



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/094
Order No.: 265 (NBI/2013)
Date: 23 December 2013
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

MELAKU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Kong Leong Toh, UNOPS

The Application and Procedural History

1. The Applicant in the present case holds a fixed-term appointment as a Financial Management Specialist with the United Nations Office for Project Services (UNOPS) in Addis Ababa. He serves as a National Officer (“NOC”).

2. On 19 December 2013, the Applicant filed an Application for Suspension of Action pursuant to art. 13 of the United Nations Dispute Tribunal (UNDT) Rules of Procedure. The Applicant seeks suspension of the “decision to designate [his] post as abolished rather than as part of the downsizing exercise.” The Applicant also contends that since his post was abolished, “the recruitment exercise that followed was handled in an unlawful manner.”

3. The Application was served on the Respondent soon after it was filed on 19 December 2013. The Respondent filed his Reply on the same day.

4. The Applicant filed his request for Management Evaluation on 19 December 2013.

Facts and Submissions

5. Within UNOPS, the Applicant works under the supervision of the Local Fund Agent (LFA) Team Leader and Coordinator for Ethiopia.¹

6. On 28 May of 2013 the Applicant received a letter from the United Nations Development Programme (UNDP), which administered the Human Resources (HR) activities of UNOPS at that time, indicating that as the Applicant’s post would be

¹ UNOPS acts as the LFA to the Global Fund to fight AIDS, Tuberculosis and Malaria (“Global Fund”), managing the Global Fund’s grant management and disbursement program in Ethiopia.

abolished effective 1 July 2013 his contract would not be extended beyond 30 June 2013.²

7. There were five other Finance Management Specialists at the NOC level in the Applicant's division at that time, four of whom were recruited around the same time as the Applicant.

8. On 6 June of 2013, the Applicant wrote to the Regional HR Practice Advisor of UNOPS, complaining that the decision to abolish his post did not appear to have been taken fairly.³ The Applicant stated that it was not clear why his post was singled out for abolishment, as he has four other colleagues on the same post at the same level who had been recruited at the same time as him. The Applicant noted that there was no indication that UNOPS had undertaken a process, applying objective criteria, to determine which of the six Finance Management Specialist posts at the NOC level would be abolished.

9. On 19 June 2013, the Applicant received an email from Greg Langham of UNOPS stating that UNOPS had considered the Applicant's complaints and would extend his contract until 31 July 2013 to provide UNOPS with enough time to ensure that all necessary actions were carried out with respect to the structure of the Ethiopia LFA team.⁴

10. On 7 July 2013, the Applicant received an email from Mr. Langham indicating that his contract was being further extended through 30 September 2013.⁵

11. On 12 August 2013, David Shimkus, Senior Manager, Global Health Partnership, UNOPS, wrote to the six Financial Management Specialists on the Applicant's team, including the Applicant. The email stated that that in light of

² Applicant's Annex 2.

³ Applicant's Annex 3.

⁴ Applicant's Annex 4.

⁵ Applicant's Annex 5.

decreased funding and the decrease in deliverable requirements for Ethiopia, UNOPS had decided to reduce the number of Financial Management Specialists from six to five.⁶

12. In the same email, Mr. Shimkus indicated that a job fair would be conducted in order to select the five Financial Management Specialist posts that would remain from the six that existed. The email specified that only the six internal candidates could participate in the job fair. Specifically, Mr Shimkus said

[t]he job fair will be conducted according to the following methodology: 1. A panel will be established, composed of impartial members; 2. A desk review will be conducted of P11 forms against FMS job descriptions; 3. Weighting will take place of the initial selection panel interviews, tests, desk review and PRA ratings; 4. A review will take place of background and reference checks; 5. The top 5 scoring candidates' contracts will be extended until 31 December 2013, and the 6th ranked candidate's contract will not be extended beyond 30 September 2013.

13. On 12 August 2013, Mr. Langham sent an email entitled "FMS [Financial Management Specialist] Job" to the six Financial Management Specialists asking for their updated and signed P11 forms. Mr Langham asked that these be sent to the UNOPS's Human Resources office, by 19 August 2013, copying him.⁷

14. The Applicant did as the email instructed.

15. On 5 September 2013, Bamidele Ilebani, Head of UNOPS Ethiopia Office, sent an email attaching the minutes of a recently held meeting.⁸ The email also stated:

... the good news for the LFA team as part of the fallout of the meeting is that the contract of all colleagues, especially the finance specialists will be extended until 31 December 2013, and the job fair for the FSMs has been put on hold for now.

⁶ Applicant's Annex 6.

⁷ Applicant's Annex 7.

⁸ Applicant's Annex 8.

16. On 11 October 2013, a draft cost proposal for 2014 pertaining to UNOPS's Ethiopia office was circulated. This contained a list of all of the key services that would be provided by the UNOPS's Ethiopia office in 2014 and specified the staff members who would be providing those services.

17. All of the Financial Management Specialists employed by UNOPS' Ethiopia office were included on this draft cost proposal, except for the Applicant.⁹

18. The Applicant sought clarification as to why he was excluded from the 2014 draft cost proposal but no substantive response was provided.¹⁰ Mr. Shimkus later told the Applicant: "The draft [cost proposal] was developed by the Global Fund, not UNOPS. We will follow our established procedures for determining staffing."

19. On 12 November 2013, the Applicant received a letter from Mr. Shimkus stating that due to lack of funding, his post was being abolished as of 31 December 2013.¹¹

20. On 13 November 2013, Mr. Shimkus sent an email to the LFA team in Ethiopia regarding the 2014 staffing situation and how the Global Fund's 2014 Ethiopia cost proposal would impact staffing.¹² The email stated that the Global Fund was continuing to reduce both funding and the services that it was requesting, such that the then-current level of LFA staffing could not be maintained and that a restructuring would take place. The email also stated that the restructuring would include the abolishment of some positions, continuation of some positions, and the creation of new positions. The email also detailed the new 2014 Ethiopia LFA staffing structure, which included two new Financial Management Specialist positions at the NOC level. The six Financial Management Specialist positions at the NOC level that were in existence were not included in the 2014 staff structure.

⁹ Applicant's Annex 9.

¹⁰ Applicant's Annex 10.

¹¹ Applicant's Annex 11.

¹² Applicant's Annex 12.

21. On 13 November 2013, the Applicant wrote to Mr. Shimkus asking for clarification as to why all of the Financial Management Specialist positions were abolished and two new positions created, and why the job fair that had been instituted could not be used to identify who among the six Financial Management Specialists would be selected for the two new Financial Management Specialist positions.¹³

22. On 13 November 2013, Mr. Shimkus replied stating that: "...this process is being implemented in agreement with UNOPS HR guidelines, approved by the HRPD Director."¹⁴

23. On 29 November 2013, the Applicant and the other Financial Management Specialists received an email from Mr. Langham stating that the new Financial Specialist positions had been advertised on UNOPS's website, which is available to external candidates.¹⁵

Prima facie Unlawfulness

24. The Applicant submits that there is not a substantial change of functions between the post of Financial Management Specialist that the Applicant had encumbered and the new Finance Specialist posts that have been advertised. They are financial specialists posts at the NOC level, working under the supervision of the LFA Team Leader and Coordinator in Ethiopia, which in turn manages the Global Fund's grant management and disbursement program in Ethiopia. The qualifications for the two posts are also very similar.

25. The Applicant submits that while the wording used to describe the responsibilities of both posts may differ slightly, those responsibilities are not in fact materially different. To show this, the Applicant provided the Tribunal with a table

¹³ Applicant's Annex 13.

¹⁴ Applicant's Annex 14.

¹⁵ Applicant's Annex 15.

containing a breakdown of the responsibilities in the new vacancy announcement, the Applicant's current responsibilities and the tasks envisaged for both.

26. The Applicant submits that the decision to abolish the Applicant's post did not properly take into account the fact that the functions between the Applicant's current post and the "new" posts are substantially similar. The fact that the Administration initially sought to abolish the Applicant's post on 28 May 2013, and then revised its decision when the irregularity was pointed out, coupled with the fact that the Applicant was excluded from the 2014 draft cost proposal without any proper explanation suggest bad faith and bias against the Applicant on the part of the Respondent.

27. The Respondent submits that the Applicant's argument should be rejected on the ground that there is no regulation, rule, policy or legal principle requiring the Respondent to take the course of action advocated by the Applicant. The Applicant himself has not adduced any statutory authority in support of the contentions he makes.

28. The Respondent also notes that the Applicant's argument that "the Applicant's post [was] advertised for external recruitment" does not give the complete picture: the recruitment process was restricted to internal candidates in the beginning and has never gone beyond that.¹⁶

29. Only the remaining five (one resigned before the interview process) Finance Specialists, including the Applicant, whose posts were abolished have been considered for the two vacancies advertised on 29 November 2013.¹⁷

30. Respondent's Annexes 6 and 9 show that no one who was not one of the six Specialists was interviewed.

¹⁶ Respondent's Annex 6.

¹⁷ Respondent's Annex 16.

31. The Applicant was sent, on 11 December 2013, the test questions for the two vacancies, but he did not respond.¹⁸

32. The Respondent stresses that the Applicant's post was abolished not because the Respondent no longer requires any work of the type performed by the Applicant. It is rather the case that there are currently six staff members performing the type of work performed by the Applicant and that as a result of funding realities the Respondent can only have two staff members performing this type of work. This, the Respondent submits, explains the description of responsibilities of the two new advertised posts. The six posts that are being abolished are not relevant.

Urgency

33. The recruitment for the new posts is currently ongoing and no final decision on the selected candidates has been disseminated. However, the Applicant understands that a written examination exercise was completed on 17 December 2013, followed quickly by oral interviews of candidates on 18 December 2013. Based on these facts, it appears that a decision on the recruitment exercise is imminent.

34. Urgency is also clear from the fact that the abolishment of the Applicant's post and the termination of his appointment are imminent.

35. The Respondent takes the view that the matter cannot be considered urgent given that the Applicant himself waited five weeks from the date he was notified of the decision to seek to challenge it.

Irreparable Harm

36. The Applicant submits that the loss of UN employment must not be viewed in terms of financial loss alone but also in terms of the loss of career opportunities. The

¹⁸ Respondent's Annex 5.

loss of opportunity, as a result of an unlawful decision, cannot be properly compensated and represents an irreparable harm.

37. The Respondent argues that there was nothing to show that the Applicant would have been one of the two selected candidates, even if the “job fair” method of selection was employed. The Respondent cites the case of *Karl* Order No. 110 (NBI/2010) in which the Court stated as follows:

The Applicant submitted 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.

Deliberations

38. Applications for suspension of action are governed by art. 2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and art. 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted. Under art. 13.3 of the UNDT Rules, the Tribunal has five working days from the service of an application on the respondent to consider an application for interim measures.

39. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

40. Before entering into a discussion on whether the Applicant has met the test for the injunctive relief that is sought, the Tribunal must determine whether or not the impugned decision has been implemented.

41. The impugned decision in this case has not yet been implemented as the Applicant's post is set to be abolished on 1 January 2014.

42. This Application must therefore be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him irreparable harm.

43. To grant an application for suspension of action, the Court must be satisfied that there is a serious question to be tried on the merits and whether damages would adequately compensate the applicant in the event that his or her application succeeds at trial.¹⁹ An application for an injunction would therefore normally fail where a court finds that the payment of damages would adequately remedy the injury suffered.

44. Within the present context of the United Nations, a suspension of action application will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

45. Further, an application for suspension of action may be brought and considered only where the Applicant has filed a request for Management Evaluation. The Applicant has satisfied this requirement.

46. The Tribunal must now apply the test described above to the facts of the present case.

¹⁹ See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC 396.

47. The Applicant is on a fixed-term appointment. Whereas it is trite law that a fixed term appointment dies a natural death at the end of the period stipulated in the contract, staff members across contractual types are entitled to expect to be treated fairly and accorded the same due process rights.

48. In other words, the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision."²⁰

49. While the burden is on the Applicant to show that the Respondent did not properly exercise his discretion, the Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue here.²¹

50. There is ample jurisprudence regarding the grounds upon which a decision not to renew a fixed-term appointment may be found unlawful. In *Koumoin*, the Appeals Tribunal held that, in reviewing a decision not to renew an appointment, it examines "whether the discretion not to renew ... was validly exercised."²² Similarly, it has been held at first instance that:

[E]ven though the staff member does not have a right to the renewal of his or her contract that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper.²³

51. A proper retrenchment exercise involving a comparative review of staff must be based on objective criteria, and the review process itself must be impartial and transparent (*Rawat, Al-Alamy*).²⁴ A decision following a comparative review process

²⁰ UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998).

²¹ See *Mills-Aryee*, UNDT/2011/051.

²² Judgment No. 2011-UNAT-119.

²³ *Azzouni*, Judgment No. UNDT/2010/005, paragraph 39.

²⁴ UNDT/2011/146, para. 23; UNDT/2012/090, paras. 26-29.

may be set aside only where there has been a breach of procedure or *mala fides* on the part of the reviewers as to taint the entire exercise.

52. On the facts of the present case, the Tribunal has carefully reviewed the submissions of the Parties, and is not persuaded that the decision of the Respondent to abolish the six posts and consolidate the functions of the six *vis-à-vis* its needs and advertise two new posts to reflect those needs and new funding realities, was improperly made or tainted by bias and bad faith.

53. The Tribunal also notes that the Applicant was afforded the opportunity to compete for those two new posts, but chose not to.

54. Having found that the impugned decision was not *prima facie* unlawful, and given that the test for suspension of action is *cumulative*, the Tribunal considers a review of the facts against the remaining two limbs of the test unnecessary.

55. The Application for Suspension of Action is hereby **DISMISSED**.

(Signed)

Judge Vinod Boolell

Dated this 23rd day of December 2013

Entered in the Register on this 23rd day of December 2013

(Signed)

Eric Muli, Officer-in-Charge, UNDT, Nairobi