



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

KRIOUTCHKOV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Russian Translator (P-3) at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), contests the “non-advertisement” of the post of Russian Translator (P-3), Russian Translation Section (“RTS”), Languages Service (“LS”), with the Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”).

2. As remedies, he requests to be “afforded the UN obligations of good faith and due process in the full and fair consideration of [his] case”, as well “as any relief customary in such instances at the discretion of the Tribunal”.

## **Facts**

3. After consulting within DCM, UNOG, the Chief, LS, DCM, UNOG, announced, by a “Service Note” of 12 June 2013, the decision—effective 1 July 2013—to laterally transfer a staff member from the Editing Section (“ES”), LS, DCM, to a P-3 post that had become vacant in the RTS.

4. On 22 January 2014, the Applicant wrote to the Chief, RTS, querying about any vacancies at the P-3 and P-4 level filled in 2013 in RTS. By email of 30 January 2014, the Chief, RTS, replied that no P-3 or P-4 positions were advertised in 2013. On the following day, the Applicant clarified that he was not asking about advertised, but *filled* posts in 2013.

5. On 5 February 2014, a Senior Human Resources Officer, Human Resources Management Service (“HRMS”), UNOG, answered to the Applicant that only one P-3 position had been filled by lateral reassignment within the department, i.e., without advertisement.

6. On 31 March 2014, the Applicant requested management evaluation of the decision not to advertise that post, which was upheld, as per a reply letter dated 29 April 2014.

7. The application at hand was filed on 25 July 2014. The Respondent replied on 27 August 2014, disclosing a number of documents, while requesting that they be placed under seal, a motion that the Tribunal granted, by Order No. 138 (GVA/2014) of 29 August 2014.

8. The Applicant filed unsolicited comments on the Respondent's reply on 12 September 2014. The Respondent moved, on 24 September 2014, for these comments to be excluded from the record. The Applicant opposed thereto in his filing of 30 September 2014.

9. Pursuant to Orders Nos. 122 (GVA/2015) of 18 June 2015, 176 (GVA/2015) of 21 September 2015 and 209 (GVA/2015) of 22 October 2015, this case, together with a number of other cases filed by the Applicant, was referred to mediation and the proceedings before the Tribunal were suspended for that purpose. However, mediation efforts were unsuccessful, and the proceedings before the Tribunal resumed on 2 November 2015.

10. By Order No. 41 (GVA/2016) of 7 March 2016, the parties were invited to file comments, if any, with respect to a judgment being rendered without holding a hearing.

11. On 10 March 2016, the Applicant filed substantive comments, without addressing the issue of having the case decided on the papers. The Respondent filed no comments.

### **Parties' submissions**

12. The Applicant's principal contentions are:

- a. The contested decision contradicts art. 101.3 of the UN Charter and staff regulation 4.2, requiring that the paramount regulation in staffing decisions be the necessity of securing the highest standards of efficiency, competence and integrity, while paying due regard to the importance of recruiting staff on as wide a geographical basis as possible. These provisions cannot be respected by not advertising a post and not conducting competitive selections or by covertly selecting candidates without

conducting transparent processes, as it not only prevents candidates from applying, but also limits the selection of candidates. The decision breaches the General Assembly resolutions providing for the announcement of “all existing vacancies”;

b. According to staff rule 12.3(b), the Secretary-General may make exceptions to staff rules provided that they are not inconsistent with any staff regulation or any decision of the General Assembly, that it is agreed by the staff member directly affected, and if, in the Secretary-General’s opinion, they are not prejudicial to the interests of any other staff member or group of staff members. The exception made in this case violated the aforementioned General Assembly resolutions and provisions, was not agreed by the staff member directly affected, and was prejudicial to the interests of other staff members, who were prevented from applying;

c. The Tribunal found in Judgment *Krioutchkov* UNDT/2016/013 that the Administration breached the applicable legal framework because it did not advertise a post;

d. The appointed staff member has repeatedly enjoyed preferential treatment in the past. In this case, she was allowed to leave the ES, where it was urgent to absorb the backlog in editing the International Law Commission Yearbook in Russian before the end of her one-year appointment with ES;

e. Against the mobility requirement proclaimed by General Assembly resolution 53/221, over the last 25 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all five duty stations where Russian translation services/units exist;

f. The Applicant has over 30 years of professional experience as a Russian translator (24 within the UN system) with excellent performance records, and has been rostered for promotion to the P-4 level since 2008. However, he has no real chance of promotion. He has been unsuccessfully applying for various Geneva language posts for some ten years. He is a victim of duty station-based discrimination. Serving at ESCAP, whose Russian Language Unit—unlike the Translation Services/Units in Geneva, Nairobi, New York and Vienna—is not part of the Department for General Assembly and Conference Management, he is harmed by the aforesaid practice of promoting translators strictly within the same services/units at all duty stations. This duty station disadvantage was noted by his then supervisor back in 23 February 1992;

g. The promulgation of Administrative Instruction ST/AI/2010/3 (Staff selection system) further diminished the Applicant's chances of a lateral move to another duty station, as its sec. 2.5 allows Heads of departments/offices to transfer staff members at the same level within their departments or offices, including in a different location, without advertising the vacancy or any review by a central review body ("CRB"). Since then, all P-3 Russian Translator posts were filled without a competitive process;

h. Sec. 2.5 of ST/AI/2010/3, coupled with the system-wide practice of promoting to P-3 and P-4 posts staff within each unit, eliminated any career development and mobility chances for him. In Bangkok, he has little prospect of career advancement, as the only P-4 Russian Reviser post is not foreseen to become vacant until 2022. However, while being a P-3 translator, the Applicant translates and self-revises his work, which by the Organization's own standards corresponds to tasks at the P-4 level;

i. Given his persistent lack of success in applying for posts in Geneva, and the fact that, back in 2006, in the context of a different recruitment process for a post in RTS, UNOG, he opposed the recruitment of the person that the Chief, RTS, wished to hire, the Applicant believes to have been a victim of personal retribution by the Chief, RTS, UNOG;

j. The Applicant has also been subject to gender and age discrimination, as the Chief, RTS, UNOG, systematically hires young female candidates for P-3 translator posts within his section; and

k. He has suffered long-term discrimination, humiliation, frustration, mental anguish and moral suffering.

13. The Respondent's principal contentions are:

a. The Applicant has no standing to contest the lateral transfer at issue, nor the non-advertisement of the post prior to the transfer. The latter does not constitute an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute, as it has no effect on the Applicant's rights and obligations as a staff member. Furthermore, he is not entitled to be considered for a lateral transfer within DCM, UNOG, since he serves in a different department or office;

b. The request for management evaluation was filed on 29 March 2014, whereas the contested decision was made on 1 July 2013;

c. There is no obligation to advertise the post prior to conducting a lateral transfer. The transfer at issue was made in conformity with the staff selection system; it comported with the staff rules and regulations and cannot be deemed to contradict the need to secure the highest standards of efficiency, competence and integrity;

d. The case law relied upon by the Applicant does not apply to the present case, as it concerns a different hypothesis and is based on different rules;

e. The contested transfer did not result in a manifestly unreasonable outcome. The transferred staff member meets all the requirements for the P-3 post; she has passed the Russian Translator Exam and worked previously as a Translator in the Department for General Assembly and Conference Management;

f. If the Applicant alleges ill-motivation or extraneous factors, he is required to prove so. In this case, he has failed to meet the burden of proof regarding his allegations of discrimination and improper motives. Also, any claim of retribution or retaliation should have been channelled to the appropriate authorities, pursuant to ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and ST/SGB/2005/22 (Ethics Office—establishment and terms of reference);

g. The claim that there will not be any translator/reviser P-4 vacancy in ESCAP before 2022 is speculative and cannot form any real basis for his case. If the Applicant intends to hold that his post should be reclassified or he should receive a Special Post Allowance, this is a wholly different matter than the challenge of the lateral move under review. An excellent performance does not confer a right to promotion or transfer to a different duty station; a staff member is only entitled to be fully and fairly considered. The contested decision does not violate mobility policy; and

h. The Applicant's rights were not violated and he did not suffer any damage.

### **Consideration**

#### *Motion to exclude the Applicant's comments on the Respondent's reply*

14. The Tribunal takes note that the Applicant's submission of 12 September 2014 was filed without seeking the Tribunal's leave. Moreover, it does not bring forward any element that could be considered crucial for the determination of the case. Therefore, this submission is excluded from the case file and, insofar, the Respondent's related motion of 24 September 2014 succeeds.

15. In any event, both parties were given an opportunity to provide their views on the need for a hearing, and could therefore have expressed their concerns if they considered that their submissions needed to be complemented. The Applicant filed further comments on the merits on 10 March 2016, which the Tribunal took

into account, whereas the Respondent did not make any. The Tribunal is thus satisfied that the parties have submitted all arguments they felt appropriate to fully make their case.

*Receivabiliy*

16. The Respondent raises different issues regarding receivability.

17. Firstly, it is submitted that neither the relevant lateral transfer nor the non-advertisement of the post constitute administrative decisions open to appeal.

18. The duties of a Judge in reviewing a case include “the adequate interpretation and comprehension of the applications” brought before it (*Massabni* 2012-UNAT-238). Making use of this prerogative, the Tribunal concludes that, in essence, the matter put to it is the filling of a P-3 translator vacancy in RTS, UNOG, by a lateral transfer, under sec. 2.5 of ST/AI/2010/3, instead of through a competitive selection process, which would have then required the advertisement of a vacancy announcement for the concerned post.

19. The choice of one or the other method to fill a given position has objective repercussions on the chances of a given candidate to be considered for, thus to obtain, such post, and the conditions in which he or she may compete for it. Concretely, pursuant to sec. 3.2(1) of ST/AI/2010/3, the entire set of rules that govern a competitive recruitment procedure within the Organization does not apply to lateral movements of staff by heads of department/office/mission in accordance with sec. 2.5 of the same instruction.

20. Not less important, a transfer pursuant to sec. 2.5 of ST/AI/2010/3 implies that only staff already holding the same grade and serving within the same department or office will be eligible to be appointed to the post in question. Hence, as from the moment the Administration determined that the vacant P-3 post would be filled by lateral transfer, this effectively meant that the Applicant was not even eligible for it.



21. It follows that such decision had a direct legal effect on the sphere of the Applicant's rights and, to this extent, it is an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute, as per the definition consistently adopted in the relevant jurisprudence (e.g., *Tabari* 2010-UNAT-030, *Schook* 2010-UNAT-013, *Al-Surkhi et al.* 2013-UNAT-304, endorsing the definition adopted in the former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003)).

22. Secondly, the Respondent argues that, precisely because he was not eligible to be laterally transferred, the Applicant has no standing to formally contest the decision. This argument is misplaced.

23. The Applicant is not contesting the fact that he was not the candidate chosen to be laterally transferred. As noted above, the grief he puts forward is, precisely, that by choosing to fill the litigious post by lateral transfer, he was deprived of a chance to be considered for it. Since this decision does have direct consequences on his rights, he has standing to file an application on this matter.

24. Lastly, the Respondent claims that the management evaluation request that must mandatorily precede this application was submitted far beyond the statutory time limits to this effect. This contention cannot stand.

25. Pursuant to staff rule 11.2(c), management evaluation must be requested within "sixty calendar days from the date on which the staff member received *notification of the administrative decision to be contested*" (emphasis added). However, the Respondent counts this time limit since the date on which the decision was made, and not as from the moment it was conveyed to the Applicant.

26. The Applicant was not informed of the contested decision before the HRMS email of 5 February 2014, and there is no valid reason to assume that he had come to know of it on a prior date. If the relevant deadline is calculated as from 5 February 2014, the Applicant, in making his management evaluation request on 29 March 2014, was well within the prescribed time limit.

27. In sum, this application fulfils all requisite receivability conditions.

*Merits*

28. In the present case, the P-3 translator vacancy at stake was filled by a lateral transfer. This possibility is catered for in sec. 2.5 of ST/AI/2010/3, which reads:

Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

29. The decision to fill the vacancy by lateral transfer is in conformity with the terms of the above provision. As such, it cannot be said to be against the applicable legal framework. In addition, sec 2.5 above explicitly foresees that lateral transfers be effected “without advertisement of the job opening”. Accordingly, the Applicant cannot hold that the lack of publication was a procedural vice.

30. Moreover, sec. 2.5 of ST/AI/2010/3 is not in contradiction with any article of the UN Charter, General Assembly resolutions or Staff Regulations, which are indeed higher rules within the Organization’s regulatory hierarchy.

31. Art. 101.3 of the Charter demands that the “paramount consideration” in the employment and the conditions of service of staff be “the necessity of securing the highest standards of efficiency, competence, and integrity”, and this prescription is echoed in staff regulation 4.2:

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.

32. None of these provisions rules out lateral transfers. As a matter of fact, staff regulation 4.2 explicitly contemplates transfers, thereby countering any interpretation to the effect that lateral transfers are intrinsically contrary to the goal of efficiency, competency and integrity set out by the Charter. Additionally, staff regulation 1.2(c) establishes the Secretary-General’s power to assign staff members to any activities within the Organization.

33. The option of reassigning a staff member of the same grade to an unencumbered position without conducting a selection process has been allowed under the successive issuances governing staffing matters ever since the promulgation of the Charter. On these grounds, lateral transfers—without publication of the concerned post—have been common practice throughout the existence of the Organization and they have never been regarded as running *per se* against art. 101.3 of the Charter (e.g., *Rees* 2012-UNAT-266, *Pérez-Soto* 2013-UNAT-329).

34. The rulings on which the Applicant relies in holding that the lack of advertisement of a post is a major flaw in selection processes (in particular, *Krioutchkov* UNDT/2016/016) concerned either cases involving promotion and/or a vacancy that the Administration claimed to have filled through a competitive selection process. Therefore, this jurisprudence cannot be transposed to the instant application, as it relates to wholly different scenarios.

35. As to the General Assembly resolutions prescribing the advertisement of all vacancies—notably resolution 51/226 of 3 April 1997—it is apparent, when read in context, that they aimed at reminding the Secretary-General of the necessity to generally fill available positions following the competitive recruitment procedures, which requires the publication of the concerned vacancies. This does not amount to banning a moderate use of lateral transfers.

36. Having concluded that lateral transfers are not unlawful, the Tribunal recalls that the Administration's discretion in this respect is not unfettered. The Tribunal is entitled to examine if the contested decision was not arbitrary or capricious, tainted by improper motives, based on erroneous or irrelevant considerations, procedurally flawed or resulting in a manifestly unreasonable outcome (see generally, *Assad* 2010-UNAT-021, *Sanwidi* 2010-UNAT-084, *Abbassi* 2011-UNAT-110).

37. In this connection, the Applicant contends that the decision was led by favouritism vis-à-vis the staff member appointed to the litigious post, and at the same time, that he has suffered from personal prejudice from the Chief, RTS, UNOG, further to a disagreement in a previous selection exercise.

38. However, the Applicant, who bears the burden of proving any allegations of ill-motivation that he may level (e.g., *Beqai* 2014-UNAT-434), has not provided evidence of these claims. On the contrary, the record made available to the Tribunal—while limited—tends to show, rather, that the initiative to transfer the staff member came, not from the Chief, RTS, but from the Executive Officer, DCM, who contacted the managers of RTS and ES suggesting this arrangement.

39. The Applicant's claims of age and gender discrimination against him are equally unsubstantiated. He limits himself to aver that the Chief, RTS, UNOG, tends to appoint young female candidates to P-3 Russian Translator posts, without establishing to what extent and how applicable provisions could have been breached.

40. Under these circumstances, the Tribunal is unable to make a finding that the contested decision was based on extraneous or improper factors.

41. Finally, the Tribunal recalls that its jurisdiction is limited to reviewing the legality of the specific decision impugned in the application under review. It is not the proper venue to examine previous recruitment decisions, or to investigate general complaints about broader systemic issues.

### **Conclusion**

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

The application is rejected.

*(Signed)*

Judge Thomas Laker

Dated this 4<sup>th</sup> day of May 2016

Case No. UNDT/GVA/2014/059

Judgment No. UNDT/2016/051

Entered in the Register on this 4<sup>th</sup> day of May 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva