



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

WAND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application for suspension of action, pending management evaluation, on the decision conveyed to her by email of 12 October 2012 rescinding the previous decision of the United Nations High Commissioner for Refugees (“High Commissioner”) to assign her to a determined post.

Facts

2. The Applicant joined UNHCR in 1995. Since 2010, she has been serving as Head of the Vacancy Management Unit in the Division of Human Resources Management (“DHRM”), at the UNHCR headquarters in Geneva.

3. Under cover of an email of 15 June 2012, the High Commissioner’s decisions on assignments were announced to all UNHCR staff members. Included in these decisions was that to assign the Applicant to the post of Senior Inspection Officer in the Inspector General’s Office.

4. On 1 August 2012, an unsuccessful candidate for the post of Senior Inspection Officer requested management evaluation of the decision not to assign her.

5. During a meeting on 11 October 2012, the Deputy High Commissioner informed the Applicant that her appointment to the post of Senior Inspection Officer was to be rescinded.

6. By memorandum also dated 11 October 2012 from the Deputy High Commissioner, the unselected candidate was informed that, following management evaluation of the decision not to select her, it had been found that she had not received full and fair consideration for the post of Senior Inspection Officer. Consequently, the decision not to select her would be rescinded and the selection process would be conducted anew.

7. By email of 12 October 2012, the Deputy High Commissioner notified the Applicant in writing of the decision to rescind her appointment.

8. On 17 October 2012, the Applicant submitted a request for management evaluation of the decision to rescind her appointment and on the same day she filed the application which forms the subject of the present judgment.

9. Pursuant to the Tribunal's directions, the Respondent filed his reply on 22 October 2012. The Applicant filed additional observations on 24 October 2012.

Parties' contentions

10. The Applicant's contentions are:

Prima facie unlawfulness

a. She successfully took part in the selection process, and she was subsequently recommended by DHRM, endorsed by the Joint Review Board and officially appointed by the High Commissioner. The rescission of her appointment would create a dangerous precedent;

b. The Policy and Procedures on Assignments and Promotions annexed to inter-office memorandum IOM/FOM No. 027/2009 of 14 June 2010 does not specify under what circumstances, if any, the High Commissioner's selection decisions may not be implemented. The wording of paragraph 76 of the Policy and Procedures on Assignments and Promotions—which reads “[t]he High Commissioner's decisions on re-assignments will be implemented ...”—indicates that these decisions are binding and have to be implemented;

c. She was the subject of discriminatory treatment owing to her position within DHRM and several colleagues were unfairly accused of distorting the selection process. To date, and since the Policy and Procedures on Assignments and Promotions were promulgated, there have been less than 20 rescission of selection decisions none of which were based on management evaluations;

d. The direct involvement of the Inspector General in the selection and management evaluation processes puts into question his neutrality as well as the confidentiality of the management evaluation process. Further, the Applicant was not given an opportunity to be heard in the context of the management evaluation which led to the contested decision. Lastly, it is doubtful that decisions of the Deputy High Commissioner taken in the context of the management evaluation can annul the High Commissioner's selection decisions;

e. According to paragraph 1.4 of inter-office memorandum IOM/FOM No. 034/2009 (The new Administration of Justice System) and staff rule 11.3(a), requests for management evaluation do not have the effect of suspending the implementation of the contested administrative decision. However, in this case, the request for management evaluation submitted by another staff member did have the effect of suspending the decision to select the Applicant for the post of Senior Inspection Officer;

f. The justification for the contested decision is weak at best and, in any event, it is for the Joint Review Board to review the selection process and determine whether or not it is tainted by irregularities;

g. The Tribunal has set a deadline of 90 days from the date the decision is communicated to the staff member for the Administration to revoke an unlawful decision conferring rights on another staff member. In this case, more than 90 days have elapsed between the selection and the rescission decisions;

Urgency

h. The decision to rescind the Applicant's appointment has not yet been implemented as no formal document has been signed off by the High Commissioner and DHRM. However, its implementation is believed to be imminent;

i. She is not challenging the decision to conduct the selection process anew but the decision to rescind her appointment;

Irreparable damage

j. The implementation of the contested decision would cause irreparable harm to her career prospects, professional and personal reputation, as well as mental anguish;

k. The implementation of the contested decision would also set a dangerous precedent whereby managers could reverse appointments even after they have been announced. Requests for management evaluation would thus unfairly put on hold another staff member's rightful appointment;

l. The delay in assigning her to the post of Senior Inspection Officer prevented her from being considered for other advertised posts, including one for which she had been recommended;

m. According to the rotation policy, the post of Senior Inspection Officer was her last chance to be reassigned to another position in the UNHCR headquarters;

n. As the UNHCR promotion framework is on a yearly basis, the implementation of the contested decision would harm her chances to be promoted;

o. Since her post within DHRM has already been filled, she has no position to return to;

p. Her supervisor within DHRM is required to attend all meetings conducted in relation to the selection of candidates and she cannot therefore be assured that she will be fairly considered for any posts;

q. The implementation of the contested decision would cause irreparable harm to DHRM and the credibility of the selection process.

11. The Respondent's contentions are:

Admissibility

a. The Deputy High Commissioner ordered that the selection process be conducted anew. In the context of this new selection process, the Applicant will receive full and fair consideration as a suitable candidate. Her application is therefore premature;

Prima facie unlawfulness

b. In basing his decision to conduct the selection process anew on the determination that the unsuccessful candidate had not received full and fair consideration, the Deputy High Commissioner did not exceed his authority. On the contrary, he indicated in his memorandum of 11 October 2012 that he expressed no view as to the merits of the relevant candidates;

c. The purpose of management evaluation is to give management a chance to correct itself in cases where there has been flawed decision-making. Thus, in order for a management evaluation to be meaningful, the Administration must have the opportunity to take appropriate interim measures that prevent a situation where a flawed decision could no longer be corrected;

Urgency

d. In the context of the new selection process, the Applicant will receive full and fair consideration as a suitable candidate;

e. Further, the Applicant's current post has not been filled and will not be re-advertised pending the outcome of the new selection process. The Applicant may thus remain on her current post;

Irreparable damage

f. No final decision on the selection for the post is made;

g. The Applicant may exceptionally submit late applications for vacancies advertised in September 2012;

h. The Applicant may remain on her current post without any negative impact on her salary, status or rights pending the new selection process as well as the outcome of any other applications she may submit.

Consideration

12. 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 implementation of a contested decision only if all three requirements of article 2.2 have been met.

Prima facie unlawfulness

13. The Applicant contests the decision conveyed to her on 12 October 2012 whereby the previous decision of 15 June 2012 to appoint her to the post of Senior Inspection Officer was revoked. It is not disputed that the appointment decision constituted an individual decision that was favourable to the Applicant.

14. The Tribunal must therefore examine whether the Administration could revoke a decision which conferred rights on a staff member. In the present case, on 1 August 2012 an unsuccessful candidate requested management evaluation of the decision of 15 June 2012 whereby she was not selected for the post of Senior Inspection Officer and the Applicant was appointed to the post in question.

15. According to staff rule 11.2, staff members have 60 calendar days from the date of the notification of the contested administrative decision to request management evaluation, and the Administration thereafter has 30 or 45 calendar days to respond to such request.

16. Inter-office memorandum IOM/FOM No. 034/2009 (The new Administration of Justice System) which, *inter alia*, establishes the procedure for requesting management evaluation within UNHCR, further states:

The system of management evaluation ... provides the administration with the opportunity to correct itself and, where possible, to hold decision makers accountable for their actions.

The decision of the Deputy High Commissioner will constitute the management evaluation and will be communicated to a staff member in Geneva within 30 calendar days, and to a staff member in the field within 45 calendar days, of receipt of the request

17. In *Cranfield* UNDT/2012/141, the Tribunal interpreted staff rule 11.2 as not only permitting but actually requiring the Administration to revoke an administrative decision that it considers unlawful.

18. It results from the foregoing that, having received within the relevant time a request for management evaluation challenging the decision to appoint the Applicant to the post of Senior Inspection Officer, the Deputy High Commissioner had not only the right but also the obligation to revoke the contested decision if he deemed it unlawful.

19. However, as was also held in *Cranfield*, in order to reconcile the above obligation with the need for legal certainty to which staff members are entitled, the power to revoke decisions conferring rights should necessarily be exercised within the relevant time frame to respond to a request for management evaluation.

20. On 1 August 2012, that is, within the time limit prescribed in staff rule 11.2(c), an unsuccessful candidate requested management evaluation of the decision of 15 June 2012. Applying the above principles to the instant case, the Deputy High Commissioner had until 31 August 2012 or 17 September 2012 depending on the circumstances, to respond to the request for management evaluation and to revoke the contested decision if he considered that it was tainted by irregularities. However, he only did so on 11 October 2012, at a date on which the contested decision had become final.

21. Therefore, the decision to revoke that of 15 June 2012 appears *prima facie* unlawful for failure to respect the relevant time limit to do so.

Irreparable damage

22. The Tribunal must now examine whether the requirement of irreparable damage is met in this case.

23. The Respondent stresses that the Applicant has remained on her P-4 post, and that the post for which she had applied was not filled and will not be pending completion of the new selection process to which the Applicant can take part.

24. In view of this, The Tribunal considers that the Applicant's alleged injury is only hypothetical and that, therefore, the application does not meet the requirement of irreparable damage.

25. It is worth recalling in this respect that "what hypothetically may, or may not, happen in the future cannot form the basis for a current finding of ... irreparable harm" (*Bauza Mercere* Order No. 12 (NY/2011)).

26. As the application fails to meet all three criteria as required under article 2.2 of the Statute, it must be rejected.

Conclusion

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

(Signed)

Judge Jean-François Cousin

Dated this 24th day of October 2012

Entered in the Register on this 24th day of October 2012

(Signed)

René M. Vargas M., Registrar, Geneva