



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/080

Order No.: 164 (NY/2010)

Date: 25 June 2010

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

SUSPENSION OF ACTION

Counsel for applicant:

Self-represented

Counsel for respondent:

Melissa Bullen, ALS/OHRM, UN Secretariat

Notice: This order has been redacted.

Introduction

1. On 21 June 2010, the applicant filed an application under art. 2.2 of the Statute (suspension of action pending management evaluation) for suspending the selection of another staff member to the position as Chief of Africa I, Coordination and Response Division (CRD), OCHA in New York. The applicant currently holds this post on a temporary basis. On 22 June 2010, the respondent filed and served its reply opposing the application. On 23 June 2010, a hearing was held at the premises of the Dispute Tribunal in New York.

Facts

2. On 22 October 2008, Vacancy Announcement (VA) Number 08-HRA-OCHA-419268-R-NEW YORK (G) for the position in question was posted on Galaxy, the online UN jobsite. A total of 110 applications were received at the 60-day mark, of which fourteen were from internal 15-day and 30-day candidates. After reviewing these, six candidates (five from the 30-day list and one from the 60-day list) were found to meet the criteria in the VA, including the applicant.

3. Interviews with these candidates were held on 24 and 26 March, 8 and 9 April 2009, and the applicant was interviewed on 26 March. The interview panel consisted of three members (the Deputy Director of CRD, a Chief of Section/OCHA Geneva and a Chief of Section/OCHA New York) and a staff representative. According to the respondent, the applicant did not, at or around the time of her interview, express any concern in relation to the constitution of the interview panel, nor did she object to the presence of any of the interview panel members. At the hearing on the suspension of action, the applicant confirmed this stating that she was unaware she could challenge the constitution of the panel and feared retaliation. She also stated that she brought up her concerns informally with different OCHA officers in September, October and December 2009 and that she had also discussed her case with the Ombudsman and the Office of Human Resource Management.

4. Following the interview process, the interview panel recommended three candidates, but not the applicant since it unanimously found that she had not demonstrated all the necessary competencies for the position.

5. CRD then submitted its recommendation to the Central Review Board (CRB). The CRB Secretariat subsequently requested that, in order to ensure that female and under-represented candidates were duly evaluated, additional female candidates be interviewed. Accordingly, four additional candidates were interviewed on 16 July and 4, 9 and 15 September 2009. Of the additional candidates, two were recommended and two were not. On 16 December 2009, CRD submitted to the CRB, through Galaxy, its recommendation of five candidates. On 30 December 2009, the CRB requested that additional candidates be interviewed. One candidate withdrew and three additional candidates were interviewed in February 2010. None of the candidates were recommended. On 15 March 2010, CRD resubmitted to the CRB its recommendation of the previous five candidates. On 25 March 2010, the CRB endorsed the recommendation of CRD.

6. On 19 April 2010, the Director of CRD informed the applicant that she had not been selected for the position as another recommended candidate was preferred. By email dated 15 June 2010, the successful candidate was officially informed by the Executive Office of OCHA of her selection. This candidate accepted the offer by return email on 16 June 2010 and is expected to report for duty before the end of August 2010.

7. By memorandum dated 18 June 2010, the applicant requested a management evaluation of her non-selection.

CONSIDERATIONS

8. This is an application for a suspension of action pending management review. This manner of application is in the nature of urgent interim relief pending final resolution of a matter. It is an extraordinary discretionary relief, which is generally

not appealable, and which requires consideration by a Judge within 5 days of the service of the application on the respondent (see art. 13.3 of the Rules of Procedure). It disrupts the normal work and day to day business of the Tribunal. Therefore parties approaching the Tribunal must do so urgently and with sufficient information for the Tribunal to preferably decide on the papers before it. The proceedings are not meant to turn into a full hearing. The application must not be frivolous or an abuse of process or else an applicant may well be mulcted in costs.

9. The applicant's case is set out in her application for suspension of action filed at the New York Registry on 21 June 2010. The application is in the required form for pleadings in such matters but is incomplete and lacks the essential facts and averments to sustain such an application. It does not even have the attachments that are referred to in the application. In other words it is incompetent as it stands. Nevertheless, I advised the applicant at the hearing that even if she were allowed to supplement the application by oral evidence and relevant documentation at the hearing with leave of the court, the three requirements for a successful suspension of action must be met. I then explained these three requirements to the applicant.

Urgency

10. The applicant alleges that the matter is urgent because of the pending "announcement of the conclusion of the selection process" following which, she claims, she will be unable to challenge her assessment by the interview panel. The applicant became aware of the decision that someone else was selected on 19 April 2010 and only moved her application on 21 June 2010. This is a delay of more than two months. As regards the applicant's challenge to the constitution of the Panel, it is common cause that her interview took place on 26 March 2009, yet the applicant failed to challenge the composition of the panel at the appropriate time or within a reasonable period thereafter. The urgency, if any, is therefore self-created. More fundamentally, it is questionable if this application is receivable at all. Therefore, I explained to the applicant that the requirement of urgency is not satisfied.

Prima facie unlawfulness

11. The applicant claims that her assessment was tainted by the bias of one of the panel members, as one of its members, had failed to recuse herself, despite the fact that she and the applicant had had a prior, work-related disagreement. The applicant further claims that there was a failure to give due consideration to her experience. The respondent contends that the assessment of the applicant by the interview panel (which included a staff representative) was unanimous, that the applicant has failed to show the decision was tainted by improper considerations and that, in light of the fact that the outcome was neither manifestly unjust nor unreasonable, the decision to appoint a candidate other than the applicant is not within the purview of the Tribunal (*Buckley* UNDT/NY/2009/64, para. 8). I explained to the applicant that since the urgency requirement was not met, the matter of unlawfulness, if any, can be dealt with at the substantive hearing failing satisfactory resolution at management evaluation level.

Irreparable harm

12. The respondent's ball park point is that the contested decision has already been implemented and therefore cannot be suspended. The respondent contends that even if the applicant were to succeed in the substantive matter the Tribunal would not be able to quash the decision and order removal of the successful candidate. The only real remedy available to the applicant would be the payment of appropriate compensation for loss of a chance of promotion. In sum, the respondent contends that the selected candidate having been appointed, the Tribunal has no power to remove her and the selection decision can no longer be suspended, thus the issue is moot. Furthermore, the applicant has an alternate remedy available to her. I explained to the applicant that, in line with UNDT authorities (*Barringer* (UNDT/NY/2010/078) and *Modeste* (UNDT/NY/2010/071), Order No. 156 (NY/2010) and Order No. 62 (NY/2010), respectively), since the contested decision had already been implemented, it cannot be suspended.

13. Having explained the difficulties regarding the statutory requirements for granting a suspension of action based on her application and submissions in court—above all since the decision concerning the selection of the other candidate had already been effectuated, the applicant, quite correctly in my view, decided to withdraw her application, reserving her rights to pursue her case by filing an application on the merits if she was dissatisfied with the outcome of the management evaluation.

IT IS ORDERED THAT —

1. The applicant having withdrawn the application for suspension of action, there is no longer any matter for adjudication.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of June 2010