



Before: Judge Goolam Meeran
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Marisa MacLennan, OSLA

Counsel for Respondent:
ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a Senior Investigator at the P-5 level, in the Office of Internal Oversight Services (“OIOS”). On 26 November 2014, he filed an application for suspension of action of the decision made on 17 November 2014 by Ms. Carole Wamuyu Wainaina, Assistant-Secretary-General, Office of Human Resources Management (“ASG/OHRM”), who refused to grant an exception to sec. 6.1 of ST/AI/2010/3 (Staff selection system) so as to enable the Applicant to apply for a position at the D-2 level. The Applicant seeks the suspension of the decision denying him the exception as well as the suspension of the recruitment exercise pending management evaluation.

Background

2. Since 14 May 2014, the Applicant has been Officer-in-Charge of OIOS, at the D-1 level.

3. On 17 October 2014, he applied for the position of Director, Ethics Office, at the D-2 level.

4. On 29 October 2014, the Applicant was notified that he did not meet the eligibility requirement for D-2 posts since he was holding a fixed-term contract at the P-5 level and may only apply for up to one level higher than his current personal grade, pursuant to sec. 6.1 of ST/AI/2010/3.

5. On 30 October 2014, the Applicant requested that an exception be granted to this rule so as to enable him to apply, and be considered for, the D-2 position.

6. On 17 November 2014, the Applicant was notified of the ASG/OHRM’s decision denying his request for an exception.

7. On 26 November 2014, the Applicant submitted a request for management evaluation.

Consideration

8. Applications for suspension of action are to be decided in accordance with art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of the Tribunal's Rules of Procedure.

9. Article 13 of the Rules of Procedure (Suspension of action during a management evaluation) provides (emphasis added):

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the *decision appears prima facie to be unlawful*, in cases of *particular urgency* and where its implementation would cause *irreparable damage*.

2. The Registrar shall transmit the application to the respondent.

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. It is clear that the Tribunal is under a duty to transmit a copy of the suspension of action application to the Respondent and to issue a decision within five days thereof. There is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for there to be a respondent's response before the applicant's request is considered.

11. The procedures governing applications for suspension of action should not, as the Tribunal has pointed out in *Applicant* UNDT/2011/158 at para. 8(e), be regarded,

or used, as a dress rehearsal for a determination of the merits of an application, should a substantive application be made subsequently.

12. Article 2.2 of the Statute is intended to provide an uncomplicated and cost-effective procedure for temporarily suspending, in appropriate cases, an administrative decision, which may have been wrongly made, so as to give the Management Evaluation Unit sufficient time to consider the matter and to advise management. The process itself should not become unduly complex, time-consuming and costly for the United Nations or its staff members.

13. Applications for suspension of action have to be dealt with on an urgent basis and the decision should, in most cases, be in summary form. There is no requirement to provide, and the parties should not expect to be provided with, an elaborately reasoned decision either on the facts or the law. To do so would defeat the underlying purpose of a speedy and cost-effective mechanism. Moreover, the time, effort and costs thereby saved by all those involved in the formal system of internal justice could be utilised to enhance the disposal of other cases.

14. An application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation of an administrative decision that may properly be suspended by the Tribunal. Further, there are three essential requirements under art. 2.2 of the Tribunal's Statute:

- a. That the decision *appears* to be *prima facie* unlawful (emphasis added);
- b. That the matter is of particular urgency; and
- c. That implementation of the decision would cause irreparable damage.

15. The Applicant has to satisfy the test that the decision *appears prima facie* to be unlawful. In other words, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed?

Applicable law

16. Section 6.1 of ST/AI/2010/3 states that:

Staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade...[footnote omitted].

17. Staff rule 12.3 (b) of ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations) provides that:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

18. The Applicant submits that the ASG/OHRM summarily dismissed his request for an exception without proper consideration of its merits and without contemplating the possibility of an exception. The Applicant relied on *Hasting* UNDT/2009/030 and contends that he is placed in a similar situation.

19. In *Hastings* 2011-UNAT-209, the Appeals Tribunal found that “the ‘exception’ language is just as much for the ability of the Administration to have flexibility in staffing decisions as it is for the staff, which is probably why the Administration conceded that exceptions could be made”. The Appeals Tribunal observed that “if the Administration had allowed that exceptions could be made, but in its discretion decided not to make an exception in this instance, we doubt a case could be made against that decision”.

20. The power granted to the Secretary-General under Staff rule 12.3 has been delegated to Ms. Wainaina, ASG/OHRM, whose email to the Applicant, dated 17 November 2014, indicates that she applied her mind to the facts before her and to

the relevant administrative issuances before she decided not to grant an exception to the eligibility requirements set out in ST/AI/2010/3. Accordingly, the Applicant was precluded from applying for the position of Director, Ethics, at the D-2 level.

21. Whether the Tribunal itself or even another person with delegated authority would have come to a different decision is neither here nor there. The Applicant's contention, at para. 10 of his application, that Ms. Wainaina, ASG/OHRM, failed to consider properly his request and did not reasonably use her discretion in deciding whether or not to grant an exception is not supported by the documents presented. It is without merit. The application for suspension of action is refused.

22. Given the conclusion of the Tribunal that the decision of the ASG/OHRM does not appear to be *prima facie* unlawful and since the test to be satisfied is cumulative in that all three elements have to be present pursuant to art. 2.2 of the Tribunal's Statute, it is not necessary to consider whether the matter is of particular urgency or whether the implementation of the decision would cause irreparable damage.

Conclusion

23. The application for suspension of action is refused.

(Signed)

Judge Goolam Meeran

Dated this 28th day of November 2014