



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI009/066
Judgment No.: UNDT/2009/054
Date: 26 October 2009
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Katya Melliush, OSLA

Counsel for Respondent:

Susan Maddox, ALU/OHRM

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

1. APPEARANCES/LEGAL REPRESENTATION

1.1 Applicant: The Application was filed by Ms. Katya Melliush of the Office of Staff Legal Assistance, Nairobi.

1.2 Respondent: The Respondent's Counsel on record is Ms. Susan Maddox, of the Administrative Law Unit, Office of Human Resources Management (OHRM).

2. CASE BACKGROUND

2.1 The Applicant, a staff member of the United Nations Economic Commission for Africa (UNECA), filed the present application on 14 October 2009 seeking an Order from this Tribunal to suspend the implementation of an administrative decision dated 5 October 2009, of the Executive Secretary, UNECA, to fill the Post of Director, Trade, Finance and Economic Development Division ("Director, TFED").

3. SUMMARY OF FACTS

3.1 On 12 June 2009, the Applicant avers that he was invited for an interview for the post of Director, TFED of UNECA. On 13 June 2009, the Applicant avers that he wrote to the Human Resources Services Section of UNECA and informed them that since in the past UNECA had appointed candidates from the roster, he should be treated in the same manner as those other rostered candidates. The Applicant avers that on the same date, he wrote to OHRM to request for an authoritative interpretation of the provisions of ST/AI/2006/3 - *Staff Selection System* of 15 November 2006 as they concern rostered candidates but he never received a response.

3.2 The Applicant avers that on 24 June 2009, he wrote to the Secretary-General of the United Nations to complain of discriminatory treatment and abuse of due process in promotions at UNECA. The Applicant alleges that he has been the subject of discrimination at UNECA for a considerable period of time because he refused the offer of the Executive Secretary of UNECA of an L-6 post in the latter's Office where he

“would be writing for him.” The Applicant alleges that this discrimination was again demonstrated in the process of filling the vacant post of Director, TFED.

3.3 The Applicant avers that according to recent past precedents at UNECA, candidates have been appointed to positions from the roster and that he was rostered by OHRM for the post of Director, TFED at UNECA. The Applicant avers that notwithstanding the precedents, however, the Head of Department decided to once again treat him in a different from other rostered candidates and that following the Head of Department’s refusal of his numerous requests for a meeting to resolve the issue, he reported the matter to the Secretary-General.

3.4 In a letter dated 3 August 2009, the Management Evaluation Unit (MEU) directed that the Applicant should submit to a competency-based interview for the post of Director, TFED, UNECA. The MEU also advised that, on the basis of the management evaluation, the Secretary-General had concluded that the decision to request the Applicant to undergo a competency-based interview was appropriate in his case. He further concluded that in order to avoid even the appearance of a conflict of interest, UNECA should reconfigure the composition of the Advisory Selection Panel (ASP) constituted to interview him.

3.5 On 8 September 2009, the Applicant filed an Application with the Nairobi UNDT, case number UNDT/NBI/2009/44, in which he requested, inter alia, the UNDT to compel the Organization to investigate his complaints against UNECA Senior Management, notably, the Executive Secretary, of abuse of due process and discrimination in appointments and to restrain the Executive Secretary and/or any of his agents from canceling the vacancy announcement for the post of Director, TFED, VA Number-08-ECO-ECA-417319-R-Addis Ababa until this matter was either fully resolved or fully adjudicated by the UNDT.

3.6 On 5 October 2009, the Executive Secretary, UNECA, announced his decision to fill the post of Director, TFED.

3.7 On 21 October 2009, the Applicant filed an *Application for Admission of Additional Evidence*. In his Application, the Applicant requests the Tribunal to admit the following documents as additional evidence/documentation in support of his application:

- (i) A request for Management Evaluation dated 19 October 2009;
- (ii) A summary of a meeting held on 26 June 2009 between the Executive Secretary, UNECA, the Applicant and a third party;
- (iii) A letter dated 5 October 2009 from the Executive Secretary, UNECA, to all staff advising them of promotions and reassignment of staff in UNECA;
- (iv) The proposed new structure of UNECA dated 30 September 2009; and
- (v) Minutes of a Senior Management Team meeting of 7 October 2009.

4. APPLICABLE LAW

4.1 The Requirement of a Management Evaluation

4.1.1 Under the former Staff Rules, which were applicable at the relevant time, (now superseded and replaced by Staff Rule 11.2), provides that:

“A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.”

4.1.2 Rule 11.2 of the new Staff Rules provides that:

“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.”

4.1.3 Article 2.2 of the UNDT Statute provides that,

“The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.”

4.1.4 Article 13(1) of the UNDT Rules of Procedure provides that,

“The Dispute Tribunal shall make an order on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.”

4.1.5 Article 13.1 of the Rules of Procedure read together with Article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff Rule 111.2 required a staff member to first request a review of the contested decision. These provisions must be interpreted in such a way as to give effect to the underlying philosophy embodied in them. The Tribunal takes the view that the underlying philosophy of these provisions is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by

management. The provisions cannot be interpreted to mean that the management evaluation is optional. It is not¹.

5. Limits on the Power to order Interim Relief

5.1 Article 14.1 of the Rules of Procedure provides,

“At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.”

5.2 Article 14.1 of the Rules, read together with Article 10.2 of the Statute of the Dispute Tribunal, puts a limit on the power of the Tribunal to order an interim relief to suspend the implementation of an administrative action even if all the other requirements are met. Such interim relief cannot be ordered in cases of *appointment, promotion or termination*.

5.3 The underlying philosophy behind the express exception in Rule 14. is to avoid any paralysis of the work of the Organization and any hampering of its activities. Given the principles and purposes of the Organization as set out in Article 1 of the Charter, it would be indeed inadvisable to issue suspension orders in relation to appointments or promotions when these measures have been implemented for the good running of the Organization. That exception however does not debar an applicant from seeking relief through alternative procedures.

CONCLUSIONS

¹ Caldarone v The Secretary General, UNDT/NBI/2009/58, 14 October 2009.

6. Suspension of Action and Unlawfulness of the Contested Decision

6.1 The Applicant seeks an Order from this Tribunal to suspend the implementation of an administrative decision dated 5 October 2009, of the Executive Secretary, UNECA, to fill the Post of Director, TFED, UNECA. At the time of the filing of the present application there was no management evaluation pending. It is only on 21 October 2009 that the Tribunal received a copy of the request for management evaluation of the decision of 5 October 2009.

6.2 Following the complaint filed by the Applicant on 24 June 2009 with the Secretary General, a response dated 3 August 2009 was sent to the Applicant by the Management Evaluation Unit (MEU). The Applicant was asked to submit to a competency-based interview for the post of Director, TFED, UNECA. The Secretary-General took the view based on the management evaluation that the decision to request the Applicant to undergo a competency-based interview was appropriate in his case.

6.3 Even if the Applicant considers that the request filed by him had not been dealt with, his application for a suspension of action is still not receivable. Article 13.1 sets out the three conditions that should be met before a suspension of the contested decision may be ordered and they are the *prima facie* unlawfulness of the decision, the urgency of the situation and irreparable harm that cannot be compensated by damages.

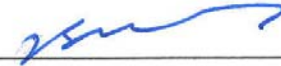
6.4 The Tribunal does not find any unlawfulness in the decision of the Respondent not to appoint the Applicant to the position of Director, TFED, UNECA. The Applicant has himself to blame as he declined to submit to an interview as requested. He cannot invoke his own omissions to pray for an equitable remedy.

7. Decision on Appointment

7.1 The position to which the Applicant is laying claim is related to an appointment. The administrative decision dated 5 October 2009, of the Executive Secretary, UNECA, to fill the post is an appointment. This cannot be the subject of an interim relief in view of the exception contained in Article 14 of the Rules.

7.2 Further, as stated for the purposes of Article 13.1 above at paragraph 6, the decision is not *prima facie* unlawful.

7.3 The application is therefore not receivable both under Articles 13 and 14 of the Rules.



Judge Vinod Boolell

Dated this 26th day of October 2009

Entered in the Register on this 26th day of October 2009



Jean-Pelé Fomété, Registrar, UNDT, Nairobi