



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/087

Judgment No.: UNDT/2017/037

Date: 30 May 2017

Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MUNYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Bettina Gerber, UNOG

Introduction

1. The Applicant, an Economic Affairs Officer (P-2) with the United Nations Conference on Trade and Development (“UNCTAD”), contests the administrative decision to cancel Job Opening (“JO”) No. 52264 for the position of Economic Affairs Officer (P-3), Knowledge Development Branch (“KDB”), Division on Technology and Logistics (“DTL”), UNCTAD, following the filling of the post through the lateral transfer of another staff member.

2. As remedies, the Applicant requests:

- a. The rescission of the cancellation of JO No. 52264 and of the lateral reassignment by which the post was filled, together with re-opening of the JO to continue with the selection process;
- b. Material damages in the amount of USD10,000 for loss in pension contributions and retirement benefits, denial of opportunities to further develop his career, and his ineligibility to apply for P-4 posts as long as he occupies a P-3 post on a temporary basis; and
- c. Moral damages resulting from the distress he suffered as a result of the irregularities committed.

Facts

3. On 1 October 2014, the Applicant started working under a Temporary Job Opening (“TJO”) as an Economic Affairs Officer, at the P-3 level, within the Investment Promotion Section, Division on Investment and Enterprise (“DIAE”), UNCTAD. He later undertook functions as an Economic Affairs Officer at the P-4 level, under another TJO, until he was competitively selected for this post in October 2015.

4. On 13 January 2016, a post of Economic Affairs Officer (P-3), KDB, DTL, that was about to become vacant due to its incumbent’s upcoming retirement, was advertised in Inspira under JO No. 52264. The Applicant, who was on the roster

of pre-approved candidates for potential consideration for future United Nations Secretariat JOs with similar functions at the same level, applied on 25 January 2016. The deadline for applications was 12 March 2016.

5. Also in January 2016, it was brought to the Administration's attention that it was increasingly challenging to secure continued financing for the post encumbered by another UNCTAD staff member, who held a fixed-term appointment and served against a project post established for a specific regional programme. This programme had previously been funded with extra-budgetary funds and, when the latter were insufficient, with funds from the programme support account. Following that, on 29 January 2016, the Chief, Resources Management Service ("RMS"), UNCTAD, sent a memorandum to the Divisional Directors explaining the precarious funding situation of said position and informing them about its incumbent's professional background and achievements. The Chief, RMS, requested the Directors "to bear in mind [the incumbent's] qualifications and place her against any suitable vacant P3 post in [their] Division".

6. By memorandum dated 1 March 2016, the Secretary-General, UNCTAD, laterally reassigned, effective 1 April 2016, the incumbent of the above-mentioned position to the post of Economic Affairs Officer (P-3), KDB, DTL, which had previously been advertised via JO No. 52264. The memorandum indicated that the decision had been made taking into account the funding situation for the project post and the competencies and qualifications of its incumbent.

7. On 16 March 2016, UNCTAD requested the United Nations Office at Geneva ("UNOG") to cancel JO No. 52264, as the vacancy had been filled by a lateral reassignment. The JO was indeed cancelled on 17 March 2016. At the time of its cancellation no assessment exercises had taken place.

8. By a system-generated email of 18 March 2016, the Applicant was informed that JO No. 52264 "ha[d] been cancelled and it may be advertised at a later date".

9. On 31 March 2016, the incumbent of the position corresponding to JO No. 52264 retired.

10. On 3 May 2016, the Applicant emailed the Chief, HRMS, UNCTAD, inquiring about the cancellation of JO No. 52264 and whether the post was filled by lateral reassignment on a temporary basis and, if so, when it would be re-advertised. After a reminder, the Chief, HRMS, UNCTAD, confirmed by phone, on 9 May 2016, that the post had been filled by way of a lateral reassignment approved by the Secretary-General, UNCTAD, and would therefore not be re-advertised.

11. On 17 May 2016, the Applicant requested management evaluation of “the cancellation of job opening 52264, that [he] was not selected for [it] despite meeting the position requirements and being on a roster of pre-approved candidates ... and that it [was] subsequently filled with a lateral move”. The decision to cancel the JO and not to select the Applicant was upheld, as per MEU letter dated 8 July 2016.

12. The present application was filed on 28 September 2016. The Respondent filed his reply on 31 October 2016. At the Tribunal’s request, the Respondent filed additional information on 18 November 2016.

13. Pursuant to Order No. 216 (GVA/2016) of 8 November 2016, inviting the parties to provide their views on the need to hold a hearing, the Respondent indicated on 25 November 2016 that in his opinion the case could be decided on the written submissions. The Applicant did not object to such course of action.

Parties’ submissions

14. The Applicant’s principal contentions are:

- a. The JO in question was cancelled six days after the application deadline without explanation. This violated his right to full and fair consideration for the position through a competitive staff selection process based on objective criteria;

b. The reasons provided for the lateral reassignment are questionable: the post against which the transferred staff member used to be appointed was advertised only two months after the lateral reassignment;

c. Extra-budgetary posts are clearly subject to availability of funds. The Organization is under no obligation to ensure perpetual employment. An arbitrary transfer such as the one effected reveals a *de facto* preference for the concerned staff member over holders of regular budget posts. Neither the JO nor the applicable rules and guidelines mention that the funding status of candidates would be part of the selection criteria;

d. The time at which the litigious position would become vacant was known in advance, as was the uncertainty about the funding of the post formerly encumbered by the transferred staff member, which afforded her ample opportunity to apply for other posts. Her lateral reassignment does not entail any restructuring or reorganization of either unit/department, and there is no gain in efficiency;

e. If the head of department/office intended to avail himself of the authority to laterally reassign a staff member to the litigious post, he could have done it in advance of the advertisement of the vacancy;

f. If the review of the applications had purportedly not begun, UNCTAD management would have already been notified of the receipt of applications from rostered candidates and they would have an idea of the number of applications received; and

g. The circumstances of the filling of JO No. 52264 were arbitrary and procedurally flawed and reveal questionable management.

15. The Respondent's principal contentions are:

a. Administrative Instruction ST/AI/2010/3 (Staff selection system) foresees the possibility to fill a vacancy through lateral transfer outside of the staff selection process. The right to full and fair consideration arises only

provided that a selection procedure under ST/AI/2010/3 takes place; this was not so in the present case as the JO was cancelled before undertaking any consideration of the candidates;

b. Cancellation of a JO is allowed, as long as the decision is reasonable, objective, supported by the facts and not tainted by improper motives. In the case at hand, the procedural requirements were respected and the reason for cancellation of the JO is supported by the facts. In this respect, the cancellation took place before the assessment exercise and the placement of any candidate on the recommended list. UNCTAD documented its request to UNOG to cancel the JO by sharing a copy of the memorandum dated 1 March 2016 from the Secretary-General, UNCTAD, with explanations and clarifications for the decision and the lateral reassignment. Furthermore, the Applicant was duly informed of the decision to cancel the JO; and

c. The filling of a vacancy through a lateral reassignment falls within the Administration's discretion, provided that it is not exercised in an arbitrary manner. The Secretary-General, UNCTAD, correctly exercised his authority in this respect. He took into account operational considerations of the Organization, after establishing that UNCTAD could benefit from retaining the concerned staff member in service. Her former position had been funded by a member state's government; however, the relevant funding agreement had come to an end on 31 March 2015 and, since then, it was funded through the programme support account, a funding source that was likely to cease on 31 March 2016. If the same post was advertised two months later, it was only because UNCTAD managed to secure funding from another member state, but the latter committed to donate these funds only after the lateral transfer decision had been made (i.e., effective 1 July 2016). Furthermore, the transferred staff member was on the P-3 Economic Affairs Officer roster and her experience, qualifications and skills fully met the requirement of the post at stake.

Consideration

16. The Applicant contends that he was denied the right to full and fair consideration for the P-3 position at issue, which was advertised and to which he applied before it was cancelled further to the lateral reassignment of a colleague. The Respondent submits that the Administration has the discretion to make lateral reassignments under sec. 2.5 of ST/AI/2010/3, that the JO cancellation constitutes a proper exercise of discretion, and that no right to full and fair consideration had arisen for the Applicant in the circumstances of the case.

17. In this light, the Tribunal must address the legality of filling a vacant post by lateral transfer coupled with the cancelling of the JO in the circumstances of this case.

Filling of the vacancy by lateral transfer

18. ST/AI/2010/3 sets the legal framework for the recruitment, placement, promotion and mobility of staff within the Secretariat, and expressly excludes lateral reassignments from its scope of application. Indeed, sec. 3.2 of this instruction provides:

3.2 The system shall not apply to the following:

...

(l) Lateral movements of staff by heads of department/office/mission in accordance with section 2.5 above;

19. Consistently, sec. 2.5 of ST/AI/2010/3 reads:

Heads of department/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.

20. Filling a given post by lateral transfer is thus expressly contemplated in the applicable legal framework, and constitutes a recognised exception to the competitive process provided for in the Organization's staff selection system.

21. In fact, the jurisprudence has repeatedly stated that the Administration enjoys wide discretion with respect to internal organization and staffing matters (see, e.g., *Simmons* 2016-UNAT-624, *Pacheco* 2013-UNAT-281). Specifically, in relation with the filling of a post by lateral transfer, this Tribunal found that reassigning a staff member of the same grade to an unencumbered position without going through a selection process as prescribed in ST/AI/2010/3 does not *per se* violate any applicable rule.

22. Indeed, *Krioutchkov* UNDT/2016/051 (not appealed) held that:

29. The decision to fill a vacancy by lateral transfer is in conformity with the terms of [the above-quoted sec. 2.5 of ST/AI/2010/3]. As such, it cannot be said to be against the applicable legal framework.

...

32. None of [the higher provisions prescribing the necessity of securing the highest standards of efficiency, competence and integrity of staff] rules out lateral transfers.

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 ... 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).

23. Along the same lines, *Krioutchkov* UNDT/2016/070 (not appealed) ruled:

26. The [relevant ST/AI/2010/3 provisions] [leave] no room for doubt that filling vacant posts by a lateral transfer is in conformity with the applicable rules. It is unconvincing ... to claim that lateral transfers are, as a matter of principle, contrary to art. 101.3 [of the Charter] 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 by 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).

24. The above notwithstanding, the Tribunal has made it clear that the Organization's authority to laterally reassign a staff member to a vacant post without conducting a full-fledged selection process is not unfettered. Like any discretionary decision, lateral reassignments must not be arbitrary, capricious, tainted by improper motives, based on erroneous or irrelevant considerations, procedurally flawed or resulting in a manifestly unreasonable outcome (*Krioutchkov* UNDT/2016/051, *Krioutchkov* UNDT/2016/070).

25. In this connection, the Applicant suggests that the lateral reassignment in question showed a *de facto* preference for a staff placed against an extra-budgetary project over others holding regular budget posts.

26. It is a well-settled principle that the burden of proof of any allegations of ill-motivation and/or extraneous factors rests with the party that proffers such allegations (see, e.g., *Azzouni* 2010-UNAT-081, *Jennings* 2013-UNAT-329, para. 25, *Obdeijin* 2012-UNAT- 201, para. 38). In this case, no concrete evidence has been adduced in this respect. While UNCTAD management has expressly put forward that funding uncertainty for the concerned staff member's former post was one of the factors considered, this fact, in and of itself, does not demonstrate a bias.

27. The documents on file support the finding that the challenged transfer was decided bearing in mind the interests of both the Organization and the staff member whose position was at risk, since the decision-maker expressed the view that UNCTAD would benefit from retaining that staff member's services. In this context, the intent to protect an employee in a vulnerable situation cannot be said to amount to arbitrary or improper motivation.

28. Furthermore, the reason given was supported by the facts, inasmuch as the evidence indicates that at the time the decision to laterally transfer the staff member was taken no source of funding had been secured for the project post then

encumbered by that staff member. The employment of that staff member was thus compromised, and the fact that a funding agreement was concluded shortly thereafter does not call into question that a real uncertainty existed at the material time.

29. Additionally, it is worth noting that both the lateral transfer and the cancellation of the JO were well recorded and clearly motivated and, in this sense, were also adequately transparent.

30. For all of the foregoing, the Tribunal cannot find that the choice of filling the vacancy at issue by lateral transfer constituted an abusive exercise of discretion.

Cancellation of the JO

31. The Applicant takes issue with the fact that cancellation of the JO took place not only after its advertisement but also after the end of the period for application.

32. Although ST/AI/2010/3 contains no specific provisions on the possibility of cancelling a JO, the Inspira Manual for Hiring Managers (Version 3.0) details what stands as the accepted practice in line with the rules in place. Sec. 6.10 of the Manual (Modifying or Cancelling a Published Job Opening) provides:

The following rules apply when considering to cancel a published job opening:

...

3. Changes to a published job opening are not allowed. However, should changes be requested to a published job opening, the Hiring Manager must provide a detailed written justification explaining the reasons for changes to the Senior Recruiter. The Senior Recruiter will cancel the job posting and if applicable, the Hiring Manager will create a new job opening with the necessary changes. The Recruiter will inform all applicants who have applied of the cancellation of the posting and if applicable, re-advertisement.
4. When the request to fill a position is withdrawn during the approval process of the job requisition, the job requisition

can be cancelled (denied) by the Senior Recruiter, at the request of the Hiring Manager or the Staffing Table Manager.

5. When the position becomes no longer available after the job opening has been published, the Hiring Manager must provide a detailed written clarification for the reasons of cancellation to the Senior Recruiter. The Senior Recruiter will cancel the job posting and the Recruiter will inform all applicants who have applied, if any.¹

...

7. The Hiring Manager shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list who has passed the assessment exercise.

33. The Tribunal is satisfied that the Administration is entitled to cancel a JO, subject to a number of limitations, to wit:

- a. The cancellation must occur before the assessment exercise and the placement of at least one candidate on the recommended list (*Verschuur* UNDT/2010/149);
- b. If, like in the present case, an advertised position becomes no longer available, the Hiring Manager must provide a detailed written clarification for the reasons of the cancellation of the JO; and
- c. The candidates who applied for the JO must be informed of its cancellation.

34. After examination of the documents at hand, the Tribunal considers that the above-cited requirements were met in this case. First, the assessment of candidates for JO No. 52264 had not commenced at the time of cancellation. Consequently, no candidate—including the Applicant—was or could have been placed on the recommended list. Second, when, on 16 March 2016, UNCTAD requested UNOG to cancel the JO, it advised that the reason for its cancellation was that the post had already been filled by lateral transfer. It also shared with

¹ This obligation is reiterated in sec. 5.13 of the Inspira Manual for the Recruiter (Release 3.0).

UNOG a copy of the memorandum of 1 March 2016 from the Secretary-General, UNCTAD, which explained his decision to proceed with the lateral reassignment. Third, the Applicant was promptly informed of the cancellation of the post by email dated 18 March 2016.

35. Therefore, from a legal standpoint, the decision to cancel JO No. 52264 fell within the Administration's purview and was made in observance of all the necessary conditions. The Tribunal further stresses that not only the Applicant had not been recommended—let alone selected—but, far from there, the assessment phases had not yet been undertaken. At that stage, despite the JO having been advertised and the application period having expired, the Applicant did not have any entitlement to have the selection process brought to completion.

36. Since no breach of the Applicant's terms of appointment has been established, he is not entitled to compensation.

Conclusion

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

The application is dismissed.

(Signed)

Judge Teresa Bravo

Dated this 30th day of May 2017

Entered in the Register on this 30th day of May 2017

(Signed)

René M. Vargas M., Registrar, Geneva