
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/116
Order No.: 281 (NY/2017)
Date: 29 December 2017
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Introduction

1. On 26 December 2017, the Applicant, a Policy Specialist at the level of P-4, step 12, with the United Nations Children's Fund) filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the edure. The Applicant

the post of Senior Statistics Specialist (Poverty and Gender), P-5, New York Headquarters, USA, #99857 With the application, the Applicant also filed a motion for disclosure of the written test results and grades awarded for the Post to establish that he was clearly the most qualified candidate for the position .

2. On the same date (26 December 2017), the case was assigned to the undersigned Judge, and the Registry acknowledged receipt of the application and transmitted it to the Respondent, directing him, upon the instructions of the Tribunal, to submit his reply by 5:00 p.m. on 27 December 2017.

3. By email of 27 December 2017, the Tribunal further instructed the Respondent to provide, together with the response to the request for suspension of action: (a) the written test results and grades awarded to the short-listed candidates for the Post, including the Applicant; (b) a list of all the available suitable posts at the the P-4 level) and at a lower level vacant or occupied by staff members under a temporary contract.

4. On 27 December 2017, the Respondent duly filed his reply in which he contends that the application is not receivable as the impugned decision has already been implemented. Furthermore, the Respondents submits that, in any event, the application for suspension of action is not urgent and thahermore, the Respondents

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redacted written test results and (b) list of all available suitable post at P-4 and P-3 levels.

5. By emails of 28 December 2017, upon the instruction of the Tribunal, the Registry directed the Respondent to submit copies of: (a) the email by which the selected candidate accepted the Job Offer on 11 December 2017, and (b) the copy of UNICEF policy on staff selection and mobility system. Later the same date, the

end of his fixed- [the Applicant] would perform his previous functions as well as the functions of the Post while recruitment for the Post was continuing. As [the Applicant] was to perform functions at a P-5 level, he was granted a special post allowance.

[The Applicant] did not receive any information in relation to his application for the Post and in July 2017, [the Applicant] noticed that the Post had been re-advertised.

On 24 July 2017, [the Applicant] received an email from his supervisor which stated the following:

[assumedly, the Department of Human Resources]

On 26 December 2017, [the Applicant] submitted a Management Evaluation Request challenging the decision by the Administration to not select him for [the Post].

7.

evidence, that:

- a. On 6 December 2017, a job offer for the Post was communicated to the selected candidate;
- b. acceptance, indicating he will be available on 1 March 2018; and
- c. Reference checks have now been concluded and, on 18 December al clearance was received.

8.

- d. It is trite law that all recruitment and selection decisions must comply

including poverty measurement which is likely to also be reflected in the written test results;

- ii. It is clear from the emails that the Applicant received on 24 July 2017 and 26 July 2017, that the Administration had pre-determined that the Applicant would not be selected on the basis of his British nationality and due to his male gender. These emails evidence that he was not afforded full and fair consideration;
- iii. The Applicant was informed by Mr. H (name redacted) on 5 December 2017 that he was not selected for the Post because he had less experience on the gender aspects of the post. There were no questions relating to gender in the written test nor were any of the questions asked during the interview related to gender. Moreover, the vacancy announcement did not place any particular emphasis on gender or the specific amount and type of experience required in relation to this aspect. Therefore, this explanation for his non-selection appears to be superficial considering the previous experience effectively performing the role of the Post and considering that the candidates were not assessed by their experience or knowledge regarding gender issues;
- iv. Moreover, the fact that the selected candidate was a non-British national is further evidence that the Applicant was discriminated

efficiency and competence, the Organiz
objectives and targets, as well as the fact that a candidate may
already be in the service of the Organization encumbering a post
slated for abolition. The Administration failed to consider such
factors and, specifically, the fact that the Applicant was effectively
performing the functions required of the Post and that the official
post that he was encumbering was to be abolished;

h. Accordingly, evidence of bias in the selection process exists in that the
was Applicant discriminated against and not selected on the basis of his
nationality. As a consequence, there are serious and reasonable doubts about
the lawfulness of the decision and that such a decision is *prima facie*
unlawful;

Urgency

i. In *Tadonki* UNDT/2009/016, the Dispute Tribunal concluded that
urgency exists when the contested decision may be implemented before the
consideration of the substantive appeal on the merits, and as a result, the
Applicant might be denied the chance of regaining the position he was
occupying or should be occupying in the event that he or she is successful in
the substantive case, especially if the position were to be filled;

j. The matter is urgent due to the impending recruitment of the selected
candidate. It is understanding that the selected candidate is yet
to commence his employment as the Senior Statistics Specialist (Poverty and
Gender) P-5, and the Applicant continues to perform the functions of the Post
and no official hand-over has taken place.

k. The Applicant has discussed his non-selection for the Post with his
superiors and tried to resolve the matter internally. Once he realised that no
genuine efforts were being made to resolve this matter, the Applicant

2017-UNAT-759 as affirmed in *Zachariah* 2017-UNAT-764, *Smith* 2017-UNAT-768).

15. The Appeals Tribunal stated in *Abbassi* 2011-UNAT-110:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

16. In *Ishak* 2011-UNAT-152, the Appeals Tribunal stated:

29.
which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.

19. In the present case, the decision subject to the management evaluation is the selection decision for the Post and the Applicant is requesting the suspension selection process, including the appointment of the selected candidate. The Tribunal concludes that the application concerns an administrative decision that may properly be suspended by the Tribunal, and the first condition is fulfilled.

Ongoing management evaluation

20. An application under art. 2.2 of the Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that he filed his request for management evaluation on 26 December 2016, which is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation was initiated prior to the filing of the suspension of action. The Tribunal notes that there is no evidence on record that the UNICEF has completed its evaluation. The Tribunal therefore finds that the Applicant evaluation is still pending and that the contested decision is the subject of an ongoing management evaluation for which reason the second condition is fulfilled.

Implementation of the contested decision

21. Following an application for suspension of action pursuant to art. 2.2 of g

24. On 6 December 2017, UNICEF provided the selected candidate with an offer for employment for the Post. On 11 December 2017, the selected candidate accepted the offer, stating that he would be available on 1 March 2018, thereby notifying the Administration of his unconditional acceptance of the conditions of the offer within the given time limit. Reference checks have been now concluded and, on 18

25. An employment contract is an agreement, which is established by an offer and a subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT- a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate *Iskandar* 2012-UNAT-248 and *Cranfield* 2013-UNAT-367).

26. In accordance with *Tiwathia* UNDT/2012/109, upheld by the Appeals Tribunal on appeal in *Tiwathia* 2013-UNAT-327, the Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Statute of the Dispute Tribunal refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the

when he was also told that this abolition was to be processed by the creation of a
- and that the
remaining responsibilities of [his] current post
would be reallocated to a post in the Data and Analytics section .

32. However, the Tribunal observes that in the list of current available suitable posts provided by the Respondent on 27 December 2018, these two posts are not mentioned and it is unclear if they will be created in UNICEF Headquarters in New York before 31 January 2018, in order for the abolition of the
processed as announced. It also appears that in the absence of these two posts,
he may
continue to perform his functions on his post until the creation of the two new posts,
if any, and on the Post (

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