



Before: Judge Alexander W. Hunter, Jr.
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

MCCARTHY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 13 February 2018, at 7:51 p.m., the Applicant filed an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure. In this application, the Applicant described the decisions that he seeks to suspend as follows:

I applied to a Recruitment from Roster ["RFR"] [Job Opening No. 88314, "JO#88314"], Chief of Unit, Procurement in Kabul, Afghanistan. I was informed by [name redacted, Mr. HJ], the [Chief Mission Support, "CMS"] of [the United Nations Verification Mission in Colombia, "UNVMC"] on 04 January 2018 that I [was] placed second on the list of suitable candidates and [name redacted, Mr. NR] [was] placed first on the list of suitable candidates. However, [Mr. HJ] informed me that [Mr. NR] rejected the offer to work as Chief of Unit, Procurement to remain in Bagdad as Chief Procurement Officer. I was notified by [name redacted, Ms. NJ], Chief Human Resource Officer, "Reference is made to your email inquiring on the status of [United Nations Assistance Mission in Afghanistan, "UNAMA"] subject job openings both RFR (#88314) and [Temporary Job Opening No. 92245, "TJO#92245"], please be advised that the mission will cancel RFR JO#88314, since [it] did not yield female rostered applicants." In accordance with the United Nations Hiring Manual, "The Hiring Manager shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list. In this respect, reference is made to a judgement made in the [United Nations Dispute] Tribunal on cancellation of a vacancy announcement [...]: [Verschuur UNDT/2010/153].

2. On 14 February 2018, the Registry of the Dispute Tribunal in New York acknowledged receipt of the application, transmitted it to the Respondent according to art. 13 of the Rules of Procedure and, under the instructions of the assigned Judge, directed him to file a reply by 15 February 2018, at 5:00 p.m.

3. On 15 February 2018, the Respondent duly filed his reply in which he submits that the application is not receivable *ratione materiae* as the contested decision is not a final administrative decision because the recruitment process for the position is ongoing. Should the Dispute Tribunal find the application receivable, the Respondent

contends that the three conditions for granting an order for suspension of action under art. 2.2 of the Dispute Tribunal's Statute have not been met.

Background

4. In his application for suspension of action, the Applicant present the factual background as follows:

- ... 16 November 2017: [the Applicant] applied for a Recruitment from Roster (RFR) post #88314, Chief of Unit, Procurement in Kabul, Afghanistan.
- ... 04 January 2018: [Mr. HJ], CMS of the United Nations Verification Mission in Colombia met with me in his office. He informed me that he had spoken to the CMS of UNAMA and the CMS of UNAMA informed him that [Mr. NR] placed as #1 of qualified and suitable candidates and [the Applicant] place[d] as #2 of qualified suitable candidates. [Mr. HJ] also informed me that he essentially convince[d] [Mr. NR] by way of a separate telephone call, not to accept the Chief of Unit, Procurement in Kabul, Afghanistan and to remain as the Chief Procurement Officer in Bagdad, Iraq because he [Mr. HJ] would soon be leaving Bogota, Colombia to be the CMS in Bagdad, Iraq. [Mr. NR] agreed with [Mr. HJ's] suggestion. [Mr. HJ] also informed me at this meeting: "Don't be surprised if you receive a job offer within ten (10) days."
- ... 31 January 2018: I noticed that a [TJO] post #92245 was posted for the Chief of Unit, Procurement in Kabul, Afghanistan and I applied immediately. Subsequent to applying for this TJO, I sent an email to [names redacted, Ms. NN and Ms. JYS] requesting an explanation as to why a TJO was posted when I had applied to an RFR for which I was deemed qualified and suitable. I stated: "Dear [Ms. NN and Ms. JYS], I've applied to this position (#92245) for the second time herein yet I have never been notified of the outcome of my original application when I applied for this position under #88314." [Ms. NN] responded: "Dear Perry, I checked with the desk that deals with UNAMA and they informed me that the mission was hoping to find a woman as their gender balance is not good. We hope that if they do not find anyone, they will consider you. Thanks." I responded: "Dear [Ms. NN], Thank you for your prompt reply. I understand the policy of gender equality/parity and its importance, however, it seems unfair to the male candidates who have applied and who are suitable for

which no female candidates have applied. Thank you and best regards.” I did not receive a reply to this email from Ms. NN.

- ... 31 January 2018: I filed a request for assistance to [the Office of Staff Legal Assistance, “OSLA”]. [Name redacted, Ms. EK] from OSLA responded and had informed me that it was premature for OSLA to assist me at this time as I had not received notification that I was not selected however upon receiving confirmation that I was not selected I should either file another request for assistance to OSLA or with [the Management Evaluation Unit, “MEU”].
- ... 02 February to 12 February 2018: I sent several follow up emails to [Ms. JYS and Ms. NN] requesting a status update on the RFR process for which no reply was received.
- ... 13 February 2018 I received an email from [Ms. NJ]: “Reference is made to your email inquiring on the status UNAMA subject job openings both RFR and TJO, please be advised that the mission will cancel RFR JO #88314, since the JO did not yield female rostered applicants.”

5. In the application, the Applicant further indicated that the contested decision had been implemented on 13 February 2018.

6. In his reply, the Respondent presents the facts relating to the recruitment process as follows:

... On 15 December 2017, the Hiring Manager recommended for selection three male candidates, including the Applicant. No female rostered candidates applied in response to [JO#88314] [reference to footnote omitted]. While the usual consultation procedures for recruitment in procurement cases were being undertaken, the proposed recommended candidate indicated that he was no longer interested in the [p]osition.

... On 27 December 2017, the Special Representative of the Secretary-General (“SRSG”) informed UNAMA staff of the non-approval of UNAMA’s budget for 2018, and the receipt of a commitment authority in its place (General Assembly resolution 72/262, part XXII, [para.] 36). The SRSG advised that all UNAMA staff contracts were to be extended for only three months, from 1 January 2018 to 31 March 2018.

... The non-approval of UNAMA’s budget was a material change in circumstances with respect to recruitment for the [p]osition. Given the budgetary uncertainty, UNAMA determined that it was prudent not to proceed with the regular recruitment for the [p]osition until such

time as the budget was approved. In addition, UNAMA's mandate is due for renewal in March 2018 and may also impact on all future recruitment. In light of these developments, UNAMA decided to cancel [JO#88314] and advertise the [p]osition on a temporary basis in [TJO#92245].

... The Appeals Tribunal has recognized that the discretion of the Organization to restructure extends to the cancellation of recruitment due to organizational or budgetary reasons (*Simmons*, 2013-UNAT-425, [para.] 31). Therefore, the decision to cancel Job Opening No. 88314 due to the budgetary constraints faced by UNAMA is lawful.

... In any event, the failure to identify a suitable female candidate for the [p]osition was a serious concern for UNAMA. As recognized under section 1(x) of ST/AI/2010/3, selection decisions are required to take into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender. The Secretary-General has announced that one of his priorities is the achievement of gender parity at all levels throughout the Organization, including missions [reference to footnote omitted]. The level of female representation among UNAMA staff at P-4 level stands at 43%, which is not desirable. As such, the objective of gender parity is a relevant factor to take into account when making a selection decision or to cancel a job opening.

Consideration

Has the contested administrative decision already been implemented?

7. It follows from the consistent jurisprudence of the Appeals Tribunal that the Dispute Tribunal is competent to review its own competence or jurisdiction and that this competence can be exercised even if the parties do not raise the issue because it constitutes a matter of law (see, for instance, *O'Neill* 2011-UNAT-182, *Tintukasiri et al.* 2015-UNAT-526 and *Babiker* 2016-UNAT-672).

8. The Dispute Tribunal's Statute, art. 2.2, as restated in art. 13 of its Rules of Procedure, provides that (emphasis added):

... 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...

9. This means that if a contested decision has already been implemented, there is no longer a matter for the Tribunal to suspend and the application for suspension of action is therefore not receivable.

10. The Appeals Tribunal has further found that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed” (see *Fasanella* 2017-UNAT-765, para. 20, and also *Hassanin* 2017-UNAT-759).

11. In the present case, for all intents and purposes, the decisions that the Applicant seeks suspension of action on are the two decisions to: (a) cancel JO#88314 and (b) proceed with the recruitment for the relevant post with TJO#92245, both of which the Applicant argues were unlawful in the relevant circumstances. This case is therefore different from *Ngokeng* 2014-UNAT-460, which the Respondent relies on in his reply, because the Appeals Tribunal specifically in this judgment found that, in essence, this latter case concerned one selection process as the initial job opening for recruitment from roster was only “suspended—that is, halted temporarily—not cancelled” (see para. 35).

12. In the present case, it follows from the parties’ presentation of the facts and the documentation on record that:

- a. The Applicant applied for JO#88314;
- b. JO#88314 was cancelled and TJO#92245 was advertised (starting from 30 January 2018) to replace it;
- c. The Applicant then applied for TJO#92245;

d. The posting period for TJO#92245 expired on 5 February 2018 and, as per 15 February 2018, TJO#92245 was no longer available (a copy of the TJO was appended to the Respondent's reply).

13. At this point, both the decisions to cancel the JO#88314 and proceed with TJO#92245 have been executed and therefore also implemented. In conclusion, there is therefore no longer any decision for the Tribunal to suspend under art. 2.2 of its Statute.

14. The Tribunal, however, notes that the explanation for the cancellation provided by the Respondent in his reply would appear not to correspond to that which the Applicant was provided by UNAMA. If the Applicant was not provided with the correct reason, this is unfortunate as this could possibly have avoided the present case.

Conclusion

15. As the contested decision has already been implemented, the application for suspension of action is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 16th day of February 2018