



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON SUSPENSION OF
ACTION**

Counsel for the Applicant:

Self-Represented

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 27 July 2011, the Applicant filed an Application for suspension of action in relation to the decision of Mr. Abdoulie Janneh, the Executive Secretary of the Economic Commission for Africa (ECA), to fill the post of Director, Regional Integration, Infrastructure and Trade Division (RIITD), (“the 2011 Director, RIITD post”) a decision of which he was notified on 27 July 2011. The Applicant filed the present Application on the same date.

Facts

2. The Applicant joined the United Nations in 2001 and is currently serving in Addis Ababa, Ethiopia, as Chief of Section, Office of Strategic Planning and Programme Management (“OPM”), ECA, a P-5 position.

3. In a letter dated 24 June 2009 the Applicant wrote to the Secretary-General to complain about discrimination, harassment and abuse of authority against the Executive Secretary, Mr. Abdoulie Janneh. On 12 March 2010 he resubmitted his complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). In April 2010 the Assistant Secretary-General for Human Resources informed the Applicant in writing that she had set up a panel to investigate the complaint.

4. Between 29 May and 12 June 2010, the panel conducted its investigation at ECA.

5. On 8 February 2010 the Applicant applied for the substantive post of Director, RIITD (“2010 Director, RIITD post”) which was advertised.

6. On 4 May 2010 the Applicant was interviewed for the 2010 Director, RIITD post. On 6 September 2010 he received a letter informing him of the negative outcome of the interview, and on 9 September 2010 the Executive Secretary by memorandum to all ECA staff announced that Mr. Joseph Atta-Mensah had been appointed to the 2010 Director, RIITD post.

7. On 12 October 2010 the Applicant submitted a request for management evaluation contesting his non-selection for the 2010 Director, RIITD post.

8. On 3 February 2011 the Applicant received a response from the Secretary-General who informed him that the evidence before the Secretary-General did not allow him to conclude that the Applicant was given full and fair consideration for the post and accordingly, the Applicant should be compensated. The Applicant however did not agree to be compensated only, but filed a case before this Tribunal registered as UNDT/NBI/2011/008, which is pending.

9. By memorandum dated 27 May 2011 the Executive Secretary informed the ECA staff that Mr. Joseph Atta-Mensah, who had been appointed to the 2010 Director, RIITD post, had been redeployed as Director, OPM, thus vacating the directorship of RIITD.

10. On 31 May 2011 the Executive Secretary temporarily assigned Mr. Stephen Karingi as Officer-in-Charge, RIITD, and on 9 June 2011, the ECA advertised the 2011 Director, RIITD post. The closing date for applications was 8 August 2011.

11. On 10 June 2011 the Applicant filed an application for suspension of action in regard to the job advertisement. The Tribunal rejected the application¹.

12. On 4 July 2011, by an email, the Executive Secretary of ECA requested from the Chief of the Human Resources Services Section (Chief/HRSS) a list of all roster candidates against D-1 posts in substantive divisions. That list was communicated to the Executive Secretary on the same day but the name of the Applicant did not appear therein.

13. By memorandum dated 13 July 2011 the Executive Secretary informed the Director of the Division of Administration of ECA that he had selected a roster candidate in compliance with section 9.4 of ST/AI/2010/3 (Staff selection system).

¹ *Nwuke*, UNDT/2011/107.

14. The person chosen was Mr. Karingi, who had applied for the job opening and had been previously rostered for the 2010 Director, RIITD post.

15. By email dated 13 July 2011, Mr. Karingi received notification of the selection decision and a formal offer of appointment which he accepted on the same day by notifying the Chief/HRSS.

16. By memorandum dated 27 July 2011 addressed to all staff, the Executive Secretary announced the appointment of Mr. Karingi to the 2011 Director, RIITD post, effective 1 August 2011.

17. The Applicant immediately filed a request for management evaluation of this decision along with the present Application to the Tribunal.

The Parties' submissions

18. It is the view of the Applicant that the appointment of Mr. Karingi to the 2011 Director, RIITD post is outside the staff selection system (ST/AI/2010/3) and that it is a lateral move because the job opening is still "open" and candidates were still under consideration as it appeared from INSPIRA.

19. The Respondent avers that the selection of a roster candidate is governed by section 9.4 of ST/AI/2010/3 which reads:

Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories. The roster candidate shall be retained in a roster for a period of two years for male candidates and three years for female candidates after the first day of the month following the selection decision. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening, without reference to a central review body.

20. The Respondent refers to section 9.5 of ST/AI/2010/3 which states "[s]hould an eligible roster candidate be suitable for the job opening the hiring

manager may recommend his/her immediate selection to the head of department/office/mission, without reference to the central review body.”

21. Reference is also made to paragraph 3 of Chapter 9 of the “2011 manual for the Hiring Manager on the Staff Selection System (inspira)” (“the Instruction Manual”), which according to the Respondent clarifies that “the Hiring Manager may immediately recommend the selection of a qualified roster candidate among the released rostered applications”.

22. Relying on section 15.7(3) of the Instruction Manual the Respondent submits finally that “a qualified roster candidate may be recommended for selection without an interview and before the closing date of the job opening.” Section 15.7(3) of the Instruction Manual reads:

Hiring Managers may immediately recommend the selection of a qualified roster candidate from among the released rostered applications. Hiring Managers are not required to interview roster candidates’ [sic] but are encouraged to do so in a less formal setting in order to establish a sense of the candidate [sic] overall fit within the team/unit. In order to speed up the process, under such circumstances the *Hiring Manager* need not record his/her evaluation of the new non-rostered applications. Selection of a roster candidate is not required to go through a review by a Central Review body. One or preferably several roster candidates found suitable may be recommended for selection at this stage.

Consideration

23. Section 4.1 of ST/AI/2010/3 reads:

Immediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings.

Whilst imposing an obligation to advertise a job opening, ST/AI/2010/3 at the same time allows—in section 9.4—the hiring manager or head of department/office to recommend or select as the case may be, a rostered candidate. That appears to this Tribunal to be rather an odd situation.

24. If a job opening is advertised prospective candidates who meet the requirements of the job have a legitimate expectation, if not of being offered the position, at least of being considered and perhaps interviewed. The situation becomes even odder when we are faced with a situation where the job is filled before the deadline of the vacancy announcement has expired. It seems unfair, to say the least.

25. As it is, section 9.4 of ST/AI/2010/3 empowers the Executive Secretary to make a selection from a list of rostered candidates without reference to those who have actually applied to the vacancy announcement.

26. Further, section 9.3 gives power to a hiring manager, who is defined in section 1(m) of ST/AI/2010/3 as “the official responsible for the filling of a vacant position”, to recommend the selection of a candidate. It is then the responsibility of the head of department/office to make the selection of the candidate “best suited for the functions”. It would appear in the present case that the Executive Secretary Mr. Janneh was wearing both hats, that of the hiring manager and of the head of department/office. If this is the case then the accountability process is totally non-existent because the hiring manager is surely meant to be accountable to his or her head of department/office and *vice versa*.

27. However strongly this Tribunal feels about whether the rules empower the head of department/office to go back and forth between a vacancy announcement and a roster, however iniquitous this Tribunal feels is the wide discretion given to the head of department/office to pick a candidate of his personal choosing or liking, this Tribunal cannot conclude that the exercise was unlawful.

28. Having reached the conclusion that the decision is not unlawful, there is no need to consider the remaining matters. The Application for suspension of action must fail.

29. However, the Tribunal must observe that, based on the reasoning of the Tribunal in *Osmanli* UNDT/2011/190, wherein it is stated that “for a selection decision to be implemented, an employment offer from the Organization and its

unconditional acceptance by the selected candidate are, at least, required”², the contested decision in the present case was implemented on 13 July 2011, some two weeks prior to the filing of the present Application. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.³ In the present case, however, the Applicant could not have known of the implementation of the decision until after it took place. Such a situation raises the issue of the justification of having in the Statute of the Dispute Tribunal article 2.2 which provides for an interim injunction. If a staff member is notified of the decision not to appoint him after the selected candidate has been offered the position and accepted it, the staff member who has not been selected is powerless under article 2.2. His only remedy is to seek reparation by way of a substantive case.

Conclusion

30. The Application is dismissed.

(Signed)

Judge Vinod Boolell

Dated this 6th day of January 2012

Entered in the Register on this 6th day of January 2012

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi

² UNDT/2011/190, paragraph 16.

³ See for example, *Tadonki* UNDT/2009/016; *Applicant* UNDT/2011/158; *Kweka* UNDT/2011/122.