



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LYNN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION
PURSUANT TO ARTICLE 13 OF THE
UNDT RULES OF PROCEDURE**

Counsel for the Applicant:

Marissa Macleenan

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is a staff member at the United Nations Mission in Darfur (UNAMID). He holds a continuing appointment and serves in El Fasher at the P5 level as Chief, Life Support Services.

The application

2. On 24 April 2018, the Applicant filed before the Tribunal an application to suspend the “non-selection and procedure for JO 93100”. The Applicant had sought management evaluation of the impugned decision on the same day.

3. The Respondent filed his reply to the application on 26 April 2018.

Submissions

4. It is the Applicant’s case that the decision not to select him for JO93100 was tainted by improper procedure and invalid reasons. The Applicant also submits that the Respondent’s decision to cancel the selection for JO93100, and to issue a Temporary Job Opening (TJO) for the same job/functions, is a blatant attempt to circumvent the failed attempt to install a female candidate against JO93100.

5. The Respondent’s case is that the Tribunal lacks jurisdiction to adjudicate this matter given that JO93100 has been closed without the position being filled and that there is, therefore, nothing for the Tribunal to suspend.

Considerations

6. Applications for suspension of action are governed by art. 2 of the UNDT Statute and art. 13 of the Rules of Procedure of the Tribunal. Article 13 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.

2. [...]

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

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

7. The impugned decision must be shown to be *prima facie* unlawful, that the matter must be particularly urgently and implementation of the decision would cause the applicant irreparable harm. All three elements must be satisfied for the Court to grant the injunction being sought, as the test is a cumulative one.

8. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he/she 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*.¹

9. In cases of suspension of action in which the matter of selection of staff is in issue, the Dispute Tribunal shall review the challenged selection process to determine whether a candidate has received full and fair consideration, whether discrimination and bias are absent, if proper procedures were followed and whether all relevant material were taken into consideration.²

10. The presumption of regularity may be rebutted by evidence of failure to follow applicable procedures, the presence of bias in the decision-making process, and consideration of irrelevant material or extraneous factors.³ The Applicant bears the burden of showing such irregularity in the selection exercise that creates doubt as to the lawfulness of the process. At this stage, the Applicant need only show *prima facie* unlawfulness.

¹ See for example Order No. UNDT/NBI/O/2010/017 *Omondi*; Order No. 494 (NBI/2016) *Newland*.

² *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540.

³ *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

11. The circumstances of the case before it places the Tribunal in an awkward position. The Applicant alleges unlawfulness and impropriety in the selection exercise and in the issuance of a TJO. The matter is also clearly urgent and would cause the applicant the irreparable harm he alleges.

12. However, the *res* that ought to be preserved no longer exists since the selection process in respect of JO93100 was closed before this application was filed. Therefore, any injunctive order granted by the Tribunal at this point would amount to making an order in vain since it will not afford the Applicant the relief he seeks.

13. In the event that management evaluation upholds the impugned decision, and the Applicant files a substantive challenge before the Tribunal, the Tribunal will use its best endeavours to schedule the matter for an expedited consideration and disposal.

ORDERS

14. The application for suspension of action accordingly **FAILS**.

(Signed)

Judge Nkemdilim Izuako

Dated this 3rd day of May 2018

Entered in the Register on this 3rd day of May 2018

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi