UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/133
Judgment No.: UNDT/2009/064
Date: 29 October 2009
Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

BUCKLEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON SUSPENSION OF ACTION

Counsel for applicant: Bart Willemsen, OSLA

Counsel for respondent: Stephen Margetts, ALU

Introduction

1. The applicant is being considered for appointment to a senior post. He has been informally advised that it is not proposed to make an appointment at this time since the character of the post itself is being reconsidered, which will require re-advertisement. It appears that no formal steps have yet been taken to cancel the appointment process. The applicant seeks to prevent the Administration from proceeding further.

Facts

2. The applicant applied for a P-5 position. He was subjected to a lengthy selection process lasting for approximately a year, and had been given to understand that, in the ordinary course, he will be appointed to the post. On 13 October 2009, when it seemed that the applicant was on the verge of appointment, he was informed that the Under-Secretary-General had decided to re-advertise the post because of "new leadership" coming into the division, and adjustments to the functions of the post, some of which it was expected would be retained in the headquarters and others moved to other service centers requiring, so it was said, "the profile/scope of this post … to be reassessed". The consequence of this change, of course, is that the foreshadowed appointment will not be made.

3. The applicant submits that this decision would be inconsistent with the situation upon which the appointment process was based and suspects that the USG may have been wrongly influenced by a petition submitted by another candidate that the applicant was not qualified for appointment. This petition should not have been taken into account because the applicant did not have an opportunity to respond to it.

4. On 27 October 2009 the applicant requested a management evaluation of the decision of the USG and on 28 October 2009 he filed an application with the United Nations Dispute Tribunal for suspension of the decision. The applicant submits, *inter alia*, that he has a legitimate expectation to appointment, and that the decision to re-

advertise the post violates the provisions of Administrative Instruction ST/AI/2006/3, art 101.1 and 101.3 of the United Nations Charter, and art IV of the Staff Regulations, which deal with the selection, appointment and promotion of staff.

5. The application was heard as an urgent matter on 29 October 2009. An oral judgment was issued on the same day, and the parties were informed that it would be reduced to writing in due course. This is that judgment. I have made some editorial changes for reasons of clarity but nothing of substances has been altered.

Analysis

6. Article 2.2 of the Statute of the United Nations Dispute Tribunal, and the corresponding rule 13.1 of the Rules of Procedure, provide 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.

7. Taking the first of the three prerequisites for a stay, the applicant must show that the contested decision "appears prima facie to be unlawful". The combination of the word "appears" with the term "prima facie" shows that this test is undemanding. The conventional law relating to obtaining relief of this kind requires, in substance, the demonstration of a fairly arguable case, although different phrases are used in different jurisdictions to the same effect.

8. Although from the applicant's point of view the decision to re-advertise the post is quite reasonably disappointing, there is nothing on the face of the material submitted by the applicant that suggests any bad faith. The applicant has candidly conceded that he is unaware of any personal *animus*, and his detailed written application essentially attacks the management wisdom of undertaking the proposed

course. Although he alleges the denial of procedural fairness, I do not see that the USG was under any obligation to inform him that she was considering the impugned decision and give him an opportunity to respond to the proposal. Furthermore, the applicant is unable to point to any particular rule that has been broken or not obeyed. The substance of his case is that the decision is a bad one. Fortunately, the power to make unwise decisions is the prerogative of the Administration and is not a matter within the purview of the Tribunal.

9. If the decision of the USG to re-advertise the post had been influenced by the petition filed against the appointment of the applicant to the post, as alleged by the applicant, providing the applicant were given an opportunity to respond to the matter in the petition, there would have been no impropriety. But in any event there is no evidence suggesting that the petition played any part in the decision.

10. As to the applicant's submission that he has a legitimate expectation to appointment, I agree that he had a *reasonable* (hence legitimate in ordinary parlance) expectation of appointment, but this is not a *legitimate* expectation in the sense that gives rise to any legal rights.

11. I therefore hold that there is an insufficient evidentiary basis for concluding even on a prima facie level that the contested decision of the USG has been motivated by other than management considerations; in other words, there is no arguable case that the contested decision is unlawful.

12. In light of this conclusion, there is no need to address the other prerequisites in art 2.2 of the Statute and rule 13.1 of the Rules.

13. Of course, if evidence of unlawfulness should be forthcoming, my decision will not preclude a further application.

Conclusion

14. The application for suspension of action is refused.

Note

15. Counsel for the respondent, Mr. Margetts, has undertaken on the respondent's behalf that the applicant will be given seven day's notice of the formal decision to abandon the appointment process (I understand that this is done by cancellation of the vacancy announcement), and that the applicant will be informed of the reasons for the cancellation, including the reasons for re-advertising the post. Provision of the above information to the applicant and, indeed, all candidates for the position, is necessary to ensure adequate transparency; at all events, it is what common courtesy requires.

(*Signed*)

Judge Adams

Dated this 3rd day of November 2009

Entered in the Register on this 3rd day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York