for JO 28179, and that he kept the Director, DTL, UNCTAD, informed of any steps taken. He could not refer to any document in this respect, nor was any produced by the Respondent following a specific request from the Tribunal for its production.

45. The Tribunal could not get further clarification from the Director, DTL, UNCTAD, as she refused to appear at the hearing on the merits, without providing any reasonable justification (see para. 20 above).

46. The Respondent’s argument is that the then Head, TLB, had been designated as “alternate hiring manager” through *Inspira*, in accordance with the procedure set forth in sec. 6.3 of the Hiring Manager Manual, and thus had delegated authority to carry out the functions of hiring manager.

47. Sec. 6.3 of the Hiring Manager's Manual provides that:

Prior to submitting the job request for approval to the Staffing Table Manager, as the primary Hiring Manager you can delegate the creation of the job opening to an alternate, assistant or another member of your team.

You, as the primary Hiring Manager retain full responsibility for all actions taken by the other members of your team and have final approval authority of the job opening.

48. The Tribunal finds that sec. 6.3 of the Hiring Manager Manual does not provide a legal basis for a designated hiring manager to delegate his or her authority in respect of a selection process to an alternate. As recalled by the Appeals Tribunal, “[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances” (*Charles* 2013-UNAT-286, para. 23). Accordingly, the Manual may, at most, provide “guidance” on the “responsibilities” of the hiring manager, as envisaged by sec. 2.6 of ST/AI/2010/3/Amend. 1 (*Asariotis* 2015-UNAT-496, para. 22). It does not vest any additional power to the hiring manager nor can it contradict the terms of ST/AI/2010/3/Amend. 1, which, as stated above, specifically assigns responsibilities to the hiring manager without providing any possibility of delegation.

49. Even if the Hiring Manager Manual were considered to be an authoritative source of delegation of authority, the Tribunal finds that its scope would be limited to the creation of the job opening and not covering the full breath of actions taken by the then Head, TLB, in the contested selection process. The delegation contained in sec. 6.3 is very specific in this respect, and the Hiring Manager Manual contains no other similar provision that would allow additional actions to be delegated to an alternate.

50. The Tribunal acknowledges that it may be useful, for practical and operational purposes, for the hiring manager to be allowed to delegate to an alternate certain tasks in a selection processes, provided that he or she remains apprised of all decisions and actions taken and is able to accurately report on the selection procedure to the central review body, as required by sec. 7.6 of

ST/AI/2010/3/Amend. 1. However, the current rules do not allow it. It is further noted that ST/SGB/2015/1 (Delegation of authority in the administration of the Staff Regulations and Staff Rules) has no application to the current matter.

51. In view of the foregoing, the Tribunal finds that the then Head, TLB, did not have the authority to take any decisive action in the selection process for JO 28179, and that his role was limited to that of a member of the assessment panel. The fact that the then Head, TLB, led the selection process and *de facto* exercised the functions reserved to the hiring manager vitiated the selection process. This constitutes a serious procedural flaw that renders the whole selection process unlawful.

Eligibility of candidates who did not submit a timely application to JO 28179

52. The Applicant takes issue with the fact that two candidates, including the selected one, did not submit their candidature for JO 28179 in a timely manner, but nevertheless, HRMS pre-screened and released them as eligible candidates to the *de facto* hiring manager, on the basis of their previous applications to JO 26288. The Respondent submits that HRMS had discretion to link the concerned candidates' applications to their previous applications to JO 26288, which relate to the same post, as *Inspira* allows a Senior Recruiter to take such action.

53. Pursuant to sec. 4.6 of ST/AI/2010/3/Amend. 1, “[e]ach job opening shall indicate the date of posting and specify a deadline date by which all applications *must* be received” (emphasis added). Sec. 5.1 further provides that “[a]pplications *must* be submitted in accordance with the instructions set out in the job opening, including use of the electronic platform provided for this purpose” (emphasis added).

54. JO 28179 was posted in *Inspira* from 19 June 2013 to 18 August 2013. It clearly indicated that it was a re-advertisement of JO 26288 and that “[c]andidates who applied for the previous Job Opening need[ed] to re-apply if they [were] still interested”.

55. Emails disclosed following the Tribunal's orders upon the Applicant's request for the production of further evidence clearly showed that two candidates who did not submit a timely application to JO 28179, including the selected candidate, were nevertheless screened as eligible by a Senior Human Resources Officer, HRMS, UNOG ("the SHRO"), and released to the *de facto* hiring manager based on their previous application to JO 26288.

56. More specifically, a candidate who had previously applied to JO 26288 and had been notified by the Chief, HRMS, that the post had been cancelled and re-advertised under JO 28179, wrote to the Chief, HRMS, on 16 August 2013, namely before the expiration of the deadline for applications, indicating that he could not find JO 28179 in the system and asking for his assistance. He received no answer. On 21 August 2013, the SHRO instructed an Associate Human Resources Officer; HRMS, UNOG, to "exceptionally" link the concerned candidate's application for JO 28179 to his previous application for JO 26288 on the basis that "he wrote to the [Chief, HRMS] within the deadline, but did not receive a reply". The concerned candidate was, as a result, included in the list of eligible candidates released to the *de facto* hiring manager.

57. The selected candidate also wrote to the SHRO on 19 August 2013, that is, after the job opening closing date, requesting "special consideration" of her late application for JO 28179, stating the following:

I had prepared my draft application on Tuesday 13 August, before my one-week leave (from 14-21 August) and was planning to read it one more time before submitting it while on leave. However during my leave, I had to undertake unforeseen hospital examinations on Wednesday 14<sup>th</sup> and Friday 16<sup>th</sup>. Consequently, under the pressure of my examinations I omitted to submit the draft application that I had prepared on Inspira, and only this morning I realized my error.

58. On 20 August 2013, the SHRO instructed an Associate Human Resources Officer, HRMS, UNOG, to "link [the selected candidate's] application for the first vacancy to the second one on an exceptional basis", "given that [she] applied for the job opening which was cancelled and that unforeseen circumstances precluded her from applying the second time". It is noted that there had been no contact

between the selected candidate and HRMS, UNOG, prior to the expiration of the application deadline.

59. These two candidates were not included in the initial list of eligible candidates that HRMS submitted to the *de facto* hiring manager, nor was the hiring manager formally informed of their late inclusion. Rather, it appears that an Administrative Assistant, UNCTAD, noted on 26 August 2013, when she was downloading the candidates' personal history profiles, that one candidate who was not in the list in question had been added in the system. In response to the inquiries made by UNCTAD about this additional candidate, an Associate Human Resources Officer, HRMS, UNOG, wrote in an email of 27 August 2013:

Please note that there were two candidates *who had technical issues* when trying to apply to the re-advertized (sic) vacancy and who wrote to HRMS regarding these issues. After consideration, it was decided to link their application from the previous job opening with the same status (pending HR assessment). Mr. X was released first within the allocated 5 days for HR assessment. For the second candidate, we needed more time to assess the lateral move requirements, therefore her application was released one week after the closing of the vacancy. (emphasis added)

60. HRMS, UNOG later clarified that the "second candidate" referred to in this email was the selected candidate.

61. The hiring manager made no reference to HRMS's decision to consider two candidates based on their previous application to JO 26288 in her transmittal memorandum to the Central Review Board ("CRB") dated 28 July 2014. Rather, the memorandum simply stated that "[a] total of 76 applicants were screened eligible for the Hiring Manager's assessment, of which 2 applicant(s) were from the Roster, following a review of the roster of suitable and available candidates".

62. The evidence clearly shows, and it is not disputed by the Respondent, that the selected candidate, as well as another candidate released for consideration by the hiring manager, did not submit an application to JO 28179 within the set deadline, as required by secs. 4.5 and 5.1 of ST/AI/2010/3/Amend. 1. The question at issue is whether HRMS was authorised to link their applications for JO 28179 to their previous applications to JO 26288.

63. In this connection, the Tribunal notes that the rules do not give HRMS any discretion to accept late applications, as sec. 4.5 of ST/AI/2010/3/Amend. 1 clearly states, in mandatory terms, that applications “must” be received within the deadline set in the job opening. Indeed, once the posting period for a job opening has elapsed, it no longer appears in *Inspira* and it is technically impossible to submit an application. The linking of the candidates’ applications for JO 28179 to their previous applications to JO 26288 appears to be a way to technically circumvent the above-mentioned rule. Although they relate to the same post, JO 28179 and JO 26288 were two distinct vacancy announcements and, as clearly set out in JO 28179, candidates who wished to be considered for this job opening had to re-apply in accordance with the applicable procedure. These were two separate recruitment processes and an application submitted for JO 26288 could not be used to cure a failure to submit a timely application for JO 28179. The mere fact that *Inspira* made it technically possible for a Senior Recruiter to link a candidate’s applications does not mean that it is allowed by the rules. The Respondent’s argument to this effect amounts to placing the technical features of a computerised system over the Organization’s regulated, normative and transparent framework, and is entirely untenable.

64. It may be arguable that HRMS, UNOG, had authority to remedy a technical issue faced by a candidate who attempted to submit his application *within the applicable time limit*, particularly in a context where it was unclear if the difficulty was due to a problem in the system, HRMS failed to respond to the candidate’s request for assistance, and the candidate had advised of an intent to submit a candidature before the expiry of the deadline for applications. It is noted, however, that the Respondent did not point to any instrument authorizing such and the Tribunal could not locate it itself.

65. Quite distinctly, HRMS, UNOG, clearly had no authority to consider an application from a candidate who failed to submit her application for the concerned job opening within the mandatory deadline due to personal reasons, whatever they may be. Otherwise, the recruitment system would be exposed to favouritism, and place at disadvantage (external) candidates who have no connection with those involved in recruitment processes. In this connection, the

Tribunal is concerned with the fact that the selected candidate personally knew the SHRO as they had previously worked together. The tone of her letter, addressed to “Dear [first name]” and asking for “special consideration”, also discloses clear evidence of some degree of familiarity. It thus seems that the selected candidate benefited from a direct access to the SHRO when seeking to have, and successfully having, her late application accepted.

66. It is further noted that HRMS’s decision to link the selected candidate’s application for JO 28179 to her previous application for JO 26288 totally lacked transparency. HRMS, UNOG, through an Associate Human Resources Officer, falsely indicated to UNCTAD that the late inclusion of the eventually selected candidate in the list of eligible candidates was due to “technical issues when trying to apply to the re-advertized (sic) vacancy”. This misleading information most likely led the hiring manager, who was copied on this email, to wrongly believe that the selected candidate was eligible for the post and could, therefore, eventually be appointed. Likewise, the CRB, which is mandated to ensure compliance with the recruitment procedure, was not made aware of the fact that the selected candidate had not submitted her application on time and, therefore, was not in a position to assess the regularity of this part of the procedure on an informed basis. The provision of this misleading and deceptive information is pivotal and disturbing, as it crystalized and hid the manipulation of the process so as to give efficacy to the application of the selected candidate for the position when examined by the CRB.

67. In view of the foregoing, the Tribunal finds that HRMS, UNOG, pre-screening and release of the application of the selected candidate to the hiring manager violated secs. 4.5 and 5.1 of ST/AI/2010/3/Amend. 1, and constituted another serious procedural defect in the selection process for JO 28179. The selected candidate was not eligible for the post, hence her appointment was illegal and improper. These matters were known to the selected candidate who asked for “special consideration”, well knowing that the deadline for applications had past. They should also have been well known to the Human Resource professionals who allowed, directed or permitted the inclusion in the selection process of the selected candidate without legal authorisation in any administrative issuance.

Anonymity of the written test

68. The Applicant claims that the principle of anonymity for the written test was subverted as Question one allowed the two panel members from the Transport Section to identify him, and the procedure used to administer the test allowed the *de facto* hiring manager, the then Head, TLB, to associate each candidate with the respective written test. The Respondent asserts that the test was anonymous as the candidates were asked to submit their answers to an Administrative Assistant, UNCTAD, and there is no evidence that the latter sent them individually to the then Head, TLB. He further contends that the requirements of Question one were legitimate to assess the candidates' substantive knowledge of the issue.

69. The Tribunal notes that there is no rule mandating that written tests be conducted anonymously, although this is clearly a desirable practice to ensure objectivity in the assessment process. That being said, once the hiring manager elects to conduct a written test anonymously, the assessment methodology and the procedure to administer the test shall be carefully crafted to ensure respect of this principle. Although it cannot be totally excluded that assessors may recognize candidates they know when evaluating written tests, reasonable efforts should be made to limit this possibility.

70. The Tribunal acknowledges that the Organization has broad discretion in conducting assessment exercises for selection processes. Unless it is manifestly unreasonable, it is not for the Tribunal to decide whether the chosen methodology is appropriate to test the candidates' competencies. However, when the Organization claims that the assessment exercise was conducted anonymously, as in the present case, the Tribunal may examine if the test was designed and administered in such a way as to ensure respect of this principle.

71. As to the assessment methodology, the written test was composed of three questions, each of which required the candidates to elaborate on their professional experience in respect of an area of work covered by the job opening. Question one specifically asked the candidates to identify an authority to whom they had provided policy advice on transport development issues. It read as follows:

Based on your experience, please select a situation in which you were requested to provide practical policy advice to a developing country authority on transport development issues. Please provide details on: the authority involved, the issues to be addressed, the way you proceeded, the advice you gave and policy options you offered.

72. In response to this question, the Applicant referred to a policy advice he gave to the Maldives Ports Limited, an experience he acquired while working in the Transport Section, UNCTAD.

73. It is undisputed that the two panel members from the Transport Section were well acquainted with the Applicant's work experience. The Chief of Trade Facilitation Section even participated in the specific project referred to by the Applicant. During their testimonies, neither the then Head, TLB, nor the Chief of Trade Facilitation Section denied the fact that they could possibly recognise the Applicant from his answer to Question one, amongst others. They also added that most candidates invited to the written test were well-known to them, three being internal candidates from the Transport Section, and suggested that most candidates could possibly be identified from their answers to the test. Furthermore, the Applicant's PHP referred to missions he undertook to the Maldives, such that it would be possible for any panel member to cross reference his answers to the written test with his PHP to identify him. It is also noted that a similar question was asked to the Applicant by the then Head, TLB, and the Chief of Trade Facilitation Section during his interview for the TVA of the contested post, and that the Applicant similarly referred to his experience with the Maldives Ports Limited.

74. As to the procedure to administer the test, the documentary evidence shows that the candidates were invited to the written test by the then Head, TLB, and were advised that the test would be assessed anonymously. They were allowed 48 hours to complete the test, at any time between 9 and 20 December 2013, and required to indicate to the panel members their preferred moment to take it. The Administrative Assistant of the then Head, TLB, sent the test to the candidates at the requested time, and instructed them to send their responses to her, indicating their respective assigned candidate number and without disclosing their name.

75. The evidence in respect of the subsequent sequence of events is more contentious. The Applicant testified that the Administrative Assistant told him that she sent the responses to the then Head, TLB, as and when they came in. In turn, the Administrative Assistant and the then Head, TLB, both testified that they could not remember how the responses were actually sent, although the then Head, TLB, acknowledged that it would have made no sense to receive them individually as it could breach anonymity of the process. The Respondent was requested to produce the email(s) by which the completed tests were forwarded to the then Head, TLB, but was unable to do so. It is not disputed that the responses were finally sent altogether by the then Head, TLB, to the other two panel members, and not by the Administrative Assistant as would have normally been expected.

76. Although the Applicant has no direct knowledge of these events and could only report what allegedly the Administrative Assistant said she had done, his version of events shall prevail as it is not contradicted, and it is corroborated by other established facts. The Respondent was given ample opportunity to contradict and provide evidence against the Applicant's assertion that the tests were sent individually to the then Head, TLB, but failed to do so. The fact that neither of the two concerned witnesses could remember how the responses were forwarded, and that the relevant documentary evidence could not be produced by the Respondent is most concerning and leads the Tribunal to infer that the tests were indeed not sent altogether to the then Head, TLB. This version of the events is also corroborated by the fact that the tests were sent to the two other panel members by the then Head, TLB, in either an email that he, rather than the Administrative Assistant, prepared and sent or, alternatively, by forwarding to the other panel members an email he had received from the Administrative Assistant. It is also clear that, from the start, the then Head, TLB, jeopardized the principle of anonymity by asking the candidates to indicate to him the date on which they would take the test. As this information served no legitimate purpose, an inference may be drawn that it could be used to identify the candidates.

77. In view of the foregoing, the Tribunal finds that the Respondent did not minimally show that the written test was assessed anonymously, as envisaged and announced to the candidates. The then Head, TLB, who was informed of the date at which each candidate would take the test, and who appears to have received the responses as the candidates submitted them, was in a position to potentially identify the candidates. Further, the chosen assessment methodology, in requiring the candidates to elaborate on their professional experience and identify an authority with whom they had previously worked, was not such as to guarantee that the test would be assessed anonymously in a context where most of the candidates were well-known to at least two of the panel members and the candidates' answers could possibly be linked with their PHPs. The presumption of regularity in respect of the written test has, therefore, been rebutted.

Composition of the assessment panel

78. The Applicant argues that the composition of the assessment panel for the written test was unlawful as one of the panel members, who was also the only one from outside the Transport Section, did not mark Question one. The Respondent submits that there is no requirement that all panel members assess the whole test, and that exclusion of the external panel member was adequately justified by her lack of specific expertise on the subject matter.

79. Pursuant to sec. 1(c) of ST/AI/2010/3/Amend. 1, an assessment panel is “a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening”.

80. The Hiring Manager Manual further provides in respect of the composition of an assessment panel at sec. 9.3.5 (emphasis added):

5. Each Assessment Panel is to be composed of a minimum of three assessors and every effort should be made to obtain geographical diversity and gender balance:

a. The *Hiring Manager*, who is usually the chair;

- b. *Two subject matter experts:*
- i. *One of whom is preferably from a non-related office within the Organization, who is at the same or a higher level of the position under review.*
  - ii. The individuals shall hold a fixed-term appointment, a permanent appointment or a continuing appointment.
  - iii. At least one of the assessors should be female at the same or higher level of the same level as the position under review.
  - iv. In situations where the assessment exercise is technical, *a technical expert may be invited to evaluate the assessment exercise.* The technical expert is required to be at the same or higher level of the position under review and should preferably be from a nonrelated office within the Organization, or if not, available from another United Nations agency, international organization or established partner institution.

81. Pursuant to sec. 9.4 of the Hiring Manager Manual, candidates may be informed of the identity of each assessor, but this is optional.

82. Finally, sec. 9.3.3 of the Hiring Manager Manual provides that “[i]n the event that changes occur during the evaluation process in ... the members participating in evaluating the assessment exercise ... reasoned and relevant information should be provided in the transmittal memorandum for submission to the relevant Central Review Body”. This provision is in line with sec. 8.1 of ST/AI/2010/3/Amend. 1, which tasks the central review bodies with a mandate to ensure that “the applicable procedures were followed”.

83. In this case, it was established that the external panel member requested not to mark Question one of the written test, which concerned experience in transport policy, as she felt she did not possess the requisite expertise. The evidence shows that the then Head, TLB, with the agreement of the other panel member from the Transport Section, decided that Question one would be marked only by the two of them. No consideration appears to have been given to the possibility of bringing

in a technical expert, as allowed under sec. 9.3.5.iv of the Hiring Manager Manual.

84. Furthermore, there is no indication that the hiring manager was consulted in making this decision. Likewise, the candidates and the CRB were informed of the composition of the assessment panel, but not informed of the fact that the external examiner would not, or did not, mark Question one.

85. The Tribunal finds that the requirement that an assessment panel be composed of at least three members necessarily implies that each of them participate in each step of the evaluation process, unless they are replaced, as permitted under sec. 9.3.2 and 9.3.3 of the Hiring Manager Manual. This is why panel members have to be familiar with the subject matter under assessment (see sec. 9.3.5 of the Hiring Manager Manual). Concluding otherwise would possibly allow assessment exercises to be *de facto* conducted by only two, or even one, assessor putting in jeopardy the principle of objective and independent assessment of candidates.

86. In view of the foregoing, the Tribunal finds that the composition of the assessment panel for the written test for JO 28179 did not comply with sec. 1(c) of ST/AI/2010/3/Amend. 1, as Question one was evaluated by only two panel members, who were both part of the Transport Section. Given that this question was worth 40 percent of a candidate's total score, the external panel member, who is meant to provide an additional guarantee of objectivity in the evaluation process, ended up having a limited input on the assessment exercise. This is particularly concerning in the present case where the evidence shows that most candidates were from the Transport Section or otherwise known to the two panel members from this Section, and that the anonymity of the assessment exercise could not be guaranteed as claimed.

87. Furthermore, the information provided to the CRB misleadingly led it to believe that all three panel members fully assessed the written test and, therefore, prevented it to scrutinise this aspect of the procedure, as required by sec. 8.1 of ST/AI/2010/3/Amend.1 and sec. 4.5 of ST/SGB/2011/7 (Central review bodies).

88. Consequently, the presumption of regularity does not stand insofar as the written test is concerned.

Other alleged procedural irregularities in respect of the written test

89. In view of its conclusions above concerning bias and significant procedural errors in the selection process, the Tribunal does not deem it necessary to address in detail each of the other procedural irregularities raised by the Applicant in respect of the written test. However, it considers that some of the matters raised by the Applicant further indicate that the selection process for JO 28179 did not comply with the requisite standard of fairness and rigour in the conduct of assessment exercises, and are additional matters upon which the Tribunal may base its findings. These will be briefly addressed below.

90. Firstly, the methodology for marking the written test was not defined, which led the three panel members to apply different grading methodologies. The evidence shows that two of the panel members gave scores in intervals of five, whilst the third one did not. The effect of this was that two panel members gave scores of either 0 or 5 while one panel member gave a score ranging from 0 to 5. The three panel members testified that there had been no discussion or instruction about the grading methodology prior to their assessment of the tests. By applying different grading scales, the panel members differently impacted on the candidates' scores and, therefore, the scores they gave to each candidate are not comparable.

91. Secondly, the collated scoring sheet was not signed contemporaneously with the assessment, and could not be verified against the original marking sheets of two panel members because they are no longer available. In this respect, the evidence shows that each of the panel members sent his/her scores to the then Head, TLB, who then calculated the average score of each candidate and conveyed it to HRMS, UNOG, by email. The then Head, TLB, was later asked to provide the marking sheets of each panel member and undertook to do so. However, it appears from the evidence that he never actually requested the two other panel members to produce their marking sheet and, ultimately, advised HRMS, UNOG, that none of the marking sheets, including his, were available.

92. The fact that the then Head, TLB, made this statement without having asked the other panel members for their marking sheets is most disturbing, as clearly the statement was not true. This must be viewed as a deliberate and calculated act. It cannot be seen as a matter of mere negligence, as the advice contained a positive statement in respect of the non-existence of documents. The three panel members were then asked by HRMS, UNOG, to sign the collated marking sheet, which they did more than six months after the assessment actually took place. It was established during the course of the present proceedings that the Chief of the Trade Facilitation Section still had his marking sheets. These were produced to the Tribunal and revealed that, in at least two instances, the scores from the individual marking sheets for each candidate did not correspond to those on the collated marking sheet. The Chief of the Trade Facilitation Section could not explain these discrepancies.

93. The Tribunal finds that the lack of a proper record in respect of the assessment of the written test, together with the discrepancies identified in the scores given by the Chief of the Trade Facilitation Section, raise doubts about the reliability of the scores reported on the collated scoring sheet. They also display a lack of transparency and rigour in the marking process.

*Conclusion on the legality of the selection process*

94. In light of the above, the Tribunal concludes that the Respondent did not minimally show that the Applicant's candidacy for JO 28179 was given full and fair consideration. The Respondent failed to support his assertion that the Applicant's test was assessed anonymously by a lawfully constituted assessment panel, which he claimed were guarantees of an objective assessment process. The written test was designed and administered in a way that allowed the two panel members from the Transport Section to identify the Applicant, whom they knew very well, thereby opening the door for personal considerations to play a role in the evaluation of his test. The exclusion of the external panel member from the rating of a question that was worth 40 percent of the total score significantly limited her input on the assessment of the written test and, as such, further

impaired the objectivity of the process, in addition to not being compliant with the requirements of ST/AI/2010/3/Amend. 1.

95. In turn, the Applicant established through clear and convincing evidence that the *de facto* hiring manager manipulated the selection process to favour the selected candidate, and that the selection process was vitiated by a number of significant procedural irregularities.

96. From the outset, the then Head, TLB, was not authorised to act as hiring manager and his leading role in the selection process renders it unlawful. Likewise, the decision to select a candidate who was not eligible for the post due to a failure to apply within the mandatory deadline was unlawful. The exception granted to the selected candidate by the SHRO to allow consideration of the former's late application is most concerning in light of their professional acquaintance and other indications that the selection process appears to have been designed to favour the selected candidate.

97. A number of facts lead the Tribunal to infer that the selection process was tainted by bias in favour of the selected candidate. The first and second job opening were drafted and modified, without legitimate justification being provided, to fit the profile of the selected candidate, who was fluent in French and had limited experience in international freight transport. This selection process was considered and stated to be "a special case" and additional efforts were made to ensure that the selected candidate, who had not been screened eligible for the first job opening, would be notified of its cancellation. The language of the modified second job opening better matched the skills of the selected candidate, notwithstanding that the *de facto* hiring manager admitted in cross examination that the required experience in the first job opening better suited the position. The *de facto* hiring manager placed himself in a position to identify the candidates and to oversee the whole testing exercise, such that the scores he gave to the candidates cannot be considered the result of an independent assessment.

98. There are also significant doubts about the accuracy and reliability of the test results presented to HRMS, UNOG, from which to draw the list of candidates to be interviewed. The three panel members did not use the same grading

methodology, which had a significant impact on the scores they gave to the candidates. The collated scoring sheet is not reliable as it was signed six months after the assessment exercise took place and two panel members no longer had access to their marking sheets to verify the accuracy of the collated scores. The lack of reliability of the scoring sheet is further supported by the deliberate failure of the *de facto* hiring manager to provide the scoring sheets of individual panel members, despite a request to do so from HRMS, UNOG, and his false indication that he had asked for them and they no longer existed. As to the third panel member, there were discrepancies between the scores that could be drawn from his marking sheets and those recorded on the collated scoring sheet, raising further doubts about the accuracy of the collated scores. The importance of the need to be able to ensure an audit of the process can be undertaken should not be underestimated. It is disappointing that the CRB did not request the marking sheets in the course of its assessment, as irregularities would have been identified prior to having an application filed with the Tribunal.

99. In view of the foregoing, the Tribunal finds that the Applicant's right to full and fair consideration for JO 28179 has been denied to him, and that the selection process for this post was vitiated by procedural irregularities. The contested decision was therefore unlawful.

#### *Remedies*

100. Art. 10.5 of the Tribunal Statute, as amended by resolution 69/203 of the General Assembly adopted on 18 December 2014, delineates the Tribunal's powers regarding the award of remedies, providing that:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

Rescission and alternative compensation

101. Having found that the selection decision for the contested post was unlawful, and considering that the Applicant had a significant chance to be selected for it, as more amply discussed below, the Tribunal rescinds the decision.

102. Since the contested decision concerns a promotion/appointment, the Tribunal is mandated by art. 10.5(a) of its Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision. That being said, the Tribunal stresses that given that an *ineligible* candidate was appointed to the contested post, the selection decision must be rescinded, as it is clear that the selected candidate had no entitlement to the post and her selection for it is void . It is further observed that the selected candidate well knew that she had missed the deadline for the application. Her email explaining her situation led to a subversion of the system to the disadvantage of all other applicants who had relied upon and trusted the Organization to have a transparent and properly regulated recruitment system in place. Her improper request for special consideration is at the root of a breach of the rules because she made a personal request that, at the very least, every staff member of the Organization should know is impermissible. In the Tribunal's view, her remaining on the post without a new selection process being conducted would perpetuate the illegality of her appointment.

103. Pursuant to the jurisprudence of the Appeals Tribunal, in determining the amount for compensation under art. 10.5(a) of its Statute in appointment or promotion cases, the Dispute Tribunal must take into account the nature of the irregularities on which the rescission of the contested decision was based, and the chances that the staff member would have had to be selected had those irregularities not been committed (*Appleton* 2013-UNAT-347). However, the determination of the "compensation in lieu" must be done on a case-by-case basis

and ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, the Appeals Tribunal held that “there is no set way for a trial court to set damages for loss of chance of promotion, and that each case must turn on its facts” (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603). The Appeals Tribunal also held that in calculating such compensation, on the basis of the probability for an Applicant to be appointed to a post at a higher level but for the procedural breach, the period of the difference in salary between an Applicant’s grade and that of the contested post that can be taken into account should be limited to a maximum of two years (*Hastings* 2011-UNAT-109).

104. The Appeals Tribunal recently awarded USD10,000 for loss of chance of promotion as compensation in lieu of rescission, in a case where it found that the particular circumstances rendered the assessment more complicated than usual. The Appeals Tribunal concluded that it “had to assess the matter in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables” (*Niedermayr* 2015-UNAT-603).

105. In the case at hand, this Tribunal has rescinded the selection decision on the basis of four significant procedural irregularities, namely the lack of authority of the then Head, TLB, to act as hiring manager and lead the selection process; the consideration and selection of a candidate who was ineligible for the post due to her failure to apply within the mandatory deadline; the breach of the principle of anonymity for the written test; and the assessment of the written test by an unlawfully constituted panel, and a finding of bias of the *de facto* hiring manager in favour of the selected candidate. These are very serious matters that not only impair the selection process but also display a flagrant lack of fairness towards the Applicant who had legitimate expectations that his candidacy for the contested post would be given full and fair consideration.

106. Given the irregularities and bias in the selection process, which vitiate it and the fact that the selected candidate ought not to have been considered among the pool of eligible candidates, the Tribunal is not in a position to assess the Applicant’s actual chances to be appointed to the contested post. That being said,

the Tribunal finds that the Applicant was objectively a strong candidate for the post, and that there was a real possibility that he would have, at least, been found suitable for it had the selection process been conducted in accordance with the applicable procedure and absent of bias.

107. The Applicant occupied the contested post for over four years as OiC at the time of the selection process for JO 28179 with satisfactory performance, as demonstrated by his performance appraisals for the period from 1 January 2010 until end of March 2014. The mere fact that the Applicant was appointed as OiC to this post for such a long period is indicative that he satisfactorily fulfilled the functions and met the requirements for it. The Applicant was also selected for the TVA for the same position in September 2013. Furthermore, it appears that the Applicant met the requirements and was eligible for the post as specifically advertised under JO 28179. HRMS, UNOG, found that he was eligible for the post and the *de facto* hiring manager shortlisted him to take the written test among 76 candidates.

108. The Respondent's argument that the Applicant had no foreseeable chance to be selected for JO 28179 because he was rated as "partially meets" the competencies when he was interviewed for the TVA for the same position is without merit. Firstly, the Respondent's position is self-contradictory, in that he suggests that the Applicant was not qualified for the TVA, but nevertheless appointed him. Secondly, the assessment of the Applicant's candidacy for the TVA must be taken with caution as it was conducted in September 2013 under the supervision of the then Head, TLB, who was heavily engaged at the time in the selection process for the fixed-term appointment for the same post, JO 28179, for which he was favouring another candidate. The fact that the Applicant was nevertheless appointed to the TVA further shows that he stood good chances to be appointed to the fixed-term position had the process not been biased in favour of the selected candidate, or had the selected candidate been excluded as ineligible as she should have been.

109. Lastly, the fact that the Applicant did not pass the written test is not in any way indicative of his chances to be selected for the post, given the procedural flaws in administering the test and the lack of objectivity of at least one panel member.

110. Considering the difficulties in ascertaining the Applicant's chances for promotion, the fact that he had occupied the post as OiC for four years, and the previous determinations of the Appeals Tribunal on the matter, the Tribunal considers, on balance, that it is fair and appropriate to set the amount of compensation in lieu of rescission to USD10,000.

Material and moral damages

111. The Applicant asks compensation for loss of earnings pursuant to art. 10.5(b) of the Tribunal's Statute. The Tribunal understands this claim as a request to be awarded compensation between the Applicant's actual salary at the P-4 level and the one he would have received had he been appointed to the contested post. The Applicant also requests compensation for moral and material damages resulting from "loss of reputation and injury to feelings".

112. The Tribunal may, pursuant to art. 10.5(b) of its Statute, award compensation for harm suffered as a result of a contested decision, if such harm has not been compensated by the rescission. For such compensation to be awarded, the applicant must identify the harm suffered. The Tribunal notes that art. 10.5(b) of its Statute was amended by the General Assembly on 18 December 2014 to require that compensation for harm be supported by evidence.

113. In the instant case, the Applicant would not be fully compensated by the rescission of the contested decision as even if a new selection procedure is conducted, any appointment would not be retroactive and, as a consequence, he would still have lost an opportunity to earn a salary at the P-5 level for the period between the appointment of the selected candidate and the conclusion of an eventual new selection procedure. The Applicant is entitled to compensation for this loss of opportunity (see, e.g., *Rodriguez-Viquez* UNDT/2016/030, para. 175).

114. Again, it is extremely difficult to calculate the quantum of damages to compensate the Applicant's loss of opportunity to occupy the contested post for the period from September 2014 until the Applicant's candidacy is examined in a new selection process, given that the whole process was void due to the lack of authority of the then Head, TLB, to act as hiring manager, the other significant procedural flaws in the process, and the fact that it was tainted by bias and unfairness. In light of the fact that the Applicant had significant chances to be selected for the post, and that the Respondent's reprehensible conduct in the selection process has made it impossible to fully ponder these chances, the Tribunal deems it appropriate to award compensation equivalent to the difference in the net base salary the Applicant would have received at the P-5 level and his current salary at the P-4 level, from the time of the implementation of the contested decision until issuance of the present judgment.

115. The Tribunal finds that the Applicant did not substantiate any additional claim for material damages.

116. Turning to moral damages, the Tribunal finds that the Applicant established that he suffered stress and anxiety as a result of the unfair treatment he was subject to in relation to the contested selection process and the challenges he made to seek redress.

117. The Applicant thoroughly explained in his witness statement, which was admitted in evidence and unchallenged by the Respondent, that the unfairness of the selection process for the post he had occupied for four years had "demoralised" him, caused him to lose faith in justice and preoccupied him to the point that he became "easily irritable, withdrawn and despondent with the world". He also explained how the challenge he brought against the contested decision had made him a "pariah" in the Transport Section where he continues to work, now under the supervision of the selected candidate. He is isolated from most of the team, which makes his working environment unbearable. The Chief of the Trade Facilitation Section confirmed in his testimony that his relationship with the Applicant has deteriorated since the selection process in question. Both the Applicant's professional and personal life have been affected.

118. The Applicant also stated that the stress associated with the selection process impacted his physical condition. He asserted that his weight fluctuated over the period by 10 kilos, that he has had symptoms of arthritis and gout affecting his legs and that a dentist confirmed that his condition of advanced periodontitis has been aggravated by stress. In this respect, the Tribunal notes that the Applicant sought to submit a letter from his dentist together with his written closing submissions, after the evidential hearing was closed. At the hearing held on 13 December 2016 scheduled to hear the Applicant's oral reply to the Respondent's written closing submissions, the Tribunal rejected this additional evidence as being filed out of time, without any proper justification, and without any possibility for the Respondent to cross-examine the author of the document. The Tribunal finds that the Applicant's witness statement lends support to his claim that he suffered stress and anxiety as a result of the illegality of the contested decision, but it is insufficient to establish that he suffered physical damage as a result of it.

119. In view of the evidence presented by the Applicant, the Tribunal finds it appropriate to award him moral damages. The amount to be paid is fixed to USD6,000.

#### Costs

120. The Applicant also request to be awarded costs in the amount of £14,000 plus VAT, totalling £16,800, which represent the fees paid to his privately retained counsel.

121. As per the Appeals Tribunal's jurisprudence, costs may only be awarded when a party "manifestly abused the proceedings" (*Bi Bea* 2013-UNAT-370). This was not the case in the instant proceedings. Therefore, the Applicant's request for costs must be rejected.

*Referral for accountability*

122. Pursuant to art. 10.8 of its Statute, “[t]he Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations ... for possible action to enforce accountability”.

123. The Tribunal is of the view that the facts described above (see paras. 57-67, 96 and 102 above) in respect of the unlawful inclusion of the selected candidate as an eligible candidate for JO 28179 raise legitimate concerns as to the professional and ethical behaviour of the individuals involved in this process. Accordingly, the Tribunal finds it appropriate to refer this case to the Secretary-General under art. 10.8 of its Statute. It will be up to the Respondent to determine what action, if any, is taken in respect of the conduct disclosed by the evidence in this matter, the motivation for it and the fact that a clearly ineligible candidate was appointed to a position based upon an improper act leading to her inclusion in the pool of eligible candidates.

**Conclusion**

124. In view of the foregoing, the Tribunal DECIDES:

- a. The selection decision for the position of Chief of Transport Section (P-5), UNCTAD, advertised under Job Opening Number 13-ECO-UNCTAD-28179-R-Geneva is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount of USD10,000;
- c. The Respondent shall pay the Applicant material damages equivalent to the difference of the net base salary the Applicant would have received at the P-5 level and his current salary at the P-4 level, from the time of the implementation of the contested decision until issuance of the present judgment.

- d. The Applicant shall also be paid moral damages in the amount of USD6,000;
- e. The aforementioned compensations shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;
- f. The matter is referred to the Secretary-General under art. 10.8 of the Dispute Tribunal's Statute for possible action to enforce accountability; and
- g. All other claims are rejected.

*(Signed)*

Judge Rowan Downing

Dated this 27<sup>th</sup> day of January 2017

Entered in the Register on this 27<sup>th</sup> day of January 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva