



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

MILLS-ARYEE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for Applicant:

James Ochieng' Oduol, Ochieng' Onyango Kibet & Ohaga

Counsel for Respondent:

Miouly Pongnon, UNON

Introduction

1. On 25 February 2011, the Applicant, a staff member of the United Nations office at Nairobi (“UNON”), requested suspension of action on the decision of the Director-General, UNON, Mr. Achim Steiner, to select another candidate for the position of Chief, Procurement Section at the P-5 level at UNON (“the contested decision”).

2. The application and its annexes were served on the Respondent on 28 February 2011 with a deadline of 1700 hours on Tuesday, 1 March 2011, for the filing of a reply. The Respondent did not submit a reply.

3. The Tribunal held a hearing in the matter on 3 March 2011 and heard extensive evidence from three witnesses, including the Applicant. The Respondent introduced twelve exhibits into evidence in support of his case. The parties submitted their written closing submissions on 7 March 2011. On 8 March 2011, the Tribunal ordered the parties to produce additional documents.

Facts

4. On 26 February 2008, the Internal Audit Division of the Office of Internal Oversight Services (“IAD/OIOS”) issued an audit report assessing the adequacy of management of UNON procurement activities. IAD/OIOS concluded, *inter alia*, that there were weaknesses in the procurement process that exposed UNON to the risk of fraudulent activities and that there was an absence of safeguards to ensure that procurement activities were being carried out in compliance with the United Nations Financial Regulations and Rules and the United Nations Procurement Manual. IAD/OIOS noted that the Procurement Unit was headed by a staff member at the P-4 level who was supervised by the Chief, Support Services Service who was at the P-5 level. Consequently, IAD/OIOS recommended that UNON review and submit for reclassification the job descriptions of the Chief, Procurement Section and the Chief,

Support Services Service to reflect the complexity and value of the activities being managed.

5. In an effort to address the structural weaknesses pointed out by IAD/OIOS in its report, the then Director-General of UNON, Ms. Anna Tibaijuka, issued an Information Circular (“IC/ODG/UNON/2008/2”), dated 4 August 2008, notifying all staff of UNON, UNEP and UN-Habitat and all heads of offices of UN Funds, Programmes and Agencies in Kenya that effective 1 September 2008, the UNON Procurement, Travel and Shipping Section (“PTSS”) would no longer be part of the UNON Support Services Service. IC/ODG/UNON/2008/2 designated PTSS as a separate section that would report directly to the UNON Director, Division of Administrative Services, Mr. Alexander Barabanov.

6. In November 2009, a group of Procurement staff members submitted a complaint of harassment, abuse of authority and intimidation against the Applicant to Mr. Steiner, who initiated an informal dispute resolution mechanism to address the complaint. In May 2010, Mr. Steiner, at a meeting with the Applicant and Mr. Barabanov, told the Applicant that in light of the complaint that had been brought against her by the group of Procurement Section staff members in 2009, she should consider leaving UNON for another duty station as, in his view, she had contributed to the problem in the Procurement Section. The Applicant refused to seek a transfer out of UNON.

7. Subsequently, a decision was taken to establish a new Chief, Procurement Section post at the P5 level at UNON. Mr. Barabanov informed the Applicant of the decision to create this new post in the Procurement Section and undertook to discourage her from applying for this post because, in his considered view, Mr. Steiner was not minded to give her the P-5 post.

8. On 8 July 2010, Mr. Steiner approved the job description for the post of Chief, Procurement Section at the P-5 level (“the contested post”), which had been sent to him by Mr. Barabanov. The job description indicated that the Chief,

Procurement Section would work under the supervision of the P-5 level Chief, Support Services Service. On 20 July 2010, the contested post was advertised by UNON in *Inspira*. The vacancy announcement indicated that the post would be located in the “Procurement Section within the Support Services Service, Division of Administrative Services, UNON” and would be under the general supervision of the Chief, Support Services Service.

9. The Applicant applied for the contested post and was interviewed on 18 January 2011. Out of the six candidates that were interviewed, the Interview Panel recommended four candidates as being suitable for the post. The Applicant was not one of the candidates recommended by the Interview Panel. On 9 February 2011, the Central Review Board recommended approval of the four candidates to Mr. Steiner and on 17 February 2011, Mr. Steiner decided to select one of the four candidates for the contested post.

10. On 18 February 2011, Mr. Barabanov informed the Applicant of Mr. Steiner’s decision to select a candidate, other than the Applicant, to the contested post. At 10:18 hours on 25 February 2011, the UNON Human Resources Management Service (“HRMS”) sent an email to the successful candidate informing her of her selection for the contested post. At 20:04 hours on 25 February 2011, the Applicant filed the current application for suspension of action with the UNDT Nairobi Registry. By a letter dated 28 February 2011, HRMS provided the selected candidate with information regarding the administrative arrangements relating to her lateral transfer to UNON.

Considerations

11. Applications for suspension of action are governed by article 2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and article 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

Prima facie Unlawfulness

12. The Applicant submits that the decision to not to select her for the contested post but to offer it to a candidate other than her is *prima facie* unlawful because:

- a. The selection process for the contested post was not carried out in conformance with the relevant regulations, rules and administrative issuances of the United Nations;
- b. The decision was made as a result of bias and discrimination against her by Mr. Barabanov;
- c. The process used for creating and classifying the contested post was flawed; and
- d. Mr. Barabanov blatantly disregarded IC/ODG/UNON/2008/2 by returning Procurement, Travel and Shipping Services to the Support Services Section without the requisite authorization.

13. The Respondent submits that the Applicant's candidacy was accorded full and fair consideration, that the selection process was conducted in compliance with all relevant rules and that the Applicant has failed to show any patent error or irregularity in the selection process. The Respondent submits that the creation of the contested post was a proper exercise of the Director-General's delegated authority under staff regulation 1.2(c) and that the decision to create the contested post within PTSS and have the function report directly to the Chief of the Support Services Section does not constitute a *prima facie* unlawful decision as it did not result in non-compliance of the Applicant's rights as a staff member or her terms of appointment. The Respondent further submits that there is no Organizational rule or policy that requires the current Director-General to adhere to IC/ODG/UNON/2008/2.

14. When considering an application for suspension of action, the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision "appears" to be *prima facie* unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful.

15. Based on the available evidence, the Tribunal finds that the Applicant has established a *prima facie* case of unlawfulness by identifying troubling anomalies that the Respondent will have to refute should she decide to pursue her case through an application on the merits. The Tribunal is of the considered view that one of the anomalies that may need to be dealt with comprehensively by the Respondent is the Applicant's contentions at paragraphs 35 to 39 of her request for management evaluation.

Particular urgency

16. Pursuant to section 10.2 of ST/AI/2010/3 (Staff selection system), the decision to select a candidate shall be implemented upon its official communication to the individual concerned.

17. The Tribunal notes that the selection decision was officially communicated to the selected candidate by HRMS/UNON before the Applicant filed her application for suspension of action. Thus, the Tribunal can only conclude that the contested decision in this case had already been implemented prior to the filing of the application for suspension of action. The Tribunal finds therefore that the test of particular urgency in this case has not been made out by the Applicant.

18. It is rather unfortunate however that a suspension of action can only be granted if the implementation of the administrative decision would cause irreparable damage but if the decision has been implemented, as in the present case, the question of suspension does not arise. In other words a patently unlawful act is allowed to survive in view of the legal provisions that do not authorize the Tribunal to suspend the execution of such an illegal act.

Irreparable damage

19. After listening to the Applicant's evidence at the hearing, it became quite clear that one of her primary concerns is the fact that the non-selection decision will result in irreversible damage to her career prospects in and outside of the United

Nations as she will be reaching the mandatory retirement age in two years. The Applicant also asserted that there would be harm to her reputation as a result of the contested decision as colleagues would assume that she was not selected for the position due to non-performance.

20. Based on the above, the Tribunal finds that the Applicant has established the element of “irreparable damage”.

Conclusion

21. The Applicant has satisfied two elements under Article 13 of the Tribunal’s Rules of Procedure in that she raised a *prima facie* case that the contested decision was arguably unlawful and that she will suffer irreparable damage. However, she was unable to establish the third element, i.e. that the matter is of particular urgency.

Decision

22. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Vinod Boolell

Dated this 11th day of March 2011

Entered in the Register on this 11th day of March 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi