



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/044

Judgment No.: UNDT/2012/116

Date: 1 August 2012

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR SUSPENSION
OF ACTION**

Counsel for Applicant:
Self-Represented

Counsel for Respondent:
Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. On 30 July 2012, the Applicant requested suspension of the implementation of a selection decision for the post of Director, D-1, Governance and Public Administration Division (GPAD) at the United Nations Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia.
2. The Respondent filed his Reply on 30 July 2012.
3. The Applicant filed his response to the Respondent's submissions on 31 July 2012.
4. After careful consideration of the submissions of the Applicant and Respondent, the Tribunal deemed it necessary to hold an oral hearing in this matter in accordance with Article 16.1 of its Rules of Procedure.
5. A Notice of Hearing was issued on 31 July 2012, setting the matter down for hearing on 1 August 2012 at 10.00am, Nairobi time.
6. At the hearing, the Parties were directed to address the Court on:
 - a. Whether the proper procedure was followed with regard to the posting and alleged changes to the Vacancy Announcement (VA);
and
 - b. Whether the impugned decision had been implemented.

Facts

7. On 24 October 2011, the Executive Secretary of ECA announced the appointment of Mr Abdalla Hamdok, then Director of GPAD, to the post of Deputy Executive Secretary (DES) of ECA. This promotion created a vacancy at the D-1 level in GPAD.
8. On 8 November 2011, a Temporary Vacancy Announcement (TVA) HRSS/11/11/1875 was issued for the temporarily vacant post of Director, GPAD.

9. The Applicant applied for this temporary post but was not invited for interview and was informed of his non-selection on 22 November 2011. On the same day, it was announced by memorandum to all staff that Mr Said Adejumobi had been selected for appointment.

10. On 8 December 2011, ECA issued a Vacancy Announcement (VA) for the same post (Director/GPAD) on INSPIRA, under JO 12-MED-22857-R-Addis Ababa (X), with a closing date of 6 February 2012. The Applicant applied for the position.

11. The posting on INSPIRA was amended a week later, removing paragraph 2 of the Special Notice section which read:

This vacancy is subject to availability of post. Staff members of the United Nations Secretariat must fulfill the lateral move requirements to be eligible to apply for this vacancy. Staff members are requested to indicate all qualifying lateral moves in their Personal History Profile (PHP) and cover note.

12. The Applicant contends that the removal of this criterion favoured the candidate who was eventually selected for the post.

13. The Applicant was invited for interview by an e-mail dated 21 March 2012.

14. In response to a query from the Applicant, on 25 March 2012, the Human Resources Services Section(HRSS) informed the Applicant that the interview panel would consist of: Abdalla Hamdok, Deputy Executive Secretary, ECA (and former incumbent of the post in dispute); Doreen Bongoy-Mawalla, Director, Division of Administration, ECA; Adebayo Olukoshi, Director, African Institute for Economic Development and Planning; Massood Karimipour, Regional Representative for the Middle East & North Africa, UNODC; Rudy Van-Dijck, Chief Division of Conference Services, UNON and Judica Lawson, Deputy Regional Director for Africa, International Labour Organization, Addis Ababa.

15. The shortlisted candidates, including the Applicant, were interviewed on 28 March 2012. Only the first four officers named above were present in the panel interviewing that day, contrary to what the Applicant had been told.

16. On 12 June 2012, the Central Review Board in New York approved the proposal for filling the position pursuant to section 8.1 of ST/AI/2010/3 (Staff selection system).

17. On 15 July 2012, the Executive Secretary of ECA selected Mr. Adejumobi, for the position pursuant to section 9.2 of ST/AI/2010/3.

18. By letter dated 20 July 2012, the selected candidate was notified that he had been selected for the position of Director/GPAD. The same day, the selected candidate accepted that appointment with an endorsement on the letter (Annex R1 of the Respondent's submission.).

19. By memorandum dated 26 July 2012, the HRSS informed the Applicant that he was not selected for the position. The same day, in a memorandum addressed to all staff, the Executive Secretary announced the appointment of the new Director, GPAD, effective 1 August 2012 (Annex A1.1 to the application).

20. On the same day, the Applicant requested management evaluation of the contested decision.

Parties' Submissions

21. The Applicant's contentions are:

Prima facie unlawfulness

- a. That there was no compelling urgency to fill the post ahead of many other vacant ones and that "the absence of reasoned justification suggests the [Executive Secretary's] action cannot but be improperly motivated".
- b. That the contested decision follows a "pattern of retaliatory measures" against the Applicant made by the Executive Secretary

for lodging a complaint against him with the Secretary-General and contesting his selection decisions before the UNDT.

- c. That the Vacancy Announcement posted on 8 December 2012 was unlawfully amended after it had been published “to make the selected candidate, Mr Adejumobi, eligible to apply for the position”. The Applicant cites Chapter 5.10.3 of the *Instructional Manual for the Hiring Manager on the Staff Selection System*, which states: “[c]hanges to a published job opening are not allowed (emphasis in the original). However, should changes be requested to a published job opening, the Hiring Manager must provide a detailed justification explaining the reasons for changes to the Senior Recruiter. The Senior Recruiter will cancel the job posting and if applicable, the Hiring Manager will create a new job opening with the necessary changes. The Recruiter will inform all applicants who have applied of the cancellation of the posting and, if applicable, re-advertisement.” The Applicant states that this procedural irregularity, whereby the VA was amended without being cancelled or re-posted, constitutes a violation of a staff member’s right to due process.
- d. That the composition of the interview panel did not correspond to that which HRSS had led the Applicant to expect in the e-mail of 25 March 2012 causing him emotional distress that hindered his performance.
- e. That it was unlawful for Mr Hamdok to serve on the panel set up to select his successor, pursuant to Section 9.2 of the *Instructional Manual for the Hiring Manager on the Staff Selection System* which instructs that: “[a] previous incumbent who is leaving the position as a result of a selection for another position should not participate in panels for his/her succession.”
- f. That the selected candidate was ineligible to apply for the post because he:

- i. Does not fulfill the lateral move requirements;
- ii. Does not meet the language criterion stipulated by the VA;
and
- iii. Was the temporary incumbent of the post. According to section 6.10 of ST/AI/2010/3, “[a] staff member holding a temporary appointment who is recruited in the Professional and above categories, on a temporary appointment, and placed on a position authorized for one year or longer may not apply for or be reappointed to his/her current position within six months of the end of his/her current service.”

Particular Urgency

- a. That the matter is urgent because the selection decision comes into effect on 1 August 2012. The Applicant maintains that the date the selected candidate assumes the post represents the date of implementation of the contested decision.

Irreparable Harm

22. That the irreparable harm caused by the decision includes loss of professional reputation, emotional and psychological distress and reduced career prospects at the UN. The Applicant contends that his age is an aggravating factor, as “any unfair loss of promotion opportunity costs immeasurably more and cannot be repaired”.

23. The Respondent’s contentions are:

Prima facie unlawfulness

- a. That the allegations of unlawfulness in the present Application are invalid.
- b. That the change to the Vacancy Announcement was not substantive and is permissible. The Respondent submits that the

paragraph in the section ‘Special Notice’ regarding lateral move requirements was erroneously included in the first post of the VA. There are no lateral move requirements for D-1 posts stipulated in ST/AI/2010/3. In any case, the Respondent considers that the ‘Special Notice’ is purely informative and does not change the substance of the VA in terms of evaluation criteria. According to the Respondent, the change therefore does not represent a procedural irregularity.

- c. That the Applicant suffered no prejudice due to the amendment and cannot rely upon it for evidence of unlawfulness in the present Application. The Respondent contends that the Applicant was not misled by the change – he applied and was interviewed – therefore there can be no link between any alleged procedural irregularity and his non-selection.

Particular Urgency

- d. That the contested decision was implemented on 20 July 2012, citing the definition of implementation provided in *Tiwathia*¹, that implementation coincides with the acceptance of an offer of appointment by the selected candidate. Under Article 2.2 of the Statute of the United Nations Dispute Tribunal (“UNDT”, “the Tribunal”), the Tribunal is only competent to hear and pass judgment on an application where the contested decision is yet to be implemented. The Respondent submits that the Application for suspension of action must therefore be refused.

Considerations

24. Applications for suspension of action are governed by article 2 of the Statute of the Tribunal and article 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie*

¹ UNDT/2012/109, para. 29.

unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

Prima Facie Unlawfulness of the Contested Decision

25. When considering an application for suspension of action, the Tribunal must first determine, based on a review of the evidence presented, whether the contested decision is *prima facie* unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful.

26. The Tribunal finds that the amendment to the Special Notice of the Vacancy Announcement constitutes a procedural irregularity according to the guidelines stipulated in the Instructional Manual for Hiring Managers. The Administration failed to cancel the job opening, re-advertise it and inform those who had already applied as required by Chapter 5.10.3 of the Manual.

27. The Manual was issued by the Office of Human Resources Management (OHRM) for the purposes of guiding hiring managers in the discharge of their duties *vis-à-vis* ST/AI/2010/3. If they are to have a meaningful effect they need to be complied with, failing which any manager or administrator may decide on his/her own volition when, where and how to comply with rules made by the administration itself.

28. The Tribunal assumes that a Manual such as that in question is produced and developed with the benefit of lessons from years of experience. In this regard, the Tribunal agrees with counsel for the Respondent that the guidelines in the Manual reflect the Organization's "best practice." The submission, however, that the Manual is simply a statement of "best practice" and therefore not binding on the hiring manager is both strange and somewhat incongruent with the very idea of enunciated best practice.

29. In *Tadonki* the Tribunal found that "[d]ue process requires that Management complies with its own rules relating to staff. The Staff Rules embody the principles that should be observed in the application of due process to staff members and they are to be found in Rule 1.1 (c):

The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.”²

30. The former United Nations Administrative Tribunal decided in *Yung* (1999) that “[w]hile the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules.”³

31. This Tribunal adopted the jurisprudence of the former UN Administrative Tribunal, which stated that:

Formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant’s right to due process.⁴

32. It was submitted by the Respondent that the change to the Vacancy Announcement was one of form rather than substance. A literal reading of the relevant guideline in Chapter 5.10.3 of the Manual that “[c]hanges to a published job opening are not allowed” does not bear this out. There is no distinction made here between formal and substantive changes.

33. The administration is also guilty of another breach of the Manual by including in the panel Mr Hamdok, who is the immediate past incumbent of the position for which the Applicant and the selected candidate interviewed. According to section 9.2.c, “[a] previous incumbent who is leaving the position as a result of a selection for another position should not participate in panels for his succession.”

34. Finally, the administration has violated legal provisions which prohibit a staff member holding a temporary appointment from applying to be reappointed to the position he/she is sitting on. Section 5.7 of ST/AI/2010/3 Rev. 1 provides that:

A staff member who holds a temporary appointment in the Professional and higher categories for a period of less than one year for a position

² UNDT/NBI/36, para 8.2.5.

³ Judgment No. 943, *Yung* (1999), para VI.

⁴ *Allen*, UNDT/2010/009, quoting judgment No. 1047, *Helke* (2002) and judgment No. 1122 *Lopes Braga* (2003).

authorized for one year or more may not apply for or be reappointed to that position within six months of the end of his/her current service on the temporary appointment, if the position is advertised through the established procedures and will result in a fixed-term appointment following review by the central review bodies.

35. Mr Adejumobi was appointed to the position of Director at GPAD on 22 November 2011 as a result of a temporary vacancy announcement, which raises questions as to his eligibility in being considered for the position he was occupying once it was advertised as a permanent position.

36. The Tribunal accordingly finds that the Applicant has met the test for *prima facie* unlawfulness.

Urgency

37. When determining the element of urgency, the Tribunal is faced with two alternatives. First, if the decision is imminently going to be implemented, urgency will arise and, depending on the other elements of the rules governing suspension of action, the application can be granted. Secondly, if the decision has been implemented then the issue of urgency becomes moot.

38. The Tribunal notes that the selection decision was officially communicated to the selected candidate by HRSS on 20 July 2012 before the Applicant filed his application for suspension of action on 30 July 2012. Acceptance of the offer was communicated by the selected candidate on the same day. Thus, the Tribunal can only conclude that the contested decision in this case had already been implemented prior to the Applicant himself being informed of the decision and the filing of the application for suspension of action. The Tribunal finds therefore that the test of particular urgency in this case has not been made out by the Applicant.

39. In the communication informing Mr Adejumobi of his selection for the position, it is stated 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 post and the assumption of a higher-level function”. This is in accord with section 10.2 of ST/AI/2010/3.

40. In *Wang* UNDT/2012/80, the UNDT held that the inclusion of such a clause in an offer of appointment would mean that mere notification does not result in implementation and that a decision is implemented when it becomes effective – presumably that is when the selected candidate assumes duty. With due respect to the learned Judge, this Tribunal takes the view that a literal reading of the relevant ST/AI on notification and implementation clearly indicates that notification of a decision in regard to an appointment constitutes implementation.

41. When the ST/AI uses the word ‘effective’, this has no relevance to the substantive issue of implementation. It is the view of this Tribunal that the use of the word ‘effective’ is just an administrative mechanism intended for the chosen candidate and management to work out the modalities for entry into service. As rightly submitted by counsel for the Respondent, the implementation and execution of a decision are two distinct concepts. Nowhere in the ST/AI is it provided that implementation is dependent on the effective time at which the selected candidate assumes duty.

42. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.⁵ In the present case, the Applicant could not have known of the implementation of the decision until after it took place. This irregularity was previously observed in *Nwuke* UNDT/2012/002:

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.

43. The Tribunal further observed in *Mills-Aryee* UNDT/2011/051:

It is rather unfortunate that a suspension of action can only be granted if the implementation of the administrative decision would cause irreparable damage but if the decision has been implemented, as in the present case, the question of suspension does not arise. In other words, a patently unlawful act is allowed to survive in view of the legal provisions

⁵ See for example, *Tadonki* UNDT/2009/016; *Applicant* UNDT/2011/158; *Kweka* UNDT/2011/122.

that do not authorize the Tribunal to suspend the execution of such an illegal act.⁶

44. In the present case, while the Tribunal finds the act unlawful, it is unable to grant interim injunctive relief.

Irreparable Harm

45. The third limb of the test for suspension of action as stipulated in Article 2.2 of the Statute is that the implementation of the impugned decision would cause irreparable harm. However, the test for suspension of action is cumulative, as observed in *McCloskey*⁷ and *Al-Alamy*⁸. As one of the three conditions required for interim injunctive relief under Article 2.2 of the Statute – namely urgency – has not been met, the Tribunal does not need to determine whether the condition of irreparable damage has been satisfied.

Conclusion

46. In view of the foregoing, the Application for suspension of action is refused.

(Signed)

Judge Vinod Boolell

Dated this 1st day of August 2012

Entered in the Register on this 1st day of August 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT Nairobi

⁶ UNDT/2011/051, para. 18.

⁷ UNDT/2012/022, para. 17.

⁸ UNDT/2012/090, para. 32.

