



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/091

Judgment No.: UNDT/2015/033

Date: 15 April 2015

Original: English

Before: Judge Alessandra Greceanu

Registry: Judge Alessandra Greceanu (Ori) New York 50 L50 -1.5stry:

Introduction

1.

Facts

4. By email dated 17 November 2011 from the Office of the Director, PPBD, the Applicant was informed that her application for a Programme Budget Officer position at the P-4 level had been unsuccessful (Job Opening number 10-FIN-OPPBA-15424-R-NEW YORK). However, she was also advised that “your name is placed on a roster of pre-approved candidates for potential consideration, within a timeframe of three years for women ... as of 01-DEC-2011 for future job openings with similar functions at that level at the United Nations Secretariat”.

5. In an email dated 4 May 2012, the Chief, Staffing Unit A, OHRM responded to a query from the Applicant and confirmed that the Applicant had “rostered status” in connection with her previous application for the Programme Budget Officer position at the P-4 level.

6. JO 24760 was advertised on Inspira with a posting period of 29 August to 11 November 2012 for a Programme Budget Officer at the P-4 level.

7. The Applicant applied for the Post on 31 August 2012.

8. By memorandum dated 12 February 2013 to the Executive Officer of the Department of Management, the then ASG/C, as the head of OPPBA, requested the cancellation of JO 24760 and the lateral transfer of Ms. CP to the advertised post.

The memorandum stated:

The purpose of this memorandum is to request cancellation of Job Opening 24760, which was advertised for a P-4 Programme Budget Officer in service I of the Programme Planning and Budget Division (PPBD) and to laterally transfer [Ms. CP], P-4 Programme Budget Officer, Office of Director, PPBD, to the advertised post.

...

In view of the demands of servicing the General Assembly during the main part of the sixty-seventh session and the subsequent workload related to the preparation of the proposed programme budget for the

biennium 2014-2015, Service I has not yet begun the evaluation of applicants for the job opening.

I have now decided to laterally move [Ms. CP] P-4 Programme Budget Officer in the Office of the Director PPBD to the vacant position. The staff member, the Chief of Service I (the Hiring Manager) and the Director of PPBD agree to the transfer.

9. On 1 March 2013, the Applicant enquired with the Director, OPPBA as to the status of JO 24760, as it had been several months since it had closed and Inspira still showed that the Applicant's application was under consideration.

10. By email dated 5 March 2013, the Executive Office, Department of Management, requested that the Chief, Staffing Unit A, Strategic Planning and Staffing Division ("SPSD"), OHRM, cancel JO 24760, "which will be filled through a lateral reassignment which was approved by the Controller on 12 Feb[ruary]". By return email the same day, the Chief, Staffing Unit A, SPSD, OHRM confirmed that JO 24760 had been cancelled.

11. On the same day, the Applicant received an automated email from OHRM thanking her for her application and informing her that the job opening had been cancelled.

12. On 9 July 2013, a personnel action was approved and the 12 February 2013 decision to laterally transfer Ms. CP to JO 24760 was implemented by a lateral reassignment of Ms. CP, effective from 1 July 2013 until 31 December 2013.

Procedural background

13. On 8 March 2013, the Applicant filed a request to the Management Evaluation Unit ("MEU"), seeking management evaluation of:

- (i) abuse of discretionary authority, retaliation, obstruction of

included the following relevant information relating to the decision by the ASG/C to cancel JO 24760 and to transfer Ms. CP (emphasis added):

The Controller states that, as no progress was being made to fill the job opening, she decided to cancel the job opening and to fill the post via lateral transfer. The Controller states that the staff member who was transferred to the post had previously expressed interest in moving laterally within the Division. *The Controller notes that this staff member did not apply for the job opening as it was part of her functions to create the job opening.*

20. On 3 December 2013, the Applicant filed her response to Order No. 322 (NY/2013). She sought to expand the scope of the present case to encompass an additional submission arising from her unsuccessful application for a Programme Budget Officer position at the P-4 level advertised under Job Opening number 13-FIN-DM-27499-R-NEW YORK (“JO 27499”). In addition, in response to the Respondent’s submission that the Applicant could only pursue her allegations of abuse of authority and retaliation based on the outcome of a complaint filed under the Secretary-General’s bulletin on harassment, the Applicant cited a number of informal attempts she had made in the past to resolve the issues she raises in her application. She further noted that, since filing her application, she had filed a harassment complaint with the Ethics Office on 17 September 2013. The Applicant also reiterated her request for further documentation from the Respondent and stated that she did not wish for the Tribunal to hold a hearing in this case.

21. By Order No. 337 (NY/2013) dated 10 December 2013, the Duty Judge (Judge Greceanu) instructed the Respondent to file a response to the Applicant’s 3 December 2013 submission. On 15 January 2014, the Respondent submitted that the Tribunal should reject the Applicant’s additional claims as inadmissible.

22. On 4 July 2014, the present case was assigned to the undersigned judge.

23. On 9 October 2014, by Order No. 274 (NY/2014), the Tribunal rejected the Applicant’s request for the Tribunal to consider the additional claims set out in her response to Order No. 322 (NY/2013). The Tribunal observed that it is only after

d. The cancellation of the vacancy was not legitimate and the discretionary authority was abused, representing another attempt to sabotage her career despite the favorable judgments in previous selection/promotion cases brought by her before the Dispute Tribunal. As a result, another opportunity for her career advancement had been blocked, creating irreparable damages and violations to her due process and contractual rights.

Respondent's submissions

25. The Respondent's principal contentions may be summarized as follows:

a. The Applicant's allegations of abuse of authority and retaliation are not receivable because she did not submit a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority);

b. The Applicant's claim against the MEU decision is not receivable. While the findings of a management evaluation may be reviewed by the Dispute Tribunal in the context of a previous Dispute Tribunal in the context

the view that the best way to carry out the required functions for the position was to laterally transfer Ms. CP. This was within the lawful and reasonable discretion of the ASG/C to manage and allocate human resources within her office;

e. The lateral transfer was lawful and the decision was made in accordance with the Staff Regulations and the relevant administrative issuances. The burden is on the Applicant to demonstrate that the lateral transfer of Ms. CP violated her rights. She has not done so;

f. The Applicant bears the burden of proof in establishing that extraneous considerations tainted the contested decisions. She has not met that burden;

g. The Applicant's claim that she lost

(a) A change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period.

29. Staff rule 11.2 of ST/SGB/2013/3 provides:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. ...

30. ST/AI/2010/3 (Staff selection system) provides, in relevant parts:

Section 1 Definitions

The following definitions apply for the purposes of the present instruction:

...

(k) *Head of department/office*: official appointed by the Secretary-General to lead a department, office, regional commission or other major organizational unit of the Secretariat who is directly accountable to the Secretary-General in the exercise of the functions set out in section 5 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11);

...

(m) *Hiring manager*: the official responsible for the filling of a vacant position. The hiring manager is accountable to his/her head of department/office to ensure the delivery of mandated activities by effectively and efficiently managing staff and resources placed under his or her supervision and for discharging the other functions listed in section 6 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11);

...

(o) *Internal applicants*: serving staff members holding an appointment under the Staff Rules, other than a temporary

appointment, who have been recruited after a competitive process under staff rule 4.15 (review by a central review body) or staff rule 4.16 (competitive recruitment examination) ... ;

(p) *Job opening*: vacancy announcement issued for one particular position or for a set of job openings;

(q) *Lateral move*: movement of a staff member to a different position at the same level for the duration of at least one year. The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different occupational group. Inter-agency loans or other movements to and from other organizations of the United Nations common system are recognized as “lateral moves”. Within the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member. A change in supervisor without a change in functions does not represent a lateral move. Temporary assignments of at least three months but less than one year, with or without special post allowance, shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year;

...

(w) *Roster*: a pool of assessed candidates reviewed and endorsed by a central review body and approved by the Head of Department/Office/Mission who are available for selection against a vacant position. Roster candidates may be selected without referral to a central review body;

2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

2.2 ... The system provides for the circulation of job openings, including anticipated staffing needs in missions through a compendium of job openings [footnote omitted] and specifies the lateral mobility requirement applicable for promotion to the P-5 level.

2.3 Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within an occupational group and/or with similar functions.

...

2.5 Heads of departments/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 ...

2.6 This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review body members, the recruiter, namely, the Office of Human Resources Management

in the Trades and Crafts category and S-3 and above levels in the Security Service category as well as to staff in the Professional and above categories and to the Field Service category for positions established for one year or longer, irrespective of the functions or source of funding. The process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present instruction. For positions at the D-2 level, the functions normally discharged by a central review body shall be discharged by the Senior Review Group, prior to selection by the Secretary-General.

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.

...

4.1 Immediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings. The compendium shall include both position-specific job openings and generic job openings. The compendium shall be published electronically and shall be updated regularly.

4.2 Position-specific job openings shall be included in the compendium when:

(a) A new position is established or an existing position is reclassified;

(b) The incumbent separates from service;

(c) The incumbent is selected for another position under the provisions of this instruction or as a result of a lateral reassignment by the head of department/office within that department or office.

4.3 Generic job openings shall be issued in the compendium for the purpose of creating and maintaining viable rosters of qualified candidates for immediate and anticipated job openings, identified through workforce planning, in entities with approval to use roster-based recruitment, such as peacekeeping operations, special political missions and other field operations. Generic job openings shall contain information on the location of current and anticipated job openings and a clause making reference to the generic nature and roster purpose. Where such entities deem it necessary, position-specific job openings may also be issued to advertise job openings.

4.4 The hiring manager or occupational group manager shall be responsible for creating the job opening and for promptly requesting

1.1 The purpose of the temporary appointment is to enable the Organization to effectively and expeditiously manage its short-term staffing needs. As stated in General Assembly resolution 63/250, “temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates”.

...

Section 2

Use and duration of temporary appointments

2.1 Pursuant to staff rule 4.12 (a), a temporary appointment may be granted for a single or cumulative period of less than one year to meet 5 TD 1 needs. As to af ter

programme manager, any extension beyond three months shall require the issuance of a temporary job opening.

Should changes be requested in a job opening already published and/or if you wish to cancel the job opening for other reasons, you must provide a detailed written justification explaining the reasons to the Senior Recruiter. A new job opening has to be created.

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

1. The **Hiring Manager** shall make every effort to accurately reflect the requirements of the job opening in the job posting and evaluation criteria, before posting the opening.
2. Changes to a 'draft' or 'pending approval' job opening are allowed while the approval process is still in progress. The approving parties may return or "push-back" the case to each other, as appropriate, for additional review and changes, before reaching the final approval and posting by the **Recruiter**.
3. Changes to a published job opening are not allowed [footnote omitted]. 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.
6. In the event the assessment panel concludes that none of the applicants were found suitable for the position, the assessment of the applicants will be properly recorded in *inspira* by the **Hiring Manager**. The **Hiring Manager** will then submit to the **Senior Recruiter** a request to cancel the job opening, along with a detailed written justification explaining the reason why none of the applicants were found suitable.
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. In this respect, reference is made to a judgment made in the UN Tribunal on cancellation of a vacancy announcement [footnote reads: “UNDT – Judgment No.: UNDT/2010/153, Case No.: UNDT/NBI/2009/04”].

34. The Recruiter’s Manual – Manual for the Recruiter on the Staff Selection System (October 2012) (“the Recruiter’s Manual”) states, in relevant parts (emphasis in original):

4.1 Recruitment Planning

1. *Inspira* is used to advertise vacant positions for one year or longer, irrespective of the source of funding or type of functions, in the following categories:
 - General Service category at the G-5 and above levels
 - Trade and Crafts category at the TC-4 and above levels
 - Security Service category at the S-3 and above levels
 - Professional and higher categories at all levels
 - Field Service category at all levels.

These positions are filled through the issuance of a job opening on *inspira*.

2. Notwithstanding the above, positions at the P-1 and P-2 levels are recruited primarily through competitive examinations (G to P or Young Professionals Programme (YPP) (previously the NCRE) or Language Competitive Examination (LCE)) and the subsequent managed reassignment programme for Junior Professionals. Appointments of staff may also take place through voluntary lateral reassignment initiatives and *Heads of Departments/Offices* retain the authority to transfer staff members within their departments to vacant positions at the same level without the advertisement of a job opening in *inspira* [footnote omitted].
3. Entities with approval to use roster-based recruitment publish generic job openings for the purpose of creating and maintaining viable rosters of qualified candidates for immediate and anticipated vacancies, including vacancies for

- a. The entities with approval to use roster-based recruitment to fill project-related positions in the field are: Department of Field Support (DFS), United Nations Office on Drugs and Crime (UNODC), Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Human Settlements Programme (UN-HABITAT), United Nations Environment Programme (UNEP) and the Office of the High Commissioner for Human Rights (OHCHR). The intent is to ensure that these entities are able to fulfil their mandates in a timely manner. The use of the roster-based option does not apply to established positions in the field such as representative and programme management officers.

...

6. The **Hiring Manager** is responsible for initiating the job opening process in *inspira* through the selection of a base document and completion of the job details section. The **Staffing Table Manager** and **Senior Recruiter** may provide assistance in this process.
7. The **Hiring Manager** is responsible for creating the job opening in a timely manner and promptly requesting the inclusion of the job opening in the compendium. The **Recruiter** may provide assistance in this process.
8. Job openings which 160 days after initiation do not record any

described in the following section outlines the necessary steps that **Recruiters** and **OGMs** need to engage to retain this pool of qualified applicants expeditiously available for placement.

Receivability and scope of the case

36. The Applicant contests the administrative decisions of OHRM from 5 March 2013 to cancel JO 24760 following the 12 February 2013 request for cancellation from the ASG/C and the 12 February 2013 decision of the ASG/C to laterally transfer another staff member to the vacant post. The Applicant filed a request for management evaluation of both of these decisions to the MEU on 8 March 2013 (see para. 13 above), within 60 days of the date that she was notified of the decisions, 5 March 2013 and 6 March 2013, respectively.

37. On 13 June 2013, the present application was filed before the Dispute Tribunal, within 90 days from the day when the MEU's response was supposed to be communicated to the Applicant. Therefore, the Tribunal finds that the parts of the application contesting the decisions to cancel JO 24760 and to transfer another staff member to the Post are receivable. On 29 November 2013, the Under-Secretary-General for Management informed the Applicant of the outcome of her MEU request, namely that the Secretary-General had decided to uphold the contested decisions.

38. The Applicant also contests in her application the Administration's failure "to give full, fair and timely consideration to [her] candidacy to fill several vacancies for P-4 Programme Budget Officer as follows VA# 422344, 10-FIN-DM-OPPBA-15424 ... 11-FIN-DN-OPPBA-21976, 11-FIN-DM-OPPBA-20766". The Tribunal notes that there is no evidence on the record that the Applicant filed request(s) for a management evaluation of these contested decisions.

39. In accordance with the mandatory provisions from staff rule 11.2(a) and (c), a staff member who wishes to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of employment, *shall* as a first step, submit to the Secretary-General in writing a request for

a management evaluation of the administrative decision within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

40. Pursuant to these provisions and the consistent jurisprudence of the Dispute Tribunal and Appeals Tribunal (see *Christensen* 2013-UNAT-335 and

included in the application will only be taken into account as part of the factual context of the case.

44. JO 24760 was advertised on Inspira with a posting period of 29 August to 11 November 2012. The Applicant applied for this position on 31 August 2012.

45. On 12 February 2013 the then ASG/C decided to request cancellation of JO 24760 and to laterally transfer Ms. CP to the advertised post. On 5 March 2013, OHRM approved the request and cancelled the job opening. The Applicant was notified on 6 March 2013. The Tribunal considers that the contested decision mentioned above has two components:

- a. The 5 March 2013 OHRM decision to cancel the job opening for the Post following the 12 February 2013 ASG/C decision to request the cancellation of the job opening; and
- b. The 12 February ASG/C decision to laterally transfer Ms. CP to the Post.

The role of the hiring manager in creating the job opening for the Post

46. The Tribunal notes that sec. 4.4 of ST/AI/2010/3 states that the hiring manager is responsible for *creating* the job opening and for promptly requesting the inclusion of the announcement in the compendium, with the assistance of the executive or local human resources office. In accordance with sec 5.1.4 of the Recruiter's Manual, the hiring manager "completes a job request, prepares evaluation criteria, drafts the Job Opening and submits it to the Staffing Table Manager". Section 5.1.1 of the Recruiter's Manual states that "the Recruiter, upon request from the Hiring Manager, may assist the Hiring Manager during the creation

In case s/he needs support in creating the job opening, a request for assistance may be addressed to the recruiter—the executive or local human resources office. The Tribunal considers that the purpose of these provisions is to protect the integrity and objectivity of the selection process.

48. Staff regulation 1.2(e) states that “by accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view”. It follows that when staff members discharge their functions, they should only act in the interests of the Organization and not in their own interest. The Tribunal considers that this is one of the main reasons why only the hiring manager and, if requested, staff members from OHRM (executive or local office) are to be involved in the creation of a job opening—to ensure not only the fairness of the selection process, but also the credibility of the process, which must always be perceived as objective. The Tribunal considers that another reason that the hiring manager has the entire responsibility for creating the job opening is to protect the right of all eligible staff members to be considered for the vacant post. The involvement of other staff members in creating the job opening may preclude them from applying for the post in order to preserve the integrity of the staff members involved, the fairness of the selection process, and the rights of other applicants.

49. The Tribunal notes that th

a roster for either a position-specific or generic job opening, as a result of a selection process initiated on or after 22 April 2010, would be retained on that roster indefinitely. Prior to the amendment, candidates who were placed on a roster for either a position-specific or generic job opening were to be retained on that roster “for a period of two years for male candidates and three years for female candidates after the first day of the month following the selection decision”. ST/AI/2010/3/Amend.1 also eliminated the previous mandatory requirement for a decision to select an external candidate over an internal roster candidate to be justified in writing and approved by OHRM. The amendments came into effect on 29 June 2012. Therefore, from 29 June 2012, the Applicant is to remain a roster candidate indefinitely or until an amendment to ST/AI/2010/3/Amend.1 is passed. Therefore, she was on the roster on 31 August 2012, when she applied for the Post and after the cancellation of JO 24760 on 5 March 2013.

The staff selection system versus lateral moves/lateral assignments and transfers

55. In *Korotina* UNDT/2012/178 (not appealed), the Tribunal stated as follows:

As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of

59. In each of the manuals for the Hiring Manager, Recruiter, and Central Review Body, there is a similar provision, set out in sec. 1.1 of each manual, which states that the respective manuals serve as “a comprehensive step-by-step guide on the staff selection process”.

60. The Tribunal considers that, in accordance with the above-mentioned provisions, the manuals for the Hiring Manager, Recruiter and Central Review Body are all comprehensive step-by-step guides on the staff selection process, which means (in accordance with the definition of the word “comprehensive” in the *Oxford English Minidictionary* (Oxford University Press, 1995) and the *Webster’s New World College Dictionary* (Wiley Publishing, Inc., 2010)) that they are including/dealing with all or many of the relevant details of the staff selection process. Further, the Tribunal considers that, once adopted and published on Inspira, these manuals, which establish in detail the steps to be followed in the selection process, must be respected by the Administration.

61. In *Gordon*

63. The last sentence from sec. 2.3 of ST/AI/2010/3 states (emphasis added):

The other candidates *shall* be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within an occupational group and/or with similar functions

64. “Roster” is defined in para. (w) of sec. 1, the definitions section of ST/AI/2010/3, as “a pool of assessed candidates reviewed and endorsed by a central review body and *approved by the Head of Department/Office/Mission* who are *available* for selection against a vacant position without referral to a central review body (emphasis added)”.

65. Section 17.1 of the Recruiter’s Manual and sec. 15.1 of the Hiring Manager’s manual define “rosters” as follows:

Rosters consist of candidates who have been endorsed by a **Central Review body** for a particular job opening and who have indicated an interest in being considered for selection for a future job opening within the same job code. A job code is defined by the following parameters: specific job family, category/level, functional title and roster type.

These candidates, who, in connection with a previous application for either a generic or a specific job opening, have undergone a rigorous competency and knowledge-based assessment and vetting process conducted by an **Assessment Panel** may be selected without referral to a **Central Review body**.

Rostered applicants are considered ready, willing and able for positions with similar functions and requirements (work experience, education, languages, competencies and skills). Roster applicants can express their interest in newly advertised position-specific job openings for consideration by submitting their updated PHP and cover letter via inspira. Entities with approval for roster-based recruitment may decide to select a roster applicant without having to advertise the new vacant position. In this case, a review by the **Central Review body** is not required, since the rostered applicant is already vetted, hence speeding up the recruitment process.

66. Section 3.1 of the Recruiter’s Manual and the Hiring Manager’s Manual each state that “[t]he process of creating a job opening begins when the **Hiring Manager**

identifies one or more positions that need to be filled (emphasis in original)” and that the process of creating a job opening *ends* when:

- Entities with approval for the roster-based recruitment select a roster candidate without having to advertise the new vacant position. In this case, a job opening must be created to record the need to fill the vacancy, but the job opening does not need to be published.
- The Recruiter [OHRM] publishes the job opening so interested applicants can apply for consideration.

67. Section 4.1 of the Hiring Manager’s Manual and Recruiter’s Manual state that Inspira is used to advertise vacant positions for one year or longer, irrespective of the source of funding or type of functions, in certain situations for Professional and higher categories at all levels. Section 4.1.2 of each of these manuals states that (italics added, bold italics in original):

Appointments of staff may also take place through *voluntary* lateral reassignment initiatives and

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a transfer is not an appropriate option for the head of department, the job opening is published on Inspira.

77. The Tribunal notes that while the procedural steps for selection from the roster *after the publication of the job opening* are detailed and covered by the manuals, there are no procedural steps provided for the first option in secs. 3.1 and 17.1 mentioned in the Hiring Manager's and Recruiter's manuals, respectively, when the selection process ends *during the creation of the job opening, by the hiring manager recommending, and the head of department selecting a roster candidate without having to advertise the new vacant position.*

78. In the present case the record shows that after JO 24760 was created by the Hiring Manager, the Recruiter published it on Inspira for the period 29 August to 11 November 2012. The Tribunal considers that the following conclusions can be drawn from the fact that the vacant post was published on Inspira and from the content of the vacancy announcement:

- a. The job opening was for a position of one year or longer;
- b. The Hiring Manager (Chief of Section I, OPPBA) did not recommend to the head of the department any of the roster candidate(s) pre-approved (including the Applicant) before the publication of the job opening. There is no evidence to support the Applicant's statement that from the 191 applicants, she was the only roster candidate;
- c. The Head of Department (ASG/C) did not decide to transfer a P-4 staff member within the department, including before the publication of the job opening 24760 and the Tribunal finds that there is no evidence that Ms. CP expressed her will for a lateral transfer before or after the creation and the publication of the JO 24760 or during the posting period, as stated in the contested decision.

The decision to cancel the job opening for the Post

79. Section 6.10 (Modifying or Cancelling a Published Job Opening) of the Hiring's Manager's Manual states:

Should changes be requested in a job opening already published and/or if [the hiring manager] wish[es] to cancel the job opening for other reasons, [s/he] must provide a detailed written justification explaining the reasons to the Senior Recruiter. A new job opening has to be created.

80. Section 4.1.8 of the Recruiter's Manual states (emphasis in original):

Job openings which 160 days after initiation do not record any progress, (i.e. movement through the various stages of the recruitment process) will be cancelled. In this case, the *Hiring Manager* will have to create a new job opening and start the process all over again.

81. Section 6.10 of the Hiring Manager's Manual requires the hiring manager to provide a detailed written justification if he or she wishes to cancel a job opening. Section 4.1.8 states that if there is no progress 160 days after the initiation of a job opening, that job opening "will" be cancelled. The Tribunal considers that sec. 6.10 of the Hiring Manager's Manual and sec. 4.1 of the Recruiter's Manual are relevant in the present case and that there is no manifest contradiction betwee.3458(Tc-.0P458(T.0023

of the Respondent's discretion based on the reasoned request for cancellation made by the ASG/C.

The decision to laterally transfer Ms. CP to the vacant post

86. The Tribunal notes the comments provided by the ASG/C to the MEU, as quoted in their decision dated 29 November 2013, which indicates that Ms. CP did not apply for the post (emphasis added):

The Controller states that, as no progress was being made to fill the job opening, she decided to cancel the job opening and to fill the post via lateral transfer. The Controller states that the staff member who

90. A change of the employment contract usually consists of a temporary or permanent change of the location and/or type of work and can be determined by the need for a better organization of the work or social-economic necessities, but also by personal interests of the employees.

91. The employment contract can be modified:

a. Consensually by the agreement of the parties or unilaterally by the employer. The consensual agreement to modify the contract, which is the general rule, has no restrictions but must respect the general principles of law, which are against any imposed unlawful transactions and/or restrictions to the employee's essential elements of contract—the location of work, type of work and salary. As an exception from the general rule, the employer can only unilaterally decide without the consent of the employee to temporarily modify the location and type of work in the interest of the Organization, for a better organization of work, as a disciplinary measure for example a demotion, or as a protection measure for staff members' health benefit;

b. In relation to the type of work and/or location of work in the same or different organizational units, duty stations, missions or occupational groups;

c. Temporarily or permanently.

92. The Tribunal notes that three different legal terms were used to describe Ms. CP's change of post: lateral transfer, lateral move and lateral reassignment.

93. Section 2.1 of ST/AI/2010/3 states:

The present instruction establishes the staff selection system ("the system") which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.

94. Section 2.2 of ST/AI/2010/3 states (emphasis added):

The system provides for the circulation of job openings, including anticipated staffing needs in missions *through a compendium of job openings* [footnote omitted] and specifies the lateral mobility requirement applicable for promotion to the P-5 level.

95. As results from secs. 1.1, 2.1, 2.2, 2.3, 3.1, 3.6 and 3.7 from ST/AI/2010/4/Rev.1 (“Administration of temporary appointments”), the purpose of a temporary appointment is to enable the Organization *to effectively and expeditiously* manage its *short staffing needs* and it may be granted for a single or cumulative period of *less than one year*. The temporary appointment must (“shall”) have an expiration date specified in the letter of appointment, *must (“shall”) not be used* to fill needs that are expected to last for one year or more and, when a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager. The selected candidate shall be offered a temporary appointment unless s/he already holds another type of appointment. Candidates holding a permanent or continuing appointment *will retain* their permanent or continuing appointment and *will be assigned* to the position to be temporarily encumbered. Candidates holding a fixed-term appointment *will retain* their fixed-term appointment and *will be assigned* to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

96. Section 1(q) of ST/AI/2010/3 defines a lateral move, to which ST/AI/2010/3 does not apply in accordance with sec. 3.2(1), as (emphasis added): “movement of
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98. In accordance with sec 3.2(b) and (l) of ST/AI/2010/3, the staff selection system is also not applicable to lateral movements of staff made by a head of department/office/mission in accordance with the discretion set out in sec. 2.5 of ST/AI/2010/3 or to temporary appointments. The Tribunal finds that ST/AI/2010/4/Rev.1 (Administration of temporary appointments) is also not applicable to lateral movements. Therefore, the Tribunal considers that currently there is no legal and transparent legal procedure established for lateral moves and transfers, they continue to be exempted together with transfers from the *staff* selection procedure and to be important parallel procedures.

99. Section 2.5 from ST/AI/2010/3 states (emphasis added):

H heads of departments/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

transfer”, “lateral move”, “lateral appointment/assignment”. There is also no specific mention and/or distinction regarding the nature of such change(s) of the position, functions, supervisor, responsibilities, department/office, duty station and/or of

appealed), issued on 30 March 2011, after ST/AI/2010/3 entered into force, the Tribunal noted at para. 59:

- a. The decision was made before the official cancellation of the job opening;
- b. After the vacancy was cancelled, the Hiring Manager did not initiate a new selection process by creating, as required, a new job opening and the transfer was implemented as a lateral reassignment for which a temporary job opening was not created;
- c. The Head of the Department did not exercise her discretion vis-à-vis the pre-approved roster candidates for the post, before she decided to fill the vacancy by a lateral transfer/move of Ms. CP based on the agreement of Ms. CP, the Hiring Manager, and the Head of Department, PPBD;
- d. Ms. CP had been involved in creating the job opening. She was effectively transferred to the post on 1 July 2013, more than four months after the decision was taken, and after the present application was filed before the Tribunal on 7 June 2013.

116. The Tribunal finds that the Applicant's fundamental right to be fairly considered for the Post, after the cancellation of the job opening, was breached and the Administration's decision to fill a vacant post through lateral transfer represented an arbitrary use of its discretion conferred by section 2.5 of ST/AI/2010/3.

Damages

117. The Tribunal underlines that in the present case, the closing submissions were filed by the parties on 24 October 2014, before the General Assembly voted for an amendment to art. 10.5 of the Dispute Tribunal's Statute by Resolution A/RES/69/203 on 18 December 2014. Consequently, the Tribunal finds that the version of art. 10.5 that applied prior to the enactment of the amendment is licable in this case.

118. The Tribunal notes the Applicant requested in her application:

... adequate financial compensation for delays, and failure to provide fair, full and timely consideration for the previous exercises 15424, 21959, 20766 and for the cancellation of vacancy 24769 [sic] for which [the Applicant] was rostered against without justification;

Adequate financial compensation for adverse effect on morale and professional reputation as well for the damage incurred.

Compensation of (2) years net salary for cancelling the vacant post because [she] was the only rostered internal candidate.

The Applicant also requested that the Respondent be ordered to give priority to her “internal rostered candidacy” within PPBD/OPPBA.

119. In *Frohler* UNDT/2010/135, the Tribunal held that in order to obtain compensation, it is not enough for an applicant to claim that a procedural irregularity was committed during a selection process, s/he should also establish that this irregularity caused her/him a direct prejudice. The Applicant must therefore prove that, if no irregularity had been committed, s/he had a serious chance of being selected for the Post. Similarly, in *Tsoneva* UNDT/2010/178, *Vangelova* 2011-UNAT-172, *Akyeampong* UNDT/2010/189 and *Bofill* UNDT/2010/190, the Tribunal held that, apart from the compensation granted in accordance with art. 10.5 of its Statute, in cases of non-promotion, it will only grant compensation for moral damage if it considers that the Applicant would have had the chance of promotion had no irregularity been committed.

120. In *Lauritzen* UNDT/2010/172 and *Znamenski* UNDT/2010/208, the Tribunal recognized that the Secretary-General has wide discretion over the organization of work, but such discretion is not unfettered; it is subject to the Tribunal’s supervision (*Assad* 2010/UNAT/021). While the Tribunal cannot substitute its judgment for that of the Secretary-General regarding the appropriate organization of work, it must verify that a decision in this respect was not made for unlawful reasons.

121. As follows from the above considerations, the request for cancellation of JO 24760 was accompanied by written reasons. There is no evidence that the Applicant

was the only roster candidate from the 191 applicants. Also there is no evidence that the cancellation of the job opening had an adverse effect on her morale and professional reputation. The Applicant has the status of a pre-approved roster candidate indefinitely and there is no evidence that JO 24760 was cancelled to personally target the Applicant and not to select her for the Post. The Tribunal considers the cancellation of JO 24760 to have been lawful and that it did not affect irreparably the contractual rights of the Applicant since it was announced that the post may be re-advertised.

122. As established by the jurisprudence of the Appeals Tribunal, a staff member has no right to be selected for a post, but has the right to receive full, fair and timely consideration for a post, and this right has a fundamental nature.

123. The Tribunal considers that the Administration's failure to restart the selection process by creating a new job opening after JO 24760 was cancelled, affected the Applicant's right to receive full, fair and timely consideration for the Post and the re-advertisement of the Post was delayed for eight months because of the lateral transfer. The delay in implementing the decision to transfer Ms. CP further suggests that there was no real need for an expedited recruitment, as required for a lateral transfer. The Tribunal also notes that in the present case, the then ASG/C exercised her discretion and opted for the lateral transfer procedure without, apparently, giving any consideration to selecting a candidate from the roster, which is the expedited procedure established by ST/AI/2010/3. The transfer procedure created an advantage for Ms. CP, who had not previously been in a position to apply for the Post because of her involvement in the creation of the job opening, and the Administration failed to ensure the appearance of fairness of the lateral transfer process.

124. In *Kamal* 2012-UNAT-204, the Appeals Tribunal ruled that the delay itself, in the absence of negligence or a violation of specific rules by the Administration, cannot be considered a valid ground for compensation.

125. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal stated (emphasis in original):

36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee [footnote omitted].

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

126. In *Ivanov* UNDT/2014/117, the Tribunal awarded the Applicant compensation in recognition of the delay by an Investigation Panel in submitting its report. The Tribunal stated:

49. The Tribunal notes that the [Under-Secretary-General, Department of Management] recognized that the three months delay in appointing the Investigation Panel resulted in a breach of sec. 5.14 [of ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations)] and awarded the Applicant compensation in the amount of USD1,000 (approximately USD300/month). The Tribunal, in the light of the particular circumstances of the present case, will therefore grant the Applicant an additional award of

FIN-DM-OPPBA-15424 ... 11-FIN-DM-OPPBA-21967, 11-FIN-DM-OPPBA-20766 ... ” is rejected as non-receivable.

132. The application is granted in part and the Respondent is to pay compensation of USD2,400 to the Applicant for the breach of her fundamental right to be fully, fairly and timeously considered for the Post.

Observations

133. The Tribunal observes that there are no specific provisions in ST/AI/2010/3 or guidance in the manuals to ensure a fair exercise of managerial discretion during the creation of the job opening and before the decision to publish the job opening in the compendium on Inspira. During this period, the hiring manager and the head of department may exercise their discretion and end the selection process without publishing the job opening by recommending and selecting a roster candidate or by laterally transferring a sta

136. The lateral move defined in sec. 1(q) has a mandatory duration of “at least one year”. It is not a temporary appointment and therefore none of the provisions from ST/AI/2010/4/Rev.1 are applicable to a lateral move. A temporary appointment does not qualify as a lateral move unless it reaches one year.

137. ST/AI/2010/3 (Staff selection system) is not applicable to lateral moves and to transfers which are expressly excluded in accordance with sec. 3.2(l), but there are no other regulations, rules or issuances regulating the procedure for these important modifications of the employment contract. Also, even if they represent movements of the staff, they are excluded from ST/AI/2010/3.

138. The Tribunal observes that ST/AI/2010/3 has special and mandatory eligibility requirements (two prior lateral moves) for staff recruited at the P-4 level to become eligible for promotion to the P-5 level and exceptions (see sec. 6.3).

139. In order to ensure that both the staff selection process and the procedure for lateral moves and transfers are substantively fair, and perceived to be so, and to prevent any potential confusion and/or abuse of discretion by hiring managers and/or heads of department in not applying the selection system as it is intended (including the roster system) by using parallel procedures to select/appoint staff members for vacant posts, procedures which are in direct relation not only with the important contractual right of a staff member to be considered for vacant posts, but also with P-4 level staff members’ right to be considered eligible for P-5 posts based on previous lateral moves, the Tribunal recommends that new procedural provisions be adopted in the area of lateral moves and transfers as soon as possible.

140. The Tribunal also underlines that selection from the roster, being part of the staff selection system, must always follow art. 101.3 of the United Nations Charter (emphasis added): “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”.

(Signed)

Judge Alessandra Greceanu

Dated this 15th day of April 2015

Entered in the Register on this 15th day of April 2015

(Signed)

Hafida Lahiouel, Registrar, New York