



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-468

Skourikhine
(Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Richard Lussick
Judge Sophia Adinyira

Case No.: 2013-541

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Mr. Skourikhine: Self-represented

Counsel for Secretary-General: Rupa Mitra/John Stompor

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/113, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 4 September 2013. The Secretary-General appealed 4 November 2013, and Mr. Alexandre Skourikhine filed his answer and cross-appeal on 6 January 2014.¹ On 7 March 2014, the Secretary-General filed his answer to the cross-appeal.

Facts and Procedure

2. The following facts are uncontested:²

Job Opening No. 16337

... On 30 September 2010, a P-5 post of Senior Reviser (Russian) in the Russian Translation Section (“RTS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”), was advertised as Job Opening No. 16337.

... The Applicant did not apply for the post, but the Executive Office of DCM forwarded his name to the hiring manager, the Chief, RTS, DCM, as a roster candidate.

... On 5 May 2011, the Secretariat of the Central Review Bodies, UNOG, approved the list of recommended candidates sent to it by the Chief, RTS, DCM. The Chief, RTS, DCM, explained that he had reviewed the roster candidates but that none of them had been found suitable for the post.

... On 23 June 2011, the Director-General, UNOG, selected Mr. Mouraviev for the post advertised under Job Opening No. 16337.

Job Opening No. 17880

... On 10 February 2011, another post of Senior Reviser (Russian), at the P-5 level, was advertised under Job Opening No. 17880. The Applicant, who was on the roster of candidates for similar posts, applied for the post.

... On 24 February 2011, the hiring manager, the Chief, RTS, DCM, requested the Human Resources Management Service, UNOG, to cancel the Job Opening. By email of the same day, the Director, DCM, approved the cancellation of the Job Opening, which was done the same day.

¹ That same day, Mr. Skourikhine also filed a “Motion for leave to file additional evidence” and the Secretary-General filed his observations on 20 January 2014. On 24 February 2014, the Appeals Tribunal issued Order No. 174 (2014) rejecting the motion.

² Impugned Judgment, paras. 4-30.

... On 3 December 2012, the Applicant asked the Chief, Human Resources Management Section (“HRMS”), UNOG, whether the post advertised under Job Opening No. 17880 had been filled and, if so, who had been selected.

... By email of 5 December 2012, an Associate Human Resources Officer informed the Applicant that the Job Opening published in February 2011 had been cancelled.

Job Opening No. 20354

... On 21 July 2011, the post of Senior Reviser (Russian) previously advertised under Job Opening No. 17880 was re-advertised under Job Opening No. 20354. The Applicant did not apply for this post and, at the time the Job Opening was published, he was no longer on the roster of candidates for similar posts. On 9 August 2011, the Director-General, UNOG, selected a roster candidate, Mr. Blokhine, for the post. Mr. Blokhine had submitted his application on the day that the Job Opening was published and the Job Opening was removed from public advertising on 22 July 2011.

Job Opening No. 23895

... On 23 May 2012, another post of Senior Reviser (Russian), at the P-5 level, was advertised under Job Opening No. 23895, with an application deadline of 2 July 2012.

... On 1 June 2012, the Senior Revisers’ Council, a consultative body of RTS, met and unanimously recommended that the roster candidate Mr. Bebenine should be selected for this post. Mr. Bebenine had been placed on the roster in July 2011, following Job Opening No. 16337 (see above). The Applicant was not on the said roster and, consequently, his file was not released to the hiring manager as a roster candidate.

... On 4 June 2012, the hiring manager proposed the selection of Mr. Bebenine.

... On 5 June 2012, the Applicant applied for the post through Inspira.

... On 7 June 2012, the Executive Office, DCM, sent documents relating to the selection of Mr. Bebenine, and a screenshot from Inspira showing all candidates who had applied for the post, to the Office of the Under-Secretary-General, Department for General Assembly and Conference Management (“DGACM”). On 8 June 2012, the Deputy Executive Officer, DGACM, confirmed by e-mail that the Under-Secretary-General, DGACM, had approved the selection of Mr. Bebenine.

... On 29 June 2012, the Director-General, UNOG, selected Mr. Bebenine for the post.

... On 23 August 2012, the Applicant was informed by means of an automatically generated e-mail sent by Inspira that he had not been selected for the post advertised under Job Opening No. 23895.

Requests for management evaluation

... On 17 October 2012, the Applicant submitted to the Secretary-General a request for management evaluation of the decision not to select him for the post advertised under Job Opening No. 23895.

... On 28 December 2012, the Applicant submitted a further request for management evaluation regarding his non-selection for the P-5 post of Senior Reviser, initially advertised under Job Opening No. 17880. In this request, he noted that, following the cancellation of Job Opening No. 17880, that P-5 post was filled using a different selection procedure, which led to the selection of Mr. Blokhine. The Applicant therefore requested a review of the decision to fill vacancy No. 17880 using a procedure in lieu of the original call for candidates. Furthermore, in his request for management evaluation dated 28 December 2012, the Applicant raised irregularities concerning Job Opening No. 16337, however without requesting a review of the selection decision for that Job Opening.

... In a letter dated 29 November 2012, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the decision not to select him for the post advertised under Job Opening No. 23895.

... In a letter dated 14 February 2013, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the decision to cancel Job Opening No. 17880. He stressed that the management evaluation had taken account of the facts set out by the Applicant in his request for management evaluation dated 28 December 2012.

... The Applicant submitted his application on 25 February 2013.

... The Respondent submitted his reply on 28 March 2013.

... By Order No. 54 (GVA/2013), the Tribunal requested the Respondent to submit additional information with respect to the selection process for Job Opening No. 23895. The Respondent provided this information on 22 May 2013, noting that some documents were confidential.

... By Order No. 75 (GVA/2013) of 6 June 2013, the Tribunal ordered that the candidate selected for the post advertised as Job Opening No. 23895, Mr. Bebenine, be joined as a party to the application, pursuant to art. 11 of the Tribunal's rules of procedure, in order to allow him to submit his comments. The Tribunal also ordered that the Applicant be granted access to the confidential annexes filed by the Respondent, some of them redacted by the Tribunal, in order to give him the possibility to provide comments thereon.

... Mr. Bebenine, the candidate selected for the post corresponding to Job Opening No. 23895, submitted his comments on 18 June 2013.

... A hearing took place on 16 July 2013, in the presence of the parties. At the hearing, the Applicant submitted to the Tribunal his observations on the Respondent's reply, and on Mr. Bebenine's comments.

... After the hearing, the Tribunal considered that it was necessary to join the candidate selected for Job Opening No. 20354, Mr. Blokhine, as a party to the application, and invited him to submit comments, which he did on 5 August 2013.

3. On 4 September 2013, the UNDT issued Judgment No. UNDT/2013/113. The UNDT found that Mr. Skourikhine's claim regarding Job Opening No. 16337 was not receivable because it had not been subject to management evaluation. With respect to Job Opening No. 17880, the UNDT found that the Administration provided no valid reason justifying the cancellation of the vacancy and therefore found it illegal. The UNDT also found illegal the Administration's selection of Mr. Blokhine for Job Opening No. 20354 and its selection of Mr. Bebenine for Job Opening No. 23895; the UNDT opined that the Administration did not have the discretion to make a selection decision from rostered candidates, without considering non-rostered candidates for each post. The UNDT ordered the rescission of the decision to select Mr. Blokhine for Job Opening No. 20354 and Mr. Bebenine for Job Opening No. 23895 or, in the alternative, payment of compensation for material damages in the amount of USD 12,000. The UNDT also awarded Mr. Skourikhine USD 4,000 for moral damages on the ground that over a period of almost two years, he was denied serious consideration for promotions due to irregularities committed by co-workers and that these irregularities had seriously affected his living conditions.

Submissions

The Secretary-General's Appeal

4. The Secretary-General submits that the UNDT erred in law and exceeded its competence in finding that the decisions to select rostered candidates for Job Openings No. 20354 and No. 23895 were unlawful.

5. The UNDT erred in finding that appointment of staff of the "highest standards" requires a review of non-rostered candidates. Recommended candidates are placed on a roster only after a central review body confirms their qualifications and competencies, as well as the integrity of the selection process in which they were considered. Candidates who are placed on a roster have been deemed to meet the highest standards required to be appointed to the post they had applied for. Furthermore, a reading of General Assembly resolution 61/244

and the Secretary-General's report "Investing in people" (A/61/255) reveals that the use of the roster clearly serves an important interest of the Organization that has been emphasized by the General Assembly.

6. The Secretary-General submits that the UNDT erred in finding that the established staff selection framework requires a review of non-rostered candidates. Contrary to the UNDT finding, neither Section 9.4 nor Section 9.5 of ST/AI/2010/3 require that the hiring manager/head of office first review all new candidates before properly exercising his or her discretion to select a rostered candidate for a particular post. Furthermore, while in Section 9.4 of former ST/AI/2006/3 it was expressly provided that a rostered candidate could be selected for a post only "after the programme manager has reviewed the applications of new candidates ... together with the pre-approved roster candidates", this requirement was explicitly excluded in its revised 2010 version (ST/AI/2010/3).

7. The Secretary-General further contends that the UNDT exceeded its competence by substituting its own judgment for that of the Secretary-General in deciding how candidates for a post should be considered. The UNDT does not have the authority to introduce different procedures for the evaluation of candidates in a selection or promotion exercise, as the authority to promulgate the rules regarding the administration of staff members lies solely with the Secretary-General as the Chief Administrator of the Organization.

8. The Secretary-General submits that the UNDT erred in law in finding that the decisions to select Mr. Bebenine and Mr. Blokhine were unlawful and violated Mr. Skourikhine's due process rights. The Hiring Manager was not required under ST/AI/2010/3 to consider Mr. Skourikhine's candidacy before lawfully taking the decisions to select Mr. Bebenine and Mr. Blokhine.

9. The Secretary-General contends that the UNDT erred in law and fact in finding that the cancellation of Job Opening No. 17880 was illegal on the sole ground that the requirement of "at least 5 years of experience of revisions of Geneva-specific texts" was absent in Job Opening No. 23895. The UNDT failed to justify why the absence of that requirement alone was sufficient to defeat the presumption of regularity of the Administration's acts.

10. The UNDT erred in law and exceeded its competence in awarding compensation for material and moral damages for selection decisions that were not irregular. If the Appeals Tribunal were to find that Mr. Skourikhine's rights were violated, the Secretary-General submits that his chances of selection were so low that he did not suffer any compensable harm. In the alternative, the Secretary-General contends that the compensation awarded for material and moral damages should be reduced as the UNDT miscalculated the number of opportunities Mr. Skourikhine would have had to be promoted as three instead of two.

11. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Mr. Skourikhine's Answer

12. Mr. Skourikhine submits that the Secretary-General failed to prove that the UNDT erred in law in finding that appointment of staff of the "highest standards" is incompatible with the use of rosters as applied by the Administration in his case. He challenges the Secretary-General's contention that only the best qualified candidates are placed on the roster. He contends that he was included in the roster before the decisions contested by him were taken and is included in the roster now, but was not on the roster in the intervening period; he was therefore not part of the "better pool of candidates", for reasons that were unrelated to his professional competence.

13. Mr. Skourikhine also contends that there was no "pool of candidates" considered for the posts. There was only one candidate registered for Job Opening No. 20354, and Job Opening No. 23895 was designed to accommodate one specific candidate. The Administration provided no reason for using such restrictive criteria other than the "significant gains in time". However, this purpose of speedier selection was not served in this particular case.

14. Mr. Skourikhine submits that the UNDT correctly held that the established staff selection framework requires a review of all candidates, whether rostered or not, before properly determining the most suitable candidate for a specific post. He contends that in the present case, the Hiring Manager failed to properly exercise his discretion.

15. Mr. Skourikhine next submits that, contrary to the Secretary-General's contention, the UNDT did not exceed its competence by substituting its own judgment for that of the Secretary-General in deciding how candidates for a post should be considered. Arguing that the roster procedure in the present case, where there was only one candidate for a post, contradicts its established purpose, and pointing out inadequacies of the roster procedure in this particular instance, cannot be qualified as introducing different procedures in the evaluation of candidates in selection exercise.

16. Mr. Skourikhine argues that the Secretary-General has failed to demonstrate that the decisions to select Mr. Blokhine and Mr. Bebenine, tainted by serious allegations of impropriety, were properly taken in accordance with the applicable legal framework; and that the UNDT erred in finding that the selection decisions constituted violations of Mr. Skourikhine's due process rights. The Secretary-General, citing to ST/AI/2010/3, has not pointed to any provision that would establish a specific excuse for not applying the right to full and fair consideration as a generally established due process right.

17. Mr. Skourikhine argues that the UNDT correctly found that the cancellation of Job Opening No. 17880 was illegal. The reason given by the Administration to cancel the job opening, to make it more user-friendly for the interviewing panel and the candidates, was erroneous given the circumstances of the case and the presumption of regularity referred to by the Secretary-General was disturbed.

18. Turning to the Secretary-General's claim that the UNDT erred in its award of compensation, Mr. Skourikhine submits that the UNDT correctly held that he had "a very serious chance of being selected". Had the correct procedure been used, he would have been "the leading candidate for promotion, given his impeccable service record dating from 1982, top performance grades, longest seniority on the job and other professional and academic competencies ... possibly exceeding achievements of other Section staff, from among which the P-5 vacancies were filled in the last five years". The Secretary-General failed to comment on the apparent contradiction between the statement of the Hiring Manager that Mr. Skourikhine was not suitable for the position and his excellent performance ratings.

19. Mr. Skourikhine contends that the UNDT did not err in awarding moral damages. As he had stated before the UNDT, "he was being subjected to treatment that *prima facie* amounted to harassment that violated his right to safe and productive working environment

and consequently caused him moral injury”. Finally, he contends that the UNDT did not err in calculating the number of promotion opportunities missed and that there is no ground for reducing the compensation awarded.

20. Mr. Skourikhine requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

Mr. Skourikhine’s Cross-Appeal

21. Mr. Skourikhine submits that the UNDT erred in procedure by failing to consider a number of facts he presented to the UNDT.

22. Mr. Skourikhine contends that the UNDT erred in procedure by failing to consider some of the legal arguments he presented to the UNDT and by not fully reasoning its Judgment, in particular on matters relating to the roster selection procedure. He also contends that the UNDT failed to address “the documents in the case file, his reasoned arguments of material misrepresentations in the matter, his claims of abuse of power, favoritism and discrimination on the ground of professional excellence, including blacklisting”.

23. Mr. Skourikhine requests that the Appeals Tribunal modify the UNDT Judgment and award additional relief.

The Secretary-General’s Answer to Mr. Skourikhine’s Cross-Appeal

24. Mr. Skourikhine’s assertions regarding Job Opening No. 16337 are moot. He failed to request management evaluation and the UNDT accordingly found his claim not receivable.

25. Despite Mr. Skourikhine’s assertions that the two successful candidates were not qualified, they were both on the roster and, therefore, had already been found suitable for such posts and their suitability had been endorsed by the Central Review Board.

26. Mr. Skourikhine makes reference to a meeting of the RTS in 2011 where the Hiring Manager allegedly declared that “the users of the Multitrans computer-assisted translation tool were on a black list and would never be promoted to the P-5 level”. The Secretary-General submits that the Administration objected before the UNDT to this description.

27. The Secretary-General contests Mr. Skourikhine's assertion that the screening questions for Job Opening No. 23895 had been changed in order to accommodate a specific candidate. The successful candidate had been placed on the roster of pre-approved candidates and after having been found suitable for Job Opening No. 16337 which included the screening question that was modified for Job Opening No. 23895.

28. The Secretary-General submits that Mr. Skourikhine has failed to establish that the UNDT erred by not awarding adequate compensation.

Considerations

29. Mr. Skourikhine applied for promotions to the posts of Senior Reviser (Russian) at the P-5 level for Job Opening No. 17880 (subsequently re-advertised as Job Opening No. 20354) and Job Opening No. 23895. His name was also put forward, as a roster candidate, for Job Opening No. 16337.

30. The UNDT decided that the application that contested the selection for the post advertised as Job Opening No. 16337 was not receivable because there had not been a request for management evaluation. The UNDT also decided that the cancellation of Job Opening No. 17880 and its re-advertisement as Job Opening No. 20354 was illegal. Similarly, it found that the selection of rostered candidates without consideration of non-rostered candidates for Job Openings No. 20354 and 23895 was illegal.

31. This case is similar to the *Charles* case.³ In *Charles*, the UNDT held that the automatic appointment of a rostered candidate without a selection process that affords other candidates full and fair consideration is contrary to the requirements of Article 101.3 of the United Nations Charter (Charter) and Staff Regulation 4.2 and allows rostered candidates to be treated as a privileged class above other candidates. ST/AI/2010/3, which is consistent with the Charter and Staff Regulation 4.2, does not provide for priority consideration of rostered candidates; the only difference is that, if selected, rostered candidates do not have to be referred to the central review bodies for approval.⁴

³ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416.

⁴ *Charles v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/040.

32. We held otherwise. ST/AI/2010/3 establishes the staff selection system. Section 9.4 of that instruction, the interpretation of which is the central issue in the instant case, provides in part:

Section 9

Selection decision

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.

9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

33. As we held in *Charles*, this is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Sub-sections 9.4 and 9.5 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered candidates. If the head of department's discretion is subject to such a requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

34. It was thus not open to the UNDT to come to the conclusion that Section 9.4 requires the head of department/office to first review all non-rostered candidates before selecting a rostered candidate.

35. We find that the UNDT erred in law in deciding that the appointment of the rostered candidates was contrary to ST/AI/2010/3. The decision to do so was entirely within the Administration's discretion, and no abuse of that discretion has been demonstrated.

36. The Appeals Tribunal finds that Mr. Skourikhine's contention that the UNDT failed to consider his arguments regarding the lack of experience of rostered candidates, the decision not to select him for improper motives and the existence of a black list is without merit. In fact, these issues were considered by the UNDT.

37. Accordingly, we find that there was no violation of Mr. Skourikhine's due process rights. It follows that the award of damages including moral damages in his favour cannot be allowed to stand.

Judgment

38. The Secretary-General's appeal is allowed and the UNDT Judgment is vacated. Mr. Skourikhine's cross-appeal is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 17th October 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Lussick

(Signed)

Judge Adinyira

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar