



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

BA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:
Shubha Suresh Naik, OSLA

Counsel for Respondent:
Cynthia Cline, ECA

Introduction

1. The Applicant holds a continuing appointment at the P-4 level at the Economic Commission for Africa (“ECA”), where he serves as an Economics Affairs Officer. He is based in Addis Ababa, Ethiopia.

Facts and Submissions

2. The Applicant joined the United Nations in June 2009 at the ECA Sub-regional Office of West Office (“SR”/Niamey) at the P-4 level and in August 2011 moved to ECA Headquarters in Addis Ababa through the mobility scheme.

3. On 4 May 2021, the Applicant applied for suspension of action of the Administration’s decision to cancel the Job Opening (“JO”) 13875 for Chief of Section (P-5) of the African Climate Policy Centre (“ACPC”) within the Technology, Climate Change and Natural Resource Management Division (“TCND”) and re-advertise it as JO 15016.

4. The Applicant alleges that the decision of the Administration is unlawful as it discriminates against male candidates beyond the permissible limits of the staff rules and regulations, and ST/AI/2020/5 (Temporary special measures for the achievement of gender parity) and furthermore the decision is not founded on sound reasons and is arbitrary.

5. The Applicant claims that the decision will cause him irreparable harm as he will lose the rare opportunity existing in his organisation for movement to a higher grade as well as getting rostered. The Applicant also considers the matter to be urgent since the applications for the advertised post will be received up to 31 May 2021 and the recruitment exercise will progress even before the results of his management evaluation request are due.

6. On 5 August 2020, ECA advertised an opening for a P-5 position of Chief of Section as JO 13875. The Applicant applied for the position on 17 September 2020.

7. The Applicant participated in the assessment process which was in the form of a competency based interview.

8. The Applicant recalls seeing a release from the Executive Secretary (“ES”) of ECA indicating that the recruitment status of JO 138765 was “awaiting selection.”

9. However, in a subsequent townhall meeting in early 2021, the ES mentioned that she may have to revisit some JO’s because there were no women on the recommended list. A similar response was given to a question from the Staff Union.

10. The Applicant asserts that he received no formal communication on the status of the recruitment on the JO as should have been done according to the Hiring Manager’s Manual (2012).

11. On 7 April 2021, the Applicant wrote to Mr Juan Paul Adam, Director of TCND seeking clarification. Mr Jean Paul Adam confirmed on the same day that the post could likely be re-advertised.

12. The post was in fact re-advertised on 16 April 2021, and the Applicant submitted a management evaluation request to challenge the decision to re-advertise the position on 29 April 2021.

13. The Applicant submits that the application meets the tri-partite burden of proof: (a) that the decision appears to be *prima facie* unlawful; (b) there is an urgency justifying a Suspension of Action; and (c) he will suffer irreparable harm if the decision is not suspended.

14. The Applicant argues that the Tribunal need not find that the decision is incontrovertibly unlawful but only that there is an arguable case of unlawfulness notwithstanding that this case may be open to some doubt.

15. The Applicant further asserts that administrative decisions must be made on proper reasons and the administration has a duty to act fairly in dealing with staff members including in matters of appointment, separations and renewals.

16. The Applicant acknowledges the Administration’s broad discretion in matters of staff selection. But it is the role of the Tribunal to assess whether the applicable regulations and rules have been applied and whether a candidate has received full

and fair consideration, that discrimination and bias are absent, proper procedures have been followed and all relevant material has been taken into consideration.

17. The Applicant questioned whether sound reasons were shown for the cancellation of the recruitment process or whether there were extraneous factors influencing the decision being that no female candidate had been recommended in the final list.

18. The Applicant was of the firm view that the Secretary-General's recent memorandum on gender parity does not give the authority to heads of office to deny qualified or recommended male candidates from being selected.

19. The gender policy allows for selection of female candidates when both male and female candidates have been recommended, and all other factors are equal. But it does not provide for cancellation of vacancy announcements when a male candidate has already been recommended or the refusal to select a male candidate when there are no female candidates.

20. The Applicant referred to section 3.4 of ST/AI/2020/5 but argued that in the instant case it is understood that women candidates had applied and at least one of them was interviewed. The Interview Panel however did not recommend any of these women candidates, and presumably these women were given full and fair consideration and their qualifications were not considered as "substantially equal" or superior to competing male candidates and consequently cancelling the complete recruitment is an abuse of discretion.

21. The Applicant referred to the case of *Belsito* where the United Nations Appeals Tribunal ("UNAT") held that if the Executive Director had indeed decided on 11 June 2017 not to select Mr. Belsito only because of his gender although he was the best qualified proposed candidate for the position, and although men were under represented in such managing positions at UN Women, the UNDT could well have come to the conclusion that the following decision to cancel the selection process was tainted by extraneous factors and was unlawful.

22. However, this case of *Belsito* based on UNAT's own words differed from the present case in that Mr. Belsito was the best qualified person and proposed candidate for the position advertised, and men were under-represented in such management positions at UN Women. The Tribunal notes that no such assertions have been made in relation to the Applicant and JO 13875. The decision is therefore distinguishable unless the Applicant can establish that the circumstances are the same in his case.

23. The Applicant does argue that in this case women candidates applied and were considered but were deemed by the hiring manager/interview panel to not meet the criteria of "highest standard of efficiency, competence and integrity." Under such circumstances, ECA's decision would amount to creating reservations for women which has not been provided for under ST/AI/2020/5.

24. The Applicant refers to section 7 of ST/AI/2010/3 (Staff selection system) and concludes that the section only mentions a recommendation that at least one female candidate be included in the list of candidates sent to be cleared by the central review body et al., and continues to propose an alternative course of action where the Administration could have explored if there were any female candidates that could have been recommended from the list, and then seen if the criteria mentioned in section 3.4 of ST/AI/2020/5 could be implemented, instead of cancelling the JO.

25. Finally the Applicant argued that the process of selection has passed the stage where cancellation and re-advertisement would be lawful. Section 6.10 (7) of the Hiring Manager's Manual 2012 states that "the Hiring Manager shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list who has passed the assessment exercise ..."

26. The Applicant submits that the process in this case was at "awaiting selection" stage, meaning that candidates were recommended and therefore cancellation of the JO was not permitted.

27. The Applicant submitted that the application was urgent because if the suspension is not granted, he will lose his candidature from the first recruitment and

rights would be created for third parties which would be difficult to reverse. The post will soon be filled, and the Applicant's substantive relief will become moot.

28. Suspension of action is the only way to ensure that the Applicant's rights are preserved; monetary compensation will not address the harm he is likely to suffer if the re-advertisement is allowed to proceed. For this assertion, the Applicant relied on *Nunez* Order No. 17 (GVA/2013) where it was held that exclusion from a recruitment exercise "would at least damage the Applicant's career prospects in a way which could not be compensated with financial means."

29. Based on the arguments aforesaid and the view that he will be caused irreparable damage by the decision to cancel the JO process the Applicant submits that he has established the tri-partite test for this injunction to be granted pending management evaluation review.

30. The Respondent filed his response on 9 May 2021.

31. The Respondent submits that gender parity is one of the core guiding principles for the United Nations. At the P-5 level, the target goal is to reach 50 percent gender balance.

32. The Respondent opines that it is a discretionary action for the ES to cast a broader net for more female candidates to be considered in the selection process. The Respondent also states that he reserves the right to supplement this section after the reply for the management evaluation request is submitted.

33. The Respondent states that the original candidates for the position are allowed to apply for the newly advertised position; and that the criteria required for such an application (the SOA) have not been met by the Applicant since the Applicant has not proved that the decision to cancel the selection process was unlawful, urgent or that irreparable harm has been caused by the decision.

34. The Respondent refutes the allegation that the decision to cancel the selection process was unlawful.

35. In essence, the Respondent argues that the Applicant is trying to circumvent the management evaluation process that has not yet been pending for 30 days to stop the recruitment process for a vacancy that has not closed and will not close until 30 May 2021. The Respondent therefore argues that the application is not receivable.

36. The Respondent further argues that the matter is not urgent. The re-advertised JO is not yet closed and the Applicant can apply for the post. There have not yet been any testing nor interviews conducted.

37. The Respondent also argues that the Applicant has failed to show harm consequently the Applicant has failed on all three criteria required to establish a case for suspension of action pursuant to article 2 of the Tribunal's Statute.

38. Finally, the Respondent asks the Tribunal to allow the Respondent to continue recruitment for the newly advertised post that closes on 30 May 2021 and agrees not to submit any final selection for this post to the Central Review Board ("CRB") until the management evaluation request is resolved.

Considerations and Order

39. The Tribunal determines that the application is receivable since the action of cancelling the selection process has affected the Applicant's interest as an employee of the United Nations in pursuing an opportunity for promotion/career advancement in an established and transparent process.

40. In the circumstances, the Tribunal finds that the cancellation is *prima facie* unlawful and discriminatory where the process which has been cancelled was previously in receipt of applications from females but did not recommend any of those females to be short-listed.

41. On the question of urgency, the Tribunal finds that the application is urgent only to the extent that the new selection process could possibly end before the management evaluation response is submitted.

42. However, the Tribunal has taken note of the statement made in the paragraph 8 of the Respondent's reply and treats the statement as an offer to the Applicant to agree to a suspension of the submission of any final selection for the post to the CRB until the management evaluation request is resolved.

43. The Tribunal takes the view that the offer made in paragraph 8 of the Respondent's response arguably meets the Applicant's request for Suspension of Action until the management evaluation request is resolved and is a just resolution to the dispute between the parties as far as the Suspension of Action Application is concerned.

44. In the circumstances, the Tribunal holds that the parties have arrived at a reasonable manner of addressing the SOA's objective until the Management Evaluation is resolved.

45. The application for suspension of action is therefore rendered moot since the management evaluation if resolved in the Applicant's favour would not have been extended beyond the date of the Management Evaluation reply. If the Management Evaluation is decided against the Applicant, the SOA will still come to an end on that date in any event.

46. A decision to proceed on the basis that the Administration has agreed to a Suspension of the submission of any final selection to the CRB also allows the Applicant to file another application for SOA if he is not satisfied with the management evaluation reply. In the circumstances this does not take the SOA any further or deprive the Applicant of any right he may have asserted had the SOA been imposed on the Administration without their agreement to do so on the terms offered.

Conclusion

47. The application is therefore rendered moot based on the Respondent's offer not to submit any final selections for the post to the CRB until the management evaluation request is resolved and the Tribunal orders that any final selections for

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the post will not be submitted to the Central Review Body until the management evaluation request is resolved.

(Signed)

Judge Francis Belle

Dated this 11th day of May 2021

Entered in the Register on this 11th day of May 2021

(Signed)

Abena Kwakye-Berko., Registrar, Geneva