



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

Judgment No. 2019-UNAT-966

**Krioutchkov
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Jean-François Neven
Case No.:	2019-1266
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Krioutchkov:	Mohamed Abdou, OSLA
Counsel for Secretary-General:	Isavella Vasilogeorgi

JUDGE MARTHA HALFELD, PRESIDING.

1. The Secretary-General appeals against Judgment No. UNDT/2019/048, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 27 March 2019, in the case of *Krioutchkov v. Secretary-General of the United Nations*. This appeal involves the non-selection of Mr. Vladislav Krioutchkov for a temporary job opening (TJO) after he was not short-listed on account of not meeting a minimum eligibility requirement that he already be located at the same duty station as the advertised post. The UNDT found this was an unlawful requirement and rescinded the decision and awarded Mr. Krioutchkov compensation. The Secretary-General appealed. This Tribunal grants the Secretary-General's appeal and reverses the UNDT's Judgment on grounds that the "local recruitment" criterion is lawful.

Facts and Procedure

2. Mr. Krioutchkov, a Russian Translator, holding a permanent appointment at the P-3 level, at the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok, applied to the position of Russian Reviser at the P-4 level in the Department of General Assembly and Conference Management (DGACM) in New York, advertised as TJO 64192. This TJO had a special notice indicating the position was for a period of 11 months and for local recruitment only. The UNDT established that Mr. Krioutchkov and four other candidates applied for the position. Mr. Krioutchkov was placed on the "long list" of candidates. The hiring manager conducted a comparative review of the five candidates, limiting it to those who "met the minimum requirement of the position and also met the eligibility requirement of being located at the duty station". The selected candidate met both.

3. Mr. Krioutchkov timely filed a request for management evaluation of the decision not to select him for the advertised post with the Management Evaluation Unit (MEU). While the MEU proposed a monetary amount to settle the case, which Mr. Krioutchkov accepted, the MEU did not revert back to Mr. Krioutchkov. Mr. Krioutchkov thus filed his application before the UNDT.

4. The UNDT granted Mr. Krioutchkov's application and found that limiting a TJO in a professional category to "local recruitment only" was unlawful as it violated Article 101(3) of the United Nations Charter, which stresses the importance of recruiting staff on as wide a geographical basis as possible. The UNDT also found it violated Staff Rule 4.4 titled, "staff in posts subject to local recruitment" which designated the general service category of

staff members to local recruitment, and Staff Rule 4.5 titled, “staff in posts subject to international recruitment”, which designated that all other staff shall be regarded as internationally recruited. Rule 4.5(b) specifically provided that staff recruited locally at a duty station for posts in the professional and higher categories in that duty station are considered internationally recruited. The UNDT noted that Staff Rule 4.5(b) did not give a right to restrict employment of staff at the professional level to local recruitment. Rather, it referred to the fact that if the selected candidate lives or is based at the duty station where the advertised post is located, he or she will be considered as being internationally recruited but will not be entitled to receive some benefits arising from an international recruitment such as relocation and travel expenses. The UNDT rejected the Secretary-General’s argument that Administrative Instruction ST/AI/2010/4 Rev. 1 (Administration of temporary appointments), whereby the “purpose of the temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs” meant that an Organization may limit temporary job openings to local recruitment. The Secretary-General equated effectiveness and expeditiousness exclusively with local recruitment and argued it was within his discretion. However, the UNDT held that limiting temporary recruitment to those candidates within a duty station was contrary to the above noted Staff Rules, which are higher norms than the Administrative instruction. The UNDT noted that, while temporary appointments may call for the Organization to conduct recruitment in the shortest time possible and mindful of budgetary constraints, these considerations could not override the existing administrative rule of law.

5. The UNDT concluded that Mr. Krioutchkov’s candidacy was not given full and fair consideration as the unlawful eligibility criterion prevented him from moving to the short-list of candidates, and accordingly rescinded the decision. Considering the probability Mr. Krioutchkov would have been selected but for the procedural breaches, the UNDT awarded him USD 3,000 as compensation *in lieu* of rescission. The UNDT held that there was insufficient evidence to grant moral damages.

6. The Secretary-General filed an appeal on 28 May 2019, and Mr. Krioutchkov filed his answer on 26 July 2019.

Submissions

The Secretary-General's Appeal

7. The Secretary-General requests the Appeals Tribunal to vacate the Judgment. The Secretary-General argues that Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1 vest him with broad discretion in staff selection matters. The UNDT's standard of review is to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. The applicable legal framework is ST/AI/2010/4 Rev. 1, which indicates that the purpose of temporary appointments is to effectively and expeditiously manage short-term staffing needs. Per resolution 63/250, the General Assembly required the Secretary-General to effectively and expeditiously manage specific short-term requirements for less than one year by swiftly appointing qualified personnel. ST/AI/2010/4 Rev. 1 was issued to allow the Organization to fulfil this requirement. Furthermore, the issue of limiting eligibility of temporary positions to candidates at the same duty station was previously considered by the Appeals Tribunal in *Smith*,¹ which held that the Secretary-General had wide inherent discretion to determine eligibility criteria for temporary appointments. There was no provision prohibiting the Administration from imposing a restriction limiting recruitment of temporary positions to staff members at a particular duty station. The impugned Judgment contradicts this legal framework.

8. In addition, the UNDT erred in fact and law in finding that Mr. Krioutchkov's candidacy had not been given full and fair consideration. The recruitment had been conducted fairly and transparently as the local recruitment criterion had been notified in the vacancy announcement and applied to all candidates. Accordingly, the UNDT erred in law when it ordered that the recruitment be rescinded and *in-lieu* compensation be awarded in the alternative, as there was no procedural breach in the recruitment or illegal application of the criteria.

Mr. Krioutchkov's Answer

9. Mr. Krioutchkov requests the Appeals Tribunal dismiss the appeal in its entirety and uphold the Judgment. He argues that the UNDT correctly held that the "local recruitment only" criterion on a temporary appointment was unlawful as it violated the United Nations Charter and the Staff Rules. The discretion of the Secretary-General is not unfettered. The

¹ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785.

need to ensure recruitment on as wide a geographical basis as possible to ensure recruitment of candidates from all Members States is set forth in Article 101(3) of the United Nations Charter. Staff Rules 4.4 and 4.5 are also clear that professional staff are internationally recruited and general service staff are locally recruited. There is no exception in these Rules and the Administration may not unilaterally amend the recruitment modalities established by the General Assembly with regard to professional category staff under the claim of the Secretary-General's discretionary power.

10. Even assuming *arguendo* that it is a justifiable exception to limit criteria to local recruitment for a temporary post based on operational needs, the reasons provided by the Administration are insufficient to demonstrate that valid operational concerns had justified this recruitment being restricted to local candidates. There is no clear correlation between efficiency and "local recruitment." The assumption that applicants at the duty station would be readily available to take up positions while others would not was highly speculative and was not a legitimate justification. The UNDT, thus, correctly rejected the argument that effective and expeditious recruitment is equated with local recruitment.

11. Lastly, the Secretary-General's submissions before both Tribunals contradict the language of the vacancy announcement, which states "subject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station". The Secretary-General has not made any mention of the source of funding in his submissions nor has he minimally shown that the funding source could constitute a valid justification for local recruitment. There is no evidence the hiring manager considered the funding source.

Considerations

12. The issue for consideration and determination in the present appeal is whether the UNDT erred on a question of law or of fact resulting in an unreasonable decision when it held that limiting a TJO at the professional level to local recruitment was unlawful.² To reach this finding, the UNDT reasoned that the geographical location of a candidate could not be the paramount consideration, because it would be contrary to the United Nations Charter and the applicable rules.³ The UNDT also found that, while the Organisation had the option of recruiting a candidate on a temporary appointment from outside of the duty station, that did

² Impugned Judgment, para. 31.

³ *Ibid.*, para. 26.

not amount to a legal basis for limiting this recruitment to a specific duty station.⁴ The eliminatory eligibility criterion of the presence at the duty station was hence by itself unlawful. As a consequence, Mr. Krioutchkov was prevented from moving to the short-list of candidates and, therefore, was not afforded full and fair consideration, which led to the rescission by the UNDT of the contested decision.

13. In his appeal, the Secretary-General alleges that he has broad discretion in matters of staff selection, as set forth in Article 101(1) of the United Nations Charter. With regard to temporary appointments, the purpose, as stated in Section 1.1 of ST/AI/2010/4 Rev. 1, (Administration of temporary appointments) is to enable the Organisation to effectively and expeditiously manage its short-term staffing needs, since they “are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates” with a duration of less than one year, as established by General Assembly resolution 63/250. The Secretary-General further notes that the UNDT’s findings are contrary to the Appeals Tribunal’s jurisprudence established in *Smith*.⁵

14. The issue of the limits and scope of judicial review is not new to the Appeals Tribunal. Since *Sanwidi* we have more broadly settled that:⁶

... Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles *in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.*

...

... When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, 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

⁴ *Ibid.*, para. 24.

⁵ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785.

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 38 and 40 (emphasis added).

of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

15. In non-selection matters, our jurisprudence has established that:⁷

... the factors to be considered are: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given fair and adequate consideration, and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration.

16. From the outset, the UNDT erred in law when it held that Staff Rules 4.4 and 4.5 establish different recruitment regimes for professional and general service staff. In reality, Staff Rules 4.4 and 4.5 establish different allowances and benefits regimes for local and international recruitment. It is true that a general line could be drawn as to assimilate, on the one hand, local recruitment to general service and, on the other hand, international recruitment to professional staff. However, this rule is not absolute. A more careful reading of both reveals that while staff members serving in the general service category shall ordinarily be subject to local recruitment (Staff Rules 4.4(a) and 4.6) and only exceptionally be considered internationally recruited (Staff Rule 4.5(c); see also Staff Rules 3.13, 3.14 and 3.15), staff members serving in the professional category can also be recruited locally (Staff Rules 4.4(b) and 4.5(b)). In this case, they are considered internationally recruited but only entitled to the allowances and benefits determined by the Secretary-General (Staff Rule 4.5(b)).

17. This interpretation is in keeping with Section 15.5 of ST/AI/2010/4 Rev. 1, which regulates home leave entitlement for internationally recruited staff members holding temporary appointments, whatever category of service to which they have been appointed—either general service or professional. The UNDT therefore committed an error of law when it found that it was illegal to restrict a TJO at the professional level to local recruitment.⁸

18. This is not to say that the geographical location of a candidate can be the paramount consideration in a job opening advertisement, but rather that it can compose an eligibility criterion of the job opening. This is of particular importance as regards temporary

⁷*Savadogo v. Registrar of International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, para. 40 (internal citations omitted).

⁸ Impugned Judgment, para. 31.

appointments, which, as discussed, necessarily and by definition do not involve widespread practice, but rather concern “short-term staffing needs” which should be effectively and expeditiously managed, without prejudice to the paramount consideration of highest standards of efficiency, competence and integrity, as established in Article 101(3) of the United Nations Charter and Staff Regulation 4.2, as well as to the recognition of the value of staff mobility to the Organisation, especially across duty stations, as stated in General Assembly resolutions 53/221 and 55/258 on human resources management. Within this context, the Secretary-General is correct in asserting that Section 5 of ST/AI/2010/4/Rev.1 does not have the effect of establishing a *numerus clausus* list of eligibility criteria for temporary appointments.

19. Further, it is true that the UNDT contradicts our jurisprudence established in *Smith*.⁹ In *Smith*, we stated that the statutory provisions confer upon the Secretary-General a wide inherent discretion to determine eligibility criteria for temporary appointments. No provision prohibits the Administration from imposing a restriction limiting recruitment for a temporary position to staff members at a particular duty station or mission. Such a restriction can be justified on various operational grounds such as cost, convenience, working environment, local conditions, etc., since local recruitment conveys the intrinsic notion of time and cost saving.

20. Despite the principle of legality, by which the Administration benefits from the assumption of being correct, and the discretion to introduce criteria in the interests of operational requirements or efficiency, the scope of the Administration’s actions is not unfettered and must be exercised lawfully, reasonably, and fairly.¹⁰ In cases where there is no *prima facie* absurd, perverse, discriminatory, capricious or any other unreasonable justification on the part of the Administration, the burden of proof rests with the staff member concerned. In other words, if the Administration is able to even minimally show that the staff member’s candidacy was given full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the staff

⁹ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785, para. 29. In para. 30, we stated: “The choice of eligibility criteria and their application must be reasonable, or at least rationally based, in the sense, *inter alia*, of not being arbitrary, capricious, improperly motivated or based on irrelevant considerations.”

¹⁰ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785, para. 30; *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, para. 30; *Scheepers et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556, para. 55; *Dhanjee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-527, paras. 29-31.

member, who must show through clear and convincing evidence that they were denied a fair chance of appointment.¹¹

21. In the present case, Mr. Krioutchkov bore the burden of proof with regard to his claim of not having been given full and fair consideration in the selection exercise. However, he has not produced any evidence to support his allegation. As stated in *Smith*, an inference of improper purpose, ulterior motive, or discrimination is not the only reasonable, legitimate, or most probable inference to be drawn from the imposition of the restriction. While there should be evidence to support such a claim on a case by case basis, a conclusion that cost and convenience were paramount cannot be discounted. The decision to include the restrictive criterion and its application, therefore, is reasonable in the premises.¹²

22. Likewise and in contrast to Mr. Krioutchkov's allegations, we are satisfied that in the peculiar circumstances of this case, where the post by virtue of being a temporary appointment had to be filled urgently for a short duration, the phrase "[s]ubject to the funding source" inserted in the TJO announcement, although not the subject of specific evidence, may be interpreted generously or extensively to permit the imposition of the restriction on the basis of cost (fiscal prudence) and convenience in the interests of operational exigencies.¹³

23. Once found that the eligibility criteria used for the TJO were lawful in the present case, the UNDT's reasoning that Mr. Krioutchkov was not, as a direct consequence, afforded full and fair consideration during the selection exercise does not stand.

¹¹ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 27.

¹² *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785, para. 32.

¹³ *Id.*, para. 34.

Judgment

24. The appeal is upheld and Judgment No. UNDT/2019/048 is hereby vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Neven

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar