



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BASALY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 28 October 2014, the Applicant, an Assistant Supervisor at the G-6 level in the Arabic Text Processing Unit (“ATPU”), the Department for General Assembly and Conference Management (“DGACM”), filed an application for suspension of action pending management evaluation, pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure, of the decision “not to select [him] for the post of Senior Editorial Desktop Publishing Assistant (Arabic)” at the G-7 Level in ATPU (“the Post”).

2. In support of his claim, the Applicant contends that the contested administrative decision is *prima facie* unlawful because the candidate selected for the Post neither possesses the qualifications nor the competencies required in the relevant Job Opening no. 14-LAN-DGACM-34787-R-NEW YORK R (“the JO”), that the issue is urgent, and that the contested decision would cause him irreparable harm if upheld.

3. On 29 October 2014, the Registry acknowledged receipt of the application and, on behalf of the Tribunal, ordered the Respondent to submit his reply by 5:00 p.m., 30 October 2014. The Respondent did so and claims that the application should be dismissed. As a matter of receivability, he contends that the contested decision has already been implemented and is therefore not susceptible of being suspended under art. 2.2 of the Statute of the Dispute Tribunal. On the merits, the Respondent submits that the decision was lawful as the selected candidate meets the requirement of the JO and that the Applicant has failed to demonstrate that any of the two other statutory requirements for granting a suspension of action are met, namely irreparable harm and urgency.

Relevant background facts

4. The background facts set out below all follow from the parties’ submissions and the written documentation on the record.

5. The Applicant has served with the Organization since 1985 and has encumbered his current position since 2007. According to his own information, he has performed his job duties successfully and received the overall rating of “fully meets performance expectations” in his electronic performance appraisals.

6. On 29 April 2014, the JO was posted on Inspira (the online job-site for the United Nations) and, on 27 May 2015, the Applicant applied for the Post within the prescribed time limit.

7. As follows from the selection memorandum, which the members of the interview panel signed on 22 September 2014, in addition to the Applicant, five other candidates, including the selected candidate, applied the Post, and all job applicants were found suitable and shortlisted for interviews. Subsequent to these interviews, according to the selection memorandum, four candidates, including the Applicant and the selected candidate, were recommended for the Post amongst whom the selected candidate was proposed for selection, *inter alia*, as she “received the highest rating of 4 for all competencies”, she had more than “30 years of relevant experience”, and her selection was deemed to “improve the gender balance of the ATPU management team”.

8. By email of 23 October 2014, the Secretary of the Central Review Panel stated that the Panel “endorsed the proposal for filling the [JO]” and requested that the “necessary action [be taken] to select the candidate for the vacancy in [Inspira] and inform the Executive Office of [the] selection”.

9. On 27 October 2014, by email through Inspira, the selected candidate was informed that she had been selected for the Post.

10. On the same date, the selected candidate responded that she “would like to confirm the receipt of [the] email and [her] interest and availability for [the Post]” and the Applicant was informed that he was not selected for the Post.

11. On 28 October 2014, the Applicant filed a request for management evaluation by which he requests that the contested administrative decision be assessed by the Management Evaluation Unit (“MEU”).

Consideration

The competence of the Dispute Tribunal

12. The United Nations Appeals Tribunal ruled in *O’Neill* 2011-UNAT-182 (affirming UNDT/2010/203) that “the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties”. The Tribunal is therefore mandated to review its competence at its own initiative.

13. Regarding the jurisdiction of the Dispute Tribunal concerning an application for case on suspension of action, art. 2.2 of its Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment 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 ...

14. Article 13.1 of the Tribunal’s Rules of Procedure states that:

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.

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

a. The application is receivable because it concerns an administrative decision that may properly be suspended by the Tribunal;

- b. The Applicant has submitted a request for management evaluation of the contested decision, which evaluation is currently pending;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

16. In his request for management evaluation and his application to the Tribunal for suspension of action, the Applicant contests a decision not to select him for the Post. The first requirement is therefore satisfied.

17. It follows from the standard form for request for management evaluation which the Applicant submitted to MEU on 28 October 2014 that he has requested that the contested decision undergo management evaluation. In lack of any contradictory information, the Tribunal therefore finds that management evaluation is currently ongoing and that the second requirement is satisfied.

Implementation of the decision

18. Following an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Tribunal may “*suspend*, during the pendency of the management evaluation, *the implementation* of a contested administrative decision” (emphasis added). This means that if the contested administrative decision has already been “implemented” there no longer is a decision that the Tribunal can suspend.

19. The present case concerns a non-selection decision and the question to be determined here is therefore when such a decision is implemented. In the online

Oxford dictionary (english.oxforddictionaries.com) the word “implementation” is defined as “the process of putting a decision or plan into effect; execution”.

20. The Tribunal considers that, if part of the same selection process, the selection of a successful candidate and the non-selection of other recommended candidate(s) produce legal effects simultaneously. Therefore, the non-selection decision of a recommended candidate is to be considered implemented at the same time as the selection of the successful candidate.

21. In the present case, on 27 October 2014, the selected candidate was informed through Inspira that she had been selected for the Post. The selected candidate was also asked to confirm her continued interest and availability for the position within five business days of receiving the notification. On this date, the Administration thereby presented the selected candidate with an offer for employment for the Post. On the same date, the selected candidate responded that she was confirming her interest in and availability for the Post, thereby notifying the Administration of her unconditional acceptance of the conditions of the offer within the given time limit.

22. An employment contract is an agreement, which is established by an offer and a subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 determined that “a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate”.

23. The Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Statute of the Dispute Tribunal refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which

each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member's unconditional acceptance of the offer.

24. When formed, the employment contract is a legally binding bilateral act that is agreed upon by the consensual will of the contracting parties and which does not require to be in a written form to be valid. It is a contract in which the selected candidate cannot be replaced as this person has been selected after a competitive selection process based on her/his personal skills and competencies (*intuitu personae*) and where this candidate work under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contract period by each of the parties when they satisfy their successive and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labour.

25. Consequently, in the present case, the Tribunal finds that the selection decision was implemented by the formation of the successful candidate's employment contract on 27 October 2014 upon her unconditional acceptance of the offer presented to her concerning the Post and that the decision not to select the Applicant was effectuated at the same time. The date on which a successful candidate is to assume her/his functions, in the present case 1 November 2014, is therefore not a matter of implementing the selection decision but one of executing the resultant employment contract. The significance of sec. 10.2 of ST/AI/2010/3 in this regard is that it refers to the effect this has on the employment contract and not on the selection decision.

26. In the present case, as results from the above mentioned considerations, both the selection of the successful candidate and the non-selection of the Applicant were implemented on 27 October 2014, a day before the application for suspension of action was filed before the Tribunal.

27. The Tribunal therefore finds that, since the contested decision was already implemented before a judgment on suspension of action could be rendered, the third condition for it to hear and pass such judgment under art. 2.2 of the Statute of the Dispute Tribunal is not fulfilled. It is therefore not necessary for the Tribunal to examine the remaining cumulative requirements for granting a suspension of action: *prima facie* unlawfulness, urgency, and irreparable harm.

Conclusion

28. The application is rejected in its entirety.

(Signed)

Judge Alessandra Greceanu

Dated this 3rd day of November 2014