



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

EVANS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Natalie Dyjakon, OSLA

Counsel for Respondent:
Chinonyelum Esther Uwazie, UNICEF

Introduction

1. On 26 December 2017, the Applicant, a Policy Specialist at the level of P-4, step 12, with the United Nations Children’s Fund (“UNICEF”) filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure. The Applicant requests the suspension of “[t]he decision by the Administration to not select him for the post of Senior Statistics Specialist (Poverty and Gender), P-5, New York Headquarters, USA, #99857 [“the Post”]”. With the application, the Applicant also filed a motion for “disclosure of the written test results and grades awarded for the Post to establish that he was clearly the most qualified candidate for the position”.

2. On the same date (26 December 2017), the case was assigned to the undersigned Judge, and the Registry acknowledged receipt of the application and transmitted it to the Respondent, directing him, upon the instructions of the Tribunal, to submit his reply by 5:00 p.m. on 27 December 2017.

3. By email of 27 December 2017, the Tribunal further instructed the Respondent to provide, together with the response to the request for suspension of action: (a) the written test results and grades awarded to the short-listed candidates for the Post, including the Applicant; (b) a list of all the available suitable posts at the Applicant’s level (the P-4 level) and at a lower level vacant or occupied by staff members under a temporary contract.

4. On 27 December 2017, the Respondent duly filed his reply in which he contends that the application is not receivable as the impugned decision has already been implemented. Furthermore, the Respondent submits that, in any event, the application for suspension of action is not urgent and that the impugned decision will not cause the Applicant any irreparable damage. With the reply, in response to the Tribunal’s instructions and the Applicant’s motion for disclosure of certain documents, the Respondent appended (a) the selection report for the Post with the

redacted written test results and (b) list of all available suitable post at P-4 and P-3 levels.

5. By emails of 28 December 2017, upon the instruction of the Tribunal, the Registry directed the Respondent to submit copies of: (a) the email by which the selected candidate accepted the Job Offer on 11 December 2017, and (b) the copy of UNICEF policy on staff selection and mobility system. Later the same date, the Respondent duly filed the relevant documents.

Background

6. In the application for suspension of action, the Applicant presents the factual background as follows (references to annexes and italics omitted):

... [The Applicant] is currently serving as a Policy Specialist in the Data and Analytics Section at the United Nations Children’s Fund (UNICEF) at the P-4 level. He has worked at UNICEF for approximately six years and is currently on a fixed-term appointment.

... On or about 3 March 2017, [the Applicant] applied for the Post [...].

... On 16 March 2017, [the Applicant] attended a meeting with the section head of the Social Inclusion and Policy Section, [name redacted, Mr. AY] and the Chief of Team in the Social Protection and Child Poverty Section, [name redacted, Mr. DS] where he was informed that his post was going to be abolished under the Office Management Plan (as part of a new Strategic Plan). During this meeting, [the Applicant] was encouraged to apply for other posts including the Post.

... [The Applicant] was informed that this abolition was to be proceeded by the creation of a new “nontechnical” post relating to poverty which would also be in the Social Inclusion and Policy Section. The remaining responsibilities of [the Applicant’s] current post including those relating to “poverty measurement” would be reallocated to a post in the Data and Analytics section.

... On 1 June 2017, it was agreed that [the Applicant] would join the Data and Analytics Section (at the Administration’s request) on a “stretch assignment” (at the P-5 level) until the

end of his fixed-term appointment [...]. It was agreed that [the Applicant] would perform his previous functions as well as the functions of the Post while recruitment for the Post was continuing. As [the Applicant] was to perform functions at a P-5 level, he was granted a special post allowance.

... [The Applicant] did not receive any information in relation to his application for the Post and in July 2017, [the Applicant] noticed that the Post had been re-advertised.

... On 24 July 2017, [the Applicant] received an email from his supervisor [...] which stated the following:

“Just to let you know that DHR [assumedly, the Department of Human Resources] has objected to your recruitment to this post, because there are too many British in the Division and they would like to see some diversity.

Sorry, I really tried but it seems there are many more forces than I could handle.”

... On 25 July 2017, after [the Applicant] realised that the Post was re-advertised, he sent an email to [name redacted, Mr. AS] asking whether he needs to reapply for the Post.

... On 26 July 2017, [the Applicant] received a response from [Mr. AS] [...] who stated the following:

“You do not need to re-apply for the P5, Gender and Poverty role. We re-posted to attract more qualified applicants and especially female applicants from Programme countries.”

... However, [the Applicant] was subsequently short-listed for the Post and completed a written examination on 18 September 2017. He was subsequently informed by [name redacted, Ms. RR] that his test results were the best of all the short-listed applicants by a significant margin.

... On 6 October 2017, [the Applicant] participated in an interview for the Post.

... On 15 November 2017, [the Applicant] received an official notification dated 7 November 2017 informing him that his post was to be abolished [...].

... On 5 December 2017, [the Applicant] was informed verbally by [name redacted, Mr. MH], Section Chief that he was not successful for the Post. [The Applicant] was told that the reason for his non-selection was that he had less experience in relation to the gender aspects of the Post.

... On 26 December 2017, [the Applicant] submitted a Management Evaluation Request challenging the decision by the Administration to not select him for [the Post].

7. In the Respondent's reply, he submits, by also providing appropriate written evidence, that:

- a. On 6 December 2017, a job offer for the Post was communicated to the selected candidate;
- b. On 11 December 2017, UNICEF received the selected candidate's acceptance, indicating he will be available on 1 March 2018; and
- c. Reference checks have now been concluded and, on 18 December 2017, the candidate's medical clearance was received.

Applicant's submissions

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

Prima facie unlawfulness

- a. Administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members including in matters of appointments, separation and renewals;
- b. In determining whether an administrative decision is *prima facie* unlawful, under the jurisprudence of the Dispute Tribunal, this condition does not require more than serious and reasonable doubts about its illegality;
- c. The decision to not select him for the Post was *prima facie* unlawful as it is founded on a discriminatory basis. Such consideration being unlawful pursuant to the existing Staff Regulations and Rules;

d. It is trite law that all recruitment and selection decisions must comply with the principles enshrined under art. 101.3 of the Charter of the United Nations, which are also contained in the prohibition of discrimination in recruitment contained in staff regulation 4.3 and 4.4;

e. As a consequence, all staff members are required to be appointed on merits and selection decisions must be made in accordance with the Charter of the United Nations together with any relevant provisions governing staff selection;

f. Under *Rolland* 2011-UNAT-122, the Dispute Tribunal will uphold a selection decision when candidates have received full and fair consideration, when discrimination and bias are absent, and proper procedures have been followed;

g. The decision not to select the Applicant for the Post was clearly discriminatory against him for the following reasons:

- i. There is ample evidence indicating that [the Applicant] was appropriately qualified for the Post and had a considerable amount of experience relevant to the Post. He had been performing some of the functions required for the Post for six years while working as a Policy Specialist (Poverty Analysis) at the P-4 level at UNICEF. The Applicant temporarily filled the Post while recruitment for it was pending from the period of 1 June 2017 until now. The Applicant was even encouraged to apply for the Post by his superiors in the meeting on 16 March 2017 and he was told that his test results for the Post were the best of all short-listed candidates by a significant margin. The Applicant is also of the view that he has greater experience and knowledge than the selected candidate with respect to the technical aspects of the Post

including poverty measurement which is likely to also be reflected in the written test results;

- ii. It is clear from the emails that the Applicant received on 24 July 2017 and 26 July 2017, that the Administration had pre-determined that the Applicant would not be selected on the basis of his British nationality and due to his male gender. These emails evidence that he was not afforded full and fair consideration;
- iii. The Applicant was informed by Mr. H (name redacted) on 5 December 2017 that he was not selected for the Post because he had less experience on the gender aspects of the post. There were no questions relating to gender in the written test nor were any of the questions asked during the interview related to gender. Moreover, the vacancy announcement did not place any particular emphasis on gender or the specific amount and type of experience required in relation to this aspect. Therefore, this explanation for his non-selection appears to be superficial considering the Applicant's previous experience effectively performing the role of the Post and considering that the candidates were not assessed by their experience or knowledge regarding gender issues;
- iv. Moreover, the fact that the selected candidate was a non-British national is further evidence that the Applicant was discriminated against and indicates that he was not selected on the basis of merit contrary to the Charter and the relevant provisions governing staff selection;
- v. In *Abdul Ghafoor* Order No. 2013 (GVA/2017), the Dispute Tribunal found that in hiring a candidate, while there is an element of discretion, such discretion is not unfettered. Certain factors need to be taken into account including the highest standards of

efficiency and competence, the Organization's human resources objectives and targets, as well as the fact that a candidate may already be in the service of the Organization encumbering a post slated for abolition. The Administration failed to consider such factors and, specifically, the fact that the Applicant was effectively performing the functions required of the Post and that the official post that he was encumbering was to be abolished;

h. Accordingly, evidence of bias in the selection process exists in that the Applicant was discriminated against and not selected on the basis of his nationality. As a consequence, there are serious and reasonable doubts about the lawfulness of the decision and that such a decision is *prima facie* unlawful;

Urgency

i. In *Tadonki* UNDT/2009/016, the Dispute Tribunal concluded that urgency exists when the contested decision may be implemented before the consideration of the substantive appeal on the merits, and as a result, the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful in the substantive case, especially if the position were to be filled;

j. The matter is urgent due to the impending recruitment of the selected candidate. It is the Applicant's understanding that the selected candidate is yet to commence his employment as the Senior Statistics Specialist (Poverty and Gender) P-5, and the Applicant continues to perform the functions of the Post and no official hand-over has taken place.

k. The Applicant has discussed his non-selection for the Post with his superiors and tried to resolve the matter internally. Once he realised that no genuine efforts were being made to resolve this matter, the Applicant

immediately took steps to file a management evaluation request and the present application and this is, therefore, not a case of self-created urgency;

Irreparable damage

l. It is trite law that loss that can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, this Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage;

m. In the present case, if the impugned decision is implemented, the Applicant will suffer harm due to the loss of employment and in relation to his career prospects. Specifically, he will lose the opportunity to advance his career at UNICEF. Such harm cannot be compensated for by a monetary award.

Respondent's submissions

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

Receivability

a. Suspension of action is only possible regarding decisions that have not been implemented. Selection decisions are considered implemented, if (i) an offer has been issued, and (ii) the Administration received the selected candidate's unconditional acceptance of offer of appointment. As both conditions have been met, the application for suspension is not receivable;

Urgency

b. Should the Tribunal find that the application is nonetheless receivable, no particular urgency requires the impugned to be suspended. Where a selected candidate is an internal candidate, UNICEF's Staff Selection Policy

provides that “[s]elected staff members shall normally be released from their current function, and take up their new function, within two months from date of the offer ...” (CF/AI/2016-005, s. 8.2);

c. The estimated start date for the selected candidate for the Post is 1 March 2018, more than one month after completion of review of the management evaluation request that the Applicant filed on 26 December 2017;

Irreparable damage

d. In view of the estimated start date, there is no likelihood that the Applicant would suffer irreparable harm before completion of review of his management evaluation request as his post is not scheduled to be abolished until 31 January 2018.

Consideration

10. 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.

11. 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”.

12. 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.

13. 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.

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

14. 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 specific 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 (see, for instance, *Hassanin*

2017-UNAT-759 as affirmed in *Zachariah* 2017-UNAT-764, *Smith* 2017-UNAT-768).

15. 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.

16. 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.

17. 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.

18. 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)).

19. In the present case, the decision subject to the management evaluation is the selection decision for the Post and the Applicant is requesting the suspension selection process, including the appointment of the selected candidate. 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

20. 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 26 December 2016, which 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. The Tribunal notes that there is no evidence on record that the UNICEF has completed its evaluation. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending and 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

21. 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.

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

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. On 6 December 2017, UNICEF provided the selected candidate with an offer for employment for the Post. On 11 December 2017, the selected candidate accepted the offer, stating that he would be available on 1 March 2018, thereby notifying the Administration of his unconditional acceptance of the conditions of the offer within the given time limit. Reference checks have been now concluded and, on 18 December 2017, the candidate's medical clearance was received.

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* UNDT/2012/109, upheld by the Appeals Tribunal on appeal in *Tiwathia* 2013-UNAT-327, 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 it is not required to be in a written form for it to be valid. It is a contract in which the successful 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 works 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. 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. Consequently, in the present case, the Tribunal finds that the selection decision was implemented on the date when UNICEF presented its offer regarding the Post to the selected candidate on 6 December 2017, and that, on 11 December 2017, it was followed by the formation of the selected candidate's employment contract upon her unconditional acceptance of this.

29. The Tribunal further finds that, since the contested decision has already been 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

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

The application for suspension of action is rejected.

Observation

31. The Tribunal observes that the Applicant was informed on 7 November 2017 that his post at the P-4 level, step 12, as Policy Specialist in New York is to be abolished on 31 January 2018 and, as results from the Applicant's uncontested statement, he was first informed about the abolition of his post on 16 March 2017

when he was also told that this abolition “was to be processed by the creation of a new ‘non-technical’ post in the Social Inclusion and Policy section” and “that the remaining responsibilities of [his] current post, including those relating to ‘poverty measurement’ would be reallocated to a post in the Data and Analytics section”.

32. However, the Tribunal observes that in the list of current available suitable posts provided by the Respondent on 27 December 2018, these two posts are not mentioned and it is unclear if they will be created in UNICEF Headquarters in New York before 31 January 2018, in order for the abolition of the Applicant’s post to be processed as announced. It also appears that in the absence of these two posts, UNICEF cannot process the abolition of the Applicant’s post and that he may continue to perform his functions on his post until the creation of the two new posts, if any, and on the Post (Senior Statistics Specialist at P-5 level post in the Data and Analytics) section until 1 March 2018, when the selected candidate will effectively assume her duties.

33. Further, the Tribunal observes that the Applicant, as the incumbent of a post that currently covers the responsibilities of the two future posts mentioned above, appears to have the required competencies for any of them.

34. The Tribunal underlines that a staff member’s post may only be abolished by his/her employer when all the functions of that post are no longer needed or the post is no longer funded, and it consists in the annulment/disappearance of the post. The abolition of a post may not be considered effective genuine, and therefore lawful, if the post is only renamed or/and moved in a different unit or if other post(s) with identical or similar functions are created in the same unit or in different units after the abolition.

35. The Tribunal underlines that according to the mandatory provisions of staff regulation 9.3(a)(i) and staff rules 9.6(c)(i) and 9.6(e)(iii), regarding the right of a staff member, including the Applicant, with a fixed-term contract in case of abolition of his/her post to express his/her interest and to be retained in any available suitable

post(s), without having to go through a competitive selection process. This information process must be transparent and fair and include full disclosure of all available suitable posts at the staff member's level, vacant or occupied by staff members with temporary contracts or at a lower level, vacant or occupied by staff members with fixed-term contracts or temporary contracts.

36. The Tribunal express its trust that UNICEF will observe and implement correctly these mandatory rules in the Applicant's case.

(Signed)

Judge Alessandra Greceanu

Dated this 29th day of December 2017