UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/014
Judgment No.: UNDT/2012/032
Date: 29 February 2012
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MCLETCHIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 22 February 2012, the Applicant, a Security Officer with the Department of Safety and Security ("DSS"), submitted an application for suspension of action, pending management evaluation, of the decision declaring her ineligible for consideration for the vacant post of Operations Assistant in the General Service ("G") category, at the G-6 level.

2. The contested decision was based on the determination that the Applicant's present post in the Security Service ("S") category, classified at the S-2 level, is equivalent to the G-4 level. The Respondent submits that this rendered her ineligible for consideration for the advertised G-6 level post as under sec. 6.1 of ST/AI/2010/3 (Staff selection system) she would be eligible only if her post was equivalent to at least the G-5 level.

3. The Applicant was notified of the contested decision on 16 February 2012 and requested management evaluation of the decision on 21 February 2012.

4. The New York Registry of the United Nations Dispute Tribunal transmitted the application to the Respondent on 22 February 2012. The Respondent duly filed his reply, as directed, on 23 February 2012, and the Tribunal proceeded to decide the matter on the papers before it.

5. Article 13.3 (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 22 February 2012, the time for its consideration will expire at the close of business on Wednesday, 29 February 2012.

Background

6. The Applicant joined the United Nations on 1 August 2005 as a Security Officer at the S-1 level. According to the Applicant, on 1 February 2009, whilst serving as Security Officer at the S-2 level, she commenced the duties of an Operations Assistant in DSS, classified at the G-6 level. It appears from the application, however, that her formal job title remained that of the Security Officer, at the S-2 level, step VI. She holds a fixed-term appointment.

7. On 8 May 2011, she applied for a position of Operations Assistant, classified at the G-6 level.

8. Some nine months later, on 6 February 2012, upon hearing that her name was not on the eligibility list, the Applicant sent an email to the Office of Human Resources Management ("OHRM") enquiring about the status of her application. On 7 February 2012, her supervisor also sent an email to OHRM, seeking clarification as to the reason why the Applicant's name did not appear on the list of names approved for consideration.

9. OHRM informed the Applicant's supervisor by email of 15 February 2012 that the Applicant's job application had been rejected based on the matrix used for determining grade equivalencies, known as the Matrix for Pre-screening on Level ("Equivalency Matrix"), which was used "as a guideline for operational purposes". The following day, in response to the Applicant's supervisor's request, OHRM sent an email providing the Internet link to the Equivalency Matrix, which was contained as Annex H to the Instructional Manual for the Hiring Manager on the Staff Selection System ("Instructional Manual").

10. The Respondent submits that the Equivalency Matrix was prepared pursuant to sec. 6.1 of ST/AI/2010/3), which states (footnotes omitted):

> **Section 6**
>
> **Eligibility requirements**
>
> 6.1 Staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade. Staff members in the General Service and related categories holding a permanent, continuing or fixed-term appointment may apply for positions in the Field Service category at any level, irrespective of the grade held in the General Service and related categories, provided they meet the requirements of the post.

11. The Applicant was informed of the decision declaring her ineligible for the position on 16 February 2012.

Applicant's submissions

12. The Applicant's principal contentions may be summarised as follows:

Prima facie *unlawfulness*

a. The Equivalency Matrix does not have the force of law and cannot curtail the rights of staff members. Alternatively, the Equivalency Matrix was not approved after consultation with the relevant organizational units and appropriate staff representative bodies as required with respect to all rules, policies, and procedures intended for general application (see ST/SGB/2009/4);

Urgency

b. Unless the contested decision is suspended, the recruitment process will continue without the Applicant's name on the list of approved candidates;

Irreparable damage

c. If the Applicant is not allowed to be considered for the vacant post of Operations Assistant, she will not be allowed to participate in a competitive recruitment process that offers the sole avenue to be selected for the vacant post. As a result, the Applicant's career aspirations and potential career development will be irreparably frustrated on the basis of a matrix of grade equivalencies that does not have the force of law;

d. The Applicant has been performing the functions of the vacant post to full satisfaction for almost 36 months, "which will add significantly to the frustration if she is now not even allowed to participate in the competitive recruitment process for this post, which cannot be repaired".

Respondent's submissions

13. The Respondent's principal contentions may be summarised as follows:

Receivability

a. There has not been a final selection decision and as such there is no administrative decision capable of being contested. Further, the Applicant has not exhausted all internal remedies, including review of the selection process by a central review body. Therefore, the present application is not receivable;

Prima facie *unlawfulness*

b. Section 6.1 of ST/AI/2010/3 applies to the Applicant, and the contested decision was arrived at correctly. The Applicant does not contend that the use of the Equivalency Matrix was irrational or that it represents an abuse of discretion. The Equivalency Matrix is only an instrument of OHRM

created on expert advice in order to implement sec. 6.1 of ST/AI/2010/3. It does not prescribe any rules and does not need to be promulgated;

c. Whether or not the Equivalency Matrix will be included in any administrative issuances in the future is a matter for further discussion and consideration by the Administration;

Urgency

d. The matter is not urgent as the selection process is ongoing. The selection process was paused pending clarification of the Applicant's queries regarding her eligibility. Now that this has been clarified, the process will continue;

Irreparable damage

e. The Applicant has not demonstrated how the contested decision would cause her irreparable harm. Frustration, referred to by the Applicant, is not irreparable harm. Any claims of potential monetary loss or harm to career prospects are purely speculative—as one of 145 candidates at the early stage of the selection exercise, the Applicant cannot claim any tangible loss or damage of any kind;

f. The "balance of harm" should also be considered. Granting the requested suspension of action would result in suspension of the entire selection exercise, which will place all other applicants for the job on hold pending management evaluation of the Applicant's case. The harm that this would occasion to those applicants far outweighs the frustration to the Applicant by being considered ineligible, which is capable of being compensated in the event that she succeeds in an application on the merits.

Consideration

14. This is an application for a suspension of action pending management evaluation. 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. Therefore, parties approaching the Tribunal must do so with sufficient information for the Tribunal to, preferably, decide the matter on the papers before it. An application may well stand or fall on its founding papers.

15. Article 2.2 of the Tribunal's Statute provides that the Tribunal 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.

Receivability

16. The Respondent contends that the present application is not receivable as the selection exercise is still ongoing and its propriety will be reviewed at the end of the process by a central review body.

17. The Tribunal finds that, as far as the Applicant's situation is concerned, the contested decision has the effect of bringing her participation in the selection process to an end. The decision that she is not eligible to participate in the selection process has been made, and the Respondent has failed to show to the Tribunal's satisfaction that any final review of the process by a central review body would encompass review of eligibility of every one of the 145 candidates. In any event, central review bodies make recommendations, which the Administration may or may not follow. The making of a recommendation is quite distinct from the relief the Applicant is seeking in the present application.

18. The Tribunal finds that, in the particular circumstances of this case, the present application is receivable.

Irreparable damage

19. One of the requirements for a successful application for interim relief is that the Applicant must satisfy the Tribunal that the implementation of the decision would result in irreparable harm.

20. It is generally accepted that financial loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

21. The Respondent submits that the Applicant would be only one out of 145 candidates considered for the job. It is unclear whether 145 is the total number of candidates for the post or candidates whose names were released for consideration. In any event, in view of the Applicant's unopposed submission that she has been performing the functions of the advertised job for the last 36 months, it appears that, if she were permitted to continue with the application process, she may have a fairly good chance to be among the qualified candidates considered at the final stage of the selection process.

22. However, the Tribunal is not persuaded that the harm to the career of the Applicant, in the event her suspension of action application is not granted, would be such as to constitute irreparable damage. The Applicant has not shown that the pool of potential jobs that she can apply for is so narrow as to effectively preclude her from any career advancement other than by applying for this G-6 post. The Applicant also holds a fixed-term appointment and makes no averment that she is in any danger of losing her current employment.

23. Furthermore, even if the Applicant has been performing the functions of the vacant post for the last 36 months, this does not guarantee that she would be selected.

24. The Applicant has failed to persuade the Tribunal on the papers filed that the implementation of the contested decision would cause her any harm that could not be compensated by an appropriate award of damages in the event the Applicant decides to file an application on the merits under art. 2.1 of the Tribunal's Statute.

25. Accordingly, the Tribunal finds that the Applicant has failed to demonstrate that the implementation of the contested decision would cause her irreparable damage, and the present application stands to be dismissed.

26. As one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal does not need to determine whether the remaining two conditions—particular urgency and *prima facie* unlawfulness—have been satisfied.

Observation

27. Although the Tribunal has found that the Applicant has failed to prove irreparable harm and is thus unsuccessful on the application for suspension of action, the Applicant has raised an important issue that requires comment. She contends that the decision regarding her ineligibility was premised on a document that is unlawful. The Applicant contends that the Equivalency Matrix has not been properly promulgated or, alternatively, that it has not been the subject of consultation.

28. The Applicant relies on an email of 8 October 2011, attached to her application, from the Assistant Secretary-General for Human Resources to the President of the Staff Union, in which the Assistant Secretary-General stated that the recruitment to General Service is the subject of a draft administrative instruction, which apparently contains, as "Annex 6", a matrix of grade equivalencies. The Assistant Secretary-General's email indicates that the draft instruction, including

Annex 6, had not yet been forwarded to staff and management representatives for consideration and comment. The Assistant Secretary-General further stated that the preparation of the final draft of the administrative instruction would proceed with the established global consultative process and "we certainly intend to engage and consult with both management in DSS as well as staff representatives".

29. In her email of 8 October 2011, the Assistant Secretary-General also comments on the issues of grade equivalencies which apparently have been the subject of ongoing discussion for a number of years, particularly because of the incongruity that similarly situated staff members such as those serving in security services have served under different categories in different duty stations. The Assistant Secretary-General recognised that this would require some form of benchmarking.

30. The Applicant has not attached the document referred to as Annex 6. It is not evident if Annex 6 referred to in the email is the same document as the Equivalency Matrix contained in the Instruction Manual and attached to the application.

31. The Applicant does not include the letter to which the Assistant Secretary-General was responding and there is no indication of any further correspondence between the Staff Union and the Assistant Secretary-General on this matter since October 2011. There is no evidence of any previous dealing or past course of conduct, including consultations, between the Administration and the Staff Union. It is unclear at this stage, on the evidence before the Tribunal, whether the Equivalency Matrix is a matter for consultation or requires to be promulgated, or whether it has become established as a measurement tool by past practice and usage over a period of time. The precise status of the Equivalency Matrix, which was apparently implemented in 2008, is not clearly discernible from the papers before the Tribunal and may well be a matter for the merits in the event the Applicant files an application under art. 2.1 of the Tribunal's Statute.

Conclusion

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

(*Signed*)

Judge Ebrahim-Carstens

Dated this 29th day of February 2012

Entered in the Register on this 29th day of February 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York