



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AJMAL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Katrina Waiters, UNFPA

Yun Hwa Ko, UNFPA

Introduction

1. By application filed on 18 March 2019, the Applicant, a staff member of the United Nations Population Fund (“UNFPA”) working for the Pakistan Country Office, requests suspension of action, pending management evaluation, of the decision not to select him for the position of Communications for Development Analyst (NO-B) advertised under vacancy No. 19135.
2. The application was served on the Respondent by the Tribunal’s Geneva Registry with instructions to file a reply by 20 March 2019 at noon.
3. The Respondent filed a reply at 3:55 p.m. on 20 March 2019 (Geneva time).
4. The Tribunal notes that since the above-mentioned instruction was issued by the Geneva Registry, the reply was obviously to be filed by noon *Geneva* time. The Tribunal does not sit at the convenience of Counsel and unless otherwise specified, the deadlines it sets are to be understood as referring to the time at its seat, in this case Geneva. This is of particular import for applications for suspension of action, which have to be decided upon under strict legal time limits. In the interests of justice, the Tribunal will nevertheless and on an exceptional basis accept the reply filed untimely in this case.

Facts

5. The Applicant holds a permanent appointment as Personal Assistant to the Representative of the UNFPA Pakistan Country Office at the G-6 level.
6. On 26 October 2018, the UNFPA Pakistan Country Office advertised the position of Communications for Development Analyst, which was newly created, at the NO-B level under Job ID 19135 (“the position”). The Applicant applied for it on 14 November 2018.

7. The Applicant was notified on 16 November 2018 that he had been short-listed for the position, along with four other candidates, and he was invited for an interview. On 18 November 2018, the Applicant and the other candidates were asked to prepare a brief technical presentation for the interview, in lieu of a written assessment.

8. On 22 November 2018, the Applicant delivered his technical presentation and underwent a competency-based interview, along with three other candidates. The interview panel comprised the following members: Mr. Klaus Beck, Representative, UNFPA Philippines Country Office; Ms. Randima Jayasinghe, Strategic Communications and Advocacy Analyst, UNFPA Sri Lanka Country Office; Mr. Bakhtior Kadirov, Deputy Representative, UNFPA Pakistan Country Office; Ms. Elizabeth Mlingwa, Human Resources Consultant hired by UNFPA; and Ms. Nazish Fatima Syed, Human Resources Associate, UNFPA Pakistan Country Office, in *ex officio* capacity.

9. The panel finalised its report on 27 November 2018, in which it did not recommend the Applicant based on its score at the interview. The panel recommended two candidates, in order of preference.

10. The Regional Compliance Review Board endorsed the selection process on 17 December 2018.

11. On 18 February 2019, the Representative, Pakistan Country Office notified the Applicant that he had not been selected for the position and presented him a letter to the same effect dated 14 February 2019. According to the Applicant, the Representative told him that none of the candidates had been selected for the position and that it would be re-advertised.

12. According to the Respondent, the candidate recommended by the panel as the preferred one declined the position. The second preferred candidate was offered the position on 26 February 2019 and he accepted it on 27 February 2019.

13. The Applicant requested management evaluation of the decision not to select him for the position on 6 March 2019.

Parties' contentions

14. The Applicant's case is that he was denied his right as an internal applicant to "special consideration" under staff regulation 4.4 and UNFPA Staffing Policy. The Applicant alleges that the former Representative, Pakistan Country Office, UNFPA, was biased against him and influenced the selection process. In particular, the Applicant asserts that the former Representative levelled allegations against him on 3 October 2018 based on misleading information and rumours, which were also used to damage [the Applicant's] performance for 2018.

15. The Applicant also asserts that the Representative, Pakistan Country Office, UNFPA, selected another candidate for the position after she had informed him that "no candidate was selected" and that he had told her that he would re-apply for the position once it is re-advertised, demonstrating a *mala fide* intent to impair his career prospects.

16. The Respondent's case is that the application is not receivable as the decision has already been implemented. He also argues that the contested decision is not *prima facie* unlawful as the Applicant was given full and fair consideration for the position, including special consideration as an internal candidate. However, the Applicant did not perform as well as the other two recommended candidates, as demonstrated by the panel's score sheets and interview notes. There is no evidence of bias. The former Country Representative short-listed the Applicant and thereafter recused himself from the assessment panel.

Consideration

17. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to 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. These three requirements are cumulative and must all be met in order for a suspension of action to be granted.

Implementation of the contested decision

18. As a preliminary matter, the Tribunal recalls that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

19. The Respondent argues that the decision has already been implemented since the selected candidate has unconditionally accepted the offer of appointment. He produced a letter dated 26 February 2019 from the Representative, UNFPA, to the selected candidate whereby she stated that it was UNFPA's "intention" to offer her a one-year fixed-term appointment to the position. The letter further stated:

If you accept this offer, we will request you to visit one of the UN Medical Examining Physician for your medical examination and the medical report will be submitted to UN Medical Unit in New York. Your official appointment will only be subject to the receipt of your medical clearance certificate from UN Headquarters.

You are advised not to commence work or services before the official contract is signed by the UNFPA Representative and yourself. Nothing in or related to this letter of intent shall be construed or understood to form a binding legal contract. Rather, this letter remains subject to successful formation of a contract and is not legally binding.

20. The Tribunal notes that this offer of appointment may produce legal effects despite its statement to the contrary, as already held by the Appeals Tribunal in *Gabaldon* 2011-UNAT-111 (see also *Sprauten* 2011-UNAT-111). However, it is clear from the jurisprudence of the Appeals Tribunal that for a decision to recruit an external candidate to be implemented, it is not sufficient that the Organization make an offer and that the selected candidate unconditionally accept it, as asserted by the Respondent. It is also required that the selected candidate meet the conditions contained in the offer, if any.

21. In this connection, the Appeals Tribunal has consistently ruled 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. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2(a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization (*Gabaldon* 2011 UNAT-111; see also *Sprauten* 2011-UNAT-111; *Cranfield* 2013 UNAT 367).

22. There is no assertion being made by the Respondent, nor any evidence, that the condition set out in the offer of appointment, namely medical clearance, has been satisfied by the selected candidate. Absent any such evidence, the Respondent's argument that the contested decision has already been implemented must fail.

Prima facie unlawfulness

23. The threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

24. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it shall examine the following: (1) whether the procedure as laid down in the relevant provisions was followed; and (2) whether the staff member was given fair and adequate consideration (see *Nunez* Order No. 17 (GVA/2013) and *Abbassi* 2011-UNAT-110).

25. Regarding the scope of judicial review with respect to decisions in selection and/or promotion matters, the Appeals Tribunal held in *Ljungdell* 2012-UNAT-265:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

26. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the Administration is able to even minimally show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

27. The gist of the Applicant's case is that he was not given "special consideration" for the position as an internal candidate and that the former Country Representative, who was biased against him, interfered with the selection process.

28. The Respondent acknowledges that the Applicant was entitled to special consideration as an internal candidate, in accordance with staff regulation 4.4 and sec. 3 of the UNFPA Staffing Policy, but argues that this requirement has been satisfied.

29. Pursuant to sec. II(3) of UNFPA Staffing Policy, special consideration to internal applicants "means that UNFPA shall especially consider whether the internal application has the requisite core and functional competencies for the post. Experience, knowledge and institutional memory relevant to the functions shall be considered as the personal contribution of the internal applicant to the achievement of the goals of UNFPA and, as such, are an important element of the process of consideration and selection".

30. In turn, sec. II(6) provides that “[i]t is necessary that General Service staff members who apply to and are considered for Professional or National Officer category posts have unambiguously demonstrated the competencies needed to advance to the post. They shall not be exempted from any of the requirements of the relevant post, including the required functional competencies and academic requirements. In particular, long term service with UNFPA in the general service category does not provide a basis for any such exemption.”

31. It is clear from the applicable rules that internal applicant must meet all the requirements, including all the competencies, for the position and be compared with the other candidates. The Appeals Tribunal held in this connection in *Megerditchian 2010-UNAT-088* that:

“[P]riority consideration” cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.

32. The Applicant was short-listed and called for an oral technical assessment and a competency-based interview. The scoring sheet that collated the rating of each of the four panel members shows that they unanimously rated the Applicant lower than the selected candidate in respect of the four competencies that were evaluated. The panel’s rating of the Applicant’s performance was supported by a brief overview of the Applicant’s interview in which the panel noted, amongst others, that the Applicant’s technical presentation was “relatively low on substance”, that “there was a lack of substantial and tangible outcomes to demonstrate communication effectiveness”, and that the Applicant was “relatively weak on knowledge sharing” and “did not come as strong on advocacy”.

33. There is no evidence at this stage suggesting that the panel’s assessment was vitiated by any procedural irregularity or tainted by bias. The fact that an external candidate was preferred to the Applicant based on their respective performance at the interview does not constitute an infringement of the Applicant’s right to receive special consideration as an internal candidate. The Applicant’s allegations of bias

on the part of the former Representative, Pakistan Country Office, UNFPA, are not sufficient to cast serious and reasonable doubts about the lawfulness of the contested decision since the latter was not part of the assessment panel nor was he the decision-maker and he departed from Pakistan on 28 November 2018, before the contested decision was taken.

34. Finally, the alleged representation on 18 February 2019 by the Representative, Pakistan Country Office, UNFPA, to the Applicant that none of the candidates had been selected whilst in fact the second recommended candidate was subsequently offered the position on 26 February 2019 is insufficient to demonstrate bias against the Applicant or any *mala fide* intent to impair his career. The report from the Compliance Review Board, finalised on 17 December 2018, shows that two candidates were recommended for the position. Whilst it is not clear why the Applicant would have been told that no candidate had been selected for the position and that it would be re-advertised, assuming that this information is correct, this is not sufficient to establish bias on the part of the decision-maker, who acted upon the recommendations of the assessment panel in taking the contested decision.

Conclusion

35. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 21st day of March 2019

Entered in the Register on this 21st day of March 2019

(Signed)

René M. Vargas M., Registrar, Geneva