
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/014

Order No.: 51 (NY/2018)

Date: 8 March 2018

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

MCINTOSH

v.

SECRETARY-

Introduction

1. On 1 March 2018, the Applicant, a staff member of the United Nations having served as an Engineering Technician/Chief Electrical and Mechanical Unit (“EMU”) at the United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-5 level, filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the decision, pending management evaluation, not to select him but another candidate for the position of Engineering Technician at the FS-5 level (“the Position”) with the United Nations Support Office in Somalia (“UNSOS”) in Mogadishu. The Applicant alleges that the decision not to select him but another candidate prior to the completion of the selection process was unlawful and that he was not given fair consideration.

2. Together with his application, the Applicant filed a motion for suspension of the contested decision pending the Tribunal’s consideration of the application for suspension of action. By Order No. 47 of 2 March 2018, the Tribunal granted this motion, noting *inter alia*, the urgency, which is not self-created, and the fact that once the decision is implemented, the Applicant will have no recourse. The Tribunal being satisfied that the requirements for an interim order pending the Tribunal’s determination of a suspension of action as set out in *Villamorán* 2011-UNAT-160 by the Appeals Tribunal had been satisfied in this case, accordingly, ordered that:

... Without prejudice to the Tribunal’s determination of the application for suspension of action under art. 2.2 of the Tribunal’s Statute, the implementation of the contested decision shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

3. On 1 March 2018, the Tribunal directed that the Respondent file his reply to the application for suspension of action pending management action by 4:00 p.m. on 6 March 2018.

4. On 6 March 2018 at 2:04 p.m., the Respondent filed his reply in which he contends, *inter alia*, that the application is premature and not receivable *ratione materiae* as no selection decision has been taken as the recruitment process is still ongoing.

5. As the Respondent's reply to the application for suspension of action raised a serious dispute of fact, and due to the urgency of the matter, at 2:32 p.m. on 6 March 2018, the Tribunal directed that the Applicant file a response to the reply by 5:00 p.m. that same day, 6 March 2018.

6. Subsequently on 6 March 2018, at 4:45 p.m., the Applicant filed a timely response, contending that, as a matter of fact, a decision had indeed been made to select someone else for the Position.

Factual background

7. The Applicant presents the relevant facts as follows:

... [The Applicant] was a staff member of the United Nations, serving as an Engineering [Technician]/Chief EMU at the United Nations Stabilization Mission in Haiti (MINUSTAH) at the FS5 level. [The Applicant] worked at the United Nations for approximately 12 years. On 1 October 2014, [the Applicant] was notified that he was granted a continuing appointment which was effective 30 September 2014 [reference to annex omitted].

- iii. The Applicant was not laterally assigned to the Engineering Technician Position notwithstanding that his post was being abolished and he is a continuing appointment holder;
 - iv. On 26 February 2018, after being invited to sit the exam and before the Applicant was required to sit the exam, he was expressly notified in writing that UNSOS had already selected a candidate and therefore it appears that the entire recruitment process was a sham; and
 - v. The Applicant's application for the Engineering Technician Position is still listed as "Under Consideration" in Inspira.
- d. In light of the above, there has been a significant procedural irregularity in the recruitment process for the Position. Specifically, the Administration had already

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 on the substantive case especially if the position were to be filled”.

g. In this case, the matter is urgent due to the impending onboarding of the selected candidate. From the email dated 26 February 2018, it appears that the selected candidate is already a staff member at UNSOS Mogadishu and will fill the Position imminently.

h. Once the Applicant was informed that a candidate had already been selected for the Position, he immediately took steps to file a management evaluation request and suspension of action. Therefore, this is not a case of self-created urgency.

Irreparable harm

i. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, this Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage;

j. In the instant case, if the impugned decision is implemented, as the onboarding of the selected candidate is imminent, the Applicant will suffer harm with respect to career prospects. Specifically, he will lose the opportunity to advance his career as an Engineering Technician at the United Nations. Such harm cannot be compensated for by a monetary award.

10. In the Respondent’s reply, it is averred that the application for suspension of action is not receivable because no selection decision has been taken and “[t]he Applicant has misunderstood the statements made in the email dated 26 February

15. 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.

16. Under art. 2.2 of the Statute, a suspension of action order 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 the contested decision.

17. 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 information for the

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 (*Villamoran* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

27. In the present case, the Applicant filed the application on 1 March 2018, three working days after becoming aware of the contested decision on 26 February 2018. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

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

Irreparable damage

29. It is generally accepted that mere economic loss only is not enough to satisfy

31. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013); *Finniss* Order No. 116 (GVA/2016)).

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

Conclusion

33. 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 a candidate other than the Applicant for the Position shall be suspended pending management evaluation.

34. In light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of March 2018