



**Before:** Judge Rowan Downing

**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, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. On 28 April 2017, the Applicant filed a motion for extension of time to file an application pending an out of court settlement proposal from the Management Evaluation Unit (“MEU”), which he had accepted on 15 March 2017, concerning his non-consideration/non-selection for the position of Russian Reviser (P-4), Russian Translation Service at the Department for General Assembly and Conference Management (“RTS/DGACM”), at Headquarters, New York, advertised under Temporary Job Opening No. 64192 (“TJO 64192”).

2. By Order No. 104 (GVA/2017) of 2 May 2017, the Tribunal considered that the information and documents submitted with the motion were sufficient to consider the 28 April 2017 filing as an incomplete application. The Tribunal therefore granted the Applicant until 3 July 2017 to complete his application.

3. On 2 July 2017, and failing a reply from MEU concerning the implementation of the settlement he had accepted, the Applicant filed an application contesting the decision not to consider/select him for TJO 64192.

4. The Respondent filed his reply on 5 September 2017.

5. By Order No. 163 (GVA/2018) of 5 October 2018, the Tribunal asked the parties’ views about rendering a judgment on the papers or holding a hearing limited to remedies.

6. By submissions dated 10 October 2018, the parties *inter alia* agreed to adjudication of the matter on the papers.

## **Facts**

7. The Applicant is a Russian Translator, holding a permanent appointment (P-3), at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), based in Bangkok.

8. On 1 August 2016, he applied for TJO 64192, which *inter alia* had a special notice indicating that it was for “a period of 11 months and ... for local recruitment only”.

9. As per the Respondent’s reply, five candidates applied for the position, the Applicant being one of them. The hiring manager considered the Applicant’s candidacy and placed him on the “long list” of candidates. The hiring manager then conducted a comparative review of the candidates limiting it to those who “met the minimum requirement of the [p]osition and also met the eligibility requirement of being located at the duty station. The selected candidate did [meet] both”.

10. On 28 October 2016, the Applicant received a notification that his candidature was unsuccessful.

11. On 17 December 2016, the Applicant requested management evaluation of the decision not to select him for the advertised position. Following several email exchanges between the Applicant and the MEU, the latter proposed an amount to settle the case. The Applicant accepted it by email of 16 March 2017 but the MEU did not revert back to the Applicant to implement the settlement proposal and the Applicant filed his application as indicated in para. 3 above.

### **Parties’ Submissions**

12. The Applicant’s principal contentions are:

a. The selection process did not provide him with full and fair consideration because he was not invited to any evaluation and staff regulation 4.4 requires that “fullest regard be given to persons already in the service of the Organization”;

b. Despite the mobility policy that the General Assembly and the Secretary-General proclaim, promotions of Russian translators have been limited to candidates at the duty station of the vacancy. No candidate from outside the duty station of the post has ever been promoted/selected. As a result, he has been a consistent victim of unfair treatment and “duty station based long-time discrimination” in various recruitment processes despite his

extensive work experience and performance appraisal ratings of “exceeds expectations”; and

c. Since he has been long rostered for P-4 Russian reviser positions, his non-selection violates the roster principle and his “legitimate expectation of being promoted to a P4 post *within a reasonable average time period on a par with all other rostered Russian Translators*” (emphasis in the original);

13. The Respondent’s principal contentions are:

a. The Organization has the discretion to limit recruitments for temporary position to locally based candidates, also known as “local recruitment only”;

b. The Applicant was fully and fairly considered for the job opening although he was not eligible to apply for the position because he is based in Bangkok and the post was located in New York;

c. Nevertheless, the hiring manager reviewed his application but he did not meet the eligibility requirement of being located at the duty station of the vacancy; and

d. The Applicant has not discharged the burden to prove that the selection decision was tainted by bias or improper motivation.

### **Consideration**

14. According to *Massabni* 2012-UNAT-238 (see also *Gakumba* 2015-UNAT-591 para. 21, *Chaaban* 2016-UNAT-611 para. 16), the duties of a judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties’ contentions. Thus, the authority to render a judgment gives the judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested.

15. The Tribunal finds that the main issues for determination in this matter is whether a temporary job opening limited to “local recruitment only” is lawful, and if the Applicant’s candidature was given full and fair consideration. If either of these is answered in the negative, a resulting issue to examine is what remedy, if any, the Applicant would be entitled to.

16. Finally, the Tribunal recalls that the burden of proof in matters of non-selection rests on the Applicant, who has to show through clear and convincing evidence that he was denied a fair chance at promotion. The Respondent is presumed to have regularly performed official acts. Therefore, if the Respondent can minimally show that the Applicant was given full and fair consideration during the selection exercise, then the presumption of regularity is satisfied (*Rolland* 2011-UNAT-122).

*Was the limitation to “local recruitment only” lawful?*

17. Article 101(3) of the United Nations Charter provides that:

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.

18. Additionally, the then applicable Staff Regulations and Rules (ST/SGB/2016/1) provided at staff regulation 4.4 that:

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations. The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no internal candidate meets the requirements of Article 101, paragraph 3, of the Charter as well as the requirements of the post.

19. Posts subject to local recruitment are regulated under staff rule 4.4, which provided that:

**Rule 4.4**  
**Staff in posts subject to local recruitment**

(a) All staff in the General Service and related categories, except as stipulated in staff rule 4.5 (c) below, shall be recruited in the country or within commuting distance of each office, irrespective of their nationality and of the length of time they may have been in the country. The allowances and benefits available to staff members in the General Service and related categories shall be published by the Secretary-General for each duty station.

(b) National Professional Officers shall be of the nationality of the country where the office concerned is located.

(c) A staff member subject to local recruitment under this rule shall not be eligible for the allowances or benefits indicated under staff rule 4.5 (a).

20. Further, staff rule 4.5 provided the following:

**Rule 4.5**  
**Staff in posts subject to international recruitment**

(a) Staff members other than those regarded under staff rule 4.4 as having been locally recruited shall be considered as having been internationally recruited. Depending on their type of appointment, the allowances and benefits available to internationally recruited staff members, may include: payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children; relocation shipment; home leave; education grant; and repatriation grant.

(b) Staff recruited locally at a duty station for posts in the Professional and higher categories at that specific duty station are considered internationally recruited but would generally not be entitled to some or all of the allowances and benefits mentioned in paragraph (a) above as determined by the Secretary-General.

(c) Under special circumstances and conditions determined by the Secretary-General, staff who have been recruited to serve in posts in the General Service and related categories may be considered internationally recruited.

21. It is noted that staff rule 4.5(b) does not give a right to restrict the employment of staff at the professional level to local recruitment. Rather, it refers 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 or all of the benefits mentioned in paragraph 4.5(a), namely those arising from an international recruitment.

22. The Respondent argues that pursuant to section 1.1 of 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”, the Organization may limit temporary job openings to local recruitment. The Respondent equates effectiveness and expeditiousness exclusively with local recruitment, and further supports the limitation to local recruitment by claiming that this is a “discretion vested in the Organization”.

23. The Respondent’s above arguments cannot stand. First, the Tribunal notes that the relevant part of section 11 (Travel related entitlements) of the above-mentioned administrative instruction reads (emphasis added):

11.1 A staff member who holds a temporary appointment serving in posts subject to international recruitment as defined in staff rule 4.5 may be eligible, **if not recruited at the duty station or from within commuting distance from the duty station**, for the following travel-related entitlements in accordance with the applicable staff rules and the conditions specified in the present administrative instruction[.]

24. It follows that recruitment of candidates outside the duty station of the vacancy is a possibility available to the Organization. The fact that it is an option does not amount, however, to a legal basis for limiting temporary recruitment to a specific duty station. This would be contrary to staff rules 4.4 and 4.5 which are higher norms and establish different recruitment regimes for professional and general service staff.

25. Second, the administrative instruction in question has a section focusing on eligibility criteria (i.e., section 5), which does not list geographical location as one of them. Further, the said administrative instruction entertains temporary recruitment of candidates at the duty station of the vacancy and outside of it, depending on the personal/professional circumstances of the selected candidate.

26. The Tribunal finds no legal grounds for the Respondent's assertion that limiting temporary recruitments to locally based candidates is a "vested right". Explicitly limiting applications to temporary job openings at the professional level to local staff makes geographical location of a candidate the paramount consideration, which is contrary the Charter and the applicable rules. The Tribunal emphasizes that qualifications, competence and skills must remain the paramount, although not the only, consideration when recruiting.

27. The Tribunal is mindful that, in most cases, temporary appointments call for the Organization to conduct recruitment within the shortest time possible. The Tribunal is also conscious of budgetary constraints that the Organization faces, which could be seen as rationale for favouring local recruitments whenever possible. The Tribunal underscores that these considerations cannot override the existing rule of law within the Organization.

28. For the reasons outlined above, the Tribunal concludes that it is unlawful to use geographical location of candidates as an eliminatory eligibility criterion for temporary openings at the professional level, as was the case for TJO 64192.

*Was the Applicant's candidacy fully and fairly considered?*

29. In his reply, the Respondent submitted that:

The Applicant was not eligible to apply for the Position. He was stationed in Bangkok, and not New York. Despite his lack of eligibility, the [hiring manager] considered the Applicant's candidacy for the Position. The [hiring manager] reviewed his application, and placed him on the long list of candidates.

30. Additionally, as recalled in para. 9 above, the Applicant did not advance to the short list because he did not meet “the eligibility requirement of being located at the duty station [of the vacancy]”.

31. As concluded above, limiting a temporary job opening at the professional level to local recruitment is illegal. Furthermore, the application of an unlawful “eligibility criterion” prevented the Applicant from moving to the short list of candidates and the Respondent failed to minimally show that the Applicant was given full and fair consideration during the selection exercise. It follows, that the Applicant’s candidacy was not afforded full and fair consideration and that the contested decision must be rescinded.

#### *Remedies*

32. Given the above rescission of a decision concerning appointment/promotion, the Tribunal is bound, pursuant to art. 10.5(a) of its Statute, to set compensation that the Respondent may elect to pay as an alternative to the rescission (“compensation in lieu”).

33. In determining the amount of compensation in lieu under art. 10.5(a) of its Statute in appointment or promotion cases, the Dispute Tribunal must take into account the nature of the irregularities on which the rescission of the contested decision was based, and the chances that the staff member would have had to be selected had those irregularities not been committed. However, the determination of the “compensation in lieu” must be done on a case-by-case basis (see *Valentine* UNDT/2017/004) and ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265).

34. In respect of decisions denying promotions, the Appeals Tribunal held that “there is no set way for a trial court to set damages for loss of chance of promotion, and that each case must turn on its facts” (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603). The Appeals Tribunal also held that in calculating such compensation, the Tribunal has to assess the probability for an Applicant to be appointed to a post but for the procedural breach.

35. In this case, five candidates, the Applicant included, applied for the temporary job opening and a person was selected for an 11-month post. The Tribunal is of the view that if the terms of the job opening had been legal and there had been a proper selection process, open to all to apply and be properly considered, the Applicant—who is on the roster of pre-approved candidates and has a longstanding experience and good performance evaluations—would have had a good chance of success.

36. In light of the foregoing, the limited duration of the advertised temporary position, and compensation in lieu generally awarded in cases of non-promotion/selection, the Tribunal finds it appropriate to set the amount of alternative compensation in lieu of rescission at USD3,000.

*Compensation for harm*

37. Under art. 10.5(b) of its Statute, the Dispute Tribunal may award compensation for harm arising out of the Administration's breaches of an applicant's rights under her/his employment contract. The objective of such compensation is to place the staff member in the position he or she would have been in had the breach not occurred (see *Mmata* 2010-UNAT-092).

38. Compensation may be awarded for actual pecuniary or economic loss, or for non-pecuniary damage such as stress or other moral injury, which must be supported by evidence (see *Nyakossi* 2012-UNAT-254). Furthermore, the Appeals Tribunal has determined that the Tribunal cannot award moral damages solely based on an applicant's testimony, and required "corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred" (*Kebede* 2018-UNAT-874).

39. The Applicant has not directly requested moral damage, although he has stated that he has suffered discrimination, humiliation, frustration, and mental anguish. The Tribunal will thus treat this as an application for moral damages, noting that the Applicant is not a lawyer and acts for himself.

40. The Applicant did not submit or suggest any evidence in respect of moral damages. He only asserted in his application that he had suffered morally. Whilst the Tribunal appreciates the position of the Applicant, a mere assertion in the

application is not sufficient, and the Tribunal is bound to act only on the evidence before it. The Tribunal is thus not in a position to make an award in respect of the moral damage asserted by the Applicant.

### **Conclusion**

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

- a. The contested decision is rescinded;
- b. Should the Respondent elect to pay financial compensation instead of rescinding the decision, the Applicant shall be paid the sum of USD3,000 as an alternative;
- c. The above compensation shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;
- d. All other claims are rejected.

*(Signed)*

Judge Rowan Downing

Dated this 27<sup>th</sup> day of March 2019

Entered in the Register on this 27<sup>th</sup> day of March 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva