



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/123

Order No.: 95 (GVA/2015)

Date: 29 April 2015

Original: English

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**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

MELPIGNANO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for Applicant:**

Marisa Maclellan, OSLA

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

## **Introduction**

1. By application filed on 20 April 2015, the Applicant seeks suspension, pending management evaluation, of the implementation of the decision to find him ineligible for a post advertised under Vacancy Announcement (“VA”) VA-13-14 (046), Human Resources Assistant (GS-6), Reference Verification Unit with the United Nations Logistics Base/Global Service Centre (“UNLB/GSC”), in Brindisi.

## **Facts**

2. The Applicant joined UNLB in 1999 as an Administrative Clerk (GS-3). Since then, he has held several different positions, and was promoted to the GS-4 and later to the GS-5 level. He currently holds a fixed-term appointment as a Human Resources Assistant (GS-5).

3. On 3 June 2014, the Applicant applied to Temporary Job Opening (“TJO”) TJO 13-14 (048), Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC. On 21 June 2014, he was notified of his selection for this TJO and he took up these functions on a temporary assignment as from July 2014.

4. On 26 June 2014, the Applicant applied for VA-13-14 (046), Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC.

5. On 5 February 2015, the Applicant was informed that he had been found ineligible for VA-13-14 (046) due to the time-in-grade requirements contained therein.

6. The Applicant submitted a request for management evaluation on 31 March 2015. On the same day, he filed an application for suspension of action pursuant to art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure.

7. By letter dated 7 April 2015, the Management Evaluation Unit (“MEU”) informed the Applicant that his request for management evaluation was deemed irreceivable. Also on 7 April 2015, the Respondent filed his reply to the application for suspension of action, pointing out that the management evaluation had already been rendered.

8. The contested decision no longer being under management evaluation, the Tribunal rejected the request for suspension of action, by Order No. 81 (GVA/2015) of 9 April 2015.

9. On 20 April 2015, the Applicant submitted a second request for management evaluation, insisting on the receivability of the matter. On the same day, he filed the present application with the Tribunal.

10. The Respondent was served the application, without being asked to file a reply. Instead, the parties were convened to a case management discussion, which was held on 28 April 2015. Also on 28 April 2015, the Applicant transmitted to the Tribunal a copy of the management evaluation reply to his request of 20 April 2015, which was issued on 27 April 2015.

### **Parties’ contentions**

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

#### *Receivability*

a. The decision to rule him ineligible for the VA at issue was not a preparatory decision. As far as the Applicant is concerned, it was the final adverse determination of his eligibility for the VA, which resulted in his being taken out of the respective selection process. Thus, it had direct legal consequences for the Applicant, specifically in this recruitment process, i.e., not only he did not get a chance to further compete and be selected, but also it affects his ability to apply for and obtain any GS-6 position;

*Prima facie unlawfulness*

b. While UNLB holds that the VA at issue reflects the time-in-grade requirements of four years for a G-5 candidate to apply to a G-6 position as articulated in the Guidelines on Placement and Promotion of Locally Recruited General Service Staff Members, dated 8 August 1996 (“Guidelines”), the Guidelines do not apply to UNLB. UNLB/GSC is not a mission, but a hybrid operation (as expressly stated e.g., in the Frequently Asked Questions for Executive Offices/Local Personnel Offices regarding Continuing Appointments). As such, the application of ST/AI/2010/3 to recruitments of UNLB staff is not excluded by virtue of sec. 3.2(h) of the administrative instruction in question;

c. Sec. 6 of Administrative Instruction ST/AI/2010/3 (Staff Selection System) does not require that General Service staff serve a specific number of years at a particular level to be eligible to apply for posts at the next higher level. Any interpretation of the Guidelines inconsistent with sec. 6 should be void, pursuant to sec. 2.6 of the same instruction;

d. The Administration’s reliance on the Guidelines, which do not rise to the level of the Staff Rules or even administrative instructions, cannot be the basis of an additional and new requirement that experience must be gained for five years at one level before being able to apply to the next higher level. Based on *Johnson* 2012-UNAT-240, not only must inferior issuances not supersede superior ones, but they must not add substantive requirements, unless expressly permitted to do so;

e. The time-in-grade requirement amounts factually and legally to a type of discrimination, in that locally recruited staff would be penalised vis-à-vis external candidates. Moreover, such requirement is no longer applicable at headquarters;

f. The application of the Guidelines imposes too specific a requirement for internal candidates. It places undue restrictions on internal candidates, rendering the VA dangerously narrow, as noted in para. 5.5.1.6 of the Inspira Recruiter's Manual;

g. UNLB has waived this requirement in other recruitments, including the TJO for the same post, in which the Applicant currently serves;

*Urgency*

h. According to the Tribunal's case law, urgency exists when an applicant may be denied the chance of regaining the position he was occupying or should be occupying despite being successful on the substantive case, especially if the position is filled. If the Administration is allowed to implement the decision, another candidate will be selected;

*Irreparable damage*

i. Suspension of action is the only remedy available to him to suspend the recruitment process and selection of another candidate and to have the use of the time-in-grade rule reviewed. Pursuant to the Tribunal's case-law, harm is irreparable if it can be shown that the suspension of action is the only way to ensure that an applicant's rights be observed; also, a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage inflicted.

**Consideration**

12. Art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure cater for the Tribunal's jurisdiction to suspend the implementation of an administrative decision provided certain conditions are met. In doing so, both provisions make it clear that the Tribunal may suspend an action "during the pendency of the management evaluation".

13. It is thus evident that the Tribunal's power in this respect is limited to such time at which the management evaluation of the decision in question is finalised. Consistently, the Appeals Tribunal has held that any jurisdictional decision ordering the suspension of a contested administrative decision for a period beyond completion of management evaluation exceeds the Tribunal's jurisdiction (*Onana* 2010-UNAT-008, *Igbinedion* 2011-UNAT-159).

14. In the present case, the Tribunal is satisfied that the management evaluation of the determination that the Applicant was ineligible for the post advertised under Vacancy Announcement VA-13-14 (046) was completed as of 27 April 2015, as it has been provided with a copy of it.

15. Accordingly, the Tribunal finds that it no longer has jurisdiction to rule on the present application for suspension of action.

#### **Conclusion**

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

*(Signed)*

Judge Rowan Downing

Dated this 29<sup>th</sup> day of April 2015

Entered in the Register on this 29<sup>th</sup> day of April 2015

*(Signed)*

René M. Vargas M., Registrar, Geneva