



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/071

Judgment No.: UNDT/2011/190

Date: 9 November 2011

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

OSMANLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jorge A. Ballesterro, UNICEF

Introduction

1. The Applicant filed, on 1 November 2011, an application for suspension of action pending management evaluation of the selection decision for the post of Child Protection Officer (National Officer, level B), Azerbaijan Country Office, United Nations Children’s Fund (“UNICEF”).

Facts

2. The Applicant joined UNICEF in 1998. She currently serves as Programme Assistant, Child Protection Section, Azerbaijan Country Office, UNICEF. The vacancy for the post of Child Protection Officer in the said Section was advertised on 3 June 2011, with 17 June 2011 as the deadline for applications. After this date, the Child Protection Specialist—the Applicant’s direct supervisor—prepared the initial shortlist of candidates, which was discussed with the Deputy Representative.

3. According to the Applicant’s description of the facts, which has not been disputed by the Respondent, she was interviewed on 8 July 2011. Some members of the panel apparently suggested during the interview that a written test be made before a final decision was taken.

4. As from this point, the Representative of UNICEF in Azerbaijan (“the Representative”) took over the recruitment process. The candidates took a written test on 4 August 2011.

5. On 5 September 2011, two candidates, including the Applicant, were invited for a second interview, this time with the Representative.

6. As per an explanatory email sent by the Representative to Counsel for the Respondent, the Representative informed, on 21 October 2011, the successful candidate by phone “that he had been selected for the job” and requested him to confirm whether “he was still interested”. On 25 October 2011, the selected candidate wrote an email to the Representative confirming his “great interest in

[the] job kindly offered to [him]” and stating that he could not yet specify the date on which he would be able to take up his new duties.

7. On 26 October 2011, the Representative verbally informed the Applicant that she had not been selected for the post.

8. On 28 October 2011, the Applicant addressed a request for management evaluation to the Executive Director of UNICEF regarding her non-selection.

9. The present application for suspension of action was filed on 1 November 2011. Following the Tribunal’s directions, the Respondent submitted his reply on 3 November 2011, which stated that “the selected candidate was offered the position of Child Protection Officer on 21 October 2011 and he accepted the offer on 25 October 2011”.

10. By Order No. 191 (GVA/2011), the Respondent was instructed to provide the Tribunal with complete information regarding how and when the said offer of employment had been made and accepted, including any pertinent document in his possession to support his contentions on this point. The Respondent submitted the requested information on 4 November 2011.

Parties’ contentions

11. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

a. Unlike the other candidates, the Applicant was not asked a single probing question by her supervisor, the Child Protection Specialist, member of the panel in his capacity as supervisor of the post incumbent and subject-matter expert; further, other panel members made inappropriate comments to her during the interview. The majority of the panel had not received training on competency-based interviewing;

b. The written test was not evaluated in the panel’s minutes and the latter made its recommendations on the basis of the interview only;

c. There are rumours and information leaked by the members of the panel pointing to other violations, e.g., inadequate rating applied by the interview panel, inadequate rating applied for the written test, submission of two different documents (panel's minutes and Representative's submission) to the relevant central review body, alteration of the documents sent to the central review body.

Urgency

d. The matter is urgent due to the impending recruitment of the selected candidate;

Irreparable damage

e. The recruitment process being unfair and not transparent, it may damage the Organization's reputation;

f. The Applicant has been exploited by the Organization during two years without any reward as she performed, in addition to her own responsibilities, the duties of Project Officer since September 2009.

12. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The recruitment process for the post at issue was, *prima facie*, carried out properly. Based on an initial review of the recruitment documents, the Applicant was accorded full and fair consideration. The rumours to which the Applicant refers are, by definition, not evidence;

b. The Applicant admitted that the selected candidate might have looked stronger than her during the first interview. It appears that UNICEF Azerbaijan Country Office simply complied with its obligation to recruit the best qualified candidate;

Urgency

c. The selected candidate was offered the position and he accepted it. Hence, the contested decision has been implemented and, as previously ruled by the Tribunal, it cannot suspend a decision already implemented;

Irreparable damage

d. The contested decision would not cause irreparable damage to the Applicant. If this case ever turns into an application on the merits, and should the Tribunal find that the Applicant's rights have been breached, the Applicant may be granted compensation for the damage suffered.

Consideration

Receivability

13. Regarding receivability, the application at hand unambiguously seeks suspension of the contested decision pending management evaluation. The application is thus exclusively governed by article 2.2 of the Tribunal's Statute and article 13 of its Rules of Procedure. Neither of these articles contains a proviso excluding suspension of action in cases of appointment, promotion or termination. Contrary to the Respondent's claim, article 10.2 of the Statute and its restrictions, which only apply to requests for interim measures during the proceedings before the Tribunal, not at the management evaluation stage, is not applicable in the present case.

14. Furthermore, the Respondent's claim that the contested decision has already been implemented must fail. While the Tribunal has held on several occasions that suspension of action is only possible regarding decisions which have not yet been implemented (*Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011)), such is not the case of the decision contested by the Applicant.

15. A selection decision is meant to ultimately lead to the appointment of the successful candidate. According to UNICEF Staff Selection Policy

(CF/EXD/2009-008) of 3 November 2009, the staff selection takes place through a number of distinguishable and successive steps, including the selection process (Section 6), the decision (Section 8) and its implementation (Section 9). The Appeals Tribunal has clarified in *Gabaldon* 2011-UNAT-120 that:

Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions.

...

[A] contract concluded following the issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally, while not constituting a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations, does create obligations for the Organization and rights for the other party, if acting in good faith.

16. It results from the foregoing that, for a selection decision to be implemented, an employment offer from the Organization and its unconditional acceptance by the selected candidate are, at least, required.

17. This is also in line with Section 9 (Implementation) of the above-mentioned Staff Selection Policy; this section, immediately after providing that “[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned”, specifies the conditions on which the offer of employment is contingent.

18. In any event, in light of the facts of the case, the contested selection cannot be regarded as already implemented, as there has been neither an official offer by the Organization, nor an unconditional acceptance by the selected candidate. On the one hand, a phone call by the Representative informing a candidate of his selection may hardly amount to an “offer of appointment” as described in Section 3 of administrative instruction CF/AI/2009-005 (Types of appointment and categories of staff), which reads (emphasis added):

3.1 Candidates who have been selected following the appropriate selection process will be informed of their selection, *and offered an appointment* with UNICEF.

Offer of appointment

3.2 When a candidate has been selected, a *detailed offer letter* is sent to him/her by the Human Resources manager in the Division of Human Resources Global Service Centre ... serving the duty station, or, in case of locally recruited staff ... stationed outside New York Headquarters, by the local Human Resources/Operations manager.

19. On the other hand, the successful candidate has limited himself to confirming his “great interest” in the position. It is unclear whether this constitutes an acceptance and, be it as it may, it is not an unconditional one. In this respect, the Appeals Tribunal, in characterizing an “unconditional” acceptance, has equated it to the situation where “no issue of importance remains to be discussed between the parties”. In this case, the selected candidate’s email of 25 October 2011 expressly states that the date—even approximate—of his joining UNICEF remains to be set.

20. For the above reasons, the application for suspension of action is receivable.

21. Accordingly, the Tribunal turns to examine whether the conditions spelled out under article 2.2 of its Statute, namely, that the decision appears to be *prima facie* unlawful, that the matter is of particular urgency and that the Applicant would suffer irreparable damage if the decision in question is not suspended, are met.

Prima facie unlawfulness

22. After a review of the file, the Tribunal concludes that the contested decision appears to be *prima facie* unlawful within the meaning of article 2.2 of its Statute. In this connection, the Tribunal has held that the condition of *prima facie* unlawfulness of the challenged decision does not require more than serious and reasonable doubts about its legality (see *Corcoran* UNDT/2009/071; *Corna* Order No. 90 (GVA/2010); *Berger* UNDT/2011/134).

23. The Applicant alleges a series of breaches of the established selection procedure. Several of the allegations leveled are clearly articulated and concrete.

24. Among others, the Applicant contends that during her interview, her immediate supervisor, who sat in the panel as direct supervisor of the post incumbent and subject-matter expert, did not formulate any probing questions unlike with the other interviewed candidates. This, if proven, may raise doubts as to whether Section 6.12 of UNICEF Staff Selection Policy, which establishes that “interviews should be conducted in a competency-based format and follow the same structure for each candidate”, has been complied with. The Applicant further claims that the selection panel made its recommendation based exclusively on the first interview, and that the results of the written test were not even mentioned in its minutes. This course of action does not seem in conformity with Section 6.15 of the Staff Selection Policy, which provides that “[t]he selection panel shall recommend a list of qualified, ranked candidates, based on the applicable evaluation criteria, and taking into account the application documents, interview performance and, where applicable, additional assessments”.

25. It is noteworthy that, while generally stating that the selection process was proper, the Respondent, nevertheless, does not rebut any of the Applicant’s allegations. No explanations, documentary evidence or alternative interpretation of the rules were provided to show that the Applicant’s contentions were unfounded. This is so despite the well-known fact that, in selection procedures, the relevant information and documents rest in the Administration’s hands.

26. In view of foregoing, the Tribunal finds that serious and reasonable doubts exist about the lawfulness of the decision at issue.

Urgency

27. The prerequisite of urgency is satisfied to the extent that the Administration is in the process of completing the necessary steps to appoint the selected candidate as soon as possible. In other words, the decision is likely to be implemented shortly, despite the Applicant’s diligence in filing her request for management evaluation and her application for suspension of action.

Irreparable damage

28. It is well established that a loss which can be adequately compensated through a monetary award does not constitute irreparable damage warranting a suspension of action (see, among others, *Tadonki* 2010-UNAT-005; *Kasmani* 2010-UNAT-011; *Ballestrieri* 2010-UNAT-041; *Kweka* UNDT/2011/122; *Villamoran* UNDT/2011/126; *Stephens* UNDT/2011/167). Nonetheless, the Tribunal has taken the view that harm to professional reputation and to legitimate career prospects may amount to irreparable damage (see, among others, *Corcoran* UNDT/2009/071; *Villamoran* UNDT/2011/126).

29. The Tribunal considers that the contested decision, if implemented, could cause such damage to the Applicant, especially taking into account that she serves as a local staff member in a country office of modest size where limited career development opportunities arise. It transpires from the record that the litigious position, which was established after a downsizing of the Child Protection Section some years ago, was the first opening within the Applicant's reach for a long time and that no similar opportunity may arise in the near future.

Conclusion

30. In view of the foregoing, it is ORDERED that the implementation of the selection decision for the post of Child Protection Officer, Azerbaijan Country Office, UNICEF, be suspended during the pendency of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 9th day of November 2011

Entered in the Register on this 9th day of November 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry