



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

MURNANE

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
Sarahi Lim Baro, ALS/OHRM, UN Secretariat

Introduction

1. On 15 August 2012, the Applicant submitted an application for suspension of action, pending management evaluation, of the decision to select an external candidate for the post of Deputy Registrar at the International Criminal Tribunal for the former Yugoslavia (“ICTY”).

Facts

2. The Applicant joined ICTY in 2006 and served until 2008 as a Senior Legal Officer in Chambers; since 2009, she has served as the Chief Court Management and Support Services, at level P-5, under a fixed term appointment.

3. By internal memorandum dated 11 October 2011, the Registrar informed all staff members of ICTY of the revised decision he had taken in relation to the 2012-2013 downsizing process (“Revised Decision”). Paragraph 35 of the Revised Decision provides:

Where a vacancy arises every effort shall be made to fill the vacancy internally. The program case officers (“PCO”) will be required to review all internal candidates documenting their suitability or non-suitability. External candidates will only be considered if no internal candidates are found to be suitable. The PCO’s recommendations will be subject to approval by the Registrar only upon endorsement by the Central Review bodies. When requesting external recruitment, the Head of the Section or Unit must confirm that such external recruitment will not prejudice existing staff.

4. On or around 18 May 2012, the Applicant submitted a complaint alleging discrimination and abuse of authority on the part of the ICTY Registrar.

5. On 24 July 2012, the post of ICTY Deputy Registrar, at level D-1, was advertised in Inspira (the online United Nations jobsite) under job opening No. 12-ROL-ICTY-24621-R-THE HAGUE (R), with a posting period from 24 July to 23 August 2012; the Applicant submitted her candidature on 28 July 2012.

6. Also on 24 July 2012, the ICTY Human Resources Section sent to the selected candidate an offer of appointment for the post of Deputy Registrar. The selected candidate signed the offer of appointment on 31 July 2012, stating that she would take up her duties as from 1 October 2012.

7. By email dated 3 August 2012 the Applicant was informed by the ICTY Head of the Recruitment, Training and Examinations Unit that the above-mentioned job opening had been closed as the Head of Department had selected a rostered candidate for the position.

8. On 8 August 2012, the Applicant requested management evaluation of the decision to select an external rostered candidate for the position of Deputy Registrar, and she filed with the Tribunal her application for suspension of action on 15 August 2012.

9. On 15 August 2012, the Registry of the Dispute Tribunal in Geneva served the application on the Respondent, and ordered him to file and serve a reply together with documentary evidence on the status of the implementation of the contested decision.

10. As per the Tribunal's instructions, the Respondent submitted on 17 August 2012 his reply together with the requested documentary evidence.

Parties' contentions

11. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The selection of an external candidate violates the Revised Decision, which is binding on the Registrar;

b. The Applicant's non-selection constitutes a reprisal for the filing of her complaint for discrimination and abuse of authority against the Registrar;

Urgency

c. The implementation of the contested decision will result in irreparable damage to her career prospects. The position of Deputy Registrar will not become available again before her reaching the mandatory retirement age;

d. Abandonment of the commitment to place internal candidates for vacant positions in accordance with the Revised Decision will affect ICTY staff members at all levels;

Irreparable damage

e. The irreparable harm caused by the implementation of the decision includes damage to her professional reputation and career prospects. Moreover, the selected candidate will become her first reporting officer;

f. ICTY staff members will be irreparably harmed if the Revised Decision becomes unenforceable.

12. The Respondent's primary contentions may be summarized as follows:

Receivability

a. An application for suspension of action may only be granted where the contested decision has not yet been implemented. In view of the fact that the successful candidate was informed on 24 July 2012 of her selection for the advertised position, and she accepted the offer of appointment on 31 July 2012, the selection decision must be considered as implemented and the application must be rejected as moot;

Prima facie unlawfulness

b. The Applicant has not established a serious and reasonable doubt about the lawfulness of the contested decision. The selected candidate was chosen from a valid roster, populated and utilized in accordance with

administrative instructions ST/AI/2006/3 (Staff selection system) and ST/AI/2010/3 (Staff selection system);

c. The Secretary-General has broad discretion in making decisions regarding appointments and the Dispute Tribunal has stressed that it is not in a position to substitute its own judgment for that of the Secretary-General;

d. The Applicant's contention that the selection decision violates the Revised Decision is without merit. The Revised Decision was issued as a guideline for the implementation of the downsizing process and it cannot override the staff selection system contained in ST/AI/2010/3, which does not provide for any priority of internal candidates. Moreover, further to General Assembly resolution 65/247, there is no requirement to justify the selection of an external candidate;

e. The Applicant has failed to prove that the actions of the Registrar constitute reprisals following her complaint for discrimination and abuse of authority, and there is no credible evidence that the selection process was tainted by extraneous considerations;

Urgency

f. The Applicant's claims are not urgent because (i) there is no imminent danger that the Applicant would lose her employment; (ii) the Applicant's contention that the selection for the post was her only real opportunity to compete for this promotion does not establish urgency; and (iii) the selected candidate will take up her duties only at a moment when the management evaluation of the Applicant's claim should no longer be pending;

Irreparable damage

g. The contested decision did not cause any harm to the Applicant's professional reputation or career prospects. The Applicant failed to

establish why she would suffer irreparable harm from the selected candidate becoming her first reporting officer;

h. The Applicant can be compensated financially, and therefore the application fails to meet the required element of irreparable harm;

i. The Applicant has no standing to claim that the implementation of the contested decision would harm ICTY staff members at all levels.

Consideration

13. 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.

14. As a preliminary matter, it is worth recalling that, as per the established case law of the Tribunal, a suspension of action is only possible regarding decisions which have not yet been implemented (see, *inter alia*, *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011), *Osmanli* UNDT/2011/190, *Tiwathia* UNDT/2012/109 and *Nwuke* UNDT/2012/116).

15. With respect to the date of implementation of selection decisions taken on the basis of the provisions of ST/AI/2010/3, the case law of the Tribunal has taken different approaches (see *Wang* UNDT/2012/080 on one side, *Nwuke* UNDT/2012/116 on the other). Nonetheless, there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of the offer of appointment (see *Tiwathia* UNDT/2012/109).

16. In the present case, the selected candidate was informed on 24 July 2012 of her selection for the advertised position. She accepted the offer of appointment on 31 July 2012, indicating that she would be available to report for duty on 1 October 2012.

17. It follows from the above that the contested decision was implemented on 31 July 2012, the date when the selected candidate expressed her unconditional acceptance of the offer of appointment. The application for suspension of action must therefore be rejected, and it is not necessary for the Tribunal to examine the other requirements for granting a suspension of action.

Conclusion

18. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 23rd day of August 2012

Entered in the Register on this 23rd day of August 2012

(Signed)

René M. Vargas M., Registrar, Geneva