



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/086

Order No.: 168 (NBI/2017)

Date: 11 October 2017

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MWANGI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION
PURSUANT TO ARTICLE 14 OF THE
UNDT RULES OF PROCEDURE**

Counsel for the Applicant:

Stanley Kihiko

Counsel for the Respondent:

Alexandre Tavadian, UNHCR

Louis-Philippe Lapicerella, UNHCR

Introduction

1. The Applicant is a staff member of the United Nations High Commissioner for Refugees (UNHCR), based in Nairobi, Kenya. She holds an indefinite appointment at the GL-6 level and serves as a Finance Associate.

The application

2. On 19 September 2017, the Applicant filed a substantive application challenging the Respondent's written assessment for the post of Assistant Finance Officer, which she had applied for, as being erroneous and inapplicable for the position of Assistant Finance Officer because, according to her, "the said test irregularly included [a]dministrative questions rather than purely finance questions."

3. In the same application, the Applicant sought an injunction restraining the Organization from "filling up the Assistant Finance Officer position, pending the hearing and determination of this application."

4. The Respondent filed his response to the motion for suspension of action on 27 September 2017.

Submissions

5. The Respondent contended that this application is not receivable because under the provisions of art. 10.2 of the UNDT Statute, the temporary injunctive relief sought cannot be granted by the Tribunal in cases of appointment, promotion or termination.

6. It was argued for the Respondent that in so far as this application sought that no appointment be made to fill the position of the Assistant Finance Officer to which the Applicant had unsuccessfully applied, this Tribunal has no jurisdiction to grant it. This is because a suspension of action order cannot be granted to stop an appointment.¹

¹ *Faye*, Order No. 003 (NY/2015); *Auda* Order No. 156 (NY/2016).

7. The Respondent also argued that the tripartite test for a suspension of action had not been met by the Applicant. She has not shown that the impugned decision is *prima facie* unlawful, that the application which she has brought more than three months after receiving a management evaluation response is urgent and that she will suffer irreparable harm if an injunction is not granted.

Considerations

8. Applications for suspension of action are governed by art. 2 of the UNDT Statute and arts. 13 and 14 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

1. 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.**

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

9. Article 14, in relevant part, provides

1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears *prima facie* to be **unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.** This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

2. [...]

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

10. Both provisions require an applicant to seek a review of the impugned decision by the Management Evaluation Unit (MEU), before resorting to litigation. The critical difference between the two provisions is the stage at which the application for suspension of action is filed.

11. The test for the grant of the injunction sought under both articles is identical. The impugned decision must be shown to be *prima facie* unlawful, that the matter must be particularly urgently and that implementation of the decision would cause the applicant irreparable harm. All three elements must be satisfied for the court to grant the injunction being sought, as the test is a cumulative one.

12. Additionally, a suspension of action application will only succeed where an applicant can establish a *prima facie* case on a claim of right, or where he can show that *prima facie*, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

13. In this case, the Court is seized of an application in which the MEU has concluded its review and upheld the impugned decision whose substance the Applicant challenges in this application.

14. Even in cases of suspension of action in which the matter of selection of staff is in issue, the role of the Dispute Tribunal is to review the challenged selection process to determine whether a candidate has received full and fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material have been taken into consideration.²

15. The presumption of regularity is rebutted by evidence of a failure to follow applicable procedures, bias in the decision-making process, and consideration of

² *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540.

irrelevant material or extraneous factors.³ The Applicant bears the burden of showing such irregularity in the selection exercise so that there is doubt as to the lawfulness of the process that was followed. At this stage, the Applicant need only show *prima facie unlawfulness*.

16. While there are submissions on the propriety of the test that was administered, the Applicant has not addressed the Tribunal on the elements of urgency and irreparable harm.

17. Following careful review of the Applicant's pleadings, the Tribunal is unable to conclude that she has discharged her burden to satisfy the Tribunal that the injunction she seeks is warranted.

18. The Tribunal wishes to observe that this application is largely confused. While it bears all the marks of a substantive application, it sought an injunctive relief under art. 14 of the Rules of Procedure among other substantive reliefs. An applicant cannot seek both injunctive and permanent reliefs in the self-same application.

19. The Tribunal also observes that the Applicant had the assistance of Counsel. It can only advise those counsel who represent applicants before this Tribunal to make the expected effort to apply themselves properly and professionally by reading and understanding the applicable legislation before bringing matters to the Tribunal.

ORDERS

20. The application for an injunction against the Respondent concluding the selection exercise by making an appointment as referred to in this application therefore **FAILS**.

21. The Respondent is directed to file his reply to the substantive application within the statutory time limit of 30 days from the date of service.

³ *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of October 2017

Entered in the Register on this 11th day of October 2017

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi