

Judgment No. 2022-UNAT-1207

8 Counsel for Appellant: t





10. There are no findings in the UNDT's Judgment about what happened to her application after it was made on 27 May 2018 or whether others applied for the same post. As the Ethics Office's recommendation set out above at paragraph 4 noted, in these circumstances the Pension Fund was then obliged to determine her suitability for the post, her competence, integrity, length of service and other relevant factors, and if these considerations did not preclude her from being appointed, to appoint her to the vacancy.

11. The Pension Fund was thus obliged to consider whether Ms. Rockcliffe was excluded from appointment and if she was not, to appoint her. The UNDT Judgment does not refer to, or analyse, whether she was excluded from appointment and why it offered, or proposed to her, three vacant, albeit less secure, posts. Indeed, that information lacuna covers the extraordinarily long period of more than a year before there was any further development in the appointment process, at least of which Ms. Rockcliffe was advised.

12. On 13 June 2019, more than one year after the vacancy announcement for the Deputy Chief, PES, Post was published and after Ms. Rockcliffe had applied for it, the Acting Chief Executive Officer of the UNJSPF decided to cancel the job opening and planned to abolish the post in the upcoming 2020 budget.

13. On 20 June 2019, Ms. Rockcliffe received brief written notification that the job opening for the Deputy Chief, PES, Post was cancelled (Contested Decision).

14. On 25 July 2019, the Pension Fund requested the United Nations Office of Human Resources (OHR) to reclassify the Deputy Chief, PES, Post at the ~~P-4~~ level to one entitled Chief of Participation Unit, also at the P-4 level (Chief, PU, Post). The reasons provided for the abolition of the Deputy Chief, PES, Post and the creation of or reclassification to the Chief, PU Post were, in relevant part, as follows:<sup>3</sup>

... [The Job Opening (JO)] has been cancelled due to a change in the organizational structure within the Operations Service. Since the change is within the same Service, it does not require budgetary approval. Please see below for a description of the justification for the change in structure:

At the time of publishing the JO, the P-5 Chief of PES post was under recruitment and two of the three P-3 Benefits Officer posts under PES were also unfilled. Since then the Chief of PES has been recruited and the two Benefits Officer P3 posts also filled. Upon finalizing

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<sup>3</sup> Impugned Judgment, para. 12.





*Procedure before the Appeals Tribunal*

24. On 28 January 2021, Ms. Rockcliffe filed an appeal against Judgment No. UNDT/2020/212, and the appeal was registered with the Appeals Tribunal as Case No. 2020-1516. On 29 March 2021, the Secretary-General filed his answer.

25. In the Respondent's answer, the Administration advised the UNAT that the Appellant had, since rejecting the offer of the Chief, PU, Post, been offered a temporarily funded P-4 position, which she had accepted. In those circumstances, we asked the parties for updated information on Ms. Rockcliffe's status. We were advised that Ms. Rockcliffe resigned from UNJSPF with effect from 30 September 2021. Her counsel attributed to the Appellant certain reasons for this resignation. The Respondent subsequently supplied a copy of relevant correspondence. There is an arguable disagreement about circumstances in which this temporary position was taken up and about the reasons for her resignation. In these circumstances, we consider that we should

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the cancellation of the post. Ms. Rockcliffe argues that the UNDT did not do so. Additionally, the Appellant also highlights and questions why the recruitment for the post of Chief and two Benefit Officers at the P-3 level in the same unit proceeded while the recruitment to the post she applied for was at first frozen and then cancelled.

28. Ms. Rockcliffe also raises issue with the timing of the cancellation of the Deputy Chief, PES, Post. She asks why this cancellation happened only after she had refused the offer of the other temporary assignments that the Acting Chief Executive Officer discussed with her.

29. Third, Ms. Rockcliffe argues that the repurposed and newly established Chief, PU, Post was also not offered to her in good faith. She maintains that the offer was made only after her legal challenge and arguably the Administration acted under pressure from the MEU. She adds that the new post was never an equivalent post and appeared to be temporary in nature. It was a mere distraction to preclude her from challenging the original decision.

30. Fourth, Ms. Rockcliffe also takes issue with the lack of transparency in the selection process for the Deputy Chief, PES, Post. She says the Administration provided no explanation for the long delay in processing the applications for the Deputy Chief, PES, Post and for not heeding the recommendations of the Ethics Office and OHRM regarding her placement.

31. Finally, Ms. Rockcliffe says that, given that there was a finding of a pattern of retaliation against her, it was a reasonable inference that the cancellation (e-10.4 f.8-6.4 (asbr))-17.9 0 Td ( )T



motivated by operational and organisational considerations. Specifically, the Secretary-General argues as the new Chief of PES had been successful in meeting benefits processing performance benchmarks without the presence of a Deputy Chief in PES, there was no need to fill the post. Meanwhile, there was a need to address participation matters, which is why the Administration created a Participation Unit (PU) and thus repurposed the Deputy Chief, PES, Post to the Chief, PU, Post. Therefore, the cancellation of the job opening, and the creation of a new post was part of a genuine restructuring exercise.

34. Furthermore, the Secretary-General argues the Appellant has not submitted any clear and convincing evidence rebutting the presumption of regularity. On this point, the Respondent stresses that Ms. Rockcliffe has failed to produce any evidence that the decision was ill-motivated. The Secretary-General also maintains that the new position Chief, PU, Post was even offered to the Appellant before it was advertised. Hence, the UNDT was correct in finding that the job opening was lawfully cancelled and that there was no evidence of ill-motivation.

35. Second, regarding the allegation that the UNDT failed to order the production of records for the selection exercise, the Secretary-General submits no such records exist because the recruitment for the Deputy Chief, PES, Post never commenced. Additionally, even if Ms. Rockcliffe was the best candidate for the post, this does not divest the Administration of its discretion to cancel the job opening in light of its changing operational needs.

36. Regarding the allegation that the UNDT failed to consider the prior pattern of retaliation against the Appellant and ought to have viewed the cancellation of the job opening as yet another retaliatory act, the Respondent argues there is no evidence pointing to such and also a prior finding of retaliation by the Ethics Office does not imply that future acts are also retaliatory in nature. The Respondent maintains the cancellation was motivated by purely organisational reasons. In the same vein, the Respondent also submits that Ms. Rockcliffe has failed to show there was a link between any past retaliation and the Contested Decision.

37. Finally, regarding the allegation that the UNDT erred in its finding that the Appellant had not met her burden to establish ill-motivation through clear and convincing evidence, the Respondent argues Ms. Rockcliffe did indeed fail in this regard. First, the argument that four out of 20 job openings that Ms. Rockcliffe applied for in the space of 8 years were cancelled is not indicative of ill-motivation as the Administration has broad discretion to cancel job openings

because of organisational changes. Additionally, one of the four cancellations over the eight-year period was for a post at the P5 level, so was not applicable to the Appellant's situation.

38. Regarding the allegation that the timing of the cancellation also shows ill-motivation on the part of the Administration as it purportedly happened only after the Appellant rejected the offer of the three available P-4 p (p)-13.2/6.8 (i)2.2 w 1.602 0 Td (7)Tj ET 83.532,6.2 .2 (so)ec2 Tw -3

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43. As to records of the selection exercise, the evidence is that this exercise which would have



49. There is a further issue arising from the case, which requires serious consideration. It is not insignificant that the Administration's reasons for taking the Contested Decision appear to have changed over time. The UNJSPF's reasons for cancelling the post at the time were:<sup>4</sup>

*At the time of publishing the JO, the P-5 Chief of PES post was under recruitment and two of the three P-3 Benefits Officer posts under PES were also unfilled. Since then the Chief of*



“considered on a preferred or non-competitive basis for any position that she may apply [for] or express interest [in] at the P-4 level within the Fund”.

56. Because the Appellant did not apply for, or express her interest in, the re-classified post (indeed she actively rejected applying for it), that did not relieve the Respondent of his obligation to continue to attempt to provide a permanent post of her preference to the Appellant. Ms. Rockcliffe was entitled to reject that offer because it did not meet the conditions of the settlement of her previous vindication and she was entitled not to be prejudiced, as she was, by her rejection of it. Contrary to the UNDT’s conclusion, her rejection of that offer of the re -classified post did not cause the cancellation of the original job opening to be lawful and obviate any question of unlawfulness on the part of the Respondent.

57. The UN





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