UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/006
Judgment No.: UNDT/2012/017
Date: 3 February 2012
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

AGONA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
George Irving

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. On 30 January 2012, the Applicant, a United Nations Reform Specialist at the P-3 level ("the P-3 post") with the United Nations Populations Fund ("UNFPA"), filed an application for suspension of action, pending management evaluation, of what he alleges is a decision to abolish the post of United Nations Reform Adviser at the P-5 level ("the P-5 post"). Both the P-3 and the P-5 posts were located in the Executive Board and External Relations Branch ("EBERB") of the Information and External Relations Division ("IERD"). Following his request that he be considered for a special post allowance ("SPA") for performing the duties of Acting Advisor, United Nations Reform since October 2010, the Applicant was granted an SPA effective 1 January 2011 to date, which is currently at the P-4 level, step 9.. The Applicant requested management evaluation of the impugned decision on 27 January 2012.

2. The Applicant appeals the alleged decision to abolish the P-5 post as he had previously applied for it, but was not selected, and contends that its abolition subverts due process, is in bad faith and is an attempt to create an *ex post facto* justification for the decision not to select him. The Applicant has separately appealed the non-selection decision and the case is at present pending before the Dispute Tribunal under Case No. UNDT/NY/2011/096.

3. On 30 January 2012, the New York Registry of the United Nations Dispute Tribunal transmitted the application for suspension of action to the Respondent, directing him to reply by 1 February 2012, which he did.

Background

4. The following factual information is based on the parties' written submissions and documents included in the case record.

5. As background for this instant application, the Applicant contends that:

a. In 2007, while encumbering his present post, the Applicant was informed by his line manager, Mr. Kwabena Osei-Danquah, Chief, EBERB, that his post had been recommended for reclassification from the P-3 to the P-4 level as he was undertaking functions above the original job description;

b. The reclassification of the P-3 post was never implemented, and Mr. Osei-Danquah instead proposed that the Applicant should wait and apply for job openings advertised at a higher level, including the P-5 post;

c. The Applicant alleges it was only after he challenged the selection process for the P-5 post that the issue of reclassification was recently "revisited as a result of the present challenge as a possible bridging solution, but no decision has been made". In May 2011, the Applicant was advised by the Director, Human Resources, "to find out what had happened with the reclassification request … and to ask [Mr. Osei-Danquah] to re-launch the recommendation for consideration in the next biennium budget";

d. Since October 2011, he has "continued to carry out higher level functions and an increasingly heavier work load, including the responsibilities of [the P-5 post], since its prior incumbent left for another job";

e. His performance evaluation from 2009 rated him as "fully proficient", noting that he continued to perform "above the level of [the P-3 post] … virtually … without supervision … and can perform exceptionally well at higher levels, if given the opportunity". In his 2010 performance rating he was graded as "fully achieved outputs", and it was stated that "the work he currently does and the quality of his work is higher than the position he occupies. He deserves a higher level position".

6. Concerning the selection process for the P-5 post, which he alleges has been abolished, the Applicant submits that he was shortlisted and interviewed for it, but

not selected, albeit already being on a "[United Nations Secretariat] P-5 roster". He contends that the process was tainted by several fatal flaws. The Respondent avers that the Applicant, in fact, came in third in the selection process and that there was "no irregularity in the selection decision for the P-5 post" (emphasis in the original). The issue of his non-selection is, as stated above, under consideration before the Tribunal under the aforementioned Case No. UNDT/NY/2011/096 and is not for determination in the present case.

7. As for the abolition of the P-5 post, the Applicant submits that, on 18 January 2012, during an EBERB staff meeting, Mr. Osei-Danquah informed the staff that the P-5 post "had already been abolished", and a draft EBERB Management Plan was circulated in which the P-5 post had been "struck through" (the Applicant has submitted this plan in evidence and the P-5 post is crossed out in relevant parts). He alleges that subsequently, including at the management evaluation for the non-selection case, he was informed that the entire United Nations Reform function will be transferred to the Program Division and it had not yet been determined how this would affect the P-5 post. These contradictory messages regarding the P-5 post following his challenge to the selection process lead him to believe that he is being subjected to unfair, discriminatory and retaliatory treatment.

8. In response, the Respondent contends that the P-5 post has actually not been abolished but merely moved from one division to another, namely from EBERB, IERD to the Programme Division ("PD"). The Respondent contends that the Applicant was made aware of this possibility in the reply to the Applicant's request for management evaluation dated 31 October 2011 where it was stated that UNFPA was still considering whether it would alter the functions and profile of the P-5 post and that there were three options under consideration. These three options included maintaining the functions as they were, abolishing the functions altogether, or making significant changes to the functions which could cause the post to be assigned to another organisational unit and result in a different classification level.

9. Therefore the only decision that has been made according to the Respondent, has to move the UN Reform Unit, including the P-5 post, from IERD to PD. As evidence in support, the Respondent submits a UNFPA interoffice memorandum, dated 10 January 2012, from the Director of IERD to the Director of PD. In this interoffice memorandum, the Director of IERD states as follows:

> Further to our discussions on 30 November … this is to initiate the process of transferring the functions of the UN Reform Unit from IERD to [PD].
>
> As you are aware, the unit currently consists of [the P-5 post], which is currently vacant, and [the P-3 post], occupied by [the Applicant] … [T]he aforementioned two posts, would be moved to PD upon the receipt of official communication and approval from your office.

Consideration

Is there a contested administrative decision requiring suspension?

10. The Applicant alleges that he has received mixed messages about the abolishment of the P-5 post. He alleges that it has been removed from the EBERB Management Plan, but in his own words describes the Respondent's position as the "stated *intention* to abolish the post" (emphasis added). Whilst the Tribunal accepts that the Applicant may have received mixed messages, an "intention" to abolish a post does not equate to a "decision" to do so. Neither does the transfer of a post equate to the abolition of a post. The Respondent has produced evidence that a decision to abolish the P-5 post has not been taken, but that the entire United Nations Reform Unit, including the P-3 and P-5 post, is being transferred from IERD to PD and that the fate of the P-5 post remains uncertain at this stage as it continues to be "vacant". On the papers before the Tribunal, the P-5 post is clearly being transferred and not abolished.

11. In the absence of a decision to abolish the post, there can be no suspension of such decision. As the contested administrative decision has not been taken, the

application for suspension of action is premature. There being no contested decision worthy of suspension, the application stands to be rejected.

The mandatory conditions for granting suspension of action

12. Even if the decision to abolish the P-5 post had been taken, the Applicant would have to satisfy the Tribunal on the papers filed to grant the suspension of action. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision 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.

13. Applications for suspension of action pending management evaluation require consideration by the Tribunal within five days of service of the application upon the Respondent. Due to their urgent nature, such applications must articulate the basic requirements with sufficiency for the Tribunal to deal with the matter on the papers. As time is of the essence, it would be in any applicant's interests to very clearly set out, under separate headings, the particular facts which satisfy each of the three essential requirements for a successful application.

14. The Dispute Tribunal's standard form contains clearly demarcated sections with regard to the mandatory requirements for a suspension of action, for completion by an applicant. The instant application contains only a mixed "Statement of Facts and Arguments" attached to the Dispute Tribunal's standard application form, and unfortunately does not clearly set out or articulate the three mandatory requirements, either separately or at all, that need to be satisfied for the granting of the suspension of action. The Applicant has failed to insert any details on the standard application form, leaving it to the Tribunal to attempt to identify the relevant facts pertaining to the relevant submissions from the unstructured document attached to the application.

Irreparable damage

15. With regard to irreparable damage, for example, the Applicant simply alleges that the stated intention to abolish the post before consideration and decision by the Tribunal in the substantive matter is designed to forestall his legitimate professional development and career prospects and obstruct the ability of the Tribunal to adjudicate the case fully on its merits, including on the question of compensation.

16. Whilst it is accepted that, depending on the circumstances of the case, harm to career prospects or sudden loss of employment may constitute irreparable damage, for an application to be successful there must at least be an averment of irreparable harm to the Applicant. The Tribunal finds the Applicant has failed to articulate that the implementation of the contested decision, even if the P-5 post were to be abolished, would cause him any harm that could not be compensated by an appropriate award of damages in the event of his success in the substantive case. The application for suspension of action would therefore fail on this ground alone.

Prima facie *unlawfulness and urgency*

17. In light of the Tribunal's above findings, the Tribunal need not address the elements of prima facie unlawfulness and urgency. However, it must be said that the application for suspension of action of the alleged decision to abolish the post, hinged entirely on allegations made regarding the alleged unlawfulness surrounding the selection process. There was not a single averment regarding the *prima facie* unlawfulness of the alleged decision to abolish the post other than generalisations made regarding an attempted subterfuge and alleged discrimination and retaliation. As it presently stands, there is no identifiable challenge to the alleged abolition of the P-5 post to be found in the application. In this regard, the current application in the Tribunal's mind, verges on the frivolous.

Conclusion

18. For the reasons stated above, the present application for suspension of action is rejected.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 3rd day of February 2012

Entered in the Register on this 3rd day of February 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York