Case No.: UNDT/NY/2010/062
Order No.: 62 (NY/2010)
Date: 5 April 2010

Introductio n

1. This is an application for suspension of action by a staff member, who was part of a promotion exercise, seeking an order preventing the appointment in question from taking place. The application was heard on 29 March 2010 and I delivered an *ex tempore* judgment refusing the order. The following is the text of that judgment, with minor editorial change s to clarify a point or correct a grammatical solecism.

Facts

2. The applicant was short-listed in a promotion exercise, interviewed and recommended for appointment. The applicant claims that she was told that another interviewed candidate was recommended as preferred to her but that a rostered candidate member was appointed who, assumedly, had not been interviewed. She said she was told this by the Programme Case Officer, who sat on the interview panel. He also said that the appointment was political . The full context in which this opinion was conveyed is not the subject, of evidence, but, in light of what I must do in respect of this application, it is unnecessary to enter that particular arena. It is enough to say that the expression of such opinion without an explanation of its basis provides a very slight evidentiary foundation for a conclusion that the opinion was correct and I would not be prepared to accept that irrelevant considerations were taken into account in making the decision on the basis of a hearsay account of this character. Much depends, also, on the sense in which the term political was meant.

The relevant criteria

3. Article 2.2 of the Tribunal s Statute specifies the prerequisites for suspending implementation of an administrative decision, here the decision to appoint another candidate than the applicant. Taking these requirements in order (though there is no priority), the first question is whether the applicant can show that the decision is prima facie unlawful. In this case, as a practical matter, this test can be applied by

Lastly, even if the Tribunal could make an order for specific performance in favour of the applicant, art 5(a) of the Statute would require the specification of an amount of compensation that the respondent could pay in lieu. Thus, since payment rather than substantive relief is the only possible obligatory outcome upon the hypothesis that the applicant would ultimately succeed, she cannot show irreparable harm.

5. The third hurdle an applicant for a suspension of action must pass concerns the urgency of the need for relief. For the reasons I have given, the only order that could be made in this case would be for financial compensation, which would, of course, be limited to the loss suffered by virtue of her failing to be promoted, hence to the difference in emoluments between her present position and that to which she aspired. It follows that it is not possible to conclude that the matter is urgent, since any loss can be compensated by an award of money.

Conclusion

6. The application for suspension of action must be dismissed.

7. It will be observed that I did not refer to any submission made by the respondent. The counsel has had the courtesy to appear and has sought leave to appear on his behalf. I have already over the past several weeks explained why the respondent has no right to appearance whilst he remains disobedient to orders of the Tribunal. I do not propose to repeat those explanations here.

8. One matter, however, needs to be explained. The situation in which the respondent disobeys an order for production of documents which are essential to the fair trial of an application within the jurisdiction of Tribunal to determine must mean that the respondent is not entitled on the one hand to put the staff member to proof and, on the other, to refuse to provide the evidence necessary to determine the issue. To require the staff member to prove a case which depends whilst withholding the means of proof is plainly an abuse of the process of the Tribunal were it to be

permitted. In such a situation it is obvious that, providing the Tribunal has jurisdiction, judgment must be by default given to the staff member.

9. The present case, however, does not involve the respondent refusing to provide relevant evidence, and accordingly my tentative view is that requiring that satisfaction of the statutory prerequisites before suspension of action is granted cannot be avoided by a default judgment. This does not affect the question whether the respondent should be permitted to appear and I refuse leave.

10. For the reasons that I have given, the application must be dismissed.

(*Signed*)

Judge Adams

Dated this 5th day of April 2010