



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

SHIMKUS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Kong Toh, UNOPS

Introduction

1. By application filed on 15 October 2018, the Applicant requests suspension of action, pending management evaluation, of the decision requiring him to go through a competitive selection process for vacancy announcement VA/2018/B5007/16320 (“VA 16320”) without prior consideration of his suitability pursuant to staff rule 9.6.

2. The application was served on the Respondent, who filed his reply on 17 October 2018.

Facts

3. On 1 August 2010, the Applicant joined the United Nations Office for Project Services (“UNOPS”) on a fixed-term appointment as Health Practice Lead, a P5 fixed-term position based at UNOPS headquarters in Copenhagen, Denmark.

4. On 1 October 2014, the Applicant was promoted as Programme Director, D— 1, with the Water Supply and Sanitation Collaborative Council (“WSSCC”), based in Geneva, Switzerland.

5. On 24 November 2017, following a restructuring process, the Applicant was informed that his WSSCC position would be abolished and that his appointment would be terminated effective 31 March 2018. His contract was subsequently extended until 31 December 2018.

6. In January 2018, the Applicant applied for a newly created UNOPS D-1 position of Programme Director and Deputy Executive Director within WSSCC, but was informed on 3 May 2018 that he was not successful.

7. In June 2018, it was agreed between the Applicant and UNOPS to place him on special leave with full pay for the period of September to December 2018. In a letter dated 12 June 2018, the Applicant was informed that he would be placed on Special Leave with Full Pay (“SLWOP”) from September to 31 December 2018, and that his fixed-term appointment would not be extended beyond that date.

8. On 28 August 2018, UNOPS posted VA 16320 for a new D-1 position of Deputy Chief Executive Officer (“Deputy CEO”) of the Defeat-NCD Partnership based in Geneva.

9. The Applicant received an invitation from UNOPS Human Resources to take a written test for that post on 9 October 2018, which he passed successfully.

10. He wrote to the Deputy Director of the UNOPS People and Change Group (“PCG”) on 25 September 2018, requesting to be considered for the post pursuant to staff rule 9.6(e), without having to go through a competitive selection process. The Deputy Director, UNOPS, PCG, responded on 26 September 2018, stressing that UNOPS was unable to assess his qualifications on the basis of the information available on file and that he would therefore be required to go through a competitive selection process.

11. On 12 October 2018, the Applicant was informed that he had passed the test successfully and he was invited to an interview on 18 October 2018.

12. On 15 October 2018, the Applicant requested management evaluation of the decision of 26 September 2018.

Parties’ contentions

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

Prima facie unlawfulness

a. The Respondent failed to consider his suitability pursuant to staff rule 9.6(e); UNOPS only considered filling the post through competitive selection, without any intention to consider internal candidates whose positions have been abolished;

b. The decision was based on ulterior motives; the restructuring exercise was specifically designed to exclude WSSCC senior management from further employment opportunities within UNOPS; UNOPS had no intention to genuinely consider the Applicant under staff rule 9.6(e); and

c. His post is subject to abolition and an agreed termination has been concluded, without prejudice to the possibility of being considered against available posts; he thus meets the requirements for priority consideration under staff rule 9.6(e).

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

Prima facie unlawfulness

a. The Applicant's current Human Resources record, and the results of the assessment that he underwent in March 2018 for the WSSCC Programme Director and Deputy Executive Director vacancy prevents UNOPS from considering the Applicant suitable under staff rule 9.6(e) for the Defeat-NCD partnership Deputy CEO post, which required the same type of competencies;

b. The Deputy Director, UNOPS, PCG, had already considered the Applicant's suitability as per staff rule 9.6(e) and had concluded that the information in his HR file was insufficient for UNOPS to make a decision about his suitability for this post; UNOPS would like the Applicant to complete the current competitive selection process so that it may have a reasonable basis to conclude that the Applicant is suitable for the Defeat-NCD partnership post;

Urgency and irreparable damage

c. The Respondent concedes that these criteria are met.

Consideration

15. 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.

Prima facie unlawfulness

16. The Tribunal recalls that 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)).

17. The Tribunal notes that the Applicant had encumbered a post at UNOPS that was abolished and he had accordingly been informed that his FTA would be terminated effective 31 March 2018.

18. The Tribunal further observes that the Applicant had been informed in November 2017 that in the framework of a restructuring exercise, a review committee had been convened to determine whether the job description of any new post was essentially the same as a job description of a current post, in which case the incumbent of such a post would be offered the new post, subject, *inter alia*, to satisfactory performance. At that time, the Applicant had further been advised that the review committee was not able to recommend that he be offered a post in the new WSSCC structure at that stage, since no post in the new structure was essentially the same as the one encumbered by the Applicant. Thereafter, a post of Programme Director and Deputy Executive Director, WSSCC, was opened in January 2018 under the new structure and the Applicant applied for it, but was not successful. He did not, however, at the time, contest the fact that his suitability for that post had not been assessed pursuant to staff rule 9.6(e), in light of the abolition of his post and the forthcoming termination of his contract. Any such claim would now be time-barred.

19. In fact, and despite the abolition of his post, the Applicant subsequently saw his FTA extended and it is now expiring on 31 December 2018. As the Applicant stated himself, the extension of his appointment was designed to allow for continuity of leadership. The Applicant further notes, without providing any evidence, that UNOPS sought to terminate his appointment effective August 2018. He also submitted a letter dated 12 June 2018 by which he was placed on SLWFP

effective 1 September 2018 until the expiration of his FTA on 31 December 2018. While he stated that this letter constituted a termination agreement, the Tribunal notes that therein, the Applicant was informed that his FTA would not be renewed upon its expiration on 31 December 2018 and that his separation would not be considered an agreed termination for the purpose of staff rule 9.8(d).

20. *Prima facie*, the Tribunal is of the view that since the Applicant's FTA was extended and will expire on 31 December 2018, the special legal regime, including staff rule 9.6(e), that applies in cases of termination—but not to cases of non-renewal of FTAs—does not apply to the Applicant's situation.

21. Arguably, after the Applicant had been informed in November 2017 of the abolition of his post, and termination of his FTA, he could have claimed that his suitability for available positions—including the new post of Programme Director, WSSCC, to which he applied—be considered, at the relevant time, pursuant to staff rule 9.6(e).

22. It appears, however, that for the post under review in the present proceedings for suspension of action, and at this point in time, the Applicant does not have a right to be considered pursuant to staff rule 9.6(e) since his appointment had been extended and would simply be left to expire at the end of 2018.

23. It follows that the decision not to consider the Applicant's suitability for the above-referenced post outside of the selection process, to wit, pursuant to staff rule 9.6(e), is not *prima facie* illegal.

24. The foregoing notwithstanding, the Tribunal wishes to underline that the Applicant has a right to have his candidature fully and fairly considered in the framework of the current selection exercise, which is still ongoing. The Tribunal is aware that he successfully passed the written test and was called for an interview.

25. Since one of the cumulative criteria for a suspension of action is not met, the Tribunal will not examine the remaining criteria, namely, urgency and irreparable damage.

Conclusion

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

(Signed)

Judge Rowan Downing

Dated this 22nd day of October 2018

Entered in the Register on this 22nd day of October 2018

(Signed)

René M. Vargas M., Registrar, Geneva