## Introduction

1. The Applicant, a Language Reference Assistant at the General Service ("GS") level, grade 7, in the Department for General Assembly and Conference Management ("DGACM"), New York, contests the decision not to grant her a continuing appointment.

2. The Applicant requests that the contested decision be rescinded and that she be granted a continuing appointment. Furthermore, she requests compensation for the alleged breach of her due process rights and undue delays.

3. The Respondent contends that the application is without merit and should be dismissed.

## Factual background

4. In response to Order No. 204 (NY/2015) dated 28 August 2015, the parties submitted the following agreed facts:

> … The Applicant is a staff member in the General Service category. On 2 September 2008, the Applicant joined the Organization at the G-3 level on a short-term appointment in the Department of Management.
>
> … In 2009 the Applicant, who was then an Administrative Assistant at the G-3 level, applied to sit a competitive examination for language reference assistants. This application was in response to ST/IC/1999/27 the "2009 competitive examination for language reference assistants." That Information Circular informed staff members that the examination was being conducted under the framework of ST/AI/1998/4 [(Competitive examinations for the placement of general service)] and related categories in particular occupational groups."
>
> … The Applicant successfully completed the competitive examination for language reference assistants and was placed on a roster of successful candidates.

… On 1 May 2011, the Applicant was promoted to the G-4 level as an Administrative Assistant with the Department of Field Support.

… On 7 June 2012, the Applicant was selected from the roster of successful candidates in the 2009 competitive examination and placed on the position of Language Reference Assistant. The Applicant's assignment to this position was subject to a two-year probationary period and she was paid a special post allowance from the G-4 to the G-6 level.

… Towards the end of the Applicant's probation period, on 29 May 2014, she was informed that she would be provided with a further fixed-term appointment rather than a continuing appointment. The Applicant sought

7. On 28 August 2015, the Tribunal issued Order No. 204 (NY/2015) instructing the parties to file a jointly signed statement outlining the agreed and disputed legal issues and facts and to submit, amongst other documentation, the comments provided by the Office of Human Resources Management ("OHRM") to the Management Evaluation Unit ("MEU") on 25 June 2014.

8. On 18 September 2015, in response to Order No. 204 (NY/2015), the parties filed the jointly signed statement in which they stated that, in their view, the case could be decided on the papers before the Tribunal and that they were "unable to agree on resolving the matter informally". Appended to the jointly signed statement, the Respondent filed *ex parte* an interoffice memorandum from OHRM to MEU dated 25 June 2014 containing its comments on the Applicant's request for management evaluation.

9. On 29 September 2015, the Applicant filed a submission in which he requested that OHRM's 25 June 2014 interoffice memorandum be disclosed to him and submitted, *inter alia*, that, "no privilege exists in relation to OHRM's comments to the MEU. No public interest is served in preserving their confidentiality from the Applicant and those comments are of important probative value in the case".

10. By Order No. 256 (NY/2015) dated 1 October 2015, the Tribunal rejected the Respondent's request for filing OHRM's 25 June 2014 interoffice memorandum *ex parte*, lifted the *ex parte* restriction, and ordered the parties to file and serve their closing statements on or before 29 October 2015 based only on the documents already before the Tribunal.

11. On 29 October 2015, both parties filed their closing submissions.

approach in terms of the will of the General Assembly, neither General Assembly resolution 63/250 (Human resources management) nor 65/247 (Human resources management) contains the alleged distinction. Instead both resolutions make a blanket reference to "staff from language services" or "language staff"; definitions which encompass the Applicant's situation. It seems clear that the General Assembly wished to ensure that all staff from language services who had completed the competitive examination would receive continuing appointments. In order to make this clear a distinction was drawn between national competitive examination recruits and "language staff" or "staff from language services". The Applicant was subject to a two-year probationary period just as is set out in General Assembly resolution 65/247;

e. The email from a Human Resources Officer of 2 June 2014 simply set out that

> staff rule 4.14 (b) on Continuing Appointments under which you were recommended by the Department, makes provision for candidates recruited at the professional level

means they accept in principle that it could apply to staff members outside the professional levels. However, the Administration deploy a definition of "special language competence" that is so restrictive that it can only apply to staff at the P-level and only competitive examinations under ST/AI/1998/7 are considered to fall within staff rule 4.14(b);

h. The wording of staff rule 4.16 renders this interpretation illogical because staff rule 4.16(c) creates an exception from amongst the individuals appointed after a competitive examination, which applies to those appointed at the P-level. For such an exception to be necessary, it must mean that non-professional level staff members were included in the prior group, i.e., those falling within staff rule 4.16(b). Otherwise the exception would not need to be drawn;

i. A breakdown of the subcategories referred to in staff rule 4.16(b)(i) is provided in the ma

Assistants to be "language staff" right up until the moment the Applicant completed her two-year probationary period;

p. Similar approaches were taken with candidates of the two different competitive examinations. The Applicant, like those at the P-level, was placed on a roster of successful candidates and assigned to a post when one became available. She was also required to complete a two-year probationary period. The fact that appointment of Language Reference Assistants are handled in the same manner as the appointment of P-level language staff further demonstrates that the distinction the Administration are seeking to draw is not supported;

q. The MEU seeks to draw a further distinction asserting that because the Applicant was already employed by the Organization and was placed in her current post, staff rule 4.14 does not apply. This is based on the fact the staff rule applies to "Staff members recruited upon successful completion of a competitive examination";

r. ST/AI/1998/4 covers the "placement" of staff members through competitive examination. ST/AI/1998/7 covers "recruitment and placement" of staff members through competitive examination. ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills) allows for the conversion to permanent appointment of both staff members recruited and placed following competitive examination under ST/AI/1998/7 following completion of a two-year probationary period. Staff rule 4.16 and former staff rule 104.15 use the same wording regarding appointment. This means that placement of P-level staff under ST/AI/1998/7 is interpreted as falling within the wording in staff rule 4.16 and former staff rule 104.15;

s. If a "placed" P-level staff member can benefit from the grant of a continuing appointment then the distinction drawn by the Administration cannot be used to avoid affording the same contractual benefit to a "placed" GS-level staff member. Since no distinction exists between P-level staff, who are recruited or placed, it is illogical to assert that such a distinction should apply to the Applicant simply because ST/AI/1998/4 does not allow for external recruitment;

t. It should not be available to the Administration to treat P-level staff placed on posts following competitive examination differently from GS-staff placed on posts following competitive examination.

**Respondent's submissions**

13. The Respondent's contentions may be summarized as follows:

a. The application has no merit because staff rules 4.14(b) and 4.16(b) do not apply to the Applicant who has no right to conversion to a continuing appointment under staff rule 4.14(b) as she was not recruited upon successful completion of a competitive examination pursuant to staff rule 4.16(b);

b. The Applicant is not entitled to be granted to a continuing appointment. Under staff rule 4.14(b), the appointment of a staff member may be converted to a continuing appointment under the criteria established under ST/SGB/2011/9 or if the staff member was recruited upon successful completion of a competitive examination pursuant to staff rule 4.16(b). The Applicant does not contest a decision under either of the provisions;

g. ST/IC/2009/27 did not state or otherwise confer upon the Applicant a right to be granted a continuing appointment upon completion of the two-year trial period as a language reference assistant;

h. Staff rule 4.16(b) establishes which appointments and recruitment shall take place through competitive examinations. All positions covered by staff rule 4.16(b) are in the P-level category;

i. One of the categories of positions covered by staff rule 4.16(b) are positions requiring special language competence in the United Nations Secretariat. The specific process to conduct competitive examinations to appoint staff to such positions is set out in ST/AI/1998/7 and ST/AI/2000/1. The competitive examinations are open to current staff members at the P-3 level and below, and external candidates (see sec. 2 of ST/AI/1998/7);

j. As stipulated in sec. 1 of ST/AI/2000/1, the process established by ST/AI/1998/7 applies to specific positions in the P-category, “that is,

in a competitive examination for posts requiring special language skills", and therefore is not entitled to a continuing appointment under staff rule 4.14(b);

l. An earlier mistake in the implementation of staff rule 4.14(b) does not confer the Applicant with a right to a continuing appointment. The Applicant refers to the circumstances of two staff members in the GS-category who passed the same examination as the Applicant, and were granted continuing appointments. These decisions were erroneous, and these two staff members should not have received continuing appointments. The Staff Rules were incorrectly applied in these two cases;

m. The erroneous application of the Staff Rules does not grant the Applicant a right to a continuing appointment. The Appeals Tribunal has consistently found that the Organization is required to correct its mistakes (*Castelli* 2010-UNAT-037, para. 26). It follows from this principle that the Organization is not bound to repeat its mistakes for the benefit of a particular staff member. As such, the Applicant is not entitled to a grant of a continuing appointment because the Organization has previously made an error in granting continuing appointments to similarly situated staff;

n. The Applicant contends that, as she passed a competitive examination for an occupational group relating to languages, she is to be treated as passing the competitive examination required for appointment to "posts requiring special language competence" under staff rule 4.16(b)(i). This contention is incorrect. The fact that the Applicant participated in an examination is not a basis upon which to grant the Applicant a continuing appointment. Competitive examinations are used widely throughout the Organization to recruit staff, in particular to assess whether

the candidates have the required technical skills to perform certain functions;

o. In order to be entitled to a continuing appointment, a staff member must successfully participate in an examination process that is part of the continuing appointment framework, i.e., an examination administered pursuant to ST/AI/1998/7 and ST/AI/2000/1. The Applicant, however, participated in an examination administered pursuant to a different framework, which is not part of the continuing appointment framework;

p. Contrary to the Applicant's submission, the former United Nations Administrative Tribunal in Judgment No. 1276 (2006) is not persuasive precedent. This case predates the introduction of the current Staff Rules and concerned the application of General Assembly resolutions 51/226 (Human Resources Management) and 53/221 (Human Resources Management) regarding conversion of GS-level staff to permanent appointments. This case concerns a different legislative framework governing conversion to continuing appointments;

q. The Applicant argues that a GS-level staff member who has passed an examination for language reference assistants under ST/AI/1998/4 has an additional right to be granted a continuing appointment. This argument violates the principle of equal treatment, which means equal treatment of equals (*McLuskey* 2013-UNAT-332, para. 21);

r. A GS-level staff member who has passed an examination administered under ST/AI/1998/4 in an occupational group that is not related to language services, for instance, statistical assistants or accounting assistants is not entitled to be granted a continuing appointment. If the Applicant's argument is accepted, GS-level staff

members who have passed examinations under ST/AI/1998/4 would be treated differently, depending on which occupational group they sat the examination for. This would violate the principle of equal treatment, and the results would be unlawful.

s. Lastly, the Applicant may be eligible for consideration for a continuing appointment under the regular annual reviews under staff rule 4.14(c), provided that she meets the conditions in ST/SGB/2011/9 and ST/AI/2012/3. The Applicant was reappointed to the Organization over five years ago on 7 April 2009.

**Consideration**

*Receivability*

14. The Applicant, a current staff member, is contesting the decision not to grant her a continuing appointment. The contested decision, which is alleged to be

*Scope of the case*

15. Responding to Order No. 204 (NY/2015) dated 28 August 2015, the parties defined the legal issues to be determined by the Tribunal as follows:

> 1. Whether the "2009 competitive examination for language reference assistants" conducted under ST/AI/1998/4 "Competitive examinations for the placement of General Service and related categories in particular occupational groups" falls within the scope of staff rule 4.16.
>
> 2. Whether staff rule 4.14(b) applied to the Applicant on completion of a two year probationary period under a fixed-term appointment.

*Applicable law*

16. The current Staff Rules and Staff Regulations (ST/SGB/2014/1) state as follows regarding the scope and purpose of the Staff Regulations:

> The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "sta

(b) Staff members recruited upon successful

19. ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances) provides in secs. 2.1, 4.1, 7 and 8 that:

> **Section 2**
>
> **Entry into force and effect of administrative issuances**
>
> 2.1 Administrative issuances shall enter into force upon the date specified therein and shall remain in force until superseded or amended by another administrative issuance of the same or higher level and promulgated in accordance with the provisions of the present bulletin.
>
> **Section 4**
>
> **Administrative instructions**
>
> 4.1 Administrative instructions shall prescribe instructions and procedures for the implementation of the Financial Regulations and Rules, the Staff Regulations and Rules or the Secretary-General's bulletins.
>
> **Section 7**
>
> **Procedures for the implementation of the present bulletin**
>
> The Under-Secretary-General for Management may promulgate administrative instructions detailing procedures for the implementation of the present bulletin.
>
> **Section 8**
>
> **Final provisions**
>
> 8.1 The present bulletin shall enter into force on the date of its issuance.
>
> 8.2 Secretary-General's Bulletin ST/SGB/1997/1 of 28 May 1997 is hereby abolished.
>
> 8.3 Administrative issuances promulgated in accordance with

20. ST/AI/1998/4 provides in its entirety that (footnotes omitted):

> The Under-Secretary-General for Management, pursuant to section 4.2 of Secretary-General'

which shall inform them well in advance of upcoming examinations.

Section 4

Specialized board of examiners

4.1 A specialized board of examiners will be set up for each occupational group. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the

requiring specific language skills in the Professional category in accordance with the needs of the Organization. Specific arrangements for such examinations shall be announced well in advance to staff members through the United Nations iSeek intranet and broadcast e-mail messages, and for external candidates through the United Nations Careers Portal. The announcements will provide, inter alia, tentative dates on which the examinations will be held and information concerning the application procedure.

**Section 2**

**Eligibility**

2.1 A staff member at the P-3 level and below may apply to take a competitive examination for placement in a post requiring specific language skills in the Professional category, provided he or she:

(a) Meets the minimum entrance criteria for that examination, as set out in the relevant announcement;

(b) Holds a United Nations appointment valid at least until the end of the month when the written examination is scheduled to take place;

(c) Has a satisfactory record of performance.

2.2 An external candidate may apply to take a competitive examination for recruitment to a post requiring specific language skills in the Professional category, provided he or she meets the minimum entrance criteria for that examination, as set out in the relevant announcement.

2.3 Staff members and external candidates shall provide relevant documents, if necessary, as evidence in support of their meeting the eligibility requirements listed in sections 2.1 and 2.2.

**Section 3**

**Applications**

Staff members who wish to apply to take a language examination for recruitment to posts advertised in Inspira shall complete the profile and application sections in Inspira and submit them with all required documents by the deadline indicated in the relevant announcement, which will be made available through the United Nations Careers Portal on iSeek.

**Section 4**

**Specialized board of examiners**

4.1 A specialized board of examiners will be set up for each examination. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the specialized agencies or outside experts may also be employed. Each specialized board will have a non-voting ex officio member representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.

4.2 Every application shall be subject to review by the specialized board of examiners in order to determine whether it meets the conditions set out in the present instruction.

4.3 All staff members and eligible external candidates shall be notified of the specialized board of examiners' decision regarding their application. The specialized board of examiners' decisions are final.

**Section 5**

**Final provisions**

The present instruction shall enter into force on 23 March 1998.

22. ST/IC/2009/27 states in secs. 1, 2, 3, 4, 5, 9 and 10 as follows:

1. The written component of a competitive examination for language reference assistants will be held on Friday, 9 October 2009, at Headquarters in New York. The purpose of this examination is to establish a roster from which future vacancies for language reference assistants at the G[S]-7 level will be filled in the Terminology and Reference Section in the Documentation Division, Department for General Assembly and Conference Management.

2. The examination is open to staff members of the Secretariat at Headquarters in the General Service and related categories, in accordance with the provisions of administrative instruction ST/AI/1998/4, entitled "Competitive examinations for the placement of General Service and related categories in particular occupational groups".

3. The main duties and responsibilities of language reference assistants are to carry out research in three official languages of the United Nations and provide support to translators to ensure accuracy, uniformity and timeliness in the translation of United Nations documents and publications by supplying the relevant language services with reference material and terminology information.

4. Staff members applying for the examination must:

(a) Have satisfactorily completed their secondary education;

(b) Have an excellent working knowledge of English and of two other official languages of the United Nations (Arabic, Chinese, French, Russian and Spanish). Knowledge of additional official languages beyond the required three, as well as of other languages, will be an asset. For applicants with knowledge of Chinese the requirement of a third language is waived. The Board of Examiners, appointed by the Assistant Secretary-General for Human Resources Management, requires that applicants be able to support their claims of knowledge of these languages by relevant documentation in their official status files. Staff members who have enrolled in the United Nations Language and Communications Programme must have passed the language proficiency examination in these languages. Those who have not pursued language courses at the United Nations must substantiate their claim of knowledge of these languages by attaching to their applications photocopies of diplomas or certificates from a language school or a brief explanation of how they acquired knowledge of the languages claimed. Applicants claiming one of these languages as their main language must be able to prove that it was the language of instruction at their secondary school;

(c) Have excellent skills in word-processing, desktop publishing, language related information technology tools and database content maintenance.

5. All applications will be reviewed by the Board of Examiners. All applicants will be notified of the decision of the Board with respect to their application. Decisions of the Board are final and are not subject to appeal.

information concerning the implementation of continuing contracts;

4. *Also requests* the Secretary-General to report to the General Assembly at its sixty-fourth session on the following issues with a view to the implementation of a system for the continuing appointment regime by 1 January 2010:

(*a*) Rigorous and transparent procedures for granting continuing appointments to staff, including the criteria for eligibility, the relationship with disciplinary measures and the central management of conversions;

(*b*) The role of the performance appraisal system and options for strengthening it to ensure that staff members considered for continuing appointments have demonstrated the highest standards of efficiency, competence and integrity, taking into account any deliberations of the Internationa

duration under the 300 series of the Staff Rules in peacekeeping operations;

6. *Authorizes* the Secretary-General, bearing in mind paragraph 5 of the present section, to reappoint under the 100 series of the Staff Rules those mission staff whose service under 300-series contracts has reached the four-year limit by 30 June 2009, provided that their functions have been reviewed and found necessary and that their performance has been confirmed as fully satisfactory;

7. *Decides* that temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates;

8. *Also decides* that staff on temporary contracts would be eligible to receive only the following benefits and allowances: post adjustment; rental subsidy; hazard pay; hardship allowance; the daily subsistence allowance portion of the assignment grant; leave (depending on the length of contract); home leave (per classification of duty station); and limited shipment allowance;

9. *Requests*, in this regard, the Secretary-General to provide information on the circumstances in which the renewal of a temporary appointment for up to one additional year could be granted;

10. *Decides* that the field staff serving on 300-series appointments of less than four years who are not performing temporary functions are to be given mission-specific fixed-term contracts until such time as they have gone through a competitive process subject to the review of a central review body;

11. *Also decides* that staff on 100-, 200- and 300-series contracts serving in locations other than peacekeeping operations and special political missions for a cumulative period of more than one year who are not performing temporary functions are to be given fixed-term contracts until such time as they have gone through a competitive process subject to the review of a central review body;

12. *Requests* the Secretary-General to submit to the General Assembly for consideration at the first part of its resumed

sixty-third session draft regulations by which the streamlined system of contracts could be implemented;

13. *Also requests* the Secretary-General to evaluate the impact of the implementation of the new system of contracts, including its financial implications, and to report to the General Assembly on this matter no earlier than at its sixty-seventh session;

14. *Further requests* the Secretary-General to discontinue the practice of assigning staff from Headquarters to missions on a travel status basis for a period of more than three months;

15. *Recalls* section V, paragraph 2, of its resolution 51/226, in which it requested the Secretary-General to make efforts to achieve the level of 70 per cent of permanent appointments in posts subject to geographical distribution;

16. *Encourages* the Secretary-General, in accordance with legislative mandates, to ensure a judicious mix of career and fixed-term appointments, so as to have an appropriate balance between institutional memory, long-term commitment and independence and the ability to bring in fresh insight and expertise, and to dismiss non-performing staff;

17. *Recognizes*

Under the Charter of the United Nations, the General Assembly provides Staff Regulations which set out the broad principles of human resources policy for the staffing and administration of the Secretariat. The Secretary-General is required by the Staff Regulations to provide and enforce such Staff Rules, consistent with these principles, as he considers necessary.

The Secretary-General, pursuant to staff regulations 12.2, 12.3 and 12.4, hereby promulgates the provisional text of the Staff Rules.

The attached provisional Staff Rules shall be effective from 1 July 2009. The 100 series and 200 series of the Staff Rules will be abolished effective 1 July 2009. The 300 series Staff Rules will remain in force as follows:

(a) Until 31 December 2010 with respect to staff members of or administered by the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA) and the United Nations Office for Project Services

services after two years of probationary service will be granted continuing contracts, notwithstanding the provisions contained in paragraphs 51 to 61 of the present resolution;

26. ST/SGB/2011/9 states in secs. 1.1, 1.2 and 1.3 as follows:

> 1.1 A continuing appointment is an open-ended appointment granted through established procedures in accordance with the Staff Regulations and Rules of the United Nations as well as the provisions of the present bulletin.
>
> 1.2 Continuing appointments may be granted to eligible staff members on the basis of the continuing needs of the Organization and in accordance with the provisions of section VI of General Assembly resolution 65/247 of 23 December 2010.
>
> 1.3 In accordance with paragraph 23 of section II of General Assembly resolution 63/250 and st

*Findings*

28.

32. General Assembly resolution 65/247, published in March 2011, approved the system of continuing appointments as per 1 January 2011 to eligible staff members on the basis of the continuing needs of the Organization, but, in sec. VI, para. 50, recalled para. 23 of section II of General Assembly resolution 63/250, and the General Assembly decided that "successful candidates from national competitive recruitment examinations and staff from language services after two years of probationary service, will be granted a continuing appointment, notwithstanding paras. 51 to 61 [of the present resolution]".

33. For the purpose of implementing sec. VI of General Assembly resolution 65/247 and staff rule 4.14, ST/SGB/2011/9 was promulgated on 18 October 2011 and, in art. 1.1, a continuing appointment was defined as "an open-ended appointment granted through established procedures in accordance with the Staff Regulations and Rules of the United Na

sections of ST/SGB/2011/9 are therefore not applicable to the staff members

b. Appointments to all posts requiring special language competencies of candidates selected exclusively from competitive examinations;

c. Appointments to P-3 level posts of candidates selected through other competitive examinations.

43. The Tribunal notes that according to arts. 1 and 5 of ST/SGB/210 (National competitive examinations) of 22 January 1985, national competitive examinations were used for the recruitment of staff at the P-1 and P-2 levels subject to geographical distribution in the Secretariat. To be eligible to sit for the examinations (written test and interview), all candidates were requested to: (a) be nationals of the Member States selected to participate in the examination in the year concerned; (b) hold a university degree; and (c) be less than 32 years of age.

44. ST/SGB/210 was abolished by ST/SGB/2011/10 issued on 19 October 2011 and the system of national competitive examinations was replaced with the young professionals programme. Articles 1.1 and 1.3 of ST/SGB/2011/10 state as follows (emphasis added and footnotes omitted):

> 1.1 … [T]he young professionals programme is designed to recruit junior professionals at the P-1 and P-2 levels through competitive examinations and to provide them with professional support"
>
> 1.3 The young professionals programme shall include all positions in the Professional category at the P-1 and P-2 levels established through the regular budget, *excluding the language posts*, and up to 15 per cent of entry level positions in field operations financed through the regular budget and voluntary contributions.

45. For the purpose of implementing ST/SGB/2011/10, ST/AI/2012/3/Rev.1 was issued on 7 November 2013, which states in arts. 1.1 and 1.3 that (emphasis added and footnotes omitted):

> 1.1 The examinations for recruitment at the P-1 and P-2 levels, which hereinafter shall be referred to as the young professionals programme examinations, are held annually in particular job families according to the needs of the Organization. Specific arrangements for such examinations shall be announced in advance through the United Nations Intranet (iSeek) and the United Nations Careers portal (https://careers.un.org/). *Competitive examinations for recruitment and placement in posts requiring specific language skills in the Professional category are not governed by the present instruction*.
>
> 1.3 In accordance with staff rule 4.16(b)(ii), recruitment to the Professional category of staff from the General Service and related categories in the United Nations Secretariat shall be made exclusively through competitive examinations.

46. The Tribunal notes that, as results from ST/IC/2009/27 and ST/AI/2000/1, DGACM has posts requiring specific language skills at both GS and P-levels. Language posts at the P-level are defined in sec. 1 of ST/AI/2000/1 as being: "interpreters, translators/précis-writers, editors, verbatim reporters and proofreaders/copy preparers in accordance with … ST/AI/1998/7". However, no administrative issuance has been adopted in accordance with ST/AI/1998/4 to define what the language posts at the G-level are which, in these circumstances, cannot be used to the detriment of the Applicant.

47. The Tribunal notes that the Appeals Tribunal has confirmed and defined the application of the plain meaning rule in several judgments, including *Scott* 2012-UNAT-225, in which it stated that:

> 28. The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be

> respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

48. The Tribunal considers that, from a plain reading of staff rule 4.16(b)(i) it results that the provision does not include any exceptions and does not distinguish between the posts requiring language skills in the GS and the P-levels. Therefore, staff rule 4.16 is generally applicable to all appointments to posts requiring special language competence within the UN Secretariat.

49. Moreover, according to the general legal principle of interpretation, *ubi lex non distinguit, nec nos distinguere debemus*, i.e., where the law does not distinguish, neither should we distinguish, the interpreter of the law cannot distinguish where the law does not distinguish and cannot create and/or add an exception(s) to an established rule with a general applicability and thereby limit its area of application. The Tribunal considers that, for staff rule 4.16 to apply only to P-level posts, the first part of staff rule 4.16(b)(i) should have had a different content such as, for instance: "Appointment to P-1 and P-2 level posts that are subject to the system of desirable ranges and to P-level posts requiring special language competence at the United Nations Secretariat, shall be made exclusively through competitive examination".

50. The Tribunal concludes that staff rule 4.16(b)(i) is applicable to *all* appointments to posts requiring special language competence at the United Nations Secretariat, including all appointments to posts at the GS-level. This is reflected by the similar provisions of secs. 2, 3 and 4 of ST/AI/1998/4 and secs. 2.3 and 4 of ST/AI/1998/7/Amend.1 regarding competitive examinations.

51. Sections 2, 3 and 4 of ST/AI/1998/4 state that:

> Section 2
>
> Eligibility
>
> 2.1 A staff member serving in the General Service and related categories may apply to take a competitive examination in a particular occupational group, provided he or she:
>
> (a) Meets the minimum entrance criteria for that examination, as set out in the relevant information circular;
>
> (b) Holds a United Nations appointment valid at least until the end of the month when the written examination is scheduled to take place;
>
> (c) Has a satisfactory record of performance.
>
> 2.2 Staff members shall provide relevant documents, if necessary, as evidence in support of their meeting the eligibility requirements listed in section 2.1.
>
> Section 3
>
> Applications
>
> Staff members who wish to submit an application shall complete the appropriate application form and submit it with all required documentation to the Office of Human Resources Management by the deadline indicated in the information circular, which shall inform them well in advance of upcoming examinations.
>
> Section 4
>
> Specialized board of examiners
>
> 4.1 A specialized board of examiners will be set up for each occupational group. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the specialized agencies or outside experts may also be employed. Each specialized board will have a non-voting ex officio member representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.

4.3 All candidates shall be notified of the specialized board of examiners' decision regarding their application. The specialized board of examiners' decisions are final.

52. Sections 2, 3 and 4 of ST/AI/1998/7/Amend.1 provide:

**Section 2**

**Eligibility**

2.1 A staff member at the P-3 level and below may apply to take a competitive examination for placement in a post requiring specific language skills in the Professional category, provided he or she:

(a) Meets the minimum entrance criteria for that examination, as set out in the relevant announcement;

(b) Holds a United Nations appointment valid at least until the end of the month when the written examination is scheduled to take place;

(c) Has a satisfactory record of performance.

2.2 An external candidate may apply to take a competitive examination for recruitment to a post requiring specific language skills in the Professional category, provided he or she meets the minimum entrance criteria for that examination, as set out in the relevant announcement.

**Section 3**

**Applications**

Staff members who wish to apply to take a language examination for recruitment to posts advertised in Inspira shall complete the profile and application sections in Inspira and submit them with all required documents by the deadline indicated in the relevant announcement, which will be made available through the United Nations Careers Portal on iSeek.

**Section 4**

**Specialized board of examiners**

4.1 A specialized board of examiners will be set up for each examination. Specialized boards will normally be composed of staff members of the Secretariat;T2 1 T8p will b 0n4 15(vxam)8..3(e )h(vx38..3(e )h(vx38..3

> representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.

53. It is clear from secs. 4 and 6 of ST/IC/2009/27 that language reference assistants have special language competences.

54. Furthermore, the Tribunal finds that staff rule 4.14(b) of ST/SGB/2014/1 applies to all the appointments to posts requiring special language competence within the UN Secretariat, including all the appointments to posts at the GS-level, i.e., also the Applicant's post.

55. The Tribunal notes that staff rule 4.14(b) states:

> [S]taff members recruited upon successful completion of a competitive examination pursuant to staff rule 4.16 shall be granted a continuing appointment after two years on a fixed-term appointment, subject to satisfactory service.

56. It results that, pursuant to staff rule 4.14(b), a staff member in the language services needs to satisfy the following mandatory and cumulative conditions to be granted a continuing appointment:

a. The staff member in the UN Secretariat must be recruited upon successful completion of a competitive examination pursuant to staff rule 4.16;

b. The staff member must complete two years on a fixed-term appointment;

c. The staff member's service must have been satisfactory.

57. The Tribunal notes that, as follows from the joint submission filed by the parties on 18 September 2015, the parties agreed that, in 2009, the Applicant, who was then an Administrative Assistant at the GS-3 level, applied to sit a

61. Moreover, granting Applicant a continuing appointment would not lead to an unlawful unequal treatment of other occupational groups, for instance, statistical assistants or accounting assistants, as argued by the Respondent. It is clear from ST/IC/2009/27 that the competitive examination on 7 October 2009 was held only for language reference assistants and that the duties and responsibilities of the language reference assistants require special language skills. There is no evidence on the record of other categories of GS-level staff members in UN Secretariat language services, including in DGACM (like the ones mentioned by the Respondent: statistical assistants or accounting assistants), who are required to have specific language skills. Also, no administrative issuance defines the posts in the United Nations Secretariat requiring specific language skills in the GS-level category in accordance with the provisions of ST/AI/1998/4. As results from sec. 1 of ST/AI/2001/1, the administrative issuance was adopted in accordance with ST/AI/1998/7 and is applicable only to posts requiring specific language skills at the P-level. No similar administrative issuance was adopted to define the posts in the United Nations Secretariat requiring specific language skills in the GS-level category in accordance with the provisions of ST/AI/1998/4.

62. The Tribunal concludes that, after two years on a fixed-term contract in the language services of DGACM and a satisfactory service during this period, the Applicant had the right to be granted a continuing appointment based on the mandatory provisions from para. 23 of General Assembly resolution 63/250 and para. 50 of General Assembly resolution 65/247 and the right to be promoted at the GS-7 level based on the mandatory provisions of sec. 10 of ST/IC/2009/27.

63. As follows from the uncontested facts, in June 2014, after completing two years of probationary service successfully, the Applicant was promoted to the GS-7 level, but not granted a continuing appointment.

64. In para. 35 of *Ovcharenko* 2015-UNAT-530, the Appeals Tribunal stated that "[d]ecisions of the General Assembly are binding on the Secretary-General" and that the administrative decision under challenge must be considered lawful when is taken by the Secretary-General in accordance with the content of the higher norms.

65. General Assembly resolution 63/250, sec. II, para. 4(e), and para. 16, requests the Secretary-General "to fully ensure that the granting … of continuing contracts is undertaken in a fair and transparent manner, with full regard to due process and t Tf c.1387 T61iil70 J7.62 ti

67. In the light of the above considerations, pursuant to art 10.5(a) of the Dispute Tribunal's Statute, the Tribunal will grant the Applicant's request for the contested decision to be rescinded and her to be granted a continuing appointment retroactively from 7 June 2014. In accordance with the mandatory language of para. 23 of Section II of General Assembly resolution 63/250 and art. 1.3 of ST/SGB/2011/9, the Applicant has the right to be granted a continuing appointment after the probationary period of two years since she met all the mandatory and cumulative requirements. Furthermore, the Administration has the correlative obligation to grant her a continuing appointment.

68. Taking into consideration that the contested decision concerns an issue of appointment, as an alternative, the Respondent may elect to pay the Applicant in amount of USD5,000.

*Applicant's request for moral damages*

69. Under art. 10.5(b) of the Statute of the Dispute Tribunal, the Tribunal may order:

> 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 for harm, supported by evidence, and shall provide the reasons for that decision.

70. The Tribunal notes that, in the application, the Applicant requested, as a remedy, compensation "for the breach of her due process rights and delay in this matter following the case of [*Baig et al.*] 2013-UNAT-357" and, in the closing submissions, the Applicant indicated that she "requests moral damages for the breach of her due process rights following [*Baig et al.*] 2013-UNAT-357". In response to Order No. 204 (NY/2015), the parties informed the Tribunal that they did not require the production of additional written and/or oral evidence.

71. In *Baig et al.* 2013-UNAT-357, the Appeals Tribunal found that (emphasis in original and footnote omitted):

> 80. However, given that this Tribunal has addressed the merits of the impugned decision of the ASG/OHRM, and has determined that that decision violated the staff members' right to have been fairly, individually and properly assessed for conversion, we shall consider whether the breach warrants an award of non-pecuniary damages.
>
> 81. In *Asariotis* [2013-UNAT-309, para. 36], the Appeals Tribunal stated:
>
> > To invoke its jurisdiction to award moral damages, [the Dispute Tribunal, ("UNDT")] must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
> >
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental nature*, the breach may of *itself*

> 82. We find that the substantive due process breaches in the ASG/OHRM's decision-making meet the fundamental nature test established in *Asariotis* and, as such, of themselves merit an award of moral damages …

72. In *Hersh* 2014-UNAT-433-Corr.1, the Appeals Tribunal stated (footnote omitted):

> 40. The Secretary-General submits that the UNDT erred in awarding compensation purely for procedural and substantive irregularities, without making any determination as to whether Ms. Hersh had suffered any moral harm as a result of the administrative actions at issue in this case. He also submits that Ms. Hersh did not describe any moral harm suffered in her UNDT application, nor did she specifically ask for moral damages or provide any evidence of moral harm.
>
> 41. Ms. Hersh submits that the Dispute Tribunal did not err in law in awarding compensation for non-pecuniary damages and moral damages, given the presence of aggravating factors. She stresses that she expressly claimed moral injury.
>
> 42. As a matter of fact, Ms. Hersh in her application before the UNDT referred to "significant moral damage as a result of the deliberate manipulation of the Organization's processes". In any event, the breach of Ms. Hersh's rights was so fundamental that she was entitled to both pecuniary and moral damages.

73. Consequently, even if the Applicant did not provide details regarding the nature of the harm, notably the effects of the contested decision on her, the Tribunal will analyse her request for moral damages.

74. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

75. In *Black's Law Dictionary*, 6th Ed. (1990), "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (p. 718).

76. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is ,

pleadings and evidence to show she has suffered any harm from the contested decision, there is no basis for awarding her any moral damages. Consequently, the request for moral damages is rejected.

**Conclusion**

83. In the light of the foregoing the Tribunal DECIDES:

a. The application is granted in part;

b. The contested administrative decision not to grant the Applicant a continuing appointment is rescinded, and the Respondent is to grant the Applicant a continuing appointment retroactively from 7 June 2014;

c. Taking into consideration that the contested decision concerns an appointment, as an alternative, the Respondent may elect to pay the Applicant compensation in the amount of USD5,000;

d. The Applicant's request for moral damages is rejected.

(*Signed*)

Judge Alessandra Greceanu

Dated this 8th day of March 2016

Entered in the Register on this 8th day of March 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York