



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/094
Judgment No.: UNDT/2020/212
Date: 18 December 2020
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

ROCKCLIFFE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a P-4 level staff member on permanent appointment with the United Nations Joint Staff Pension Fund (“UNJSPF” or “the Fund”) in New York, contests the Administration’s decision of 20 June 2019 to cancel Job Opening (“JO”) No. 95597 for the post of Deputy Chief, Pensions Entitlements Section (“PES”) at the P-4 level (“the Post”), which she had applied for. The Applicant describes the contested decision as “violation of the Secretary-General’s instruction to afford the Applicant priority consideration for suitable vacancies”.

2. For the reasons stated below, the application is rejected.

Facts

3. In October 2016, the Applicant submitted a request for protection against retaliation to the Ethics Office.

4. On 26 April 2018, the Ethics Office informed the Applicant that the Ethics Office found that retaliation had been established when UNJSPF attempted to terminate her permanent appointment without making sufficient efforts to find a suitable position within the Fund. Accordingly, the Ethics Office recommended, among other things, that UNJSPF would consider the Applicant on a preferred or non-competitive basis for any position she may apply at the P-4 level within the Fund.

5. On 23 May 2018, the vacancy announcement for the Post was published.

6. By memorandum dated 25 May 2018, the Assistant Secretary-General for Human Resources Management (“ASG/OHRM”) informed the Applicant that the Administration accepted the Ethics Office’s recommendation that she be considered on a preferred or non-competitive basis for any position that she may apply or express interest at the P-4 level within the Fund.

7. On 27 May 2018, the Applicant applied for the Post.
8. On 8 June 2018, UNJSPF offered the three positions, namely Training Officer, Outreach Officer, and Programme Officer at the P-4 level, to the Applicant in accordance with the Administration's acceptance of the Ethics Office's recommendation.
9. By email dated 11 June 2018, the Applicant rejected these three positions on the ground that these positions were "dead-end" jobs that had little or no effect on the operations of the Fund. The Applicant reiterated her interest in the Post.
10. On 13 June 2019, the Acting Chief Executive Officer of UNJSPF approved the Chief of the Operations Service's request for cancellation of JO 95597.
11. On 20 June 2019, the Applicant received a notification that the job opening for the Post was cancelled.
12. On 25 July 2019, UNJSPF requested the reclassification of the Post as Benefits Officer (Chief of the Participations Unit) based on the following reasons:

1. The post was approved in the 2018-2019 budget, classified in April 2018 as Benefits Officer/Deputy Chief of the Pension Entitlements Section (PES)/Operations Service and advertised in May 2018—see attached classification and [terms of reference ("ToR")].

2. Since then the JO has been cancelled due to a change in the organizational structure within the Operations Service. Since the change is within the same Service, it does not require budgetary approval. Please see below for a description of the justification for the change in structure:

At the time of publishing the JO, the P-5 Chief of PES post was under recruitment and two of the three P-3 Benefits Officer posts under PES were also unfilled. Since then the Chief of PES has been recruited and the two Benefits Officer P-3 posts also filled. Upon finalizing these important recruitment processes, PES has been running more effectively, exceeding the processing benchmark since August 2018. After being in the role for almost a year, the new Chief of PES has determined that there is less of a need for the Deputy, PES (P4) role as

things have been functioning much better with the 3 Benefit Officers and other team members continue to step up to lead projects. Also, there has been a shift of some of the functions the Deputy role would have been responsible for completing to the Operations Support Unit, including policy development, working on audit recommendations and training. Therefore, the recommendation would be to repurpose the post for Deputy Chief PES (P4).

The Chief of the Operations Service proposes that the Service will be better served if this P4 Deputy Chief PES is re-purposed to a head a newly established Unit with the Operations Service called the Participation Unit, which falls under the Operations Support Section. The Benefits Officer (Chief of the Participation Unit) P4 will head a small team (2 [General Service (“GS”)] GTA [unknown abbreviation] posts-within existing resources) who will look after the open (non-processable) workflows, including liaising with the Member Organizations to implement the end-to-end review recommendations, streamlining the separation process and following up on missing separation documentation. The team will also assist PES in the participants’ data clean-up exercise. Finally, the incumbent will also develop the document quality assurance function which would be helpful in establishing appropriate quality control at the front-end office.

3. Although the title and level of the post remains Benefits Officer, P-4, the previous [Job Description (“JD”)] would not be usable, as it would be misleading to candidates for the following reasons:

- The duties and responsibilities listed are significantly different as the post will no longer be under PES/OS but be part of a new unit, Participations Unit/OS. Please find the ToR attached in the P.148 form attached.

- The number of posts directly supervised by the new position would not be in line with the previous JD. The new post will supervise 2 GS staff (within existing resources) only and not 3 [professional] staff and 27 GS Staff as per the previous JD.

4. We explored using other existing JD’s of Benefits Officer, P-4 and the GJPs [unknown abbreviation], but note that the proposed ToR is significantly different.

5. The proposed organizational chart is attached for ease of reference and comparison with the previous org chart submitted, when the post was originally classified.

13. On 19 August 2019, the Applicant filed a request for management evaluation of the decision to cancel the JO for the Post.

14. On 26 August 2019, UNJSPF's request for the reclassification of the Post was approved by the Office of Human Resources ("OHR") following a review of the organizational setting and the proposed description of the functions to be attached to the post.

15. On 5 September 2019, the acting Chief Executive Officer, UNJSPF, offered the Applicant the newly established position of Benefits Officer (Chief of the Participations Unit).

16. On 13 September 2019, based on the management evaluation, the contested decision was upheld.

17. On 15 September 2019, the Applicant rejected the offer of placement as the Chief of the Participations Unit.

18. On 19 September 2019, the Acting Chief Executive Officer, UNJSPF, acknowledged receipt of the Applicant's declining the offer and informed the Applicant that the Post, which was classified on 26 August 2019, would be advertised.

Consideration

Receivability

19. The Respondent argues that the application is not receivable since the cancellation of the job opening was not a final administrative decision and carried no direct legal consequences to the terms and conditions of the Applicant's employment contract. The Respondent cites *Kawamleh* 2018-UNAT-818, para. 14, in which the Appeals Tribunal stated, "[s]imply put, since the selection exercise was cancelled, there was no decision for [the applicant] to contest".

20. In *Kawamleh*, a first written test in the selection exercise was cancelled after questions were raised about it and then a second written test was administered. Since the first written test was cancelled, the Appeals Tribunal held that any challenge in this regard should be dismissed.

21. To reach this conclusion, the Appeals Tribunal cited *Ishak* 2011-UNAT-152, in which the Appeals Tribunal rejected the application as not receivable on the ground that the Applicant challenged an earlier non-promotion decision, which became moot due to his promotion three months thereafter through a recourse session. In this context, the Appeals Tribunal stated that “[a] selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the [Dispute Tribunal]”.

22. The case at hand is distinguishable from *Kawamleh* and *Ishak*. The cancellation of JO for the Post was not one of a series of preliminary steps leading to the final administrative decision. Rather, the Administration decided to abolish and reclassify the Post and therefore cancelled the JO in question. Therefore, this was a final administrative decision with regard to the Post and therefore can be reviewed by the Tribunal.

23. Accordingly, the Tribunal finds that the application is receivable.

The applicable legal framework and the issues of the case

24. The Applicant argues that she was likely to be selected for the Post should the JO was not cancelled, and the purported reason for the JO cancellation, namely a restructuring exercise, was only a pretext. The Applicant claims that the contested decision was “violation of the Secretary-General’s instruction to afford the Applicant priority consideration for suitable vacancies” and breached her right to be protected from retaliation.

25. The Respondent submits that the JO was lawfully cancelled following a restructuring exercise directed at achieving greater efficiency and was not tainted by extraneous considerations.

26. It is well settled jurisprudence that an international organization necessarily has power to restructure some or all of its departments or units, including through the abolition of posts. The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like with any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, at para. 40, when judging the validity of the exercise of discretionary authority,

... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

27. Under the jurisprudence of the Appeals Tribunal, if the applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

28. In light of the parties' submissions and the applicable legal framework, the Tribunal finds that the issue in this case is whether the Administration exercised its discretion appropriately when it cancelled the JO or whether the Administration unlawfully cancelled the JO in order to deprive the Applicant of an opportunity to be considered for the Post on a preferred or non-competitive basis.

29. The record shows that UNJSPF cancelled the JO for the Post about one year after publishing the vacancy announcement and thereafter submitted a request for reclassification of the Post to OHR. In its request, UNJSPF explained that at the time of publishing the JO, the post as Chief of PES at the P-5 level was under recruitment and two of the three Benefits Officer posts at the P-3 level under PES were also unfilled. UNJSPF further explained that since then the Chief of PES has been recruited and the two Benefits Officer P-3 level posts also filled, and the Chief of PES, after managing the team without the Deputy Chief for one year, decided that the Deputy Chief was no longer needed and instead could be repurposed as a Chief of Participations Unit, a newly established team within the same Service. Based on the information provided by UNJSPF, OHR approved the reclassification request.

30. The Applicant alleges that a restructuring exercise is a pretext for the cancellation of JO and it was a continued retaliatory act against her, but there is no evidence to conclude that the reclassification of the Post was not a genuine restructuring exercise. UNJSPF appropriately provided detailed reasons for its request for the reclassification and OHR approved it.

31. Furthermore, the Applicant, who bears the burden to prove any ill-motivation, fails to produce any evidence to support her argument that the decision was made in “violation of the Secretary-General’s instruction to afford the Applicant priority consideration for suitable vacancies”. In fact, UNJSPF offered the reclassified Post (i.e. Benefits Officer (Chief of the Participations Unit)) to the Applicant to fulfil its obligations in accordance with the Ethics Office’s recommendations, and yet the Applicant rejected the offer.

32. Therefore, the Tribunal finds that the cancellation of the JO for the Post was lawful and there is no evidence that the decision was ill-motivated.

Conclusion

33. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 18th day of December 2020

Entered in the Register on this 18th day of December 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York