
Case No.: UNDT/NBI/2011/025

Judgment No.: UNDT/2011/107

Date:

3. On 3 June 2011, the Applicant submitted a narrative in support of his application for suspension of action, which was served on the Respondent the same day. In addition to providing further elaboration on the initial application for suspension of action, this submission also amended his application to reflect the fact that an OIC had been designated for the vacant Director/RITD post by the Executive Secretary of ECA.

4. The Respondent submitted a reply to the application on 6 June 2011. On 7 June 2011, the Applicant filed additional comments on the Respondent's reply.

5. The Tribunal held an oral hearing on 8 June 2011. During the hearing, the Respondent was instructed to submit additional documentation¹ to the Tribunal on a confidential basis, which he did on 10 June 2011.

Facts

6. The Applicant joined the Organization in 2001 and is currently serving as Chief of Section (P-5)/OPM with ECA in Addis Ababa, Ethiopia.

7. By an interoffice memorandum dated 25 June 2011, the Executive Secretary, ECA, informed all ECA staff members of: (i) the retirement of the Director of OPM, Mr. Z at the end of May; (ii) the decision to appoint Mr. A-M, who was the Director of RIITD, to the post of Director/OPM with effect from 1 June 2011; and (iii) the decision to advertise and fill the position of Director/RITD immediately.

8. On 30 May 2011, the Applicant requested management evaluation of the decisions of the Executive Secretary relating to the OPM and RITD positions and on 31 May 2011, he filed this current application for suspension of action. On 31 May 2011, the Executive Secretary informed all ECA staff members that Mr. K would be acting as OIC of RITD with effect from 1 June 2011 until further notice. On the same day, the Applicant wrote to the Under-Secretary-General of the Department of

¹ i.e. the Executive Secretary's rationale for not advertising the Director, OPM post and documentation showing that the procedure for advertising the Director, RIITD post had been initiated prior to the appointment of an OIC.

Management requesting management evaluation of this decision. On 3 June 2011, he amended his application for suspension of action to reflect the Executive Secretary's

Applicant because they concern the staff member who was laterally transferred. Thus, the only person whose terms of appointment are directly affected is the staff member who was laterally transferred.

12. Article 2.1 (a) of the Tribunal's Statute provides in relevant part that:

“1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance; [...].”

13. In *Luvai* UNDT/2009/074, Izuako J opined that:

“[m]uch as I agree that an administrative decision is one done unilaterally by the Administration, I am not compelled by the reasoning that for a decision or an act to be defined as an administrative decision, it must be of individual application. Where the act of the Administration complained of affects an individual even though not exclusively, it is my view that the individual has *locus standi* and can bring an action. In other words, an administrative decision must not necessarily be of individual application for an Applicant to have a cause of action.”

14. The Tribunal endorses the legal principle set out above. A staff member occupying a position in the Organization is entitled to apply for other positions when they are advertised. The Tribunal is of the considered view that this is related to the contract of employment. Section 5.3 of ST/AI/2010/3 encourages staff members to “carefully consider all suitable job openings as they are expected to move periodically between positions” and section 5.4 stipulates that individuals may apply for job openings that they feel they are qualified for. If the job opening is not advertised, how may a staff member apply for it and be able to move periodically between positions?

15. Although the administrative decision to advertise or not advertise a job opening is of general application and would no doubt affect other staff members, this does not and cannot mean that the Applicant would also not be affected by it. The Tribunal also finds the decision to laterally transfer another staff member to the Director, OPM post to be receivable because this decision is so intertwined with the decision not to advertise the post that the two decisions cannot be separated and reviewed independent of each other.

16. In light of the foregoing, the Tribunal finds that the current application is receivable because the decisions being contested by the Applicant (see paragraph 10 above) are administrative decisions that are related to his contract of employment.

Applicable law for a suspension of action

17. Applications for suspension of action are governed by article 2 of the Statute and article 13 of the Rules of Procedure of the Tribunal. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must all be satisfied for an application for suspension of action to be granted.

Prima facie unlawfulness

18. When considering an application for suspension of action, the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision appears to be *prima facie* unlawful.

Issue 1

19. Was the decision not to advertise the post of Director, Office of Strategic Planning and Programme Management (“OPM”) but to fill the post through lateral transfer *prima facie* unlawful?

Applicant's submissions

20. While the Applicant recognizes that heads of departments have discretionary authority under section 2.5 of ST/AI/2010/3 (Staff selection system) to laterally transfer staff members, he submits that this authority is not unlimited and must be fairly exercised. In this respect, he submits that the decisions are based on improper motive because the Executive Secretary has been exercising his authority in a manner that is discriminatory and detrimental to his career ever since he lodged a formal complaint against the Executive Secretary in 2009 and was deemed to have engaged in a protected activity by the Ethics Office.

Respondent's submissions

21. The Respondent submits that the Applicant has failed to demonstrate that the decision is *prima facie* unlawful. In this regard, he asserts that the Executive Secretary acted within the full scope of his discretionary authority because: (i) the Organization enjoys broad discretion in assigning its employees to different functions, as appropriate; (ii) the head of department does not have to apply the new staff selection system in order to laterally transfer a staff member; and (iii) his decisions were motivated by organizational considerations.

Considerations

22. Pursuant to section 4.1 of ST/AI/2010/3 (Staff selection system), “[i]mmediate and anticipated job openings for positions of one year or longer shall be advertised through a compendium of job openings [...]” However, under section 2.5 of the same administrative instruction, heads of departments/offices “retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further

apply to “[l]ateral movements of staff by heads of department/office/mission in accordance with section 2.5”. Thus, the head of department is allowed to laterally transfer a staff member without having to apply the staff selection system (i.e. ST/AI/2010/3).

23. The Tribunal does not necessarily agree with the construct of sections 2.5 and 3.2(1) of ST/AI/2010/3 because it seems the discretionary authority of heads of departments/offices is being allowed to take primacy over the requirement in section 4.1. The administrative instruction does not provide any guidance whatsoever as to when a head of department/office may or may not apply sections 2.5 and 3.2(1), thus leaving wide discretion to the head of department/office to juggle with staff members.

24. The saving grace though is that it is well established in law that discretionary authority in any form must not be exercised in an arbitrary or improper manner. The Respondent submitted on 10 June 2011 that the Executive Secretary, ECA, decided to exercise his discretion to laterally transfer the Director/RIITD to the OPM post because he felt he could not afford to leave the critical function of Director/OPM, vacant, particularly as ECA is in the process of finalizing its program planning for the next biennium. The Tribunal does not, at this point in time, have reason to doubt the veracity of this explanation. Additionally, with respect to why the Executive Secretary chose to laterally transfer the Director/RIITD to the OPM post when he had been in the RIITD position for less than one year, the Tribunal notes that section 9.1 of ST/AI/2010/3 provides that “[s]taff members holding a permanent, continuing, probationary or fixed-term appointment should normally serve in a position for at least one year before being eligible to be appointed to another position”. Hence, while service of at least one year would be ideal, it is obviously not mandatory under the administrative instruction.

25. The Applicant contends that the challenged decisions continue a pattern of retaliation and discrimination against him dating back to 2009 when he made a complaint against the Executive Secretary. In this respect, he submits that it has been the accepted practice of ECA to appoint the next most senior officer in a Division as

OIC upon the retirement of the Director. However, when the post of Director/OPM became vacant, the Executive Secretary decided to block him, the most senior officer in OPM from becoming OIC. Instead, another staff member was laterally transferred from another division to the vacant OPM post.

26. In the view of the Tribunal, the evidence available at this stage does not adequately support his contention that the Executive Secretary demonstrated retaliatory and/or discriminatory conduct towards him in his decision-making. Thus, the Tribunal cannot conclude that the Executive Secretary exercised his discretionary authority improperly by laterally transferring another staff member to the post of Director/OPM so as to prevent the Applicant from applying for the post if advertised.

27. In light of the foregoing, the Tribunal concludes that the decision not to advertise the post of Director, Office of Strategic Planning and Programme Management (“OPM”) but to fill the post through lateral transfer was not *prima facie* unlawful.

Issue 2

28. Whether the decision to advertise *de novo* the post of Director, RIITD, given that the August 2010 selection decision in respect of this post is before the UNDT is *prima facie* unlawful.

Applicant’s submissions

29. The Applicant points out that he has filed a claim, which is now pending with the Tribunal as Case No. UNDT/NBI/2011/008 on the appointment of the Director/RIITD. He submits that the decision of the Executive Secretary regarding the Director/RIITD post is unlawful because it is a deliberate attempt to tamper with the administration of justice system. In this respect, he submits that the decision bears directly on Case No. UNDT/NBI/2011/008 and is an attempt to vitiate and render moot a matter before the Tribunal or at least to limit the scope of remedies that the Tribunal might award in the event that it decides in his favour.

Respondent's submissions

30. The Respondent submits that Case No. UNDT/NBI/2011/008 concerns a previous selection exercise relating to the Director/RIITD post and the decision to advertise this post has no bearing at all on the Applicant's pending case before the Tribunal. Thus, the Applicant has not presented any evidence of *prima facie* unlawfulness in relation to this decision.

Considerations

31. On 8 February 2010, the post of Director/RIITD was advertised. The Applicant applied and was interviewed on 4 May 2010. The Central Review Board endorsed the list of recommended candidates on 26 August 2010. On 6 September 2010, the Applicant received a letter informing him that he had not been selected for the post. On 9 September 2010, the Executive Secretary informed ECA staff that Mr. A-M had been selected for the post. On 12 October 2010, the Applicant submitted a request for management evaluation of the decision not to select him for the Director/RIITD post.

32. In a letter dated 3 February 2011, the Management Evaluation Unit concluded that "since the Administration did not prove, by reference to the evidentiary record, that it gave full effect to your right to be given full and fair consideration for the Post, it is incumbent upon it to compensate you accordingly." The MEU subsequently determined that compensation in the amount of two months of the Applicant's net base salary would be appropriate in the circumstances. Not being satisfied with MEU's proposal on compensation, the Applicant appealed the matter to the Tribunal. This is now pending with the Tribunal as Case No. UNDT/NBI/2011/008.

33. The Tribunal notes that the selection exercise challenged by the Applicant in Case No. UNDT/NBI/2011/008 was completed in August 2010 and the decision to select a candidate other than the Applicant was implemented in September 2010. Since that selection process was brought to completion 9 months ago, it is only logical that ECA would advertise it again if Mr. A-M, the then appointed candidate,

has moved on to another position and the

Respondent's submissions

38. The Respondent submits that Mr. K's temporary "assignment" to serve as OIC of RIITD is not a temporary "appointment" within the meaning of ST/AI/2010/4. He submits that the assignment is governed by ST/AI/1999/17, which does not state that a temporary assignment to a vacant post must be advertised.

Considerations

39. It is worth noting that this issue relates to two processes that must run parallel to each other. One of the processes deals with the issuance of a TVA while the other process deals with the procedure for filling the post on a permanent basis.

40. Firstly, should a TVA have been issued for the Director/RIITD post before the appointment of an OIC? Section 3.1 of ST/AI/2010/4 makes it a requirement for a temporary vacancy announcement to be issued when there is a need for a service for more than three months but less than one year. Section 3.2 of ST/AI/2010/4 provides that:

"While the decision to issue a temporary vacancy announcement for a temporary appointment of less than three months is made at the discretion of the programme manager, any extension of three months or more shall require the issuance of a temporary vacancy announcement."

41. The Tribunal notes that the post of Director/RIITD became vacant on 1 June 2011 and that Mr. K was appointed OIC of RIITD on the same day. The Respondent's counsel explained at the hearing that a TVA was not issued because the recruitment process for the vacant Director/RIITD post is expected to be completed within three months. He explained that since the decision to issue a temporary vacancy announcement for a temporary appointment of less than three months is made at the discretion of the programme manager, ECA had decided not to issue a TVA at the moment but rather to temporarily assign an OIC in accordance with section 2.1 of ST/AI/1999/17. When the Tribunal asked what would happen in the

stated that under those circumstances, ECA is required to issue a TVA in accordance with section 3.1 of ST/AI/2010/4.

42. Noting the Secretariat-wide benchmark of 120 days as the average selection time for all positions (i.e. this is the average number of days between the date of issuance of a job opening and the date of the selection decision)², it appears that ECA is not being extremely realistic about the length of time that the selection process will take for the Director/RIITD post. However, since there is no precise requirement for a TVA to be issued for a service that is needed for less than three months, the Tribunal cannot conclude that the Executive Secretary's decision not to issue a TVA at this stage is unlawful. If the recruitment process is not completed within three months and a TVA is not issued, then there will be a need to closely scrutinize the actions of the Executive Secretary as he will no longer be in a position to exercise the discretionary authority granted to him by section 3.2 of ST/AI/2010/4.

43. Pursuant to staff rule 3.10³, staff members are expected to assume temporarily the duties and responsibilities of higher level posts. In exceptional cases, a staff member who assumes such temporary duties at a higher level for a period exceeding

45. Effective 1 June 2011, the Executive Secretary appointed Mr. K as OIC of RIITD pursuant to staff rule 3.10 and section 2.1 of ST/AI/1999/17. The Tribunal finds nothing unlawful in this decision. The question though is whether the provisions of section 3.2 of ST/AI/1999/17 have been complied with to fill the post on a permanent basis. In light of the fact that this was an immediate job opening within the meaning section 1(n) of ST/AI/2010/3, the vacancy announcement of this post could not have been issued far in advance of the vacancy. In this respect, the Tribunal notes that ECA staff members were informed on 25 May 2011 of the Executive Secretary's decision to laterally transfer Mr. A.M from RIITD to OPM with effect from 1 June 2011. The Executive Secretary stated in the same memorandum that the position of Director/RIITD would be advertised immediately and filled in accordance with relevant United Nations rules and regulations.

46. By a letter dated 30 May 2011, the Executive Secretary informed Mr. K that effective 1 June 2011, he was being temporarily reassigned as OIC of RIITD. On 31 May 2011, the Executive Secretary informed all ECA staff of Mr. K's appointment as OIC of RIITD effective 1 June 2011. In compliance with the Tribunal's instructions, the Respondent provided documentation, on a confidential basis, to support his assertion that proper procedures for filling the post on a permanent basis had been initiated prior to the appointment of the OIC. Based on the documentation submitted, the Tribunal is satisfied that as of 27 May 2011, the job opening/vacancy announcement for the vacant post of Director/RIITD had been created and the Chief of Staff/ECA had requested that it be posted. The Respondent did not provide any evidence that the vacancy announcement has actually been posted but based on the chronology of events set out above, the Tribunal feels that it can reasonably conclude that ECA complied with the provisions of section 3.2 of ST/AI/1999/17, as good faith is presumed in the absence of any evidence to the contrary.

47. The conclusion above notwithstanding, the Tribunal wishes to remind ECA of the 3-month timeline it has set itself for completion of this selection process and the Executive Secretary's undertaking that the post "will be advertised immediately and

filled in accordance with relevant UN rules and regulations”. In this respect, ECA should ensure that the vacancy announcement/job opening is issued post-haste.

Conclusion on “*prima facie* unlawfulness”

48. Based on the available evidence, the Tribunal finds that the decisions the Applicant is contesting were not *prima facie* unlawful.

Particular urgency

Applicant’s submissions

49. The Applicant submits that the matter is urgent because as at the time he submitted his application on 31 May 2011, the lateral transfer of Mr. A-M to the

May 2011. At 1832 hours, he sent an email to the Under-Secretary-General, Department of Management requesting management evaluation of this decision. He did not, however, amend his application for suspension of action to include this decision until 3 June 2011. Thus, by the time he sought suspension of the decision to appoint Mr. K as OIC of RIITD, the decision had been implemented. The element of urgency was therefore no longer an issue.

53. Lastly, with respect to the decision to fill the Director/RIITD post, the available evidence shows that the process to advertise the post commenced on 27 May 2011, which was prior to the filing of the application for suspension of action. Thus, this decision too had already been implemented.

Conclusion on “particular urgency”

54. The Tribunal concludes that the Applicant was unable to establish that the matter was of particular urgency since the decisions he was contesting had already been implemented.

55. Even though the Applicant did not make a prima facie case of urgency with respect to the issues raised, the Tribunal wishes to express the gravest of concern at the manner in which the staff members of ECA, including the Applicant, were informed of the decisions (e.g. sending them out hours and/or two or so days before implementation).

Irreparable damage

Applicant’s submissions

56. The Applicant submits that he will suffer irreparable damage: (i) to advancing his career in programming because the “swapping” of vacancies extinguishes his right to be fully and fairly considered for the post of Director/OPM; (ii) to his reputation because he will be cast as someone who is not dynamic and who is

unfaithful to ECA's corporate interests; (iii) in that he will lose confidence in himself

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