



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

WARE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:
Alexandre Tavadian, OSLA
Nicole Washienko, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM

- c. Whether Mr. Rao should be referred to the Secretary-General for accountability.

Motion Pursuant to Article 19 and 36 of the UNDT Rules of Procedure

14. His appointment with UNAMID expires on 30 June 2015. He has not requested its renewal on the basis of the decision to select him for the Post. The decision to select him for the Post has not been implemented. The failure to implement this decision is the subject of the underlying management evaluation request.

15. The expiration of his appointment will occur before the United Nations Dispute Tribunal will have time to adjudicate the application for suspension of action under art. 13 of the Dispute Tribunal's Rules of Procedure. Consequently, to preserve his contractual rights, the Applicant requests the Tribunal to provisionally suspend the implementation of the decision pending the adjudication of the suspension of action. The Applicant cites arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure and the United Nations Appeals Tribunal's (UNAT) holding in *UNAT/2011/160* in support of its request. *UNAT/2011/160* in support of g7-91(g7-922(c)-3(a)-3(3111(e)-3(n)3111(6)9(0

~~HI~~

20. If the Applicant's appointment is allowed to expire, his employment prospects with the United Nations will be significantly and adversely affected. The Applicant has been a United Nations staff member for over 12 years.

21. The Suspension of Action is the only remedy available to the Applicant which can prevent the Administration from unlawfully depriving him of employment and career prospects.

22. No amount of monetary compensation can adequately repair damages caused by such an egregious violation of his fundamental rights.

~~EMRIS~~

~~GA~~

23. Article 10.8 of the Statute of the Dispute Tribunal stipulates that the Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

24. The Applicant submits that, in the present case, the conduct of Mr. Rao warrants such an order. Mr. Rao has waited for seven months before informing

Respondent

Response to the Application for Suspension of Action Pursuant to article 13 of the Rules of Procedure

27. The Respondent submits that this Application is moot as the Applicant's fixed-term appointment has been renewed beyond 30 June 2015.

28. The Respondent cites ¶ 2013-UNAT-328 and ¶ UNDT/2015/057 as authority for his submission that where an impugned decision has been reversed, corrected or superseded, it is in the power of the Tribunal to find that the challenge is moot and therefore not receivable.

29. In this case, the contested decision has been superseded by the decision to renew the Applicant's appointment for three months. Furthermore, UNSOA has informed the Applicant that no action will be taken in respect of the recruitment process for the post of Logistics Officer pending the outcome of his request for management evaluation. As a consequence, the Application for suspension of action has been rendered moot and there is no aspect of the contested decisions remaining to be adjudicated.

Accountability Measures

30. The Respondent submits that the Dispute Tribunal does not have competence to refer the case to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Statute of the Dispute Tribunal.

31. The referral of a case to the Secretary-General under art. 10.8 is inappropriate given that the Secretary-General has the opportunity to review the contested decisions during the management evaluation process. The referral of an individual under art. 10.8 on the basis of a finding of ~~it~~ unlawfulness is inappropriate. In the usual course, such an order would be appropriate following a hearing on the merits.

32. Further, an order under art. 10.8 is not appropriate in the circumstances. Mr. Rao was not in a position to respond to the Applicant's Counsel's email as he was in hospital at the time.

DELIBERATIONS

33. The Applicant is seeking suspension of the decision of the Administration not to implement the recruitment process in regard to the position of P-4 Logistics Officer in UNSOA. He submits that an offer was made to him which he accepted and that the Administration cannot now without any valid reason suspend the implementation of the recruitment process. The Applicant also submits that the Tribunal has jurisdiction under art. 10.2 of its Statute and art. 13 of its Rules of Procedure to suspend the decision not to implement the recruitment process.

34. The Respondent submits that there was no offer of appointment made and that the UNDT has no jurisdiction to make an order to implement a decision to recruit an individual. In the alternative, should the Tribunal find that there was a valid offer of employment to grant the Application would amount to directing the

36. That email was sent at 1400 hours. On the same day at 1525 hours, that is, one and half hours later, the Applicant wrote back by email

New

46. In the present case, there can be no doubt that there was an offer of appointment to the post of Logistics Officer made to the Applicant. The offer was accepted unconditionally and the Applicant was informed that the administrative process for his onboarding would be under way. As pointed out in ¶ , such a situation did create “obligations for the Organization” and ‘rights’ for the Applicant who acted “in good faith”. “Having undertaken, even still imperfectly, to conclude a contract for the recruitment’ of the Applicant, the “Organization should be regarded as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member”.

Was the offer validly withdrawn?

47. Unlike the situation in ¶ where the applicant was being recruited as an external candidate but like the situation in ¶ , the Applicant here was being recruited as a person who was already an employee of the Organisation.

48. In the case of ¶ UNDT/2010/087, Adams J made a distinction between a candidate who was already an employee of the Organization and an external candidate. This what Adams J said:

The crucial issue here is whether respondent’s offer had been accepted by the applicant and, thus, a binding agreement created. In this regard, it is important to note that the applicant was already a UN employee when this occurred and rather than recruiting him

54. Nothing more is said about this. Nor is there any explanation why the recruitment was not implemented soon after December 2014 and before the request of the new Chief of Security in February 2015 or after the Director of UNSOA insisted that the on-boarding should go ahead. It was not until April 2015 when serious incidents occurred in Somalia that the posts were returned in May 2015 as it is explained in the statement of Mr. Rao.

55. Though it may appear unlawful that the Administration did not implement the recruitment process timely the Tribunal takes the view that there is no decision to suspend as the post is no longer available to be filled by the Applicant. This is the unfortunate situation that has been created by the inaction of the Administration. However unpalatable this is for the Applicant, the blunt fact remains that a Tribunal cannot make an interim order in vain.

56. In view of the above finding there is no necessity to consider the two other components of suspension of action.

Referral for Accountability

57. The Applicant also moved the Tribunal for an order referring Mr. Rao to the Secretary-General for accountability pursuant to art. 10.8 of the UNDT Statute.

58. The Respondent submitted that “the referral of a case to the Secretary-General un981 0 0 1 119.04 23 suA8(y)] Tq BT /F0 rg 0.9981 0e28 Tf 0 0 0 rg 0.998u3(e)- 0.99810 0

accountability.” In ~~#~~ 2011-UNAT-103, the UNAT observed that the article means exactly what it says⁷.

60. There is nothing in art. 10.8 that would restrict its application to cases that are heard on the merits. Even applications for suspension of action may reveal a certain form of conduct or attitude on the part of a manager that would warrant a referral for accountability. There is no reason that potentially unlawful conduct should not be accounted for at any stage of the proceedings. It is obvious that a remedy at the earliest possible stage would serve the interest of both the Organization and the staff member.

61. Additionally, the Tribunal considers that the power to refer Mr. Rao for accountability is a matter within its discretion and it is not appropriate for parties to make motions for referral.

62. In the present case, the Tribunal declines to refer Mr. Rao for accountability because the impugned decision appears to have been taken by a series of actors and through a culmination of events, the circumstances of which are unclear to the Tribunal.

Conclusion

63. In view of the foregoing, the Application for Suspension of Action is refused.