UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2013/001
	Order No.:	8 (NY/2013)
	Date:	10 January 2013
	Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ADUNDO *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Lennox S. Hinds
Claire Gilchrist

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 3 January 2013, a group of 24 Security Officers serving in the Security and Safety Service ("SSS"), Department of Safety and Security ("DSS"), United Nations Secretariat, filed an application for suspension of action, pending management evaluation, of the decision "to require [them], as a condition of further employment or selection for retrenchment or renewal, to undergo a comparative review exercise" announced on 28 December 2012. The competitive process was introduced in connection with the ending of funding for the Capital Master Plan ("CMP"), a large-scale, long-term renovation of the United Nations Headquarters Complex in New York.

2. The Applicants submit in their application that the comparative review exercise is incompatible "with the standard procedures within the Organization, and that [it] violates staff members' right to fair and equitable performance evaluation". They submit that the decision to carry out the comparative review process violates, *inter alia*, their right to be treated the same as other staff members in the Organization in matters of renewal and retrenchment as well as their right to effective participation in identifying, examining, and resolving issues related to staff welfare. The Applicants submit that the implementation of the comparative review process would cause them irreparable harm as this process would determine their job status.

3. On 7 January 2013, the Respondent replied to the application, submitting that the application is not receivable and is without merit. With respect to receivability, the Respondent submits that the comparative review has been completed and the contested decision has been implemented and is thus not capable of being suspended. The Respondent further submits that the contested decision is not a final administrative decision as it was only one of the steps in determining whether or not to renew the Applicants' contracts and the matter is now moot as all of

the Applicants have been offered renewed fixed-term appointments until 31 December 2013. Nineteen of them have been placed on regular budget posts and five were placed on posts funded through extra-budgetary sources. The Respondent submits that the application is without merit as the Applicants have failed to demonstrate that the contested decision is *prima facie* unlawful, that they would suffer irreparable harm as a result of its implementation, or that this is an urgent case. The Respondent submits that the Administration has acted in good faith throughout the comparative review process.

4. Pursuant to Order No. 3 (NY/2013), the Applicants filed a supplementary submission on 8 January 2013 in response to the Respondent's reply. The Applicants state in their supplementary submission that a decision that has been implemented may still be suspended where the implementation is ongoing or where the Administration, by its own actions, has attempted to prevent suspension by "hasty implementation". The Applicants submit that their rights are affected and will continue to be affected throughout 2013, regardless of whether their posts are funded through regular budget or extra-budgetary resources, due to the harm caused to them by an illegal process.

Background

5. This case stems in some part from the circumstances described in *Adundo et al.* UNDT/2012/077 and *Adundo et al.* UNDT/2012/118. In *Adundo et al* UNDT/2012/077, rendered on 30 May 2012, the Dispute Tribunal ordered suspension of the decision requiring the Applicants to undergo, as a condition of future employment, an *ad hoc* competitive process with a competitive test component that had been announced in April 2012. In *Adundo et al.* UNDT/2012/118, rendered on 31 July 2012, the Tribunal found that the *ad hoc* competitive process announced in April 2012 was unlawful and ordered the rescission of the decision to carry it out.

6. As a result of the Tribunal's judgments in *Adundo et al.*, the Administration was required to come up with new criteria for the CMP related reduction of staff. The Respondent submits that the Administration followed the Tribunal's directions in *Adundo et al.* UNDT/2012/118, and changed the scope of the exercise. In particular, the competitive elements that were included in the prior review exercise, such as a competitive written test and a competency-based interview, were excluded from it.

7. The Applicants submit that the proposed criteria for the comparative review exercise were first put to them on 11 December 2012. They provided feedback on 17 and 26 December 2012 that the new proposed criteria were not in line with established standards and rules of the Organization. However, the final criteria were issued on 28 December 2012 with no significant modifications. The daily orders bulletin issued by the Chief of SSS for 29–31 December 2012 stated:

> As promised, I am sharing with you the OHRM-approved criteria for your information (please see copy attached). We are now proceeding with the comparative review based on the approved criteria and should be able to inform all concerned officers individually sometime next week [the week of 31 December 2012 to 4 January 2013] as to your respective positions on the final ranking list.

8. The comparative review process was a points-based exercise that took into account various factors, including performance evaluations and seniority. Following the comparative review exercise, the affected Security Officers were ranked from 1 to 68. Depending on their ranking, they were offered renewed fixed-term appointments against posts funded either by regular budget or by extra-budgetary resources.

9. The Administration completed the comparative review exercise on 2 January 2013 and notified the Applicants the following day, on 3 January 2013. Based on their ranking, 19 of the Applicants were offered fixed-term appointments until 31 December 2013 on regular budget posts. The remaining five Applicants

were offered fixed-term appointments, also until 31 December 2013, on posts funded through extra-budgetary resources.

10. The Respondent submits that, in ensuring the fairness and effectiveness of the comparative review of the CMP draw down, the SSS consulted with other UN entities, such as the Department of Peacekeeping Operations and the International Criminal Tribunal for the former Yugoslavia, which had conducted similar exercises in the past, as well as with staff representatives, the DSS Executive Office and the Office of Human Resources Management. The Respondent submits that the messages in the daily orders bulletin issued by the Chief of SSS kept all the affected Security Officers informed of any development in connection with the CMP draw down. The Respondent submits that "[t]he staff representatives' views and suggestions were given serious consideration in the design of the comparative review exercise".

11. On 3 January 2013, the Applicants filed both a request for management evaluation and filed the present application for suspension of action. Later on the same day, each Applicant received an email informing her or him of the completion of the comparative review process, of her or his individual ranking, and of the renewal of her or his contracts until 31 December 2013.

12. On 4 January 2013, Counsel for the Applicants sent a letter to the Respondent stating that "our 24 clients will be signing the contracts of extension under protest and without prejudice, in light of the litigation now before the Tribunal".

Consideration

Whether the contested decision is preparatory in nature

13. The decision that the Applicants seek to suspend in this case is the decision to require them to undergo the comparative review process announced on 28 December 2012. The Respondent submits that the contested decision is not a final

administrative decision as it was only one of the steps in determining whether or not to renew the Applicants' contracts.

14. The Tribunal is surprised to see the submission about the preliminary nature of the contested decision repeated by the Respondent for the third time in relation to the same subject matter. In *Adundo et al.* UNDT/2012/077 and *Adundo et al.* UNDT/2012/118, the Tribunal found that, in appropriate circumstances, the decision to require staff members to participate in a comparative review process would not be merely preparatory. Although the outcome of the competitive process may be used for various future administrative decisions and actions, this does not change the fact that the decision to launch such a competitive exercise and to require staff members to participate in it is an administrative decision in its own right, capable of being contested and suspended.

Whether the contested decision is capable of being suspended

15. The primary contention that the Respondent makes is that the impugned decision has already been implemented and that therefore the matter is not receivable. The Applicants submit that a decision that has been implemented may still be suspended where the implementation is ongoing or where the Administration, by its own actions, has attempted to prevent suspension by hasty implementation. The Applicants submit that in this case the Tribunal deals with an ongoing implementation and ongoing legal effect on their rights.

16. Indeed, there are authorities—such as *Calvani* UNDT/2009/092 and *Hassanin* Order No. 83 (NY/2011)—that reject the Respondent's interpretation of whether "implementation" will necessarily and always prohibit the granting of an application for suspension of action. In *Calvani*, the Tribunal held that the decision to place a staff member on administrative leave without pay during a certain period of time had continuous legal effect during that period of time and could only be deemed to have been implemented in its entirety at the end of

the administrative leave (rather than when the decision was first notified). In *Hassanin*, the Tribunal found that the decision to suspend the monthly deductions of Staff Union membership dues from the applicant's salary was implemented on month-to-month basis and was therefore ongoing and capable of suspension.

17. Therefore, it is not the case that every decision that has been "implemented" will be unable to be suspended by an order for suspension of action. To accept the Respondent's interpretation would be to render the Tribunal impotent. It could not have been the intention of the drafters of the Dispute Tribunal's Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the "implementation" of a decision. This would allow even the most tainted and unlawful decision to stand, so long as it has been implemented hastily (*Hassanin*).

18. However, it is the considered view of the Tribunal that the present case is distinct from *Hassanin* and *Calvani*. The subject matter of the present application for suspension of action was the decision to require the Applicants to undergo the new comparative review process. This review has been completed and implemented, resulting in the renewal of the Applicants' contracts. The implementation of the comparative review process is no longer ongoing. Therefore, it would appear that claims regarding how the exercise was prepared, the methodology applied, or the resultant ranking could be issues for a substantive application under art. 2.1 of the Statute.

19. Whilst some of the Applicants may be dissatisfied that five of them have been placed on posts funded through extra-budgetary resources, this, however, is a separate cause of action that affects the individual rights of the five concerned staff members and that is not canvassed under the present application for suspension of action, which concerns the decision to carry out the comparative review. At this stage, it seems that any such applications against the placement of the five

Applicants against posts financed through extra-budgetary sources would have to be filed by each Applicant individually as they may well have competing interests and their cases may be affected by different circumstances.

20. With respect to the Applicants who have been placed on fixed-term contracts funded through regular budget, if they are still dissatisfied with the comparative review process, although it resulted in a positive outcome for them, the proper avenue to dispute the process at this stage would be to file applications on the merits under art. 2.1 of the Statute and not an application for temporary relief under art. 2.2 of the Statute.

21. It followed from *Adundo et al.* UNDT/2012/118 that the situation in SSS needed to be resolved and that it was likely that a new process in connection with the winding down of CMP, of which the Tribunal has insufficient information at this stage, would have to take place in the months following that Judgment. The Applicants state that they were first notified of the proposed comparative review process on 11 December 2012 and provided their input on 17 and 26 December 2012. On 28 December 2012, they were informed that the review process would be completed the following week (31 December 2012 to 4 January 2013). The Respondent submits that the comparative review was completed on 2 January 2013, with its outcome communicated to each of the 24 Applicants on the evening of 3 January 2013, the day they filed their suspension of action application. This case is different from *Adundo et al.* UNDT/2012/077, in which the Applicants filed an application for interim measures on 21 May 2012, approximately two weeks before the date of 2 June 2012, when the comparative test was scheduled to take place. Therefore, the Tribunal cannot at this stage make a finding on the evidence before it that the actions of the Respondent in this case were in bad faith.

22. For the reasons stated above, the Tribunal finds that, in the particular circumstances of this case and due to the completion of the comparative review

process and the notification of its results to the Applicants, as well as the subsequent extensions of their contracts, the decision to carry out the comparative review process can no longer be suspended.

Requirements for suspension of action

23. Although the findings above are sufficient to reject the present application, the Tribunal finds it appropriate to include some observations regarding whether the Applicants have met the requirements for a successful suspension of action application. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Particular urgency

24. Although the Applicants may have acted with sufficient speed when filing their application for suspension of action, the claim of urgency has been rendered moot in view of the findings above. The comparative review process has been finished and each Applicant has received a contract renewal until 31 December 2013. Therefore, the Tribunal finds that, in the circumstances, the requirement of particular urgency has not been met.

Irreparable damage

25. The Applicants must satisfy the Tribunal that the implementation of the decision would result in irreparable harm such that is not sufficiently compensable on the final outcome of the case. In each case, the Tribunal has to look at the particular factual circumstances.

26. The Tribunal finds that the Applicants have failed to demonstrate that the implementation of the contested decision would cause them irreparable harm. Each Applicant has received a fixed-term appointment until 31 December 2013. Nineteen of the Applicants have been placed on fixed-term appointment on regular posts. The remaining five Applicants have been placed on fixed-term appointments on extra-budgetary resources that may expire in one year. Although some of the Applicants may still be dissatisfied with how the comparative review process was carried out or their individual rankings, they have preserved their right to contest it.

27. The Applicants submit, *inter alia*, that the decision to require them to undergo the comparative review that they consider unlawful will continue to have legal effect on them throughout 2013 regardless of whether they are placed on posts funded through regular budget or extra-budgetary sources. The Applicants claim that some of them have already been urged to begin looking for alternative employment beyond December 2013. The Applicants also submit, with respect to those of them on regular budget posts, that

> [i]t is no less harmful to a staff member's dignity, integrity, and fundamental rights to financially benefit from a procedurally and substantively unlawful downsizing than to have his or her livelihood negatively impacted by it. There is emotional and psychological harm in a staff member knowing that for their own arbitrary reasons, management has selected him or her above or below colleagues for renewal.

28. To the extent some of the Applicants may decide to claim non-pecuniary loss based on alleged emotional harm resulting from the belief that her or his own selection was at the expense of her or his colleagues, it would be appropriate to consider such claims as part of their applications on the merits, if any are to be filed in due course, with each Applicant providing evidence of her or his loss in that respect. The Tribunal is not persuaded that such an alleged distress, even if demonstrated by the Applicants in this case, would constitute irreparable damage that is not compensable.

29. The Tribunal finds that the Applicants have failed to persuade it that, in the circumstances of this case, the implementation of the contested decision causes them irreparable harm.

Prima facie unlawfulness

30. In view of the findings above, it is not necessary to make any determinative conclusions with respect to whether the contested decision appears *prima facie* to be unlawful.

Conclusion

31. Conditions for the granting of suspension of action not being satisfied, the present application for suspension of action is rejected.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 10th day of January 2013