



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PONCE-GONZALEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Alan Gutman, AAS/ALD/OHR

Introduction

1. The Applicant is the Chief of the Budget and Finance Section at the United Nations Interim Security Force for Abyei (UNISFA) in Abyei, an area disputed by Sudan and South Sudan.

2. On 26 March 2019, he filed an application requesting for suspension of action of the Temporary Job Opening (TJO) selection process for the P-5 post of Chief, Operations and Resource Management (Chief/ORM) in UNISFA. The Applicant also requests the Tribunal to redact his name from any resulting order or judgment of the Tribunal in this case as he is currently applying to several posts and fears that the disclosure of his name might prejudice his chances for selection.

3. The Respondent filed a reply on 29 March 2019 in which it is argued that the request to suspend the implementation of the selection process for the TJO is not receivable.

Facts

4. On 25 September 2018, TJO 104314 for the P-5 level post of Chief/ORM was issued with a closing date of 9 October 2018. When TJO 104314 was issued on 25 September 2018, UNISFA did not have delegation of authority to select and appoint staff and the Field Personnel Division (FPD) who acted as the delegated entity recommended that the Mission cancel TJO 104314 and proceed with a Recruit from Roster (RFR) exercise.¹

5. On 9 October 2018, the UNISFA Administration issued an RFR exercise for the same post of Chief/ORM at the P-5 level with a reference number 104637 (RFR 104637) with a closing date of 23 October 2018.²

¹ Applicant's management evaluation request - Application – annex 3 at page 16.

² Application – annex 3 at page 26.

6. On 22 October 2018, the Applicant applied for the RFR 104637 post as a pre-approved (rostered) candidate for similar positions at the same level.

7. According to the Applicant and undisputed by the Respondent, UNISFA's delegation of authority over selection and appointment of staff was restored on 1 January 2019.

8. On 11 January 2019, when RFR 104637 was still running, the Administration, issued a parallel TJO for the same Chief/ORM post with a reference number 109862 (TJO 109862) and a closing date of 18 January 2019.³ There is no difference in the content of the three job descriptions TJO 104314; RFR 104637 or TJO 109862.

9. On 18 January 2019, the Applicant applied for TJO 109862 which process has not yet been completed. As of 18 January 2019, the status of his application for RFR 104637 was active.

10. On 28 January 2019, the Applicant was informed via *Inspira* that RFR 104637 had been cancelled and that it may be advertised at a later date.

11. On 27 February 2019, the Applicant sent an email to Ms. Doris Munoko, UNISFA's Chief Human Resources Officer with a list of questions regarding the three different job openings. On 3 March 2019, UNISFA's Chief of Mission Support, (CMS) Mr. Robert Kirkwood, responded to the Applicant's email informing him that he would organize an interview process upon his return.⁴

12. On 18 March 2019, the Applicant requested management evaluation of the decision to cancel RFR 104637 on the basis that it constituted failure to afford his candidacy for the said job opening (JO) full and fair consideration.

³ *Ibid.*, at page 30.

⁴ *Ibid.*, at page 47.

Applicant's case

Prima facie unlawfulness

13. Despite exceeding the minimum and desired requirements for the Chief/ORM post as a rostered candidate, his candidacy under RFR 104637 was rejected.

14. The cancellation of RFR 104637 improperly favours non-rostered applicants to TJO 109862 to be selected with the intention of thereby granting the means to subsequently roster and regularize such an individual through a future RFR exercise at the expense of full and fair consideration of qualified rostered candidates.

15. There was improper interference by the hiring manager, the CMS, who denied him full and fair consideration for the post under RFR 104637. The CMS attempted to portray that the roster membership to which the Applicant belonged was not compatible with the Chief/ORM post which is “legally and logically inadmissible when scrutinized and even contrary to guidelines of the staff selection process”. The intrusion of extraneous considerations not part of the approved selection criteria renders the decision *prima facie* improper as held in *Ndagiheze* UNDT/2018/061.

16. Cancelling RFR 104637 after the evaluation of candidates had taken place and the process was near completion is irregular. In an unrelated meeting that took place on 2 December 2018, the CMS conveyed the erroneous impression that the Applicant did not have performance management experience and informed him that he had instructed the Human Resources Section to conduct an assessment of the candidates to determine if the applicants could demonstrate experience in performance management which was one of the six areas of experience required in the JO. Despite the fact that the Applicant could document experience in performance management, his candidacy was ruled out. In the end, the hiring manager cancelled the RFR without explanation.

17. The failure to provide a sound reason for cancelling the process involving pre-rostered candidates calls into question the presumption of regularity and shifts the

burden of proving proper motive to the Respondent. The lack of a credible and articulated reason for the action renders the entire process *prima facie* improper.

18. The decision to discontinue RFR 104637 without an adequate basis deprived the Applicant of a legitimate opportunity of being selected for a post for which he had met all the requirements and violated his right to full consideration and due process and was contrary to Human Resources regulations, policies and guidelines on staff selection. As affirmed by the United Nations Appeals Tribunal (UNAT) in *Verschuur*, 2011-UNAT-149, the JO cancellation must occur before the assessment exercise commences and the placement of at least one candidate on the recommended list. Section 6.10 of the *Inspira* Manual for Hiring Managers refers to *Verschuur* UNDT/2010/153 in the text and in footnote 9 on page 61

19. While UNISFA's restored delegation of authority is not being contested per se, the decision to discontinue RFR 104637, which was in progress prior to the new delegation of authority that came into effect on 1 January 2019, is being contested on the following grounds:

a. All discretionary authority must be exercised in a manner consistent with the rules in force. The new delegation of authority is not intended to circumvent legitimate requirements already in place for selection processes yet to be completed and cannot in any case apply retroactively to a selection process which was underway before they were put into effect.

b. The delegation of authority governing the three recruitment actions that have been issued to date for the same post was applied inconsistently and resulted in contradictory actions of the hiring manager as it pertains to the treatment of pre-approved candidates for this post. The misplaced view shared by the hiring manager during the 2 December meeting that pre-approved candidates for P-5 CMS posts do not meet the requirements for the Chief/OMS is not based on the JO requirements and is counterintuitive to the staff selection

process promulgated by the United Nations Secretariat and the expected treatment of pre-approved candidates for similar positions at the same level.

c. The new delegation of authority effective 1 January 2019 did not provide the hiring manager with the latitude to retroactively cancel a legitimate RFR under progress that had been established by a preceding authorized delegation of authority. To do so again in favour of an unjustified TJO, which had already been called into question and brought to the attention of the hiring manager previously by FPD as not necessary, raises some serious concerns given the availability of pre-approved rostered candidates, including the Applicant.

Urgency

20. The decision to proceed with a temporary selection process after cancelling RFR 104637 deprives the Applicant of his right as a rostered candidate to full and fair consideration after having completed a rigorous interview process during the rostering exercise and having met all of the advertised requirements for the post. Once the post is filled temporarily, the roster will become redundant.

21. The Administration is proceeding with the interviews of candidates for TJO 109862 and given that the selection decision from this TJO would not have to be reviewed by a central review body, the selection decision can be confirmed in a matter of days. This would preclude any effective remedy for the Applicant as the post will have been filled and this important opportunity for career development would have been taken away from him before the Management Evaluation Unit (MEU) could review whether the cancellation of the prior selection process was warranted. It is therefore urgent that an immediate suspension of proceedings to TJO 109862 be authorized so as to allow the review of the decision to cancel RFR 104637 to be properly conducted before the process becomes irreversible.

Irreparable harm

22. Loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual.

23. As the Applicant is close to retirement, the removal of his promotion opportunity for advancement could irreparably harm his legitimate career expectations and affect his pension. The failure to fairly consider his application as a rostered candidate would cause irreparable harm and irreversible damage to his professional standing and reputation.

24. Since the object of the new TJO is to circumvent the intention of maintaining the roster, it would contribute to the possible manipulation of the selection process by eliminating the safeguards usually associated with promotion decisions.

Respondent's case

Receivability

25. The request to suspend the implementation of the selection process for TJO 109862 is not receivable. The Applicant has not requested management evaluation of an administrative decision relating to the TJO selection exercise. Furthermore, there is no final administrative decision for the Dispute Tribunal to review in relation to the TJO selection exercise. The selection exercise for the TJO is ongoing.

26. The Applicant's request for management evaluation is limited to the cancellation of the RFR. The Dispute Tribunal cannot suspend the decision to cancel RFR 104637 because that decision has been implemented.

Merits

Urgency

27. The Dispute Tribunal has consistently held that the requirement of urgency will not be satisfied if the urgency was created or caused by an applicant. The Dispute

Tribunal has stated that if an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the Applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions.

28. According to the Applicant, the TJO was advertised on 11 January 2019 and he became aware of the cancellation of the RFR on 28 January 2019. The Applicant, however, has provided no explanation as to why he waited almost two months before taking legal action. Had the Applicant acted with the urgency, the management evaluation processes would have been completed by now. The Applicant's failure to act with the appropriate urgency has meant that judicial resources are being expended unnecessarily in reviewing his claims. Therefore, the Applicant does not meet his burden of demonstrating urgency.

Prima facie unlawfulness

29. The Secretary-General has broad discretion stemming from the Charter of the United Nations, which establishes the framework for staff selection through a general grant of authority to the Secretary-General. Article 101(1) of the Charter provides that staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Article 101(3) of the Charter states that the necessity of securing the highest standards of efficiency, competence, and integrity is the paramount consideration in the employment of staff and in the determination of conditions of service.

30. Staff regulation 4.1 confirms that the power of appointment of staff members rests with the Secretary-General. Staff regulation 4.2 provides that the paramount consideration in the appointment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.

31. The Appeals Tribunal has recognized the wide discretion vested in the Secretary-General in reaching decisions on staff selection. The Dispute Tribunal does

not substitute its own judgment for that of the Secretary-General regarding the outcome of a selection process. Following a minimal showing by the Administration that the candidacy of a staff member was given full and fair consideration, the burden of proof shifts to the applicant who must be able to show through clear and convincing evidence that he or she was denied a fair chance of appointment.

32. The Applicant received full and fair consideration for the RFR. The RFR was advertised on 9 October 2018 for 14 days. Following this period, the hiring manager reviewed all the screened in job applicants, including the Applicant. The hiring manager concluded that none of the released job applicants met the requirements of the job opening. The hiring manager documented his consideration in a comparative analysis report. With respect to the Applicant, the hiring manager determined that the Applicant partially met the experience requirement of the job opening.

33. The hiring manager's review was entered into the *Inspira* system in December 2018. The *Inspira* system displays the status "recruitment completed" for all job applicants when all job applicants are either rejected or not recommended. Therefore, in December 2018, all job applicants for the RFR, including the Applicant, would have been able to see the change in status of the RFR.

34. On 27 January 2019, the RFR was administratively cancelled. This triggered the 27 January 2019 notification of cancellation to the Applicant. The hiring manager lawfully exercised his discretion under section 7 of ST/AI/2010/3 (Staff selection system) to review job applicants to ensure that they meet the requirements of the job opening. The hiring manager concluded that none of the job applicants met the requirement of the job opening.

35. The Applicant is receiving full and fair consideration for the TJO. Section 2.2(d) of ST/AI/2010/4/Rev.1 (Administration of temporary appointments) provides that the Organization may use temporary appointments to temporarily fill a vacant position pending the finalization of regular selection process. In accordance with that section, UNIFSA on 8 December 2018, requested FPD to authorize the publication of

a TJO. The temporary appointment was intended to provide operational continuity pending the finalization of a regular recruitment process against the post.

36. On 11 January 2019, UNISFA issued the TJO. The Applicant applied for the TJO on 18 January 2019. Following an evaluation of the Applicant's job application the Applicant was invited to an interview and he has confirmed his availability.

Irreparable harm

37. The Applicant has not established irreparable harm. In light of the ongoing evaluation of the Applicant's candidacy for the TJO, the continuation of the selection exercise pending management evaluation will not deprive the Applicant of an opportunity for career advancement, or harm his professional standing, or reputation.

The Applicant's request for confidentiality should be denied

38. The Applicant's request to redact his name from any published order should be denied. The Dispute Tribunal has held that unless there are unusual or exceptional circumstances, particularly arising from the evidence presented, motions for confidentiality should be discouraged and will not ordinarily be allowed. The Application presents no unusual or exceptional circumstances. The Dispute Tribunal routinely considers applications contesting selection decisions. The granting of a request for confidentiality in the current circumstances would negate transparency, a key element of the system of justice.

39. In view of the foregoing, the Respondent requests the Dispute Tribunal to reject the application.

Considerations

The Applicant's request for confidentiality

40. The Applicant requests the Tribunal to redact his name from this Order as he is currently applying to several posts and fears that the disclosure of his name might

prejudice his chances for selection. Article 11.6 of the UNDT Statute which is mirrored by art. 26.2 of the UNDT Rules of Procedure provides that “the judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal”. The provisions do not specifically refer to the publication of the names of applicants and the term “personal data” is not defined in the Tribunal’s Statute or Rules of Procedure. In addition, Practice Direction No. 6 of the Dispute Tribunal provides, inter alia, that “the work of the tribunal should be open and transparent, except insofar as the nature of any information that is deemed sensitive”.

41. In the United Nations internal justice context, the UNDT and the UNAT in their published rulings generally identify the applicants bringing cases before them. The rationale for this is the fact that transparency is a key element of the new system of justice. In *Utkina*, the UNAT held that a party must demonstrate a substantive reason or exceptional circumstances to justify anonymity.⁵

42. In the present the Applicant fears that the disclosure of his name will affect his candidature for several posts for which he has applied. The Applicant, however, provides no particulars of how the publication of his name will affect his candidature. The Tribunal notes that applying for multiple positions is commonplace for staff in the United Nations system. Accepting the Applicant’s argument would mean that every applicant who has applied, or intends to apply, for a post should remain anonymous, and thus transforming an exception into a rule, or that every applicant who brings a case before the Tribunal risks impediment in his/her career, which is not true. The Tribunal has no option but to conclude that these are speculations/unjustified fears of retribution for bringing a case before the Tribunal and do not amount to exceptional circumstances justifying the redaction of the Applicant’s name from this Order.

⁵ *Utkina*, 2015-UNAT-524 para. 18.

Receivability

43. The application is irreceivable, albeit not for the reasons stated by the Respondent.

44. Arguably, a cancellation of a job opening might be challenged by a candidate who has been found suitable and thus would have earned his place on a roster⁶, or, *a minori ad maius*, by a candidate recommended for appointment. The latter position is reflected in a directive expressed by the Hiring Managers' Manual to not cancel job openings where at least one candidate has been deemed suitable⁷, even though, contrary to the Applicant's averment, such position does not transpire from the Appeals Tribunal judgment, where the position as to the impact on staff member's rights was inconclusive.⁸ On the other hand, an argument might be made that, absent a positive rule establishing otherwise, until the decision produces binding external relation (such as acceptance of an offer of appointment by the selected candidate) the administration is competent to reconsider and amend its own decision.⁹ 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.

45. The case at hand, however, is different because the Applicant has not been recommended. The onerousness of the cancellation of the RFR for the Applicant is indirect: had the cancellation affected a shortlisted or recommended candidate from the roster, the Applicant would not have a standing to appeal; conversely, had the Applicant been rejected while another rostered candidate been selected, the Applicant, hypothetically, would have a standing to appeal. The direct negative consequences attach to a decision of the hiring manager to reject his candidacy for the advertised

⁶ *Verschuur* UNDT/2010/153.

⁷ Manual for the Hiring Manager on the Staff Selection System (Inspira) Version 3.0, United Nations (2012), at page 61.

⁸ *Verschuur* 2011-UNAT-149, para. 31.

⁹ See for example staff rule 11.4(a) - "A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation ...etc*" as well as the body of jurisprudence on correcting mistakes.

position, which, combined with the fact that no other candidate has been found qualified, led to the cancellation of the RFR. In essence, thus, the case concerns a non-selection decision. So interpreted, the application would be, in principle, receivable. The intervening element is introduced, however, by the fact that a new vacancy announcement has been posted, which should normally provide for the Applicant an opportunity to exercise his right to be considered for the job.¹⁰ This renders the application moot.

46. In this junction, as already held by this Tribunal in the context of priority for appointment claimed by an internal candidate, a staff member has no right to have external candidates excluded from the competition, no matter the nature of the job advertised. A mere availability of “suitable” internal candidates does not bar the Organization’s seeking the best candidates available internally and externally. Any possible overstepping the scope of discretion by the management in opening the vacancy externally may be considered in the aspect of efficiency and cost effectiveness of the recruitment process; the question of the right of individual internal candidates, however, does not arise. The same applies, *mutatis mutandis*, to rostered vis-à-vis non-rostered candidates. Placement on the roster cannot be interpreted as a promise or guarantee to be appointed in priority over the not rostered candidates; to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.¹¹ Therefore, in principle, opening of a new TJO satisfies the legitimate interests of the Applicant.

47. This said, the Tribunal wishes to draw the Respondent’s attention to particulars of the new TJO 109862 recruitment which indicate that the Applicant’s right to full and fair consideration may be jeopardized. The Applicant, previously found unqualified for the very same job upon – according to the Respondent – a full and fair

¹⁰ *Andrysek* 2010-UNAT-070, in *Charles* 2013-UNAT-286, para. 27; *Hersh* 2014-UNAT-433, para. 30; *Wang* 2014-UNAT-454, para. 41; *Luvai* 2014-UNAT-417, para. 32.

¹¹ *Lemmonier* 2017-UNAT-762 at para. 29 citing to *Krioutchkov* 2016-UNAT-707; See also *Charles* 2012-UNAT-242, at para. 33.

consideration, has now has been shortlisted and invited for an interview. A conspicuous change of assessment of his suitability may indicate that the current exercise is a façade masking a pre-conceived result for the Applicant. In addition, the Applicant's chances may also be compromised should the same hiring manager who previously disqualified the Applicant have a decisive influence on the selection. The Respondent should promptly address these concerns to prevent building in impropriety, and a ground for appeal, in the future selection decision.

Conclusion

48. The application for suspension of action is rejected as irreceivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 3rd day of April 2019

Entered in the Register on this 3rd day of April 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi