



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

LACKNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 16 July 2018, the Applicant, a Judicial Affairs Officer (P-4) at the United Nations Assistance Mission in Afghanistan (“UNAMA”), requested suspension of action, pending management evaluation, of the decision to launch a new recruitment process for the post of Senior Judicial Affairs Officer (P-5) at UNAMA (Job Opening 18-ROL-UNAMA-97210-F-KABUL (M)) (“JO 97210”) and its continuation.
2. The application for suspension of action was served on the Respondent, who filed his reply on 19 July 2018.

Facts

3. On 17 February 2017, UNAMA published Job Opening 17-Rule of Law-FMADPKO-74088-R-Kabul (M) for the post of Senior Judicial Affairs Officer (“JO 74088”). The Applicant submitted his candidature for it and the job opening was later cancelled.
4. On 4 June 2018, UNAMA published the above-mentioned JO 97210 as a “Recruit from Roster” job opening, namely one that “is only open to roster applicants who are already placed on pre-approved rosters, following a review by a United Nations Central Review Body”. The Applicant submitted his candidature for it and the recruitment process is currently ongoing.

Parties’ contentions

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

Receivability

- a. The Applicant did not put forward any arguments in support of the receivability of his application, which the Respondent challenged in his reply;

Prima facie unlawfulness

b. A series of facts taken together demonstrate bias in the recruitment of the Senior Judicial Affairs Officer (“SJAO”), namely: the cancellation of the recruitment process under JO 74088, “the expression of the expectation to see [another former UNAMA staff member] coming back soon on [the position of SJAO]”, the opening of a new vacancy as a Recruit from Roster exercise after the departure of said former UNAMA staff member, and the formulation of Terms of Reference that, in his view, shows the intention to “design a post for specific tasks” and appoint a specific person;

Urgency and irreparable damage

c. The Applicant is seeking to re-open the recruitment process under JO 74088 to receive an offer of appointment as the “second ranked” candidate following the “first ranked” candidate’s non-acceptance of an appointment offer. It follows that if the recruitment under JO 97210 is not suspended, his action vis-à-vis JO 74088 would become moot. Therefore, the matter is urgent and, if the contested decision is not suspended it would cause him irreparable damage.

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

Receivability

- a. The application is not receivable because:
- i. the decision to re-advertise the SJAO position has already been implemented following the publication of JO 97210 and “the Dispute Tribunal does not have competence to suspend a decision that has been implemented”; and
 - ii. the selection exercise under JO 97210 is ongoing and only a final administrative decision taken at the conclusion of a selection exercise constitutes an administrative decision under Article 2(1)(a) of the Tribunal’s Statute;

Prima facie unlawfulness

b. The decisions to cancel JO 74088 and to issue JO 97210 are lawful. They result from a change in UNAMA's mandate affecting the terms of reference of the SJAO post. UNAMA's decision to launch a new selection exercise, with revised terms for the respective job opening, fall within the Organization's broad discretion to determine its organizational needs, including staffing requirements;

Urgency

c. Any urgency in the instant case is self-created and, therefore, cannot be entertained. JO 97210 was published on 4 June 2018 and the Applicant submitted his candidature on 8 June 2018. However, he filed his application for suspension of action almost five weeks after he applied to the JO and has not provided any explanation for this delay;

Irreparable damage

d. The Applicant has also not demonstrated how the implementation of the decision would cause him irreparable harm. Indeed, he has not identified any imminent decision that is likely to cause him irreparable harm, and his application for the Position is under consideration.

Consideration

Receivability

7. The Tribunal first has to assess the Respondent's two-fold argument that the application is not receivable.

Publication of JO 97210

8. Art. 2.2 of the Tribunal's Statute provides that (emphasis added):

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual *requesting the Dispute Tribunal to suspend*, during the pendency of the management evaluation, *the implementation of a contested administrative decision* that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

9. The above language is also echoed in art. 13.1 of the Tribunal's Rules of Procedure. It follows that one of the premises on which the examination of applications for suspension of action rests is the existence of an administrative decision that has not yet been implemented.

10. As the Respondent pointed out in his reply, the publication of JO 97210 materialized on 4 June 2018. Even if one were to entertain the argument that publication of a job opening fully materializes at the end of its posting period, in the case at hand said period ended on 18 June 2018, namely a little less than a month prior to the filing of the instant application for suspension of action.

11. The Tribunal therefore finds that the Applicant's request in connection with the publication of JO 97210 is not receivable *ratione materiae*.

Ongoing selection exercise under JO 97210

12. The Respondent argues that only a final selection decision constitutes a reviewable administrative decision. In this connection, the Tribunal recalls that it has already ruled on several occasions that certain "intermediate" steps in a recruitment exercise, such as finding a candidate ineligible or unsuitable, constitute reviewable administrative decisions under art. 2.1(a) of its Statute.

13. It is required, however, that there be a decision within a recruitment process that “produces direct legal consequences affecting [an] [a]pplicant’s terms of appointment” (see *Melpignano* UNDT/2015/075). In his application, the Applicant unequivocally states that he “aim[s] to have suspended ... only the ... decision, to process a new recruitment [under JO 97210] and its continuation”.

14. The Tribunal is satisfied that the assessment of the candidates to JO 97210 is ongoing. Moreover, the Applicant did not produce any decision arising from that recruitment exercise affecting his terms of employment.

15. Therefore, the Tribunal finds that there is no administrative decision to consider for suspension concerning the ongoing recruitment under JO 97210. It follows that the Applicant’s request in this connection is also not receivable *ratione materiae*.

16. Having found that the application is not receivable, the Tribunal will not examine the cumulative requirements set out in art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure for the granting of a suspension of action, namely whether a decision appears *prima facie* to be unlawful, whether a matter is of particular urgency, and whether the implementation of an administrative decision would cause irreparable damage.

IT IS ORDERED THAT:

17. The application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 23rd day of July 2018

Entered in the Register on this 23rd day of July 2018

(Signed)

René M. Vargas M., Registrar, Geneva