



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/056/T
Order No.: 079 (NBI/2022)
Date: 12 July 2022
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KREMER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Shubha Suresh Naik, OSLA

Counsel for the Respondent:
Saidou Ndow, UN-Habitat
Nana Elsler, UN-Habitat

Introduction

1. The Applicant filed an application on 5 July 2022 seeking suspension of the decision by the United Nations Human Settlement Programme (“UN-Habitat”) to cancel the recruitment process for the post of Senior Programme Management Officer, P-5, with the United Nations Innovation Technology Accelerator for Cities in Hamburg (“UNITAC Hamburg”), and to re-advertise it.

2. The application was transmitted to the Respondent on 5 July 2022 in accordance with art. 13.2 of the UNDT Rules of Procedure. The Tribunal did not consider a reply from the Respondent necessary.

Facts

3. UN-Habitat advertised a job opening for a P-5 Senior Programme Management Officer (“JO 154337”) on 21 May 2021.¹

4. The Applicant, who has roster membership for posts at the P-5 and D-1 level, applied for this JO on 10 June 2021² and was subsequently invited for and participated in an informal interview, a written test and a competency-based interview.

5. On 13 April 2022, the Applicant followed up on the recruitment process for JO 154337. On 19 April 2022, the UNITAC Hamburg Programme Manager a.i., informed the Applicant that: the Central Review Board (“CRB”) had endorsed the recommendation for selection of candidates; the UN-Habitat Executive Director had forwarded the recommendation to the Executive Office of the Secretary-General (“EOSG”) for clearance in accordance with the Organization’s gender parity strategy; and the hiring manager was awaiting clearance from the EOSG.³

6. On 17 May 2022, the Director, Management Advisory and Compliance

¹ Application, annex 1.

² Application, paras. 7 & 8.

³ Application, annex 3.

Service, UN-Habitat, informed the Applicant that UN-Habitat had decided to cancel JO 154337 following advice from the EOSG pursuant to the United Nations gender parity strategy.⁴

7. On 29 June 2022, UN-Habitat re-advertised the post of P-5 Senior Programme Management Officer as JO 181702 with a closing date of 28 July 2022.⁵

8. On 1 July 2022, the Applicant submitted a request for management evaluation of the decision to cancel the recruitment process for JO 154337 and to re-advertise the post.⁶

Applicant's submissions

9. The impugned decision is *prima facie* unlawful because:

- a. Cancellation of a recruitment process requires sound reasons⁷ and in this case, the sound reasons are missing. JO 154337 was cancelled due to an extraneous factor because there were no female candidates recommended in the final list.
- b. The Secretary-General's recent memo on gender parity does not give the authority to Heads of Office to deny qualified or recommended male candidates from being selected. The gender policy thus far allows for selection of a female candidate when both a male and female candidate have been recommended, and all other factors are equal (see section 3.4 of ST/AI/2020/5 (Temporary special measures for the achievement of gender parity)). It does not provide for the cancellation of a vacancy announcement when a male candidate has already been recommended, or the refusal to select a male candidate when there are no female candidates available.

⁴ Ibid. and annex 6.

⁵ Application, annex 4.

⁶ Application, annex 5.

⁷ See *Kinyanjui* 2019-UNAT-932, para. 21.

- c. In the instant case recruitment, it is understood that women candidates had applied and were not considered to be at an equal level or had withdrawn their candidacy. This implies that these women candidates were given full and fair consideration however their qualifications were not considered as '*substantially equal or superior to the competing male candidates*'. Under such circumstances, cancelling the complete recruitment process is abuse of the discretion vested in the Head of Office.
- d. Section 7.7 of ST/AI/2010/3 (Staff selection process) merely recommends that at least one female candidate be included in the list of candidates sent for CRB clearance. The wording used in the said section is 'normally' which means there can be circumstances when no female candidate is recommended. Before cancelling JO 154337, the Administration could have explored if there were any recommendable female candidates from the interview panel's list and then seen if the criteria mentioned in section 3.4 of ST/AI/2020/5 could be implemented.

10. There is urgency because the post has been readvertised and will soon be filled. If the decision to suspend the second recruitment process (JO 181702) is not granted then the Applicant will lose his position from the first recruitment and if the second recruitment is allowed to proceed, rights would be created for third parties which would be difficult to rescind or reverse. Additionally, if the relief is not granted, the Applicant's substantive relief of consideration in the first recruitment would become moot.

11. Implementation of the contested decision will cause irreparable damage to the Applicant's career development. Such damage to career progression cannot be compensated for by financial means. He may also lose his potential rights in the first recruitment process if this new one concludes prior to a decision being taken on his management evaluation request.

Considerations

12. This application is made under art. 2.2 of the UNDT Statute and art. 13 of the UNDT Rules of Procedure, which allow the Tribunal to suspend implementation of an impugned decision where it appears *prima facie* to be unlawful, that it is a case of particular urgency and its implementation would cause irreparable damage. Indeed, as noted by the Applicant, a *prima facie* determination does not warrant a complex inquiry. Obviously, however, for the application to be receivable, the impugned decision must fall under the Tribunal's jurisdiction *rationae materiae*, that is, must produce direct consequences for the terms of appointment in "a precise individual case".⁸

13. The Tribunal wishes to recall that, arguably, a cancellation of a job opening might be challenged by a candidate who has been found suitable and thus would have earned his place on a roster⁹, or, *a minori ad maius*, by a candidate recommended for appointment¹⁰. The latter position is reflected in a directive of the Hiring Managers' Manual to not cancel job openings where at least one candidate has been deemed suitable.¹¹ On the other hand, an argument might be made that, absent a positive rule establishing otherwise, until the decision produces a binding external relation (such as acceptance of an offer of appointment by the selected candidate), the administration is competent to reconsider and amend its own decision.¹² As noted by this Tribunal, in the case where a candidate is recommended, but not yet offered an appointment, a candidate's reliance interest is weak and should not prevent a cancellation of the recruitment process where e.g., a serious violation of the applicable rules has taken

⁸ See former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003) para. V and *Lee* 2014-UNAT-481, para. 49.

⁹ *Verschuur* Order UNDT/2010/153.

¹⁰ *Jannoun* Order 029 (NBI/2013); *Belsito* Order 127 (NBI/2017).

¹¹ Manual for the Hiring Manager on the Staff Selection System (Inspira) Version 3.0, United Nations (2012), at page 61. The position of the Appeals Tribunal as to the impact on staff member's rights, was, however, inconclusive, see *Verschuur* 2011-UNAT-149, para. 31.

¹² See for example staff rule 11.4(a) - "A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation ...etc*" as well as the body of jurisprudence on correcting mistakes.

place.¹³

14. The latter view seems to be endorsed by the Appeals Tribunal, which held in *Kinyanjui*:

“In the Appeals Tribunal’s view, the Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the post which has become vacant. This falls within the discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one. The rule is nonetheless that, in filling the post, the Administration must proceed with the appointment of successful candidates in accordance with the recruitment results. However, it can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities occurred in the recruitment process or for reasons connected with the interests of the service, while providing an adequate statement of the reasons therefor which are subject to the above mentioned jurisprudential principles of judicial review as to their correctness and veracity.”¹⁴

15. In an attempt to reconcile the premise expressed as “discretionary authority ...to terminate a recruitment procedure and/or to initiate a new one” with the disposition “must proceed with the appointment ... in accordance with the recruitment results”, this Tribunal takes the Appeals Tribunal’s judgment to mean that an appointment decision must not run contrary to the result of a recruitment procedure; cancellation of the recruitment procedure and initiation of a new one is, however, allowed where sound reasons obtain for it. It should be assumed that the Appeals Tribunal’s judgment approaches the matter as a staff member’s right, and not merely a postulate of good administration. It, however, does not pronounce in what situation, or, more precisely, as of what moment in the recruitment procedure, this right becomes activated. On this junction, this Tribunal remains of the opinion that until the decision taken in a recruitment process produces a binding external legal relation, that is, one going beyond relations within the administrative apparatus, the administration has the competence to abandon or repeat any recruitment exercise without creating an obligation for itself to furnish justifications. Indeed, the question should preferably be

¹³ *Ponce-Gonzales* Order No. 036 (NBI/2019).

¹⁴ *Kinyanjui* 2019-UNAT-932 para. 21.

determined conventionally, by a positive rule. Absent a positive rule, however, this Tribunal considers, that no right/legitimate expectation, in any event, is being conferred upon any candidate in a process that did not bring about a selection decision.

16. With the latter respect, section 10 of ST/AI//2010/3, titled “Notification and implementation of the decision”, states in subsection 10.2:

The decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions.

17. The Tribunal posits that only an official communication on selection gives rise to a claim to be accordingly promoted or appointed. Arguably, cancellation of the recruitment exercise and initiation of a new one would not render the claim moot for the selected candidate who could request a judicial review as described by the Appeals Tribunal.

18. In the present case there has been no official communication on selection. The Applicant only believes that he was the recommended candidate. The Applicant’s grievance is *de facto* directed against the application of a policy to the recruitment exercise but not against a decision taken in an individual case. The Tribunal cannot therefore proceed to pronounce on whether the impugned decision would be *prima facie* unlawful, discriminatory and a waste of the Organization’s resources, as the decision lies outside its subject matter jurisdiction.

ORDER

19. The application for suspension of action is rejected as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 12th day of July 2022

Entered in the Register on this 12th day of July 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi