



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

XU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:

None

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 16 December 2010 and registered under case number UNDT/GVA/2010/116, the Applicant requests the United Nations Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of the decision not to interview him for a vacancy for which he had applied.

Facts

2. The Applicant works as a Chinese Reviser, at level P-4, in the Division of Conference Services, United Nations Office at Geneva, under a permanent appointment.

3. On 16 September 2010, vacancy announcement 10-CON-DEPT FOR GA & CONFERENCE MGMT-16202-R-NEW YORK was issued to fill two vacant posts of Reviser/Self-Revising Translator (Chinese), at level P-4, in the Department for General Assembly and Conference Management (“DGACM”), at the Organization’s Headquarters in New York. It was stated in the vacancy announcement that work samples of applicants would be assessed.

4. The Applicant applied for the vacant posts and, on 12 November 2010, the Chief of the Chinese Translation Service, DGACM, acknowledged receipt of his application and requested him to submit supporting material and to document his productivity.

5. On 6 December 2010, the Applicant sent the requested information, together with four writing samples. The Chief of the Chinese Translation Service requested two additional writing samples, which the Applicant provided on that same day. Following a further request from the Chief of the Chinese Translation Service, he sent another two writing samples.

6. On 8 December 2010, the Applicant was invited for a telephone interview scheduled on 15 December.

7. Responding to another request from the Chief of the Chinese Translation Service, the Applicant provided another writing sample on 9 December 2010.
8. By an email of 12 December 2010, the Chief of the Chinese Translation Service informed the Applicant that the work samples he had provided did not meet the relevant requirements and that the invitation to attend the interview was thus withdrawn.
9. On 15 December 2010, the Applicant requested management evaluation of the decision not to invite him for a telephone interview.
10. On 16 December 2010, the Applicant filed with the Tribunal an application for suspension of the decision to cancel his telephone interview pending management evaluation. The Respondent submitted his reply on 22 December 2010 and, on the same day, the Applicant filed observations thereon.

Parties' contentions

11. The Applicant's principal contentions are:
 - a. The contested decision is unlawful because:
 - i. It is in breach of staff regulations 4.2 and 4.4, the last of which provides that "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations". He has the required experience and competencies, as reflected by his successive performance appraisals;
 - ii. In view of the fact that he is likely to be the only candidate applying for a lateral transfer, the contested decision contravenes General Assembly resolution 53/221, which requests that full consideration be given to the need for staff mobility;
 - iii. The contested decision is also in breach of Section 7 of administrative instruction ST/AI/2010/3 (Staff selection system)

according to which candidates are shortlisted “based on a review of their documentation”;

- iv. His application was not given full and fair consideration;
 - v. He has unsuccessfully applied to a number of positions in New York since 2005. His intentional exclusion from the selection process is further indicative of the harassment and retaliation he has been subjected to by the Chief of the Chinese Translation Service;
- b. The case is of particular urgency because:
- i. The Chief of the Chinese Translation Service is about to appoint another candidate;
 - ii. His mother’s poor health makes it necessary for him to relocate in New York as soon as possible;
- c. Irreparable damage will be caused because:
- i. He would lose an opportunity to be fairly considered for the vacant posts;
 - ii. His professional advancement would be disrupted;
 - iii. Justice would be compromised;

12. The Respondent’s principal contentions are:

- a. The Applicant has failed to identify any administrative decision. He challenges an incomplete process since a selection decision has not yet been made and his application is therefore premature;
- b. The Applicant has failed to establish that the decision is unlawful. The selection process was conducted in accordance with administrative instruction ST/AI/2010/3 and his application was given full and fair

consideration. Further, his contention that he suffered harassment and retaliation is unfounded;

c. The Application has not shown that there was any urgency;

d. The Applicant has not established that he will suffer irreparable damage. He applied for a lateral transfer and, should he not be selected, he will remain employed at the same level.

Considerations

13. The Tribunal first considers the admissibility of the application. In his application, the Applicant seeks to challenge the decision to cancel his telephone interview. In his observations on the Respondent's reply, the Applicant emphasizes that he "requests that the [selection] process be announced null and void".

14. In accordance with article 2.1(a), of its Statute, the Tribunal has jurisdiction to hear and pass judgement only on an application concerning "an administrative decision" that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the Applicant.

15. In its Judgment *Planas* UNDT/2009/086, the Tribunal stated that an administrative decision can only be considered as such if, *inter alia*, it carries direct legal consequences (effects) on the Applicant's rights and obligations. With respect to the nature of a selection process, the Tribunal held:

A selection process, being a process of decision-making, involves a series of steps or findings which lead to an administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process but cannot be, alone, the subject of an appeal to the Tribunal. Only if the Applicant contested the outcome of a selection process for a specific post (the administrative decision) would the Tribunal be competent to hear and pass judgment on her application as per article 2 of its statute.

16. In *Ishak* UNDT/2010/085, the Tribunal pointed out that all preparatory decisions connected with a promotion session can only be disputed in the light of the final decision as to a staff member's promotion. Such preparatory decisions

are not in themselves capable of adversely affecting the applicant's legal situation since they modify neither the scope nor the extent of his rights. Consequently, an appeal against such decisions must be considered irreceivable.

17. The same applies to the Applicant's case. The decision not to invite him for an interview is part of the staff selection procedure established in administrative instruction ST/AI/2010/3. As part of the "pre-screening and assessment" foreseen in section 7.5 of that instruction, the assessment of candidates may include a competency-based interview. Although the fact not to be invited to such an interview will most likely affect a candidate's chances to be selected, this must not be equated with a direct impact on the candidate's legal situation. Indeed, only the final selection decision might have direct legal effects. In the case at hand, a final selection decision has not yet been taken, and it is open to the Applicant to apply for judicial review of such an administrative decision once it is made.

Conclusion

18. In view of the foregoing, the application for suspension of action is hereby rejected as irreceivable.

(Signed)

Judge Thomas Laker

Dated this 28th day of December 2010

Entered in the Register on this 28th day of December 2010

(Signed)

Víctor Rodríguez, Registrar, Geneva