



Before: Judge Alessandra Greceanu

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 12 October 2016, the Applicant filed an application for suspension of action pending management evaluation of the “[s]election decision for Chief of Enterprise Application Centre, NY, ([Job Opening, “JO”] 63461)” (emphasis omitted), requesting the “suspension of the entirety of selection process, including the appointment of the selected candidate effective 1 November 2016”.

2. The same date, the case was assigned to the undersigned Judge. In accordance with the instructions of the Judge, the New York Registry of the Dispute Tribunal transmitted the application to the Respondent, directing that a reply be filed by 5:00 p.m. on 14 October 2016, informing the Tribunal whether the relevant JO was part of the job networks that have transitioned to the new staff selection system and managed mobility governed by ST/SGB/2016/3.

3. On 14 October 2016, the Respondent filed a reply to the application for suspension of action. The Respondent submits that, as the selection decision has already been implemented, the Tribunal does not have jurisdiction to order a suspension of action.

Factual and procedural background

4. In his application, the Applicant summarized the facts as follows:

(1): At 12:31am on 29 July 2016, the position of Chief of Enterprise Application Center, NY (JO 63461) was advertised in Inspira with a closing date of 25 September, 2016. ... As a rostered applicant at the D-1 level for this job code, I received a message from Inspira advising of this published job opening. ... I noted the following in the JO[:]
“The Chief of Service reports to the Assistant Secretary General and Chief Information Technology Officer (CITO)[”].

(2): At 05:50am on 29 July 2016, I submitted my application which was also acknowledged on the same date. In the acknowledgement, it

confirmed that I was applying and being considered as a rostered (RM) applicant. ...

(3): On 11 October, 2016 at 16:00pm, I noted that the status of the JO in Inspira had changed to “Selected from Roster”. ... I received an automated message from Inspira that a rostered applicant had been selected and that the JO was now closed. No comparative assessment exercise against the requirements of the Job Opening, even of the rostered applicants had taken place.

(4): On 11 October, 2016, I was informed that [the successful candidate], had been selected for the position, but had not yet accepted and that her release from her existing position was not already negotiated.

(5): On 12 October 2016 at 01:57am, I submitted my request for management evaluation to [the Management Evaluation Unit] at the same time as filing this request for SOA. At 09:21am on 12 October 2016, I received acknowledgement from the MEU with case number MEU/805-16/R assigned. ...

5. As directed by the Tribunal, on 14 October 2016, the Respondent filed his reply in which he stated that the selected candidate had accepted her selection to the contested JO on 13 October 2016 and, as evidence, he appended an email exchange between the selected candidate and the Office of Information and Communication Technology. From this exchange follows that, on 11 October 2016, the selected candidate was informed about her selection and requested “to confirm by return e-mail, within five business days of receipt of this message [her] continued interest in and availability for this position”, which she did on 13 October 2016, when she replied that she confirmed her “continued interest and availability for the position”.

Consideration

6. Article 2.2 of the Dispute Tribunal’s Statute states:

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.

7. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required;

8. 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.

9. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Consideration

Whether the application concerns an administrative decision that may be properly suspended by the Tribunal

10. As the Dispute Tribunal stated in *Wilkinson et al.* UNDT/2009/089 (not appealed) and *Ishak* UNDT/2010/085 (affirmed in *Ishak* 2011-UNAT-152), in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision taken by the Administration in a precise individual case and which produces direct legal consequences to the legal order, including the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision.

11. The Appeals Tribunal stated in *Abbassi* 2011-UNAT-110:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

12. In *Ishak* 2011-UNAT-152, the Appeals Tribunal stated:

29. ... A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.

13. However, in the subsequent judgment of *Luvai* 2014-UNAT-417, the Appeals Tribunal stated:

31. It is established in the jurisprudence of this Tribunal that with regard to promotion cases, every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

14. The Tribunal concludes that the findings in *Ishak* 2011-UNAT-152 are no longer valid in the light of the latest jurisprudence with regard to promotion cases, according to which every stage of the selection procedure is subject to judicial review/appeal (*Luvai* 2014-UNAT-417). Therefore, a decision taken at any stage of the selection process is an administrative decision that can be the object of an application for suspension of action pursuant to art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure if the case is deemed to be of particular urgency, filed to prevent irreparable damage, and when the decision appears to be *prima facie* unlawful (*Goodwin* Order No. 18 (NY/2016)).

15. In the present case, the decision subject to the management evaluation is the selection decision for Chief of Enterprise Application Centre, NY, JO 63461 and the Applicant is requesting the suspension of the entirety of the selection process, including the appointment of the selected candidate effective 1 November 2016. The Tribunal concludes that the application concerns an administrative decision that may properly be suspended by the Tribunal, and the first condition is fulfilled.

Ongoing management evaluation

16. An application under art. 2.2 of the Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that he filed his request for management evaluation on 12 October 2016 and this aspect is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation was initiated prior to the filing of the suspension of action, within 60 days from the date of notification on 11 October 2016. The Tribunal notes that there is no evidence on the record that the MEU has completed its evaluation. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending, that the contested decision is the subject of an ongoing management evaluation for which reason the second condition is fulfilled.

Implementation of the contested decision

17. Following an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Tribunal may “*suspend*, during the pendency of the management evaluation, *the implementation* of a contested administrative decision” (emphasis added). This means that if the contested administrative decision has already been “implemented” there no longer is a decision that the Tribunal can suspend.

18. The present case concerns a selection decision and the question to be determined here is therefore when such a decision is implemented.

19. Arguing that the selection decision has not been implemented, the Applicant refers to sec. 10.2, second sentence, of ST/AI/2010/3 (Staff selection system), which provides that “[w]hen 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, subject to the availability of the position and the assumption of higher-level functions”. In the light of this, he contends that the contested administrative decision is only to be implemented at the time upon which the selected candidate assumes the D-1 level post, which is 1 November 2016, since her selection amounted to a promotion. The Applicant submits that the selection decision has therefore not yet been implemented. The Applicant also refers to *Finniss* Order No. 116 (GVA/2016) in Case No. UNDT/GVA/2016/037 in which the Dispute Tribunal judge assigned to the case found that (para. 15):

... 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 finds that such a procedure is reserved for selection decisions 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.

20. Furthermore, the Applicant submits that, as the selected candidate has not accepted the position and the release of the applicant has not been negotiated, the decision has not been implemented and the selected candidate is currently employed at the P-5 level for which reason her selection for a post at the D-1 level constitutes a promotion.

21. In response, the Respondent indicates that the present selection process was governed by ST/AI/2010/3 and that section 10.2, first sentence, provides that “[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned. The Respondent claims that the selection decision has been implemented and he refers to judgment *Tiwathia* UNDT/2012/109, upheld by the Appeals Tribunal on appeal in *Tiwathia* 2013-UNAT-327. As for *Finniss and Wilson*, the Respondent submits that the Dispute Tribunal’s decisions in these cases are currently under appeal and therefore not persuasive jurisprudence.

22. The Tribunal notes that it follows from the consistent jurisprudence of the Appeals Tribunal that the principle of *stare decisis* applies to the Dispute Tribunal, which is therefore bound by the case-law of the Appeals Tribunal (see, for instance, *Igbinedion* 2014-UNAT-410 and *Hepworth* 2015-UNAT-503). The Tribunal considers that there is no binding legal effect of other Dispute Tribunal’s decisions/orders issued in similar cases which are currently under appeal and not yet confirmed by the Appeals Tribunal.

23. In the online Oxford dictionary (english.oxforddictionaries.com) the word “implementation” is defined as “the process of putting a decision or plan into effect; execution”.

24. In the present case, the selected candidate, a P-5 level United Nations staff member, was informed by the Office of Information and Communication Technology

on 11 October 2016 that she had been selected for the D-1 level post. The selected candidate was also asked to confirm her continued interest and availability for the position within five business days of receiving the notification. On 11 October 2016, the Administration thereby presented the selected candidate with an offer for employment for the relevant post. On 13 October 2016, the selected candidate responded that she was confirming her continued interest and availability in the post, thereby notifying the Administration of her unconditional acceptance of the conditions of the offer within the given time limit.

25. An employment contract is an agreement, which is established by an offer and a subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 determined that “a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate” (see also *Iskandar* 2012-UNAT-248 and *Cranfield* 2013-UNAT-367).

26. In accordance with *Tiwathia*, the Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Statute of the Dispute Tribunal refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member’s unconditional acceptance of the offer.

27. When formed, the employment contract is a legally binding bilateral act that is agreed upon by the consensual will of the contracting parties and which does not require to be in a written form for it to be valid. It is a contract in which the selected candidate cannot be replaced as this person has been selected after a competitive

selection process based on her/his personal skills and competencies (*intuitu personae*) and where this candidate work under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contract period by each of the parties when they satisfy their successive and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labour.

28. Unlike what the Applicant appears to submit, the date on which a selected candidate is to assume her/his functions is therefore not a matter of implementing the selection decision but one of executing the resultant employment contract. The significance of sec. 10.2 of ST/AI/2010/3 in this regard is that it refers to the effect this has on the employment contract and not on the selection decision.

29. The Tribunal considers that sec. 10.2, first sentence, which provides that (emphasis added), “[t]he decision to select a candidate *shall be implemented* upon its official communication to the individual concerned” constitutes the general mandatory rule regarding the implementation of the selection decisions. From this general mandatory rule, there is only one exception as stated in the third and last sentence of sec. 10.2, notably the situation (emphasis added) “when an encumbered position has been included in the compendium after upward reclassification and an applicant other than the incumbent is selected the decision *shall be implemented* only when a suitable position has been identified for the incumbent”. This exception is not applicable in the present case.

30. This Tribunal is of the view that the legal provision of sec. 10.2, second sentence, “[w]hen the selection entails a promotion to a higher level, the earliest possible date on which such a promotion may become effective shall be the first day of the month following the decision” reflects the principle *dies certus an et quando* according to which an employment contract, which is formed/agreed by the parties on the date of accepting the offer of employment becomes effective at a later date. It results that in cases of promotion, the employment contract, which exists from the

moment when the selected candidate accepted the offer of employment, is suspended for a certain limited period of time, and is to be executed only on the first day of the month following the selection decision.

31. In the jurisprudence invoked by the Applicant (*Finniss* and *Wilson*), the relevant Tribunals considered that there is a difference between implementing a selection decision over an external candidate with no prior contractual relationship between the Organization and an internal candidate. This Tribunal considers that legal provision of sec. 10.2 of ST/AI/2010/3 does not distinguish between the implementation of the selection decision(s), including promotions and the execution of the employment contract(s), of external vis-à-vis internal candidates. Therefore, according to the principle *ubi lex non distinguit, nec nos distinguere debemus* (where the law does not distinguish, the judge cannot do so), the Tribunal concludes that all selection decisions of external and internal candidates are to be implemented in a similar manner.

32. Consequently, in the present case, the Tribunal finds that the selection decision was implemented on the date when it was officially communicated to the selected candidate and the Applicant, namely on 11 October 2016, and that, on 13 October 2016, it was followed by the formation of the selected candidate's employment contract upon her unconditional acceptance of the offer presented to her concerning the D-1 level post.

33. The Tribunal further finds that, since the contested decision was already implemented, one of the cumulative conditions for it to render a suspension of a contested decision is not fulfilled. It is therefore not necessary for the Tribunal to further examine if the remaining 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

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

The application for suspension of action is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of October 2016