



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

NIVIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. By application filed on 28 February 2023, the Applicant, a staff member in the Country Office in Myanmar of the United Nations Development Programme (“UNDP Myanmar”), requests suspension of action, pending management evaluation, of the decision not to select her for the post of Risk and Strategic Management Specialist, UNDP, Myanmar, at the P-4 level, and the subsequent non-renewal of her contract.
2. The application for suspension of action was served on the Respondent, who filed his reply on 6 March 2023.

Facts

3. Following a Strategic Review in 2022, UNDP Myanmar approved a new office structure resulting in the abolition of two international posts, one of which was encumbered by the Applicant, and in the creation of a new international post of Risk and Strategic Management Specialist (“the post”), at the P-4 level. On 2 November 2022, UNDP advertised the post, giving priority to staff members affected by the Strategic Review. In this context, the Applicant was one of the candidates that were invited for technical assessments and interviews.
4. On 1 December 2022, the Applicant took the written assessment, and, on 15 December 2022, she was interviewed for the post.
5. On 31 January 2023, the Resident Representative (“RR”), UNDP Myanmar, informally told the Applicant that her application had not been successful.
6. On 2 February 2023, the Applicant wrote to a Human Resources Management Consultant, Office of Human Resources (“OHR”), UNDP, requesting, *inter alia*, a re-assessment of the selection process, namely of the technical examination, by assessors from outside UNDP’s Bangkok Regional Hub (“RBH”) and the Regional Bureau for Asia and the Pacific (“RBAP”).

7. On 6 February 2023, the RR, UNDP Myanmar, informed the Applicant in writing that her application for the post had not been successful. By the same letter, the RR informed the Applicant that since her Fixed-Term Appointment (“FTA”) was due to expire on 28 February 2023, her assignment with UNDP Myanmar would be extended until 7 March 2023, pursuant to UNDP’s practice of giving 30-days’ notice in cases of non-renewal of appointments.

8. On 7 February 2023, a Human Resources Business Partnering Specialist, OHR, UNDP, responded to the Applicant’s email of 2 February 2023 informing her that OHR reviewed the process, concluded that it was in line with the applicable framework, and closed the matter.

9. On 15 February 2023, the Applicant requested management evaluation of “a recent recruitment process, in particular regarding the quality and integrity of the candidate exam assessment process”.

10. On 16 February 2023, UNDP acknowledged the Applicant’s request, notified her of the Organization’s deadline to respond, and asked her to submit the standard UNDP form for requesting management evaluation.

11. On 27 February 2023, the Applicant submitted the management evaluation form, identifying the following as the contested decision: “[the decision] not to select [her] for the post of Team Leader – Risk and Strategic Management Unit, UNDP Yangon, Myanmar, and consequent non-renewal of contract/separation from service.”

12. On 1 March 2023, the Applicant filed the instant application for suspension of action.

13. On 3 March 2023, the application for suspension of action was served on the Respondent, who filed his reply on 6 March 2023.

Consideration

14. The Applicant is seeking suspension of the decision not to select her for the post and the subsequent non-renewal of her FTA, which expired on 7 March 2023.

15. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. As mentioned, these three requirements are cumulative; in other words, they must all be met in order for a suspension of action to be granted.

16. The Tribunal recalls that it is incumbent on the Applicant to demonstrate that the cumulative requirements for suspension of action are met and consequently, that the suspension of action should be granted.

Prima facie unlawfulness

17. The Tribunal further recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

18. After a careful analysis of the parties' written submissions and the evidence on record, the Tribunal is of the view that the first requirement of *prima facie* unlawfulness has not been met.

19. The Applicant argues that she has been consistently and negatively targeted by the RBAP in terms of career development and career progression support; that the recruitment process for the post was tainted by favouritism as the successful candidate is far less qualified than her; and that the assessments were not scored anonymously. All of these supposedly tainted the integrity of the recruitment process and rendered unlawful the decisions not to select the Applicant for the post and not to renew or extend her appointment beyond its expiry date.

20. Despite the seriousness of the allegations made against the recruitment process for the post, the Tribunal has not been presented with any evidence that hints to any appearance of wrongdoing by the Organization.

21. In this regard, the Tribunal recalls that the Respondent benefits from the well-established presumption of regularity and that it is incumbent on the Applicant to provide evidence regarding the alleged wrongdoing. As provided by UNAT in *Rolland* 2011-UNAT-122, para 26:

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellants candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

22. In the instant case, the Respondent minimally demonstrated that the allegations made by the Applicant do not stand.

23. First and foremost, the Applicant has failed to substantiate her allegations of bias, targeting and blocking of career progression, as she neither identified a single circumstance in which it supposedly occurred nor who were the people involved. As the Respondent correctly pointed out, the fact that the Applicant passed the UNDP's Deputy Resident Representative assessment in 2021 and has not yet been selected to a DRR position since, is not probative of targeting, bias or any form of wrongdoing.

24. Secondly, as per the Respondent, the recruitment panel for the post was composed of a majority of members from outside the RBPA and RBH. Namely, the written assessment was scored by one staff member from BRH and one from the Country Office in Afghanistan, while the interview panel was composed of one panellist from the Regional Bureau for Latin American and the Caribbean, one from the Regional Bureau for the Arab States, and one from BRH. Thus, for the sake of argument, even if some sort of bias from staff members of the RBPA and RBH against the Applicant was established, the Applicant would have had to demonstrate

how said staff members influenced and manipulated the recruitment panel members who were not part of RBPA and RBH.

25. In this regard, the Tribunal also notes that the Applicant has neither mentioned nor demonstrated the underlying reasons for the alleged bias, nor in what way a panel member from the BRH was allegedly involved in “targeting her”.

26. Thirdly, the Respondent submitted that the written assessment was scored anonymously, and that the Applicant was, in fact, shortlisted for the interview. From the Tribunal’s point of view, the fact that the Applicant’s interview was pre-recorded does not necessarily taint the whole recruitment process as it corresponds to just one step of a sequence of other steps leading to a final decision.

27. Moreover, there is an objective element that cannot be overlooked, which is the fact that, as per the Respondent, the Applicant ranked lower than the selected candidate. In this context, the Applicant’s frustration for not scoring first in the selection process, albeit being the staff member exercising the responsibilities of the post, is not probative of wrongdoing in the technical assessment or in the interview.

28. As a result, the Tribunal concludes that the Applicant has failed to minimally demonstrate the alleged bias, targeting or wrongdoing in the recruitment process for the post.

29. In relation to the non-renewal of the Applicant’s FTA, the application for suspension of action is also meritless.

30. The Applicant does not argue that the decision to allow her appointment to expire is unlawful and she does not contest the lawfulness of the decision not to renew or extend it. At most, she claims that the consideration of her candidature for the position in reference was tainted and that, as a result, she should not be separated from service upon the expiration of her FTA.

31. There is no evidence on record to suggest any unlawfulness in the restructuring exercise that abolished the Applicant's post, or in the decision not to renew or extend her FTA beyond the standard 30-days' notice that was given to her.

32. In this regard, the Tribunal recalls that abolition of a post resulting from a reorganization exercise constitutes a valid reason for not renewing a staff member's appointment (*De Aguirre* 2016-UNAT-705, para.31, *Gehr* 2012-UNAT-236, para 2.). Moreover, a proposal to restructure resulting in loss of employment for staff members falls within the Secretary-General's discretionary authority (*Loeber* 2018-UNAT-844, para. 18, *De Aguirre*).

33. Nonetheless, non-renewals can be challenged on the grounds that a staff member had a legitimate expectation of renewal, the existence of a procedural irregularity, or that the decision was arbitrary or motivated by bias, prejudice, or improper motive (*Obdeijn* 2012-UNAT-201, para. 38, *Ahmed* 2011-UNAT-153, para. 46, *Frechon* 2011-UNAT-132, para. 44). In this regard, the Dispute Tribunal's review is limited to whether the restructuring was conducted in accordance with relevant procedures, that it was not improperly motivated, and due process was afforded (*Samwidi* 2010-UNAT-084, para. 38). The Applicant bears the burden of proving that the discretion not to renew his appointment was not validly exercised (*Hepworth* 2015-UNAT-503, para. 44).

34. Furthermore, under the jurisprudence of UNAT, in a restructuring process the Administration does not have an obligation to place affected staff members in new positions, and the restructuring process can also be organized in a way that staff members have to apply for available suitable posts (*Haimour & Al Mohammad* 2016-UNAT-688, paras. 25-27, *Zama* 2018-UNAT-850, para. 39).

35. Therefore, from all of the above, the Tribunal concludes that the Applicant has not minimally demonstrated serious and reasonable doubts about the lawfulness of the impugned decision, thus failing to meet the requirement of *prima facie* unlawfulness.

36. Accordingly, since the requirements for granting an application for suspension of action are cumulative, there is no need for the Tribunal to determine whether the application meets the other requirements of urgency and irreparable damage.

Conclusion

37. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 9th day of March 2023

Entered in the Register on this 9th day of March 2023

(Signed)

René M. Vargas M., Registrar, Geneva