UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/064
Judgment No.: UNDT/2012/109
Date: 18 July 2012
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

TIWATHIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 11 July 2012, the Applicant filed an application for suspension of action of the administrative decision to select staff member other than her for the post of Deputy Director, Medical Services Division ("MSD") at the D-1 level ("the D-1 post").

2. On 12 July 2012, the Registry of the Dispute Tribunal in New York served the application on the Respondent and ordered him to file and serve a reply by 4:00 p.m., 13 July 2012.

3. On 12 July, 01:33 p.m., the Tribunal issued Order No. 139 (NY/2012) to the parties. In this Order, the Tribunal instructed the parties to file submissions by 4:00 p.m., 13 July 2012, with the Tribunal regarding whether the Applicant had filed a request for management evaluation and, if so, when she had done so and whether the contested decision had been implemented.

4. In response to Order No. 139 (NY/2012), on 13 July 2012, the Applicant filed her submission at 11:29 a.m. and the Respondent filed his submission 3:44 p.m. On 16 July 2012, at 9:12 a.m., the Applicant filed an additional submission, replying to the Respondent's submission dated 13 July 2012.

Relevant background

5. The following factual chronology is based on the submissions of the parties and the appended documents filed with the Tribunal.

6. On 12 January 2012, the Applicant applied for the D-1 post.

7. On 8 March 2012, the Director of MSD informed the Applicant that she was to be Officer-in-Charge in her absence and that a former MSD staff member was

hired as a consultant to assist the Office of Human Resource Management ("OHRM") in the prescreening / short-listing of applicants for vacancies at the D-1 and D-2 level.

8. On 24 April 2012, the Applicant was interviewed for the D-1 post. The interview panel consisted of three persons, including the Director of MSD, and was assisted by the former MSD staff member hired as a consultant.

9. According to the Applicant, at the end of the interview, the chair of the panel informed the Applicant that there were two vacancies at MSD, namely a position at the D-2 level ("the D-2 post") as well as the D-1 post, and that the selection decision would take time as both selection processes were to be handled in tandem. The Respondent denies this assertion.

10. On 29 or 30 May 2012, as a follow-up to the interview by the interview panel, the Applicant was interviewed by the Assistant Secretary-General for Human Resources Management ("ASG/OHRM").

11. On 8 July 2012, the Applicant received an e-mail from the Director of MSD, informing her that a named Australian female had been appointed to the D-2 post.

12. On 9 or 10 July 2012, the Director of MSD came to the Applicant's office and informed her that the Under-Secretary-General of Management ("USG/DM") had selected a named male from a Western European country rather than her for the D-1 post.

13. The Applicant alleges that the Director of MSD explained that the Applicant was found to be equally qualified by the interview panel and that that was the reason for her now being placed on a roster. The Respondent rejects this statement. Appended to his submission dated 13 July 2012, he adduces in evidence, on an *ex parte* basis, the written evaluations of the interviewed candidates. These evaluations indicate that the selected candidate was deemed more qualified by the interview panel

and that he was also "the most senior P-5" among the recommended candidates for the D-1 post.

14. Later the same evening, the Applicant received an email from the Director of MSD confirming the decision to appoint the successful candidate to the D-1 post.

15. On 10 July 2012, at 6:01 p.m., OHRM informed the successful candidate that he had been selected for the D-1 post. OHRM further requested him to confirm his "continued interest in and availability for this position" by return email.

16. On 11 July 2012, at 9:04 a.m., the successful candidate replied to OHRM affirming his "continued interest and availability for the position".

17. By letter from the Executive Officer of the Department of Management dated the same day, the Applicant was informed that he had been selected for the D-1 post and that the "personnel action implementing your promotion will be issued by this Office upon your assuming the functions of the [D-1 post]".

18. By an email of the same date, the ASG/OHRM informed the Applicant that she had not been selected for the D-1 post and that she had been placed on a roster for job openings with similar functions at the same level, effective 1 August 2012.

Applicant's submissions

19. The Applicant's principal contentions may be summarized as follows:

The competence of the Tribunal

a. The request for management evaluation was properly submitted;

b. To the best of the Applicant's knowledge, the impugned decision has not been implemented as the selected candidate has yet to assume the functions of the D-1 post. Furthermore, the Applicant is not aware as to

whether or not the selected candidate has been formally or contractually appointed;

c. ST/AI/2010/3 (Staff selection system) states that "the earliest possible date on which such a promotion may become effective shall be the first day of the month following the decision" which in this case would be 1 August 2012;

Prima facie *unlawfulness*

The integration of the selection processes for the D-1 and the D-2 posts

d. During the selection process, the Applicant was informed by the chair of the interview panel that it had been decided that the selection process for the D-1 and D-2 posts would be conducted in tandem to ensure the compatibility of the selected candidates. Such a decision breaches the requirement that each candidature be considered on its own merits, is not sanctioned by any rules, violated the Applicant's right to equal treatment, and is therefore unlawful. The D-1 post was kept vacant since January so that the recruitment process for that post could be "coupled" to that of the D-2 post resulting in the "orchestration" of the selection process whose purpose was to obtain a desired result thereby resulting in a selection process that was in breach of ST/AI/1999/9;

The Applicant's gender and geographical background

e. Following the completion of the selection process, the Applicant was informed that despite the fact that she was a female candidate from a developing nation, and in opposition to ST/AI/1999/9 (Special measures for the achievement of gender equality), it had been decided that the selection of a male candidate from the Western European and Other Group ("WEOG") for

the D-1 post was more appropriate as a result of the fact that a female had been selected for the D-2 post;

f. The improper consideration and selection of a candidate solely due to the fact he is a male is a clear violation of ST/AI/1999/9 that requires that efforts be made to increase the number of female candidates from developing nations and resulted in a decision that is biased and prejudiced;

g. In addition to being denied the D-1 post as a result of her gender, the selection of a male's candidature over that of the Applicant's was done even though they had been deemed to be equally qualified, as acknowledged by the interview panel who rostered the Applicant following the completion of the D-1 post selection process;

h. Over the past 11 months, all senior management position in the MSD have been filed by males from the WEOG which reflects, as acknowledged by the Director of MSD, who said that this was not fair, an abuse of due process and a manipulation of the recruitment process. This violates the spirit of art. 10.2 of the United Nations Charter in that it results in the overrepresentation and dominance of a regional group within MSD;

i. The Director of MSD, as evidenced by her statement that "the best qualified doctors come from countries where the field of medicine is more advanced", was biased towards the Applicant. This bias was reflected by the interview panel that graded the Applicant as satisfactory in professionalism whereas the selected candidate was deemed to be outstanding thereby violating section 4.3 of the Staff Regulations and Rules.

Seniority as a selection criterion

j. The memorandum to the USG/DM identified seniority as a decisive, new, factor that was factored into the selection decision. This criterion was

introduced by the ASG/OHRM and is not defined by any of the Administrative Instructions, General Assembly resolutions or even the practices regarding the post selection process. Furthermore, a review of the actual professional experience of the selected candidate reveals that he was on a P-4 level post that was elevated to the P-5 level, without a change in scope of the post, whereas the Applicant's own experience was at an actual P-5 level which also involved D-1 level functions;

The successful candidate served less than one year at the P-5 level in MSD

k. In addition to disregarding a female candidate for that of a male, the selection of the successful candidate is further unlawful since, prior to being selected for the D-1 post, he had not served for at least a year at a P-5 level within MSD;

Urgency

l. The decision may yet have to be implemented. Consequently, should the selection process proceed, it will result in irreparable damages to the Applicant's professional reputation, career prospects as well as a loss of income;

Irreparable damage

m. The implementation of the decision to appoint another candidate will result in irreparable damage to the Applicant's professional reputation and to her legitimate career prospects.

Respondent's submissions

20. The Respondent's principal contentions may be summarized as follows:

Prima facie *unlawfulness*

a. The record of the case reflects that the selection process was conducted in full compliance with all of the applicable Staff Rules and Regulations. The Applicant was accorded full and fair consideration and her claims, in addition to being without merit, do not raise any "serious and reasonable doubts about the lawfulness of the contested decision" (*Hepworth* UNDT/2009/003; *Pirnea* UNDT/2011/059);

b. The Applicant was among six candidates, out of seventy-two that had applied, that were shortlisted for the D-1 level post. The Applicant was subsequently one out of the four candidates that was deemed suitable for the contested post. The Central Review Board ("CRB") reviewed the interview and evaluation process and, on 5 July 2012, endorsed the process and the candidates that were deemed suitable for the contested post;

c. The Officer-in-Charge for Human Resources Management proposed that the USG/DM approve the selection of the most senior P-5 level candidate who had also previously served as Chief Medical Service for the United Nations Assistance Mission for Iraq ("UNAMI"). On 10 July 2012, the selected candidate was informed of his selection and, the following day, he confirmed his availability for the position;

d. Upon being informed of the section decision the Applicant was advised that, as a recommended candidate, she would be placed on the roster of qualified candidates but she was never informed that she was "equally qualified" to the selected candidate or that the recent selections within MSD were unfair. Of note, the selected candidate was graded as outstanding in professionalism whereas the Applicant was only assessed as satisfactory;

e. There is no requirement that the Respondent take the Applicant's gender or country of origin into consideration as part of its selection process;

f. The Applicant's candidacy was reviewed objectively and there is no evidence that any of the acts of the Respondent were not performed regularly, that relevant material was ignored or that irrelevant material was taken into account, that would result in the post selection being prima facie unlawful;

Urgency

g. There is no urgency to the Applicant's request as the selection decision was implemented upon being communicated to the selected candidate on 10 July 2012;

h. There is no imminent risk to the Applicant such as a loss of salary seeing that the implementation of the contested decision will not result in the Applicant losing her employment;

Irreparable damage

i. The Applicant has not demonstrated how the implementation of the contested decision will cause her a harm that cannot be repaired by an award of damages;

j. There is no evidence to conclude that the contested selection process, in which she was recommended and then rostered, would harm her reputation;

k. The Applicant neither has standing, nor an actual factual basis, to raise a potential harm to the Organization's reputation as an valid argument.

Consideration

The competence of the Dispute Tribunal

21. The United Nations Appeals Tribunal ruled in its judgment in *O'Neill* 2011-UNAT-182 (affirming UNDT/2010/203) that "the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties". The Tribunal is therefore mandated to review its competence at its own initiative.

22. Regarding the jurisdiction of the Dispute Tribunal concerning an application for case on suspension of action, art. 2.2 of its Statute provides that:

> The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation …

23. It follows from this that the following two complementary requirements must be satisfied for the Tribunal to be competent to hear and pass judgment on the application for suspension of action:

a. The management evaluation process must be pending when the judgment on suspension of action is rendered; and

b. The contested administrative decision must not yet have been implemented.

The Applicant's request for management evaluation

24. In the standard form by which the Applicant filed her application for suspension of action, the Applicant did not indicate whether or not she had requested a management evaluation of the impugned decision nor did she append a copy of her

request for such an evaluation to her application. Rather, the Applicant noted that, "I am preparing my request for Management Evaluation presently".

25. By her submission dated 13 July 2012, the Applicant forwarded a copy of her request for management evaluation which she submitted at 4:49 p.m. on 12 July 2012 and which is therefore subsequent to her filing her application for suspension of action with the Dispute Tribunal.

26. The Tribunal observes that the decision being challenged in the application for suspension of action and in the request for management evaluation is the same, namely the decision to select a candidate other than the Applicant for the D-1 post.

27. The Tribunal further notes that art. 2.2 of the Statute of the Dispute Tribunal makes no distinction between whether the request for management evaluation is filed before or after the application for suspension of action. Art. 2.2 simply states that the Dispute Tribunal shall hear and pass judgment on an application for suspension of action "during the pendency" of management evaluation.

28. Thus, the Tribunal finds that, in the present case, the first requirement is satisfied.

Implementation of the decision

29. Following an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Tribunal may "*suspend*, during the pendency of the management evaluation, *the implementation* of a contested administrative decision" (emphasis added). This means that if the contested administrative decision has already been "implemented" there no longer is a decision that the Tribunal can suspend.

30. The present case concerns a selection decision and the question to be determined here is therefore when such a decision is implemented.

31. The Applicant refers to sec. 10.2 of ST/AI/2010/3 (Staff selection system), which provides that "the earliest possible date on which [a] promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions". In light of this, she contends that the contested administrative decision is only implemented at the time upon which the successful candidate assumes the D-1 post, which is 1 August 2012, since his selection amounted to a promotion. She submits that the selection decision has therefore not yet been implemented.

32. In the online Oxford dictionary (english.oxforddictionaries.com) the word "implementation" is defined as "the process of putting a decision or plan into effect; execution".

33. In the present case, the successful candidate was informed by the ASG/OHRM on 10 July 2012 that he had been selected for the D-1 post. The successful candidate was also asked to confirm his continued interest and availability for the position within five business days of receiving the notification. On 10 July 2012, the Administration thereby presented the successful candidate with an offer for employment for the D-1 post. On 11 July 2012, the successful candidate responded that he was confirming his continued interest and availability in the D-1 post, thereby notifying the Administration of his unconditional acceptance of the conditions of the offer within the given time limit.

34. An employment contract is an agreement, which is established by an offer and an subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 determined that "a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate".

35. The Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Statute of the Dispute Tribunal refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member's unconditional acceptance of the offer.

36. When formed, the employment contract is a legally binding bilateral act that is agreed upon by the consensual will of the contracting parties and which does not require to be in a written form for it to be valid. It is a contract in which the successful candidate cannot be replaced as this person has been selected after a competitive selection process based on her/his personal skills and competencies (*intuitu personae*) and where this candidate work under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contract period by each of the parties when they satisfy their successive and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labour.

37. Unlike what the Applicant submits, the date on which a successful candidate is to assume her/his functions is therefore not a matter of implementing the selection decision but one of executing the resultant employment contract. The significance of sec. 10.2 of ST/AI/2010/3 in this regard is that it refers to the effect this has on the employment contract and not on the selection decision.

38. Consequently, in the present case, the Tribunal finds that the selection decision was implemented by the formation of the successful candidate's

employment contract on 11 July 2011 upon his unconditional acceptance of the offer presented to him concerning the D-1 post.

39. The Tribunal further finds that, since the contested decision was already implemented before a judgment on suspension of action could be rendered, the second condition for it to hear and pass such judgment under art. 2.2 of the Statute of the Dispute Tribunal is not fulfilled. The Tribunal is therefore not competent to adjudicate on the matter before it. It is therefore not necessary for the Tribunal to decide on the merits of the application, namely the three requirements for granting a suspension of action: *prima facie* unlawfulness, urgency, and irreparable harm.

Conclusion

40. The Application is rejected in its entirety.

(*Signed*)

Judge Alessandra Greceanu

Dated this 18th day of July 2012

Entered in the Register on this 18th day of July 2012

(*Signed*)

Hafida Lahiouel, Registrar, New York