



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

SHEMSU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION AND NOTICE
OF HEARING**

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Bartolomeo Migone, WFP

Simone Parchment, WFP

Introduction

1. The Applicant has been employed by the World Food Programme (WFP) for 7 years, first under service contracts and currently under a fixed-term contract. Following a Vacancy Announcement dated 10 September 2008, he was appointed to a National Professional Officer-A (NOA) post as a Geographic Information Systems (GIS) Officer in the Vulnerability Analysis and Mapping (VAM) Unit.

2. In early 2011, the Applicant received notice that his post was being abolished at the end of his contract and that his contract would not be renewed. Thereafter, the Applicant learned that the WFP was retaining GIS staff. The Applicant learned, sometime in June 2011, that a new Senior Programme Assistant, General Service-7 level post was being created with substantially the same job responsibilities as his current post in the VAM Unit.

3. The Applicant's current fixed-term contract is scheduled to expire on 30 June 2011. On 21 June 2011, the Applicant requested for Management Evaluation and for suspension of action of the selection process for the said General Service-7 level post.

The Applicant's case

4. The Applicant frames his suspension of action case as follows:

5. In late 2010 and early 2011, the WFP engaged in a restructuring or Staffing Review Exercise, the objective of which was to eliminate approximately 100 posts and the exercise took place due to reduced beneficiary numbers and funding.

6. It is the Applicant's position that his post was not abolished at all but that it was reclassified downwards. He was invited to compete for the new post. His Counsel sought clarification of whether consideration was being given to his incumbency in the post being reclassified but the WFP Administration is yet to respond. The interviews for the General Service-7 level post are scheduled to take place today, 22 June 2011.

7. Due to his precarious financial predicament and career investment in the WFP, he has applied for the post even if it could involve an effective demotion for him. He does not know whether he is being invited to compete for precisely the same NOA GIS post which he currently encumbers and it appears that the WFP Administration might not be aware that they are interviewing candidates who are ineligible for the post due to its proper classification.

8. One of the members of the selection panel for the new post, Mr. Ahmedsha Shahi is a close personal friend to the only other competitor for the new post, Mr. Solomon Tilahun. The Applicant alleges that in a conversation with a friend of Mr. Ahmedsha, it was confirmed that Mr. Ahmedsha had already expressed a preference for Mr. Solomon over the Applicant in respect to selection for the new post.

9. Simultaneous with the filing of this Application, the Applicant has sought management evaluation and asked the WFP Administration to suspend the selection process to address the irregularities described above. It is the Applicant's contention that his post was not abolished but was instead reclassified. It is the Applicant's submission that this distinction hinges on a "substantive evaluation of job responsibilities and not on a nominal label the Administration chooses to apply".

10. If a post is reclassified, a reclassification request must include detailed, justified and contextual information, including: information pertaining to the position; the new operation needs of the Country Office, as well as both the old and the new job description; an updated, detailed, organizational chart indicating the affected position and other positions impacted by the proposed action; and the approved budget in accordance with the WFP "Rank-in-Post Policy for Locally-Recruited Staff in Regional Bureaux and Country Offices" dated 26 August 2010 ("the RIP Policy"). There is no evidence that any such reclassification exercise has taken place and that this is therefore unlawful.

11. If his current post, a fixed-term appointment, has been reclassified one level higher or lower within the same category, he must be invited to apply for the

reclassified post and, according to the RIP Policy, his application should receive priority consideration and, if he is found qualified and suitable, he may be selected for the post irrespective of his ranking in the selection process. The WFP Administration has failed to indicate that it will apply this provision in his case.

12. If his current post has been reclassified more than one level higher or lower or across categories, such as from NOA to GS-7, the reclassification must be confirmed and approved by the HR Organizational Management Branch since an upward reclassification of more than one level represents, essentially, a new job requiring an appropriate selection process for which many incumbents may not be eligible and that similarly, when a post is downgraded more than one level, the same principles apply in accordance with the RIP Policy.

13. There is no evidence that the HR Organizational Management Branch has confirmed or approved any reclassification and that not having properly classified the post, it is impossible for the WFP Administration to apply the appropriate selection process. It is impossible for candidates to prepare for an appropriate selection process yet the WFP Administration has indicated a determination to proceed with selection.

14. WFP local staff who are appointed to a lower level post are entitled to retain their personal grade for up to 2 years in accordance with para. 19(c) of the RIP Policy. It is a reasonable inference that the WFP wishes to avoid the application of this policy by performing an irregular selection. The Applicant has learned that the selection panel for the new post may be tinged with the appearance of bias if not outright bias as a result of the participation of Mr. Ahmedsha Shahi who entertains a preference for his friend, Mr. Solomon Tilahun.

15. For the foregoing reasons, there are serious and reasonable doubts that the Applicant will not receive full and fair consideration for the reclassified post in accordance with the relevant administrative issuances and with the Tribunal's

jurisprudence in *Hepworth*¹; *Tsoneva*²; *Buckley*³; *Miyazaki*⁴; *Kasmani*⁵, *Utkina*⁶; *Lewis*⁷; and *Corna*⁸.

16. His current contract will expire on 30 June 2011. After that date, he will be ineligible to compete for WFP posts as an internal candidate. Further, he will face immediate financial distress associated with having no income and a young family. The WFP Administration has indicated that it intends to proceed with the described irregular selection process imminently, as early as 22 June 2011. It is possible that errors can be rectified if the process is halted. The errors will be irremediable if the process proceeds to completion.

17. If the WFP Administration completes its selection process through irregular means, he will be permanently deprived of the staff benefits to which he is entitled. Those benefits include full and fair and priority consideration for WFP posts as an internal candidate. The loss of the ability to exercise one's rights has been held to be irreparable in *Tadonki*⁹; *Fradin de Bellabre*¹⁰; *Abosedra*¹¹; *Jaen*¹²; *Hashimi*¹³; and *Perrot-Maitre*¹⁴. The selection of another candidate in a flawed selection process has been described as giving rise to irreparable harm in *Tadonki*¹⁵. It is a harm that the Tribunal and by default the staff member loses the power to remedy contrary to art. 10(5)(a) of the Statute of the Tribunal.

18. He has had a long and successful career in the WFP. The WFP has expressly avowed a desire to reduce its staffing levels. Employment opportunities in Ethiopia are limited. He is unlikely to have success pursuing alternative employment. His loss

¹ UNDT/GVA/2009/38.

² UNDT-GVA-2009-2.

³ UNDT/2009/064.

⁴ UNDT/2009/076.

⁵ UNDT/2009/063.

⁶ UNDT/2009/096.

⁷ UNDT/2009/097.

⁸ Order No. 90 (GVA/2010).

⁹ UNDT/NBI/2009/36.

¹⁰ UNDT/2009/004.

¹¹ Order No. 10 (NBI/2011).

¹² Order No. 29 (NY/2011).

¹³ Order No.93 (NY/2011).

¹⁴ UNDT/2011/076.

¹⁵ UNDT/2009/016.

of income, although qualitatively susceptible to monetary compensation, will prove impossible to quantify with any reasonable accuracy. If he is unable to find a job for two years, his losses may again be presumptively unrecoverable in accordance with art. 10(5)(b) of the Statute of the Tribunal.

19. The consequences arising from his unemployment will be qualitatively irreparable. These include damage to professional reputation, enduring loss of career prospects and emotional instability in his family. The Applicant cites the following cases to support this submission: *Kasmani*¹⁶, *Osman*¹⁷; and *Rasul*¹⁸.

20. He is also in a precarious financial situation. If he ceases to receive income, he will have difficulty paying for school fees for his young children causing a lasting effect upon their education. Ethiopia is an impoverished country with a limited social support network and a 20 per cent annual inflation rate eroding savings. His situation is dire.

21. In view of the foregoing, the Applicant requests that the Tribunal order the suspension of the selection process for the Senior Programme Assistant, General Service-7 level post pending management evaluation. The Applicant also requests that his contract be extended during this time frame work.

Consideration

22. This request for suspension of action was filed with the UNDT Registry at 1815 hours on Tuesday, 21 June 2011 and was formally received on Wednesday, 22 June 2011. The Tribunal has taken note of the seriousness of the Applicant's allegations, the fact that the selection process is intended to commence today, 22 June 2011 and the fact that his contract is due to expire on 30 June 2011, which is only eight business days away from the date of the filing of his request for suspension of action.

¹⁶ UNDT/NBI/2009/36.

¹⁷ UNDT/GVA/2009/39.

¹⁸ Order No. 23 (NBI.2010).

IT IS ORDERED THAT:

23. Due to the exigencies of the circumstances outlined above and in the interests of justice, the Tribunal has decided to grant the Application for suspension of action until Friday, 29 July 2011 as requested by the Applicant.

24. This case will be heard on Tuesday, 26 July 2011.

CASE MANAGEMENT DIRECTIONS:

25. Counsel are required to provide the Registry, by or before **29 June 2011**, with the following information:

a. Whether they intend to call witnesses and to clearly indicate the relevance of the evidence of each witness to be called. The Parties should also indicate the approximate amount of time they may need for examination-in-chief of their witnesses.

b. The names of witnesses and full contact details (telephone/email) shall be sent to the Registry.

26. It is the responsibility of the Parties to ensure the availability of their witnesses. This Order serves as a hearing notice pursuant to Article 16 of the Tribunal's Rules of Procedure.

(Signed)

Judge Vinod Boolell

Dated this 22nd day of June 2011

Entered in the Register on this 22nd day of June 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi