



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/116
UNDT/GVA/2018/117
UNDT/GVA/2018/118
UNDT/GVA/2018/122
Judgment No.: UNDT/2020/184
Date: 27 October 2020
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

JULLIARD
SIMONPIERI
MARIDOR
BARLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA

Counsel for Respondent:

Jérôme Blanchard, UNOG

Miriana Belhadj, UNOG

Introduction

1. This Judgment relates to four applications dated 1 November 2018 concerning the selection process for the position of Security Officer at the G-3 level, advertised under Job Opening No. 77635 (“JO 77635”) in the United Nations Office at Geneva (“UNOG”).
2. The Applicants each contest the decision not to select them for JO 77635. They were serving as Security Officers at the G-2 Level, Department of Security and Safety (“DSS”), UNOG, at the time of the contested decisions.
3. The Respondent submits that the non-selection decision was based on valid and legitimate grounds. The Respondent contends that the Applicants were not selected for the position as they failed the psychological test to determine their fitness to carry a weapon.

Procedural history

4. By Order No. 72 (GVA/2020) dated 23 June 2020, the Tribunal consolidated the applications in Cases No. UNDT/GVA/2018/116, UNDT/GVA/2018/117, UNDT/GVA/2018/118 and UNDT/GVA/2018/122, in the interests of procedural efficiency for purposes of case management on the basis that all four relate to the same underlying claim. The Tribunal further requested the parties to provide additional submissions, including in relation to the assessments used under JO 77635.
5. By Order No. 75 (GVA/2020) dated 25 June 2020, the Tribunal requested the parties to file supplementary submissions *inter alia* in connection with the Applicants’ compensation claims for moral damages.
6. The parties duly filed submissions pursuant to the above-mentioned Orders.

7. By Order No. 95 (GVA/2020) dated 2 September 2020, the Tribunal granted, in part, the Applicants' request for additional disclosure of documents relating to each of the Applicants' assessments under the psychological test ("LABEL" test) used for JO 77635. The parties duly filed their submissions pursuant to Order No. 95 (GVA/2020).

Facts

8. On 21 August 2017, JO 77635 was published on Inspira (the online jobsite for the United Nations Secretariat), with a closing date of 19 September 2017, for seven positions. The Applicants submitted their candidatures for JO 77635, which indicated that candidates "must be in excellent physical and mental shape" and that "candidates must pass a medical exam that includes a psychological test".

9. Given UNOG's increased operational needs and the fact that the Security Officers at the G-2 level were not carrying weapons, after consultations with DSS, in October 2017, a pilot project was launched to explore the feasibility of allowing Security Officers at the G-2 level to carry weapons.

10. On 17 November 2017, a call for expressions of interest to perform armed duties was then issued to all G-2 Officers. The call for expressions of interest indicated the following in its relevant part (emphasis added):

In view of security situation and considering the needs of the Service, the management has decided to implement a pilot project aiming to arm some of G-2 temporary agents.

Due to budgetary reasons, for the moment 14 G-2 agents will be trained for this purpose.

The pilot project includes the following steps for the selected G-2 agents:

Apply for the 2018 G-2 roster and keep available through the whole year,

Pass the psychological examination for carrying a weapon,

Participate and succeed in the United Nations Firearms Training (40 hours),

Pass the Host Country Weapons License Examination.

These exams are compulsory and eliminatory for carrying a weapon.

11. The call for expressions of interest further indicated that “priority [would] be given to those who apply for JO 77635 (G-3 posts) in order to optimize the cost of the training”.
12. Out of 36 G-2 Security Officers, a total of 14 responded to the call for expressions of interest, including the Applicants.
13. The selected Security Officers were informed that they would have to pass the LABEL test, namely a psychological test for carrying a weapon (“*test psychologique sur le port de l’arme*”). The Applicants were accordingly invited to take it on line.
14. The candidates were informed that:

Ce test se fait en ligne et dure au maximum 30 minutes. Nous vous demandons de vous placer dans un endroit calme, de le faire en une fois et de fournir des réponses spontanées sans trop réfléchir. En effet, si vous tentez de manipuler le test ou d’enjoliver votre description les coefficients de contrôle le révéleront[t].
15. The result of the first part of the LABEL personality test showed that ten (out of 14) candidates, including the Applicants, had failed the test.
16. In the report, the psychologist concluded that she would not be in a position to make a determination on whether or not each Applicant could carry a weapon and that, given the result, any direct interview was compromised.

17. On 21 December 2017, after consultations with DSS, the Chief, Human Resources Management Section (“HRMS”), UNOG, informed the Applicants and the other unsuccessful candidates that they would be considered ineligible to participate in the pilot project and in the selection exercise for JO 77635. Her communication read in its relevant part as follows (emphasis added):

3. Suite au test LABEL que vous avez effectué en novembre 2017, je regrette de vous informer que le rapport psychologique montre que, malgré les consignes très claires, vous avez « cherché à maquiller vos résultats ». Ceci fait que votre profil LABEL n’est pas représentatif de la réalité et soulève des doutes sérieux sur votre aptitude au port de l’arme.”
4. Au vu des résultats du test, vous serez considéré inéligible pour participer au projet pilote ainsi que pour tout poste au sein de SSS où le port de l’arme est un requis, y compris pour l’avis de vacance JO 77635 (G-3) auquel vous avez postulé récemment.

18. Following responses from the Security Officers concerned, including the Applicants, the Administration decided to conduct a more in-depth analysis of the issues involved, and consulted with the psychologists who administered the test and the designer of the test, Professor Capel of the University of Lausanne.

19. Following this, HRMS and DSS, UNOG, agreed that the nine unsuccessful candidates would be entitled to receive feedback from the psychologist as to the circumstances for their failure of the first part of the psychological assessment. Meetings were scheduled with the candidates end of January 2018.

20. After the meeting with the unsuccessful candidates, the psychologist reported that, while some candidates who had failed the test accepted their fault and admitted that they tried to embellish their personality, others did not, in particular one of the Applicants.

21. On 7 March 2018, the Chief, HRMS, UNOG, informed the Applicants that (emphasis added):

[S]ur la base des conclusions de la psychologue, il a été décidé que vous pourrez être considéré pour les postes armées qui seront affichés à **l'avenir** au sein du Service de la sécurité et de la sûreté.

La psychologue a toutefois exprimé ses doutes face à votre manque d'autocritique. A cet égard, je vous encourage vivement à réfléchir à ce processus et à accepter vos responsabilités.

Je tiens à préciser que si vous êtes retenu dans le cadre d'un processus de sélection pour un poste armé au sein de SSS, **il vous faudra repasser et réussir le test psychologique** afin de valider cette sélection.

22. On 28 April 2018, the selection exercise for JO 77635 was completed. The Applicants were found not suitable as they had failed the psychological test. All the seven selected candidates had passed the psychological assessment.

Parties submissions

23. The Applicants' principal arguments can be summarized as follows:

- a. The Administration has failed to act fairly and transparently in the course of the selection exercise for the G- 3 Security posts as it made use of the same psychological assessment in two different recruitment exercises, *i.e* the Job Opening and the Pilot Project;
- b. The Administration has failed to ensure priority consideration for the Applicants (as internal candidates) and to treat them on an equal footing, since all the selected ones did not have prior experience in the United Nations and were not subject to the psychological assessment; and
- c. A roster of G-3 Security Officers was established but the posts were never advertised in Inspira.

24. The Respondent's principal arguments can be summarized as follows:
- a. The recruitment process for the G-3 level positions is not subject to ST/AI/2010/3 (Staff selection system);
 - b. However, UNOG has established as an administrative practice to advertise those vacant positions in Inspira and select the candidates through a competitive selection exercise;
 - c. Selections are reviewed by Human Resources Partners and Staff Representatives;
 - d. All recruitment processes for G-3 up to G-7 level include a medical examination that comprises a psychological test named "LABEL" and an interview;
 - e. JO 77635 established that the psychological assessment was compulsory and eliminatory;
 - f. For budgetary reasons, it was decided that the result of the psychological test undertaken in the context of the "Pilot Project" would be taken into account in the selection process for JO 77635. This was the result of a managerial decision that sought to optimize cost given that all participants in the "Pilot Project" had applied and been recommended to participate in the selection process for JO 77635;
 - g. The Applicants were not selected as they failed the psychological test; and
 - h. All 7 candidates who were selected for G-3 positions under JO 77635 passed the psychological assessment.

Consideration

25. The Tribunal recalls that the issues at stake are whether the non-selection decisions were lawful and, if not, what remedies are to be awarded.

Lawfulness of the contested decisions

26. Under the current legal and jurisprudential framework, the scope of the Dispute Tribunal's jurisdiction in relation to challenges against administrative decisions on selection and appointment matters is mainly twofold:

- a. To evaluate if the Administration has followed the pre-established procedures and staff members were given full and fair consideration; and
- b. In matters where the Administration enjoys a certain margin of manoeuvre (which is the current case) the role of the Tribunal is to analyse if the decision is not blatantly unreasonable, arbitrary, nor illegal.

27. According to the evidence on file, the recruitment exercise for the positions in question at UNOG falls outside the scope of ST/AI/2010/3 (see sec. 3.2(f)), and the whole procedure is carried out by the Administration with a large margin of appreciation in relation to vacancies, requirements, assessment tools, deadlines and selection of candidates.

28. However, discretion does not equate to "arbitrariness" and, consequently, the Tribunal will assess whether the recruitment procedure for JO 77635 was a proper exercise of administrative discretion and if the Applicants were given full and fair consideration.

29. After having carefully read the parties submissions and the documents available on file, the Tribunal is satisfied that UNOG established and followed proper procedures to fill the positions advertised under JO 77635.

30. In fact, UNOG published the vacancy announcement in Inspira to establish a competitive selection exercise, which included a compulsory and eliminatory medical examination that also entailed a psychological assessment made by an external party.

31. The above as well as other requirements to be assessed during the recruitment process were clearly stated in the job opening (e.g., excellent physical and mental shape). and that “candidates must pass a medical exam that includes a psychological test”.

32. The Applicants submit that they were not informed that the psychological test (LABEL) performed in the context of the Pilot Project would be used in the recruitment process for JO 77635. This claim, however, does not stand scrutiny as the call for expressions of interest for the Pilot Project advised that, to optimize cost, priority would be given to Pilot Project participants who would also apply for JO 77635 (see paras. 10 and 11 above).

33. Furthermore, the Tribunal notes that both JO 77635 and the call for expressions of interest for the Pilot Project clearly indicated that a psychological test was compulsory and eliminatory in both contexts.

34. The Applicants also submit that they should have been given the opportunity to perform another psychological test in the context of the recruitment process for JO 77635. This argument does not persuade the Tribunal. In fact, allowing the Applicants to perform another psychological test, after having failed the first one under the Pilot -Project, would have placed them in an advantageous position in relation to other candidates taking it for the first time.

35. The Tribunal is of the view that the Applicants were perfectly aware that a psychological test was compulsory and eliminatory and that, by failing it, they would be excluded from both procedures, i.e., JO 77635 and the Pilot Project.

36. The Tribunal finds that the fact that the Administration decided to consider the result of the LABEL test when examining applications for JO 77635 does not amount to an illegality, nor does it constitute an abusive exercise of administrative discretion. On the contrary, that is an example of a good managerial practice that also ensures equal treatment for all candidates who would, in the future, perform similar functions (i.e., fitness of candidates to perform armed duties).

37. In addition, the Tribunal observes that it was not UNOG who administered the test but rather an independent outside party. This indicates that the Administration has neither interfered with the outcome of those tests nor chose the way in which they were conducted. The Administration's actions are in line with its responsibility to establish the requirements for JO 77635 and the Pilot Project, as well as to define assessment tools to be used.

38. What results from the evidence on file is that all four Applicants simply failed the psychological assessment. Furthermore, they have not even minimally demonstrated that they were targeted, side-lined or victims of bias, so as to compromise the outcome of the test or of the whole recruitment exercise.

39. In this regard, the Tribunal refers to the internal case law (see, *Asaad*, 2010-UNAT-021, *Jennings* 2011-UNAT-184, *Azzouni* 2010-UNAT-081, *Obdeijin* 2012-UNAT-201) which has consistently held that it is an applicant who bears the burden of proving any allegations of ill-treatment, or extraneous factors interfering with a recruitment exercise.

40. In the current case the Applicants have argued that they were not afforded "priority consideration" as the selected candidates were all external ones (without any experience in the United Nations system) and have not passed the psychological test.

41. The Tribunal is not convinced by these arguments for the following reasons. First, the Applicants have not presented any evidence to support these allegations, which were expressly denied by the Respondent who clearly stated (and presented the corresponding documentary evidence) that all seven selected candidates passed the psychological (LABEL) test.

42. Second, priority consideration only becomes relevant in a context where two or more candidates have similar profiles or skills and have successfully passed all the steps of the recruitment procedure. It is not applicable in a context, such as the current one, where candidates seeking priority consideration failed a compulsory and eliminatory part of the recruitment process.

43. Third, priority consideration does not mean “preferential treatment”, particularly in cases where an external candidate performs better than an internal one.

44. Since the Applicants were not able to demonstrate any wrongdoing or bias the presumption of regularity of official acts stands, as per the Appeals Tribunal’s case law in *Rolland* 2011-UNAT-122:

26. There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant’s candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that [she/he] was denied a fair chance of promotion.

45. Finally, absent any element of flagrant unreasonableness, the Tribunal will not interfere with the choices made by UNOG in relation to the recruitment process for JO 77635 and the call for expressions of interest for the Pilot Project.

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Remedies

46. All four Applicants have requested compensation for loss of promotion opportunity and for moral damages.

47. Since the Tribunal has not found any illegality in the contested decisions there are no legal grounds to award compensation.

Conclusion

48. In light of the above, the applications registered under Cases No. UNDT/GVA/2018/116, UNDT/GVA/2018/117, UNDT/GVA/2018/118 and UNDT/GVA/2018/122 are rejected.

(Signed)

Judge Teresa Bravo

Dated this 27th day of October 2020

Entered in the Register on this 27th day of October 2020

(Signed)

René M. Vargas M., Registrar, Geneva