UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2010/062
	Order No.:	62 (NY/2010)
	Date:	5 April 2010
	Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

MODESTE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS

Introduction

1. This is an application for suspension of action by a staff member, who was part of a promotion exercise, seeking an order preventing the appointment in question from taking place. The application was heard on 29 March 2010 and I delivered an *ex tempore* judgment refusing the order. The following is the text of that judgment, with minor editorial change's to clarify a point or correct a grammatical solecism.

Facts

2. The applicant was short-listed in a promotion exercise, interviewed and recommended for appointment. The applicant claims that she was told that another interviewed candidate was recommended as preferred to her but that a rostered candidate member was appointed who, assumedly, had not been interviewed. She said she was told this by the Programme Case Officer, who sat on the interview panel. He also said that the appointment was "political". The full context in which this opinion was conveyed is not the subject, of evidence, but, in light of what I must do in respect of this application, it is unnecessary to enter that particular arena. It is enough to say that the expression of such opinion without an explanation of its basis provides a very slight evidentiary foundation for a conclusion that the opinion was correct and I would not be prepared to accept that irrelevant considerations were taken into account in making the decision on the basis of a hearsay account of this character. Much depends, also, on the sense in which the term "political" was meant.

The relevant criteria

3. Article 2.2 of the Tribunal's Statute specifies the prerequisites for suspending implementation of an administrative decision, here the decision to appoint another candidate than the applicant. Taking these requirements in order (though there is no priority), the first question is whether the applicant can show that the decision is prima facie unlawful. In this case, as a practical matter, this test can be applied by

asking whether the applicant is able to establish a sufficient likelihood of ultimate success. The most obvious point against the applicant on this ground is that, as I have mentioned, she was not at all events the favored candidate. Realistically, it should be inferred, I think, from her account of what she was told that she would not be likely to have been appointed even if no "political" considerations were taken into account. In the circumstances here that fact might be enough by itself to refuse the application since the applicant appears not to have sufficient interest in the decision to litigate. However, the question of *locus standi* is not an easy one to determine and fortunately I do not have to deal with it. It is sufficient to say that the evidence does not show a reasonably arguable case that the decision was unlawful.

4. The second element which an applicant seeking a suspension of an administrative decision must show is that there must be cogent evidence, not necessarily established on the balance of probabilities, that the applicant will suffer irreparable damage if the decision in question is not suspended. I make the observation concerning the standard of proof since the very point of this suspension jurisdiction is to avoid irreparable harm. The early stage at which the applications for suspensions are usually made means that the whole of the circumstances often are not known. Because of the urgency of consideration, time for collection and presentation of relevant evidence is extremely limited. Accordingly, it is perhaps better to speak of proof of the existence of a real, as distinct from fanciful, risk of irreparable damage. In this case, however, the applicant is unable to pass this hurdle. As it is a promotion case, she remains in her present position. It would in all events not be open, even if she were to succeed in the substantive case, for the Tribunal to quash the promotion decision and order the removal of the successful candidate. The only compensation available to the candidate would be the payment of some appropriate amount representing the value of the loss of her chance of promotion. The applicant submitted that permitting a promotion to be made for "political" reasons would cause irreparable damage to the Organization. Certainly the making of decisions for irrelevant reasons would cause damage, but very rarely "irreparable". More to the point, the damage in question must be, in my opinion, suffered by the applicant.

Lastly, even if the Tribunal could make an order for specific performance in favour of the applicant, art 5(a) of the Statute would require the specification of an amount of compensation that the respondent could pay in lieu. Thus, since payment rather than substantive relief is the only possible obligatory outcome upon the hypothesis that the applicant would ultimately succeed, she cannot show irreparable harm.

5. The third hurdle an applicant for a suspension of action must pass concerns the urgency of the need for relief. For the reasons I have given, the only order that could be made in this case would be for financial compensation, which would, of course, be limited to the loss suffered by virtue of her failing to be promoted, hence to the difference in emoluments between her present position and that to which she aspired. It follows that it is not possible to conclude that the matter is urgent, since any loss can be compensated by an award of money.

Conclusion

6. The application for suspension of action must be dismissed.

7. It will be observed that I did not refer to any submission made by the respondent. The counsel has had the courtesy to appear and has sought leave to appear on his behalf. I have already over the past several weeks explained why the respondent has no right to appearance whilst he remains disobedient to orders of the Tribunal. I do not propose to repeat those explanations here.

8. One matter, however, needs to be explained. The situation in which the respondent disobeys an order for production of documents which are essential to the fair trial of an application within the jurisdiction of Tribunal to determine must mean that the respondent is not entitled on the one hand to put the staff member to proof and, on the other, to refuse to provide the evidence necessary to determine the issue. To require the staff member to prove a case which depends whilst withholding the means of proof is plainly an abuse of the process of the Tribunal were it to be

permitted. In such a situation it is obvious that, providing the Tribunal has jurisdiction, judgment must be by default given to the staff member.

9. The present case, however, does not involve the respondent refusing to provide relevant evidence, and accordingly my tentative view is that requiring that satisfaction of the statutory prerequisites before suspension of action is granted cannot be avoided by a default judgment. This does not affect the question whether the respondent should be permitted to appear and I refuse leave.

10. For the reasons that I have given, the application must be dismissed.

(*Signed*)

Judge Adams

Dated this 5th day of April 2010