



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KRIOUTCHKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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 decision not to “evaluate/select” him for a vacancy of Russian Translator (P-3), Russian Translation Section (“RTS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”).

2. As remedies, he seeks 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. The post at issue was advertised through Internal Vacancy Announcement (“IVA”) DCM 5/2012 from 4 to 18 October 2012. The Applicant applied by email of 14 October 2012. The message from the Executive Office, DCM, UNOG, circulating the IVA stated that it was “for lateral movements of staff only”.

4. By memorandum dated 19 October 2012, the Chief, RTS, informed the Director, DCM, that further to the circulation of the IVA, three applications had been received, including the Applicant’s, and that after careful consideration of all three, he recommended the lateral transfer of another candidate, a female staff member who then served with the Department for General Assembly and Conference Management (“DGACM”), in New York Headquarters. He grounded his recommendation on that candidate’s unique combination of languages and her good performance according to her e-PASes; additionally, he noted that her lateral transfer would improve the gender balance in RTS.

5. By memorandum of 22 October 2012, the Director, DCM, transmitted said recommendation to the Acting Head, DGACM, for his approval of the recommended candidate’s lateral transfer from Headquarters to UNOG.

6. On 7 November 2012, the successful candidate was informed of her selection, and was advised that her transfer would be effective on 15 January 2013.

7. As a result of subsequent inquiries on advertised and filled post within RTS in 2013, the Applicant was informed, on 15 August 2014 according to him, by a Senior Human Resources Officer, Human Resources Management Service (“HRMS”), UNOG, that the litigious post had been filled in 2013.

8. The Applicant requested management evaluation of the impugned decision on 19 September 2014. The Management Evaluation Unit (“MEU”) replied by letter of 19 January 2015, upholding the decision.

9. The present application was filed on 23 January 2015. The Respondent replied on 2 March 2015, annexing a number of documents recording the process leading to the contested decision.

10. 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.

11. By Order No. 84 (GVA/2016) of 29 April 2016, the parties were invited to file comments, if any, with respect to the Tribunal’s view that a judgment could be rendered without holding a hearing. The parties made no comments.

Parties’ submissions

12. The Applicant’s principal contentions are:

- a. The decision not to invite him to any customary evaluation activities, such as a competency-based interview and a written test, contradicts art. 101.3 of the Charter and staff regulation 4.2, providing that the paramount

consideration in the staff's appointment, transfer and promotion "shall be the necessity of securing the highest standards of efficiency, competence and integrity". These provisions cannot be respected by covertly selecting candidates instead of conducting transparent competitive selection processes or by limiting selection to DGACM candidates only, as it not only prevents candidates from applying, but also limits the selection of candidates. In the case that led to *Kasyanov* UNDT/2009/022, the Respondent placed significant reliance on the paramountcy of the aforesaid Charter's and Staff Regulations' requirements, going even onto asserting the inconsistency of ST/AI/2006/3 with the Charter (see paras. 39-49 of *Kasyanov*);

b. The disputed decision also breached General Assembly resolution 51/226, which requests that all vacancies be announced, so as to give equal opportunity to all qualified staff and to encourage mobility, and runs contrary to the requirement of mobility of all internationally recruited UN staff, stressed in General Assembly resolution 53/221;

c. For the past over 25 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all duty stations where Russian translation services exist. Some UNOG vacancies even stated at some point that Geneva candidates were preferred;

d. The promulgation of Administrative Instruction ST/AI/2010/3 (Staff selection system) further diminished the Applicant's chances, 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 have been filled without a competitive process. This, 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;

e. Considering the above and his history of lack of success in applying for posts in Geneva for the last 20 years, the Applicant believes he is a victim of duty station-based discrimination. He is penalized for serving in a regional commission, which is not part of a DGACM system. Also, given that back in 2006, in the context of a different recruitment process for a post in RTS, UNOG, the Applicant opposed the recruitment of the person that the Chief, RTS, wished to hire, he believes to have suffered from personal retribution by the Chief, RTS, UNOG;

f. While being a P-3 translator, the Applicant has been translating and self-revising his work, which by the Organization's own standards corresponds to tasks at the P-4 level, without the Organization granting him in return any practical recognition or real chance of promotion;

g. 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

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

13. The Respondent's principal contentions are:

a. This application is irreceivable on two grounds:

i. The contested decision had no direct legal effects on the Applicant's terms and conditions of appointment. The unlawfulness allegations hinge on the lateral transfer process, rather than the consideration of his individual application, even though sec. 2.5 of ST/AI/2010/3 specifically exempts lateral transfers from the staff selection system. The filling of a vacancy by means of a lateral transfer is not a contestable administrative decision. The Applicant is contesting the system;

ii. The related request for management evaluation was not submitted within the prescribed time limits. Although the Applicant holds that he learned about the disputed transfer in August/September 2014, he had been informed already in February 2014 by HRMS, UNOG, that “[d]uring 2013 only one P-3 position in [RTS] was filled as a result of lateral reassignment within department”. While the Applicant filed other applications arising from the same correspondence only in July 2014, he requested management evaluation of the matter at hand in September 2014, i.e., nearly seven months after the February 2014 communication. The Applicant has engaged in a consistent pattern of behaviour of claiming that he was unaware of the outcome of posting decisions, when in fact he was;

b. On the merits, under sec. 3.2(l) of ST/AI/2010/3, lateral transfers are exempt from the staff selection system, including the conduct of “evaluation activities” such as a written assessment and a competency-based interview;

c. Moreover, sec. 3.2(e) of the same instruction excludes from its scope of application, the “[m]ovement during the first five years of service of staff serving against a P-2 or P-3 language position who 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”. In this connection, sec. 2.2 of Administrative Instruction ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills) provides that during their first five years of service, language candidates successful in a competitive language examination “may be reassigned to language posts at other duty stations according to the needs of the Organization”. Furthermore, para. 19.4 of the Inspira Hiring Manager’s Manual (“Manual”) sets out the authority of the Under-Secretary-General for General Assembly Affairs and Conference Management to “transfer

laterally language staff, including ... translators ... up to ... the P-5 level, who serve in New York, Geneva, Vienna and Nairobi”;

d. The criticised transfer was in accordance with the above-cited provisions. It fell outside the application of the staff selection system, and no obligation existed to engage in standard assessment activities such as written tests and competency-based interviews. Staff regulations 1.2(c) and 4.2 caters for lateral transfers and cannot be said to contradict the need to secure the highest standards of efficiency, competence and integrity;

e. There was no obligation to conduct a written assessment or a competency-based interview for a lateral transfer. The only assessment carried out was a comparative analysis of the candidates, based on their Personnel History Profile (“PHP”), with a view to verifying eligibility and compliance with minimum requirements and competencies. This review included the Applicant’s PHP;

f. The Applicant has not proven, as per the required standard, that the decision was tainted by ill-motivation or extraneous factors. Its outcome was not manifestly unreasonable, given that the transferred staff member meets all the requirements for the P-3 post in question. Also, having joined the Organization in 2010, she was within her first five years of service, whereby falling under sec. 2.2 of ST/AI/2000/1, sec. 3.2(e) of ST/AI/2010/3 and para. 19.4 of the Manual. Lastly, given that RTS,UNOG, had an overall representation of women of 13% and only 8% in Professional positions, the transfer of a female candidate contributed to promote gender balance; and

g. The Applicant has not discharged the burden of proof incumbent on him regarding his allegation of bias and retribution against him, as well as with respect to his broad allegations on other selection or transfer decisions. His claims on gender discrimination are belied by the statistics on women representation.

Consideration

Receivability

Challenge of a reviewable administrative decision

14. Regarding the Respondent's claim that the decision at stake does not have direct legal consequences on the Applicant's terms of appointment, the Tribunal is satisfied that the Applicant does identify and contest an individual administrative decision, to wit, the choice of filling by lateral transfer a vacancy for which he had applied. As already ruled in *Krioutchkov* UNDT/2016/051, this course of action by the Administration carries objective repercussions on the chances of a given candidate to be considered for—thus to possibly be appointed against—the concerned post, and the conditions under which he or she may compete for it.

15. Specifically, 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 of the vacant post in question will be eligible to be appointed to it. 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, not serving within the concerned department or office, was not even eligible for it. Furthermore, pursuant to sec. 3.2(1) of ST/AI/2010/3, the regime that governs a competitive recruitment procedure within the Organization does not apply to lateral movements of staff effected by heads of department/office/mission in accordance with sec. 2.5 of the same instruction.

16. Since it had a direct legal effect on the Applicant's rights, the decision in question constitutes one open to appeal under 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)).

17. Whether or not lateral transfers are permitted as a matter of law is a different issue that pertains to the merits of the case and, hence, is not to be conflated with the non-existence of an administrative decision as a cause of irreceivability.

Management evaluation time limits

18. The Respondent further submits that the Applicant failed to request management evaluation within the prescribed time limits, holding that the Applicant was made aware of the impugned transfer already by an email from a Senior Human Resources Officer, HRMS, UNOG, to the Applicant of 5 February 2014.

19. The Tribunal notes that this email merely stated that “[d]uring 2013 only one P3 position in [RTS] was filled as a result of lateral reassignment within department, i.e. without advertisement”. Importantly, it referred to “one” undetermined P-3 post that had been filled by a lateral movement. Indeed, said message did not contain the details permitting to identify the decision, notably the post in question, the date of the transfer or the reference number of the IVA announcing the vacancy. Manifestly, the Applicant required additional information before engaging in formal contestation.

20. In the absence of a proper complete notification—either on 5 February 2014 or on any other date prior to 15 August 2014, the date on which the Applicant claims to have learned about the contested decision—the Administration cannot claim with any degree of certainty that the Applicant was aware of the transfer. Therefore, the Tribunal considers that 15 August 2014 was the date of notification.

21. For all the foregoing, the Tribunal declares this application receivable.

Merits

22. Sec. 2.5 of ST/AI/2010/3 establishes that:

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.

23. Sec. 2.2 of ST/AI/2000/1 also caters for the possibility of lateral transfers in the more specific case of language professionals during their first five years of service, which was the case of the staff member laterally moved to the litigious post, as it reads:

After recruitment or placement against a Professional language post, candidates successful in a competitive language examination are expected to serve for at least five years in language posts, provided they complete successfully their probationary or trial period ... before they may be assigned to, or selected for, a post other than language post. During that period, they may be reassigned to language posts at other duty stations according to the needs of the Organization.

24. The Secretary-General's authority to laterally transfer language staff is reiterated in para. 19.4 of the Manual.

25. Consistent with the above-quoted provisions, sec. 3.2(l) and 3.2(e) of ST/AI/2010/3, respectively exclude from the scope of application of the staff selection system laid down in ST/AI/2010/3 lateral moves within a department, as well as those of language Professional staff to another linguist post in their first five years of service.

26. The above leaves no room for doubt that filling vacant posts by a lateral transfer is in conformity with the applicable rules. It is unconvincing, and misplaced, to claim that lateral transfers are, as a matter of principle, contrary to art. 101.3 and staff regulation 4.2, inasmuch as they require the Organization to secure "the highest standards of efficiency, competence and integrity". None of them rules out lateral moves. On the contrary, staff regulation 4.2 explicitly

contemplates transfers. Additionally, staff regulation 1.2(c) establishes the Secretary-General's power to assign staff to any activities within the Organization. Consequently, they counter any interpretation to the effect that lateral transfers are intrinsically against the goal of efficiency, competency and integrity prescribed in the Charter. In fact, the Appeals Tribunal has upheld as lawful the option of laterally transferring staff (see *Rees* 2012-UNAT-266, *Pérez-Soto* 2013-UNAT-329).

27. As to the General Assembly resolutions prescribing the advertisement of all vacancies to enable open competition for such posts—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 vacancies. This does not amount to banning the use of lateral transfers.

28. Notwithstanding its finding that reassigning a staff member of the same grade to an unencumbered position without conducting a full-fledged selection process as per ST/AI/2010/3 does not *per se* violate any applicable rule, the Tribunal recalls that lateral reassignments, like any discretionary decision, must not be 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).

29. In this connection, the Applicant suggests that the decision was unduly influenced by personal retribution from the Chief, RTS, UNOG, further to a disagreement in a previous selection exercise, and at the same time, by a discriminatory preference for young female staff.

30. It is well-established that the burden of proving any allegations of ill-motivation or extraneous factors rests with the applicant (*Jennings* 2011-UNAT-184, *Obdeijn* 2012-UNAT-201, *Beqai* 2014-UNAT-434). In this case, the Applicant has not provided any evidence backing either of these claims. His history of unsuccessful applications for Geneva-based posts falls short to demonstrate personal prejudice. The allegations of age and gender discrimination are equally unsubstantiated; if anything, the figures on female representation within RTS at the time of the contested decision tend to belie such claim, as women were significantly underrepresented, especially at the Professional category.

31. Against this background, the Tribunal cannot conclude that the disputed transfer was based on extraneous or improper factors.

Other allegations

32. As regards the allegations such as the pattern to promote translators within each duty station, or his prolonged placement on the P-4 roster without that leading to his actual promotion, the Tribunal cannot but note that they fall beyond the scope of the present proceedings, intended to review the legality of the specific decision impugned. In fact, said allegations exceed the jurisdiction of the Tribunal, which is not the proper venue to examine previous recruitment decisions or to investigate general complaints about broader systemic issues.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 8th day of June 2016

Entered in the Register on this 8th day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva