

Introduction

1. The Applicant is employed as an Economics Affairs Officer with the Economic Development and Globaliza

Case No. UNDT/NBI/2013/010

Order No. 077 (NBI/2013)

12. In the present case, one of the Applicant's requests is for the Tribunal to order the suspension of the selection process for the post of Chief, Economics Analysis Section at the P5 level advertised as Job Opening Number 12-ECO-ESCWA-25517-R-BEIRUT(G). The facts show that the vacancy announcement for JO 25517 was advertised on 3 October 2012 with the closing date being 19 January 2013.

13. The Applicant submitted his Applicati

interpretation of the Administration would create damaging and serious implications.

- c. He submitted his job application on 9 October 2012 but he could have also submitted his Application at any other time until the deadline on 19 January 2013 by which time he would have met the one year requirement. It is therefore “absurd” for the Administration to take into account the date of application for a job as this would jeopardize the selection process. Therefore the Administration’s interpretation of sect. 9.1 of ST/AI/2010/3 is highly erroneous.
- d. With regard to sect. 6.3 of ST/AI/2010/3, a staff member at the P4 level can apply for a post at the P5 level if the said staff member has made two lateral moves. The exceptions to this provision, which are applicable to the Applicant and they are: (i) one lateral move will suffice where a staff member has completed one year or more on in the professional category with a regional economic commission and (ii) where the staff member has made a lateral move at the P4 level.
- e. The Administration refused to consider the Applicant’s lateral move which

EDGD to the Economic Analysis Section of EDGD is not considered to be a lateral move as the Applicant served in the position in the Regional Integration Section for less than one year before his reassignment.

- c. The underlying rationale for requiring lateral moves for one year or longer is that a staff member should gain experience in different functions or duty stations, with *each* assignment having an accumulated duration of at least one year. The purpose of the lateral move requirement would therefore not be served if the Applicant's movement after less than one year in the position to which he was recruited was counted.
- d. The Applicant was re-employed by the Organization under Staff Rule 4.17 when he was initially recruited to ESCWA on 31 October 2011. Under Staff Rule 4.17 (b), the terms of his new appointment shall be fully applicable without regard to any period of former service and service shall not be regarded as continuous between the prior and new appointments. Furthermore, the Applicant had separated from the Organization for more than twelve months before joining ESCWA in 2011.
- e. There is no basis for the Applicant's prior service with ECA to count toward the lateral move requirement under section 6.3 of ST/AI/A2010/3.

Element of urgency

17. The Applicant submits that if the contested administrative decision is not suspended, the selection process would follow its normal course and the Applicant would have no chance to be selected as a candidate.

18. The Respondent submits that:

- a. The Applicant has failed to satisfy the requirement of urgency, as the deadline for management evaluation of the contested decision is due to expire before any selection decision for the position can be implemented.
- b. The recruitment process is at an early stage. The Hiring Manager, the Applicant's supervisor, has not yet evaluated the applicants or prepared a shortlist of those who appear most qualified for the job opening under section 7.5 of ST/AI/2010/3 (Staff selection system). As such, a selection decision has not yet been made by ESCWA.

- c. Lastly, the Respondent argues that the management evaluation is due to be completed within 45 days of the receipt of the request for management evaluation (Staff Rule 11.2 (d)). An order for suspension of action can only be made during the pendency of the management evaluation (Article 2(2) of the Statute). Accordingly, there is no realistic prospect that the selection decision would be implemented before the management evaluation process is due to be completed.

Irreparable harm

19.

advancement other than by applying for the P-5 position of Chief, Economic Analysis Section. Should the Applicant file an application on the merits, any harm suffered by the Applicant could be compensated by an appropriate award of damages.

Considerations

Prima facie unlawfulness

21. In the case of *Corcoran*⁶ it was held that,

Since the suspension of action is only an interim measure and not the final decision of a case it may be appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact that Art. 2.2 of the UNDT Statute only requires that the contested decision “appears” *prima facie* to be unlawful (cf. UNDT/2009/003 Hepworth).

22. Furthermore, in *Miyazaki*⁷ it was found that

The combination of the words “appears” and “*prima facie*” indicate that the threshold required to be met by the apparent unlawfulness is commensurate to that which has been required in different national jurisdictions for similar applications. That is, in the context of an application for interim relief pending the outcome of the substantive application, what is required is the demonstration of an arguable case of unlawfulness,

supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member.

25. Section 6.3 defines the baseline condition that staff members in the professional category seeking to be eligible for promotion to P5 must meet. Such staff members should have at least two prior lateral moves. The exceptions to this condition are found in sections 6.3(a) to (d). Sect. 6.3(a) provides that the requirement is reduced to one lateral move when a staff member has served in the professional category in Nairobi or a regional economic commission⁹ for one year

28. The Administration submitted that: (1) that the Applicant's reassignment to the Economic Analysis Section did not qualify as a lateral move because he had not served in the EDGD position for one year prior to his reassignment; and (2) the eligibility to a job opening is determined on the date of application. ST/AI/2010/3 does not encompass these two conditions. Had the Applicant applied for the job on 11 January 2013 (with a closing date of 19 January 2013) instead of 9 October 2012, he would have met the second condition. But he would still be considered ineligible, according to the Administration, for the post

Element of urgency

32. It was held in *Onana*¹² that:

A situation in which the Applicant faces a loss of his livelihood in the next twenty-four hours, or even two weeks for that matter, or one month, as long as the decision he complains about is likely to take effect before his case is heard on the merits and determined necessarily makes his Application one of “*particular urgency*.” It is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent.

33. The requirement of urgency is satisfied to the extent that the Administration is in the process of completing the list of eligible candidates for the purposes of the selection of a suitable candidate.¹³

Element of irreparable harm

34. In *Khambatta*¹⁴, the Tribunal stated that:

Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one’s life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.¹⁵

35. It is well established that a loss that can be quantified and compensated as a monetary award does not constitute irreparable damage warranting a suspension of action. However the Tribunal has taken the view that harm to professional reputation and legitimate career prospects may amount to irreparable damage.¹⁶

36. The fact that the Applicant is being considered ineligible for the position he applied for, a decision that the Tribunal finds unlawful, puts him in an

¹² UNDT/2009/033 at para 29.

¹³ See UNDT/2011/190 *Osmanli*.

¹⁴ UNDT/2012/058 at para 30.

¹⁵ See also UNDT/2012/099 *Okongo* at para 28.

¹⁶ See, *Tadonki* 2010-UNAT-005; *Kasmani* 2010-UNAT-011; *Ballestrieri* 2010-UNAT-041; *Kweka* UNDT/2011/122; *Villamorán* UNDT/2011/126; *Stephens* UNDT/2011/167.

unenviable situation. He may not have an opportunity to apply for a similar position and there is no guarantee that a similar job opening would be available to him. To that extent monetary compensation is not the appropriate answer. The element of irreparable damage is met.

Conclusion

37. The three statutory conditions for a suspension of action have been met in this case.

IT IS HEREBY ORDERED THAT

38. The decision considering the Applicant ineligible for the position Chief, Economics Analysis Section at the P5 level is suspended pending the outcome of management evaluation.

(Signed)

Judge Vinod Boolell

D./TT2 TJud 5n0.c)TJ-20.2173 -2.1lem 01 T5ingt 12.34