

# UNDT/2018/093, Krioutchkov

## UNAT Held or UNDT Pronouncements

The main issue for determination in this matter is whether the advertised job opening was a “recruitment from roster” position, thus barring the Applicant from competing for it. If it was not, a resulting issue to examine would be what remedies, if any, the Applicant is entitled to. The Tribunal noted that in the case at hand, nothing in the vacancy announcement indicated that only candidates from the language or any other roster for that matter were eligible to apply. The Tribunal found that the Organization cannot be permitted to post vacancy announcements and use eligibility requirements that are not divulged to the public therein to eliminate candidates who apply in good faith believing that they meet the requirements that appear on the published job opening. The Tribunal therefore found that the Applicant’s eligibility was never assessed in a transparent manner but rather through unpublished requirements unknown to the candidates for the job opening at stake. Moreover, even entertaining that the Organization was not required to post a job opening in the case at hand, if it elects to do so, it is bound to respect and follow the applicable recruitment rules. The Respondent cannot claim, on the one hand, not to be required to advertise a vacancy and, on the other hand, that if he chooses to advertise, he should not be held to the same standards and rules of recruitment. The Tribunal found that since the contested post is one of Translator (Russian), the requirement for a command of Spanish, rather than Russian, as the candidate’s primary language was perplexing, to say the least. The Tribunal further found that Russian was indispensable for this position, while Spanish appeared to have no significant importance for it. As admitted by the Respondent, the reference to Spanish instead of Russian was thus clearly an error which vitiated the entire recruitment process. The Tribunal was concerned that the necessary care and attention to actually reflect the intended eligibility and language requirements for the job opening was not applied in the case at hand. The Respondent’s actions in connection with the selection process were not aligned with the published eligibility and language requirements. This, in turn, vitiated the contested decision, which was rescinded. As the contested decision concerned an appointment, the Tribunal was directed by art. 10.5(a) of its Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision. The Tribunal found it appropriate to set the amount for compensation in lieu at the equivalent of two months’ net base salary. No compensation for moral damages was awarded.

## Decision Contested or Judgment/Order Appealed

The Applicant contested the decision not to evaluate his candidature for, as well as his non-selection and the failure to inform him of his non-selection to, the position of Russian Translator (“P-3”), at the United Nations Office at Nairobi (“UNON”).

## Legal Principle(s)

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). The determination of the “compensation in lieu” must be done on a case-by-case basis (see Valentine UNDT/2017/004) and it ultimately carries a certain degree of empiricism (see Mwamsaku 2011-UNAT-265). 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; 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. The Appeals Tribunal has held that compensation has to be assessed “in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables” (Niedermayr 2015-UNAT-603).

#### Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

This judgment was vacated by the Appeals Tribunal (Krioutchkov 2019-UNAT-920) and the case was remanded to the Dispute Tribunal for a full consideration of its merits by another Judge.

Full judgment

[Full judgment](#)

Applicants/Appellants

Krioutchkov

Entity

ESCAP

Case Number(s)

UNDT/GVA/2016/100

Tribunal

UNDT

Registry

Geneva

Date of Judgement

21 Sep 2018

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)

Applicable Law

UNDT Statute

- Article 10.5

Related Judgments and Orders

UNDT/2016/187

UNDT/2016/025

UNDT/2010/009

UNDT/2017/004

2012-UNAT-219

2015-UNAT-603

2017-UNAT-742