



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

NUNEZ

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Erol Arduc, OSLA

**Counsel for Respondent:**

Stephanie Cochard, UNOG

## **Introduction**

1. The Applicant is a staff member at the United Nations Conference on Trade and Development (“UNCTAD”), serving as an Economic Affairs Officer at the P3 level in the Division of International Trade in Goods and Services (“DITC”) and Trade Environment and Development (“TED”).
2. On 1 February 2013, the Applicant filed an application for suspension of action of the decision not to be considered for the post of Economic Affairs Officer, P4 (“contested decision”), job opening number: 12-ECO-UNCTAD-24545-R-GENEVA (R) with UNCTAD (“contested post”).
3. The application was received and served on the Respondent on the same date and the Respondent was required to file a reply by Tuesday, 5 February 2013 at 6:00pm (CET).
4. The Tribunal directed the Respondent’s counsel in filing the reply to address the following matters:
  - a. Whether the selection of the successful candidate with regard to the contested post had taken place;
  - b. Whether the selected candidate had been informed of this decision; and
  - c. Whether the selected candidate had accepted the offer.
5. The Tribunal further directed the Respondent not to undertake, as from the date of service, any further steps regarding the recruitment against the contested post until the determination of the suspension of action.
6. On 5 February 2013, the Respondent filed his reply.

## **Facts**

7. The contested post was advertised from 3 August 2012 to 9 October 2012, and the Applicant applied for it on 17 August 2012. A total of 84 candidates were found eligible for the contested post. After conducting a preliminary review, the Chief, TED, DITC, UNCTAD (“hiring manager”), found eight candidates to be suitable and shortlisted them for the first round of assessment.

8. On Saturday, 3 November 2012, six out of the eight shortlisted candidates were invited to participate in a “technical assessment” to be held on 7 November 2012.

9. On 6 November 2012, through a colleague, the Applicant learned that the technical assessment for the contested post was being conducted on 7 November 2012. Consequently, she wrote to the hiring manager inquiring as to the status of her candidature for the contested post; she received no reply.

10. On 7 November 2012, the written technical assessment took place for the six candidates who had been invited on 3 November 2012. According to the documents before the Tribunal, the assessment panel consisted of three persons, namely: the hiring manager, a female P-4 UNCTAD staff member and one additional person.

11. On Friday, 9 November 2012, the Applicant received an email that sought to know whether she was still interested in the post and also invited her to take the technical assessment on the following Monday, 12 November 2012.

12. On 12 November 2012, the Applicant took the technical assessment, together with one other candidate. The Applicant alleges that she only found out on the date of the technical assessment that it had an oral segment in which she had to make a presentation of a concept paper to a panel of experts. The assessment panel consisted of two persons, namely: the hiring manager and the above-referenced female P-4 UNCTAD staff member.

13. After the technical assessment, some exchanges between the Applicant and the hiring manager took place. On 4 December 2012, the Applicant had a meeting

with the hiring manager and after the meeting, the hiring manager sent an email to the Applicant, informing her that her candidature would not be considered any further.

14. Between 5 December 2012 and 15 January 2013, the Applicant met with some Senior Officials at DITC, UNCTAD, to raise her concerns regarding the recruitment process. She also wrote to the hiring manager, requesting to know the outcome of the technical assessment, but never received any response.

15. The Applicant alleges that on 25 January 2013, she informally learned that there were two male candidates under consideration and a decision was about to be made between the two of them.

16. On 31 January 2013, the Applicant filed her request for management evaluation of the contested decision.

### **Applicant's contentions**

17. The Applicant's contentions may be summarized as follows:

#### *Prima facie unlawfulness*

- a. The recruitment process was tainted from the onset and her candidacy was not accorded fair consideration citing bias and discrimination, she should have been selected based on her qualifications, experience, the fact that she is on the roster of pre-approved candidates and that she is currently performing the tasks of the contested post;
- b. The notice given for the invitation to attend the technical assessment was short, which is contrary to ST/AI/2010/3 (Staff Selection System) and the Inspira Hiring Manager's Manual (2012) on communication to applicants regarding invitation for interviews;
- c. She was not informed of the nature of the technical assessment, especially the need to make an oral presentation before a panel of experts; and

d. The assessment panel was comprised of two persons, which is contrary to requirements of ST/AI/2010/3 (Staff Selection System), rendering the process arbitrary and therefore inappropriate.

*Urgency*

e. The recruitment exercise is still ongoing and since the final decision on selection has not been made, it would be possible for the Tribunal to be seized of the matter before it becomes irremediable.

*Irreparable damage*

f. If the selection process continues, then she will be ineligible for the post and consequently she would have been denied full and fair consideration; and

g. Her non-selection would damage her professional reputation and entail loss in career prospects.

**Respondent's contentions**

18. The Respondent's contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The Applicant received full and fair consideration, proper procedures as set out in ST/AI/2010/3 were followed, the process was not tainted by prejudice, bias or any other extraneous factors and no evidence in support of the above has been adduced;

b. The technical assessment did not include an interview. The Applicant was only required as part of the technical assessment to prepare a concept note and to present it to a panel to assess its viability;

c. The principles to be applied for competency based interviews do not necessarily apply to technical assessments;

d. The Applicant voluntarily accepted the short notice to attend the technical assessment and did not raise concern regarding the short notice. Further, while it is good practice to inform candidates in advance about a test, there is no mandatory requirement to do so and short notice does therefore not constitute a procedural flaw; and

e. The qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and cannot be considered by staff members as giving rise to expectancy of promotion.

*Urgency*

f. As at the time of filing the reply, no selection decision had been made though the recommendations for selection are being finalized. Nothing has been submitted to the Central Review Committee yet.

*Irreparable damage*

g. The Applicant has failed to show how the implementation of the decision would cause her irreparable damage; besides, her performance at the technical test did not give her a higher chance or likelihood of being selected for the post.

**Consideration**

19. Article 2.2 of the Statute and article 13 of the Rules of Procedure of the Tribunal provides that the Tribunal can suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage to the Applicant. All of these requirements must be met in order for a suspension of action to be granted.

*Prima facie unlawfulness*

20. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the

lawfulness of the contested decision (see, *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080).

21. Regarding the scope of judicial review with respect to decisions in selection and/or promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

22. In applying this standard, serious and reasonable doubts arise regarding the application of rules governing the selection procedure in the present case. The Tribunal will address them in turn.

#### *Composition of Assessment panel*

23. ST/AI/2010/3 (Staff Selection System) provides for the following:

#### **Section 1 Definitions**

*(b) Assessment:* the substantive process of evaluating applicants to determine whether they meet all, most, some or none of the requirements of the position under recruitment;

*(c) Assessment panel:* **a panel normally comprised of at least three members**, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening. (Emphasis Added)

24. The Inspira Hiring Manager's Manual<sup>1</sup> provides for the following in Chapter 9:

9.3 Composition of the Assessment Panel

2. It is suggested that the members participating in evaluating the assessment exercise be the same members as the panel conducting the competency-based interviews. **Ideally, all applicants for one job opening are to be assessed and/or interviewed by the same assessors.** (Emphasis Added)

5. **Each Assessment Panel is to be composed of a minimum of three assessors** and every effort should be made to obtain geographical diversity and gender balance. (Emphasis Added)

25. In the present case, it follows from the submission of the parties that the panel that assessed the Applicant was comprised of two members only: the hiring manager and another P-4 staff member. In contrast, the panel which assessed the group of six candidates on 7 November 2012 had one additional member.

26. From the above provisions it is clear that any evaluation mechanism, be it a written test, or the presentation of a concept paper as in the present case, should be done before a panel of at least three members who meet the requirements stipulated above. Additionally, candidates for a post should be assessed by the same assessors. The Respondent has not claimed exceptional circumstances which may allow for an exception from these requirements.

27. The Tribunal finds that the Applicant's candidature was not accorded a full panel as required under the above-referenced provisions of the ST/AI/2010/3 and the Inspira Hiring Manager's Manual. Moreover, the candidates for the contested post were not assessed by the same group of assessors, as such tainting the recruitment process. This constitutes a major procedural flaw.

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<sup>1</sup> Manual for the Hiring Manager on the Staff Selection System (Inspira), United Nations, October 2012 (Release 3.0)



*Notice of assessment (Technical test)*

28. Chapter 9.6 of the Inspira Hiring Manager's Manual provides that candidates should normally be informed of the interview at least five working days in advance.

29. On Friday, 9 November 2012 the Applicant was invited to undertake a technical assessment to be conducted on Monday, 12 November 2012.

30. The other six candidates had their invitations to attend the technical assessment sent on Saturday, 3 November 2012 and it was to be conducted on Wednesday, 7 November 2012, effectively giving them two working-day notice.

31. The Respondent acknowledged that though it was good practice to inform candidates well in advance, there is no mandatory requirement to do so and consequently a short notice does not constitute a procedural flaw.

32. The Tribunal is not convinced that a zero working-day notice, such as the one sent to the Applicant, meets the requirement of full and fair consideration under any circumstances, even if the five working-day notice period was not applicable to invitations regarding technical tests.

33. In any case, if the Tribunal were to take the Respondent's argument that advance notice is not mandatory, it is a matter of fairness that all candidates have to be treated alike. While six of the candidates had two working-day notice period, the Applicant had none. This is a further indication that the Applicant's candidature was not fairly considered for the contested post.

34. Finally, the Tribunal has to address whether the Applicant had a likelihood of promotion had the Organization adhered to the applicable Rules and Regulations and/or treated all the candidates equally. In *Vangelova* 2011-UNAT-172 and *Bofill* 2011-UNAT-174, the Appeals Tribunal held that:

An irregularity in promotion procedures will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff

member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

35. The Tribunal has found that the Applicant was not accorded equal and fair treatment at competing for the contested post with the other candidates. The Respondent filed *ex parte* the scores of the technical assessment which indicated that the Applicant missed the pass mark by no more than one point.

36. There is a possibility that had the Applicant been accorded the same notice period for preparation and had she been assessed by the three member panel, as the other candidates, in her technical assessment, which included an oral presentation, she could have passed the threshold to be shortlisted for an interview. Insofar, the irregularity of the procedure had a direct impact on the Applicant's technical assessment. Therefore, the Applicant had a likelihood of promotion to a sufficient extent.

#### *Urgency*

37. The Applicant contends that the application is urgent because the recruitment is on going and the final selection decision has not been made but could be made in the near future. Therefore, the recruitment process should be halted before the decision is made. The Respondent on the other hand confirms that no selection decision has been made for the contested post, and that the recommendations have not yet been submitted to the Central Review Committee.

38. The fact that the selection decision has not yet been made and implemented in the present case in itself creates urgency in dealing with the application because once the selection decision has been implemented, it would be futile for the Applicant to request a suspension of action (see *Hussein* UNDT/2009/020). Considering the fact that the Respondent has not made an assurance that no selection decision will be taken until management evaluation has been completed, particular urgency cannot be denied.

*Irreparable damage*

39. While the Tribunal has established that mere financial loss is not enough to satisfy this requirement (see *Fradin de Bellabre* UNDT/2009/004 and *Utkina* UNDT/2009/096), it has also found in a number of cases that harm to professional reputation and career prospects, or harm to health, or sudden loss of employment may constitute irreparable damage (see *Corcoran* UNDT/2009/071, *Calvani* UNDT/2009/092, *Villamorán* UNDT/2011/126, *Ullah*/2012/140).

40. Likewise, in the instant case, the Tribunal finds that the exclusion from the selection process for the post at stake at this stage would at least damage the Applicant's career prospects in a way which could not be compensated with financial means.

**Conclusion**

41. In view of the foregoing, it is ORDERED that:

The decision of 4 December 2012 not to further consider the Applicant's candidature for the contested post be suspended pending the outcome of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 8<sup>th</sup> day of February 2013

Entered in the Register on 8<sup>th</sup> day of February 2013

(Signed)

René M. Vargas M., Registrar, Geneva