



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 serves with the United Nations Support Office in Somalia (“UNSO”), based in Mogadishu, Somalia.¹
2. On 3 December 2021, the Applicant filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi, seeking suspension of the decision of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) on non-selection for the Recruit-from-Roster (“RFR”) Job Opening #165353 Logistics Officer, P-3.
3. The Tribunal considered that a reply from the Respondent was not necessary.

Facts

4. The Applicant applied for Job Opening #165353 Logistics Officer, P-3 in MINUSCA. The Applicant is on a roster of candidates for a similar post.²
5. On 22 November 2021, the Applicant learnt from a friend working with MINUSCA, with knowledge of the recruitment of Job Opening #165353, that the hiring manager had recommended the Applicant for appointment to the post. However, MINUSCA decided to instead advertise the same post with the purpose of attracting and recruiting female candidates.³
6. On 23 November 2021, the Applicant wrote to the Chief Human Resources Officer, MINUSCA informing her that she identifies as a female, which is recognized by her home country, and thus should be considered as female for the purpose of the selection decision for the Job Opening #165353.⁴

¹ Application, section I.

² Application, section VII, para. 1.

³ Ibid.

⁴ Application, annex 1.

7. On 26 November 2021, MINUSCA advertised the post as Job Opening #169256 with a closing date of 9 December 2021.⁵

8. On 28 November 2021, the Applicant requested management evaluation of the contested decision and also requested that the Management Evaluation Unit (“MEU”) suspend the selection process for Job Opening #169256.⁶

9. On 1 December 2021, the MEU acknowledged receipt of the Applicant’s request and informed her that its decision will be issued within 45 calendar-days. Regarding her request for the suspension of the selection process for Job Opening #169256, the MEU informed her that her request may only be reviewed if it pertains to a decision relating to separation from service in accordance with staff rule 11.3(b)(ii).⁷

Submissions

Unlawfulness

10. The Applicant contends that the contested decision is unlawful based on two points, namely (i) relevant factors were ignored; and (ii) the decision is irrational.

11. On the first argument, the Applicant submits that on 25 September 2021, the Organization was notified that she now identifies as a female. This has been certified by her country of origin in the form of a new passport.⁸ The United Nations Office of Legal Affairs (“OLA”) also sought and received a confirmation from the Permanent Mission of the Applicant’s country of origin. The Applicant had equally requested the UNSOS Human Resources Section to accordingly change the designation of gender in Umoja, though they are yet to do so. On 23 November 2021, the Applicant specifically informed MINUSCA of the new gender. Therefore, this factor should be

⁵ Application, section VII, para. 5.

⁶ Application, annex 5.

⁷ Application, annex 4.

⁸ Application, annex 3.

taken into consideration when assessing her candidature for applications. Failure to do so leads to *prima facie* unlawfulness of the contested decision.

12. On the irrationality prong, the Applicant submits that MINUSCA is discarding the candidature of a female candidate with the purpose of attracting another female candidate. In the Applicant's view, this is an irrational exercise of discretion; at worst a deliberate act of discrimination in violation of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority) which expressly includes gender identity in its definition of discrimination.

Urgency

13. The Applicant contends that this matter is urgent because MINUSCA may select a rostered candidate for Job Opening #169256 at any time after the posting period closes on 9 December 2021, and in any case well before the MEU issues its decision.

Irreparable harm

14. The Applicant is currently undertaking two full time jobs, her own at a P-3 level and that of the supervisor at the P-4 level, and with no additional compensation. Over the last 20 months, she has only managed to take two weeks of annual leave due to the heavy workload and the absence of anyone else to assist. This has recently led to the necessity of four weeks of certified sick leave due to stress. Denying the Applicant the opportunity to be fully and fairly considered for a position in another entity would result in the continuation of this situation, with adverse effects on the Applicant's health.

Anonymity

15. The Applicant requests the Tribunal to anonymize the identifying information due to the sensitive nature of the issues involved.

Considerations

16. Under art. 2.2 of the Dispute Tribunal's Statute, the Applicant must establish that: (i) the contested decision was *prima facie* unlawful; (ii) there is particular urgency; and (iii) implementation of the decision would cause irreparable harm. All three statutory requirements must be satisfied in order for the implementation of a contested decision to be suspended. The Tribunal, at this stage, does not conduct any profound factual examination.

17. On the prong of legality, the Tribunal recalls that staff selection is an area where the Respondent acts with wide discretion.⁹ In the exercise of this discretion, the Respondent must act reasonably, fairly and transparently towards the candidates. In assessing reasonableness of many choices available to him in the selection processes, the guiding principle is that the Respondent, in accordance with staff regulation 1.1(d), is responsible for securing staff of the highest standards of efficiency, competence and integrity.

18. The Tribunal further recalls that placement on the roster of pre-approved candidates is a management tool and does not confer on staff members a right to be considered in priority over other, non-rostered candidates.¹⁰

19. Taking these two premises into account, the Tribunal does not find unreasonableness in the Respondent's decision. Consistent with the *prima facie* determination, the Tribunal need not determine at this point whether the Organization is bound to treat the Applicant as a female. As stated in the Tribunal's Order No. 254 (NBI/2021), as long as gender is a relevant criterion in the selection process, the circumstance of the Applicant's gender must be taken into consideration. However, assuming, for the sake of argument, that the Applicant is to be treated as female, the mere availability of a female on the roster does not preclude advertising the position in order to solicit a broader interest of qualified candidates.

⁹ Staff regulation 1.2(c).

¹⁰ *Skourikhine* 2014-UNAT-468, para. 31; *Simmons* 2016-UNAT-624, para. 12.

20. In conclusion, the impugned decision to not select the Applicant from the roster and to advertise the job opening for broader competition is not unreasonable. It does not violate the Applicant's terms and conditions of service because the Applicant may take part in the current selection exercise. The impugned decision, is therefore, not unlawful. This finding renders unnecessary examining the other prongs of art. 2.2 of the Dispute Tribunal's Statute.

ORDER

21. The application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 7th day of December 2021

Entered in the Register on this 7th day of December 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi