



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 15 June 2016, the Applicant filed an application seeking suspension, pending management evaluation, of the suspension decision for Chief, Information Management Systems Service, D-1 [level] United Nations Joint Staff Pension Fund [UNJSPF]. The Applicant is presently employed as Chief (D-1 level), Financial Information Operations Service, Office of Programme Planning, Budget

7. The Applicant has been on the pre-approved roster for D-1 positions since October 2008, when he was promoted to the D-1 level in OPPBA. In 2012 and 2013, he was additionally rostered twice at the D-1 level in the Information and Communication Technology (“ICT”) job family.

8. The contested job opening was publicly advertised through Inspira (UN’s career and job website) on 13 April 2016 with the deadline of 11 June 2016. The Chief Executive Officer (“CEO”) of UNJSPF and Deputy CEO were

12. On 27 May 2016, the selected candidate P-5 level staff member with the Office of Internal Oversight Services (“OIOS”)—was notified by email of his selection. On the same day, the selected candidate replied to the selection notification, also by email, stating that he was “happy to confirm [his] interest and availability for this position”.

13. On 31 May 2016, UNJSPF sent an email to OIOS requesting the release of the selected candidate for transfer to UNJSPF. On the same date, the OIOS Executive Office confirmed, by email, the release and approved the transfer of the selected candidate effective 30 June 2016.

14. On 3 June 2016, the Applicant received an email from Inspira announcing the selection of the rostered P-5 level staff member.

15. Also on the same day, the Applicant received an email from Inspira announcing the selection of the rostered P-5 level staff member.

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Applicant's submissions

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

Receivability

a. The contested decision will not be implemented until 1 July 2016; accordingly, the application is receivable (sec. 10.2 of ST/AI/2010/3 (Staff

Irreparable damage

e.

21. 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.

22. In accordance with art. 2.2 of the Dispute Tribunal's Statute, 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. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

23. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

24. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects, but so bearing in mind that the matter is not at the merits stage at this point of the proceedings.

25. It also follows from the language of art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure that suspension of action of a challenged decision may only be ordered when management evaluation of that decision has

been duly requested and is still ongoing (see *Medion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256). Furthermore, as stated in *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010-UNAT-011, *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed (para. 19). It follows also that an order for a suspension of action cannot be used to restore a situation or reverse an allegedly unlawful act which has already been implemented (see *Candolfo* Order No. 101 (NY/2013)).

Receivability

Contested decision

26. Although the Applicant identifies the contested decision as the “[s]election decision for Chief, Information Management Systems Service”, he states in his application that the date on which the decision is to be implemented is 1 July 2016. Therefore, it is clear that the Applicant seeks suspension of the entirety of selection process, including the appointment of the selected candidate effective 1 July 2016.

Implementation

27. It follows from art. 2.2 of the Tribunal’s Statute, that where an administrative decision has been implemented, a suspension of action may not be granted (*Candolfo* Order No. 101 (NY/2013)). However, in cases where the implementation of the decision is an ongoing matter (see, e.g. *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013); *Gallieny* Order No. 60 (NY/2014), the Tribunal may grant a request for a suspension of action.

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(GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

16. The structure of ST/AI/2010/3 obviously distinguishes between selection decisions on the one hand and their notification and implementation on the other (see sec. 9 and sec. 10 of ST/AI/2010/3).

17. Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision (see *Wang* UNDT/2012/080, *Tiwathia*

Prima facie *unlawfulness*

34. For the *prima facie* unlawfulness test to be satisfied, the Applicant is

Recommendation

Overall rating: Outstanding

Recommendation: Recommended

General Comments

[The selected candidate] is a ~~best~~ candidate currently working in OIOS. He is very familiar with the functioning of the UNJSPF based [on] his many years as ~~Chief~~, IT Audit assigned to the Pension Fund. He therefore ~~has~~ extensive experience in pension matters, both from the IT and business perspectives and is considered highly suitable for this position. The hiring manager recommends the selection ~~of~~ this rostered candidate.

38. The “Assessment” page disclosed by the Respondent raises a number of concerns. Notably, it appears that the ~~sole~~ candidate or any other candidates were not evaluated against any of the ~~five~~ competencies listed in the job opening, as they are all indicated as “Not Applicable”.

39. Further, there is no actual explanation as to why the selected candidate was preferred over other candidates. ~~There~~ is no record of any substantive comparative evaluation of any of the ~~candidates~~ who applied for this position.

40. The Tribunal also considers that additional submissions will be required on whether it is indeed permissible ~~to~~ conclude a recruitment process in this manner, given the wording of the job opening, which contained no reference to it being a roster-based recruitment exercise.

41. Further, it is a matter of concern ~~that~~ the publically-published job opening stated clearly that the closing date ~~for~~ applications was 11 June 2016, yet that deadline was not respected. Presumably, ~~the~~ job opening remained open until 11 June 2016, more applications—including from rostered candidates—would(a)-.9(nne397 Tw

accountability in the recruitment system. The issues highlighted above suggest that the selection process in this case may have been an arbitrary exercise, in breach of the general requirements stipulated in the United Nations Charter and staff regulation 4.2.

43. Accordingly, on the papers before the Tribunal, there are serious and reasonable concerns as to whether the selection exercise was lawful.

44. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Urgency

45. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of an application is only to be granted in cases of particular urgency.

46. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangalista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Madamoran* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

47. The Applicant filed the present application on 15 June 2016, eight working days after becoming aware of the contested decision, and the contested decision is set to be implemented on 1 July 2016. The Tribunal finds that there is

no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

48. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

49. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. *Magdo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

50. The Applicant submits, in effect, that there are very few opportunities for lateral moves at the D-1 level and that being able to be fully and fairly considered for them would have an adve

53. In the circumstances and on the ~~papers~~ before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Applicant's motion for production of evidence

54. On 15 June 2016, the same day ~~the Applicant~~ filed his application for suspension of action, ~~he~~ also filed a motion for ~~production~~ production of evidence, seeking an extensive disclosure of records ~~related~~ relation to his claims. The Respondent opposes the Applicant's motion on the ground of relevance. The Respondent submits that all documents relevant to ~~the~~ selection exercise in question have been attached to his reply.

55. In light of the findings made herein~~and~~ in view of the urgent nature of these proceedings, the Tribunal does not find it necessary to order production of further records, as requesting by ~~the~~ Applicant in his motion of 15 June 2016.

56. However, the Tribunal finds it ~~is~~ appropriate to make the following

Conclusion

57. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied. Accordingly, the decision to select and appoint the candidate is confirmed. In light of its findings, the Tribunal orders that the candidate be appointed to the position of [redacted] in the [redacted] category, effective from [redacted].