



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/069

Judgment No.: UNDT/2012/198

Date: 14 December 2012

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SHAIIDI-NGATUNGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON AN APPLICATION
FOR SUSPENSION OF ACTION**

Counsel for the Applicant:

Seth Levine, OSLA

Counsel for the Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Berengere Neyroud, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a Claims Assistant with the United Nations International Criminal Tribunal for Rwanda (“ICTR”). On 4 December 2012, she filed an Application for suspension of an administrative decision to deem her ineligible for a Field Service (FS) level Claims Assistant post at the ICTR, despite having served under an FS post in Arusha since 2005.

2. The Applicant also alleges that, on 4 December 2012, she was informed by the Chief of Human Resources at the ICTR that she has until Friday, 7 December 2012 to make a decision on whether she would accept a G-6 post or take early retirement and she was threatened that if she should challenge the decision, the Administration would seek to recover overpayments in salary and pension contribution.

3. Having considered the Applicant’s submissions and in light of the urgency of the matter, on 5 December 2012 the Tribunal issued an interim Order (Order No. 156 (NBI/2012) to maintain the status quo pending a review of the Respondent’s submissions and a full determination of the Application for Suspension of Action.

4. The Respondent filed a Reply to the Application on 7 December 2012.

5. The Tribunal conducted an oral hearing of the Application on Monday, 10 December 2012. Shortly before the hearing, the Applicant filed an Addendum to her Application in which she requested the Tribunal to direct the Administration to cease all and any steps in furtherance of the recruitment of another candidate for the Field Service (FS) level Claims Assistant post.

6. The Respondent filed a response to the said Addendum on 10 December 2012 requesting the Tribunal to reject it. On the same date, the Respondent filed his closing submissions in which he tendered two documents into evidence namely:

a. An email dated 11 October 2012 informing the candidate selected for the FS-5 level Claims Assistant post of her successful competition for the post.

b. An offer of appointment to the candidate selected for that post.

7. On 11 December 2012, the Applicant notified the Tribunal that, on 10 December 2012, she had filed a second management evaluation request in which she seeks a further evaluation of the decision to select another candidate for the FS-5 Claims Assistant post.

8. On 13 December 2012, the Applicant filed additional submissions after leave to do so was granted by the Tribunal.

Facts

9. The Applicant joined the UN offices at Nairobi (“UNON”) on 2 January 1985. In 1993 she received a permanent appointment. Between 1992 and 1996 she served as a Claims Assistant (internationally recruited) with the United Nations Protection Force (“UNPROFOR”) in Zagreb. From 2000 to 2001 she served in East Timor, again as an internationally recruited Claims Assistant.

10. On 29 April 2004, the Applicant applied for a vacancy for a Claims/Property Survey Board Assistant with the ICTR in Arusha, Vacancy Announcement No. AR-04-ADM-INT-010.

11. On 2 March 2005, initially on secondment from UNON, the Applicant took up the post of Claims Assistant at the FS-4 level in ICTR, Arusha. She was informed at this time that as the ICTR post was in her home country, she would have to forego benefits available to other international staff such as Home Leave, Education Grant and Repatriation.

12. On 27 January 2009, the Registrar of the ICTR approved the regularization of the Applicant’s post with the ICTR. She was thereafter separated from UNON effective 31 December 2010.

13. The Applicant's FS-4 level post was reclassified to the FS-5 level in November 2010 and the newly re-classified post was advertised on Inspira in February 2011. The Applicant duly applied and was interviewed in September 2011.

14. In November 2011, the Chief of Administration informed the Applicant that there was a query over her recruitment to an FS-post given that she is Tanzanian. The Applicant wrote a memo and explained that it had always been known that she was Tanzanian and indeed she had agreed to forego certain benefits enjoyed by internationally recruited staff from the outset.

15. On 16 November 2012, the Applicant was informed by the Chief of the Staff Administration and Recruitment Unit that she had been granted Special Post Allowance at the FS-5 level from 2 November 2010, the date of the re-classification of her post. On the same day, she received a further letter from the Chief of Human Resources and Planning (HRPS) indicating that her application for the FS-5 post was not successful.

16. On 19 November 2012, the Applicant received a further letter from the Chief of HRPS informing her that another candidate had been selected for the FS-5 post and that, pursuant to section 10.2 of ST/AI/2010/3 (Staff Selection System), another post at the G-6 level had been identified for her.

Applicant's submissions

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

Prima facie unlawfulness

- a. There is no rule prohibiting a national from serving as an international staff member in a duty station in his or her home country.
- b. There being no prohibition on her recruitment as an internationally recruited staff member, it must follow that there is a wide discretion on the part of the Administration to so recruit her, that discretion having been exercised in 2005 and at every renewal since.

c. The Secretary-General is equitably estopped from withdrawing his consent to treat her as an internationally recruited staff member. She gave up a permanent contract with UNON and other job opportunities with the Organization in order to serve with the ICTR. She has acted in reliance on the Administration's explicit representation that she was entitled to serve as an international staff member with the ICTR, without suspecting that the Administration believed differently.

d. She had a legitimate expectation that her candidacy for the FS-5 post would be afforded fair and full consideration on the same basis as any other international candidate.

e. The threat that, if she challenges the impugned decisions, monies may be recovered from her, are wholly without legal foundation. This much must be known to the Administration and can only lead to the conclusion that they were designed solely to intimidate.

Urgency

a. She was informed by the Chief, HRPS, that she had until Friday, 7 December 2012 to make a decision on whether she would accept the G-6 post or take early retirement. It was reiterated that if she should challenge the decision, the Administration would seek to recover overpayments in salary and pension contribution.

Irreparable damage

a. She was granted a two year contract effective 1 January 2012. She therefore has a legitimate expectation that it would be honoured. The FS-5 post (whose functions she is currently discharging) is expected to continue until the end of the life of the ICTR. If the unlawful actions of the ICTR are allowed to run to fruition, the ordinarily available two years' net base salary in compensation will not compensate her for the loss of remuneration and the loss of pension benefits and entitlements.

b. The threats made to her about the recovery of remuneration and pension contributions will continue to cause her mental distress and anguish if she is separated.

c. She has already reached early retirement age. There is little to no prospect of her again finding employment. If the unlawful actions are allowed to lead to her separation, it will effectively bring her working-life to a premature end.

d. Monetary damages are inadequate to compensate for the frustration and unhappiness engendered by the unlawful and unjust curtailment of a working-life dedicated to the service of the Organization.

e. That another candidate has been identified and will invariably be placed against the post upon her separation constitutes irreparable harm.

f. Where there is a continuing breach of a staff member's rights, those rights should be safeguarded by a suspension of action, even where compensation is available

g. There is a real danger that if the recruitment of the selected candidate is left to run its course, the Applicant's rights will be irreparably harmed. Despite the Administration's attempts to characterize this case as being about non-selection rather than ineligibility, the evidence overwhelmingly demonstrates that the Applicant was denied the FS-5 post because of the issue of her nationality.

h. The Administration should not be allowed to circumvent judicial injunction through the simple expediency of selecting another candidate, waiting a month to inform the applicant and then asserting that the recruitment is a *fait accompli*.

Respondent's submissions

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

- a. It is not clear what the contested decision is. In the request for Management Evaluation, the Applicant challenged a termination decision whereas before the Tribunal she also challenges her eligibility for the FS-5 post.
- b. The Applicant should not be permitted to amend her Application at this stage.
- c. The question of the Applicant's eligibility for the FS 5 post is moot because she went through a full selection process. The Respondent has also decided that she shall remain at the FS-4 level on a Special Post Allowance at the FS-5 level until the Management Evaluation Unit fully reviews her case and therefore there is no decision to suspend.
- d. The Applicant will not suffer any irreparable harm during the management evaluation period as there is no adverse decision taken on the issue of ineligibility for Field Service category positions.
- e. With respect to the Applicant's challenge of the selection exercise for the FS-5 position of Claims Assistant in her Addendum to her Application, the selection decision was officially communicated to the selected candidate by HRPS on 11 October 2012 before she filed her Suspension of Action Application on 5 December 2012. The selected candidate accepted the offer on 19 October 2012.
- f. The selection decision cannot be suspended as the selected candidate has already signed her offer of appointment.

Considerations

19. The Applicant has requested the Tribunal to order the suspension of the following decisions:
 - a. The administrative decision to deem her ineligible for an FS-level Claims Assistant post at the ICTR.

b. The oral notification to the Applicant that the ICTR would recover overpayments in her salary and pension contributions.

c. The decision to select another candidate for the FS-5 Claims Assistant post.

20. With respect to the first decision regarding her eligibility for FS level posts, the Respondent submitted that this issue is moot because the Applicant went through a full selection process. The Respondent has also decided that she shall remain at the FS-4 level on a Special Post Allowance at the FS-5 level until the Management Evaluation Unit fully reviews her case. The Tribunal therefore finds that this decision can no longer be the subject of a suspension of action order.

21. With respect to the oral notification to the Applicant that the ICTR would recover overpayments of the Applicant's salary and pension contributions, Counsel for the Respondent gave an undertaking to the Tribunal that the ICTR Administration shall not take such administrative action pending management evaluation. In view of this, the Tribunal finds and holds that this decision can no longer be the subject of a suspension of action order.

22. The Tribunal is left with the Applicant's challenge of the selection decision for the FS-5 Claims Assistant post for its consideration.

Prima facie unlawfulness

23. Under this head, the Applicant submits that she had a legitimate expectation that her candidacy for the FS-5 post would be afforded fair and full consideration on the same basis as any other international candidate. The Applicant's primary contention is that she was denied the FS-5 post purely because she is a Tanzanian national. The Respondent's submits that the selection decision cannot be suspended as the selected candidate has already signed her offer of appointment.

24. The evidence before the Tribunal is that despite some initial concerns about the Applicant's eligibility for the FS-5 post because of her Tanzanian

nationality, she was deemed eligible and was subsequently interviewed for the post. The Applicant has adduced no evidence to show that her nationality was taken into consideration by the interview panel in recommending and selecting another candidate for the post.

25. Section 10.2 of ST/AI/2010/3, (Staff Selection System) provides as follows:

The decision to select a **candidate shall be implemented upon its official communication to the individual concerned**. When the selection entails promotion to a higher level, the earliest possible date on which such 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. However, when an encumbered position has been included in the compendium after upward reclassification **and an applicant other than the incumbent is selected, the decision shall be implemented only when a suitable** position has been identified for the incumbent. (Emphasis added).

26. Section 11.1(a) of ST/AI/2010/3 provides as follows:

The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process: (a) Incumbents, other than staff members holding a temporary appointment, of positions reclassified upward for which an applicant other than the incumbent has been selected...

27. In the letter to the Applicant dated 19 November 2012 from the Chief, HRPS, indicating that her application for the FS-5 post was not successful, the Applicant was also informed that a *suitable* position had been identified for her, namely, a Claims Assistant post at the *G-6 level*.

28. The Tribunal finds that the selection decision for the FS-5 post has not been implemented. Despite the selection decision being officially communicated to the selected candidate by HRPS on 11 October 2012 and the selected candidate accepting the offer on 19 October 2012, the identification of a G-6 level post for the Applicant who is currently encumbering an FS-4 level post cannot be

considered a *suitable* position for the Applicant as required by sections 10.2 and 11.1(a) of ST/AI/2010/3.

29. For purposes of clarity, the satisfaction of section 10.2 of ST/AI/2010/3 is predicated on two conditions:

- a. Official communication to the selected candidate.
- b. The identification of a suitable position for the incumbent.

There is evidence that the first condition under section 10.2 has been satisfied. The second condition has not been satisfied. Given the current state of affairs, section 10.2 has not been given effect.

Urgency

30. Under this second limb which must be fulfilled to justify an Order for suspension of action, the Applicant submits that she was informed by the Chief, HRPS, that she had until Friday 7 December 2012 to make a decision on whether she would accept the G-6 post or take early retirement. It was reiterated that if she should challenge the decision, the Administration would seek to recover “overpayments” in salary and pension contribution.

31. The Tribunal shall rely on Counsel for the Respondent’s undertaking that no such actions shall be implemented during the pendency of the management evaluation process.

32. According to the 19 November letter from the Chief, HRPS, the decision to assign the Applicant to a G-6 Claims Assistant shall become effective as soon as the selected candidate for the FS-5 post commences duty. The Tribunal finds that the Applicant has satisfied the element of urgency.

Irreparable damage

33. Having considered the Parties’ submissions on the element of irreparable damage the Tribunal finds that the Applicant shall suffer irreparable harm if

another candidate is selected for the FS-5 Claims Assistant post and upon her assignment to a G-6 Claims Assistant post.

Conclusion

34. Considering that the Respondent has not given effect to section 10.2 of ST/AI/2010/3, the administrative decision remains unlawful until the said section is fully complied with.

35. The Application for suspension of action of the decision to select another candidate for the FS-5 Claims Assistant post is granted pending management evaluation of the decision.

(Signed)

Judge Nkemdilim Izuako

Dated this 14th day of December 2012

Entered in the Register on this 14th day of December 2012

(Signed)

Jean-Pelé Fomété Registrar, Nairobi