



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

DIANKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Seth Levine, UNDP

Introduction

1. On 26 April 2013, the Applicant, a staff member in the Programme Division, United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”), filed an application for suspension of action, pending management evaluation, of the “[d]ecision not to align the functions of [her] post during the implementation of the Regional Architecture Process [(“RAP”)] at UN Women. Since the functions of [her] post are not aligned the post will be opened up for a first stage recruitment exercise amongst UN Women staff”.

Background

2. The Applicant has worked for the United Nations Development Fund for Women (“UNIFEM”) since 1 December 1998, and, save for a two-year secondment in a peacekeeping mission, she has continuously worked on the post she currently encumbers, firstly with UNIFEM, and then with UN Women upon its creation in July 2010 by the United Nations General Assembly. Since its creation, UN Women has gone through the RAP which involves a review of the functions of all the posts within the organization, with the first one taking place in 2011 and the second one which is currently ongoing. The rationale behind the process is said to be due to UN Women’s “need to adapt its organizational structure to support efficient and effective implementation of its mandate”, and required to strengthen its “capacity to deliver results for women and girls at the national level as envisaged in its Strategic Plan and in response to national priorities”.

3. On 7 February 2011, the Applicant, following the completion of the second phase of UN Women’s first RAP, received an email confirming her on the post of Programme Associate (Africa). She was offered the opportunity to accept or decline being maintained on this post, and she accepted. She was also informed in the same email that notwithstanding her acceptance, she may apply for up to three posts in

Phase 1 of the Competitive Selection Process which would only be opened to internal candidates, but limited to newly established and vacant positions.

4. In the lead up to the second RAP, the Applicant, pursuant to the Human Resources Guidelines for Implementation of the Regional Architectural Process (“Guidelines”), forwarded her three most recent performance evaluations and terms of reference for additional functions of her post. The Tribunal notes that the Applicant’s two most recent performance evaluations had a final overall rating of “Outstanding Performance”.

5. On 21 March 2013, the Applicant received a letter from the Director, Management and Information, UN Women, informing her that the Executive Director, UN Women, had, as part of the most recent RAP, approved the Management Review Committee’s (“MRC”) recommendation that her position “not [be] aligned in the new structure due to a significant change (more than 20%) in the functions in the new job description vis-à-vis [her] existing job description”. In the same letter, the Applicant was strongly encouraged to participate in the internal competitive selection process as well as to apply for any other available vacancies in UN Women. The Applicant was further informed that unaligned staff were to be given priority consideration in Phase I and that the unaligned positions would only be open to unaligned staff members as well as staff members that did not accept their aligned positions.

6. The Applicant contends that the functions of her post have not changed by more than 20 per cent, that the newly established job description does not materially differ from the previous one, and that there have been no changes in levels of accountability and responsibility for the post as suggested by the MRC.

7. On 5 April 2013, the Applicant was provided with a copy of the new job description which she stated had a deadline of 26 April 2013 for applications for the post. On 15 April 2013, she was provided with the description of her current position.

8. On 26 April 2013, the Applicant requested management evaluation of the “decision not to align the functions of her post in the most recent alignment process and the recruitment exercise for her post that results from this decision”. As part of her request for management evaluation, the Applicant also requested suspension of action of the contested decision “and consequently suspension of the recruitment exercise currently underway in relation to this post” as “this recruitment process is part of the decision not to align the functions of her post. Therefore a challenge to the basis for the non-alignment is also a challenge to the recruitment exercise taking place in relation to this post. Since this recruitment exercise is ongoing it follows that the administrative decision challenged has not yet been implemented”.

9. On the same day, the Applicant also filed the current application with the Tribunal requesting suspension of “the decision not to align the functions of her post in the most recent alignment process and the recruitment exercise for her post that results from this decision”. However, the Applicant, at para. 23 of her application, is requesting that the Tribunal “order the suspension of the decision not to align the functions of the Applicant’s post pending a decision from the Management Evaluation”.

Parties’ submissions

10. The Applicant submits that the decision not to align her post is unlawful as the functions of her post have not changed by more than 20%, that the newly established job description does not materially differ from the previous one, and that there have been no changes in levels of accountability and responsibility for the post as suggested by the MRC. Furthermore, the contested decision has resulted in a recruitment process with an application deadline of 26 April 2013, and “[i]t follows that if the decision not to align the functions of the post is unlawful then the recruitment exercise itself is also unlawful”. She contends that this is not a case of self-created urgency as she could not assess the legality of the decision she is

contesting, until she was able to compare the description of the new post with her current one.

11. In sum the Applicant contends that the matter is urgent and that if the recruitment process is allowed to continue, the selection of another candidate could possibly be made, resulting in her separation from UN Women, unless she is successful in an application for a different post (which she does not indicate she has made). She contends that if the selection exercise is allowed to continue she will, as a result of the failure to align her post, suffer irreparable harm by her separation on short notice after a long period of service, as a result of the loss of a career opportunity.

12. The Respondent contends that the Applicant has not shown that the contested decision was *prima facie* unlawful, particularly as the decision not to align the General Service posts was made without regard to the current incumbents, that there is no urgency as the Applicant's contract does not expire until September 2013, and that there is no irreparable harm as she has been provided with the opportunity to participate in the selection process for the unaligned posts with a right to full and fair consideration, and not to continuation of employment.

13. In addition to filing on the merits of the application for suspension of action the Respondent contends that the application is not receivable for the following reasons: the application is premature, the Applicant has not shown that any of her rights have actually been breached by the decision not to realign her post, her contract has been extended until 30 September 2013, as part of Phase I of the selection process for the new posts is only open to UN Women staff members. Furthermore, she does not submit that the new recruitment process which she is requesting the Tribunal to suspend is unlawful. Rather, her complaint concerns the decision to not align the new post to her current post, which specific decision has already been implemented.

Consideration

14. This is an application for a suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). It is interim relief intended to preserve the status quo pending management evaluation and is not meant to make a final determination on the substantive claims.

15. 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.

16. It follows from art. 2.2 of the Statute that should a contested decision have already been fully implemented, the Tribunal generally will no longer have the authority to order the suspension of the contested decision pending the completion of the management evaluation. However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013)), the Tribunal may grant a request for a suspension of action.

Implementation

17. The Respondent contends that the impugned decision, the nonalignment of post, has already been completed and implemented and the application is therefore not receivable. The Respondent further submits that the competitive selection exercise is still ongoing and that no decision has been made that would affect the Applicant's rights in this regard. The Applicant on the other hand contends that

the ongoing selection exercise, being a direct consequence of the non-alignment of her post, means that it has the potential to affect her legal rights.

18. In the case of *McLetchie* UNDT/2012/032, the Tribunal found the application receivable as in that case the contested decision had the effect of bringing the applicant's participation in the selection process to an end, as the decision that she was ineligible to participate in the selection process had already been made and the respondent had failed to show to the Tribunal's satisfaction that any final review of the selection process by a central review body would encompass a review of the candidates' eligibility to be part of the process.

19. In this particular instance, the Respondent contends that the RAP will be subject to further scrutiny before the management evaluation and that an application for suspension of action does not lend itself to a detailed analysis of the RAP process. The case of *McLetchie* is clearly distinguishable, as in the instant case, the Applicant is eligible to participate in the ongoing selection process in which her long service, experience and performance record should stand her in good stead. However, she contends that the non-alignment decision cannot be separated from the resulting selection exercise which is ongoing and could affect her rights.

20. Matters regarding the implementation of an administrative decision are often complicated and are not always clear cut, particularly when the Tribunal does not have all the relevant information at hand and has to render a decision in a short time. In light of its findings below on the merits of the request for suspension of action, and taking into consideration the Appeals Tribunal judgment in *Saka* 2010-UNAT-075, the Tribunal finds that it need not decide the issue of implementation in this case.

Requirements for suspension of action

21. As previously stated, the Tribunal can only suspend a contested decision if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

22. For the *prima facie* unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamorán* UNDT/2011/126).

23. The Tribunal will generally not substitute its own decision for that of the decision-maker, nor will it readily interfere with the discretionary authority of a reviewing body such as the MRC. However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the procedures were properly followed or were carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Krioutchkov* UNDT/2010/065, *Liarski* UNDT/2010/134, *Abbassi*, Charles 2012-UNAT-242).

24. The documents before the Tribunal indicate that out of 22 posts being considered, only six would have their functions aligned under the revised structural organization, and none of the functions of the GS posts were aligned as all were found to have been changed by more than 20 per cent.

25. In this case, on the limited evidence available, there appears to be a shift in emphasis from regional to national strategies within UN Women, apparently necessitating a restructuring exercise with the accompanying changes in job descriptions. The Applicant submits that a detailed review of the description of the non-aligned post with the new one illustrates that there is no 20 per cent change in job functions.

26. Although it is unclear why in the first RAP the Applicant's post was confirmed, there is no evidence before the Tribunal, nor does the Applicant make any suggestion, that the contested decision during the second RAP was applied selectively

or was biased, that the failure to align her post was motivated by any extraneous factors such as her age or performance, or that the applicable procedural rules of the RAP for determining whether or not a post should be aligned, including having a staff representative involved in the process, were not properly carried out.

27. On the evidence available before it, the Tribunal cannot make a finding of *prima facie* unlawfulness of the process by which certain posts were aligned. There is no evidence, nor has it been contended, that the failure to align her post has been motivated by any extraneous reasons. Moreover, the only argument put forward by the Applicant regarding the potential unlawfulness of the Phase I recruitment process is her submission that “if the decision not to align the functions of the post is unlawful then the recruitment exercise itself is also unlawful”, which in and of itself is not sufficient for a finding of unlawfulness.

28. In view of the findings above, it is not necessary to make any determinative conclusions with respect to whether the contested decision appears urgent or whether it could create irreparable harm.

Conclusion

29. The present application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 3rd day of May 2013