



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

Judgment No. 2019-UNAT-920

**Krioutchkov
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Richard Lussick
Case No.:	2018-1210
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Krioutchkov: Mohamed Abdou, OSLA

Counsel for Secretary-General: Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/093, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 21 September 2018, in the case of *Krioutchkov v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 16 November 2018, and Mr. Vladislav Krioutchkov filed his answer on 15 January 2019.

Facts and Procedure

2. Mr. Krioutchkov is a Russian Translator holding a permanent appointment at the P-3 level with the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok, Thailand.

3. On 21 May 2015, Mr. Krioutchkov applied for Job Opening No. 15-LAN-UNON-39481-F-NAIROBI (L) (JO 39481) for the P-3 Russian Translator position with the United Nations Office at Nairobi (UNON). The JO required a candidate to i) have a first-level degree from a university or institution of equivalent status; ii) have passed the relevant United Nations Competitive Examination for Russian Translators; iii) have a minimum of two years of experience in translation; and iv) have a “perfect command of Spanish, which must be the candidate’s primary language, ... as well as an excellent knowledge of English and at least one other official language of the United Nations”.¹

4. Also on 21 May 2015, Mr. Krioutchkov received an e-mail from the Office of Human Resources Management (OHRM) acknowledging receipt of his application for JO 39481, in both English and French. The e-mail reads, in part:

Dear Mr. Krioutchkov,

We are pleased to confirm receipt of your application for the position of TRANSLATOR, RUSSIAN, P3 (Job Opening 39481).

Your application will be given due consideration along with all other applications. You will be kept informed of the status of your application throughout the process. You may follow the status of your application in your inspira account under “Careers Home”/ “My Applications”. Should you move forward in the process, you may be contacted for further assessment. You will also be notified once the recruitment process is completed.

¹ The Secretary-General clarifies in the appeal that the requirement of a “perfect command of Spanish” in the JO was a “typographical error”. It should read a “perfect command of Russian”.

5. Approximately a year later, on 6 May 2016, Mr. Krioutchkov wrote to the Acting Chief, Translation and Editorial Section, Division of Conference Services, UNON, inquiring about the status of his application for JO 39481. After several reminder e-mails, the Acting Chief forwarded Mr. Krioutchkov's request to the Human Resources Management Service (HRMS), UNON. On 1 July 2016, the HRMS informed Mr. Krioutchkov by e-mail that his candidature was unsuccessful. The e-mail message is reproduced, in part, below:

Dear Vladislav,

This is to acknowledge and respond to your inquiry regarding your application to the subject JO 394481 [sic] of Russian Translator.

Please note that the Job Opening was only open to candidates available for placement from the *existing* Russian Language Exam Roster. All RfR (Recruit from Roster) JOs, including the subject JO, are only available to roster applicants who are already placed on pre-approved ro[s]ters, in this particular case Russian Language exam roster.

It is [noteworthy] that even applicants that are not on such rosters can apply without hindrance. However, during the screening process, the Inspira system automatically screens out applicants who don't meet the latter requirement of being on the roster, which was the case with you.

I hope the foregoing explanation clarifies the matter.

6. Mr. Krioutchkov requested management evaluation on 5 August 2016 and then filed an application with the Dispute Tribunal on 13 December 2016. In the impugned Judgment, the Dispute Tribunal concluded that the decision to exclude Mr. Krioutchkov's candidature from consideration for JO 39481 was vitiated by i) the unpublished eligibility requirement of "recruitment from roster" (RfR) or "entry-level recruitment" that was not specified in the JO, and ii) the erroneous requirement in the JO that a candidate have a "perfect command of Spanish". The UNDT found that Mr. Krioutchkov's eligibility had not been assessed in a transparent manner as his candidacy had been excluded by the unpublished requirement unknown to him and other candidates. The UNDT dismissed the Secretary-General's submission that the requirement of a "perfect command of Spanish" in the JO was a mere typographic error. In the view of the Dispute Tribunal, this error changed the real requirements for the JO and went beyond it being a mistake to vitiate the entire recruitment process. The Administration's failure to apply the necessary care and attention in formulating the eligibility and language requirements for the JO resulted in Mr. Krioutchkov's exclusion from the recruitment process. The UNDT ordered rescission of the contested decision and in-lieu compensation in the amount

of two months' net base salary for the loss of opportunity to be selected for the position and its ensuing negative impact on his reaching the mobility requirement and his career development. However, the Dispute Tribunal refused to award moral damages as it found that Mr. Krioutchkov had not provided any evidence in respect of his alleged mental anguish and moral suffering.

Submissions

The Secretary-General's Appeal

7. The Administration properly conducted the selection exercise for JO 39481 in accordance with the applicable legal framework, i.e., Administrative Instruction ST/AI/2000/1 titled "Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills", and not ST/AI/2010/3 titled "Staff selection system". Under ST/AI/2000/1, positions requiring special language skills at the P-2 and P-3 levels are filled by candidates that have been selected from the roster. Once these roster candidates have been selected, they are taken out of such a roster. In other words, in the present case, the Administration could only examine the applications from the candidates who were on the roster of successful candidates for the Russian language examination. It did not look at the candidates, such as those in Mr. Krioutchkov's situation, who were already at the P-3 level and therefore no longer on the roster. Mr. Krioutchkov could only apply to posts requiring special language skills at the P-4 level.

8. The Dispute Tribunal erred in concluding that the selection process for JO 39481 was unlawful and lacked transparency. It also erred in importing the RfR notice language from a different JO governed by another administrative issuance and interpreting it as a requirement for JO 39481. The UNDT failed to apply the correct legal framework in assessing the selection process for JO 39481. ST/AI/2000/1, or for that matter ST/AI/2010/3, does not require a job opening to include an RfR notice. Mr. Krioutchkov was, or ought to have been, aware of the specificities of the recruitments for posts requiring special language skills at the P-3 level, and the vacancy announcements for these types of language positions do not contain a special RfR notice.

9. The Dispute Tribunal erred in finding that the erroneous requirement for a "perfect command of Spanish" in the JO vitiated the entire recruitment process. As the JO clearly identified the position as a "Russian Translator", "under the supervision of the Chief of Russian Language" and required a candidate to "have passed the relevant United Nations

Competitive Examination for Russian Translators”, there was no doubt that the reference to Spanish in the JO was a typographic error. Even the UNDT acknowledged that corrective measures had been taken by the Administration to correct the erroneous reference to Spanish in the JO by conducting a manual review of the personal history profile of each candidate.

10. The Dispute Tribunal erred on a question of law in its determination of the monetary compensation in lieu of rescission. In finding that Mr. Krioutchkov had a good chance of being selected for the position, the UNDT effectively created and applied an alternative selection process by which candidates who were not on the roster could be considered for a position at the P-3 level requiring special language skills. That approach was inconsistent with the selection process set forth in ST/AI/2000/1 and the Appeals Tribunal’s jurisprudence in *Mebtouche*.² Since Mr. Krioutchkov had no chance of being selected for the P-3 position, the position was not a promotion but a lateral move with no increase in earnings, and Mr. Krioutchkov’s non-selection had no impact on his career development, he suffered no loss by not being considered for JO 39481. The amount of two months’ net base salary as in-lieu compensation was therefore excessive.

11. The Secretary-General requests that the Appeals Tribunal vacate the impugned Judgment in its entirety.

Mr. Krioutchkov’s Answer

12. The Secretary-General has failed to minimally show that Mr. Krioutchkov’s candidature was given full and fair consideration. It is difficult to reconcile the Administration’s practice of removing successful candidates from the roster of eligible candidates following their assignment to a post with any sound legal principle or rule. There is no indication in ST/AI/2000/1 that successful candidates are removed from the roster once assigned to a post. Nor is there any condition restricting the possibility for reassigning current staff members to similar posts. To the contrary, Section 2.2 of ST/AI/2000/1 provides for the possibility of reassignment to language posts at other duty stations. The Administration’s practice constitutes a unilateral amendment to the applicable regime. It modifies important aspects of eligibility criteria and precludes internal candidates from being assigned to other positions. By introducing novel conditions of general application and expanding the regime of exceptions applicable to translators, the Administration failed to follow the proper procedure for enacting legal rules or to act transparently and fairly and

² *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033.

made eligibility criteria dependent on arbitrary standards. Moreover, the application of this policy led to clearly unsatisfactory and absurd results, in violation of Article 101(3) of the United Nations Charter and Staff Regulation 4.4. The restrictions placed on the mobility for the Russian translators are clear evidence of a discriminatory and unfair treatment.

13. The Dispute Tribunal correctly concluded that the selection process for JO 39841 was unlawful and lacked transparency. The applicants for JO 39841 were left in the dark as to the minimum requirements for the post. The new eligibility conditions were not promulgated through administrative issuances or included or referred to in the JO. As there was no reference in the JO to the condition that candidates remain on the roster in order to be eligible or that a successful candidate would be removed from the roster after he or she was assigned to a post, Mr. Krioutchkov had no reason to doubt his eligibility to apply for the position. Under the novel policy, roster membership became part of the eligibility requirements for language positions as opposed to a factor to be considered by the hiring manager.

14. The Secretary-General has failed to identify a discernable error in the Dispute Tribunal's reasoning that the erroneous requirement of a "perfect command of Spanish" vitiated the entire recruitment process. It is reasonable to presume that suitable candidates may have been diverted from applying for the position as a result of this error. Errors affecting the pool of candidates for a particular post necessarily call into question the integrity of the process as a whole.

15. The amount of compensation awarded by the Dispute Tribunal was appropriate given Mr. Krioutchkov's good chance of selection considering that he had had more than 25 years of satisfactory service and that the JO was at the same level as the post he held, bore the same functional title and involved identical tasks. It was also reasonable in view of the far-reaching implications of the policy to recruit candidates from the roster without advertising vacant positions and to remove him from the roster precluding him from competing for numerous positions.

16. Mr. Krioutchkov requests that the Appeals Tribunal dismiss the appeal and affirm the impugned Judgment.

Considerations

17. The Secretary-General argues, on appeal, that the selection exercise for JO 39481 was conducted in accordance with the provisions of ST/AI/2000/1 and there is no evidence to suggest otherwise.

18. Pursuant to the provisions of ST/AI/2000/1, positions, including the position advertised in JO 39481, are only open to rostered candidates who are part of the pool of pre-approved rostered candidates. We note the content of the e-mail from HRMS, which was sent to Mr. Krioutchkov and reads in part as follows:

Please note that the Job Opening was only open to candidates available for placement from the *existing* Russian Language Exam Roster. All RfR (Recruit from Roster) JOs, including the subject JO, are only available to roster applicants who are already placed on pre-approved ro[s]ters, in this particular case Russian Language exam roster.

It is [noteworthy] that even applicants that are not on such rosters can apply without hindrance. However, during the screening process, the Inspira system automatically screens out applicants who don't meet the latter requirement of being on the roster, which was the case with you.

Mr. Krioutchkov submits that “there is no indication [in ST/AI/2000/1] that successful candidates be removed from the roster once assigned to a post. Nor is there any condition restricting the possibility for reassigning current staff members to similar posts.”

19. The Secretary-General argued before the UNDT that the absence of notice that JO 39481 was an RfR had no bearing on Mr. Krioutchkov's chances of selection because he was not a “new language professional under ST/AI/2000/1 [and his] membership on the Russian language examination roster [had] lapsed upon his successful recruitment”. On appeal, the Secretary-General also argues that ST/AI/2000/1 governs the recruitment for language posts and it provides that for P-2 and P-3 positions only candidates from the respective rosters will be considered. Since Mr. Krioutchkov had been removed from the roster when placed in a position, he was no longer eligible to apply for any other P-3 posts. It was open to him, however, to apply for a P-4 position. Mr. Krioutchkov submits in his answer to the appeal that the Administration had no legal authority to remove him from the roster as ST/AI/2000/1 does not expressly require it.

20. We agree with the Secretary-General's submissions that the Dispute Tribunal erred in finding that the erroneous requirement for a "perfect command of Spanish" in the JO vitiated the entire recruitment process, and we so rule. There was no doubt that the reference to Spanish in the JO was a typographic error and corrective measures had been taken by the Administration to correct the erroneous reference to Spanish in the JO by conducting a manual review of the personal history profile of each candidate.

21. We turn to the legal framework governing the selection process for JO 39481, i.e., ST/AI/2000/1 titled "Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills", which *inter alia* provides:

Section 1

Scope

The present instruction defines the special terms and conditions for recruitment of external candidates and placement of internal candidates who are successful in a competitive examination administered by the United Nations for posts requiring specific language skills in the Professional category ("competitive language examination"), that is, interpreters, translators/précis-writers, editors, verbatim reporters and proofreaders/copy preparers, in accordance with the provisions of administrative instruction ST/AI/1998/7.

Section 2

Conditions applicable to all candidates successful in a competitive language examination

2.1 Candidates successful in a competitive language examination shall be placed on a roster. They shall be selected from the roster as vacancies occur, taking into account the needs of service and the combination of languages and skills offered by individual candidates.

22. An amendment to ST/AI/2000/1, which came into effect in 2003, namely, ST/AI/2003/1, does not address the issue of whether it is fair and transparent to limit professional language posts and similar posts to candidates on a roster only. In fact, it makes no mention of the issue. Therefore, the Administration, by virtue of those legal provisions, could not select Mr. Krioutchkov to fill the position because he was not on a roster, and to do otherwise would have been in breach of the provisions of ST/AI/2000/1. Moreover, the UNDT could not step outside of its legal remit to consider an alternative and/or different selection process even if that alternative might have appeared to be more transparent. In this case, the Administration

adhered to the provisions of ST/AI/2000/1 in the selection process. The UNDT therefore erred in its finding that the selection process for JO 39481 was unlawful and lacked transparency.

23. The Secretary-General essentially argues that, in accordance with the provisions of ST/AI/2000/1, JO 39481 was only open to candidates available for placement from the existing Russian language exam roster. As a result, Mr. Krioutchkov's application could not be considered because he was already at the P-3 level and could no longer be placed on the roster.

24. However, a very important limb of Mr. Krioutchkov's submission is the allegation that the Administration has a "practice" of removing successful candidates from the roster of eligible candidates following their assignment to a post without any sound legal principle or rule. He submits that there is no indication in ST/AI/2000/1 that successful candidates can or ought to be removed from the roster once assigned to a post, and that there is no condition in law which restricts the possibility for reassigning current staff members to similar posts. He argues that to the contrary, Section 2.2 of ST/AI/2000/1 provides for the possibility of reassignment to language posts at other duty stations.

25. This issue is critical in determining whether the process which was adopted by the Administration is unlawful or lacks transparency, and also, whether Mr. Krioutchkov's claim is valid. There is no evidence to suggest that the issue was given full consideration at the hearing before the UNDT, or that the factual and/or legal basis for this approach by the Administration was properly examined by the UNDT.

26. The UNDT considered the Secretary-General's argument that ST/AI/2000/1, which governs the recruitment for special language posts, did not require a vacancy announcement in the first place, and found that since the Administration had elected to issue a JO, it was bound by the tenets of transparency and fairness. We wish to emphasize that it is important in instances where there is a vacancy notice which targets a specific pool of candidates from a roster that the vacancy notice make specific mention to the effect that consideration will only be given to rostered candidates to fill the position.

27. The Secretary-General further argues that Mr. Krioutchkov had no chance of being selected for the P-3 position and that since the position was not a promotion but a lateral move with no increase in earnings, his non-selection had no impact on his career development. The Secretary-General submits that the UNDT appeared to be applying a requirement of

ST/AI/2010/3 that a staff member in the Professional category have lateral moves prior to promotion to the P-5 level. Section 6.3(d) of ST/AI/2010/3, however, expressly waives the requirement for lateral moves for “staff serving against language positions that are subject to the provisions of the administrative instruction setting out special conditions for recruitment or placement of candidates successful in a competitive examination for positions requiring special language skills when applying for another such language position”. Thus, Mr. Krioutchkov being on a language post governed by ST/AI/2000/1 did not have a lateral move requirement. The Secretary-General is correct in his assertion. However, we note that this is true only in so far as he applies to other “such language position[s]”. It is unclear whether the Administration would require Mr. Krioutchkov (or any staff member in a similar position) to have lateral moves prior to applying to a non-language P-5 position.

28. The need for the factual determination of all of the evidence related to the roster, placement, and removal of candidates requires that the instant case be remanded to the UNDT for a rehearing pursuant to the provisions of Article 2(3) of the Statute of the Appeals Tribunal.

Judgment

29. Judgment No. UNDT/2018/093 is vacated and the case is remanded to the Dispute Tribunal for a full consideration of its merits by another Judge.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Lussick

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar