



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WILSON

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 15 June 2016, the Applicant filed an application seeking suspension, pending management evaluation, of the “selection decision for Chief, Information Management Systems Service, D-1 [level], United Nations Joint Staff Pension Fund [UNJSPF]”. The Applicant is presently employed as Chief (D-1 level), Financial Information Operations Service, Office of Programme Planning, Budget and Accounts (“OPPBA”), Department of Management.

2. 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 12 p.m. on Friday, 17 June 2016.

3. Prior to the filing of the Respondent’s reply, the Applicant filed, on 16 June 2016, two additional filings—a motion for production of evidence in relation to the contested selection process and a further “analysis of contested job opening”. The Respondent was directed to respond to the Applicant’s motion for production of evidence as part of his reply due 17 June 2016.

4. The Respondent’s reply to the application was duly filed on 17 June 2016 (Friday) and transmitted on the same day to the Applicant through the eFiling portal.

5. On 19 June 2016 (Sunday), the Applicant filed, without leave of the Tribunal, a submission entitled “Reply to Respondent’s position on receivability and merits”.

Relevant background

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

7. The Applicant has been on the pre-approved roster for D-1 positions since October 2008, when he was promoted to the D-1 level in OPPBA. In 2012 and 2013, he was additionally rostered twice at the D-1 level in the Information and Communication Technology (“ICT”) job family.

8. The contested job opening was publicly advertised through Inspira (UN’s career and job website) on 13 April 2016 with the deadline of 11 June 2016. The Chief Executive Officer (“CEO”) of UNJSPF and Deputy CEO were the hiring managers for the selection exercise, with the Deputy CEO acting as the primary hiring manager.

9. The job opening identified the following five competencies against which candidates would be assessed: professionalism; planning and organizing; client orientation; leadership; and managing performance. The job opening further stated that “[j]ob openings advertised on the Careers Portal [i.e., Inspira] will be removed at midnight (New York time) on the deadline date”.

10. On 14 April 2016, as a result of being included in the ICT job family roster under the same job code, the Applicant received notification of the job opening.

11. On the same day, 14 April 2016, the Applicant submitted his application and received a confirmation of receipt of his application. The confirmation stated:

You will be identified as a rostered applicant for this job opening as you were previously placed on a roster of pre-approved candidates for positions with similar functions at the same level, provided that you meet the requirements indicated in the job opening.

Should you move forward in the process, you may be contacted for further assessment. You will also be notified once the recruitment process is completed.

12. On 27 May 2016, the selected candidate—a P-5 level staff member with the Office of Internal Oversight Services (“OIOS”)—was notified by email of his selection. On the same day, the selected candidate replied to the selection notification, also by email, stating that he was “happy to confirm [his] interest and availability for this position”.

13. On 31 May 2016, UNJSPF sent an email to OIOS requesting the release of the selected candidate for transfer to UNJSPF. On the same date, the OIOS Executive Office confirmed, by email, the release and approved the transfer of the selected candidate effective 30 June 2016.

14. On 3 June 2016, the Applicant received an email from Inspira announcing the selection of the rostered P-5 level staff member.

15. Also on 3 June 2016, an email was circulated to UNJSPF staff on behalf of the CEO of UNJSPF, announcing the selection of the new Chief of the Information Management Systems Service.

16. On 7 June 2016, the Applicant submitted a request for management evaluation of the decision

by the CEO of the pension fund ... to select a rostered applicant prior to the expiration date of the published JO without giving full and fair consideration to me as also a rostered applicant already serving at the D-1 level for the past 8 years, with the selected applicant being promoted from P-5. No comparative assessment even of the rostered applicants was undertaken by an assessment panel, the Hiring Manager was bypassed with the decision maker making the selection decision unilaterally.

17. As of the date of the Respondent’s reply, the management evaluation of the Applicant’s request is pending.

Applicant's submissions

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

Receivability

a. The contested decision will not be implemented until 1 July 2016; accordingly, the application is receivable (sec. 10.2 of ST/AI/2010/3 (Staff selection system); *Finniss* Order No. 116 (GVA/2016));

Prima facie unlawfulness

b. No competitive evaluation and selection process took place. The selection process was undertaken in circumvention of the standard recruitment procedures, as required by ST/AI/2010/3. The actual job competencies listed in the job opening were not evaluated during the selection process;

c. Although the selected candidate was rostered under the relevant job family, he was not rostered for the exact position-specific functions and positions as in the contested post. The competencies for the contested post are significantly different from those in the position against which the selected candidate had been rostered;

Urgency

d. The Applicant acted prudently and timeously with respect to the filing of his application. The urgency in this case was not self-created. The application allowed sufficient time for the Respondent to prepare his reply. If the decision is not suspended by 30 June 2016, the selected candidate will be appointed to the contested post;

Irreparable damage

e. The Applicant has been in the same position for eight years. The implementation of the contested decision would cause the Applicant irreparable harm as only very few D-1 level job openings become available. If the Applicant does not have a lateral move, he might have to go through “forced mobility” in 2018, the ramifications of which are “becoming very stressful and [are] impacting [his] health”.

Respondent’s submissions

19. The Respondent’s principal contentions may be summarized as follows:

Receivability

a. The application is not receivable as the contested decision has been implemented and can no longer be suspended. The selected candidate was notified of the contested decision and “accepted his selection to the contested job opening”, which resulted in a legal obligation on the part of the Organization to appoint the selected candidate (*Al-Midani* Order No. 309 (NY/2014));

Prima facie unlawfulness

b. The Applicant has failed to satisfy the requirement of *prima facie* unlawfulness. The Applicant received full and fair consideration, and the selected candidate was “the only rostered candidate with extensive experience in the specialized work of UNJSPF”. There was no bias in the selection process. Further, a selection recommendation of a roster candidate can be made by the hiring manager at any stage of the recruitment process. It was a reasonable exercise of discretion for the Administration to close the job opening once a candidate had been

selected as the position was no longer vacant. In any case, the issue is irrelevant as the Applicant applied for the position before it was closed and suffered no prejudice;

Urgency

c. The Applicant filed his application eleven days after notification of the contested decision, which means that the urgency in this case is self-created;

Irreparable damage

d. The requirement of irreparable harm is not satisfied in this case as the Applicant's contractual situation has not been adversely affected. His claims that his career will suffer irreparable harm because of the scarcity of D-1 positions and that he will suffer stress from the potential ramifications of being subject to the forced mobility in 2018 are mere conjecture.

Consideration

Legal framework

20. 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.

21. 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.

22. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the 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.

23. 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.

24. 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 of the proceedings.

25. 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 of 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)).

Receivability

Contested decision

26. Although the Applicant identifies the contested decision as the “[s]election decision for Chief, Information Management Systems Service”, he states in his application that the date on which the decision is to be implemented is 1 July 2016. Therefore, it is clear that the Applicant seeks suspension of the entirety of selection process, including the appointment of the selected candidate effective 1 July 2016.

Implementation

27. It follows from art. 2.2 of the Tribunal’s Statute, that where an administrative decision has been implemented, a suspension of action may not be granted (*Gandolfo* Order No. 101 (NY/2013)). 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); *Gallieny* Order No. 60 (NY/2014), the Tribunal may grant a request for a suspension of action.

28. The Respondent submits that, “on 27 May 2016, the selected candidate accepted his selection to the contested job opening”, which “resulted in a legal obligation on the part of the Organization to appoint the selected candidate”. The Respondent relies on *Al-Midani* Order No. 309 (NY/2014) in support of this contention.

29. However, due to the paucity of facts in *Al-Midani*, whilst it was unclear whether the selected candidate in that case had signed the letter of appointment and taken up the post already, the applicant therein acknowledged that the decision had already been implemented (see paras. 3 and 20 of *Al-Midani* Order No. 309 (NY/2014)). In contrast, the Applicant herein clearly states that the implementation in this case would be effective 1 July 2016.

30. Further, whilst the selected candidate’s email of 27 May 2016 confirms his continued interest and availability, no records have been tendered or indeed any submission made that a formal offer has been made to the selected candidate or that he has accepted any such offer.

31. Further, the present matter, unlike *Al-Midani*, concerns promotion to a higher level (from P-5 to D-1), and pursuant to sec. 10.2 of ST/AI/2010/3,

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

32. The Tribunal takes note of the following pronouncements in *Farrimond* Order No. 113 (GVA/2016) (see also *Finniss* Order No. 116 (GVA/2016)), in which the Dispute Tribunal (Judge Laker) stated:

15. As a preliminary matter, it is worth recalling that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4

(GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

16. The structure of ST/AI/2010/3 obviously distinguishes between selection decisions on the one hand and their notification and implementation on the other (see sec. 9 and sec. 10 of ST/AI/2010/3).

17. Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision (see *Wang* UNDT/2012/080, *Tiwathia* UNDT/2012/109 and *Nwuke* UNDT/2012/116), there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment (see *Quesada-Rafaraso* Order No. 20 (GVA/2013)). However, the Tribunal notes that such a procedure seems to be reserved for selection decisions taken involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

18. With respect to selection procedures that entail promotion of internal candidates, like in the present case, the Tribunal recalls that section 10.2 of ST/AI/2010/3 [Staff selection system] clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

19. It follows from this provision that the implementation of the selection decision at stake, which was taken on 13 May 2016, cannot be implemented before 1 June 2016. ... Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

33. Accordingly, in view of the above, the decision to select and appoint the selected candidate has not yet been implemented, and the present application is receivable.

Prima facie unlawfulness

34. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for him 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).

35. Article 101.3 of the United Nations Charter states that "the necessity of securing the highest standards of efficiency, competence, and integrity" is the "paramount consideration in the employment of the staff and in the determination of the conditions of service". Staff regulation 4.2 contains similar language. Staff regulation 4.3 further specifies that "[s]o far as practicable, selection shall be made on a competitive basis".

36. The Tribunal notes that a number of issues arise in connection with this selection exercise.

37. The Tribunal has been provided with a one-page "Assessment" print-out from Inspira, concerning only the selected candidate. It states:

Rate Applicant

Academic	Outstanding
Experience	Outstanding
Language	Outstanding
Client Orientation	Not Applicable
Planning and Organizing	Not Applicable
Professionalism	Not Applicable
Leadership	Not Applicable
Managing Performance	Not Applicable

Recommendation

Overall rating: Outstanding

Recommendation: Recommended

General Comments

[The selected candidate] is a rostered candidate currently working in OIOS. He is very familiar with the functioning of the UNJSPF based [on] his many years as the Chief, IT Audit assigned to the Pension Fund. He therefore has extensive experience in pension matters, both from the IT and business perspectives and is considered highly suitable for this position. The hiring manager recommends the selection of this rostered candidate.

38. The “Assessment” page disclosed by the Respondent raises a number of concerns. Notably, it appears that the selected candidate or any other candidates were not evaluated against any of the five competencies listed in the job opening, as they are all indicated as “Not Applicable”.

39. Further, there is no actual explanation as to why the selected candidate was preferred over other candidates. There is no record of any substantive comparative evaluation of any of the candidates who applied for this position.

40. The Tribunal also considers that additional submissions will be required on whether it is indeed permissible to conclude a recruitment process in this manner, given the wording of the job opening, which contained no reference to it being a roster-based recruitment exercise.

41. Further, it is a matter of concern that the publically-published job opening stated clearly that the closing date for applications was 11 June 2016, yet that deadline was not respected. Presumably, had the job opening remained open until 11 June 2016, more applications—including from rostered candidates—would have been submitted for consideration.

42. It is worth noting that the United Nations is not a private corporation, and its posts are financed through public funds, which calls for transparency and

accountability in the recruitment system. The issues highlighted above suggest that the selection process in this case may have been an arbitrary exercise, in breach of the general requirements stipulated in the United Nations Charter and staff regulation 4.2.

43. Accordingly, on the papers before the Tribunal, there are serious and reasonable concerns as to whether this selection exercise was lawful.

44. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Urgency

45. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

46. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

47. The Applicant filed the present application on 15 June 2016, eight working days after becoming aware of the contested decision, and contested decision is set to be implemented on 1 July 2016. The Tribunal finds that there is

no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

48. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

49. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

50. The Applicant submits, in effect, that there are very few opportunities for lateral moves at the D-1 level and that not being able to be fully and fairly considered for them would have an adverse impact on his career and mobility expectations and cause him significant stress.

51. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013); *Finniss* Order No. 116 (GVA/2016)).

52. A lateral move, particularly at a senior D-1 level, is a valuable element of career progression, and the consequences of the loss of an opportunity to move laterally within the Organization may be hard to quantify. The Tribunal finds, in the particular circumstances of this case, that the implementation of the contested decision would cause a significant detriment to the Applicant's career prospects, such as to satisfy the requirement of irreparable harm.

53. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Applicant's motion for production of evidence

54. On 15 June 2016, the same day the Applicant filed his application for suspension of action, he also filed a motion for production of evidence, seeking an extensive disclosure of records in relation to his claims. The Respondent opposes the Applicant's motion on the ground of relevance. The Respondent submits that all documents relevant to the selection exercise in question have been attached to his reply.

55. In light of the findings made herein, and in view of the urgent nature of these proceedings, the Tribunal does not find it necessary to order production of further records, as requesting by the Applicant in his motion of 15 June 2016.

56. However, the Tribunal finds it appropriate to make the following observations regarding disclosure requests in the context of urgent proceedings. Under arts 13 and 14 of its Rules of Procedure, the Tribunal is required to conclude proceedings for suspension of action and interim measures within five working days due to their urgent nature. Accordingly, when dealing with interdict proceedings, often there is no time for the Tribunal or parties to entertain extensive production requests as it may delay the proceedings well beyond the statutory five-day period. Therefore, when appearing before the Tribunal parties should bear in mind that an application or reply may well stand or fall on the initial papers filed. It is only in particular cases that the Tribunal will find it necessary to order the parties to make further submissions or document productions in the context of urgent proceedings.

Conclusion

57. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied. Accordingly, the decision to select and appoint the candidate selected for the contested post shall be suspended pending management evaluation.

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

- a. The Applicant's motion for production of evidence is rejected;
- b. The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of June 2016