



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BARWARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICANT'S
MOTION FOR SUSPENSION OF
ACTION**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent: Fatuma Mninde-Silungwe, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant seeks suspension of the implementation of the decision not to select him for the position of Chief Transport Officer (“CTO”) (P-5) under Position Specific Job Opening (“PSJO”) No. 161640.

Factual Background

2. The Applicant entered into service of the Organization on 22 July 2017 as a P-4 Engineer at the Transport Section with the United Nations Support Office in Somalia (“UNSOS”).

3. From 23 October to 6 November 2018, UNSOS advertised temporary job opening (“TJO”) 105702 for a P-5 CTO position. The Applicant applied for this position but was not selected because he lacked the requisite experience at the time. The selected candidate for the TJO performed the functions of the position from 14 May to 14 November 2019.

4. On 28 October 2019, UNSOS advertised PSJO No. 122057 for a P-5 CTO position. UNSOS appointed the Applicant as OIC Transport Section pending the recruitment of PSJO 122057.

5. On 31 October 2020, a successful candidate was selected on promotion on the PSJO. The Applicant applied but was not rostered at this point. The selected candidate in the present contested decision was one of the two rostered candidates following that PSJO recruitment.

6. On 15 May 2021, the P-5 CTO position fell vacant following the reassignment of the incumbent to the United Nations Integrated Office in Haiti (“BINUH”).

7. On 19 October 2021, UNSOS advertised PSJO No. 161640 for the CTO Position. UNSOS shortlisted 11 candidates who met the minimum requirements, including the Applicant, and invited them for a competency-based interview (“CBI”). Five out of the 11 interviewed candidates passed the CBI and were recommended for selection.

8. On 28 July 2022, the Head of Mission selected the only female candidate on the recommended list.

9. On 2 August 2022, the UNSOS Director informed the Applicant through email that his application for the CTO position was unsuccessful.

10. On 11 August 2022, the Applicant requested management evaluation of the selection decision.

Procedural Background

11. On 12 August 2022, the Applicant filed for suspension of the implementation of the selection decision pending management evaluation.

12. On 15 August 2022, the Respondent filed a reply, alleging that the application was not receivable *ratione materiae*, given that the challenged decision was already implemented, and was ill-founded on the merit, since the decision was lawful.

13. The Respondent assumes that the challenged decision has been implemented with the notification to the candidate of her selection. Section 10.2 of ST/AI/2010/3 on the Staff Selection System states, indeed, that “[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned”.

Considerations

Receivability

14. The Tribunal is well aware that the implementation of a selection decision is when the successful candidate receives the “official communication” concerning her/his selection and can reasonably rely on it (see, for instance, *Sina* 2010-UNAT-094, which affirms the liability definition of *Sina* UNDT/2010/060, and *Cranfield* 2013UNAT-367; see also UNDT case law, expressed in *Passarelli*, Order No. 57 (NY/2020), *Kennedy*, Order No. 114 (NY/2018), *Al-Midani*, Order No. 309 (NY/2014), *Quesada-Rafaraso*, Order No. 20 (GVA/2013), *Farrimond*, 113 (GVA/2016)); indeed, the selection decision is fully implemented with the formal

notification of the selection to the selected candidate, given that this notification creates a legal obligation upon the Organization to appoint the selected candidate.

15. In this case, however, the Respondent provided as evidence (annex R1) only an email message by the Administration acknowledging the confirmation of interest in the position by a (not mentioned) candidate. The Tribunal is not satisfied with the decisive relevance of the document, which does not entail an official notification of the final selection to a specific candidate (among the three recommended candidates indicated in the interoffice memorandum provided in annex R2) and still foresee unspecified “remaining onboarding procedures”. Therefore, the application is receivable.

Merits

16. As to the merits, the mandatory and cumulative conditions for suspending an administrative decision are provided under art. 2.2 of the Dispute Tribunal’s Statute, which states:

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.

17. 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.

18. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions: a.

The applicant requested management evaluation of the contested decision, which evaluation is ongoing; b. The contested decision has not yet been implemented; c. The application concerns an administrative decision that may properly be suspended by the Tribunal; d. The impugned administrative decision appears *prima facie* to be unlawful; e. Its implementation would cause irreparable damage; and f. The case is of particular urgency.

19. With reference to the job offer at stake, the Applicant was placed on a roster, while the post was given to Ms. R.; the Applicant seems to allege that the fact that Ms. R. (which was on the roster in a same level position offered by a previous JO) was not chosen from the roster is a sign she was not suitable for the post; the Applicant further claims, recalling having been Officer-in-Charge (“OIC”) of the Transport Section during the vacancy of the post and that all his performance evaluations were positive (rated as “Fully competent” and lastly “Exceeds expectations), that he ought to be offered the post.

20. The claim is not founded; the challenged decision is not *prima facie* unlawful.

21. Indeed, the Applicant was found suitable and was one of the five candidates recommended for selection, but he was not found to be the most suitable candidate. The Applicant’s candidature received full and fair consideration for the position, while the Secretary-General has wide discretion in staff selection; the Tribunal does not have the power to substitute its own judgment for that of the Secretary-General regarding the outcome of a selection process.

22. The Applicant does not even allege any flaw in the procedure nor contests that the procedures laid down in the staff regulations and rules were not followed in the case; the Applicant, who –without comparing his position with that one of the selected candidate and without even alleging that the latter did not meet any of the requirements of the position offered- only complains for the fresh evaluation given to the selected candidate, has not demonstrated that the decision not to select him was *prima facie* unlawful, improperly motivated or otherwise unreasonable.

23. On the one hand, it is only the selected staff member that can, in abstract, complain of not having been selected directly from the roster. On the other hand, the Applicant's position was fairly examined and he was even rostered. The fact that he was OIC of the Transport Section during the vacancy of the post and his good past performance evaluations do not give him the right to be prioritized in the selection.

24. As one of the cumulative conditions for it to render a suspension of a contested decision is not fulfilled, it is not necessary for the Tribunal to further examine if the remaining statutory requirements specified in art. 2.2 of its Statute have been met in the case at hand.

Conclusion

25. In light of the foregoing the motion for suspension of action is DENIED.

(Signed)

Judge Francesco Buffa

Dated this 18th day of August 2022

Entered in the Register on this 18th day of August 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi