



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1486

Case No. 1557

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Sir Bob Hepple, First Vice-President;
Ms. Brigitte Stern, Member;

Whereas, on 10 October 2007, a staff member of the United Nations filed an Application requesting the
Tribunal, *inter alia*:

“II. PLEAS

8. ... [To] find:

- (a) that his candidature for the post of Chief of the E-Commerce Branch, Division for Service Infrastructure for Development and Trade Efficiency (SITE) at UNCTAD [United Nations Conference on Trade and Development] ... was not given full and fair consideration;
- (b) that the Respondent further denied the Applicant due process by failing to apply the correct selection procedure as set out in ST/AI/2002/4, in particular the procedure set out in paragraph 7.1 thereof;
- (c) that the Applicant’s due process rights were violated and the decision to appoint an external 60-day mark candidate under ST/AI/2002/4 to the above post was vitiated by procedural error and bias.

9. ... [To] order:

(a) that the Respondent pay to the Applicant financial compensation in an amount to be determined by UNAT [United Nations Administrative Tribunal], to compensate the Applicant for the violation of his rights and for the distress caused; and

(b) that the Applicant be given priority consideration for any future D1 vacancy that becomes available and for which he is qualified.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 9 June 2008, and once thereafter until 9 July 2008;

Whereas the Respondent filed his Answer on 19 June 2008;

Whereas the Applicant filed additional comments on 19 October 2009;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“[Applicant’s] Professional Record

... The [Applicant] entered service at the United Nations in New York on 18 July 1988, in the Department for Economic Social Information and Policy Analysis (DESIPA, former DIESA (Department of International Economic and Social Affairs)), Energy and Resources Branch, as an Associate Economic Affairs Officer at the P-2 level on the basis of a short-term contract of 3 months. His contract was extended until 18 January 1989 when it was converted into a fixed-term appointment until 17 June 1989. As of 18 June 1989, it was renewed until 31 December 1989 and the [Applicant’s] grade was changed from P-2 to P-3 (Economic Affairs Officer). His contract was further renewed regularly until 1 September 1994, when it was converted into a permanent appointment. In the meantime, the [Applicant] was promoted to the P-4 level on 1 April 1993.

... On 16 May 1998, the [Applicant] was transferred from the Department of Economic and Social Affairs (DESA) in New York to ... UNCTAD in Geneva, in the framework of a lateral exchange of personnel between UNCTAD and DESA.

... On 1 April 2001, the [Applicant] was promoted to the P-5 level as the Chief of the Technology for Development Section.

... In his latest periodical evaluations (January 2001 – March 2003), the [Applicant] was assessed as ‘frequently exceeding performance expectations’.

Summary of Facts

... On 3 June 2003, [a] vacancy announcement ... was issued for the post of Chief (D-1), Electronic Commerce Branch, Division of Services Infrastructure for Development and Trade Efficiency at UNCTAD in Geneva. The application deadline was 2 August 2003, and the [Applicant] applied for this position through the Galaxy system on 2 July 2003.

... According to the [Applicant], he was interviewed for the above-mentioned vacancy on 29 September 2003 ‘by the Interview and Evaluation Panel, chaired by the Director of the Division of Services Infrastructure for Development and Trade Efficiency’. The total score of the evaluation of his candidature reached 80 out of a maximum of 100 points. The [Applicant’s] candidature was however not retained in the list of recommended candidates. In the Respondent’s words, only one candidate – who was male and

external – ‘was found to be suitable for the post’, and was recommended for the Head of [the] Department’s approval. The vacancy was then cancelled.

... On 24 February 2004, the post of Chief, Electronic Commerce Branch was re-advertised under [a different VA number], with a deadline for applications set at 24 April 2004. According to the Respondent, the post was re-advertised because the Head of Department ‘was concerned that the vacancy announcement had attracted such a relatively small pool of potentially suitable candidates’, and was also concerned ‘that the vacancy announcement had not managed to generate a representative number of qualified female candidates’.

... As it was expressly stated in the new vacancy announcement that ‘candidates who applied previously for that VA need to re-apply if they are still interested’, the [Applicant] submitted his application anew on 10 March 2004 through the Galaxy system. He was not interviewed a second time.

... According to the Respondent, on 19 July 2004 ‘the Programme Case Officer (PCO) submitted to the Head of Department a recommended list of five suitable candidates, which included one external male, one external female, and three internal male candidates - one of which was the [Applicant]’. The evaluation of these short-listed candidates was the following: 95 (an external male candidate), 90 (an external female candidate), 85 (two internal male candidates), and 82 (the [Applicant]). The list was approved on the same day by the Head of Department, who submitted it to the Central Review Board (CRB) for approval. The Board held a meeting on 22 July 2004 and noted that the recommended candidates ‘were evaluated on the basis of the pre-approved criteria and that the applicable procedures were followed’. The list was sent back to the Head of Department for selection. The latter selected on 26 July 2004 the external female candidate.

... On 29 July 2004, the Director of the Division of Services Infrastructure for Development and Trade Efficiency – who had been the Chairperson of the Interview and Evaluation Panel – wrote an e-mail to the [Applicant], informing him that he had been included by the interview panel on a short list of candidates who were eligible for the post, but had not been selected by the Secretary-General of UNCTAD. The [Applicant] was also indicated that he would be notified officially that he had been identified by UNCTAD as having met all of the evaluation criteria for the post and that this information would be placed on his personnel file.

... According to the [Applicant], following the above-said e-mail, he was made aware on two occasions – in a meeting with the Deputy Secretary-General of UNCTAD and in a telephone conversation with a Personnel Officer from the Human Resource Management of UNCTAD (dates unknown) - that a successful female candidate ‘was selected for the post in priority to the [Applicant] as a 15-day mark internal candidate (lateral move)’.

... On 20 September 2004, the successful female candidate was appointed to the post of Chief, Electronic Commerce Branch, UNCTAD. Her appointment was not announced on the Electronic Bulletin Board.

... By letter dated 22 September 2004, the Human Resources Management Service (HRMS) of UNOG [United Nations Office at Geneva] informed the [Applicant] that in relation with his application to the post of Chief, Electronic Commerce Branch, he had been placed on the roster of candidates in accordance with paragraph 9.3 of ST/AI/2002/4. The roster was to be valid for one year, starting from 1 August 2004.

... By letter dated 20 October 2004, the [Applicant] requested the Secretary-General to review the administrative decision not to select him for the post of Chief of the Electronic Commerce Branch, Division of Services Infrastructure for Development and Trade Efficiency at UNCTAD.

... By letter dated 27 October 2004, the Chief, Administrative Law Unit, OHRM, acknowledged receipt of the [Applicant’s] request for administrative review on 25 October 2004.

... On 24 January 2005, in the absence of a reply from the Secretary-General to his request for review, the [Applicant] filed a statement of appeal to the [JAB] Secretariat in Geneva.”

The JAB adopted its report on 11 January 2007. Its considerations, conclusions, and recommendations read, in part, as follows:

“Merits of the case

42. Having concluded that the appeal was admissible ..., the Panel considered the merits of the case. It examined the arguments of both parties, and agreed that the successful [female] candidate was correctly considered as an external candidate (60-day mark), whereas the Appellant was an eligible 30-day mark candidate for he was applying for a promotion from P-5 to D-1. The Panel further noted that the main issue of the present appeal was the interpretation of Section 7.1 of ST/AI/2002/4 (Staff selection system – Consideration and selection), on which the parties did not agree. This rule states the following:

“In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable”.

43. In this regard, the Panel noted that the Appellant supported the view that external candidates should be considered only if no suitable candidate could be identified either at the 15-day mark in the first place, nor at the 30-day mark in the second place. The Appellant’s interpretation was in fact that the new staff selection introduced a ‘staircase’-system, which limits the choice of the [PCO]. Under this system, when a candidate at the 15-day is deemed suitable for an advertised post, he has to be selected. It is only if no suitable 15-day candidate was identified that the Programme Case Officer may look for a suitable 30-day candidate. According to the Appellant, the same applies to the 30-day mark candidates: the PCO can recommend an external (60-day) candidate for the final selection only if no suitable 30-day candidate was identified at this second stage of the selection process. With regard to his case, the Appellant put forward that when the vacancy was re-advertised for the second time in 2004, three internal candidates (including him) were found suitable and hence recommended for final selection. In view of his understanding of the new staff selection system as exposed above, he considered that the selected candidate should have been one of the three internal (and suitable) candidates, and not an external one.

44. For his part, the Respondent supported that ‘the language of section 7.1 only require[d] that 30-day candidates be given first priority in consideration over 60-day candidates’ but did not preclude programme managers, ‘except in case of P-3 posts, from reviewing 60-day eligible candidates, even though 30-day candidates are found eligible for the post’. The respondent consequently held the view that the selection of the external (60-day) candidate was done in accordance with the rules, although three internal candidates – among whom the Appellant – were also deemed suitable for the post.

45. The Panel studied the applicable law and noted that the major rule governing the appointment, transfer or promotion of staff was that the human resources policy of the Organization had to secure ‘the highest standards of efficiency, competence and integrity’ Staff members already in service of the UN are, however, still given special consideration for internal career movements. To illustrate, Staff Regulation 4.4 states that ‘the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations’, and even allows the Secretary-General to ‘limit eligibility to apply for vacant posts to be filled by staff members appointed for one year or longer under the 100 series of the Staff Rules to internal candidates, as defined by [him]’. If so, ‘other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no internal candidate meets the requirements of Article 101, paragraph 3, of the Charter as well as the requirements of the post’.

46. It has to be noted that in the current staff selection system, vacancy announcements are not limited to internal candidates. However, distinction is made between three categories of applications: those of 15-, 30- and 60 day-mark candidates The *eligibility* of candidates of each of these successive categories is defined in Section 5 of ST/AI/2002/4 (Eligibility requirements). For its part, the *consideration and selection* of eligible candidates is regulated by Section 7 of said administrative instruction, the principle being that *‘in considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable’* ...

47. The Panel observed that Section 7.1 first and second sentences clearly express a selection mechanism meant to be a ‘staircase’ system. Indeed, the literal meaning of these provisions is the following: at the first stage of the procedure and once eligible staff members to be considered at the 15-day mark have been identified, their suitability for the post has to be assessed; then, if there is a suitable candidate among these 15-day mark candidates, 30-day mark candidates cannot be considered anymore. They shall be considered only if no suitable candidate can be identified among the 15-day mark candidates. The Panel recalled that in the present case, the main legal question was whether, in view of the fact that three internal candidates (30-day mark) were identified as suitable, the Administration was precluded from selecting an external candidate or not. The Panel therefore had to examine if the ‘staircase system’ which applies to the 15- and 30-day mark candidates did also apply to the 60-day mark candidates, in the sense that they should be considered only if no suitable candidate could be identified among the 30-day mark candidates.

48. The Panel was aware that the text of the third sentence of Section 7.1, which dealt with this issue, did not *expressly* state ‘if no suitable candidate could be identified at the second stage (i.e. among the 30-day mark candidates), candidates eligible at the 60-day mark shall be considered’ ..., but reads rather *“other candidates shall be considered at the 60-day mark, where applicable”*, thus opening room for interpretation. In this respect, the Panel stressed that according to universally recognized methods of interpretation of norms, a rule has to be interpreted beyond its literal meaning in conformity with the overall structure, context and purpose of the whole legal text to which it belongs. The Panel therefore had a closer look at the whole text of ST/AI/2002/4 and its specific provisions. It noted that ‘in order to recognize and encourage mission service’, Section 5.4 (b) of ST/AI/2002/4, allows for certain candidates to be eligible at the 15- instead of the 30- or 60-day mark. The same rationale applies for the eligibility at the 30-day mark: according to Section 5.5(b) certain candidates ‘who are not internal candidates’ but fall under specified categories (e.g. staff members serving in peacekeeping missions or female staff members) are eligible to be considered already at the 30-day mark and not at the 60-day mark.

49. The Panel found that by allowing for certain candidates to be considered under specific circumstances as eligible at the 30- instead of the 60-day mark under Section 5.5 (b), the drafters of the ST/AI/2002/4 clarified that there had to be a difference in treatment of 30- and 60-day mark candidates. Indeed, if this specific provision is to make any sense, the candidates ‘who are not internal’ but are nevertheless to be considered eligible at the 30-day mark must have an advantage in comparison to those considered eligible (only) as 60-day mark candidates. The Panel could therefore not but conclude that the staircase-system which expressly applied to the 15- and 30-day mark candidates also applied to the 30- and 60-day mark candidates. It therefore considered that the third sentence of Section 7.1 of ST/AI/2002/4 (i.e. *‘other candidates shall be considered at the 60-day mark, where applicable’*) had to be interpreted in the same way as the second sentence of the same Section 7.1, *that is as a second step in a “staircase”-system, where a 60-day mark candidate can be chosen for a position only if a suitable candidate could not be identified at the 15-day or 30-day mark, i.e. at the first two stages of the selection process*. Such an interpretation is also in line with Staff Regulation 4.4 and Section 9.2 of ST/AI/2002/4

50. The Panel was consequently unable to agree with the point of view supported by the Administration, which is that Section 7.1 does not preclude from considering – and eventually selecting – candidates at the 60-day mark even though there was a 30-day candidate who was deemed suitable for the post. Such an interpretation is, in the Panel’s view, contrary to the meaning of the text of Section 7.1 of ST/AI/2002/4 as exposed above. The Panel stressed that the Respondent’s position could neither be backed

by the ‘Staff selection system - Evaluation and Selection Guidelines for action by Programme Case Officers and Head of Department’ (hereinafter ‘the Guidelines’) approved on 9 June 2004, as these Guidelines are not binding legal text and can therefore not serve as a mean to circumvent the legal provisions of an administrative instruction.

51. In the same line of argumentation, the Panel was not convinced by the explanation given by the Respondent that in practice ‘the programme manager is not in a position to complete a full evaluation process and to make a recommendation before receiving the list of 60-day candidates’. On the contrary, the Panel reiterated that even if in some cases all candidates, whether 15-, 30-, or 60-day mark, were released at the same time ..., this does not exonerate programme managers from their obligation to respect the ‘staircase’ principle when considering suitable candidates at the successive stages (15-, then 30-, then 60-day mark candidates) and recommending them accordingly. In this regard, the Panel expressed its disappointment that the Guidelines did not foresee clear and strict obligations for the PCOs in order to ensure that the selection process is correctly applied. As a general remark, the Panel observed that the selection principle established by ST/AI/2002/4 would probably work better if, in accordance with Staff Regulation 4.4 ..., vacancy announcements be released only internally in the first place, and then externally if no suitable candidates were identified at the 15-day nor 30-day mark, as this could help programme managers to respect Section 7.1 of ST/AI/2002/4...

52. The Panel wished to stress that its above interpretation of ST/AI/2002/4 did not entail an opinion as to the adequacy - or inadequacy - of the ‘staircase’ principle. The Secretary-General has indeed the discretion to take policy decisions on staff management matters, in this case on whether or not priority shall be given to suitable internal candidates. However, once such decisions are made and incorporated in administrative instructions, the latter have to be followed. In the present case, the Panel considered that the text of Section 7.1 of administrative instruction ST/AI/2002/4 was clear. The Administration cannot, through guidelines – which are no binding legal text – adopt a practice which is contrary to the provisions of an administrative instruction. If the rule foreseen by the administrative instruction reveals itself to be difficult to put into practice, then it has to be changed by a text of the same level – i.e. another administrative instruction, and not by mere guidelines. Until there is no such a change, the JAB - when considering appeals - has to respect and ensure the application of the law in effect, no matter what it may think about its adequacy.

53. Having said the above, the Panel turned to the case at stake, and noted that the Appellant was recommended by the PCO for the vacancy in question, along with four other candidates (2 internal (30-day) and 2 external (60-day)). The Respondent himself admitted that these short-listed candidates were **suitable** candidates for the post and placed the Appellant on the roster for future similar vacancies (see paras. 0 and 0). Hence, in accordance with its analysis of Section 7.1 of ST/AI/2002/4 (the ‘staircase’-principle), the Panel considered that the person for the position at stake *should have been selected among the three internal suitable candidates (i.e. including the Appellant), and that the Administration should have been precluded from selecting an external candidate (since there were three internal suitable candidates already)*. As in the present case, the successful candidate was external, the Panel concluded that there had been indeed a violation of the selection procedure.

54. The Panel also considered whether the administrative instruction on the ‘special measures for the achievement of gender equality’ from 21 September 1999 (ST/AI/1999/9) could legitimately have an impact on the selection process, in the sense that priority could have been given to the external female candidate because of her gender. In other words could the staircase system be ‘circumvented’ through the application of ST/AI/1999/9 in the sense that a 60-day mark external **female** candidate could legitimately be selected although there were suitable and equally qualified 30-day mark internal male candidates.

55. In considering this question, the Panel first recalled that ST/AI/1999/9 entered into force under the former staff selection system. Administrative instruction ST/AI/2002/4, introduced a new staff selection system as of 1 May 2002. While it did not abolish ST/AI/1999/9, it took over some of its core principles, such as section 1.4 (‘eligibility to apply for internal vacancies’) ... This provision is reflected in the new system by Section 5.5 (b) (ii) of ST/AI/2002/4, which gives the possibility for ‘not internal’ [female] candidates at the P-3 or P-4 level to be eligible to be considered already at the 30-day mark when applying

for vacancies at the P-4 or P-5 levels, provided they meet certain conditions ... As regards selection and appointment, Section 1.8 of ST/AI/1999/9 states the following:

'(a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that: (i) her qualifications meet the requirements for the vacant post; (ii) her qualifications are substantially equal or superior to those of competing male candidates;

(b) In accordance with staff regulation 4.4, the fullest regard shall be given to the qualifications and experience of women already in the service of the United Nations; (...).'

56. In view of the above, the Panel considered that in the hypothesis that Section 5.5 (b) (ii) of ST/AI/2002/4 had applied to the selected female candidate in the case at stake – i.e. had she been considered as a 30-day mark candidate together with the other three internal 30-day mark candidates – Section 1.8 (a) of ST/AI/1999/9 would indeed have applied to her and might have justified her selection because of her being a woman, had it appeared that the conditions set down by said provision were met However, the Panel confirmed that in the present case, it was correct that the selected female candidate did not benefit from the application of Section 5.5 (b) (ii) of ST/AI/2002/4 in order to be considered at the 30-day mark, since the post at stake was a D-1 post Section 1.8 of administrative instruction ST/AI/1999/9 could hence not be applied when comparing her application with those of the internal (30-day mark) candidates and can therefore not be invoked to legitimize her selection to the post. As the Panel already concluded, the procedure in the present case had in any case been flawed by the selection of an external candidate instead of one of the 3 short-listed **internal** candidates.

57. The Panel furthermore deemed itself incompetent to examine the pertinence of the evaluation of the candidates, as this would have been tantamount to substitute itself to the Secretary-General, who has discretionary power in this respect. The Panel wished, however, to express its astonishment as to the fact that in September 2003 - when the first vacancy announcement for the post of Chief, Electronic Commerce Branch UNCTAD was advertised - the Appellant was deemed not suitable and hence not short-listed But, only a few months later - when the post was re-advertised in February 2004 - the Appellant was deemed 'suitable' and recommended, although this new evaluation was based on the same interview conducted in September 2003, after the Appellant had submitted his application to the first vacancy announcement. The Panel had difficulties in understanding this sudden change in the assessment, and noted, with surprise, that the evaluation of the Appellant between both dates – although based on the same interview – changed from an overall rating of 80 in 2003 to 82 in 2004. This, in turn, reflected the combined impact of a less favourable evaluation for 'experience' and a more favourable rating for 'other skills' in 2004.

58. In conclusion, the Panel stated that Section 7.1 of ST/AI/2002/4 was not properly followed in the case at stake, and hence the Appellant's right to a fair and full consideration for promotion was not respected. In this respect, the Panel stressed that it was not necessary for the Appellant to prove – nor for the Panel to establish – that the Appellant would have been selected for the disputed post had these flaws not occurred (see UNAT judgement 870 *Choudhury and Ramchandani* (1998)). The Panel reiterated that the mere fact that the rules were not correctly applied had flawed the whole selection process, and that a proof of prejudice in such case was unnecessary ...

59. The Panel then examined the requests of the Appellant and noted that it was not possible to consider his demand to 'ensure that [he] be given priority as an eligible candidate to any future D1 vacancy for which he is qualified and becomes available in UNCTAD'. As regards his request to 'recommend to the Secretary-General that he take the necessary action to ensure that the Appellant is compensated financially for not being selected to the post in question', the Panel agreed that such a compensation was justified given the flaws that had characterized the selection process for filling the vacancy. In discussing the appropriate level of compensation the Panel took into account that the Appellant's chances for being selected for the post, had the proper procedure been followed, were not certain, given that his overall ranking was inferior to those of two other internal candidates. The Panel believed, nevertheless, that a compensation of one-month net base salary at the Appellant's level of appointment at the time of the

selection (September 2004) was justified, in view of the overriding importance of ensuring that the staff selection process is in line with the established procedures.

Conclusions and Recommendations

60. In view of the foregoing, the Panel **concludes** that the decision not to select the Appellant to the post advertised ... was tainted by a procedural flaw.

61. The Panel hence **recommends** that the Appellant be paid one-month net base salary at his level of appointment at the time of the selection (September 2004), and that all other pleas in connection with the present appeal be dismissed.”

On 12 July 2007, the Under-Secretary-General, Department of Management, transmitted a copy of the JAB report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case and has decided not to accept the findings and conclusion of the JAB. He does not agree with the conclusion of the JAB that a 60-day mark candidate may be chosen for a position only if a suitable candidate could not be identified at the 15-day or 30-day mark. The Secretary-General states that unless the programme manager has identified a suitable candidate and has submitted a proposal to the central review body or that submission of such a proposal is imminent, OHRM is required to release to the programme manager all applicants eligible to be considered at the 60-day mark, who are then considered together with other candidates.”

On 10 October 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. His candidature for the contested post was not given full and fair consideration.
2. His due process rights were denied by the Administration’s failure “to apply the correct selection procedure as set out in ST/AI/2002/4, in particular the procedure set out in paragraph 7.1 thereof”.
3. The decision to appoint an external 60-day mark candidate under ST/AI/2002/4 “was vitiated by procedural error and bias”.
4. He is entitled to financial compensation, in an amount to be determined by the Tribunal, “for the violation of his rights and for the distress caused”.
5. He is entitled to “priority consideration for any future D1 vacancy that becomes available and for which he is qualified”.

Whereas the Respondent’s principal contentions are:

1. The Applicant’s candidacy was fully and fairly considered.
2. The applicable procedures were followed.
3. The Applicant’s due process rights were not violated by the decision to select a 60-day mark candidate rather than the Applicant.
4. The Applicant has not right to the compensation or to the preferential consideration he seeks.

5. The contested decision was not tainted by bias, improper motivation, or other extraneous considerations.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

I. The Applicant claims that the Administration failed to give him full and fair consideration when he applied for the vacant post of Chief (D-1), Electronic Commerce Branch, Division of Services Infrastructure for Development and Trade Efficiency, at UNCTAD in Geneva. At the time he was the Chief of the Technology for Development Section at the P-5 Level.

II. The vacancy was advertised on 3 June 2003 with an application deadline set at 2 August. The Applicant applied for the position on 2 July 2003 and was interviewed on 29 September. His candidature was not retained in the list of recommended candidates. According to the Respondent, only one candidate – who was male and external – “was found to be suitable for the post”, and was recommended for the Head of Department’s approval. The vacancy was then cancelled.

III. On 24 February 2004, the position was re-advertised, with a deadline for applications set at 24 April. The new vacancy announcement specified that candidates who had applied previously for that post needed to re-apply if they were still interested. The Applicant submitted his application anew on 10 March 2004. He was not interviewed a second time.

IV. According to the Respondent, on 19 July 2004 “the [PCO] submitted to the Head of Department a recommended list of five suitable candidates, which included one external male, one external female, and three internal male candidates - one of which was the [Applicant]”. The evaluation of these short-listed candidates was the following: 95 (an external male candidate), 90 (an external female candidate), 85 (two internal male candidates), and 82 (the Applicant). According to the Respondent, the list was approved on the same day by the Head of Department, who submitted it to the [CRB] for approval. The CRB held a meeting on 22 July 2004 and noted that the recommended candidates “were evaluated on the basis of the pre-approved criteria and that the applicable procedures were followed”. The list was sent back to the Head of Department for selection. On 26 July 2004, the latter selected the external female candidate.

V. On 29 July 2004, the Applicant was informed that he had been included by the interview panel on a short list of candidates who were eligible for the post, but that he had not been selected by the Secretary-General of UNCTAD. On 20 September 2004, the successful female candidate was appointed to the contested position. By letter dated 22 September 2004, HRMS informed the Applicant that in relation to his application to the subject post he had been placed on the roster of candidates in accordance with Section 9.3 of ST/AI/2002/4.

VI. On 20 October 2004, the Applicant requested an administrative review of the decision not to select him for the subject post, and on 24 January 2005, in the absence of a reply from the Secretary-General, he filed an appeal to the JAB Secretariat in Geneva. In its report dated 11 January 2007, the JAB found that because three internal candidates (30-day mark) had been identified as suitable, the Administration was precluded from selecting an external candidate. The JAB concluded that the Administration had violated the Applicant's right to full and fair consideration for promotion and recommended that the Applicant be paid one month net base salary at his level of appointment at the time of the selection.

VII. In his letter dated 12 July 2007, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had not accepted the findings and conclusion of the JAB. On 10 October 2007, the Applicant filed the above-referenced Application.

VIII. At the outset of its assessment of the case at hand, the Tribunal deems it necessary to set out the legal instruments governing the appointment and promotion of staff:

Article 101.3 of the United Nations Charter provides:

“The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity...”

The relevant provisions of the Staff Regulations read as follows:

“4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity...”

4.3 In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

4.4 Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations...”

ST/AI/2002/4 states in pertinent part:

“2.1 The present instruction establishes a new staff selection system (the “system”), which integrates the recruitment, placement, promotion and mobility of staff.

2.2 All staff, up to and including those at the D-2 level, are expected to move periodically to new functions throughout their careers. To facilitate and regulate mobility, the system provides for the circulation of all vacancies and anticipated mission needs through a compendium, defines maximum periods of occupancy of posts, requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection and specifies the lateral mobility requirement applicable before a staff member may be promoted to the P-5 level.”

“4.5 Each vacancy shall indicate the date of posting and specify a deadline by which all applications must be received. The deadline for vacancies at the Professional level and above shall normally be 60 calendar days after posting, unless, as may be done for particular cases of unanticipated vacancies,

OHRM has exceptionally approved a 30-day deadline. The deadline for vacancies in the General Service and related categories shall normally be 30 calendar days after posting, unless it has been established to the satisfaction of OHRM or the local personnel office that there are no suitable internal candidates at the duty station, in which case the deadline shall be 60 calendar days after posting. Staff members are encouraged to submit their applications as early as possible, because staff fulfilling the eligibility requirements set out in section 5.4 shall be considered 15 calendar days after posting, and those fulfilling the eligibility requirements set out in section 5.5 shall be considered 30 calendar days after posting.”

“5.4 The following staff members shall be eligible to be considered for a lateral move at the 15-day mark:

(a) Internal candidates whose appointment is not limited to service with a particular office may be considered for any vacancy at their level. Staff whose appointment is limited to service with a particular office may be considered for vacancies at their level in that office only. Staff in the Professional category and above who do not have geographic status may be considered for vacancies at their level at the 15-day mark in respect of posts that are not subject to geographical distribution;

(b) In addition, and in order to recognize and encourage mission service, the following candidates shall be eligible to be considered at the 15-day mark:

(i) Internal candidates on mission detail who have been in receipt of a special post allowance (SPA) for at least two years in a field mission and who meet the requirements of section 5.2, where applicable, may apply for a move to a non-mission post at the SPA level and be promoted to that level if selected, except for staff having received an SPA from the General Service to the Professional category;

(ii) Field Service officers at the FS-6 and FS-7 levels may be considered for a move to the P-3 and P-4 levels respectively, provided that they have served for two years at their current level and meet the academic qualifications required for an appointment to the Professional category.

5.5 The following staff members shall be eligible to be considered at the 30-day mark:

(a) For promotion against a post one level higher than the level of the staff member:

(i) Internal candidates whose appointment is not limited to service with a particular office may be considered for any post in the Secretariat;

(ii) Staff whose appointment is limited to service with a particular office may be considered for a higher-level post in that office only;

(iii) Staff in the Professional category and above who do not have geographic status may be considered for higher-level posts that are not subject to geographical distribution;

(iv) Field Service officers at the FS-6 and FS-7 levels may be considered for a post at the P-4 and P-5 levels respectively, provided they have served for two years at their current level and meet the academic qualifications required for an appointment to the Professional category and the requirements of section 5.2, where applicable;

(b) For promotion against a post one level higher than the level of the staff member, or appointment at the same level of staff who are not internal candidates but fall in the following categories:

(i) Staff appointed at the P-3 level under the 100 series of the Staff Rules to serve against peacekeeping support account posts at Headquarters or under the 100 or 300 series in peacekeeping or other field missions may be considered for

vacancies at the P-4 level; staff appointed at the P-4 level under the same conditions may be considered for vacancies at the P-4 or P-5 levels, provided in each case that they have a continuous period of 12 months of service;

(ii) Women staff members who hold a current appointment of any type at the P-3/L-3 level may be considered for vacancies at the P-4 level; women staff members holding a current appointment of any type at the P-4/L-4 level may be considered for vacancies at the P-4 or P-5 level, provided in each case that they have been in the service of the Organization for a cumulative period of at least one year accrued over the two years immediately preceding the application and meet the requirements of section 5.2, where applicable. The same shall apply to women serving with the other entities of the United Nations common system.”

“6.7 Applications shall be submitted to OHRM or the local personnel office, as indicated in the vacancy announcement. OHRM or the local personnel office shall transmit electronically to the department/office concerned at the 15-, 30- and 60-day marks the applications of candidates eligible to be considered at each of those dates. At the same time, OHRM or the local personnel office shall transmit the roster of pre-approved candidates eligible to be considered at the 15-, 30- or 60-day mark, as set out in section 9.3.”

“7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.” (footnotes omitted)

“9.2 The head of department/office shall select the candidate he or she considers to be best suited for the functions, having taken into account the Organization’s human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and shall give the fullest regard to candidates already in the service of the Organization.”

IX. It is, as the JAB rightly acknowledged, the interpretation of Section 7.1 that gives rise to the present dispute. The Applicant argues that on a proper construction of Section 7.1, 60-day mark candidates should be considered for vacancies only if a suitable 30-day mark candidate could not be identified. The Applicant adopts the analysis of the JAB in this regard that Section 7.1 effectively creates a “staircase system” which, he contends, is the only meaningful interpretation of the paragraph in light of ST/AI/2002/4 read as a whole. He accordingly submits that 60-day mark candidates may only be considered if no suitable 30-day mark candidate could be identified. He alleges that the appointment of the 60-day mark candidate in the present case was in violation of Section 7.1 of ST/AI/2002/4 since three suitable internal 30-day mark candidates, including the Applicant, had been identified.

X. The Respondent replies that the applicable procedures were precisely followed; that the Applicant’s candidacy was fully and fairly considered; and that his due process rights were not violated by the decision to select a 60-day mark candidate rather than the Applicant. He rejects the Applicant’s interpretation of Section 7.1 and contends that the selection process is clearly set forth in Section 7.1, leaving no room for the interpretation suggested by the Applicant. The Respondent points out that Section 7.1 makes a distinction between lateral candidates at the 15-day mark and those seeking promotion at the 30-day and the external candidates at the 60-day mark, and submits that ST/AI/2002/4 supplies a clear and cogent rationale for this distinction. The Respondent avers that in view of the Organization’s mobility policy, the right to be considered initially on an exclusive basis is

fully justified, and that this justification has not, in the text in question been applied to candidates seeking promotion. The Respondent submits that the contested decision was properly taken and that the Applicant's due process rights were not violated.

XI. The Tribunal notes that in interpreting the text of Section 7.1 of ST/AI/2002/4, it must give the words their "natural and ordinary meaning". This follows general international practice, which refers to interpretation according to the "ordinary meaning" of the terms "in their context and in the light of [their] object and purpose". (*Cf.* Judgement No. 1225 (2005).) The Tribunal has examined the text of Section 7.1 in this light, bearing in mind that the exclusion of any class of candidates is to an extent a denial of full and fair consideration and will not be justified in the absence of clear and explicit language.

XII. The Tribunal finds that ST/AI/2002/4 is clear with respect to lateral movements of candidates eligible to be considered at the 15-day mark under section 5.4. Such candidates have not only to be given priority consideration but must be given *exclusive* consideration. The wording of Section 7.1 provides explicitly and specifically that only "if no suitable candidate can be identified at this stage", candidates eligible at the 30-day mark under Section 5.5 are to be considered. The underlying rationale for according exclusive priority consideration to *staff members seeking a lateral transfer* is that "[a]ll staff, up to and including those at the D-2 level, are expected to move periodically to new functions throughout their careers. To facilitate and regulate mobility, the system ... requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection and specifies the lateral mobility requirement applicable before a staff member may be promoted to the P-5 level" (footnotes omitted). It is clear from ST/AI/2002/4, and uncontested by the parties, that it is the Secretary-General's policy on staff mobility that requires and justifies the exclusive priority consideration given to internal candidates seeking a lateral move.

XIII. However, Section 7.1 makes no similar provision for candidates identified at the 30-day mark vis-à-vis 60-day mark candidates. Section 7.1 merely stipulates that "[i]f no suitable candidate can be identified at this first [15-day mark] stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable."

XIV. The Tribunal agrees with the JAB's contention that "by allowing for certain candidates to be considered under specific circumstances as eligible at the 30- instead of the 60-day mark under Section 5.5 (b), the drafters of the ST/AI/2002/4 clarified that *there had to be a difference in treatment of 30- and 60-day mark candidates.*" The Tribunal does however not agree with the JAB's conclusion, adopted by the Applicant, that such "difference in treatment" means that internal candidates seeking a promotion (30-day mark candidates) should receive exclusive priority over external candidates. In fact, staff regulation 4.4 and Section 9.2 of ST/AI/2002/4 only provide that internal candidates be given the "the fullest regard" in the recruitment procedure.

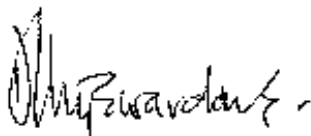
XV. Moreover, these provisions are subject to Article 101 of the Charter which stipulates the concern to provide the Organization with staff meeting the highest standards of efficiency, competence, and integrity. It is in light of Article 101 of the Charter that the Tribunal has consistently held that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General. (Judgement No. 1117, *Kirudja* (2003), para. II). To construe Section 7.1 in the way the JAB did would not give adequate scope to the Secretary-General's discretion in appointment and promotion matters.

XVI. The Tribunal therefore finds that Section 7.1 must be construed in the sense that the Administration should give priority consideration to the internal candidates at the 30-day mark, but does not preclude consideration of external candidates for the same post at the 60-day mark. Where an internal candidate has the same qualifications as another – external – candidate, preference must be given to the internal candidate. *Cf.* Judgement No. 971, *Stepanenko* (2000).

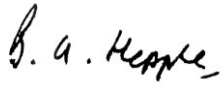
XVII. In the present case, three internal male 30-day mark candidates were found suitable for the position, including the Applicant; and two external candidates were found suitable, including the female candidate who was selected and appointed for the subject post. A review of the record reveals that the two external candidates scored higher than the three internal candidates. In view of the interpretation of Section 7.1 above, the Tribunal is satisfied that the Secretary-General did not err in the exercise of his discretion by selecting an external candidate over the less qualified internal candidates.

XVIII. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

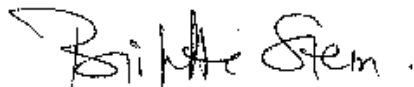
(Signatures)



Mr. Dayendra Sena **Wijewardane**
President



Sir Bob **Hepple**
First Vice-President



Brigitte **Stern**
Member

New York, 25 November 2009



Tamara **Shockley**
Executive Secretary