



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

JITSAMRUAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Miles Hastie, OSLA

Esther Shamash, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. On 23 November 2011, the Applicant, a Security Officer in the Department of Safety and Security (“DSS”) of the United Nations Secretariat in New York, submitted an application for suspension of action of the decision finding him ineligible to take the Young Professionals Program (“YPP”) examination on 7 December 2011.

2. The Applicant applied to take the YPP examination in two subject areas, Administration and Humanitarian Affairs and received separate notifications of his ineligibility for each subject area. As these notifications relate to the same decision regarding his ineligibility, they will be referred to collectively as “the decision” or “the contested decision”.

3. The Applicant requested management evaluation of the contested decision on Monday, 21 November 2011. On Wednesday, 23 November 2011, following receipt of the present application, the New York Registry of the United Nations Dispute Tribunal transmitted the present application to the Respondent. The following day (Thursday, 24 November 2011) being an official holiday, the Respondent was directed to file his reply by 12 p.m. on Monday, 28 November 2011. The Respondent duly filed the reply and the Tribunal proceeded to decide the matter on the papers before it.

4. Article 13 (Suspension of action during a management evaluation) of the Tribunal’s Rules of Procedure provides that the Tribunal “shall consider an application for interim measures within five working days of the service of the application on the respondent”. As the present application was served on the Respondent on 23 November 2011, and the following day was an official holiday, the five working days for consideration of the present application will expire at the close of business on Thursday, 1 December 2011.

Background

5. The following background information is based on the parties' written submissions and the record.

6. The Applicant is a General Service-level staff member. The Applicant sought to take the YPP examination in the fields of Administration and Humanitarian Affairs. Taking this examination successfully would entitle the Applicant to apply and be considered for jobs at the Professional level.

7. According to the parties' submissions, the Applicant's employment record with the United Nations is as follows:

a. 18 February 2003 to 31 May 2007: Safety and Security Section, United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP"), Bangkok, Thailand;

b. 1 June 2007 to 1 February 2009: The Applicant submits that during this period he worked in a United Nations Secretariat entity, although his contract was administered by the United Nations Development Programme ("UNDP"). The Respondent submits, to contrary, that the Applicant was a staff member of UNDP "in accordance with a memorandum of understanding between UNDP and DSS";

c. 2 February 2009 to present: DSS, New York.

8. On 4 October 2011, the Chairperson of the Central Examinations Board ("CEB") informed the Applicant in writing that his application to take the YPP examination in both subject areas was rejected because the CEB had decided that the Applicant did not "have a minimum of five years of continuous service in the Secretariat to qualify for admission to the examination". The Applicant was also informed that he had the right to appeal the decision of the CEB within 10 calendar days by sending his appeal by email.

9. On 14 October 2011, the Applicant filed an appeal with the CEB against the decision communicated to him on 4 October 2011. His appeal was addressed to the Chairperson of the CEB.

10. On 18 October 2011, the Applicant received an email in response, confirming the decision that he did not meet the requirement of five years of continuous service. The email identified the sender as the Examinations and Tests Section, Office of Human Resources Management (“OHRM”).

11. On 20 October 2011, the Applicant sent an email to the Examinations and Tests Section, OHRM, seeking clarification as to the basis for the contested decision, asking also whether the email he received on 18 October 2011 from the Examinations and Tests Section was considered as the formal reply on behalf of the CEB.

12. On 25 October 2011, the Applicant received a reply from the same email account, confirming that “[his] time of service under UNDP contract cannot be counted towards five years of continuous service with the UN Secretariat”.

13. On 26 October 2011, the Applicant sent an email reiterating his reasons why he should be permitted to take the examination.

14. By email dated 27 October 2011, the Applicant was informed that “for the purpose of the examination, [his] contractual status does matter”, which was “why the time [he] worked under UNDP contract cannot be counted towards the required five years of service with the Secretariat”.

15. In response, by email dated 27 October 2011, the Applicant sought a confirmation that the emails “from [the] Examinations and Tests Section represent the final decision and formal reply of the Central Examination Board”. The Applicant also stated that he wished to “formally contest the decision by requesting a management evaluation on this issue”.

16. On 28 October 2011, the Applicant received another email, confirming that “this decision of the Central Examinations Board [was] final”.

17. On 3 November 2011, the Applicant sent an email to the Examinations and Tests Section, stating that he needed to use their email exchange “to contact [the Office of Staff Legal Assistance], UN Ombudsman, [the Management Evaluation Unit], and/or related UN officials”. The Applicant referred to the standard confidentiality disclaimer at the end of each email he had received and sought permission to “share the information with [the] above-mentioned parties”.

18. On the same day, he received an email, stating, “[p]lease feel free to share our communication[s]”.

19. It is common cause that the Applicant’s request for management evaluation was filed on 21 November 2011.

Applicant’s submissions

20. The Applicant’s principal contentions may be summarised as follows:

Prima facie unlawfulness

a. There is no validly implemented administrative instruction, enacted pursuant to sec. 2.1 of ST/SGB/2011/10 (Young professional programme), dated 19 October 2011, establishing criteria that would exclude the Applicant from the YPP examination;

b. Even if the requirement of five years of continuous service has been properly promulgated, it is wrongly interpreted and incorrectly applied to the Applicant. The requirement is to have five years of continuous service “in” the Secretariat, not “for” the Secretariat or in a contract “administered by” the Secretariat;

c. Even if the requirement was properly established and applied, an exception to it should have been properly considered;

Urgency

d. The examination is scheduled to take place on 7 December 2011. According to the Applicant, “[m]anagement evaluation need not be completed by that date and the [Dispute Tribunal] cannot resolve the matter on the merits by that date”. The Applicant further submits that he “exercised great diligence in pursuing redress in a timely fashion”;

Irreparable damage

e. Writing the examination is a unique opportunity. At this time, there are no further scheduled examinations. If the Applicant is denied the opportunity to take this examination, it is impossible to know how quickly the YPP-related posts will be filled or how many such posts may be available in the future. A loss of potential career development and ensuing frustration that the Applicant will face if unable to take the examination will be irreparable;

f. To the extent that a balance of convenience is material, permitting the Applicant to take the examination so that management evaluation and possible judicial review can take place before placement of YPP candidates will entail minimal expense.

Respondent’s submissions

21. The Respondent’s principal contentions may be summarised as follows:

Prima facie unlawfulness

a. The contested decision is not *prima facie* unlawful. Conversion from the General Service category to the Professional category is still regulated by

ST/AI/2010/7 (Competitive examination for recruitment to the Professional category of staff members from other categories), which sets out at sec. 3.1(a) that only those staff members with a “minimum of five years of continuous service in the Secretariat, excluding any service in separately administered fund or programmes” may apply to take a competitive examination;

b. From June 2007 to February 2009, the Applicant was a staff member of UNDP. The Applicant was engaged by UNDP in accordance with a memorandum of understanding between UNDP and DSS, sec. 3.3 of which provides that “UNDP shall contract staff” and “recruit and administer personnel on UNDP Letters of Appointment and/or contracts as appropriate, limited to service within the [Field Security Coordination Officers] programme”. It further stipulates that “[l]etters of appointments signed before the assignment to UN/DSS will stipulate that the staff member will be loaned to UN/DSS, and as such is not a UN/DSS staff member”;

Urgency

c. Any urgency in this matter is self-created. The Applicant waited until 21 November 2011 to file his request for management evaluation and until 23 November 2011 to file the present application. The Applicant could have asked for management evaluation immediately and received a decision by late November 2011, well before the examination date. Instead, he delayed and brought this matter before the Tribunal in the form of an urgent application, thus forcing the issue before the Tribunal and creating urgency;

Irreparable damage

d. The Applicant will not suffer irreparable damage. Should he not participate in the examination this year, he will have the opportunity to do so in the future. The Applicant cannot argue irreparable damage on the basis of

uncertainty as to how quickly the YPP-related posts will be filled or how many such posts may be available in the future. Mere speculation by the Applicant is insufficient to establish irreparable harm.

Consideration

22. This is an application for a suspension of action pending management evaluation. This manner of application is in the nature of urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five days of the service of the application on the Respondent (see art. 13.3 of the Rules of Procedure). Such applications disrupt the normal day-to-day business of the Tribunal and the parties' schedules. Therefore, parties approaching the Tribunal must do so on genuine urgency basis and with sufficient information for the Tribunal to, preferably, decide the matter on the papers before it. The proceedings are not meant to turn into a full hearing and an application may well stand or fall on its founding papers.

23. Due to the nature of urgent applications, both parties and the Tribunal are under pressure of time in such situations. The Tribunal has to deal with these matters as best as it can on a case-by-case basis, depending on the particular circumstances and facts of each case, within five working days.

24. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision action during the pendency of 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 Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Urgency

25. The Dispute Tribunal has held in several instances that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Applicant* Order No. 164 (NY/2010), *Corna* Order No. 90 (GVA/2010), *Lorand* Order No. 93 (GVA/2010), *Yisma* Order No. 64 (NY/2011), *A-Ali et al.* Order No. 220 (NY/2011), as well as *Dougherty* UNDT/2011/133). The Tribunal has also held in *Sahel* UNDT/2011/023 and *Patterson* UNDT/2011/091 that informal attempts at settlement and mediation, if any, do not absolve an applicant from acting timeously.

26. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions.

27. The Applicant acknowledges that he first became aware of the decision on 4 October 2011, after which he appealed to the CEB. On 28 October 2011, the Applicant received a final confirmation that the decision of the CEB was final. Therefore, taking the Applicant's case at its best, the Applicant was notified of the final nature of the decision taken on 28 October 2011, at the latest.

28. However, the present application for suspension of action was filed on 23 November 2011, more than three weeks after the email of 28 October 2011 and only nine working days before the date of the examination. Any urgency in this case is, accordingly, of the Applicant's own making. Although the Applicant states in his application that he "exercised great diligence in pursuing redress in a timely fashion", he provides no explanation to the Tribunal as to the reasons for filing the present application 25 calendar days after the email of 28 October 2011.

29. Furthermore, the Tribunal notes that, if the Applicant were to prevail, the timing of this application would likely have the practical effect of rendering final relief with respect to the examination of 7 December 2011. As the Applicant sought management evaluation on 21 November 2011, the deadline for its completion expires on 20 December 2011. Since the examination will take place on 7 December 2011, the Tribunal's decision to suspend the contested decision would therefore allow the Applicant to take the examination (provided management evaluation affirming the contested decision would not be issued prior to 7 December 2011).

30. Notably, while the Applicant had several weeks to request management evaluation and to prepare and file the present application, he now forces upon the Respondent only the briefest period of time to prepare and submit his reply in a situation in which, due to the timing of the application and the date of the examination, the Tribunal's decision would likely be fully dispositive of the issue. This demonstrates the unique nature of urgent relief and explains, in part, why the Tribunal expects applicants to act timeously, taking into account the circumstances of the case, when filing applications seeking urgent relief.

31. In the circumstances of this case, the Tribunal finds that the Applicant cannot seek its assistance as a matter of urgency on an imminent decision when he has had knowledge of the decision for more than three weeks. The Tribunal finds that the urgency in the present matter was created or caused by the Applicant, who did not act timeously in filing the present application with sufficient urgency and who failed to provide any explanation for the delay of more than three weeks.

32. The Applicant has failed to discharge his onus on the issue of urgency and has thus failed to meet one of the three conditions required under art. 2.2 of the Statute, the Applicant has thus failed to satisfy the test for a suspension of action. For this reason, the Tribunal will not consider whether the implementation of the contested

administrative decision would cause the Applicant irreparable damage. Likewise, no determination will be made as to the *prima facie* unlawfulness of the decision.

33. This does not preclude the Applicant from filing an application under art. 2.1 of the Tribunal's Statute in due course. The Tribunal would then be in a position to assess the lawfulness of the contested administrative decision.

Conclusion

34. The present application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of December 2011

Entered in the Register on this 1st day of December 2011

(Signed)

Hafida Lahiouel, Registrar, New York