



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

MOHAMED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 19 May 2016, the Applicant, a P-4 level Human Resources Policies Officer, Human Resources Policies Division (“HRPD”), International Civil Service Commission (“ICSC”), filed a request to suspend, pending management evaluation, the recruitment process for a P-5 level post of Senior Human Resources Policies Officer, HRPD, ICSC. The Applicant identified the contested decision as the decision of the Chairman of ICSC to “exclude [her] name from the recommended short-list” for the P-5 post. The Applicant submits, *inter alia*, that the selection process was marred by irregularities; that she was discriminated against; that the panel failed to properly consider her as “a female candidate whose qualifications and experience are equal or better than the short-listed candidates”; and that the process was tailored to favour one of the candidates.

2. The case was initially assigned to Judge Greceanu, who on 19 May 2016 recused herself from the matter (see Order No. 121 (NY/2016)) due to her prior consideration of the Applicant’s earlier suspension of action application challenging the same administrative decision to exclude her from the list of recommended candidates (see Order No. 114 (NY/2016), Case No. UNDT/NY/2016/016). The present case was therefore assigned to the undersigned Judge.

3. The New York Registry transmitted the application to the Respondent on the date of receipt of the application. The Respondent was instructed to file his reply to the application by 5 p.m. on Monday, 23 May 2016.

4. The Respondent’s reply was duly filed on 23 May 2016.

Relevant background

5. The following outline of the relevant background is based on the parties' submissions as well as the documentation on file.

6. The Applicant has been working as a Human Resources Policies Officer with the ICSC since 2005.

7. In September 2015, the ICSC advertised the contested P-5 level post, to which the Applicant applied. The Applicant alleges the Administration changed the job description before the vacancy was announced.

8. In January 2016, the Applicant successfully participated in an assessment exercise that consisted of three external assessment tests. She received very positive feedback and high scores on her test performance.

9. On 1 March 2016, she was interviewed by a panel of six members, including the Chairman of the ICSC; Vice-Chair of the ICSC; Executive Secretary of the ICSC; Chief, Human Resources Policies Division, ICSC; Chief, Salary and Allowances Division, ICSC; and Director of Human Resources, United Nations Population Fund ("UNFPA").

10. The Applicant submits that, although the interview was competency-based, it did not proceed in a regular manner. She states *inter alia* that she and several other candidates were interviewed for 40–45 minutes, whereas one of the recommended candidates was apparently interviewed for two hours. She states that she has an excellent performance record, far superior qualifications (master's degree in public administration), and 14 years of experience in human resources policies, whilst the first of the three recommended candidates only has a bachelor's degree in computer science

and a certificate in human resources management, obtained in September or October 2015, when the ICSC Chairman allegedly sent him to London for the training course in order to boost his eligibility for the post.

11. On 31 March 2016, the Chairman of the ICSC sent a letter to the Secretary-General, recommending three candidates, in order of preference. The list of recommended candidates did not include the Applicant.

12. On 29 April 2016, upon her return from home leave, the Applicant learned of the ICSC Chairman's letter dated 31 March 2016, and that she was not among the three recommended candidates.

13. On 7 May 2016, the Applicant requested management evaluation of the contested decision.

14. On 10 May 2016, the Management Evaluation Unit ("MEU") replied to the Applicant's request for management evaluation, stating that her claims were not receivable given that the selection process is still ongoing and no decision has been taken with direct legal consequences to her terms of appointment. The MEU stated that, based on the relevant case law, the ICSC Chairman's letter dated 31 March 2016 was a preparatory step in the selection process which did not, on its own, constitute a final administrative decision that affected her contract of employment or terms of appointment.

15. On 12 May 2016, the Tribunal (Judge Greceanu) issued Order No. 114 (NY/2016), finding that, management evaluation having been completed, there was no longer any matter pending for evaluation. The Tribunal also made an observation that MEU's conclusion that there was no contestable administrative decision was erroneous and that

the Applicant's application concerned an administrative decision that may be properly suspended by the Tribunal if relevant conditions are satisfied. The Tribunal observed that the contested decision not to include the Applicant on the list of recommended candidates could not be considered preparatory since it resulted in the ending of her participation in the selection process and was thus final and capable of being contested before the Tribunal.

16. Based on the aforesaid observation, on 18 May 2016, the Applicant filed a new request for management evaluation of the same decision to exclude her name from the list of recommended candidates for the P-5 post. She requested the MEU to "reconsider [her] request for management evaluation ... in light of the UNDT's findings [in Order No. 114 (NY/2016)] that the decision is reviewable as a final administrative action". She provided the following explanation for her submission of the new request:

1. As elaborated in my attached letter ..., I am requesting the evaluation of the ICSC Chairman's decision to exclude my name from the recommended short-list of candidates that he presented to the Secretary-General in his letter dated 31 March 2016 ... in respect of the selection of the Senior Human Resources Policies Officer

...

4. I previously submitted a request for management evaluation of this decision on 7 May 2016, shortly after becoming aware of the decision on 29 April 2016. I subsequently submitted an application for suspension of action with the UNDT. On 10 May 2016, I was notified by the attached letter that the MEU deemed my request to be premature and not receivable due to the fact that it did not consider the action to be a reviewable administrative action

5. The UNDT subsequently found in its order ... that although it could not consider the application for SOA since

there was no request for management evaluation pending (the MEU having found the request to be premature), it did find that the decision not to include my name on the short-list did in fact constitute a final administrative decision as it pertains to me, and that every step of the recruitment process constitutes a reviewable administrative decision.

6. I am therefore requesting the MEU to reconsider my request for management evaluation of the decision not to include my name on the recommended short-list for the P-5 post of Senior Human Resources Policies Officer, in light of the UNDT's findings that the decision is reviewable as a final administrative action.

Applicant's submissions

17. The Applicant's submissions may be summarized as follows:

Prima facie unlawfulness

a. The selection process was procedurally and substantially flawed, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith. The Applicant has been deprived of fairness and justice and discriminated against, including on the basis of gender, in a process that is tantamount to abuse of authority and ridden with conflict of interest and bias;

b. The selection of one recommended candidate in this case was pre-determined. The Applicant is more a qualified candidate than the first of the recommended candidates and should have been recommended pursuant to ST/AI/1999/9 (Special measures for the achievement of gender equality);

c. The external member of the panel (Director of Human Resources, UNFPA) was effectively excluded from the shortlisting exercise and was not aware that candidates were recommended;

Irreparable damage

d. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the involved individual. There have only been three P-5 vacancies relevant to the Applicant's experience within ICSC advertised in the last eight years, and given the limited number of senior positions within the ICSC, another P-5 vacancy is unlikely to be available for years to come. This will have a direct effect on the Applicant's career. Monetary damages would be the only remedy available to her if the recommended candidate's appointment is completed, which would be insufficient in relation to the detrimental effect this decision would have on her career. Apart from the emotional and physical distress that this biased and procedurally irregular process and decision have caused the Applicant, she would also suffer financial loss caused by a deprivation of career progression, and potential loss of future opportunities and income because in this hierarchical organization career progression must be sequential. Being deprived of the P-5 opening for which she is clearly the best qualified deprives her of a logical progression to higher decision making levels. This process has also caused her to lose motivation and trust in her workplace. She would suffer reputational harm by being forcefully stuck at the same level for a prolonged period and because challenges to the bureaucratic organization and culture of the UN and the ICSC result in long-term personal and professional marginalization;

Urgency

e. The appointment of the selected candidate has not yet been completed and the error is reversible until he is appointed. The finalization could occur at any time. Once the ICSC Chairman receives the response from the Secretary-General, the first choice candidate will receive a letter of appointment. Once the selection is confirmed, a suspension of action will not be possible.

Respondent's submissions

18. The Respondent's principal contentions may be summarized as follows:

Receivability

a. The Application is not receivable. First, the principle of *functus officio* applies. On 10 May 2016, the Management Evaluation Unit made the determination that the Applicant's request for management evaluation dated 7 May 2016 was not receivable. The Applicant resubmitted a second request for management evaluation on 18 May 2016 in respect to the issues already determined by the management evaluation response to the Applicant's 7 May 2016 request. MEU discharged its statutory mandate by its determination dated 10 May 2016 and is therefore barred from revisiting the Applicant's claims;

b. Second, the Application is not receivable *ratione materiae*. The Applicant has not identified a final administration decision. A series of further mandatory steps must be completed before a recruitment decision can be finalized. It is merely a preparatory

step. The final selection decision may differ from the panel recommendations;

c. The Applicant can only challenge the selection decision at the conclusion of the recruitment process as only a final administrative decision taken at the conclusion of the process has direct legal consequences for a staff member's terms of appointment (*Nguyen Kropp & Postica* 2015-UNAT-509; *Ivanov* 2013-UNAT-378). Although in *Luvai*, the Appeals Tribunal confirmed "that with regard to promotion cases, every stage of the selection procedure is subject to judicial review", these stages may be challenged only in the context of an appeal against the outcome of the selection process (*Ishak* 2011-UNAT-152). The applicant in *Luvai* was able to challenge steps in the recruitment process once he was notified of his non-selection;

Prima facie unlawfulness

d. The selection process is proceeding in compliance with the standard procedures. The Applicant's experience was duly and favourably considered in the evaluation process. Each of the seven interviewed candidates were asked identical questions and allotted approximately one hour for interview, based on the length of responses given by each interviewee. Following its assessment, the interview panel found that the Applicant did not demonstrate satisfactory competence in the communication and decision making competencies. The panel gave the Applicant the lowest ratings out of the seven candidates for interview performance. The panel recommended the three highest rated candidates for selection. It was the proper exercise of discretion of the Chairman to recommend

the highest rated candidates (*Tiwathia* 2016-UNAT-616). Lastly, the Applicant presents no credible evidence of discrimination, bias and unfair treatment. The Applicant's allegation of gender bias lacks legal basis and is without merit. The recommended candidates include a female candidate;

Irreparable damage

e. The Applicant has demonstrated no harm. Her contractual situation is not adversely affected. The Applicant's claim that she will suffer financial, emotional and reputational harm and potential loss of future employment opportunities is mere conjecture. In the absence of procedural errors or a breach of the Applicant's rights, frustration, disappointment, and distress are not actionable before the Tribunal. Even if the Applicant were to establish harm, such harm is not irreparable as it is compensable;

Urgency

f. The Applicant puts forward no valid argument to demonstrate that the matter is urgent. Her terms of contract remain unchanged. The letter of the Chairman of the ICSC, dated 31 March 2016, is a request to the Secretary-General to initiate a consultation regarding the recommended candidates under art. 20.2 of the Statute of the ICSC and is not a final determination of the recruitment process. It is a mandatory step in a process and remains subject to change. (Article 20.2 of the ICSC Statute provides that ICSC "staff ... shall be appointed by the Secretary-General after consultation with the Chairman of the Commission and, as regards senior staff, with the Administrative Committee on Co-ordination.)

Consideration

Legal framework

19. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

20. Article 13.1 of the Tribunal's Rules of Procedure states:

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.

21. Staff rule 11.2 (Management evaluation) of ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations) provides that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

22. Staff rule 11.4 (United Nations Dispute Tribunal) provides that:

(a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

23. In accordance with art. 2.2, the Dispute Tribunal 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 case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

24. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

25. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, but also bearing in mind that the matter is not at the merits stage at this point in proceedings.

26. It also follows from the language of art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256). Furthermore, as stated in *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010-UNAT-011, *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed (para. 19). It follows also that an order for a suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented (*Gandolfo* Order No. 101 (NY/2013)).

Purpose of management evaluation

27. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, as read with staff rule 11.2(a), an applicant must, as a mandatory first step (other than in cases that fall under staff rule 11.2(b)), request management evaluation of the contested decision before filing an application with the Tribunal.

28. The mandate of the Management Evaluation Unit and the purpose of management evaluation were discussed in General Assembly resolution

62/228 (Administration of justice at the United Nations) (adopted on 22 December 2007), which provided as follows (footnotes omitted):

E. Management evaluation

50. *Emphasizes* the need to have in place a process for management evaluation that is efficient, effective and impartial;

51. *Reaffirms* the importance of the general principle of exhausting administrative remedies before formal proceedings are instituted;

52. *Decides* to establish an independent Management Evaluation Unit in the Office of the Under-Secretary-General for Management ... ;

...

54. *Emphasizes* the importance of prompt decisions and responses to formal requests for management evaluation, and decides that such evaluation should be completed in a timely manner, as soon as possible and within a limit of thirty calendar days for Headquarters and forty-five calendar days for offices away from Headquarters after the submission of such a request;

55. *Stresses* the importance of establishing adequate accountability measures for managers to ensure their timely response to management evaluation requests;

56. *Emphasizes* the importance for the United Nations to have an efficient and effective system of administration of justice so as to ensure that individuals and the Organization are held accountable for their actions in accordance with relevant resolutions and regulations;

29. The provisions relating to the core functions of the MEU and the various time limits are outlined in sec. 10 of ST/SGB/2010/9 (Organization of the Department of Management) and the relevant Staff Rules and are also clearly and concisely set out in the recent Order of Judge

Izuako in *De Masi* Order No. 2 (NBI/2016), which referred to *Abu-Hawaila* 2011-UNAT-118 and *Eng* 2015-UNAT-520.

30. Section 10 of ST/SGB/2010/9 states:

Section 10

Management Evaluation Unit

10.1 The Management Evaluation Unit is headed by a Chief, who is accountable to the Director of the Office of the Under-Secretary-General for Management.

10.2 The core functions of the Unit are as follows:

(a) Conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations;

(b) Making recommendations to the Under-Secretary-General for Management on the outcome of the management evaluations and proposing appropriate remedies in case of improper decision made by the Administration;

(c) Communicating the decision of the Under-Secretary-General for Management on the outcome of the management evaluation to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York;

(d) Proposing means of informally resolving disputes between staff members and the Administration; making recommendations to the Under-Secretary-General for Management on extending the deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman;

(e) Conducting a timely review of an application to suspend the implementation of a contested administrative decision until the management evaluation has been completed in cases involving separation from service; making a recommendation to the Under-Secretary-General on the outcome of such review; and communicating the decision of the Under-Secretary-General on the outcome of the review to the staff member;

(f) Monitoring the use of decision-making authority and making recommendations to the Under-Secretary-General for Management to address any discerned trends;

(g) Assisting the Under-Secretary-General for Management to strengthen managerial accountability by ensuring managers' compliance with their responsibilities in the internal justice system.

31. Under the internal justice system of the United Nations, management evaluation is an administrative process, which is primarily intended to afford the Administration the earliest opportunity to reconsider and remedy a situation in which an administrative decision has been challenged (*Omondi* UNDT/2011/020). The requirement for management evaluation is meant to assure that there is an opportunity to speedily resolve a staff member's complaint or dispute without the need for judicial intervention, within the time limit specified by the Statute and the Staff Rules (*Kouadio* 2015-UNAT-558).

32. Under the former system of justice, before initiating an appeal, a staff member had to seek a review of the administrative decision, a process that normally took 60 days. The Redesign Panel recommended that this system of administrative review before action be abolished, having identified it as one of the factors causing egregious delays in the proceedings before the former Joint Appeals Boards (see paras. 66 and 87 of A/61/205 (Report of the Redesign Panel on the United Nations

system of administration of justice), dated 20 July 2006). It is instructive that the General Assembly thereafter adopted the current system of management evaluation with strict deadlines in the Statute of the Dispute Tribunal. The Dispute Tribunal and the United Nations Appeals Tribunal have consistently stressed the importance of complying with statutory deadlines (see, e.g., *Mezzoui* 2010-UNAT-043).

Is the requirement of ongoing management evaluation satisfied in this case?

33. The Applicant submitted two requests for management evaluation of the same decision. The first request was rejected on 10 May 2016. The issue therefore is whether the filing of a request to “reconsider [her] request for management evaluation” in light of Order No. 114 (NY/2016) brings the case back under the ambit of art. 2.2 of the Tribunal’s Statute.

34. The Respondent submits that, having replied to the Applicant’s request for management evaluation on 10 May 2016, the MEU discharged its statutory mandate and is therefore barred from revisiting the Applicant’s claims.

35. It is important to bear in mind that what is contested before the Tribunal is the actual contested decision, not the outcome of management evaluation. It is settled law that the contested decision which may be reviewed by the Dispute Tribunal is not the decision of the MEU, but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member (*Staedtler* UNDT/2014/046; *Kalashnik* UNDT/2015/087). In this instance the management evaluation of the decision not to recommend the Applicant for selection was completed as of 10 May 2016.

36. In *Eng* 2015-UNAT-520, the Appeals Tribunal found that the MEU did not have the power to extend the statutory deadline for the filing of an application with the Tribunal and that correspondence with the MEU did not result in the re-setting of the applicable time limits. Therefore, requests to reconsider management evaluation after it has been completed cannot have the effect of resetting the clock with respect to the applicable time limits for the Secretary-General's response to the management evaluation request, or for the filing of an application with the Dispute Tribunal.

37. Indeed, if a request for reconsideration of management evaluation were to be treated as a new management evaluation request, it would have the effect of arbitrarily resetting the deadlines for the filing of the application with the Dispute Tribunal. Any further or multiple requests for reconsideration would have a similar effect, resetting the deadline on each occasion. This would be in clear conflict with the Statute, which provides under art. 8.3 that the authority to extend the deadlines for the filing of an application rests with the Dispute Tribunal (art. 8.3 states that the Tribunal "may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases").

38. The possibility of resetting of statutory deadlines by multiple re-filing of management evaluation requests would also go against the principle of legal certainty, which requires that deadlines be applied and procedures be followed in a predictable and consistent manner (*Cranfield* UNDT/2012/141 (affirmed in *Cranfield* 2013-UNAT-367); *Wand* UNDT/2012/157; *Igbinedion* 2014-UNAT-410; *Weerasooriya* 2015-UNAT-571).

39. The new system of justice has been structured such that, regardless of the outcome of management evaluation, once it has been completed, the 90-day time limit for the filing of an application starts to run (see art. 8 of the Statute and staff rule 11.4). Even if the Applicant were to continue to engage in further communications with the Management Evaluation Unit, it would not have the effect of suspending the time limit for the filing of an application with the Tribunal. It follows therefor that, once the 90-day time limit for the filing of the case with the Tribunal starts to ran, the matter cannot revert to management evaluation as the MEU can no longer be seized of it.

40. Without considering the merits of the application, or commenting on the findings of the MEU, the Tribunal finds that the management evaluation of the contested decision has been completed. Since an application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation, and as the management evaluation of the contested decision in this case is no longer pending and has been completed, the Tribunal cannot rule on the present application for suspension of action of the same contested decision as that of Case No. UNDT/NY/2016/016 and the application is rejected.

41. It is of course open to the Applicant to institute proceedings to contest the decision on the merits and initiate any further proceedings.

42. Consequently, the Tribunal need not examine if the three statutory requirements specified in art. 2.2 of its Statute—namely, *prima facie* unlawfulness, particular urgency and irreparable damage—have been met in the case at hand.

Conclusion

43. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 26th day of May 2016