



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/007

Judgment No.: UNDT/2013/113

Date: 4 September 2013

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

SKOURIKHINE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Bettina Gerber, UNOG
Arne Treves, UNOG

Introduction

1. By application registered 26 February 2013 under case No. UNDT/GVA/2013/007, the Applicant contests the decisions not to promote him to the post of Senior Reviser (Russian), at the P-5 level, in respect of Job Openings Nos. 16337, 17880, 20354 and 23895.

2. The Applicant requests rescission of the decisions to select Messrs. Mouraviev, Blokhine and Bebenine for Job Openings Nos. 16337, 20354 and 23895, respectively.

3. He also requests compensation, on the one hand, for the material injury arising from the loss of salary increment that he would have received if he had been promoted to the P-5 level, from the date on which the post advertised as Job Opening No. 16337 was filled until his separation from service, and, on the other hand, for the moral injury suffered.

Facts

Job Opening No. 16337

4. 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.

5. 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.

6. 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.

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

Job Opening No. 17880

8. 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.

9. 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.

10. 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.

11. 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

12. 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

13. 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.

14. 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.

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

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

17. 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.

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

19. 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

20. 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.

21. 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.

22. 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.

23. 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.

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

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

26. 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.

27. 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.

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

29. 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.

30. 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.

Parties' submissions

31. The Applicant's contentions are:

a. With regard to Job Opening No. 16337, he learned only recently that he had not been shortlisted for the vacancy and, consequently, his request for management evaluation was not time-barred; he had obtained the top rating in his Performance Appraisal System (e-PAS) report and in a previous interview for a post for which he had been placed on the roster, he had been rated higher than most candidates on the shortlist for vacancy No. 16337; the procedure followed for Job Opening No. 16337 is illegal;

b. The reasons given for cancelling Job Opening No. 17880 are not valid because when the post was re-advertised as Job Opening No. 20354, there was no interviewing team, nor were several candidates considered; there was just one candidate and once his application had been received, the Job Opening was immediately removed from public advertising; the selection for the post initially advertised under Job Opening No. 17880 is therefore illegal; the candidate selected after the post was re-advertised did not meet the essential requirements set out in the Job Opening and is a friend of the hiring manager, which demonstrates abuse of authority;

c. The vacancy was re-advertised under Job Opening No. 20354 exactly one day after expiry of the one-year period during which the Applicant had been retained in the roster, and the post was filled the next day from the same roster; the decision is illegal and discriminatory;

d. With regard to Job Opening No. 23895, the fact that the selected candidate has passed the language proficiency examination in French is not enough to prove that he has the standard of excellence in French required from a Senior Reviser;

e. It is clear from the candidate selection procedure for this post that the Administration never intended to compare the Applicant's candidacy with those of other candidates: the successful candidate was chosen from the roster, which no longer contained the Applicant's name, and the selection process was completed quickly through the immediate selection of a roster candidate;

f. It is beyond doubt that the authors of secs. 4.5 and 4.6 of the Secretary-General's bulletin ST/SGB/2011/7, secs. 1 (w), 8.1 and 9.4 of

administrative instruction ST/AI/2010/3, and section 15.7, paragraph 3, of the Manual for the Hiring Manager wished to establish an efficient and expedited procedure that would also ensure the selection of the best candidate without any abuse of power; selection of the best candidate is obligatory pursuant to art. 101.3 of the Charter of the United Nations and staff regulation 4.2;

g. The contention that he did not meet the requirements of Job Opening No. 23895 is factually wrong, given that it had been confirmed on several occasions that he had the competencies required for the post; at his interview in 2010 for a Senior Reviser post, advertised under Job Opening No. 424318, for which he was placed on the roster, he was rated higher than the candidate selected for Job Opening No. 23895; in other words, there was no candidate who was obviously better than any other and a process of competency-based interview and evaluation by the central review bodies was therefore essential;

h. The opinion given by the Senior Revisers' Council, which had no formal terms of reference and did not prepare any minutes of its deliberations, could not replace the proper procedure as established by the relevant regulations;

i. The decision not to select him for the four posts was taken for improper motives. In particular it was linked to the fact that, at a revisers' meeting, the Section Chief had 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; he was one of those users;

j. He requests rescission of the promotion decisions taken with respect to Job Openings Nos. 16337, 20354 and 23895; he also requests compensation for loss of salary from the date of promotion of the candidate selected for vacancy No. 16337. In addition, he requests compensation for moral injury resulting from the discrimination he has suffered and the damage to his career.

32. The Respondent's contentions are:

Job Opening No. 16337

a. Some of the Applicant's requests are irreceivable: as far as Job Opening No. 16337 is concerned, the recruitment process was completed by 1 July 2011, when the selected candidate took up his functions. Since the Applicant had not applied for the Job Opening, he did not receive written notification of his non-selection, although as a roster candidate his file was automatically submitted. The roster candidates were informed only if selected, and asked whether they would like to take up the post; hence, there was no obligation to send a written notification to the Applicant;

b. Nevertheless, bearing in mind that the Applicant worked in the Section, he was well aware of the promotion of the candidate selected for Job Opening No. 16337; in November 2011, a party was organized in the Section to celebrate the promotion of the selected candidate, at which the Applicant was present. It follows that by submitting the request for management evaluation only on 28 December 2012, it was time-barred;

c. On the merits, the decision to select Mr. Mouraviev following Job Opening No. 16337 was lawful. The Applicant's file was in fact submitted to the hiring manager, as a roster candidate. Besides, the hiring manager indicated in his memorandum dated 8 March 2011 that he had reviewed all roster candidates but found none of them suitable. The hiring manager's recommendation was confirmed by the Central Review Board;

Job Openings Nos. 17880 and 20354

d. At the time when Job Opening No. 17880 was cancelled, "A Hiring Manager's Functional Guide to Creating a Job Opening Using Inspira", released in March 2010, did not provide for written notification to be sent out individually to candidates in the event that a job opening was cancelled. That obligation was established only in the 2011 Hiring Manager's Manual (hereinafter "the Manual"), which entered into force in April 2011, a month after the Job Opening was cancelled;

e. Nevertheless, each candidate could see in Inspira that the Job Opening had been cancelled, and all candidates, including the Applicant, were duly informed thereof in February 2011; hence, the application is time-barred because the Applicant submitted his request for management evaluation on 28 December 2012, that is more than one and a half years after having received that information;

f. At the hearing, the Respondent maintained that the application is also time-barred with regard to Job Opening No. 20354, and that the Applicant had no legal interest in bringing proceedings as he had not applied for that post;

g. The cancellation of Job Opening No. 17880 was lawful and constitutes a legitimate exercise of the Administration's discretionary powers in this respect (see judgment *Asariotis* UNDT/2012/066): in the present case, at the time of cancellation, the selection procedure was at an initial stage, since the cancellation took place just two weeks after publication of the Job Opening, which was not sufficiently streamlined with the job requirements; since Inspira was introduced in April 2010, managers needed to be trained; the hiring manager did not receive his training until after Job Opening No. 17880 had been advertised; after this training, it became apparent to him that the requirements of the post needed to be adjusted in order to ensure that the Job Opening complied with the provisions of sec. 4.5 of administrative instruction ST/AI/2010/3, which constituted a legal motif for cancelling the Job Opening;

h. The re-advertisement of the post under Job Opening No. 20354 constitutes a new recruitment process. The selection of a roster candidate was in conformity with sec. 9.5 of administrative instruction ST/AI/2010/3; with chapter 9, para. 3, of the Manual; and with sec. 15.7, para. 3, of the Manual, which confirms that a roster candidate may be selected without an interview and before the closing date for the job opening. The Tribunal confirmed that this practice was lawful, even if the roster candidate was selected before the expiration of the deadline for the job opening, and that the Administration was obliged to follow its own rules, including guidelines (*Nwuke* UNDT/2012/002; *Nunez* UNDT/2013/017¹);

i. The Tribunal has always held that, if it was in its interests, the Organization had the authority to establish selection and eligibility criteria, even if those criteria were intended to limit the number of candidates (*Al-Mulla* UNDT/2013/046; *Willis* UNDT/2012/44). The roster system relates to eligibility rather than a consideration of the candidates' status;

j. Section 9.4 of administrative instruction ST/AI/2010/3 is intended precisely to expedite the selection process. A comparison between sec. 9.4 of administrative instruction ST/AI/2010/3 and the previous administrative instruction (sec. 9.4 of administrative instruction ST/AI/2006/3) helps to clarify the intention of the legislator and the way in which this rule should be interpreted;

k. The selected candidate, Mr. Blokhine, had been lawfully placed on the roster, following his application, his recommendation for vacancy No. 16337, and confirmation of that recommendation by the Central Review Board; in conformity with sec. 15.5 of the Manual, Job Openings Nos. 20354 and 16337 do not deviate by more than 30 per cent; the successful candidate fulfilled all requirements of the Job Opening;

l. The fact that the Job Opening was published two days after the Applicant's placement on the roster had expired was pure coincidence; however, even if the Applicant had still been on the roster, the hiring manager enjoyed discretion to select among the roster candidates;

m. The Applicant offers no evidence that the decision was taken for illegal motives; the fact that the hiring manager and the selected candidate are friends does not automatically imply favouritism and the Applicant failed to demonstrate how this friendship had implications for the selection procedure;

Job Opening No. 23895

n. With respect to Job Opening No. 23895, the selection of a roster candidate was in accordance with the applicable rules, for the same reasons as for Job Opening No. 20354; Mr. Bebenine had been lawfully

¹ Translator's note: This should read "*Nunez* Order No. 17 (GVA/2013)".

placed on the roster; the Applicant was not on the roster at that time and therefore could not be recommended immediately. In accordance with the Tribunal's case law, *Nwuke* UNDT/2012/002, the fact that Mr. Bebenine had already been recommended to the Director-General, UNOG, when the Applicant filed his application was not illegal;

o. The hiring manager has discretion to choose the screening questions in Inspira, and there was no abuse of power; in particular, the questions were not selected to accommodate certain candidates; they also included a question related to the utilization of technical and computer-based tools;

p. The selected candidate fulfilled all requirements of the post, including fluency in French; he has passed the United Nations language proficiency examination in French and Spanish, which is the highest language examination recognized by the United Nations;

q. It might be that the Applicant was also a suitable candidate for the post; however, the hiring manager has discretion to choose a candidate from the roster; given that the Applicant was not on the roster, the hiring manager chose a suitable candidate from the said roster;

r. The allegation that a black list of *Multitrans* users had been established must be rejected, since the Applicant provides no evidence thereof; his candidatures were given full and fair consideration.

Consideration

33. First, the Tribunal considers that, since the written comments submitted by the Applicant at the hearing do not contribute anything new to the written materials already placed on record and to the Applicant's statements at the hearing, there is no need for the Tribunal to provide them to the Respondent or to the staff members joined as parties to the proceedings.

34. After the hearing, the Tribunal decided that, since the Applicant had confirmed orally that he sought the rescission of the decision to select Mr. Blokhine, the latter should be granted access to all parts of the application concerning him and to a copy of the audio recordings of the hearing so that he could submit his written comments before the Tribunal gave its judgment.

Receivability

35. The Tribunal must also determine which administrative decisions have been lawfully contested before it. In order to do so, it must first determine which decisions were submitted for management evaluation.

36. Rule 11.2 of the United Nations Staff Rules provides:

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

37. It follows that a staff member who submits a request for a management evaluation must specify which administrative decisions, whether explicit or implicit, he or she is contesting.

38. In this case, the Applicant submitted two requests for management evaluation, dated 17 October and 28 December 2012 respectively.

39. In his letter of 17 October 2012, the Applicant requested a management evaluation of the decision of 23 August 2012 not to select him for Job Opening No. 23895 and to select Mr. Bebenine for the post. The Tribunal finds that this part of the application submitted to the Tribunal on 25 February 2013 was presented within the prescribed time limit and that its receivability is not contested by the Respondent.

40. In his letter of 28 December 2012, the Applicant requested a management evaluation of the decision not to select him for Job Opening No. 17880, as well as the decision to appoint another staff member, Mr. Blokhine, to the post. Although, in this request, the Applicant also mentioned an irregularity in the selection procedure for Job Opening No. 16337, this cannot be interpreted as a request to review the selection decision for the post advertised under Job Opening No. 16337. The Tribunal recalls that a request for management evaluation of a decision is the first mandatory step which can, eventually, lead to the rescission of an administrative decision and, therefore, the Tribunal must assess very strictly which decision was contested.

41. It follows that the Tribunal considers that the request for management evaluation of 28 December 2012 applies only to the decision not to select the Applicant for Job Openings Nos. 17880 and 20354 and the decision to select Mr. Blokhine. The request for management evaluation did not cover the decision to select Mr. Mouraviev for the post of Senior Reviser advertised as Job Opening No. 16337. Therefore, the part of the application that contests the selection for the post advertised as Job Opening No. 16337 is not receivable and must be rejected.

42. The Tribunal must now determine whether the decisions recognized as having been subject to a request for management evaluation were contested within the prescribed time limits.

43. Job Opening No. 17880 was published on 10 February 2011 and cancelled on 24 February 2011; the Applicant applied for the post on 15 February 2011. The Respondent claims that the guidelines in force at the time the Job Opening was cancelled did not provide that the Administration had an obligation to send out individual notification of the cancellation of a selection procedure or of a non-selection, and that, as of 24 February 2011, the candidate could have seen, by logging into Inspira, that the status of the Job Opening was listed as "cancelled". He also maintains that the Applicant, who worked in the Section, could not have been unaware of the fact that the vacancy had been cancelled and re-advertised, particularly given that he had attended a party in November 2011 to celebrate the promotion of Mr. Blokhine to the post of Senior Reviser at the P-5 level.

44. If, as claimed by the Respondent, there were no guidelines in force at the time of these events requiring the Administration to notify candidates that the vacancy to which they had applied had been cancelled, the absence of such guidelines does not establish any obligation for candidates to find out such information for themselves. In this case, the Applicant received an e-mail from the Office of Human Resources Management ("OHRM") on 15 February 2011, which acknowledged receipt of his application for Job Opening No. 17880 and stated that he would be kept informed of the status of his application throughout the recruitment process. It follows that the Applicant had a legitimate expectation that the Administration would keep him informed of the outcome of his application, including the possible cancellation of the vacancy, without himself having actively to seek this information. When the Administration fails to provide notification of an individual decision, it creates legal uncertainty for itself and for the staff member; it cannot then object if some of its decisions are contested long after they were taken.

45. Neither can the Respondent's argument that the Applicant would necessarily have learned of the cancellation of Job Opening No. 17880 and the selection of Mr. Blokhine be upheld, given that the case record establishes that several job openings for similar posts were published within a period of a few months and there was not much transparency in the Section's working relationships.

46. Thus, the time period for submitting a request for management evaluation began only on 5 December 2012, when, upon inquiry, the Applicant received notification of the cancellation of the Job Opening, and the Tribunal considers that the Applicant submitted his request for management evaluation of the decision to cancel Job Opening No. 17880 within the prescribed time limit.

47. The same also applies to Job Opening No. 20354, to which the Applicant could not apply, since it was removed from public advertising the day after it was published. As a consequence, the Applicant did not receive notification of his non-selection, and the Tribunal considers that he was not aware of the selection of

Mr. Blokhine for the post in question until 5 December 2012. Thus, his request for a management evaluation in respect of Job Opening No. 20354 was also submitted within the prescribed time limit.

48. With regard to receivability, the Tribunal must also rule on the Applicant's legal interest in bringing proceedings. Regarding the post advertised under Job Opening No. 23895, the Applicant applied and another candidate was selected. There can therefore be no doubt that he has a legal interest in bringing proceedings to contest the decision not to select him and to select another candidate for that post.

49. Regarding the post advertised as Job Opening No. 17880, the Applicant applied for the post, and the Job Opening was then cancelled, thus ending the selection procedure. The Applicant thus has a definite legal interest in bringing proceedings.

50. Regarding the post advertised under Job Opening No. 20354, the Applicant did not apply and was no longer on the roster for similar posts. However, Job Opening No. 20354 was published on 21 July 2011, and the hiring manager recommended the selection of Mr. Blokhine, a roster candidate, the same day. At the hearing, the Respondent acknowledged that it was practically impossible for the Applicant to apply for this post, as the Job Opening was removed from public advertising the day after its publication.

51. The Tribunal therefore considers that the fact that the Applicant did not apply to Job Opening No. 20354 does not take away his legal interest in bringing proceedings to contest the decision to select Mr. Blokhine. Furthermore, the Tribunal notes that Job Opening No. 20354 contained no indication that it was a re-advertisement of Job Opening No. 17880.

On the merits

Job Opening No. 17880

52. The Applicant supports his claim that the cancellation of this Job Opening was illegal by maintaining that it was cancelled on 24 February 2011 solely in order to deny him any chance of being selected for the post and to allow a friend of the hiring manager to be selected by means of a new job opening. The argument offered in defence is that, following the launch of the Inspira system in April 2010, the hiring manager realized that the Job Opening was not in conformity with sec. 4.5 of administrative instruction ST/AI/2010/3 and that the requirements of the post needed to be adjusted, which constituted a legal motif to cancel the Job Opening.

53. However, the Tribunal notes that the reason given by the Administration to justify the cancellation of Job Opening No. 17880 does not appear to be supported by the documents on record. In fact, when the post was re-advertised as Job Opening No. 20354, an additional requirement was added, namely, five years of experience working on issues specific to the United Nations Office at Geneva. Yet this requirement was not included in Job Opening No. 23895, which was

published subsequently, demonstrating that the reason given by the Administration is erroneous.

54. Although the Administration has broad discretion to decide to cancel a job opening, it must provide the Tribunal with a reason grounded in fact for such a decision. It follows that the Tribunal finds no valid reason that justifies the cancellation of the vacancy and that the cancellation must therefore be considered illegal.

Job Opening No. 20354

55. Pursuant to secs. 9.4 and 9.5 of administrative instruction ST/AI/2010/3/Amend.1, the Administration may select a candidate from the roster of candidates for similar posts, if a review of all candidates leads to the conclusion that he or she is the best candidate; in such cases, the Administration is not required to refer the candidate to a central review body.

56. In this case, following the cancellation of Job Opening No. 17880, a Job Opening was republished on 21 July 2011 under No. 20354; that same day, the successful candidate, having been selected from the roster, was recommended for the post. The Applicant, and no doubt other candidates, did not even have the opportunity to learn about Job Opening No. 20354, let alone to apply for the post.

57. This Tribunal has already ruled that the Administration's interpretation of secs. 9.4 and 9.5 of administrative instruction ST/AI/2010/3/Amend.1 (Staff selection system), according to which the Administration may select a candidate from the roster of candidates pre-approved for similar functions without considering the applications of other candidates, is illegal (*Charles* UNDT/2013/040).

58. Indeed, the Administration's interpretation, the practical application of which is set out in more detail in the Manual for the Hiring Manager on the Staff Selection System, clearly constitutes a violation of the principles of art. 101, para. 3, of the Charter of the United Nations and staff regulation 4.2.

59. Article 101, para. 3, of the Charter of the United Nations states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

60. Staff regulation 4.2 states:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

61. It results from these provisions that the Administration is required to select the best out of all the candidates for a post and cannot simply select a roster candidate who would meet the requirements set out in the job opening, but whose qualifications and skills have not been compared to those of other eligible candidates. To determine the most suitable candidate for a post, all candidates must be assessed and compared in the context of the criteria and requirements set out in the job opening. In addition, this Tribunal and the United Nations Appeals Tribunal have established, on the basis of the above-mentioned provisions, that every candidate for a post in the United Nations has the right to have his or her application given full and fair consideration. It is clear that this right is not respected when the Administration selects a person from the roster without considering other eligible individuals who have applied for the same job opening. Furthermore, rapidly selecting a staff member from the roster without considering other candidates and removing the job opening from public advertising before the end of the posting period defeats the purpose of publishing a job opening for a given period. These actions not only prevent candidates from applying, but also limit the selection of candidates, which constitutes a clear breach of the principles of art. 101, paragraph 3, of the Charter and staff regulation 4.2. The intention of the legislator, which was cited by the Administration to justify its interpretation of administrative instruction ST/AI/2010/3/Amend.1, was certainly not to eliminate all effective competition and, in any event, cannot be used to justify the violation of these instruments of higher authority.

62. Therefore, the right of the Applicant, who had been a candidate in respect of Job Opening No. 17880, to apply for Job Opening No. 20354 was fundamentally violated, as he was deprived of any opportunity to compete for this post. The decision to select Mr. Blokhine for the post advertised under Job Opening No. 20354 is therefore illegal and must be rescinded, as requested by the Applicant.

Job Opening No. 23895

63. In this case, the selected candidate, Mr. Bebenine, was recommended for the post on 1 June 2012, while the Applicant applied on 5 June 2012, as he was permitted to do by the Job Opening, which had an application deadline of 2 July 2012. The Respondent does not contest the claim that the Applicant's application for this post was simply not considered. For the same reasons as outlined above with regard to Job Opening No. 20354, the selection of Mr. Bebenine for the vacancy must also be rescinded.

64. Given the above rescission orders, the Tribunal need not to rule on whether or not the irregularities cited above were motivated by the intention to deny the Applicant any promotion.

Consequences of the above rescission orders

65. The Tribunal has decided to rescind the decisions to appoint Messrs. Blokhine and Bebenine to the posts in question and promote them to the P-5 level. As these decisions concern a promotion, they are subject to the

provisions of article 10, paragraph 5, of the Statute of the Tribunal, which provide that when the Tribunal orders the rescission of decisions relating to a promotion, the judge must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision.

66. The Tribunal should be guided by two considerations when setting the amount of such compensation. The first is the nature of the irregularity that led to the rescission of the contested decision; the second is the chance that the Applicant would have been recommended for promotion if the correct procedure had been followed (see *Solanki* 2010-UNAT-044; *Mezoui* 2012-UNAT-220; *Appleton* 2013-UNAT-347).

67. In this case, the Applicant's rights to apply to Job Openings Nos. 17880, 20354 and 23895 and to have his application duly considered were violated. The Tribunal considers that in the three cases, that is, on three occasions, the Applicant had a very serious chance of being promoted if the correct procedure had been followed. Indeed, the Respondent confirmed that, during the past five years, no external candidate has ever been selected to a post of Senior Reviser, at the P-5 level, within the Russian Translation Section at UNOG.

68. With regard to Job Opening No. 23895, only four internal candidates, including the Applicant and the selected candidate, applied to the post. With regard to Job Opening No. 20354, only the internal candidate who was selected, Mr. Blokhine, submitted an application on the day the Job Opening was published; it was removed from public advertising the next day. Lastly, the Applicant was placed on the roster for similar posts in July 2010 when he applied for another P-5 Senior Reviser post within the Russian Translation Section at UNOG and he appears to the Tribunal to have been fully qualified for the disputed posts.

69. In view of the foregoing, and in the event that the Administration decides not to carry out the Tribunal's rescission orders, the Applicant should be awarded compensation equivalent to the material injury suffered as a result of the irregularities committed.

70. The Court considers that this injury consists of the difference in salary between the P-4 level and the P-5 level, from the date when the selection procedure for Job Opening No. 17880 would have concluded until the date of notification of this Judgment, which amount shall be reduced to reflect the fact that the irregularities committed caused the Applicant to lose only a chance to be selected, even if that chance was very strong. In this case, if the Respondent chooses to maintain the two staff members, Messrs. Blokhine and Bebenine, in their P-5 posts, he must pay the Applicant the sum of US\$ 12,000.

71. If the Administration chooses to carry out the Tribunal's rescission orders, the selection procedures for the posts in question must be reopened and the Applicant will have another opportunity to apply to these posts. In this case, on the one hand, if the Applicant is selected for one of the posts in question, he may submit a claim for retroactive promotion with a start date of 10 May 2011 and will

thus not have suffered any material injury. On the other hand, if he is not promoted, he may not claim any compensation.

72. With regard to moral injury, the Tribunal considers that this remains the same regardless of the option chosen by the Administration. Damages for a moral injury may arise from a breach of due process entitlements guaranteed in an employee's contract of employment; where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages (*Asariotis* 2013-UNAT-309; *Goodwin* 2013-UNAT-346). In this case, over a period of almost two years, the Applicant applied several times for promotion and was denied any chance of being seriously considered owing to the repeated irregularities committed by people with whom he worked. The Tribunal considers that these irregularities have seriously affected his living conditions and therefore awards him compensation in the amount of US\$ 4,000.

Conclusion

73. In view of the foregoing, the Tribunal DECIDES:

- a. The decisions to select Mr. Blokhine for the post advertised under Job Opening No. 20354 and to select Mr. Bebenine for the post advertised under Job Opening No. 23895 are rescinded;
- b. If, instead of carrying out the rescission orders, the Administration chooses to pay compensation, it shall pay the Applicant the equivalent of US\$ 12,000 for material injury and US\$ 4,000 for his moral injury;
- c. If the Administration chooses to carry out the rescission orders issued by the Tribunal, the Administration shall pay the Applicant the equivalent of US\$ 4,000 for his moral injury;
- d. The aforementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;
- e. All other claims of the Applicant are rejected.

(Signed)

Judge Jean-François Cousin

Dated this 4th day of September 2013

Entered in the Register on this 4th day of September 2013

(Signed)

René M. Vargas M., Registry, Geneva