3. The Respondent submits that the decision that the Applicant was not eligible for consideration for conversion to permanent appointment was lawful because she did not meet the requirements in ST/SGB/2009/10 in that she did not complete, as of 30 June 2009, five years of continuous service with the United Nations on fixed-term appointments under the former 100-series Staff Rules. Moreover, the Respondent submits that the lawfulness of the break in service in 2006 is not open to challenge because the Applicant failed to lodge a complaint within the requisite time limits.

4. At the hearing on the merits held on 22 January 2013, the Tribunal heard evidence from the Applicant as well as from Mr. Suren Shahinyan, Chief, Learning, Development and Human Resources Services Division, Office of Human Resources Management ("OHRM").

Relevant facts

5. According to ST/SGB/2009/10, a staff member is eligible for consideration to conversion for permanent appointment if, among other things, he or she has completed five years of continuous service under a 100-series appointment by 30 June 2009. Accordingly, the qualifying period of service is to be computed by working backwards from 30 June 2009 to establish whether the Applicant met the five-year continuous service requirement.

6. The record shows that the Applicant was serving in MONUC on a fixed-term appointment with effect from on 28 January 2003.

7. On or around 1 March 2006, the Applicant received an offer of appointment

9. By letter of 28 June 2006, OHRM informed the Applicant that pre-recruitment formalities for her post in DSS had been completed and requested that she notify OHRM of the date on which she will report for duty.

10. In July 2006, the Applicant engaged in email communications with Mr. Richard Floyer-Acland, Chief of the Policy Unit in DSS, who would be her new supervisor in DSS, and it was agreed that she would report in New York in September 2006. The Applicant mentioned in her email of 7 July 2006 to Mr. Floyer-Acland that it had been suggested to her by MONUC that she take a few days in Bangkok, and he responded that "it is a good idea to get back to Bangkok for a break between MONUC and DSS".

11. On 19 July 2006, OHRM followed-up with the Applicant and requested that she indicate her date of travel so that visa and travel arrangements could be made for the Applicant and her husband. The next day the Applicant responded by email that following consultations with DSS she planned to travel to New York by the end of August–early September. She stated that it was likely that she and her spouse would be traveling to New York from Eritrea, where he resided at the time.

12. On 2 August 2006, the Applicant emailed the then Chief Civilian Personnel Officer ("CCPO") in MONUC that she planned to leave MONUC by 1 September 2006 and requested his "kind consideration for appropriate actions in facilitating [her] repatriation by 31 August 2006". On 10 August 2006, a Human Resources Assistant, MONUC, requested the Applicant to clarify whether her "departure from MONUC is separation or reassignment to UNHQ. It would be much appreciated if you forward the Offer you have received, and based on what I read from that offer I can do the required and necessary action".

13. By email of 10 August 2006, the Applicant wrote to MONUC to "confirm, after consultations with [her] new duty station in UN Secretariat, that [her] departure from MONUC is the separation". She attached a memorandum signed by her and

dated 2 August 2006, stating that, following her acceptance of an offer of employment with the Secretariat in New York, she "wish[ed] to end the assignment with MONUC by 1 September [2006]" and seeking "kind consideration for appropriate actions in facilitating [her] repatriation by 31 August 2006".

14. At the hearing the Applicant testified, in effect, that she had been told that, if she wanted to take up her appointment in New York, she had to take a break in service.

15. On 10 August 2006, the CCPO in MONUC wrote to the Applicant that in view of her memorandum of 2 August 2006 notifying them of her desire to separate from MONUC on 31 August 2006, he was providing her with the applicable administrative forms and details concerning her entitlements.

16. ed

> be higher than to Asmara (Eritrea), MONUC agreed to arrange for my travel to Asmara, where my spouse is living.

19. The United Nations paid for the split shipment of her personal effects from Kinshasa to Bangkok and New York as well as her travel from Eritrea to New York. The Applicant was paid all other entitlements due upon her separation from MONUC, including repatriation grant.

20. On 31 August 2006, the Applicant departed MONUC for Eritrea.

21. On 9 September 2006, the Applicant travelled to New York from Eritrea and assumed her functions with DSS.

22. Approximately four years later, on 14 July 2010, the Applicant made a request, apparently for a correction of her records. Her request is not on record. By memorandum dated 22 February 2011 and entitled "Amendment of Records", the Applicant was informed by Mr. Jeppe Christensen, CCPO, United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO", which took over from MONUC), that:

> We have consulted with FPD [Field Personnel Division] and they have advised that it was a practice for any staff member serving in a field mission and who is selected for a position at [the Headquarters], to have to resign from their post with a 3-day break in service before appointment to a position in [the Headquarters]. In your case you accepted to do so in order to take up your appointment at [the Headquarters]. If you did not see that as appropriate, then it would have been advisable to have objected and appealed the decision at that point in time.
>
> On this basis, FPD has advised that it is too late to challenge the decision, and in consequence your record cannot be amended as requested in your email[.]

23. On 4 August 2011, the Applicant was informed by the Executive Officer, DSS, that she was ineligible to be considered for a conversion of her fixed-term appointment to permanent appointment because she did not meet the requirement of

(b) The terms of the new appointment shall be fully applicable without regard to any period of former service, except when a staff member receives a new appointment in the United Nations common system of salaries and allowances less than twelve months after separation. In such cases, the amount of any payment on account of termination indemnity, repatriation grant or commutation of accrued annual leave shall be adjusted so that the number of months, weeks or days of salary

> demonstrated their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter, provided that:
>
> …
>
> (iii) They have completed five years of continuous service under fixed-term appointments and have been favourably considered under the terms of rule 104.12(b)(iii).

28. Staff rule 13.4(b) (ST/SGB/2011/1) provides, in relevant part:

> **Rule 13.4**
>
> **100-series fixed-term appointment**
>
> …
>
> (b) Notwithstanding that a 100-series fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment, a staff member who has completed five years of continuous service on a 100-series fixed-term appointment on or before 30 June 2009 who has fully met the highest standards of efficiency, competence and integrity and who is under the age of 53 years on the date on which he or she reaches five years of qualifying service will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization.

29. Section 1(a) of ST/SGB/2009/10 provides that to be eligible for conversion to a permanent appointment a staff member must, by 30 June 2009, have completed, or complete, five years of "continuous service" on fixed-term appointments under the 100-series Staff Rules.

30. Section 4 of the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as at 30 June 2009 ("Guidelines"), as approved by OHRM on 29 January 2010, provides that:

> United Nations field mission staff members who held a 100-series fixed-term appointment limited to service with a specific mission or a 300-series appointment of limited duration in a United Nations field

Administrative decisions must be based on proper reasons and take into account proper facts and considerations. The issue of the break in service forms one of the reasons, if not the principal reason, for the contested decision. Although the break in service is recorded in the A

b. If continuity of employment was interrupted, what was the reason for it? Do the circumstances constitute a voluntary act on the part of the Applicant or was she forced, induced or otherwise misled into separating from the Organization?

c. If the Applicant did not separate of her own volition what consequences flow from it?

Was the Applicant on an appointment under the 100-series Staff Rules during the qualifying period of service?

38. In his reply, the Respondent submitted the following:

The Applicant's prior service, from 25 May 1995 to 31 August 2006,

9 September 2006 to 30 June 2009 the Applicant was on an appointment under the 100-series Staff Rules.

42. A close perusal of copies of personnel action forms attached to the Respondent's submission demonstrates that the Applicant was under a 100-series fixed-term appointment during the period 28 January 2003 to 31 August 2006.

43. Accordingly, the record shows that during the qualifying period, from 1 July 2005 to 30 June 2009, the Applicant's appointments in MONUC and DSS were under the former 100-series Staff Rules.

Was the Applicant's appointment limited to a specific field mission?

44. The Respondent contends that the Applicant's service in MONUC was limited to that particular mission, and, therefore, in accordance with sec. 4 of the Guidelines, she was not eligible to be considered for conversion to permanent appointment. As mentioned above, sec. 4 of the Guidelines provides that only field service officers who held 100-series fixed-term appointments not limited to service with a specific mission as at 30 June 2009 are eligible for consideration.

45. There would appear to have been a misunderstanding about the scope of the Guidelines, even if the Tribunal were to accept that they could be relied on for the purposes of this case (see, e.g., *Korotina* UNDT/2012/178, *Egglesfield* UNDT/2013/006, *Guedes* UNDT/2013/031). Section 4 of the Guidelines concerns staff serving on fixed-term appointments limited to service with a specific mission as at 30 June 2009. In the Applicant's case, although her service was limited to MONUC from 25 May 2003 to 31 August 2006, she no longer had such limitation of service as of 30 June 2009, the date on which a determination of eligibility had to be made.

Did the Applicant's break in service render her ineligible for consideration for conversion to permanent appointment?

46. According to the Respondent, the plain meaning of staff rule 13.4, sec. 1 of ST/SGB/2009/10, and sec. 5(a) of the Guidelines, taken together, is that "continuous service" means service without interruption, and that any interruption

50. It is not surprising that there is evidence on record that there had been discussions and communications between the Applicant and MONUC regarding the arrangements for her taking up duty in DSS New York. Specifically,

a. by email of 10 August 2006, MONUC requested the Applicant to forward a copy of her letter of appointment for them to determine whether she should be transferred or separated;

b. in response, in her email of the same day, the Applicant indicated that "following consultations with New York", she was being separated and not transferred from Kinshasa to New York.

51. There are no contemporaneous records before the Tribunal of the consultations that the Applicant had with "New York" and that resulted in her communication of 10 August 2006. However, in the absence of contemporaneous documentary evidence the Tribunal has to consider the evidence as a whole, including documents emanating at a later date and testimony given at the hearing. In particular, the Tribunal has to consider whether the evidence in this case tends to support the Applicant's version of events.

52. The Tribunal notes the Applicant's evidence at the hearing and the following:

a. Memorandum dated 22 February 2011 from Mr. Jeppe Christensen, CCPO, MONUSCO, to the Applicant, referring to her request dated 14 July 2010 regarding amendment to her personnel records and stating that "it was a practice for any staff member serving in a field mission and who is selected for a position at [the Headquarters], *to have to resign* from their post with a 3-day break in service before appointment to a position in [the Headquarters]" (emphasis added);

b. Mr. Richard Floyer-Acland's memorandum dated 20 January 2013, which was tendered by the Respondent and accepted into evidence, with

leave, subject to the Tribunal determining the weight to be given to it since it was unsworn and had not been tested. The memorandum confirms that Mr. Floyer-Acland, who was the Applicant's new supervisor in DSS, was supportive of her request "to take a few days leave to see her husband between two lengthy periods apart due to UN service" so that she would arrive refreshed and ready to start work, adding the following paragraph which the Tribunal considers significant:

> I discussed her date of arrival with administrators and human resources staff in DSS New York in terms [of] my unit's work programme and her own welfare. I do not remember anyone in administration or human resources advising me that time off in Asmara would constitute a break in service, and I am sure that had they done so I would have advised her to come straight to New York without taking time off. I assumed that these five days would be counted as normal annual leave.

53. Taking the evidence as a whole, the Tribunal finds that the break in service occurred at the insistence of the Organization, as evidenced by the Applicant's account, which is consistent with the memorandum of 22 February 2011 confirming the practice that existed at the time with

2006 that were not issued as properly promulgated administrative issuances, it would have had no legal effect (see, e.g., *Villamoran*, *Rockcliffe*, *Korotina*, *Egglesfield*, *Guedes*).)

55. The Tribunal further finds that the Applicant's several days' leave in Eritrea could have and would have been treated as annual leave had she been transferred to New York instead of being separated.

56. The Tribunal also notes there is no evidence that any consideration was given to reinstating the Applicant in accordance with the provisions of former staff rule 104.3 or that she was even informed of that option at the time.

57. The Tribunal finds that, in the Applicant's case, the break in service that took place in 2006 shall not be taken into account for the purposes of consideration for conversion to a permanent appointment.

Remedies

58. In a number of judgments, the United Nations Appeals Tribunal ("UNAT") has ruled that an applicant must substantiate the pecuniary and/or non-pecuniary damages that she or he claims to have suffered in consequence of the Administration's violation(s) of her or his rights (see, for instance, *James* 2010-UNAT-009, *Sina* 2010-UNAT-094, *Antaki* 2010-UNAT-095 and *Abboud* 2010-UNAT-100). The quantification of the award therefore depends on the specific harm that the Tribunal assesses and determines that the individual applicant has suffered (*Solanki* 2010-UNAT-044). Article 10.7 of the Statute precludes an award of punitive damages.

59. The Applicant accepts that she did not suffer any pecuniary damage. However, at the hearing the parties were given leave to make submissions on non-pecuniary (moral) damages.

the break in service in 2006 (such as repatriation), they are apar

68. The Tribunal awards the Applicant USD