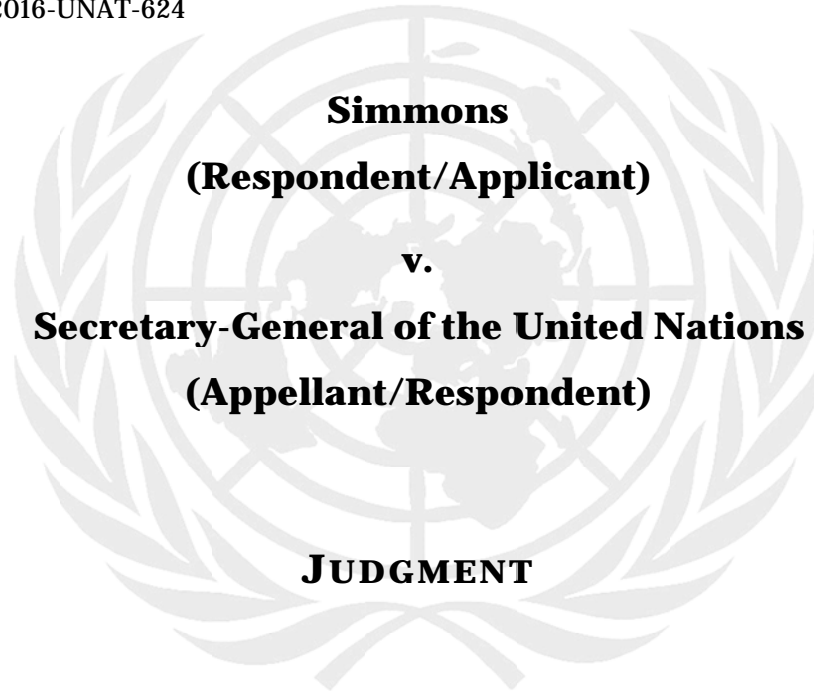




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-624



**Simmons
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Luis María Simón Judge Mary Faherty
Case No.:	2015-728
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Ms. Simmons:	Not represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/033, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 15 April 2015. The Secretary-General filed an appeal on 15 June 2015. Ms. Sheryl Simmons has not filed any answer.

Facts and Procedure

2. The following facts are uncontested:¹

... 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.

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

... By memorandum dated 12 February 2013 to the Executive Officer of the Department of Management, the then [Assistant Secretary-General/Controller (ASG/C)], as the head of [the Office of Programme Planning, Budget and Accounts (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.

... 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.

¹ Impugned Judgment, paras. 6-23.

... 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.

... 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.

... 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

... 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 [her] opportunities for career advancement;
- (ii) the decision to cancel job Vacancy 13-FIN-OPPBA-24760-R-New York in order to prevent consideration of [her] candidacy to fill the subject advertised post;
- (iii) the decision to use the vacant post unlawfully for a lateral move of an existing P4; and
- (iv) the continued unfair and incomplete consideration of [her] candidature.

... On 11 March 2013, the Applicant filed an application for suspension of action pending management evaluation with the Dispute Tribunal. The Applicant sought to suspend the decision to cancel JO 24760, to fill the Post, and to deny her candidacy full and fair consideration. In Order No. 70 (NY/2013), dated 15 March 2013, the Tribunal (Judge Ebrahim-Carstens) found that “due to the implemented cancellation of the job opening, of which all the candidates were apparently notified, the decision to carry out the comparative review process can no longer be suspended” and rejected the application for suspension of action.

... The application on the merits was filed on 13 June 2013.

... On 28 June 2013, the Applicant filed a motion requesting the disclosure of documents from the Respondent relating to JO 24760 and the recruitment process for a number of other vacancies.

... The Respondent filed his reply to the application on 17 July 2013 contending that the application is without merit.

... By Order No. 322 (NY/2013), dated 25 November 2013, the Duty Judge (Judge Ebrahim-Carstens) granted the parties leave to file “any additional submissions, including any request for further documents they seek to produce or to be produced, including, in the latter case, a reasoned explanation as to their relevance”.

... On 29 November 2013, the MEU responded to the Applicant’s request for management evaluation. The MEU found that the decision to cancel JO 24760 and to fill the post through a lateral transfer was lawful and notified the Applicant that the Secretary-General had decided to uphold the decision. The MEU’s response 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.*

... 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.

... 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.

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

... 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 a new application has been filed that the Tribunal may consider joining cases, and only if it finds that there is a direct legal connection between the claims or that they have a common legal cause. The Tribunal also rejected the Applicant’s motion for disclosure

of further documents, finding that documents relating to recruitment processes that took place before JO 24760 became vacant were not relevant to the present case. The parties were ordered to file their closing submissions by 24 October 2014. Both parties duly complied.

3. On 15 April 2015, the UNDT issued its Judgment. It concluded that the Administration's decision to cancel JO 24760 was lawful. It was based on the fact that more than 160 days had passed since the initiation of the job opening without any progress made in the evaluation of the candidates. It further found no evidence that the decision was based on extraneous motives such as the intention to block Ms. Simmons from being promoted or to accommodate the lateral reassignment of Ms. CP.

4. The UNDT, however, found that the decision to laterally reassign Ms. CP to the position was unlawful and constituted an arbitrary use of the Administration's discretion. It based its conclusion on the grounds that: a) The decision to laterally reassign Ms. CP had been made before the official cancellation of JO 24760; b) no new selection process had been initiated by creating a new job opening; c) the ASG/Controller, as the Head of Department, did not consider the pre-approved candidates from the roster before deciding on a lateral reassignment; and d) Ms. CP had been involved in creating JO 24760.

5. The UNDT awarded USD 2,400 as compensation to Ms. Simmons for the breach of her rights to be fully, fairly and timeously considered for the position.

The Secretary-General's Appeal

6. The UNDT erred in law and fact in concluding that the lateral transfer was unlawful and an arbitrary use of the Administration's discretion. The Administration has broad discretion in relation to the internal organization of units and departments. Section 2.5 of ST/AI/2010/3 (Staff Selection System) allows for lateral reassignment within a department or office without the creation of a job opening. The lateral reassignment of Ms. CP thus fell within the internal reorganization of PPBD, which is within the discretion of the Administration.

7. The ASG/Controller simultaneously requested the cancellation of JO 24760 and the lateral reassignment of Ms. CP to the position. The requests were both based on the absence of progress in the recruitment process. The lateral reassignment of Ms. CP was a

solution to the shortage of staff members in PPBD and to the delay in the evaluation of candidates for JO 24760. The basis for the lateral reassignment of Ms. CP to the position was, therefore, the same one as the one for the cancellation of the JO, which the UNDT found had been lawful and had not been motivated by any improper motives. Moreover, as the position already existed, the fact that a new job opening was not created after the cancellation of JO 24760 and before carrying out the lateral reassignment, cannot have had any impact on the lawfulness of the reassignment and the exercise of the Administration's discretion. The UNDT therefore erred in law and fact in concluding that the lateral reassignment was an unlawful and arbitrary use of the Administration's discretion.

8. The UNDT erred in finding that the ASG/Controller should have considered the pre-approved candidates from the roster before deciding on the lateral reassignment of Ms. CP. Lateral reassignment and selection from a roster are two distinct procedures that do not occur in the same process. According to Section 2.5 and Section 3.2 of ST/AI/2010/3, a lateral reassignment is an internal reorganization of a department or office and as such falls outside the scope of the staff selection system. Pursuant to Section 3.2 of ST/AI/2010/3, the staff selection system does not apply to a lateral reassignment and under Section 2.5, a Head of Department may laterally reassign a staff member within the department without advertising the job opening. Conversely, the selection from a roster is part of the selection system and, according to Section 2.3 of ST/AI/2010/3, can only take place once a job opening has been advertised. Therefore, there is no obligation for the Administration to evaluate pre-approved candidates from the roster before deciding on a lateral reassignment.

9. The UNDT erred in fact in finding that Ms. CP was involved in the creation of JO 24760 as nothing on the record shows that Ms. CP participated in it. Moreover, the UNDT itself found that there was no evidence that the manager had delegated his function to create the job opening to Ms. CP. The UNDT's findings are thus contradictory and inconclusive regarding Ms. CP's involvement in the process. Furthermore, even if Ms. CP had participated in the creation of the job opening, she did not apply for the post and was not part of the selection process regarding the position. Ms. CP was laterally reassigned to the position and this was the lawful discretionary decision of the ASG/Controller as the Head of OPPBA. The UNDT therefore also erred in finding that Ms. CP's alleged involvement rendered the decision to reassign her unlawful.

10. Finally, the UNDT erred in awarding USD 2,400 in compensation. As the UNDT found the decision to cancel JO 24760 to be lawful, it cannot conclude that Ms. Simmons was not fairly considered during the selection process. Once the job opening was cancelled, Ms. Simmons' participation in the selection process for the position ceased. The lateral reassignment took place after the recruitment process was cancelled and is of no relevance to the way Ms. Simmons' application was considered during the selection process. Even if the Appeals Tribunal were to find that Ms. Simmons had an interest in Ms. CP's subsequent reassignment, the Administration's decision to laterally reassign Ms. CP to the position and not to restart the selection process cannot in any way be construed as a fundamental breach of Ms. Simmons' rights warranting compensation.

Considerations

11. We agree with the Secretary-General's submissions, namely, that the Administration has broad discretion in relation to the internal organization of its units and departments. Section 2.5 of ST/AI/2010/3 allows for lateral reassignment within a department or office without the creation of a job opening. The lateral reassignment of Ms. CP in this case falls entirely within the discretion of the Administration.

12. The jurisprudence of the Appeals Tribunal has been that the Administration has the power to restructure and reorganize its units and its departments to lend to greater efficiency.² It is therefore not within the remit of the UNDT to pronounce on the exercise of this discretion, as in this case, to determine whether or not rostered candidates should be considered and other internal management issues. This can only be done if there is evidence before the Dispute Tribunal of arbitrary and unlawful exercise of the discretion. We find no evidence of arbitrary and unlawful exercise of discretion in this appeal.

13. It is noteworthy that the UNDT in its Judgment found that:³

... There is no evidence that the Applicant was the only roster candidate of 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 Tribunal considers the

² *Simmons v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-425, para. 31, citing *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Liverakos v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-206; *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097.

³ Impugned Judgment, paras. 121 and 122.

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.

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.

14. Since there is no finding of any illegality and a finding by the UNDT that there is “no evidence that the cancellation of the job opening had an adverse effect on [Ms. Simmons’] morale and professional reputation”⁴ and that it did not affect irreparably [her] contractual rights, the award of USD 2,400 as compensation to Ms. Simmons for a breach of her rights “to be fully, fairly and timeously considered for the [p]ost”⁵ cannot be supported. We therefore order that the award of USD 2,400 be vacated.

Judgment

15. The appeal is granted and the Judgment of the UNDT is set aside.

⁴ *Ibid.*, para. 121.

⁵ *Ibid.*, para. 132.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Thomas-Felix

(Signed)

Judge Simón

(Signed)

Judge Faherty

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar