



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

MOHAMED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

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

Introduction

1. On 7 May 2016, the Applicant, a P-4 level Human Resources Policies Officer, Human Resources Policies Division, International Civil Service Commission (“ICSC”), filed via email a request to suspend, pending management evaluation, the recruitment process for a P-5 level post of Senior Human Resources Policies Officer, ICSC. The Applicant identified the contested decision as the decision of the Chairman of ICSC to recommend another candidate as the first choice for selection for the P-5 post and to exclude the Applicant from the final list of three recommended candidates.

2. Given that the application for suspension of action was filed on 7 May 2016, which was a Saturday, it was processed by the New York Registry the next working day, i.e., Monday, 9 May 2016. On the same day, the New York Registry requested the Applicant to file her application for suspension of action through the eFiling portal. The Applicant proceeded accordingly and filed her application through the eFiling portal on the same day.

3. Following the Applicant’s submission of the application through the eFiling portal, on 9 May 2016, the case was assigned to the undersigned Judge.

4. On 9 May 2016, the New York Registry transmitted the application for suspension of action to the Respondent, who was instructed via email to file a reply by 1:00 p.m. on Wednesday, 11 May 2016.

5. The Respondent’s reply was duly filed on 11 May 2016. On the same day, the Applicant, without leave of the Tribunal, but diligently, filed a submission in response to the Respondent’s reply.

Factual and procedural background

6. The following outline of relevant background is based on the parties' submissions as well as the documentation on file.
7. The Applicant has been employed by the ICSC since 2005.
8. The Applicant states *inter alia* that, in June 2015, she learned that the incumbent P-5 level Senior Human Resources Policies Officer, Human Resources Policies Division, ICSC, would be retiring.
9. In September 2015, the contested post was advertised, with a deadline for submission of applications of 16 November 2015.
10. On 23 December 2015, the Applicant was informed that she had been short-listed for the post and was invited to participate in an assessment administered by an external assessment company.
11. In January 2016, the Applicant took three external tests. She was subsequently informed by the external assessment center that she was to proceed to the next stage of the process and that they would arrange for a feedback session.
12. On 25 February 2016, the Applicant received her assessment/development report with high scores for each of the three tests. She submits that the external assessor's feedback on her performance was very positive.
13. On 1 March 2016, she was interviewed by a panel of six members, including the ICSC Chairman; ICSC Vice-Chair; ICSC Executive Secretary; Chief, Human Resources Policies Division, ICSC; Chief, Salary and

Allowances Division, ICSC; and Director of Human Resources, United Nations Population Fund (“UNFPA”).

14. The Applicant submits that it was a competency-based interview, although its methodology did not conform to the competency-based practices. She states *inter alia* that she was interviewed for 40–45 minutes, whereas one of the recommended candidates was apparently interviewed for two hours.

15. On 31 March 2016, the Chairman of the ICSC sent a letter to the Secretary-General, recommending three candidates, in order of preference. The list of recommended candidates did not include the Applicant.

16. On 29 April 2016, upon her return from home leave, the Applicant learned of the ICSC Chairman’s letter dated 31 March 2016 and that she was not among the three recommended candidates.

17. On 7 May 2016, the Applicant requested management evaluation of the contested decision.

18. On 10 May 2016, the Management Evaluation Unit (“MEU”) replied to the Applicant’s request for management evaluation, stating that her claims were not receivable given that the selection process is still ongoing and no decision has been taken with direct legal consequences to her terms of appointment. The MEU stated that the ICSC Chairman’s letter dated 31 March 2016 was a preparatory step in the selection process which did not, on its own, constitute a final administrative decision that affected her contract of employment or terms of appointment.

19. On 11 May 2016, the Respondent filed the reply to the application, requesting the Tribunal to dismiss it in view of MEU’s completion of the management evaluation on 10 May 2016.

20. On 11 May 2016, the Applicant filed a submission in response to the Respondent's reply, *inter alia* objecting to the MEU's conclusion that her case was not receivable.

Applicant's submissions

21. The Applicant's submissions may be summarized as follows:

Dispute Tribunal's competence to order suspension of action

a. Contrary to the MEU response of 10 May 2016, the decision of the ICSC Chairman not to include the Applicant on the list of recommended candidates constitutes an administrative decision that may be appealed. Being excluded from the final list of three short-listed candidates constitutes a final decision resulting in a loss of opportunity for her to be considered for the post and has direct and final legal consequences on her appointment and career;

b. According to the ICSC recruitment procedure for senior staff at P-5 level and above, once the ICSC Chairman receives the response from the Secretary-General, the first choice candidate would receive the appointment letter for the post. Once the selection is confirmed, a suspension of action will not be possible;

Prima facie unlawfulness

c. The selection process in this case was pre-determined. The Applicant was deprived of fairness and justice and has been discriminated against. The Applicant is more qualified candidate than one of the recommended candidate and should have been recommended pursuant to ST/AI/1999/9 (Special measures for the achievement of gender equality);

Irreparable damage

d. The implementation of the contested decision would cause her “emotional and physical distress on account of discrimination and bias”; “financial loss [caused] by deprivation of career progression”; “loss of motivation and trust”; “potential loss of future opportunities and income”; “reputational harm”; and “humiliation”;

Urgency

e. The Applicant states that the contested decision was made on 31 March 2016 and she became aware of it on Friday, 29 April 2016, upon her return from home leave. She filed her request for management evaluation on Saturday, 7 May 2016;

f. Once the ICSC Chairman receives the response from the Secretary-General, the first choice candidate will receive a letter of appointment. Once the selection is confirmed, a suspension of action will not be possible.

Respondent’s submissions

22. The Respondent’s principal contentions may be summarized as follows:

Dispute Tribunal’s competence to order suspension of action

a. The contested decision is no longer pending management evaluation. On 10 May 2016, the MEU informed the Applicant that her request for management evaluation was not receivable. Pursuant to art. 2.2 of the Tribunal’s Statute, the Tribunal may suspend the implementation of a decision “during the pendency of

the management evaluation” (see also *Igbinedion* 2011-UNAT-159). As a result of the determination by the MEU, the Tribunal no longer has jurisdiction under art. 2.2 of its Statute to order suspension of the contested decision.

Consideration

23. The United Nations Appeals Tribunal ruled in *O’Neill* 2011-UNAT-182 (affirming *O’Neill* 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.

24. Article 2.2 of the Tribunal’s Statute states:

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.

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

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.

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

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether the application concerns an administrative decision that may be properly suspended by the Tribunal

27. As the Dispute Tribunal stated in *Wilkinson et al.* UNDT/2009/089 (not appealed) and *Ishak* UNDT/2010/085 (affirmed in *Ishak* 2011-UNAT-152), in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision taken by the Administration in a precise individual case and which produces direct legal consequences to the legal order, including the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision.

28. The Appeals Tribunal stated in *Abbassi* 2011-UNAT-110:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

29. In *Ishak* 2011-UNAT-152, the Appeals Tribunal stated:

29. ... A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.

30. However, in the subsequent judgment of *Luvai* 2014-UNAT-417, the Appeals Tribunal stated:

31. It is established in the jurisprudence of this Tribunal that with regard to promotion cases, every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

31. The Tribunal concludes that the findings in *Ishak* 2011-UNAT-152 are no longer valid in the light of the latest jurisprudence with regard to promotion cases, according to which every stage of the selection procedure is subject to judicial review/appeal (*Luvai* 2014-UNAT-417). Therefore, a decision taken at any stage of the selection process is an administrative decision that can be the object of an application for suspension of action pursuant to art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure if the case is deemed to be of particular urgency, filed to prevent irreparable damage, and when the decision appears to be *prima facie* unlawful (*Goodwin* Order No. 18 (NY/2016)).

32. The Tribunal is of the view that the main scope of the procedure established for a suspension of action pending management evaluation in selection and promotion cases is to prevent at any stage, through the Tribunal's prompt intervention (as soon as possible), the continuation of a selection process which appears to be unlawful and ultimately the finalization of it by the issuance of an illegal selection decision.

33. In the present case, the contested administrative decision is the decision to exclude the Applicant from the list of recommended candidates. The Tribunal concludes that the present application concerns an administrative decision that might be properly suspended by the Tribunal. This decision cannot be considered preparatory since it is final and applies individually to the Applicant. The decision not to include the Applicant in the final list of recommended candidates obviously results in the ending of her participation in the selection process. As the Dispute Tribunal also stated in paras. 23–26 of *Korotina* UNDT/2012/178 (not appealed), decisions resulting in the ending of a staff member's participation in a selection process cannot be described as merely preparatory since they are final and apply individually to the staff member, signifying the end of the process as far as that staff member is concerned.

34. The Tribunal concludes that the first condition mentioned in para. 26(a) above is fulfilled.

Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

35. It follows from art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly

requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256).

36. As results from the facts, the Applicant submitted her request for management evaluation on 7 May 2016, contesting the decision to recommend another candidate among three short-listed candidates, and not to include her among the recommended candidates. The MEU completed its review of the request for management evaluation on 10 May 2016 and concluded that it was not receivable. Since an application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation, and as the management evaluation in this case is no longer pending and has been completed, one of the cumulative and mandatory conditions presented above is not fulfilled.

37. Consequently, the Tribunal will not examine if the three remaining statutory requirements specified in art. 2.2 of its Statute—namely, *prima facie* unlawfulness, particular urgency and irreparable damage—have been met in the case at hand.

Conclusion

38. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of May 2016