



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/010

Order No.: 077 (NBI/2013)

Date: 05 April 2013

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Officer-in-Charge

BCHIR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Alexandre Tavadian, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is employed as an Economics Affairs Officer with the Economic Development and Globalization Division (EDGD) of the United Nations Economic and Social Commission for Western Asia (ESCWA) at the P4/6 level on a fixed-term appointment in Beirut, Lebanon.

2. On 26 March 2013, the Applicant filed the present Application for suspension of action pursuant to art.13 of the Rules of Procedure of the Tribunal of the decisions not to consider him eligible for the position of Chief, Economics Analysis Section at the P5 level and of the recruitment process relating to the position.

Facts

3. The Applicant first joined the Organization on 1 September 2005 as an Economic Affairs Officer at the P3 level with the United Nations Economic Commission for Africa (UNECA) until 31 July 2008 when he resigned to take up a new post with the African Development Bank (ADB) in August 2008.

4. On 31 October 2011, the Applicant joined ESCWA at the P4 level as an Economics Affairs Officer in the Regional Integration Section of Economic Development and Globalization Division (EDGD) in Beirut. On 10 January 2012, he moved laterally to the Economic Analysis Section as Officer-in-Charge (OIC) at the same level.

5. On 9 October 2012, the Applicant submitted his application for the post of Chief, Economic Analysis Section, EDGD, at the P5 level referenced as JO 25517.

6. On 22 March 2013, the Human Resources Management Section (HRMS) informed him that his candidacy was considered ineligible on the following grounds:

- a. At the time of application, the Applicant had not yet served with ESCWA for one year as per ST/AI/2010/3 (“Staff Selection

System”) sect. 9.1. The eligibility to a job opening is determined on the date of application (Policy guidance from the Strategic Planning and Staffing Division, OHRM). This criterion was not met at the time of application.

b. The Applicant’s reassignment to the Economic Analysis Section was not considered as a qualifying lateral move since he had not served in this position for one year prior to being reassigned to another section.

7. Concerning the Applicant’s request for reconsideration of his reassignment to the Economic Analysis Section as a lateral move, HRMS received guidance from the Office of Human Resources Management (OHRM) and advised the Applicant in the same memorandum that:

a. The underlying rationale for requiring lateral moves of one year or longer is that a staff member should gain experience in different functions or duty stations with each assignment having an accumulated duration of at least one year.

b. In this case, the staff member served only 2.5 months in the first position and just over a year in the second position.

8. On 26 March 2013, the Applicant simultaneously filed the present Application and his request for management evaluation. The outcome of the request for management evaluation is still pending.

9. The Application was served on the Respondent on 27 March 2013 and he was given an opportunity to file his Reply, if any, by 28 March 2013 by 14:00 hours (Nairobi time). The Respondent submitted his Reply on 28 March 2013 accordingly.

10. After a review of the submissions of the parties, the Tribunal did not deem it necessary to hold an oral hearing in this matter.

Preliminary matters

11. Pursuant to art. 2.2 of the Tribunal’s Statute read together with art.13 of the Tribunal’s Rules of Procedure, the Tribunal can only suspend the implementation of an administrative decision that is the subject of an on-going management evaluation, provided the three requirements of Art.13 of the Rules of Procedure are met and the decision has not been implemented.

12. In the present case, one of the Applicant's requests is for the Tribunal to order the suspension of the selection process for the post of Chief, Economics Analysis Section at the P5 level advertised as Job Opening Number 12-ECO-ESCWA-25517-R-BEIRUT(G). The facts show that the vacancy announcement for JO 25517 was advertised on 3 October 2012 with the closing date being 19 January 2013.

13. The Applicant submitted his Application on 9 October 2012. It is therefore clear that the administrative decision, namely the selection process, was implemented 6 months before the Applicant's application on 27 March 2013. In addition the Applicant had not sought management evaluation of the on-going recruitment process when he submitted the present Application to the Tribunal.

14. The Tribunal therefore has no jurisdiction in regard to the recruitment process, which has already been implemented.¹ Thus, the only issue left to be determined is whether the eligibility criterion was properly considered under the heading of unlawfulness of the administrative decision.

Parties' submissions

Prima facie unlawfulness

15. The Applicant submits as follows:
- a. The interpretation of sect. 9.1 of ST/AI/2010/3 ("Staff Selection System") is erroneous. The Administration holds that at the *time of application*, the Applicant had not yet served with ESCWA for one year as per ST/AI/2010/3 sect. 9.1. The eligibility to a job opening is determined on the date of application (Policy guidance from the Strategic Planning and Staffing Division, OHRM).
 - b. According to sect. 9.1, a staff member should have served in a post for at least one year by the time the selection decision has taken place and not when the staff member submits his or her job application. The incorrect

¹ See Judgment No. UNDT/2012/183 *Abu Ras*.

interpretation of the Administration would create damaging and serious implications.

- c. He submitted his job application on 9 October 2012 but he could have also submitted his Application at any other time until the deadline on 19 January 2013 by which time he would have met the one year requirement. It is therefore “absurd” for the Administration to take into account the date of application for a job as this would jeopardize the selection process. Therefore the Administration’s interpretation of sect. 9.1 of ST/AI/2010/3 is highly erroneous.
 - d. With regard to sect. 6.3 of ST/AI/2010/3, a staff member at the P4 level can apply for a post at the P5 level if the said staff member has made two lateral moves. The exceptions to this provision, which are applicable to the Applicant and they are: (i) one lateral move will suffice where a staff member has completed one year or more on in the professional category with a regional economic commission and (ii) where the staff member has made a lateral move at the P4 level.
 - e. The Administration refused to consider the Applicant’s lateral move which took place on 10 January 2012 for a period of 14 months as this lateral move took place after the Applicant had served with ESCWA for only two and a half months. The date on which the lateral move occurred is of no importance as it is the duration of the lateral move that is relevant. The Administration is therefore seeking to include an extra provision which does not appear in writing in the Administrative Instruction.
 - f. The above erroneous statutory interpretation of the Administration necessitates the present application for suspension of action.
16. The Respondent’s submissions are as follows:
- a. The Applicant does not satisfy the requirement that the contested decision is prima facie unlawful. The Applicant is not eligible for the position as he has failed to meet the lateral move requirements for a promotion to the P-5 level under section 6.3 of ST/AI/2010/3.
 - b. The definition of a lateral move is set out in section 1 (q) of ST/AI/2010/3. The Applicant’s reassignment from the Regional Integration Section of

EDGD to the Economic Analysis Section of EDGD is not considered to be a lateral move as the Applicant served in the position in the Regional Integration Section for less than one year before his reassignment.

- c. The underlying rationale for requiring lateral moves for one year or longer is that a staff member should gain experience in different functions or duty stations, with *each* assignment having an accumulated duration of at least one year. The purpose of the lateral move requirement would therefore not be served if the Applicant's movement after less than one year in the position to which he was recruited was counted.
- d. The Applicant was re-employed by the Organization under Staff Rule 4.17 when he was initially recruited to ESCWA on 31 October 2011. Under Staff Rule 4.17 (b), the terms of his new appointment shall be fully applicable without regard to any period of former service and service shall not be regarded as continuous between the prior and new appointments. Furthermore, the Applicant had separated from the Organization for more than twelve months before joining ESCWA in 2011.
- e. There is no basis for the Applicant's prior service with ECA to count toward the lateral move requirement under section 6.3 of ST/AI/A2010/3.

Element of urgency

17. The Applicant submits that if the contested administrative decision is not suspended, the selection process would follow its normal course and the Applicant would have no chance to be selected as a candidate.

18. The Respondent submits that:

- a. The Applicant has failed to satisfy the requirement of urgency, as the deadline for management evaluation of the contested decision is due to expire before any selection decision for the position can be implemented.
- b. The recruitment process is at an early stage. The Hiring Manager, the Applicant's supervisor, has not yet evaluated the applicants or prepared a shortlist of those who appear most qualified for the job opening under section 7.5 of ST/AI/2010/3 (Staff selection system). As such, a selection decision has not yet been made by ESCWA.

- c. Lastly, the Respondent argues that the management evaluation is due to be completed within 45 days of the receipt of the request for management evaluation (Staff Rule 11.2 (d)). An order for suspension of action can only be made during the pendency of the management evaluation (Article 2(2) of the Statute). Accordingly, there is no realistic prospect that the selection decision would be implemented before the management evaluation process is due to be completed.

Irreparable harm

19. The Applicant submits that in Order No. 090 (GVA/2010) *Cornas*², Laker J referred to the reasoning in *Fradin de Bellabre*³, *Tadonki*⁴ and *Utkina*⁵ where the Tribunal indicated that damage is irreparable where the Applicant demonstrates that the application for suspension of action is the only means to preserve his or her rights. Thus, an order for suspension of action is the only remedy available to him so as to prevent his exclusion on the basis of ineligibility.

20. The Respondent submits that:

- a. That the Applicant would suffer damage to his career prospects is speculative. Further, any damage suffered by the Applicant, should the contested decision ultimately be found to be unlawful, may be repaired through an award of compensation.
- b. The balance of harm requires that the order should not be granted. The harm that would be suffered by the other applicants to the position as a result of a suspension of the recruitment process far outweighs any possible harm that the Applicant may suffer.
- c. The Applicant has no entitlement or right to be considered and selected for the position. There are 44 eligible applicants for the position, including an applicant who is on a roster and holds a position within the Economic Development and Globalization Division (EDGD).
- d. Further, the Applicant has adduced no evidence that the pool of P-5 positions within the Organization is so small that he has no prospect for career

² *Corna* Order 90 (GVA/2010).

³ *Fradin de Bellabre*, UNDT/2009/004.

⁴ *Tadonki* UNDT/2009/016.

⁵ *Utkina* UNDT/2009/096.

advancement other than by applying for the P-5 position of Chief, Economic Analysis Section. Should the Applicant file an application on the merits, any harm suffered by the Applicant could be compensated by an appropriate award of damages.

Considerations

Prima facie unlawfulness

21. In the case of *Corcoran*⁶ it was held that,

Since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact that Art. 2.2 of the UNDT Statute only requires that the contested decision “appears” *prima facie* to be unlawful (cf. UNDT/2009/003 Hepworth).

22. Furthermore, in *Miyazaki*⁷ it was found that

The combination of the words “appears” and “*prima facie*” indicate that the threshold required to be met by the apparent unlawfulness is commensurate to that which has been required in different national jurisdictions for similar applications. That is, in the context of an application for interim relief pending the outcome of the substantive application, what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt.⁸

23. The present case concerns the interpretation of ST/AI/2010/3 (Staff selection system) with regard to lateral moves, promotion from P4 to P5 and the requisite conditions contained within the Administrative Instruction.

24. A lateral move is defined in sect. 1(q) as:

Movement of a staff member to a different position at the same level for the duration of at least one year. Within the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the

⁶ UNDT/2009/071 at para 45.

⁷ UNDT/2009/076 at para 11.

⁸ See also *Buckley* UNDT/2009/064 at para 7 wherein it states that “The combination of the word “appears” with the term “*prima facie*” shows that this test is undemanding.”

supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member.

25. Section 6.3 defines the baseline condition that staff members in the professional category seeking to be eligible for promotion to P5 must meet. Such staff members should have at least two prior lateral moves. The exceptions to this condition are found in sections 6.3(a) to (d). Sect. 6.3(a) provides that the requirement is reduced to one lateral move when a staff member has served in the professional category in Nairobi or a regional economic commission⁹ for one year or longer, or when a staff member is applying for a P-5 position at those duty stations from another duty station. Section 6.3(b) provides that staff recruited at the P4 level shall “become eligible for promotion to the P5 level after one lateral move at the P4 level.”

26. The Applicant had resigned in August 2008 to take up duties with the African Development Bank. As per staff rule 4.17 (b), “the terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service shall not be considered as continuous between the prior and new appointments.” From a reading of that staff rule the eligibility of the Applicant should be considered from the date of his new appointment on 31 October 2011 when he joined EDGD in Beirut as an Economics Affairs Officer at the P4 level. Thus, in so far as eligibility for promotion to the P5 level is concerned, he would need to have made one lateral move at the P4 level.

27. On 10 January 2012, the Applicant moved to the Economic Analysis Section as OIC at the same level. He still encumbers this post. Was this a lateral move? In this instance, the Applicant moved to a different position and therefore a change in functions at the same level for a period of more than 12 months within the same department/office. Therefore, based on the definition in sect. 1(q) of ST/AI/2010/3, the Tribunal finds that the Applicant had made a lateral move.

⁹ This does not include the Economic Commission for Europe.

28. The Administration submitted that: (1) that the Applicant's reassignment to the Economic Analysis Section did not qualify as a lateral move because he had not served in the EDGD position for one year prior to his reassignment; and (2) the eligibility to a job opening is determined on the date of application. ST/AI/2010/3 does not encompass these two conditions. Had the Applicant applied for the job on 11 January 2013 (with a closing date of 19 January 2013) instead of 9 October 2012, he would have met the second condition. But he would still be considered ineligible, according to the Administration, for the post following conditions that are not provided in ST/AI/2010/3 but are used as a policy guidance for the purposes of the Strategic Planning and Staffing Division, OHRM.

29. Concerning Policy/Guidelines, it has been held in *Korotina*¹⁰ that

Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).

30. In *Egglesfield*¹¹, Carstens J held that:

"[i]f the construction of the rule is that there should be additional pre-conditions...such conditions would have to be promulgated in an administrative issuance in accordance with established procedures. This would not only be the proper and lawful way of giving effect...but it would guide managers in making sound reasoned decisions, and allow staff members to seriously take these considerations into account before making decisions affect their careers."

31. The Tribunal therefore finds that the Applicant satisfies the requirements laid down in of ST/AI/2010/3 for the purposes of his eligibility to be considered for the position he has applied for and has satisfied the requirement of unlawfulness.

¹⁰ UNDT/2012/178 at para 32.

¹¹. UNDT/2012/208

Element of urgency

32. It was held in *Onana*¹² that:

A situation in which the Applicant faces a loss of his livelihood in the next twenty-four hours, or even two weeks for that matter, or one month, as long as the decision he complains about is likely to take effect before his case is heard on the merits and determined necessarily makes his Application one of “*particular urgency*.” It is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent.

33. The requirement of urgency is satisfied to the extent that the Administration is in the process of completing the list of eligible candidates for the purposes of the selection of a suitable candidate.¹³

Element of irreparable harm

34. In *Khambatta*¹⁴, the Tribunal stated that:

Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one’s life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.¹⁵

35. It is well established that a loss that can be quantified and compensated as a monetary award does not constitute irreparable damage warranting a suspension of action. However the Tribunal has taken the view that harm to professional reputation and legitimate career prospects may amount to irreparable damage.¹⁶

36. The fact that the Applicant is being considered ineligible for the position he applied for, a decision that the Tribunal finds unlawful, puts him in an

¹² UNDT/2009/033 at para 29.

¹³ See UNDT/2011/190 *Osmanli*.

¹⁴ UNDT/2012/058 at para 30.

¹⁵ See also UNDT/2012/099 *Okongo* at para 28.

¹⁶ See, *Tadonki* 2010-UNAT-005; *Kasmani* 2010-UNAT-011; *Ballestrieri* 2010-UNAT-041; *Kweka* UNDT/2011/122; *Villamorán* UNDT/2011/126; *Stephens* UNDT/2011/167.

unenviable situation. He may not have an opportunity to apply for a similar position and there is no guarantee that a similar job opening would be available to him. To that extent monetary compensation is not the appropriate answer. The element of irreparable damage is met.

Conclusion

37. The three statutory conditions for a suspension of action have been met in this case.

IT IS HEREBY ORDERED THAT

38. The decision considering the Applicant ineligible for the position Chief, Economics Analysis Section at the P5 level is suspended pending the outcome of management evaluation.

(Signed)

Judge Vinod Boolell

Dated this 5th day of April 2013

Entered in the Register on this 5th day of April 2013

(Signed)

Abena Kwakye-Berko, Officer-in-Charge, Nairobi Registry