



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

PASSARELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Marcos Zunino, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. On 24 March 2020, the Applicant, a Human Rights Officer at the P-4 level with the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure for the Tribunal to suspend, pending management evaluation, the decision not to select her for the position as Senior Human Rights Officer at the P-5 level with OHCHR in New York under Job Opening no. 110837.

2. On the same date (on 24 March 2020), the Registry served the application on the Respondent, instructing him to file a reply by 27 March 2020.

3. On 27 March 2020, the Respondent filed his reply. He contends that the application for suspension of action is, in effect, not receivable as the contested selection decision has already been implemented and that, in any event, it is *prima facie* lawful.

Background

4. After the Applicant had applied for Job Opening no. 110837, she passed the written test and interview round for the position.

5. By interoffice memorandum from an OHCHR Director in New York to the High Commissioner for Human Rights (through the Assistant Secretary-General for Human Rights) dated 22 January 2020, it was stated that “[a]s a result of the interview process, the Panel determined that [among others, the Applicant] met the requirements of all competencies and [was] therefore recommended” for the post. It was further stated that “[o]ut of these recommended candidates, the panel agreed, and the hiring manager endorsed [the Applicant] as the preferred candidate”. It was further explained that “[the Applicant] received the highest interview assessment of all candidates by the panel, and she also scored the highest grade of all recommended candidates on the blindgraded written assessment”.

6. By email of 10 March 2020 from an OHCHR staff member, another candidate for the post was, however, informed that “the Head of the Department ha[d] selected [him] for the position”. He was requested to “confirm by return e-mail, within five business days of receipt of this message, [his] continued interest in and availability for this position”.

7. By email of the same date (10 March 2020), the successful candidate unconditionally confirmed that he “would like to accept the position”.

8. By a formal letter dated 12 March 2020—the letter head states “the Human Resources Management Services”, “Division of Administration”, “United Nations Office at Geneva” and the letter is signed by a “Human Resource Officer”—the successful candidate was again informed that “you have been selected to fill the vacant post of Human Rights Officer in the High Commissioner for Human Rights, in New York, following Job Opening No. 19-HRI-OHCHR-110837-R-New York (X)”.

9. It was further stated that the “effective date of [his] promotion” to the P-5 level was 1 April 2020 and that he would “[i]n due course” be “notified of the Personnel Action reflecting this matter”. No reference whatsoever was made to the issuance of a letter of appointment or that the selection decision was conditioned upon any other prerequisites.

Consideration

Legal framework

10. Under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, 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.

11. The Dispute Tribunal can therefore only suspend the contested decision if it has not already been implemented. Otherwise, the Tribunal has no jurisdiction to do so, and the application is therefore not receivable.

Has the contested decision already been implemented?

12. The Applicant contends that since “the selected candidate is internal, the decision cannot be implemented until the first day of the month following the decision”. In response, the Respondent submits that the selection “decision was implemented on 10 March 2020 upon the official communication to the staff member” and that the staff member “unconditionally accepted the offer on the same day”.

13. The Tribunal notes that ST/AI/2010/3 (Staff selection system), under which the parties agree that the contested selection decision is governed, stipulates that “[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned” (see sec. 10.2, first sentence).

14. As a point of departure, the deciding moment for implementation of a selection decision is therefore “its official communication to the individual concerned”. Section 10.2, second sentence, then adds that 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”.

15. The Tribunal notes the different approaches that the Dispute Tribunal has taken in the past regarding the interpretation of sec. 10.2 and the meaning of the word “effective” in the second sentence (see, for instance, *Finniss* Order No. 116 (GVA/2016) and *Wilson* Order No. 241 (NY/2016)). At the same time, the Tribunal notes the Appeals Tribunal’s jurisprudence on the formation of the employment contract according to which the determinative action is the issuance of the letter of appointment and that until then only “quasi-contract” exists (see, *Al Hallaj* 2018-UNAT-810, paras. 38 and 39).

16. As this Tribunal interprets sec. 10.2, the implementation of the contested selection decision and the timing of when the resultant promotion becomes effective are two different matters. The implementation of a selection decision is when the successful candidate receives the “official communication” concerning her/his selection and can reasonably rely on it (see, for instance, *Sina* 2010-UNAT-094, which affirms the liability definition of *Sina* UNDT/2010/060, and *Cranfield* 2013-UNAT-367). The effectiveness of a promotion is instead a question of when the relevant staff member can actually benefit from this promotion in terms of, for instance, salary increase and ability to apply for higher level positions.

17. Regarding the formation of the employment contract, under general principles of contract law, such contract would be formed upon the successful candidate’s unconditional acceptance of the job offer (similarly, see *Wilson*, paras. 22-32 and the Appeals Tribunal caselaw referred to therein: *Sprauten* 2011-UNAT-111, *Iskandar* 2012-UNAT-248 and *Cranfield* 2013-UNAT-367). In the present case, the Applicant unconditionally accepted the job offer on 10 March 2020.

18. The Appeals Tribunal has, however, also held that “the employment contract of a staff member subject to the internal law of the United Nations is not the same as a contract between private parties” (see *Sprauten*, para. 24). In the present case, by a formal letter of 12 March 2020, which has all the characteristics of an official communication, a Human Resources officer informed the successful staff member that he had been selected for the relevant position.

19. In this context, the Tribunal finds that the issuance of the letter of appointment is not important. In line with sec. 10.2 of ST/AI/2010/3, nowhere in the correspondence between OHCHR and the successful candidate is any reference made to the implementation of the selection decision being conditioned upon issuance of such a letter of appointment. There is therefore no statutory or contractual basis for the Tribunal to make any other finding that at the very latest, the selection was implemented on 20 March 2020.

20. As the Applicant filed the application to the Dispute Tribunal on 24 March 2020 and the selection had already been implemented at that time, the application for suspension of action is therefore not receivable.

Has the Administration already suspended the contested decision during management evaluation?

21. In the reply, the Respondent states that he “informs the Tribunal that the effective date of the appointment of the selected candidate has been put on hold as OHCHR has decided not to process the selected candidate’s appointment to the P-5 position pending the review”. Annexed to the reply, the Respondent appends an email from which follows that the OHCHR Chief of Human Resources writes to “hold the personnel action for [...] promotion to P-5 [New York Office—do not process”.

22. The Tribunal does not understand from the reply to what “review” the Respondent refers: the present judicial review of the Tribunal or the concurrent management evaluation review? In any event, the Tribunal observes that, as it has already concluded that the application is not receivable, it considers that this has no effect on its decision

Conclusion

23. The application for suspension of action is rejected as not receivable.

(Signed)

Judge Joelle Adda

Dated this 30th day of March 2020