



UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. On 30 July 2012, the Applicant requested suspension of the implementation of a selection decision for the post of Director, D-1, Governance and Public Administration Division (GPAD) at the United Nations Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia.

2. The Respondent filed his Reply on 30 July 2012.

3. The Applicant filed his response to the Respondent's submissions on 31 July 2012.

4. After careful consideration of the submissions of the Applicant and Respondent, the Tribunal deemed it necessary to hold an oral hearing in this matter in accordance with Article 16.1 of its Rules of Procedure.

5. A Notice of Hearing was issued on 31 July 2012, setting the matter down for hearing on 1 August 2012 at 10.00am, Nairobi time.

6. At the hearing, the Parties were directed to address the Court on:

a. Whether the proper procedure was followed with regard to the posting and alleged changes to the Vacancy Announcement (VA);
and

b. Whether the impugned decision had beenhe iA)bo(b.A-1.,4(A(b a)2.5(.4(J/TT4 1 Tf6-.0007 -
9(rectng)-5.3f7()5.GPAD(At)6.,se to te(post)6.1g e

15. The shortlisted candidates, including the Applicant, were interviewed on 28 March 2012. Only the first four officers named above were present in the panel interviewing that day, contrary to what the Applicant had been told.

16. On 12 June 2012, the Central Review Board in New York approved the proposal for filling the position pursuant to section 8.1 of ST/AI/2010/3 (Staff selection system).

17. On 15 July 2012, the Executive Secretary of ECA selected Mr. Adejumobi, for the position pursuant to section 9.2 of ST/AI/2010/3.

18. By letter dated 20 July 2012, the selected candidate was notified that he had been selected for the position of Director/GPAD. The same day, the selected candidate accepted that appointment with an endorsement on the letter (Annex R1 of the Respondent's submission.).

19. By memorandum dated 26 July 2012, the HRSS informed the Applicant that he was not selected for the position. The same day, in a memorandum addressed to all staff, the Executive Secretary announced the appointment of the new Director, GPAD, effective 1 August 2012 (Annex A1.1 to the application).

20. On the same day, the Applicant requested management evaluation of the contested decision.

Parties' Submissions

21. The Applicant's contentions are:

Prima facie unlawfulness

- a. That there was no compelling urgency to fill the post ahead of many other vacant ones and that "the absence of reasoned justification suggests the [Executive Secretary's] action cannot but

for lodging a complaint against him with the Secretary-General and

i.

unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

Prima Facie Unlawfulness of the Contested Decision

25. When considering an application for suspension of action, the Tribunal must first determine, based on a review of the evidence presented, whether the contested decision is *prima facie* unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful.

26.

The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.”²

30. The former United Nations Administrative Tribunal decided in *Yung* (1999) that “[w]hile the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules.”³

31. This Tribunal adopted the jurisprudence of the former UN Administrative Tribunal, which stated that:

Formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant’s right to due process.⁴

32. It was submitted by the Respondent that the change to the Vacancy Announcement was one of form rather than substance. A literal reading of the relevant guideline in Chapter 5.10.3 of the Manual that “[c]hanges to a published job opening are not allowed” does not bear this out. There is no distinction made here between formal and substantive changes.

33. The administration is also guilty of another breach of the Manual by including in the panel Mr Hamdok, who is the immediate past incumbent of the position for which the Applicant and the selected candidate interviewed. According to section 9.2.c, “[a] previous incumbent who is leaving the position as a result of a selection for another position should not participate in panels for his succession.”

34. Finally, the administration has violated legal provisions which prohibit a staff member holding a temporary appointment from applying to be reappointed to the position he/she is sitting on. Section 5.7 of ST/AI/2010/3 Rev. 1 provides that:

A staff member who holds a temporary appointment in the Professional and higher categories for a period of less than one year for a position

² UNDT/NBI/36, para 8.2.5.

³ Judgment No. 943, *Yung* (1999), para VI.

⁴ *Allen*, UNDT/2010/009, quoting judgment No. 1047, *Helke* (2002) and judgment No. 1122 *Lopes Braga* (2003).

authorized for one year or more may not apply for or be reappointed to that position within six months of the end of his/her current service on the temporary appointment, if the position is advertised through the established procedures and will result in a fixed-term appointment following review by the central review bodies.

35. Mr Adejumobi was appointed to the position of Director at GPAD on 22 November 2011 as a result of a temporary vacancy announcement, which

40. In *Wang* UNDT/2012/80, the UNDT held that the inclusion of such a clause in an offer of appointment would mean that mere notification does not result in implementation and that a decision is implemented when it becomes effective – presumably that is when the selected candidate assumes duty. With due respect to the learned Judge, this Tribunal takes the view that a literal reading of the relevant ST/AI on notification and implementation clearly indicates that notification of a decision in regard to an appointment constitutes implementation.

41. When the ST/AI uses the word ‘effective’, this has no relevance to the substantive issue of implementation. It is the view of this Tribunal that the use of the word ‘effective’ is just an administrative mechanism intended for the chosen candidate and management to work out the modalities for entry into service. As rightly submitted by counsel for the Respondent, the implementation and execution of a decision are two distinct concepts. Nowhere in the ST/AI is it provided that implementation is dependent on the effective time at which the selected candidate assumes duty.

42. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.⁵ In the present case, the Applicant could not have known of the implementation of the decision until after it took place. This irregularity was previously observed in *Nwuke* UNDT/2012/002:

Such a situation raises the issue of the justification of having in the Statute of the Dispute Tribunal Article 2.2 which provides for an interim injunction. If a staff member is notified of the decision not to appoint him after the selected candidate has been offered the position and accepted it, the staff member who has not been selected is powerless under article 2.2. His only remedy is to seek reparation by way of a substantive case.

43. The Tribunal further observed in *Mills-Aryee* UNDT/2011/051:

It is rather unfortunate that a suspension of action can only be granted if the implementation of the administrative decision would cause irreparable damage but if the decision has been implemented, as in the present case, the question of suspension does not arise. In other words, a patently unlawful act is allowed to survive in view of the legal provisions

⁵ See for example, *Tadonki* UNDT/2009/016; *Applicant* UNDT/2011/158; *Kweka* UNDT/2011/122.

that do not authorize the Tribunal to suspend the execution of such an illegal act.⁶

44. In the present case, while the Tribunal finds the act unlawful, it is unable to grant interim injunctive relief.

Irreparable Harm

45. The third limb of the test for suspension of action as stipulated in Article 2.2 of the Statute is that the implementation of the impugned decision would cause irreparable harm. However, the test for suspension of action is cumulative, as observed in

