



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/080
Order No.: 162 (NY/2017)
Date: 16 August 2017
Original: English

Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

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

Introduction

1. On 10 August 2017, at 7:30 p.m., the Applicant, an Chief, Financial Information Operations Service, at the D-1 level, step 8 level, in the Office of Programme planning, budget and accounts (“OPPBA”), filed an application for suspension of action pending management evaluation of the decision “not to include [him] in the list of recommended applicants for [Job Opening] #58836 Director, Global Services Division, D-2 and therefore not to consider [him] for selection”. By his application for suspension of action, the Applicant sought “suspension of the entirety of selection process, including the appointment of the selected candidate effective 1 September 2017”. In his application, the Applicant, furthermore, requested the Tribunal to order the Respondent to provide certain evidence.

2. On 11 August 2017, at 10:33 a.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent, directing him, upon the instructions of the Tribunal, to file a reply by 15 August 2017.

3. By regular email of 12 August 2017 (and not through the eFiling portal), the Applicant informed the Registry that, on 11 August 2017, the Management Evaluation Unit (“MEU”) had responded to his management evaluation request stating that the request was not receivable. Attached to his email, the Applicant also submitted the MEU’s 11 August 2017 letter. The Applicant further noted that, “Because the MEU has already responded with ‘not receivable’, the management evaluation is therefore no longer pending and ‘is completed’. Since one of the cumulative requirements of Article 2.2 is that Management Evaluation must still be pending, procedurally [the request for suspension of action] for this case must then axiomatically fail”. The Applicant, however, also stated that “before the judge issues the ruling to reject [his request for suspension of action, he] would request an oral hearing to be heard on this matter. The MEU should not be allowed to manipulate the proceedings of the UN judicial system in this manner without any legal review of their actions and arguments and leaving me with no remedy for injunctive relief”.

4. On 14 August 2017, the Respondent filed his reply. On the same date, the Applicant filed another regular email, commenting on the Respondent's reply, reiterating his request for an oral hearing.

5. On 15 August 2017 the Respondent filed a copy of the management evaluation request submitted by the Applicant on 10 August 2017, as instructed by the Tribunal via email.

Background

6. In his application for suspension of action, the Applicant summarizes the facts of the case as follows (emphasis in original):

(1): On 23 April, 2015, the proposed programme budget for the Office of Information and Communications Technology ["OICT"], Section 29E of Part VIII Common Support Services, Section 29E was issued. This contained proposals for the upgrade of posts to implement the new ICT strategy.

(2): In Section VIII.116 (a). *“(a) One post of Director, Global Services Division (D-1) (subprogramme 5), is proposed for reclassification as a D-2 post. The incumbent would be responsible for leading business transformation and the overall management of strategic [Information and Communications Technology, “ICT”] initiatives; providing leadership across the Secretariat; and ensuring a unified approach to the harmonization of activities and the implementation of the revised ICT strategy;”*

This was for Umoja position # 30005194, encumbered by [name redacted, Mr. SA] appointed at the D-1 level.

(3): In the report of the 5th Committee A/70/648, V Information and communications technology in the United Nations, the 5th Committee “2. Endorses the conclusions and recommendations contained in the report of the Advisory Committee.”

(4): By [General Assembly] Resolution A/RES/70/247, the report of [the Advisory Committee on Administrative and Budgetary Questions] and the 5th Committee were adopted. Umoja position number #30005194 was reclassified from D-1 to D-2 effective 1 January 2016. [Mr. SA] has continued to encumber the position since that time while still appointed at the D-1 level.

- (5): On 15 April 2016, the position of Director, Global Services Division, OICT was advertised as Job Opening #58856 for Umoja position #30005194 [reference to annex omitted]
- (6): On 13 June 2016, I applied for the position [reference to annex omitted]
- (7): On 29 June 2016, I was invited for a competency based interview. [reference to annex omitted]. After some scheduling issues, the interview was scheduled for 15 July 2016 at 11:00 am. I was advised that the composition of the assessment panel was [the Chief Information Technology Officer (“CITO”), name redacted, Mr. AO] and [name redacted, Mr. MT] (WHO). [reference to annex omitted]
- (8): Mr. MT had previously been screened in for JO #54326 (Director, Global Operations Division, D-2) after being improperly being afforded the opportunity to submit a second application after the advertising period for JO #54326 had been illegally extended by one month to 29 April 2016. The entire circumstances of this, JO #63461 and TJO #52485 are documented in cases UNDT/NY/2017/012 and UNDT/NY/2017/063 currently before this tribunal.
- (9): On 15 July 2016, I was interviewed for the position by phone. During the interview, I continually protested that the questions being asked being were not in compliance with the requirements of a competency based interview and assessment.
- (10): After the interview, I wrote to the interview panel members, to the Executive Office and [the Office of Human Resources Management, “OHRM”] formalizing my protest of the conduct of the Panel members during the interview been selected.
- (11): On 21 July 2016, I received a response from the Hiring Manager denying any irregularities [reference to annex omitted]
- (12): On the same day, I wrote to the Senior Review Board with my concerns [reference to annex omitted]. On 4 August 2016, I also reported this to [the Assistant Secretary-General (“ASG”) of] OHRM.
- (13): On 4 August 2016, I forwarded this to the ASG/OHRM as well as other reports of irregularities for JO #54326 and [temporary JO (“TJO”)] #52485.
- (14): After no action for more than 10 months, on 14 June 2017, I received information that the case had been submitted to the Senior Review Group for endorsement and selection. I also determined that I was not one of the recommended applicants.

- (15): On 14 June 2017, I requested management evaluation of the decision to not include me in the list of recommended applicants and that I had not received full and fair consideration for the position. The MEU assigned case number MEU/696-17/R. [reference to annex omitted]. I fully intended to submit a case to [the Dispute Tribunal] with an application for Suspension of Action by 16 June 2017; this was the reason for urgently requesting the MEU to assign a case number.
- (16): On 16 June 2017, I received the MEU's response that the case was not receivable [reference to annex omitted]
- “The MEU noted that selection exercise is still ongoing and that no final selection decision has been made. Accordingly, the MEU considered that presently there is no administrative decision that can be reviewed.[”]
- (17): The case had been submitted to the Senior Review Group (SRG) for selection; however, I was already aware that my name had not been included in the list of recommended applicants. While the final selection decision had yet to be communicated at the time, the decision as it pertained to my candidacy was already final; I was not included in the list of applicants recommended for the position. This response by the MEU is in direct conflict with *LUVAI*, UNAT-2014-417, which states that every stage of a selection procedure is subject to judicial review.
- (18): Also, I also refer to *BALDINI*, Order No.: 103 (NY/2013) paragraph 17 and *GOODWIN*, Order No.: 18 (NY/2016) paragraphs 38 and 39. In *GOODWIN*, paragraph 38, the Tribunal stated
- “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 in any stage of the selection process is an administrative decision which can be the object of an application for suspension of action pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure if the case is deemed to be of particular urgency, is filed to prevent irreparable damage, and when the decision appears to be *prima facie* unlawful”
- (19): The response of the MEU stating the case not to be receivable was a simple and cynical ploy by the administration to ensure that an application for suspension of action would immediately fail at the time, due to the management evaluation no longer

being pending (See *SAREVA*, Order No. 127 (GVA/2017), *SAREVA*, Order No. 142 (GVA/2017) Paragraph 11)

- (20): On 10 August 2017, I was advised that an applicant had been selected and that [Mr. SA], the incumbent of the upgraded D-2 position #30005194 for the past 20 months, had been selected. The status of my candidacy for the Job Opening in Inspira still shows “Under Consideration”; however, this is just semantic, the decision has been made and endorsed. The selection decision represents a promotion for [Mr. SA], therefore the date of implementation is 1 September 2017.
- (21): On the same day as filing this application, I again requested management evaluation of the decision to not give me full and fair consideration for the position. The MEU has assigned case number MEU/1085-17/R [reference to annex omitted]. The expected response date is 11 September 2017.

Applicant’s submissions

7. The Applicant’s principal contentions and allegations may be summarized as follows:

Receivability

- a. The selected applicant is a D-1 level staff member and the contested selection represents a promotion to the D-2 level. As per *El Badaoui Nehme* Order No. 66 (GVA/2017), ST/AI/2010/3 (Staff selection system), secs. 9 and 10, govern selection procedures within the Secretariat. These two sections distinguish between the selection decision as such and its notification and implementation. Regarding the selection procedures that, as in this case, culminate in the promotion of a staff member who already serves in the Organization, sec. 10.2 of ST/AI/2010/3 provides: “When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision”;

b. As per *Wilson* Order No. 147 (NY/2016), *Wilson* Order No. 276 (NY/2016), *Finniss* Order No. 116 (GVA/2016), *Farrimond* Order No. 113 (GVA/2016), *El Badaoui Nehme* Order No. 66 (GVA/2017), the contested selection decision, cannot be implemented before the first day of the month following the selection decision, this being 1 September 2017. Therefore, the contested decision has not been implemented, and this application for suspension of action must be considered receivable, referring also to *Sareva* Order No. 142 (GVA/2017), para. 25;

Prima facie unlawfulness

c. The outcome of this selection was predetermined. For more than two years and well before the position was even upgraded on 1 January 2016 and advertised on 15 April 2016, this position has been publically referred to as “Mr. SA’s D-2” to which many witnesses can attest. Manipulating a procurement or recruitment process to ensure a certain outcome constitutes fraud as defined in sec. 6(j) of ST/IC/2016/25 (Anti-fraud and anticorruption framework of the United Nations Secretariat). The whole interview process was conducted just for show to confirm the selection of Mr. SA who has been the incumbent of the upgraded D-2 post since 1 January 2016 while still appointed at the D-1 level;

d. The actions taken during the course of this recruitment violated the provisions of ST/AI/2010/4/Rev.1 (Administration of temporary appointments), sec. 3.1. No TJO for this position was issued despite the D-2 level position was established on 1 January 2016. Instead, Mr. SA was allowed to continue to encumber the position for 20 months and get even more experience without any competition, thus making the outcome even more predetermined;

- e. The JO violated the provisions of sec. 4.1.8 of the Inspira Manual for Recruiters. No action was taken between the completions of the interviews on 16 July 2016 through at least early June 2017;
- f. The inclusion of Mr. MT, who was one of the aforementioned favored applicants for JO #54326, on the interview panel for JO #58836, violated sec. 9.3.3(c), (d) and (e) of the Inspira Hiring Manual for Managers;
- g. The Panel did not ask any follow-up questions even when the Applicant specifically inquired whether they wished him to provide further information;
- h. The Applicant have received “A – Exceeds Expectations” ratings in each of his last five completed performance documents;
- i. The selection process was completed almost 13 months since the conclusion of the interviews, without any status updates provided;
- j. Numerous other JOs in the OICT have been full of irregularities;
- k. The assessment panel was biased against the Applicant and had no interest in his answers and just went through the motions without asking even one follow-up or probing question. No matter what the Applicant had said, he would not have been recommended;
- l. The Dispute Tribunal has consistently held that ST/AI/2010/3 establishes the procedures applicable to the staff selection process (sec. 2.6). The staff selection system manuals for “the Applicant,” “the Hiring Manager,” “the Recruiter,” “the Department Head” and “the Central Review Bodies” were first issued in March 2011 in accordance with sec. 2.6 of ST/AI/2010/3. The issuance of these manuals was mandatory under section 2.6 of ST/AI/2010/3, which states that “[m]anuals will be issued that provide

guidance” and that the steps set out in these manuals are therefore binding and form part of the procedures applicable from “the beginning to the end” of the staff selection process. The guidelines provided in these manuals must be respected during the entire staff selection process, except where there is an inconsistency between the text of the manuals and the text of ST/AI/2010/3. In these circumstances, the text of ST/AI/2010/3 will prevail. As a result, the administration is compelled to adhere to the provisions contained within the Inspira manual for Hiring Managers except where they conflict with ST/AI/2010/3;

m. Specifically, sec. 9.3.3(c) was breached in that it requires that, “In identifying and assigning the panel of assessors, by nomination, the Hiring Manager must ensure that the individuals selected fulfill the appropriate requirements as follows ... [c] Freedom from outside pressure: There is no appearance of a conflict of interest”;

n. Mr. MT served on the assessment panel for the contested JO and was one of the favoured applicants for JO #54326 where he had been allowed to submit a second personal history profile (“PHP”) after the allegedly illegal extension of the JO advertising period and after his application based on his original PHP had been screened out by the OHRM;

o. Whenever an applicant submits an application for a position in Inspira, they are warned that the contents of their PHP will be used as the basis of pre-screening. Every JO states that, “Each applicant must bear in mind that submission of incomplete or inaccurate applications may render that applicant ineligible for consideration for the job opening. Initial screening and evaluation of applications will be conducted on the basis of the information submitted. Applications cannot be amended following submission”;

p. Mr. MT was permitted to submit a revised PHP which resulted in the OHRM screening in his second application and he was interviewed for JO

#54326. Other applicants who submitted incomplete PHPs and were screened out did not get the same opportunity to submit another PHP because the Hiring Manager had no interest in them. The Applicant reported this to the ASG/OHRM on 4 August 2016. The Ethics Office has confirmed that this report to the ASG/OHRM is a protected activity;

q. At the time of the Applicant's interview for JO #58836 on 15 July 2016, the selection decision for JO #54326 had not been completed. Therefore, his participation in the interview process for JO #58836 was entirely improper given that he would certainly have been under pressure to please and not contradict the CITO as the decision maker also for JO #54326. As a result, he had a serious conflict of interest in serving on the assessment panel for JO #58836.

r. Mr. MT is working as the Chief Information Officer of WHO based in Geneva. It was inappropriate for Mr. MT, a person with a conflict of interest and employed outside of the UN Secretariat to be involved in an assessment panel and competency-based interview for a Secretariat position. He did not assess any technical elements as a technical specialist; he was the one that asked questions about the accountability competency. The CITO was able to get another D-2 level staff member to serve on the assessment panel for JO #54326. There are also many other D-2s in the UN Secretariat without a conflict of interest who could have served on this assessment panel for JO #58836;

s. After the Applicant's report to the ASG/OHRM on 4 August 2016, there was no further action to complete the selection process for JO #54326. Five months later, on 16 January 2017, JO #54326 was canceled with a lateral D-2 level applicant transferred to the vacant position at the instruction of the Under-Secretary-General for Management against the wishes of the CITO. As a result of the lateral transfer, Mr. MT did not get selected;

t. Mr. MT had not completed competency-based selection and interviewing skills before serving on the assessment panel and not completed Inspira self-study training. WHO does not use Inspira for staff selection. He does not even have an account to login;

u. The Applicant was advised of the composition of the interview panel on 12 July 2017 containing Mr. MT and the interview was held on 16 July 2016. Under *Faust* UNDT/2016/213, the Applicant had no idea who Mr. MT was at the time and consequently had no grounds to contest his inclusion in the assessment panel. Only on 2 August 2017, two weeks after the interview, was the Applicant made aware of the circumstances of the alleged favoritism given to Mr. MT in JO #54326 which the Applicant immediately reported to the ASG/OHRM and the Senior Review Group Secretariat on 3 and 4 August 2016. Therefore, at the time of the interview, the Applicant had no knowledge of Mr. MT's conflict of interest in serving on the assessment panel for JO #58836 and cannot be held responsible for not challenging the composition of the panel when there were material facts not known to me at the time. Certainly, the Respondent had a vested interest in not disclosing the full identity of Mr. MT or that he was an applicant for JO#54326 at the same time;

v. The assessment panel asked questions during the interview which did not correspond to the competencies in the advertised JO. It also asked hypothetical questions and did not ask any follow-up questions even when the Applicant specifically inquired whether they wished him to provide further information;

w. In the accountability competency, Mr. MT, who had not taken the required competency-based interview training, asked the following questions (paraphrased): "Please provide an example of when you did not agree with a decision by your manager and how did you convince them to change their mind", and, "How do you build trust with your staff"? The questions bear no

relation to the accountability competency and therefore had no probative value in determining whether or not the Applicant met the requirements of the accountability competency. The question, “How do you build trust with your staff?” was about building trust which is an entirely separate managerial competency not included in the advertised JO and certainly had no connection to accountability;

x. In the leadership competency, the CITO asked, “If I asked your staff and other people what kind of leader you are, what would they say”? This question is hypothetical, speculative and had no place in a competency-based interview where the absolute requirement is to elicit evidence of past experience, not the ability to invent and improperly put words into the mouths of others. As the Applicant said to the assessment panel during the interview, the only way to correctly and honestly answer that question is to say, “Ask them”. Anything the Applicant said in response would be self-serving and could not be used to determine positive or negative indicators of the leadership competency.

y. The Applicant is a senior member of the Central Review Body and have reviewed many P-5/D-1 level JOs for compliance with the rules and regulations. The Applicant has also been a hiring manager and conducted hundreds of competency-based interviews since 2002. The Applicant is also chair of the Young Professionals Programme (“YPP”) for ICT again this year at the explicit request of the examinations section of the OHRM and have just completed many competency-based interviews to assess the potential YPP applicants. Therefore, the Applicant do not make claims lightly to state that JOs have irregularities or that the assessment process is tainted;

z. The fact that all candidates may have been treated alike does not in and of itself render the procedural defects to be procedurally correct. This case is not testing the principle of equal treatment but procedural propriety,

perversity and absurdity in a decision-making process as it affected my candidacy for the position. The fact that other candidates may have been similarly affected does not of itself render these procedural defects a nullity;

aa. After the report to the ASG/OHRM on 4 August 2016, no final selection decision was communicated in JO #58836 until 10 August 2017;

bb. The acknowledgment email stated that, “You will be kept informed of the status of your application throughout the process”, and it is almost 13 months since the Applicant was interviewed for the position (referring also to *Rolland* 2011-UNAT-122, para. 31);

Urgency

cc. The management evaluation response from the MEU will not be due until at least 11 September 2017. Unless the decision is suspended, the decision will be implemented on 1 September 2017 with the selected applicant appointed;

dd. The urgency is not self-created as the Applicant has filed this application less than 8 hours after becoming informed of the decision;

Irreparable damage

ee. There are very few D-2 positions available in the ICT job family. Unless the selection is suspended, the Applicant will lose one of the few promotion opportunities available;

ff. The justification for irreparable harm was previously well documented in *Wilson* Order No. 147 (NY/2016), which apply equally in this case;

gg. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the

circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances;

hh. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013) and *Finniss* Order No. 116 (GVA/2016)).

Respondent's submissions

8. The Respondent submits that the Dispute Tribunal does not have jurisdiction to issue an order suspending the contested decision because the Applicant's request is no longer pending management evaluation. Pursuant to art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may only suspend the implementation of a decision "during the pendency of the management evaluation" (*Igbinedion* 2011-UNAT-159, para. 23).

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

9. Article 2.2 of the Dispute 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.

10. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

11. 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.

12. 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 Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- 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 Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing

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

14. The Tribunal notes that, as results from the case record, the Applicant submitted his request for management evaluation on 10 August 2017, requesting a management evaluation of the decision not to “fully and fairly” consider him for the “Umoja position # 30005194, Inspira Job Opening #58836, DIRECTOR, INFORMATION SYSTEMS AND TECHNOLOGY (D2)”, and therefore not select him but another candidate, Mr. SA, for the post. In the management evaluation request, the Applicant stated that, he “received advise that he had not been selected and [Mr. SA] had been was selected” and that “[t]herefore the selection decision has been finalized and the process is complete”. In the application for suspension of action pending management evaluation filed on 10 August 2017, the Applicant identified the contested administrative decision “not to include [him] in the list of recommended applicants for [Job Opening] #58836 Director, Global Services Division, D-2 and therefore not to consider [him] for selection”. By his application for suspension of action, the Applicant sought “suspension of the entirety of selection process, including the appointment of the selected candidate effective 1 September 2017”.

15. The Tribunal further notes that MEU completed its review of the request for management evaluation on 11 August 2017 and took into consideration the information provided by the Chief, Senior Review Board Secretariat according to which that, while the Senior Review Group had delivered a signed report with the list of recommended candidates to the Executive Office of the Secretary-General, as of now, no appointment has been made by the Secretary-General. Based thereon, the MEU concluded that the Applicant’s request for management evaluation was not receivable.

16. Consequently, as the management evaluation in this case has been completed and is no longer pending, one of the cumulative and mandatory conditions presented above is not fulfilled. The Tribunal will therefore not examine if the remaining

statutory requirements specified in art. 2.2 of its Statute have been met in the case at hand.

17. In line herewith, the Applicant's request for further evidence is to be rejected. Regarding the request for hearing filed on 14 August 2017, the Tribunal considers that it is related to the considerations included in the 11 August 2017 management evaluation decision and therefore not admissible in the present case since, pursuant to the jurisprudence of the Appeals Tribunal, management evaluation decisions are not by themselves appealable administrative decisions in accordance with art. 2.1 of the Dispute Tribunal's Statute (see, for instance, *Kalashnik* 2016-UNAT-661 and *Nwuke* 2016-UNAT-697). The Tribunal has therefore no competence to review any such decisions.

Conclusion

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

The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of August 2017