



Date: 3 May 2013

Introduction

1. On 26 April 2013, the Applicant, a staff member in the Programme Division, United Nations Entity for Gender Equa

Phase 1 of the Competitive Selection Process which would only be opened to internal candidates, but limited to newly established and vacant positions.

4. In the lead up to the second RAP, the Applicant, pursuant to the Human Resources Guidelines for Implementation of the Regional Architectural Process (“Guidelines”), forwarded her three most recent performance evaluations and terms of reference for additional functions of her post. The Tribunal notes that the Applicant’s two most recent performance evaluations had a final overall rating of “Outstanding Performance”.

5. On 21 March 2013, the Applicant received a letter from the Director, Management and Information, UN Women, informing her that the Executive Director, UN Women, had, as part of the most recent RAP, approved the Management Review Committee’s (“MRC”) recommendation that her position “not [be] aligned in the new structure due to a significant change (more than 20%) in the functions in the new job description vis-à-vis [her] existing job description”. In the same letter, the Applicant was strongly encouraged to participate in the internal competitive selection process as well as to apply for any other available vacancies in UN Women. The Applicant was further informed that unaligned staff were to be given priority consideration in Phase I and that the unaligned positions would only be open to unaligned staff members as well as staff members that did not accept their aligned positions.

6. The Applicant contends that the functions of her post have not changed by more than 20 per cent, that the newly established job description does not materially differ from the previous one, and that there have been no changes in levels of accountability and responsibility for the post as suggested by the MRC.

7. On 5 April 2013, the Applicant was provided with a copy of the new job description which she stated had a deadline of 26 April 2013 for applications for the post. On 15 April 2013, she was provided with the description of her current position.

8. On 26 April 2013, the Applicant requested management evaluation of the “decision not to align the functions of her post in the most recent alignment process and the recruitment exercise for her post that results from this decision”. As part of her request for management evaluation, the Applicant also requested suspension of action of the contested decision “and consequently suspension of the recruitment exercise currently underway in relation to this post” as “this recruitment process is part of the decision not to align the functions of her post. Therefore a challenge to the basis for the non-alignment is also a challenge to the recruitment exercise taking place in relation to this post. Since this recruitment exercise is ongoing it follows that the administrative decision challenged has not yet been implemented”.

9. On the same day, the Applicant also filed the current application with the Tribunal requesting suspension of “the decision not to align the functions of her post in the most recent alignment process and the recruitment exercise for her post that results from this decision”. However, the Applicant, at para. 23 of her application, is requesting that the Tribunal “order the suspension of the decision not to align the functions of the Applicant’s post pending a decision from the Management Evaluation”.

Parties’ submissions

10. The Applicant submits that the decision not to align her post is unlawful as the functions of her post have not changed by more than 20%, that the newly established job description does not materially differ from the previous one, and that there have been no changes in levels of accountability and responsibility for the post as suggested by the MRC. Furthermore, the contested decision has resulted in a recruitment process with an application deadline of 26 April 2013, and “[i]t follows that if the decision not to align the functions of the post is unlawful then the recruitment exercise itself is also unlawful”. She contends that this is not a case of self-created urgency as she could not assess the legality of the decision she is

contesting, until she was able to compare the description of the new post with her current one.

11. In sum the Applicant contends that the matter is urgent and that if the recruitment process is allowed to continue, the selection of another candidate could possibly be made, resulting in her separation from UN Women, unless she is successful in an application for a different post (which she does not indicate she has made). She contends that if the selection exercise is allowed to continue she will, as a result of the failure to align her post, suffer irreparable harm by her separation on short notice after a long period of service, as a result of the loss of a career opportunity.

12. The Respondent contends that the Applicant has not shown that the contested decision was *prima facie* unlawful, particularly as the decision not to align the General Service posts was made without regard to the current incumbents, that there is no urgency as the Applicant's contract does not expire -22Seg(after a lonice that3a0 10i.155 -1.2

Consideration

14. This is an application for a suspension of action pending management evaluation. It is an extraordinary discretionary relief, which is generally not appealable, and which requires consideration by the Tribunal within five working days of the service of the application on the Respondent (art. 13.3 of the Rules of Procedure). It is interim relief intended to preserve the status quo pending management evaluation and is not meant to make a final determination on the substantive claims.

15. Article 2.2 of the Statute of the Tribunal provides that it 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 cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

16. It follows from art. 2.2 of the Statute that should a contested decision have already been fully implemented, the Tribunal generally will no longer have the authority to order the suspension of the contested decision pending the completion of the management evaluation. However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013)), the Tribunal may grant a request for a suspension of action.

Implementation

17. The Respondent contends that the impugned decision, the nonalignment of post, has already been completed and implemented and the application is therefore not receivable. The Respondent further submits that the competitive selection exercise is still ongoing and that no decision has been made that would affect the Applicant's rights in this regard. The Applicant on the other hand contends that

the ongoing selection exercise, being a direct consequence of the non-alignment of her post, means that it has the potential to affect her legal rights.

18. In the case of *McLetchie* UNDT/2012/032, the Tribunal found the application receivable as in that case the contested decision had the effect of bringing the applicant's participation in the selection process to an end, as the decision that she was ineligible to participate in the selection process had already been made and the respondent had failed to show to the Tribunal's satisfaction that any final review of the selection process by a central review body would encompass a review of the candidates' eligibility to be part of the process.

19. In this particular instance, the Respondent contends that the RAP will be subject to further scrutiny before the management evaluation and that an application for suspension of action does not lend itself to a detailed analysis of the RAP process. The case of *McLetchie* is clearly distinguishable, as in the instant case, the Applicant is eligible to participate in the ongoing selection process in which her long service, experience and performance record should stand her in good stead. However, she contends that the non-alignment decision cannot be separated from the resulting selection exercise which is ongoing and could affect her rights.

20. Matters regarding the implementation of an administrative decision are often complicated and are not always clear cut, particularly when the Tribunal does not have all the relevant information at hand and has to render a decision in a short time. In light of its findings below on the merits of the request for suspension of action, and taking into consideration the Appeals Tribunal judgment in *Saka* 2010-UNAT-075, the Tribunal finds that it need not decide the issue of implementation in this case.

Requirements for suspension of action

21. As previously stated, the Tribunal can only suspend a contested decision if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

22. For the *prima facie* unlawfulness test to be satisfied, it is enough for

or was biased, that the failure to align her post was motivated by any extraneous factors such as her age or performance, or that the applicable procedural rules of the RAP for determining whether or not a post should be aligned, including having a staff representative involved in the process, were not properly carried out.

27. On the evidence available before it, the Tribunal cannot make a finding of *prima facie* unlawfulness of the process by which certain posts were