



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Yehuda Goor, AS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant is a Human Resources Officer at the P-3 level at the United Nations Support Office in Somalia (“UNSOS”).
2. On 24 February 2022, he filed an application with the United Nations Dispute Tribunal (“UNDT”), contesting the UNSOS Director’s decision not to recommend/select him for a Logistics Officer position at the P-4 level, Job Opening 163168 (“JO 163168”) and requested UNDT to direct UNSOS to perform a new selection, within the framework of JO 163168, by ordering that a new selection decision be made from the four previously recommended candidates. The Applicant further requested compensation for harm for the delay caused if subsequently selected, and compensation for harm and loss of opportunity, if not selected.
3. On 30 March 2022, the Respondent filed his response contesting the receivability of the application. He has argued that the contested decision was rescinded before the filing of the application and that the Applicant failed to demonstrate any continuing injury resulting from the rescinded decision. Therefore, the application is moot and should be dismissed as not receivable.

## **Facts**

4. On 13 September 2021, the Applicant applied for JO 163168.
5. The Applicant wrote to the UNSOS Human Resources Section on 25 September 2021 requesting for a change of gender, from male to female in Umoja.<sup>1</sup> He indicated that he now identifies as female<sup>2</sup> and that his national passport was issued with “sex” marked as “X”.<sup>3</sup> The Applicant further indicated that his request was based on the Danish national laws whereby registration of gender identity is notated as “X” based on the person’s declaration of belonging to the other gender.

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<sup>1</sup> Applicant Order No. 254 (NBI/2021).

<sup>2</sup> Application, annex 4, Request for Registration of Change of Gender.

<sup>3</sup> Application, annex 5.

6. On 13 October 2021, the Applicant was interviewed for JO 163168 and was identified amongst the recommended candidates as male.<sup>4</sup>
7. On 18 November 2021, the Applicant was copied on an automated email from Inspira confirming that another candidate had been selected and had indicated continued interest and availability for the position.<sup>5</sup>
8. On 21 November 2021, the Applicant requested management evaluation of the decision to select another candidate for JO 163168 as well as suspension of action.<sup>6</sup>
9. On 22 November 2021, the United Nations Dispute Tribunal granted the request for suspension of action via Order No. 254 (NBI/2021).
10. By letter dated on 07 December 2021, the Management Evaluation Unit (“MEU”) replied to the Applicant and informed him that the recruitment process for the position was cancelled *and re-advertised as a recruit-from roster with oversight by a different hiring manager*.<sup>7</sup> Therefore, MEU decided that the Applicant’s request for management evaluation was moot and closed his file.<sup>8</sup>

### **Considerations**

11. The Tribunal finds that this application is not merited for the reason outlined below.
12. For the application to be receivable, the impugned decision must fall under the Tribunal’s jurisdiction *rationae materiae*, that is, it must produce direct consequences for the terms of appointment in “a precise individual case”.<sup>9</sup>

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<sup>4</sup> Application, annex 2.

<sup>5</sup> Application, annex 1.

<sup>6</sup> Reply, page 10.

<sup>7</sup> Application, annex 7.

<sup>8</sup> *Ibid.*

<sup>9</sup> See former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003) para. V and *Lee* 2014-UNAT-481, para. 49.

13. In connection with recruitment, the Tribunal recalls occasional jurisprudence according to which, arguably, a cancellation of a job opening might be challenged by a candidate who had been found suitable and thus would have earned his place on a roster<sup>10</sup>, or *a minori ad maius*, by a candidate recommended for appointment.<sup>11</sup>

The position of the Appeals Tribunal as to whether and in what circumstances the cancellation of a job opening affects the terms of a staff member's appointment has been, however, inconclusive.<sup>12</sup>

14. On the other hand, an argument might be made that, the Administration is competent to cancel a job opening akin to cancellation of an auction, or bidding process, no matter the frustration for the participants and waste of resources that it entails, and it is only the question of good practice to avoid it.<sup>13</sup>

15. Absent a positive rule regulating this question, it seems most appropriate from the perspective of staff member rights, that the administrative discretion in withdrawing from a recruitment exercise should be fettered pursuant to the criterion whether or not the process has produced a binding external relation, that is, one going beyond relations within the administrative apparatus (such as acceptance of an offer of appointment by the selected candidate).

16. It has been noted by this Tribunal, that in the case where a candidate is recommended, but not yet offered an appointment, a candidate's reliance interest is weak and should not prevent a cancellation of the recruitment process where e.g., a serious violation of the applicable rules have taken place.<sup>14</sup> The latter view seems to be endorsed by the Appeals Tribunal, which, more recently, held in *Kinyanjui*:

In the Appeals Tribunal's view, the Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the

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<sup>10</sup> *Verschuur* UNDT/2010/153.

<sup>11</sup> *Jannoun* Order No. 029 (NBI/2013); *Belsito* Order No. 127 (NBI/2017).

<sup>12</sup> *Verschuur* 2011-UNAT-149, para. 31.

<sup>13</sup> Manual for the Hiring Manager on the Staff Selection System (Inspira) Version 3.0, United Nations (2012), at page 61, directing not to cancel job openings where at least one candidate has been deemed suitable.

<sup>14</sup> *Ponce-Gonzales* Order No. 036 (NBI/2019).

post which has become vacant. This falls within the discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one. The rule is nonetheless that, in filling the post, the Administration must proceed with the appointment of successful candidates in accordance with the recruitment results. However, it can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities occurred in the recruitment process or for reasons connected with the interests of the service, while providing an adequate statement of the reasons therefor which are subject to the above mentioned jurisprudential principles of judicial review as to their correctness and veracity.”<sup>15</sup>

17. In an attempt to reconcile the premise expressed as “discretionary authority to terminate a recruitment procedure and/or to initiate a new one” with the disposition “must proceed with the appointment ...in accordance with the recruitment results”, this Tribunal takes the Appeals Tribunal’s judgment to mean that a selection or appointment decision must not happen contrary to the result of a recruitment procedure; a cancellation, on the other hand, of the recruitment procedure is allowed where sound reasons obtain for it. This Tribunal takes it that the Appeals Tribunal’s judgment is contemplating the matter in the area of a staff member’s right or legitimate expectation, and not merely a postulate of good administration. The judgment, however, does not pronounce in what situation, or, more precisely, as of what moment in the recruitment procedure, such legitimate expectation becomes activated. On this junction, this Tribunal remains of the opinion that until the decision taken in a recruitment process produces a binding external legal relation, the administration has the competence to abandon or repeat any recruitment exercise without creating an obligation for itself to furnish justifications, and without compensating the candidates for their vexation or loss of opportunity. Specifically, no right, or legitimate expectation is conferred in a process that did not bring about a selection decision. Significance of the communication of the selection decision is affirmed in section 10 of the ST/AI//2010/3 (Staff selection system), titled “Notification and implementation of the decision”, which states in subsection 10.2:

The decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the

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<sup>15</sup> *Kinyanjui* 2019-UNAT-932 para. 21.

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.

18. The Tribunal posits that only an official communication on selection gives rise to a legitimate expectation to be accordingly promoted or appointed. The selected candidate could then challenge the cancellation decision and place the Administration under the burden of showing good cause to cancel, as described by the Appeals Tribunal in *Kinyanjui*.

19. Conversely, a candidate who has not been selected may challenge the decision on selection of another candidate and have it rescinded. Following a cancellation of the job opening, however, the breach of the non-selected candidate's terms and conditions of the appointment does not arise. Such candidate may not compel the Administration to proceed with the recruitment process, either afresh, or to have the impugned process returned to a stage favourable to him/her. To construe such claim, notwithstanding dubious basis for it, would belie the competence of the Secretary-General as Chief Executive Officer of the United Nations.

20. In the present case, in all appearances, the job opening was cancelled in recognition of the Applicant's criticism of the selection decision, that is, that irrelevant factors had informed it, and relevant ones had been ignored. This intervention has prevented filling the post without the Applicant being fully and fairly considered.<sup>16</sup> The Applicant, however, has no standing to contest the modality of a further recruitment process. Absent a reviewable administrative decision, the application is not receivable with respect to the principal claim.

21. As the administration acted within the scope of its discretion, a compensation is not due.

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<sup>16</sup> *Kinyanjui* 2019-UNAT-932 para. 27.

**JUDGMENT**

The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart  
Dated this 30<sup>th</sup> day of September 2022

Entered in the Register on this 30<sup>th</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi