
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/073

Order No.: 276 (NY/2016)

Date: 16 December 2016

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WILSON

v.

Introduction

1. On 9 December 2016, the Applicant filed an application seeking suspension, pending management evaluation, of the selection decision for the post of Chief, Information Management Systems Service (D-1 level) with the United Nations Joint Staff Pension Fund (“UNJSPF”) in New York. The Applicant “seek[s] suspension of the entirety of [the] selection process, including the appointment of the selected candidate, effective 1 January 2017”.

2. The Applicant is employed as Chief (D-1 level), Financial Information Operations Service, Office of Programme Planning, Budget and Accounts (“OPPBA”), Department of Management.

3. The Respondent’s reply to the application was timeously filed on 13 December 2016, which the Applicant received same day via the eFiling portal.

Relevant background

4.

2012 and 2013, he was additionally rostered twice at the D-1 level in the Information and Communication Technology (“ICT”) job family.

7. On 13 April 2016, the contested job opening was publicly advertised through Inspira (the UN’s career website). The job opening set forth five competencies against which candidates would be assessed.

8. On 14 April 2016, as a result of being included in the ICT job family roster under the same job code, the Applicant received notification of the job opening. On the same day, he submitted his application and received a confirmation of receipt along with confirmation that he was identified as a rostered applicant for that job opening given his previous placement on a roster of pre-approved candidates for positions with similar functions at the same level.

9. The Chief Executive Officer (“CEO”) and the Deputy CEO of the UNJSPF both served as the hiring managers for this recruitment, with the Deputy CEO acting as the primary hiring manager.

10. On 3 June 2016, the Applicant received an email from Inspira which indicated that a candidate had been selected from the roster. The selected candidate was a rostered P-5 level staff member from the Office of Internal Oversight Services.

11. On 7 June 2016, the Applicant submitted a request for management evaluation of the selection decision, and, on 15 June 2016, he submitted an application seeking suspension of action of the implementation of the selection decision pending management evaluation.

12. On 20 June 2016, this Tribunal, by way of Order No. 147 (NY/2016) suspended the contested June 2016 decision, pending management evaluation.

13. The Applicant submits that the Secretary-General subsequently appealed Order No. 147 (NY/2016). According to the Applicant, the appeal was dismissed.

14. On 30 August 2016, upon the recommendation of the Management Evaluation Unit (“MEU”), the Under-Secretary-General for the Department of Management (“USG/DM”) rescinded the suspended June 2016 selection decision and directed that the selection process be recommenced from, at the latest, the point at which the names of the four rostered candidates were released to the UNJSPF. The USG/DM further decided, “[t]o ensure the fairness of the selection process going forward”,

- UNJSPF should establish a panel, comprising a majority of individuals outside of the UNJSPF and with no prior involvement in this recruitment, to assist the hiring manager in the recruitment;
- The panel should assess whether the rostered candidates meet the requirements and competencies of the job opening. Such assessment should include a review by the panel of candidates’ applications and competency-based interviews, as well as any other evaluation mechanisms which the panel considers appropriate;
- The panel should prepare a documented record of its assessment of the rostered candidates;
- The hiring manager should submit the documented record of the panel and his/her own reasoned recommendation for selection to the UNJSPF Chief Executive Officer for his decision.

15. On 23 September 2016, the Administration invited the Applicant to an interview scheduled for 28 September 2016. The interview was to be conducted via Skype by three interview panel members, one of whom was the hiring manager. The Applicant was also informed that a Human Resources *ex officio* member would be present.

Case No. UNDT/NY/2016/073

Order No. 276 (NY/2016)

Also, the below is the circular sent to many members in OHRM [Office of Human Resources Management] and MEU (someone forwarded to me to show the pithy facing the Fund) which illustrates the level of contempt they have for you:

It is up to you to decide how you want to expose this insane, out of character in the UN that exists in the Fund and how OHRM is supporting their lack of ethics in recruitments.

20. Included with the anonymous email sent on 27 September 2016 was an undated internal email that appears to have been sent by a UNJSPF employee to OHRM and MEU:

Dear [First name of unidentified staff member], and OHRM and MEU colleagues,

We would like to draw your attention to the exchange below, particularly Mr. Wilson's statement on his e-mail dated 23 September: "Knowing all the 4 applicants, all of us are in HQ offices ..." The Fund wants to note its concern that the recruitment/interview process could be compromised given that Mr. Wilson seems to be in possession of detailed confidential info

26. On 3 October 2016, OHRM responded that although OHRM was not in possession of a copy of the questions since the Applicant deleted them, they could not validate whether they were indeed the ones intended for use, but nonetheless action had been taken regarding the questions. The Applicant has attached as Annex 10 to his application the interview questions he recovered from his computer.

27. On 7 October 2016, the Applicant was interviewed by Skype. He states that the interview was disrupted by several disconnections due to connectivity issues.

28. On 7 December 2016, the Applicant noticed the status of the currently contested job opening in Inspira had changed to “selected from roster”.

29. Having spoken to two of the other three interviewed candidates, the Applicant deduced that the recommended panel selected the same candidate as was previously selected (the P-5 level staff member). The Applicant submits that, on 8 December 2016, he requested management evaluation of the contested selection decision.

Applicant’s submissions

30. The Applicant’s principal contentions may be summarized as follows:

Receivability

a. The contested decision will not be implemented until 1 January 2017 as the selected candidate is a P-5 level staff member whose selection is a promotion to the D-1 level. The Application reiterates the rationale applied in Order No. 147 (NY/2016), citing

sec. 10.2 of ST/AI/2010/3 (Staff selection system), which provides that the effective implementation date of promotions is the first day of the month following the decision (see paras. 31–33 of said Order). Accordingly, the Applicant asserts that implementation of the decision is not effective until 1 January 2017 and the matter is therefore receivable;

Prima facie *unlawfulness*

b. The outcome of the selection process was pre-determined and the “fix was in” depriving him of full and fair consideration. He

addition, the management evaluation is unlikely to be rendered before the selection is implemented on 1 January 2017;

Irreparable damage

e. There are very few opportunities for lateral moves at the D-1 level. Not being fully and fairly considered in this selection process has had an adverse impact on his career progression, in light of the mobility policy, resulting in loss of opportunity and has caused him significant stress.

Respondent's submissions

31. The Respondent's principal contentions may be summarized as follows:

Receivability

a. The Application is not receivable as the contested selection decision was implemented on 5 December 2016 when the UNJSPF officially informed the selected candidate of his selection and he unconditionally accepted it. The selected candidate has been released by his former office so that he may assume his new duties on 1 January 2017. Since the contested decision is now implemented it can no longer be suspended;

Prima facie unlawfulness

b. The Applicant has not demonstrated that the contested decision is *prima facie* unlawful. The Applicant's rights have been respected. There is no serious and reasonable doubt about the lawfulness of the contested decision;

c. Following cancellation of the interview, the panel members drafted new questions. In order to protect the confidentiality and competitiveness of the process, the panel did not share the questions electronically. The documented record of the selection exercise demonstrates that the Applicant's candidacy was fully and fairly considered. The panel did not recommend him for selection having determined that he did not fully demonstrate all of the required competencies;

Urgency

d. There is no urgency as the contested decision has been implemented and cannot be suspended;

Irreparable damage

e. The Applicant has not demonstrated irreparable harm. His contractual situation is not adversely affected by the contested decision, which is at the Applicant's current level. His claims with respect to the new managed mobility system are meritless as the managed mobility will facilitate his lateral movement and provide him with the lateral career opportunity he seeks. The Applicant is not facing an imminent reassignment under the new system. Further, if the Applicant were to establish loss of opportunity such loss would be quantifiable and compensable.

Consideration

Legal framework

32. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. 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, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

33. 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.

34. 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.

35. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary

Receivability

Implementation

38. 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 (*Gandolfo* Order No. 101 (NY/2013)). However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani*

that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

... 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).

... 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* UNDT/2012/109 and *Nwuke* UNDT/2012/116), there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment (see *Quesada-Rafaraso* Order No. 20 (GVA/2013)). However, the Tribunal notes that such a procedure seems to be reserved for selection decisions taken involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

... With respect to selection procedures that entail promotion of internal candidates, like in the present case, the Tribunal recalls that section 10.2 of ST/AI/2010/3 clearly states that:

When 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.

... It follows from this provision that the implementation of the selection decision at stake, which was taken on 13 May 2016, cannot be implemented before 1 June 2016. ... Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

42. The Respondent has not refuted the application of ST/AI/2010/3, and acknowledges that the recruitment of staff at the UNJSPF is governed by same. Accordingly, in view of the above, the Tribunal determines that the selection decision has not yet been implemented, and the present application is receivable.

Prima facie unlawfulness

43. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

44. Article 101.3 of the United Nations Charter states that "the necessity of securing the highest standards of efficiency, competence, and integrity"

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majority of individuals outside of the UNJSPF and with no prior involvement in [the first] recruitment”.

47. The Deputy CEO served as the hiring manager in both the first and second selection processes. The apparent failure to comply with the decision of the USG/DM raises concerns regarding the good faith intentions of the hiring managers and undermines the integrity and fairness of the process.

48. The Applicant has also presented information that would reasonably render the selection process procedurally defective in light of his receiving an anonymous circulation of the intended interview questions.

49. It is worth noting that the United Nations is not a private corporation, and its posts are financed through public funds, which calls for transparency and accountability in the recruitment system. The issues highlighted above suggest that the selection process in this case may have lacked integrity and fairness in breach of the general requirements stipulated in the United Nations Charter and staff regulation 4.2.

50. The Applicant has presented a fairly arguable case that the selection decision was influenced by improper considerations, namely that the hiring managers are biased, favored the twice-selected candidate, and have pre-determined the outcome of the process. There are serious and reasonable concerns as to whether this selection exercise was lawful. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Urgency

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

52. 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, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* 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 (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

53. The Applicant filed the present application on 9 December 2016, shortly after learning of the contested decision. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

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

Irreparable damage

55. 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

to establish the relevance for the requested disclosures and thus both motions should be denied.

61. 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.

62. The Tribunal finds it appropriate to make the following observations regarding disclosure requests in the context of urgent proceedings. Under arts. 13 and 14 of its Rules of Procedure, the Tribunal is required to conclude proceedings for suspension of action and interim measures within five working days due to their urgent nature. Accordingly, when dealing with interdict proceedings, often there is no time for the Tribunal or parties to entertain extensive production requests as it may delay the proceedings well beyond the statutory five-day period. Therefore, when appearing before the Tribunal parties should bear in mind that an application or reply may well stand or fall on the initial papers filed. It is only in particular cases that the Tribunal will find it necessary to order the parties to make further submissions or document productions in the context of urgent proceedings.

Applicant's motion to introduce rebuttal evidence

63. On 13 December 2016, the Applicant filed a motion to rebut evidence relating to the panel's summary of his interview and his competencies. He indicated that, upon request of the Tribunal, he would make available an audio recording of his interview showing that the summary of his competencies does not accurately reflect his actual responses at the interview.

