



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
AAS/ALD/OHR

Introduction

1. The Applicant is a staff member of the United Nations Support Office in Somalia (“UNSOS”). She filed an application on 21 November 2021 seeking suspension of the decision to not select her for Job Opening 163168 (“JO 163168”).
2. The application was transmitted to the Respondent on 22 November 2021 in accordance with art. 13.2 of the UNDT Rules of Procedure.

Facts

3. On 25 September 2021, the Applicant wrote to the UNSOS Human Resources Section requesting a change of gender in Umoja from male to female. The Applicant explained that the request was based on the laws of her country of nationality whereby registration of gender identity is notated in a national’s passport as “X” based on the person’s declaration of belonging to the other gender. The Applicant’s passport indicates an “X” under “sex”.
4. JO 163168 was advertised between 12 - 26 September 2021 as a Recruit from Roster recruitment. The Applicant applied for the JO.
5. Following an informal conversation with shortlisted candidates by an interview panel, four candidates, two females and two males, were recommended for selection. The Applicant was listed as one of the males.
6. On 18 November 2021, the Applicant was copied on an automated mail from Inspira, confirming that another candidate had been selected and had indicated continued interest and availability.
7. The Applicant submitted a request for management evaluation and filed this current application on 21 November 2021.

Receivability

8. A suspension of action is only possible regarding decisions that have not yet been implemented. There is rich jurisprudence of the Dispute Tribunal which stresses that, in order for the suspension of action to be a meaningful relief, implementation must not be seen in a mere notification of the dispositive part of a decision; rather, it is required that the impugned decision has produced irreversible consequences.¹ With regard to selection and promotion processes, it has been accepted that a decision is not implemented until the selected candidate has unconditionally accepted the offer.²

9. In the present case, the selected candidate confirmed her continued interest and availability on 18 November and the case was referred to the United Nations Regional Service Centre Entebbe (“RSCE”) on 19 November 2021, a Friday, for generation of an offer of appointment. There is currently no evidence before the Tribunal indicating that an offer of appointment has been generated by the RSCE and accepted by the selected candidate.

10. The application for suspension of action is therefore receivable.

Merits

11. Article 2.2 of the Statute of the Dispute Tribunal (Statute) and art. 13 of the Rules of Procedure (Rules) empower the Tribunal to grant an interim relief by way of a suspension of action in relation to an administrative decision that impacts on the contract or terms of employment of an individual provided the criteria of *prima facie* unlawfulness, urgency and irreparable damage are satisfied. Since the test is cumulative, the three elements must be satisfied for the Tribunal to grant this relief.

¹ *Harris* Order No. 135 (NBI/2017), *Kandil* Order No. 060 (NBI/2018), *Cox* Order No.150 (NBI/2018), *Gavazzo* Order 165(NBI) 2020.

² *Wang* UNDT/2012/080; *Murnane* UNDT/2012/128 quoting *Tiwathia* UNDT/2012/109; *Quesada-Rafaraso* Order No. 20 (GVA/2013); *Basaly* Order No. 296 (NY/2014); *Samra* Order No. 195 (GVA/2015); *Wilson* Order No. 147 (NY/2016); contrariwise *Nwuke* UNDT/2012/116.

12. When reviewing administrative decisions regarding appointments and promotions, the Tribunal considers: (a) whether the procedure in the Staff Regulations and Rules was followed; (b) whether the staff member was given fair and adequate consideration; and (c) whether the applicable rules were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration.³

Prima facie unlawfulness

13. The Applicant avers that the contested decision was *prima facie* unlawful because her candidacy was denied full and fair consideration. The Comparative Assessment Report shows that the interview panel and the hiring manager considered irrelevant factors because they decided to the Applicant's detriment that she should not be considered for this promotion as she is indispensable in her current role, which is at a lower level.

14. Further, the Applicant submits that relevant factors were ignored because her gender was not taken into consideration and she was erroneously assessed as a male candidate. Relying on ST/AI/2020/5 (Temporary special measures on gender parity), the Applicant argues that since she was erroneously assessed as a male candidate, she had to be "clearly superior" to a female candidate to be selected for the JO. Had her candidature been correctly assessed as female, she would only have had to be better qualified than the selected candidate. Unfortunately, the Selection Recommendation memorandum makes no direct comparison between her and the selected female candidate, which would allow verification of the standard utilized.

15. The Tribunal agrees that the impugned decision is *prima facie* unlawful on both counts. The Secretary-General has broad discretion in making decisions regarding promotions and appointments; these discretionary decisions are however reviewable for reasonableness as per the *Sanwidi* standard, which, among other, requires that

³ *Savadogo* 2016-UNAT-642, para. 40.

relevant factors be considered and irrelevant not relied upon.⁴ Referring to selection processes, the “fair and adequate consideration” means that criteria which are relevant for the post must be taken into consideration and irrelevant ones must not be.

16. The Comparative Assessment Report’s conclusion that “[t]he panel discerned that the candidate is best left in his current role, key in fulfilling the mission human resource deliverables, especially now when the section is under-staffed” clearly has taken irrelevant criterion into consideration. The Organization’s competitive selection exercises and ensuing comparative assessment reports are about vetting the candidates against the requirements for the advertised position and not deciding pursuant to staffing convenience. Notwithstanding the strictly formal questionability of such criterion for assessment, a mere concept of denying promotion to a candidate because he or she is actually useful on the current job, would be the antithesis of several principles of human resources management in the Organization.

17. Secondly, it is apparent that in the selection process the Applicant was referred to as a male. In the recruitment process, gender is a relevant criterion according to ST/AI/2020/5 as well as a stated recruitment target of UNSOS. The Applicant had informed that, according to the laws of her country, she should, or at a minimum, could, be regarded as female. It is thus obvious that a relevant criterion has not been taken into consideration.

Urgency

18. The Tribunal finds the matter to be urgent because the case was forwarded to the RSCE on 19 November 2021 for generation of an offer of appointment. This means that an offer of appointment may be issued and accepted by the selected candidate imminently.

⁴ *Sanwidi* 2010-UNAT-084.

Irreparable harm

19. The Tribunal is satisfied that implementation of the selection decision at this stage would harm the Applicant's career prospects in a way which could not be compensated financially at a later stage.⁵

ORDER

20. The application for suspension of action is granted pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 22nd day of November 2021

Entered in the Register on this 22nd day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁵ *Tadonki* UNDT-2009-016; *Farrimond* Order No. 200 (GVA/2013).