



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SMITH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Jiries Saadeh, OSLA

Counsel for Respondent:

ALS/OHRM, UN Secretariat

Introduction

1. On 13 March 2015, the Applicant filed an application for suspension of action pending management evaluation, pursuant to art. 2.2 of the Dispute Tribunal's Statute. The Applicant seeks suspension of the decision to consider him ineligible for the post of Chief Aviation Officer at the P-5 level in the United Nations Mission in South Sudan ("UNMISS") on the basis that he is not a staff member of UNMISS.

Background

2. The Applicant is an Air Transport Officer at the P-4 level rostered against the P-5 position of Chief Aviation Officer since July 2013.

3. On 24 February 2015, the UNMISS Broadcasting Service circulated a Temporary Job Opening Announcement for the Chief Aviation Officer post to UNMISS staff. The deadline for applications was 2 March 2015. The Notes section of the announcement included the following statement: "Subject to the funding source of the position, this temporary job opening may be limited to candidates based at the duty station".

4. On 2 March 2015, the Applicant applied for the post, attaching his Personal History Profile and his two most recent e-PAS performance appraisals.

5. By email dated 3 March 2015, a Human Resources Officer working for UNMISS advised the Applicant: "Your application is hereby acknowledged. However, this position is open to UNMISS staff only".

6. On 13 March 2015, the Applicant submitted a request for management evaluation.

7. The same day the Applicant submitted an application for suspension of action pending management evaluation.

Consideration

8. Article 2.2 of the Statute of the Dispute Tribunal provides:

The Dispute Tribunal shall be competent to hear and pass judgement 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

9. In accordance with art. 2.2 of its Statute, the Tribunal has to consider whether the impugned decision appears to be *prima facie* unlawful; whether the matter is of particular urgency, and whether its implementation will cause the Applicant irreparable harm. The Tribunal must find that all three of these requirements have been met in order to suspend the action, meaning the implementation of the decision, in question.

Does the decision appear to be prima facie unlawful?

10. It is important for all concerned, including the Management Evaluation Unit of the Department of Management, to understand that, in essence, the Tribunal is expressing an opinion as to whether on the facts presented by the Applicant it appears that the decision is *prima facie* unlawful.

11. The Tribunal is not required to make a finding that the impugned decision is, in fact, unlawful. For the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Villamorán* UNDT/2011/126).

12. As a current staff member with a continuing appointment and one who is on a roster for such a position, the Applicant is eligible to apply for such a post absent a cogent reason why he should not. The rather curt reply provides no explanation as to why the restriction of the temporary job opening is to UNMISS staff only.

13. The Applicant is a staff member at the Department of Field Support in New York. It would appear that the Human Resources Officer may have mistakenly read the note quoted at para. 3 to mean that the temporary job opening is restricted to candidates already based at the duty station when in fact such a restriction would only be applicable if funding was an issue. Even if it turns out subsequently that such an issue arises, it would be necessary for the Administration to justify the restriction. Accordingly, the exclusion of the Applicant satisfies the legal test the decision appears to be prima facie unlawful.

Urgency

14. The closing date for the temporary job opening was 2 March 2015. The Administration will now be engaged in the process of examining the applications and once an appointment is made it will be too late for the Applicant to be considered. Even if he were to file a substantive claim, it will be too late for him to be properly and fairly considered for appointment since there would be no vacancy.

Irreparable damage

15. The Applicant is in the fortunate position of being on the roster for such a post. It is not unreasonable to suppose that he would stand a good chance of being favourably considered. If another candidate is selected, the loss of opportunity of advancing his career by performing duties at a higher grade will be lost for an indeterminate period and may never arise in the foreseeable future. In this regard, the Tribunal notes the Applicant's assertion that within the Organization, there are only six P-5 posts for technical aviation specialists. The Tribunal finds that this test is satisfied.

Order

16. The request for suspension of action is granted.
17. The impugned decision is suspended pending management evaluation.

(Signed)

Judge Goolam Meeran

Dated this 13th day of March 2015