



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

RIYAZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON CASE MANAGEMENT
AND ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Advocate Babar Qadri

Counsel for Respondent:

Steven Dietrich, ALS/OHRM

Introduction

1. By application filed on 14 June 2017, the Applicant requests suspension, pending management evaluation, of the decision not to renew her fixed-term appointment with the United Nations Military Observer Group in India and Pakistan (“UNMOGIP”) beyond 30 June 2017.

Facts

2. On 8 February 2015, UNMOGIP issued a vacancy announcement (“VA”) for an Administrative Assistant position (G-7 level). It was advertised in the local newspaper, with a closing date of 23 February 2015. The VA stated, *inter alia*, that “[c]andidates having minimum education of secondary school diploma, and/or supplementary administrative or management training or any related qualifications *along with minimum 10 years of relevant working experience* are requested to apply” (emphasis added).

3. It appears that during the shortlisting process, UNMOGIP applied the Standard Operating Procedure on Staff Selection for Peacekeeping Operations and Special Political Missions (“SOPs”), which provide guidance to staff members in field missions in implementing the policies set out in ST/AI/2010/3 (Staff selection system).

4. The Applicant applied to the VA and, on the basis of her Personal History Profile (“PHP”), and was found eligible although her PHP clearly indicated that her professional experience totalled less than ten years. Following a competitive selection exercise, the Applicant was selected for the post and recruited, at the G-7 level, under a one year fixed-term appointment, on 1 July 2015.

5. A review of the Applicant’s selection was initiated by the Field Personnel Division, Department of Field Support (“FPD/DFS”) in September 2015, on the basis of allegations of irregularities that had been made by an external candidate.

6. FPD/DFS found that the selection process had not complied with the established procedures on the recruitment of staff, because the Applicant did not meet the minimum years of work experience as required by the VA. Although UNMOGIP was advised by FPD not to renew the Applicant's FTA, it was renewed through 30 June 2017, on 1 July 2016.

7. On 27 May 2017, FPD again advised the Mission not to renew the Applicant's FTA beyond 30 June 2017. Accordingly, by memorandum dated 30 May 2017, the Head of Mission informed the Applicant that her appointment would not be renewed beyond 30 June 2017. The memorandum also noted the following:

1. A review undertaken by the Field Personnel Division at UNHQ in New York identified several significant errors in the recruitment process for the GL-7 post of Administrative Assistant for which you have been selected effective 1 July 2015.

2. In particular, it was determined that you did not meet the eligibility requirements at the time of your recruitment and that you still won't at the time when your current fixed-term appointment expires. As a result, it has been determined that your placement against the post is not in compliance with the recruitment guidelines.

8. The Applicant requested additional information for the justification of the non-renewal decision, including documents relating to her recruitment. The exchange of emails on file indicates that the Applicant was provided with documents contained in her personnel file; however, there is an argument about certain documents not having been disclosed to her.

9. By email 9 June 2017, the Chief Human Resources Officer, UNMOGIP, again explained to the Applicant that since she only had five years of work experience at the time of her recruitment, whereas the vacancy announcement required 10 years of working experience, the applicable rules and regulations had not been followed correctly at the time of her recruitment, and it had, thus, been determined that her contract should not be renewed.

10. The Applicant filed a request for management evaluation on 12 June 2017 and the present application for suspension of action on 14 June 2017.

11. The application was served on the Respondent, who filed his reply on 16 June 2017. On 17 June 2017, the Applicant filed a motion for production of documents.

Parties' contentions

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

Prima facie unlawfulness

a. At the time of her application, she disclosed all the relevant information with respect to her qualifications and work experience to Human Resources; Chapter 9 of the Staff Rules could only have been attracted if she had concealed any substantive material, which was not the case; her appointment can thus not be terminated;

b. While as a holder of a fixed-term appointment she has no right to renewal, in the absence of her having provided false information, the laws of natural justice and the doctrine of legitimate expectations create a right of the Applicant with respect to her position; her excellent performance during the two years support her claim for expectancy for renewal;

c. Her rights under ST/AI/108 (Annual Inspection of Official Status File) were violated, thus depriving her from making an effective application before the Management Evaluation Unit and the Tribunal;

d. Pursuant to ST/AI/2010/3 (Staff selection system), it is the duty of the Human Resources to pre-screen and determine the eligibility of candidates, including the Applicant; the Applicant's candidature was cleared as fulfilling the technical requirements and competencies of the position; by selecting the Applicant, the Organization has implicitly waived the lack of working experience;

e. The Applicant fulfils the criteria for contract renewal under the relevant provisions of ST/AI/2013/1 (Administration of fixed-term appointment);

f. The termination of her contract occurred without any legitimate reasons and the justification given for the exercise of discretion was not supported by legitimate facts (*Islam* 2011-UNAT-115);

g. She cannot be punished for the neglect applied by Human Resources at the time of her recruitment; the Chief, Human Resources, UNMOGIP, admitted that the rules of Field Service (“FS”) level were erroneously applied, although they were technically not applicable for recruitment at the General Service level; in not renewing her FTA, the Organization breached the value of professionalism and of integrity; an error cannot be rectified by the Organization through another error; and

h. The termination of her FTA is the result of conspiracies.

13. The Respondent’s primary contentions may be summarized as follows:

Prima facie unlawfulness

a. Irrespective of the length of service, an FTA does not carry an expectancy of renewal, but expires automatically; the Applicant’s performance evaluations do not give rise to an expectation of renewal; the decision was based on valid reasons, namely, the fact that the Applicant did not have the minimum requirement (10 years) of progressively responsible prior work experience;

b. The error gave the Applicant an unfair advantage vis-à-vis other staff members and external candidates who met the requirements of the vacancy; the Administration could not allow the situation to persist, and was obliged to correct the error.

Consideration

14. The Tribunal recalls that the present case concerns an application for suspension of action of a decision not to renew an FTA, which is different from a termination decision.

15. Article 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 cases 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)).

16. With respect to the non-renewal of an FTA, the Tribunal recalls the established jurisprudence of the Appeals Tribunal, according to which an FTA does not bear any expectancy of renewal or of conversion to any other type of appointment (*Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). A non-renewal decision can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The staff member alleging that the decision was based on improper motives carries the burden of proof with respect to these allegations (*Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503).

Prima facie unlawfulness

17. The Tribunal finds that the non-renewal of the Applicant's FTA was not *prima facie* illegal. It recalls that the threshold required for *prima facie* illegality 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)).

18. The VA for the post of Administrative Assistant, G-7, required a minimum of ten years of working experience. It is undisputed that at the moment of her recruitment, the Applicant did not possess the required professional experience. Even after having worked for two years as Administrative Assistant, G-7, at UNMOGIP, she still falls short of the ten years working experience required for the position. The Applicant was thus not eligible to apply and to be selected for the position of Administrative Assistant, G-7.

19. The Administration admitted that it made a mistake when it found the Applicant eligible by applying sec. 1.4.9 of the SOPs on Staff Selection System for Peacekeeping Operations and Special Political Missions (SOPs) to that recruitment. The SOPs provide for some flexibility to replace the number of work experience required in a given VA for positions in the Field Service category, if a candidate holds a first level university degree. As such, e.g. for a position at the FS-6 level, it provides “10 years with a high school diploma or equivalent, technical or vocational certificate (5 years with a first level university degree)”. It seems that that provision was applied by UNMOGIP when it found the Applicant eligible for and recruited her against a G-7 post.

20. The Tribunal recalls that unlike for General Service positions, like the one encumbered by the Applicant, recruitment in the Field Service Category is international. More importantly, it notes that sec. 2 of the SOPs explicitly provides that the SOPs do “not apply to the selection of candidates against locally-recruited positions in the General Service and the National Professional Officer categories in the field missions”.

21. Rather, the selection process for the position of Administrative Assistant (G-7), is guided by ST/AI/2010/3 (Staff selection system), which provides for Eligibility requirements (sec. 6) and Pre-screening and assessment (sec. 7). Section 7.1 of that Administrative instruction states:

Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

22. Further, the relevant parts of section 5.4.1 of the Manual for the recruiter on the staff selection system (inspira) (Release 3.0 of 12 October 2012) provides:

6. For positions in the General Service and related categories, the standard minimum requirement may vary from position to position and location to location.

...

8. An applicant is automatically pre-screened by the system as meeting or not meeting the required length of work experience based on the indication in his/her application.

9. When this requirement is met, the applicant is considered eligible. The applicant who does not meet the requirement for length of work experience is not eligible and is rejected.

23. In light of the requirements of the VA, and under the above-mentioned rules, it is thus clear that the Applicant was not eligible to be selected for the post of Administrative Assistant, G-7 at the time of her recruitment, and that she still currently does not meet that eligibility requirement.

24. The Tribunal notes that the Applicant does not contests that she failed to meet the eligibility requirement for “working experience”. She sustains, however, that she cannot be held accountable for the error made by the Administration.

25. In several recent decisions, the Tribunal stressed the importance for staff members to fulfil the eligibility requirements in order for an appointment to be legal (cf. *Kauf* Order No. 116 (GVA/2017); *Valentine* UNDT/2017/004).

26. Further, in *Boutruche* UNDT/2009/085 (not appealed) the Tribunal held the following:

Contrary to [what is] maintained by the Applicant, the Administration, bound as it is to apply existing rules, has a right and even an obligation to put an end to illegal situations as soon as it becomes aware of them, while preserving any rights acquired by staff members in good faith.

27. The Administration is thus not estopped from putting an end to an illegal situation, which is what it did when it decided not to extend the Applicant's FTA. The fact that the Applicant, when applying for the position of Administrative Assistant, G-7, did provide in good faith all the information, including that related to her working experience, does not change the fact that the Administration was bound to apply the rules and was entitled, and even obliged, to put an end to the illegal situation created by its own mistake.

28. As such, the Tribunal finds that the Administration is not holding the Applicant accountable for its own mistake; rather, it re-established the legality of the recruitment procedure since the ten years of working experience were a mandatory requirement. Indeed, the requirements of a VA have to be respected in any recruitment process to ensure its transparency and legality. Whenever an error is detected, the Administration is obliged to correct it as a matter of fairness.

29. Having found that the non-renewal decision was justified, the Tribunal also notes that the Applicant did not meet the burden of proof concerning arbitrariness, prejudice or improper motivation, and that no inference can be drawn from the documents on file that the decision was based on any ulterior motive, or that it resulted from a conspiracy.

30. Since the decision is not *prima facie* illegal, the Tribunal will not address the two other cumulative conditions for a suspension of action, namely urgency and irreparable harm.

Motion for production of documents

31. In light of the foregoing, and since it reached its conclusions on purely legal grounds, the Tribunal is satisfied that it has all documents at its disposal to ensure a fair adjudication of the application for suspension of action.

Conclusion

32. In view of the foregoing:

- a. the application for suspension of action is rejected; and
- b. the Applicant's motion for production of documents is rejected.

(Signed)

Judge Teresa Bravo

Dated this 20th day of June 2017

Entered in the Register on this 20th day of June 2017

(Signed)

René M. Vargas M., Registrar, Geneva