



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ELZAROV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

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

---

**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Nusrat Chagtai, ALS/OHRM

## **Introduction**

1. The Applicant is a staff member at the African Union/United Nations Hybrid Operation in Darfur (UNAMID). He is currently serving on a continuing appointment at the P-5 level as a Chief of Service, Humanitarian Affairs in El Fasher, Sudan.
2. The Applicant is seeking suspension of the decision not to select him for the position of Chief of Service, Humanitarian Affairs at the D-1 level.

## **Facts**

3. On 18 May 2015, the Applicant was appointed as Officer-in-Charge, Protection of Civilians and Humanitarian Liaison Section, UNAMID. He later served temporarily as Chief of Service, Humanitarian Affairs on a SPA at the D-1 level. On 28 October 2016, his fixed-term appointment was converted to a continuing appointment.
4. On 21 February 2017, the position of Chief of Service, Humanitarian Affairs at the D-1 level in UNAMID was advertised<sup>1</sup>. The Applicant applied for this position on 9 March 2017.
5. On 28 August 2017, the Senior Review Board (SRB) convened to consider candidates that had been shortlisted for the position. According to the minutes of the SRB meeting, seven rostered candidates and four non-rostered candidates from the written assessment and interview phase were submitted to the SRB for endorsement. The Applicant was among the list of candidates submitted to the SRB for review.
6. By memorandum dated 20 September 2017 to the Executive Office of the Secretary-General, the SRB recommended three candidates, including the Applicant, for the position.

---

<sup>1</sup> This job opening was based on a Position Specific Job Opening (PSJO) where applicants apply to a published vacancy, and after a suitability review, non-rostered candidates undergo a written assessment and competency based interview.

7. On 27 December 2017, the UNAMID's Chief of Staff informed the Applicant, by telephone, that he had not been selected for the position.

8. On 28 December 2017, the Applicant filed a request for management evaluation of the decision not to select him for the position of Chief of Service, Humanitarian Affairs at the D-1 level. On 29 December 2017, he amended his initial request for management evaluation indicating that his non-selection may result in losing his job with the Organization after "21 years of dedicated service".

9. On 29 December 2017, the Applicant filed the current application seeking suspension of the decision not to select him for the D-1 position of Chief of Service, Humanitarian Affairs at UNAMID. The application was transmitted to the Respondent on 3 January 2018.

10. The Respondent filed his reply to the application on 4 January 2018.

11. The Applicant filed his comments on the Respondent's reply on 4 January 2018.

12. On 6 January 2018, the Applicant filed a motion for disclosure of documents requesting the Tribunal to order the Respondent to produce a) the PHP's of the recommended candidates for the position, b) the results of the written test of candidates recommended for the position, and c) the interview report signed by the members of the interview panel.

### **Parties' contentions**

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

#### *Prima facie unlawfulness*

a. He has been informed that the reason for his non-selection is likely to be that "[he is] not a woman", which contradicts the Staff Regulations and Rules of the United Nations, the criteria set in the vacancy announcement and the Secretary-General's Strategy on Gender Parity itself.

b. He satisfies all the selection criteria. He has performed the duties and responsibilities of this position at the highest rate of “exceeds expectations” for more than two years and seven months. Furthermore, he is a national of the Russian Federation which nationality is underrepresented among the staff of the Organization.

c. Specifically, in his comments to the reply, the Applicant refers to the contents of the 20 September 2017 memorandum of the SRB and notes the following:

- In para. 11, the SRB confirmed that “[it] considered the organizational priorities such as gender”. However, the vacancy announcement provides that the UN places no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.
- The vacancy announcement provides that due regard would be paid to the importance of recruiting the staff on as wide geographic basis as possible. The memorandum fails to indicate that he was the only recommended candidate whose country is under-represented.
- In para. 13, “the SRB noted that UNAMID’s scorecard on gender target for senior women is set at 20% and it has reached 20% for women at the P5 – D2 levels”.
- The Hiring Manager failed to include in his comments the Applicant’s more than 20 years of experience in the UN, which is longer than the other recommended candidates. This omission was done on purpose. The Hiring Manager also failed to mention that the Applicant had already been performing the duties and responsibilities of this position for more than two years and seven months at the e-performance rating of “exceed expectations”. Particulars demonstrating relevance of his experience were also omitted while the same information was stressed in relation to the

other candidate. In sum, the Hiring Manager misled the SRB, and subsequently, the Secretary-General, by tailoring his comments to enable the selection of the candidate that he preferred.

*Urgency*

d. The selected candidate may join UNAMID at any time soon.

*Irreparable damage*

e. After the selected candidate joins UNAMID, it would be very difficult to reverse the contested decision given that the candidate will already be in the position.

**Respondent's contentions**

14. The Respondent's contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The contested decision is lawful. The Secretary-General has broad discretion stemming from the Charter of the United Nations, which establishes the framework for staff selection through a general grant of authority to the Secretary-General. The Appeals Tribunal has recognized the wide discretion of the Secretary-General in reaching decisions on staff selection.

b. In the present case, proper procedure for staff selection was followed by the Administration and the Applicant received full and fair consideration. The position was advertised as PSJO pursuant to the Staff Selection AI. Candidates were screened in accordance with section 6 and assessed pursuant to section 7. The shortlisted candidates were reviewed and ranked by the Programme Manager. The Applicant was included in a list of eleven candidates submitted to the SRB. In accordance with sections 11.8 and 11.9 of the Staff Selection AI, and section 4.7 of ST/SGB/2016/3, the SRB recommended three candidates, including the Applicant, for the Secretary-General's consideration. The candidate considered to be most suitable by the Programme Manager was ranked in first place, in line with Article 101.3 of the Charter and Staff Regulation 4.2. The Applicant was ranked

third in the list of recommended candidates. He was therefore not selected for the position.

c. The Applicant's claim that he was not selected for the position due to the Secretary-General's Strategy on Gender Parity is unsupported. As communicated to the Applicant on 27 December 2017, the selected candidate was "determined to be fully qualified and suitable for the position". The selected candidate more than met the criteria for the position. There is nothing in the SRB's memorandum of 20 September 2017 indicating that the candidate should be selected due to the Strategy.

d. The Applicant has failed to discharge his burden of showing through clear and convincing evidence that he was denied a fair chance of appointment. He has therefore not established that the contested decision is *prima facie* unlawful.

e. Since the Applicant has failed to satisfy one of the three conditions for granting an order for suspension of action, the application should be denied.

### **Considerations**

15. Pursuant to art. 2.2 of the Tribunal's Statute the Dispute Tribunal may suspend the implementation of an administrative decision during the pendency of the management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These are cumulative conditions. Therefore, the impugned decision can be suspended only if all three requirements are met.

16. 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 an applicant to show that there is a judiciable issue before the court.<sup>2</sup>

17. The Tribunal notes that the Applicant did not request leave from the Tribunal to file his comments on the Respondent's reply. The Tribunal, however,

---

<sup>2</sup> See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

conceded, on exceptional basis, to admit his comments on the record, taking into account that the filing was done under the constraints of tight time-limits for deciding the motion.

18. The Tribunal finds that the criteria of urgency and irreparable harm are fulfilled. In light of art. 10.5(a) of the UNDT Statute, once the impugned decision has been implemented, the Applicant's chances of receiving the promotion will be diminished, even if the Tribunal finds in his favour, as the Respondent may elect to pay a compensation *in lieu* of rescission of decision or performance ordered. In accordance with UNAT jurisprudence, the decision of non-selection is "implemented" where an offer of appointment is accepted by another candidate.<sup>3</sup> Such acceptance may indeed follow any time soon.

19. In relation to the Applicant's arguments on unlawfulness of his non-selection, the Tribunal finds that, without more, a consideration of a gender policy in the selection process does not render the selection unlawful. Rather, the question is whether or not the gender policy was allowed to prevail over the merit-based criteria. The SRB memorandum confirms in no uncertain terms that gender policy had been considered but does not explain how it weighed on the recommendation decision. The Tribunal also notes that, while the Respondent maintains that the gender criterion was not decisive because the selected candidate had been ranked at the first place and the Applicant on the third place by the Hiring Manager, he does not however disclose the criteria and instruments used for making up of this ranking, nor the results of a written test and a competency-based interview. At the same time, the Applicant makes a valid point in that particulars that could speak in his favour had been downplayed in the document drawn up by the Hiring Manager.

20. Altogether, the Tribunal is satisfied that the Applicant has made a *prima facie* showing that in the selection process the gender policy may have been applied in priority over merit and that the Applicant did not receive full and fair consideration. As such, the decision is *prima facie* unlawful. Regarding the

---

<sup>3</sup> See for example, *Sprauten* 2011-UNAT-111, *Gabalton* 2011-UNAT-120 and *Cranfield* 2013-UNAT-367.

motion for disclosure of documents filed by the Applicant on 6 January 2018, the Tribunal does not consider it necessary to order the production of such documents at this stage of the proceedings. Rather, it is necessary that the implementation of the impugned decision be suspended pending elucidation of the relevant issues during management evaluation.

**Conclusion**

21. In view of the foregoing, the application for suspension of action is granted.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 8<sup>th</sup> day of January 2018

Entered in the Register on this 8<sup>th</sup> day of January 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi