
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/018
Order No.: 105 (NY/2018)
Date: 29 May 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

MCINTOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES UNDER ART.10.2 OF THE
STATUTE**

Counsel for Applicant:
Natalie Dyjakon, OSLA

... [The Applicant] submits that the Respondent's reliance on the case of *Elzarov* [UNDT/NBI/2018/028] is misplaced. That case is clearly distinguishable in relation to the facts. In *Elzarov*, the applicant, while a continuing appointment holder, was seeking a promotion from a P-5 to a D-1 position. In such circumstances, a suspension of action is not permissible. In the case of [the Applicant] the subject matter is a lateral reassignment upon selection and not a promotion or appointment.

... The Engineering Technician Position is at the same level and grade as his previous post and

- ... On 2 March 2018, the Tribunal granted an interim order suspending the implementation of the contested decision pending the Tribunal’s determination of the suspension of action [...].
- ... On 8 March 2018, the Tribunal ordered that the application for suspension of action be granted and that the contested decision be suspended pending management evaluation [...]. The Tribunal concluded that there were, [emphasis omitted] “serious and reasonable concerns ap

on [“s

are clearly enunciated. Pursuant to staff regulation 4.1, “Upon appointment, each staff member...shall receive a letter of appointment...”;

e. At the same time, under staff regulation 3.4 provides that, “On appointment, a staff member shall normally be placed at the first step on the level of his or her post, unless otherwise decided by the Secretary-General”;

f. In this case, as a continuing appointment holder, the Applicant would

the Applicant received an email which notified him that the selected candidate was already onboard;

j. Pursuant to the Appeals Tribunal in *Luvai* 2010-UNAT-014, the Applicant does not need to wait until the final inevitable notification to challenge the non-selection. It is evident from the email and reinforced by the MEU decision that the Applicant had already been excluded from the final selection process. As a consequence, his exclusion constitutes an administrative decision subject to challenge. To argue that the Applicant must await a final inevitable notification of his non-selection, sacrifices form over substance and diminishes the Applicant's right to challenge his non-selection. The Applicant contends that it is self-evident that a decision has been made not to select him for the Position and to contend otherwise and to submit that the Applicant is still being 537.46u5-2(it)-3(d)-29nfo

successful before the Dispute Tribunal, the Tribunal could order rescission of the decision regarding non-selection. However, such a decision is dependent on the Engineering Technician Position not being filled. Were the Administration in a position to implement the decision and select an alternative candidate, the Applicant would lose the opportunity of rescission and in so doing, would prevent any possible step to re-establish his continuing appointment status within the United Nations;

o. As a consequence, such harm cannot be compensated for by a monetary award. The Applicant would have permanently lost his continuing appointment status and the associated entitlements accompanying his long service in the United Nations. Effectively, if the Applicant obtained new employment within the United Nations then he would be starting again. The consequence for the Applicant is that he would not have the stability of employment associated with a continuing appointment and he would have to commence the lengthy process of obtaining continuing appointment status;

Prima facie unlawfulness

p. It is well-established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members;

q. In determining whether an administrative decision is *prima facie* unlawful, the Tribunal has found that this condition does not require more than serious and reasonable doubts about its illegality. The Tribunal must examine whether the procedures laid down in the Staff Regulations and Rules were followed and whether the staff member was given fair and adequate consideration. The decision not to select him for the Engineering

Technician Position was *prima facie* unlawful because he was not given full and fair consideration;

r. Specifically, the Tribunal should consider the following:

- i. The Applicant was already performing the role of Engineering Technician in MINUSTAH at the FS-5 level to the full satisfaction of MINUSTAH and had several years of experience as an Engineering Technician;
- ii. The Applicant applied for the Engineering Technician Position and was invited to sit a written assessment on 21 February 2018;
- iii. The Applicant completed the written assessment on 1 March 2018;
- iv. The Applicant was not laterally assigned to the Engineering Technician Position notwithstanding that his post was being abolished and he was a continuing appointment holder; and
- v. On 26 February 2018, after being invited to sit the exam and before he was required to sit the exam, the Applicant was expressly notified in writing that UNSOS had already selected a candidate and therefore it appears that the entire recruitment process was a sham;

s. In light of the above, there have been significant procedural irregularities in the recruitment process for the Engineering Technician Position. Specifically, the Administration had already selected a candidate at the commencement of the recruitment process and the recruitment process was only a formality to hire the particular candidate;

t. The email from Ms. ED is clear and unambiguous in that the selected candidate for the post had already been onboarded;

u. In contrast, the explanation given by the MEU provides little by way of clarity. According to the MEU, the Administrative Assistant, Ms. ED, actually meant in her email that, “the post has an incumbent on board i.e., a serving staff member on the post, for which the job opening was advertised as a result of the classification of the post at the FS-5 level”. The MEU’s reinterpretation of this email constitutes at best a lawyer’s defense and bears little resemblance to what Ms. ED actually stated. It is self-evident that a candidate had been identified and would be selected and then either appointed, assigned or promoted. Whatever method the Administration chose, it was clear that the intention was to not

This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

13. The Tribunal considers that an order on interim measures may be granted at the request of the parties when the following cumulative conditions are met:

- a. The motion for interim measures is filed in connection with a pending application on the merits before the Tribunal, anytime during the proceedings;
- b. The application does not concern issues of appointment, promotion or termination;
- c. The interim measure(s) ordered by the Tribunal must provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed;
- d. The contested administrative decision appears *prima facie* to be unlawful;
- e. There is a particular urgency in requesting the interim measures;
- f. The implementation of the contested administrative decision would cause irreparable damage.

Discussion

14. The Tribunal notes that the Applicant filed an application on the merits on 23 April 2018 contesting the administrative decision consisting in his non-selection for the position of Engineering Technician at the FS-5 level in UNSOS which was registered before the Dispute Tribunal as Case No. UNDT/NY/2018/018. On 21 May 2018, the Applicant filed a motion for interim measures in the same case. The Respondent provided his response to the motion for interim measures

has an appointment with the Organization.

21. The Tribunal concludes that the present application relates to an appointment and therefore the second condition is not fulfilled.

22. Since one of the above-mentioned cumulative conditions is not fulfilled, the Tribunal need not consider whether the remaining requirements, namely if: the interim measure(s) ordered by the Tribunal would provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed; and if the conditions of *prima facie* unlawfulness, urgency and irreparable damage, are met.

23. In the light of the foregoing,

IT M tac5w3(T 2 0(en-G5e)7(met.)) TJETQ0.00000912 0 612 792 reW*nBT/F1 12 Tf1 0 0 1 298.37 n.658.