



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

ABDUL GHAFOOR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Nicole Wynn, ALS/OHRM, UN Secretariat

Nusrat Chgtai, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 21 April 2017, the Applicant, a Finance and Budget Assistant (GS-5) in the Islamabad office of the United Nations Military Observer Group in India and Pakistan (“UNMOGIP”), seeks suspension of the decision not to recruit him for the position of Procurement Assistant (GS-6) within UNMOGIP.

2. On 21 April 2017, the application was served on the Respondent, who submitted a reply on 25 April 2017.

Facts

3. The Applicant joined the United Nations in 2010. He is currently employed as a Finance and Budget Assistant in the Islamabad office of UNMOGIP working on “Accounts Payable”. There are three G-5 Finance and Budget Assistant posts within the Section, two working on Accounts Payable and one on Payroll.

4. On 21 August 2016, a post of Procurement Assistant (GS-6) in UNMOGIP was advertised. The Applicant applied for it on 19 September 2016.

5. The Applicant was invited to a written test and, subsequently to a competency-based interview.

6. By email of 22 March 2017 from a Human Resources Assistant, UNMOGIP, the Applicant was informed that although he was among the recommended candidates another recommended candidate had been selected by the Head of Mission, namely the Chief Military Observer. The Applicant was also advised that his name had been placed on the roster for future Procurement Assistant job openings at the GL-6 level.

7. By letter of 24 March 2017, the Applicant sought assistance from the National Staff Union to challenge his non-selection for the post. By letter of the same day, the Chairperson of the National Staff Union requested the Administration to suspend the recruitment process.

8. By letter of 30 March 2017, the Applicant asked the Director of Field Personnel Division (“FPD”) to stop the recruitment process, alleging that he had to be given preference over an external candidate, especially in view that his current post was slated for abolition.

9. By letter of 21 April 2017, the Chief, Asia and Middle East Section, Field Personnel Operations Service, FPD, confirmed that an external candidate had been selected for the post, and stated that there was currently no plan under review to abolish Finance positions within UNMOGIP.

10. On 21 April 2017, the Applicant requested management evaluation of the decision not to select him for the post.

Parties’ contentions

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

Prima facie unlawfulness

a. The Applicant, who occupies a post slated for abolition in a downsizing unit, had to be given preference over an external candidate when considered for the contested post for which he had been found suitable;

b. The Chief Military Observer lacked the technical competence to overrule the Hiring Manager’s recommendation to select the Applicant for the contested post;

Urgency

c. The sending of an offer to the selected candidate is imminent;

Irreparable damage

d. The Applicant’s non-selection for the contested post leaves him on a post slated for abolition where comparative review is likely to cause his separation. Monetary compensation would be insufficient to compensate the

frustration, unhappiness and loss of chance of career development associated with the non-renewal of his fixed-term appointment.

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

Implementation of the contested decision

a. The contested decision has already been implemented as a formal offer of appointment was sent to the selected candidate on 24 March 2017, and unconditionally accepted on 6 April 2017. Therefore, the Tribunal lacks jurisdiction to suspend the implementation of the contested decision.

Consideration

13. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears prima facie to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

Implementation of the contested decision

14. As a preliminary matter, the Tribunal recalls that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

15. It is settled law that "the legal act whereby the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or by an official acting on his behalf" but that "this does not mean that an offer of employment never produces any legal effects" (*Gabaldon* 2011-UNAT-120; see also *Sprauten* 2011-UNAT-111).

16. In this connection, the Appeals Tribunal has consistently ruled that:

Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2(a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organisation. (*Gabaldon* 2011-UNAT-120; see also *Sprauten* 2011-UNAT-111; *Cranfield* 2013-UNAT-367).

17. It is clear from the jurisprudence of the Appeals Tribunal that for a decision to recruit an external candidate to be implemented, it is not sufficient that the Organization make an offer and that the selected candidate unconditionally accept it, as asserted by the Respondent. It is also required that the selected candidate meet the conditions contained in the offer, if any.

18. To support his argument that the contested decision has already been implemented, the Respondent filed an offer of appointment dated 24 March 2017 to the selected candidate, which states:

This offer is subject to satisfactory completion of pre-recruitment formalities, including medical clearance, reference checks and confirmation of university degrees, and will be confirmed to you as soon as all information is received. In this connection, please refer to the attached note on Verification of References and Academic Qualifications.

This appointment will become effective when you report for duty.

19. The selected candidate accepted the offer on 4 April 2017 and indicated that he would be available as of 1 May 2017.

20. There is no assertion being made by the Respondent, nor any evidence, that the conditions set out in the offer of appointment, namely medical clearance, reference checks and confirmation of university degrees, have been satisfied by the selected candidate. Absent any such evidence, the Respondent's argument that the contested decision has already been implemented must fail.

21. In this respect, the Tribunal notes that it was for the Respondent, who was given the opportunity to respond to the application for suspension of action and claimed that the decision has already been implemented, to adduce the necessary evidence to support his argument. Given the short time frame for the Tribunal to decide on the application for suspension of action, and the fact that these proceedings concern only an interim measure, this Tribunal is not required to engage in a fact finding exercise to examine the merits of the argument raised by a party.

Prima facie unlawfulness

22. The Tribunal recalls that the threshold required in assessing this first condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99(GVA/2015)).

23. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it shall examine the following: (1) whether the procedure as laid down in the relevant provisions was followed; and (2) whether the staff member was given fair and adequate consideration (see *Nunez* Order No. 17 (GVA/2013) and *Abbassi* 2011-UNAT-110).

24. Regarding the scope of judicial review with respect to decisions in selection and/or promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals’ role is not to substitute their decision for that of the Administration.

25. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

26. The gist of the Applicant's case is that he should have been given preference over the selected candidate, who is an external one, given that he is already in the service of the Organization and that his current post is slated for abolition. The Tribunal will examine whether the available evidence and the application of the relevant rules *prima facie* support this contention.

27. Art. 101(3) of the Charter provides that "[t]he paramount consideration in employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity".

28. Staff regulation 4.4 states that:

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

29. Sec. 2.3 of ST/AI/2010/3 (Staff selection system) of 21 April 2010 provides that:

Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission *may select any one of those candidates for the advertised job opening*, subject to the provisions contained in sections 9.2 and 9.5 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future job openings at the same level within

an occupational group and/or with similar functions (emphasis added).

30. Finally, a “selection decision” is defined in sec. 1(x) of ST/AI/2010/3 as a:

decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the Organization’s human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and giving the fullest regard to candidates already in the service of the Organization as well as those encumbering posts that are slated for abolition or are serving in secretariat entities undergoing downsizing and/or liquidation.

31. It is clear from the above that the Chief Military Observer had authority to select any of the recommended candidates. However, his discretion was not unfettered. In making his decision, he had to take into account a number of factors that included the highest standards of efficiency and competence, the Organization’s human resources objectives and targets, as well as the fact that a candidate may already be in the service of the Organization or encumbering a post slated for abolition.

32. In the context of the forthcoming abolition of posts due to the implementation of the Global Service Delivery Model, chiefs of mission were specifically instructed by Code Cable 2583 of 16 December 2016 to “make every attempt to accommodate affected national staff in other roles in the mission in cases where they cannot be placed in RSCE [Regional Service Centre Entebbe] and KJSO [Kuwait Joint Support Office]”. It follows that whilst the rules do not foresee that an internal candidate whose post is subject to abolition is to be automatically be given preference over an external candidate, there must be good reasons for a decision maker to prefer an external candidate over an internal one, when the former is likely to be separated from the Organization and is found suitable for the concerned post.

33. The Applicant has expressed serious concerns that his current position as Finance and Budget Assistant in UNMOGIP will be abolished imminently, which is likely to result in his separation from service, based on the following:

- a. Code cable no. 2230 of 31 October 2016 informing field missions that a project of Global Service Delivery Module, which would entail consolidation of administrative services—including payroll and accounts payable—in regional hubs was being considered by the General Assembly, with a proposal to transfer UNMOGIP’s administrative services to the Regional Service Centre Entebbe on 1 January 2018;
- b. Information Circular No. 16/08 of 4 November 2016, by which the Chief of Mission Support, UNMOGIP, informed all UNMOGIP Personnel that as a result of the Global Service Delivery Module, which was being considered by the General Assembly, positions in payroll and accounts payable services would be transferred to the Regional Service Centre in Entebbe, effective 1 January 2018; and
- c. Code cable no. 2583 of 16 December 2016 informing field missions of proposed budget amendments to be put forward to the General Assembly to centralise processing of payroll, which includes a proposal to cut one payroll post in UNMOGIP and a new one to be created in the Kuwait Joint Support Office.

34. The Tribunal notes that the post currently encumbered by the Applicant has not yet been specifically identified for abolition, and that the documents referred above solely include proposals to be considered by the General Assembly. Most significantly, the Chief, Asia and Middle East Section, Field Personnel Division Services, FPD, assured the Applicant by letter of 21 April 2017 that no plans to abolish Finance positions in UNMOGIP were under consideration at the moment and that should this happen in the future, it would be dealt with in accordance with the established guidelines on downsizing.

35. The Tribunal finds no evidence that the Applicant's current position is subject to abolition but rather that the Organization has given him assurances that his position is not currently the subject of consideration for abolition. The Tribunal is thus unable to find that there has been a prima facie establishment that the Chief Military Observer ought to have given preference to the Applicant over an external candidate, although this may be seen as a good managerial practice. Obviously, any incorrect information or misrepresentation made to the Applicant in respect of the status of his current post would be seen as a very serious matter that puts into question the legality of the contested decision.

36. Furthermore, the Tribunal finds that it has not been established prima facie that the Applicant was recommended by the hiring manager and endorsed by the Mission Review Panel as the preferred candidate, and that the Chief Military Observer overruled this recommendation by selecting an external candidate. The Tribunal notes that there is no indication in the application of the source of this information, nor is this assertion supported by any of the documents that the Applicant submitted in support of his application. Rather, this allegation by Counsel appears to be contradicted by an email of 21 April 2017 sent by the Applicant to the Chief, Asia and Middle East Section, Field Personnel Division Services, FPD, where he stated that he did not challenge the fact of not having been identified as the most suitable candidate by the hiring manager but claimed that he had to be given preference over an external candidate given his particular situation as a staff member whose position was subject to abolition.

37. The Tribunal acknowledges that the threshold of evidence is low at the stage of an application for suspension of action, and that it is reasonable to assume that the Applicant does not have access to the selection documents. However, the mere assertion by Counsel in the present circumstances is not sufficient to reach this threshold.

38. In view of the foregoing, the Tribunal finds that it has not been established that the contested decision is prima facie unlawful. As the first condition to grant an application for suspension of action is not met, the Tribunal does not need to address the two other cumulative conditions.

Conclusion

39. The application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 28st day of April 2017

Entered in the Register on this 28st day of April 2017

(Signed)

René M. Vargas M., Registrar, Geneva