UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/055
Order No.: 110 (NBI/2010)
Date: 25 June 2010
Original: English

Before: Judge Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KARL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for applicant:
Self represented

Counsel for respondent:
Miouly Pongnon, UN-HABITAT

Introduction

1. On 4 June 2010, the Applicant, a staff member of the United Nations Human Settlements Programme (UN-Habitat), requested a management evaluation and also brought this application for suspension of action on the decision to "establish a new panel for the sole purpose of conducting a second round of interviews for the post of Chief, Partners and Youth Branch", which was notified to him on 3 June 2010.

2. On the same day, the application was served on the Respondent and by Order No. 104, the United Nations Dispute Tribunal (the Tribunal) granted the application for suspension of action until 10 June 2010 to allow the Respondent an opportunity to file his comments and any relevant documentary evidence.

3. By an email of 10 June 2010, the Respondent's counsel submitted a reply and relevant documentary evidence (exhibits R1 to R5) to the Tribunal. Due to a communication gap between the Respondent and the Tribunal's Registry, exhibits R1 to R5, which the Respondent wanted to submit to the Tribunal solely on an *ex parte* basis, were served upon the Applicant along with the Respondent's reply. Consequently, by an email dated 10 June 2010, the Registry instructed the Applicant to destroy the confidential documents and refrain from referring to them before the Tribunal or elsewhere.

4. On 14 June 2010, after a careful examination of the submissions of the parties, the Tribunal issued Order No. 105 instructing the Parties to attend a hearing on the application for suspension of action on 18 June 2010. Further, the Tribunal extended the suspension of action until 30 June 2010, pending its final decision on the application.

5. On 15 June 2010, the Respondent's counsel filed an application for revision of Order No. 105, which granted suspension of action until 30 June 2010. The Respondent's counsel proffered, *inter alia*, the following reasons for her application:

a. Recently discovered decisive facts regarding the end of term of the current Executive Director of UN-Habitat, Dr. Anna Tibaijuka[1] require a revision of Order No. 105 in accordance with Article 29 of the UNDT Rules of Procedure;

b. Failure to shorten the grant of suspension of action will result in irreparable harm to the status quo by forever foreclosing Respondent's right to make a timely and expeditious selection decision in respect of the subject post, which "would be at odds with both the letter and spirit of Articles 19 and 13(a) [sic] of the Tribunal's Rules of Procedure";

c. Suspension of the contested decision until 30 June 2010 is inconsistent with both the letter and spirit of Article 13(3) of the Tribunal's Rules of Procedure that requires that the Tribunal consider an application for suspension of action within five working days.

6. On 16 June 2010, the Applicant submitted comments, including the following, to the Tribunal in response to the Respondent's application for revision of Order No. 105:

a. Article 29 of the UNDT Rules of Procedure is inapplicable in the present case as the Respondent has not proffered any new information;

b. Selection and appointment processes are institutional, not personal, and as such there is no reason why the incoming or Acting Executive Director could not complete this process should unforeseen circumstances lead to such an eventuality.

7. On 18 June 2010, the Tribunal held a hearing on the application for suspension of action, which was attended in person by the Applicant and the Respondent's counsel.

[1] The Respondent represents, on information and belief, that the term of Dr. Tibaijuka, which is formally set to end in August 2010, will in reality end in the third week of July 2010 so as to allow her to take accrued and unused annual leave.

Relevant facts

8. The post of Chief, Partners and Youth Branch at UN-HABITAT became vacant in July 2009. In September 2009, it was advertised internally as a temporary appointment. On 17 September 2009, the regular post was advertised on Galaxy.

9. Following interviews in November 2009, the Applicant was appointed as Acting Chief, Partners and Youth Branch on 4 December 2009 on a temporary basis.

10. On 12 January 2010, an Interview Panel interviewed the Applicant, together with four internal and three external candidates, for the regular post that was advertised on Galaxy.

11. On 20 January 2010, the Program Case Officer (PCO) submitted the 60-day recommended list of candidates to the Central Review Board (CRB) for review and the case was assigned on 21 January 2010 and 8 March 2010, after clarifications had been sought from the substantive office.

12. By a memorandum dated 6 April 2010, the CRB informed the Executive Director of UN-HABITAT that it was not in a position to endorse the recommendation of the PCO due to several irregularities it had noted in the interview process.[2] The CRB also advised in its 6 April 2010 memorandum that if the Executive Director wished to proceed with the selection, the case would have to be referred to the Under-Secretary-General (USG) for Management for a final decision in accordance with section 9.1 of ST/AI/2006/3.

13. By an email dated 3 May 2010, the Human Resources Liaison Officer informed the Secretary of the CRB that UN-HABITAT wanted to establish a new interview panel with a new PCO and sought advice as to whether it would be appropriate for them to proceed with the previously identified short-list.

[2] The irregularities included: (i) the failure to clearly indicate in the record which competencies the candidates were tested on; (ii) assessment of competencies and skills that were not required in the VA; and (iii) comments on the competencies of candidates under "other skills" that did not relate to the required "other skills" listed in the VA.

14. By an email dated 4 May 2010, the Secretary of the CRB advised that the Chairperson of the CRB had confirmed that UN-HABITAT could proceed with the previous short list and that it was not necessary to re-start the process.

15. By an email dated 4 June 2010, the previously short-listed candidates, including the Applicant, were invited to a second interview on 8 June 2010. The Applicant then filed this current application for suspension of action against the decision to conduct a second round of interviews.

Applicant's submissions

16. The Applicant avers in his application that after he was interviewed for the post of Chief, Partners and Youth Branch on 12 January 2010, he heard rumours in April 2010 to the effect that the Galaxy process had not been cleared by the Central Review Board (CRB) and that the CRB had suggested that a new panel be established to interview the candidates again. He did not, however, receive any formal notification from UN-HABITAT as to why the ongoing appointment process had been aborted.

17. On 3 June 2010, the Applicant received an email inviting him for a second interview for VA 09-PGM-UN-HABITAT-422376-R-Nairobi, Chief of Partners and Youth Section, Monitoring and Research Division and on 4 June he filed an application for suspension of action against the decision to "establish a new panel for the sole purpose of conducting a second round of interviews" for the following reasons:

a. The decision is unlawful as a continuation of the selection process through "unheard of second panels and interviews" violates: paragraph 5.6 of ST/SGB/2002/6; ST/AI/2006/3/Rev. 1, Annex I page 16, paragraph 2; and staff regulation 4.2[3].

[3] Staff regulation 4.2 provides that "*[t]he paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence*

18. The matter is urgent because his second interview has been scheduled for 8 June 2010 and he strongly believes that these new interviews should not take place.

19. He would suffer irreparable harm if the decision is implemented in that his career aspirations would be damaged, which would result in mental anguish and loss of motivation. He further avers that the image of the United Nations would be damaged and that the integrity of the selection process would be put in doubt among staff members at the Nairobi duty station.

20. During the hearing on 18 June 2010, the Applicant averred that:

a. Based on all the applicable legal instruments[4], the case should have been referred to the Under-Secretary-General for Management for a final decision and that the CRB *"overstepped its authority"* as it *"had no discretion to confirm UN-Habitat's request for a new panel and a second round of interviews."* The Applicant also averred that the establishment of a new panel and a second round of interviews *"does not exist anywhere. Not in the SGB nor in the ST/AI nor in the rules of procedure of the CRB. It is an invention of UN-Habitat to fulfill the Executive Director's agenda"*;

b. The selection process was further flawed due to the fact that the "30-day rule" set out in ST/AI/2006/3/Rev. 1 was not followed; and

c. Based on the precedent[5] in Nairobi, the Executive Director does not have authority to make appointments during the last six months of her tenure with the Organization.

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and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

[4] Paragraph 5.6 of ST/SGB/2002/6[4]; ST/AI/2006/3/Rev. 1, Annex I page 16[4], paragraph 2; and the Rules of Procedure of the Central Review Board.

[5] According to the Applicant, the former head of the United Nations Environment Programme (UNEP)/ the Director-General of the United Nations Office at Nairobi (UNON) was given a letter six months before his departure from the Organization, which barred him from making appointments before the end of his term.

Respondent's submissions

21. The Respondent submits in his reply that the application for suspension of action should be dismissed on the grounds that the Applicant failed to satisfy the requirements of Article 13 of the Tribunal's Rules of Procedure for the grant of a suspension of action. In this respect, the Respondent submits that Applicant has made no *prima facie* showing that the contested decision is unlawful in that:

a. He has not identified a right that he enjoyed as a staff member that would be violated by the implementation of the impugned decision;

b. By taking the decision to re-interview all short-listed candidates, the Respondent was in full compliance with all relevant staff selection rules and the recommendation of the CRB; and

c. Having noted the defects in the first interview process, Respondent was not required to relinquish its right to make the selection decision by referring the case to the Under-Secretary-General for Management.

22. The Respondent submits that, in view of the fact that there is no *prima facie* unlawfulness, the Applicant would not suffer any irreparable damage if the second interviews are held. The Respondent further submits that the present application for suspension of action is "born of a profound misunderstanding of the relevant UN staff selection provisions and informed by an incomplete record of illicitly obtained information from the confidential records of the Central Review Board (CRB), the Interview Panel or the Office of the Executive Director."

23. During the hearing on 18 June 2010, the Respondent submitted that ST/AI/2006/3/Rev. 1, ST/SGB/2002/6 and the Staff Regulations and Rules envision a collaborative process whereby if the CRB notes irregularities in the selection process and those irregularities can be cured, it can provide recommendations. Accordingly, in the present case, the Executive Director, as a result of this collaborative process,

contacted the CRB with a view to curing the irregularities by re-interviewing the short-listed candidates.

24. The Respondent's counsel averred that the only time the Executive Director may be divested of her authority to make the selection decision is when she makes that decision over and above the objections of the CRB, using a list of candidates that has not been endorsed. The Respondent's counsel submitted that in the present case, the selection decision was not taken out of the Executive Director's hands as she did not use the unendorsed list but rather attempted to engage in a process that has been recommended and endorsed by the CRB.

Procedural issues

a) Respondent's application for revision of Order No. 105

25. On 15 June 2010, the Respondent's counsel filed an application for revision of Order No. 105, which granted suspension of action until 30 June 2010.[6] During the hearing on 18 June 2010, the Applicant and Respondent's counsel reiterated their arguments relating to this application.

26. Article 29 (1) of the UNDT Rules of Procedure provides that:

> *Either party may apply to the Dispute Tribunal for a revision of a judgement on the basis of the discovery of a decisive fact that was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence.*

27. The Tribunal considers that Article 29 (1), which the Respondent is basing its application on, is inapplicable in the present case as the provision relates to

[6] The reasons provided by the Respondent in support of this application are at paragraph 5 above and Applicant's arguments against it are at paragraph 6.

"judgments"[7] and not to "orders"[8], such as the one which was issued by the Tribunal on 14 June 2010. This view is further reinforced by Articles 29 (2) and (3), which provides that:

> *2. An application for revision must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgment.*
>
> *3. The application for revision will be sent to the other party, who has 30 days after receipt to submit comments to the Registrar.*

28. The United Nations Appeals Tribunal's (the Appeals Tribunal) judgment in *Tadonki*[9] is also dispositive when differentiating between judgments and orders. The Appeals Tribunal stated:

> *The UNAT Statute does not clarify whether UNAT may review only a judgment on merits, or whether an interlocutory decision may also be considered a judgment subject to appeal. But one goal of our new system is timely judgments. This Court holds that generally, only appeals against final judgments will be receivable. Otherwise, cases could seldom proceed if either party was dissatisfied with a procedural ruling.*

29. The Tribunal has taken note of the Respondent's contention that suspension of the contested decision until 30 June 2010 is inconsistent with the provisions of Article 3(3) of the Tribunal's Rules of Procedure. This article provides that:

> *The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.*

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[7] A "judgment" is a court's final determination of the rights and obligations of the parties in a case. *Black's Law Dictionary* (8th ed. 2004).
[8] An "order" is a command, direction or instruction. It is also the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings. *Black's Law Dictionary* (8th ed. 2004).
[9] Case No. 2009-006.

30. Due to the gravity of the matter being contested by the Applicant, the Tribunal issued Order No. 104 on 4 June 2010, allowing the Respondent until 10 June 2010 to file a reply. Order No. 104 was issued on the same day that the application was served on the Respondent. On 14 June 2010, the Tribunal issued Order No. 105, which the Respondent is seeking to have revised, and on 18 June 2010, the Tribunal held a hearing on the application for suspension of action.

31. The Tribunal holds the view that by issuing Order No. 104, which granted an interim measure, the application was considered within the five working days prescribed by Article 13 (3) of the UNDT Rules of Procedures. Additionally, as noted by the Respondent, Article 19 also allows the Tribunal to issue, "at any time", orders or give directions which appear to be appropriate for "the fair and expeditious disposal of the case and to do justice to the parties".

32. With respect to the Respondent's contention that Order No. 105 permanently deprives the Executive Director of UN-Habitat of "her legitimate right and duty" to make a timely and expeditious selection decision in respect of the subject post, the Tribunal is surprised that the Respondent is averring that the right to appoint is vested solely, and specifically, in Dr. Anna Tibaijuka. The Tribunal is not convinced, however, that it is the absolute right of Dr. Tibaijuka to make this particular appointment decision. The Tribunal wishes to remind the Respondent that rules and regulations exist in the Organization to regulate appointments.

33. Further, as the Applicant rightfully pointed out, the appointment process is institutional, not personal, and as such, an incoming or Acting Executive Director could complete the process, if Dr. Tibaijuka is unable to do so. In light of the fact that the selection/appointment process can and will continue even after the departure of Dr. Tibaijuka, the Tribunal considers that whether or not the date contained in Order No. 105 is revised, the institutional entity, which is the Executive Director of UN-Habitat, will not be permanently deprived of any rights.

b) Admissibility of the Respondent's *ex parte* exhibits

34. During the hearing on 18 June 2010, the Applicant requested that the Tribunal allow him to use the full text of the Respondent's *ex parte* exhibits R3, R4 and R5 due to their being critical to the establishment of his case.

35. The Respondent's counsel opposed the Applicant's request for permission to use the Respondent's exhibits R3, R4 and R5 on the basis of Article 18(4) of the Tribunal's Rules of Procedure and due to the fact that the confidential documents were placed before the Tribunal on an *ex parte* basis to allow the Tribunal to decide, on an informed basis, on issues of fact. The Respondent's counsel averred that since these *ex parte* documents were erroneously disclosed to the Applicant, he should not be allowed to rely on them.

36. Additionally, the Respondent's counsel submitted that the Applicant brought this case on the basis of "a misguided notion that he was a recommended candidate, a fact that exists only in confidential documents", which has gone between the PCO and the CRB and/or between the Executive Director and the CRB. In this regard, the Respondent's counsel requested that the Applicant also not be allowed to rely on these confidential documents that he received by "illicit" means through "a leak in the system" in breach of his duty of integrity as a UN staff member.

37. In the present case, the Tribunal notes that the Respondent seeks to prevent the Applicant from using two different sets of confidential documents. On one hand is Respondent's exhibits R1-R5, which were submitted on an *ex parte* basis to the Tribunal, but which were served erroneously on the Applicant. On the other hand the Respondent is alleging that the Applicant also has confidential documents from the PCO, CRB and/or the Executive Director, which he obtained by "illicit" means.

38. In light of the fact that the Respondent did not provide any concrete evidence to establish that the Applicant actually "received", or has in his possession, confidential documents that had been transmitted between the PCO and the CRB and/or between the Executive Director and the CRB, and the Applicant did not seek

leave to use any such document(s), the Tribunal is of the view that this allegation is *non sequitur* and as such, need not be considered. Consequently, the Tribunal's considerations will focus solely on the admissibility of the Respondent's *ex parte* exhibits R1-R5, which were erroneously transmitted to the Applicant through no efforts of his own.

39. Pursuant to Article 18(4) of the Tribunal's Rules of Procedure, the Tribunal "*may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances*". Thus, under its Rules of Procedure, the Tribunal is empowered, in appropriate circumstances, to exclude relevant evidence as a matter of discretion. This discretion, however, must be weighed against any existing public interests.

40. While a party to litigation has an interest in the admission of evidence that supports his case, there is also a public interest in withholding material where its disclosure would harm the nation or the public service.[10] Here, the Applicant avers that the evidence contained in *ex parte* exhibits R3-R5 should be admissible as it is critical to his establishing the truth of the matter before the Tribunal. The Respondent, on the other hand, submits that while the Tribunal is vested with almost unfettered discretion to decide on the disclosure of confidential matters, this discretion must be balanced against the overarching principles of the Organization that include a duty of integrity, which in turn encompasses a duty to maintain and not violate the confidentiality of documents. Thus, the Tribunal finds itself in the position of balancing the interests of the Applicant against those of the Organization.

41. In *Webster v James Chapman & Co*[11], it was held that the court should balance the interests of the parties, taking into account how the document was obtained and its relevance to the issue in the action. Thus, the Tribunal finds it relevant to consider *English and American Insurance Co Ltd v Herbert Smith & Co*[12].

[10] Adrian Kean, *The Modern Law of Evidence* 418 (3rd ed. 1994).
[11] [1989] 3 All ER 939 (Ch D)
[12] [1987] NLJ Rep 148 (Ch D).

In this case, solicitors received the other side's counsel's papers inadvertently, read the papers and advised their client on the contents before returning them to the other side. An injunction was granted restraining the use of the information derived from these documents.

42. In *Science Research Council v Nasse*[13], Lord Wilberforce concluded that while relevance is a necessary ingredient, it does not provide an "automatic sufficient test" for ordering discovery. He also concluded that:

> *The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.*

43. The Tribunal endorses the above legal principles for the purpose of deciding whether the Applicant can make use of the documents, which came into his possession inadvertently.

44. In weighing the interests of the parties in the present case, the Tribunal has taken into account how the documents in question were obtained by the Applicant. The Respondent's *ex parte* exhibits, which, due to their confidential nature, were being submitted solely for the Tribunal's review, were erroneously served on the Applicant by the Registry. The Registry subsequently instructed him to destroy the documents and refrain from referring to them before the Tribunal or elsewhere. Under these circumstances, the Tribunal considers that the Applicant is under an obligation not to use or disclose these documents, which were inadvertently disclosed to him.

[13] [1980] AC 1028, HL

45. The Tribunal has also taken into account the relevance of the documents to the case. According to the Applicant, being able to use the full text of *ex parte* exhibits R3-R5 is critical to his establishing the truth of the matter before the Tribunal. However, he informed the Tribunal that he could make his case by relying on the Respondent's reply, which refers to and quotes relevant parts of the *ex parte* exhibits. It is worth noting that the Applicant presented his case effectively on this basis during the hearing

46. Taking into consideration the competing interests and all the circumstances of this case, the Tribunal considers that the interests of the Organization in maintaining the confidentiality of the documents in this case outweighs the interests of the Applicant insofar as he was able to make his case without full disclosure of the *ex parte* documents. Justice will be better served if the Tribunal limits the review and use of the confidential documents solely to itself. Accordingly, the Applicant's request that the Tribunal allow him to use the full text of the Respondent's *ex parte* exhibits R3, R4 and R5 is rejected.

Considerations on the application for suspension of action

47 Applications for suspension of action are governed by Article 2 of the Statute of the Tribunal and Article 13 of the Tribunal's Rules of Procedure. Article 13, entitled "suspension of action during a management evaluation", provides as follows:

> *1. The Dispute Tribunal shall order a suspension of action 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.*

48 The current application must therefore be reviewed against the three essential prerequisites to a suspension of action application as outlined in Article 13(1) of the Tribunal's Rules of Procedure and Article 2(2) of the Statute.

a) Prima facie unlawfulness

49. Paragraph 5.6 of ST/SGB/2002/6 provides that:

> W*hen, after obtaining additional information, the central review body has found that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed, it shall transmit its findings and recommendation to the official having authority to make the decisions on behalf of the Secretary General, as follows:*
>
> *a) The Under-Secretary-General for Management for posts at the P-5 and D-1 levels;*
>
> *b) The Assistant Secretary-General for Human Resources Management for all other posts.*

50. Paragraph 2 of Annex 1 of ST/AI/2006/3/Rev.1 provides that:

> *The head of department/office is accountable to the Secretary-General for the manner in which the selection process is conducted in his or her department/office, and for the progress made towards achieving the targets for geography and gender balance set out in the departmental human resources action plan. The head of department/office is also accountable to the Secretary-General through the annual performance management plan. Authority to make a selection decision with respect to a particular vacancy is withdrawn when a central review body finds that the evaluation criteria have not been properly applied and/or the applicable procedures have not been followed and refers the case to the Under-Secretary-General for Management or the Assistant Secretary-General for Human Resources Management."*

51. Paragraph 7 of the Rules of Procedure of the Central Review Board provides that:

> *In the case of a tie vote or when the majority of members of the Board have found that the evaluation criteria were improperly applied and/or that the record indicates a mistake of fact, mistake of law, or procedural error, prejudice or improper motive which could have prevented a full and fair consideration of the requisite qualifications and experience of the candidates, it transmits its findings and recommendation to the official having authority to make the selection decision on behalf of the Secretary-General. The Assistant Secretary-General for Human Resources Management has the authority to make decisions on behalf of the Secretary-General for professional posts up to the P-4 level.*

52. It is the Applicant's contention that the decision to re-interview him was prima facie unlawful as it violates paragraph 5.6 of ST/SGB/2002/6, ST/AI/2006/3/Rev. 1 and the Rules of Procedure of the CRB.

53. It is the Respondent's contention that there is no *prima facie* unlawfulness as the decision to re-interview all short-listed candidates was in full compliance with all relevant staff selection rules and the recommendation of the CRB. The Respondent further avers that having noted the defects in the first interview process, the Executive Director was not required to relinquish her right to make the selection decision by referring the case to the Under-Secretary-General for Management.

54. After a careful examination of the parties' written and oral submissions and of the relevant legal instruments, the Tribunal notes that ST/SGB/2002/6, ST/AI/2006/3/Rev. 1 and the Rules of Procedure of the CRB prescribe that when the central review body finds that the evaluation criteria were improperly applied and/or that the applicable procedures were not followed, it "***shall*** *transmit its findings and recommendation to the official having authority to make the decisions on behalf of*

the Secretary-General" (emphasis added). In the present case, this would be the Under-Secretary-General for Management.

55. The Respondent's counsel told the Tribunal during the hearing that ST/AI/2006/3/Rev. 1, ST/SGB/2002/6 and the Staff Regulations and Rules envision a collaborative process whereby if the CRB notes irregularities in the selection process and those irregularities can be cured, it can provide recommendations. It is difficult for the Tribunal to accept this line of argument in view of the fact that the Respondent's counsel did not provide any written evidence establishing this "collaborative process".

56. Further, the Tribunal notes that while the CRB, in accordance with paragraph 5.6 of ST/SGB/2002/6, is authorized to transmit "findings and recommendation" regarding irregularities in a selection process, these findings and recommendations are supposed to be transmitted to "the official having authority to make the decision on behalf of the Secretary-General", which, in the current case, would be the USG for Management and not the Executive Director of UN-Habitat.

57. The Tribunal also notes that the drafter(s) of paragraph 5 of ST/SGB/2002/6 used the word "shall" to inform the CRB of its duty to report to the USG or ASG. In the Tribunal's mind, the use of the word "shall" indicates that there is no discretionary authority on the part of the CRB to decide whom "recommendations" are to be submitted to. ST/SGB/2002/6 clearly states that the CRB's recommendations on irregularities are to be submitted to either the USG for Management or the Assistant Secretary-General (ASG) for Human Resources Management for a decision.

58. Moreover, paragraph 5.5 of ST/SGB/2002/6 and paragraph 6 of the Rules of Procedure of the CRB set out very clearly, the "curative" measures the CRB is allowed take with respect to anomalies before the issue is raised to the USG for Management or the ASG for Human Resources Management. Pursuant to paragraph 5.5 of ST/SGB/2002/6,

> *When the central review body has questions or doubts regarding the proper application of the evaluation criteria and/or the applicable procedures, it shall request the necessary information from the head of department/office, the programme manager or the ex officio member representing the Office of Human Resources Management or the local personnel office, as appropriate. If the questions are answered and the doubts are resolved to the satisfaction of the central review body, that body shall proceed as provided in section 5.4.*

59. Based on the available evidence, the Tribunal finds, in accordance with Article 2 of the Statute of the United Nations Dispute Tribunal and Article 13 of the Tribunal's Rules of Procedure, that the Respondent's decision to conduct a second round of interviews after the CRB identified irregularities in the selection process is prima facie unlawful. Thus, the Applicant has met his burden of proof in this respect.

60. The Tribunal will not consider the Applicant's contention that the "30-day rule" set out in ST/AI/2006/3/Rev. 1 was breached as he failed to seek a management evaluation of this decision. The Tribunal will also not address the Applicant's contention that due to the precedent in Nairobi, the Executive Director should be divested of appointment authority during the last six months of her tenure with UN-Habitat. The Applicant was unable to provide documentation to substantiate this claim.

b) Particular urgency

61. The Respondent's counsel agreed during the 18 June 2010 hearing that there is urgency; the Tribunal finds that the test of particular urgency in this case has been met.

c) Irreparable damage

62. Generally, an interim measure should not be granted in a case where damages can adequately compensate an Applicant, if he is successful on the substantive case. The Tribunal recognizes, however, that damage to legitimate career prospects is not a

matter that can be adequately compensated for by a monetary award. In this regard, the Applicant must show that the Respondent's decision will lead to irreparable damage in order to convince the Tribunal that an award of damages would not be an adequate remedy.

63. In the present case, the Applicant submits that the following would be the irreparable damage he would suffer as a result of the implementation of the contested administrative decision:

a. Possibility of the appointment of a staff member who does not meet the highest standard of efficiency, competence and integrity as established by the United Nations;

b. The image of the United Nations would be damaged and the integrity of the selection process put in doubt among staff members at the Nairobi duty station; and

c. His career aspirations would be damaged and that he would suffer mental anguish and loss of motivation.

64. The Tribunal considers that the Applicant's first two averments identify potential damage or harm to the interests of the Organization. These averments do not identify any rights of the Applicant that have been or would be violated by implementation of the contested decision.

65. The Applicant submits that he was recommended for the post. However, in light of the fact that the Applicant was not the only recommended candidate, it cannot be concluded that he would have been selected for the post.

66. The Applicant also submits very generally that his career aspirations would be damaged if the contested decision is implemented. He does not, however, pinpoint how his career aspirations will be irreparably damaged. As the Tribunal can only make decisions based on tangible matters placed before it, the Applicant's lack of

specificity makes it impossible for the Tribunal to conclude that he will, in fact, suffer irreparable damage.

67. In light of the foregoing, the Tribunal concludes that the Applicant failed to show that the Respondent's decision will cause irreparable damage to his rights.

Conclusion

68. The Applicant has satisfied two elements under Article 13 of the Tribunal's Rules of Procedure in that he raised a prima facie case that the decision was arguably unlawful and that this is a case of particular urgency. However, he was unable to establish the third element as the Tribunal is not satisfied that the damage, if any, to the Applicant's career prospects in the UN cannot be adequately compensated by a monetary award should the matter proceed to a judicial determination.

Decision

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

(Signed)
Judge Vinod Boolell

Dated this 25th day of June 2010

Entered in the Register on this 25th day of June 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi