



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ZHAO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 17 October 2013, the Applicant, a P-4 Interpreter at the United Nations Office at Geneva (“UNOG”), Division of Conference Management (“DCM”), Interpretation Service, seeks suspension of action, pending management evaluation, of the decision to select Mr. Z. Y. for the position of Senior Interpreter (Chinese), P-5, advertised under Job Opening No. 13-LAN-UNOG-27762-R-GENEVA (L).

Facts

2. On 27 May 2013, the Applicant applied for the post of Senior Interpreter (Chinese), P-5, Job Opening No. 13-LAN-UNOG-27762-R-GENEVA (L), advertised on 16 April 2013. A total of 14 applications were received, out of which five candidates, including the Applicant, were screened eligible and forwarded to the Hiring Manager, the then Officer-in-Charge, Interpretation Service, DCM, UNOG, for evaluation. These five candidates were invited for a competency-based interview in July 2013, following which the Assessment Panel determined that all the candidates met the requirements of the post. Consequently, the names of all five candidates, including the Applicant’s, were placed on the list of recommended candidates that was transmitted to the Central Review Board (“CRB”) on 17 July 2013.

3. At its meeting of 31 July 2013, the CRB was not in a position to endorse the list of recommended candidates because it noted several inconsistencies on the Comparative Analysis Report between the write-up of the evaluations and the rating of the competencies. Also, the link between the evaluation and the Panel’s conclusion was not always clear. Hence the CRB sought more clarifications and details in the evaluations of the candidates, and requested the Hiring Manager to review the write-up of the evaluations clearly indicating how the Assessment Panel arrived to its recommendation.

4. Following the request from the CRB, the Hiring Manager reviewed the evaluations; the Comparative Analysis Report provided to the CRB indicated that

four candidates, including the Applicant, successfully met the requirements for the position and that one, the selected candidate, exceeded the requirements. On 14 August 2013 the CRB endorsed the recommendations in favour of the five candidates.

5. By memorandum of 20 August 2013 addressed to the Human Resources Management Service (“HRMS”) through the Director of DCM, the Hiring Manager forwarded the names of the five candidates and provided reasons for his recommendation to select Mr. Z. Y.

6. On 27 August 2013, the Hiring Manager’s recommendation was submitted to the Director-General of UNOG by the Director, Division of Administration.

7. On 28 August 2013, the Director-General selected Mr. Z. Y. for the position.

8. By e-mail of 2 September 2013 from the Hiring Manager and generated by Inspira, the Applicant was informed that his name was placed on a roster of pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions at the same level. A few days later he was made aware of the name of the selected candidate.

9. By a memorandum of 2 September 2013 from a Senior Human Resources Officer, the successful candidate, Mr. Z. Y., was informed of his selection, to be effective “1 March 2014, upon retirement of the current incumbent of the post”. He was told that HRMS would issue in due time a Personnel Action implementing his promotion.

10. On 17 October 2013, the Applicant requested management evaluation of the selected decision for the position at stake. On the same day, he filed before this Tribunal the present application for suspension of action of the challenged decision, pending management evaluation.

11. On 18 October 2013, the application was served on the Respondent, who was instructed by the Tribunal to submit his reply by 23 October 2013. The Tribunal also directed the Respondent not to undertake, as from the date of

service, any further steps regarding the recruitment against the position until the determination of the suspension of action.

12. On 23 October 2013, the Respondent filed his reply, with one annex filed *ex parte* (Annex 2). On the same day, the Applicant requested leave to file comments on the Respondent's submission, which was refused by the Tribunal since the processing of a request for suspension of action is subject to particularly short time limits due the urgent nature of such requests.

13. On 24 October 2013, the Applicant requested access to above-mentioned Annex 2.

Parties' contentions

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

Prima facie unlawfulness

a. Section 6.3 of administrative instruction ST/AI/2010/3 (Staff selection system) was violated in the selection process, since the selected candidate does not fulfil the requirement of prior lateral moves to be considered for promotion to P-5, whereas the Applicant does;

b. Also, sec. 1 (a) of ST/AI/2010/3 was not respected since the position was advertised on 16 April 2013 whereas the retirement of the incumbent is planned on 28 February 2014, *i.e.* almost 11 months-instead of the prescribed six months-ahead of the retirement; this was timed to favour a particular candidate before the Hiring Manager left the Interpretation Service on 23 August 2013;

c. The selection process is marked with irregularities, namely with regard to the impact that the language used during the interview had on the evaluations;

d. Article 101 para. 3 of the United Nations Charter and Staff Regulation 4.2 were violated in the selection process, since in his view the selected candidate is less qualified than him for the position;

e. In this Tribunal's Order No. 132 (GVA/2013), it was already demonstrated that another selection process for a vacancy in the Interpretation Service, but in the English booth, showed some procedural irregularities, hence the selection process for the position at stake in the present case should be duly verified;

Urgency

f. The decision to select another candidate for the position is going to be implemented imminently, if not already done;

Irreparable damage

g. The implementation of the contested decision would seriously jeopardize his fair chance for promotion as no promotion opportunity would be available in the foreseeable future;

h. The flawed selection decision would have a lasting demoralising effect throughout the section as a number of other candidates are eminently better qualified than the selected candidate.

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

Prima facie unlawfulness

a. The decision is not *prima facie* illegal. The Applicant was found eligible for the position at stake, he was invited for the competency-based interview and was placed on the list of recommended candidates for transmission to the Director-General for final selection;

b. The selected candidate was assessed as “exceeding the requirements” of the position, whereas the Applicant was deemed to only “successfully meet” those requirements. The recommendation to the Director-General was properly documented and reasoned based on the Panel’s assessment of the candidates;

c. While it is correct that the initial Comparative Analysis Report was sent back for clarifications as required by the CRB, it later endorsed the list of recommended candidates and so found that the candidates were duly evaluated based on the pre-approved criteria;

d. As regards the issue of the language used during the interview, the fact that the Applicant answered only in English did not negatively impact on his rating, and the selected candidate received the same rating as the Applicant for the competency “Communication”. The fact that the selected candidate answered to some questions in French was of no relevance;

e. As for staff serving against language posts, they are subject to a waiver of the prior lateral moves requirement before promotion to the P-5 level in accordance with Sec. 6.3 (d) of ST/AI/2010/3; since the position at stake is a language post subject to administrative instruction ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills), the decision is not flawed in this regard;

f. Section 1 of ST/AI/2010/3 lists only non-exhaustive examples and does not preclude the administration from advertising a Job Opening more than six months before the post is anticipated to become vacant. It is even sound administration to anticipate future vacant positions in advance and to take action to fill the post as soon as possible. The Applicant does not demonstrate how his candidacy was affected by the fact that the Job Opening was published more than six months before the post was expected to become vacant, and his belief that the Hiring Manager intended to conduct the selection exercise himself in order to favour a particular candidate is unsubstantiated;

Urgency

g. There is no urgency since the current incumbent of the position is expected to retire only on 1 March 2014, and by then the management evaluation of the contested decision would be completed;

Irreparable damage

a. Based on *Utkina* (UNDT/NY/2009/096), irreparable harm is “injury that cannot be adequately compensated in damages”, which is not the case here since monetary compensation could adequately compensate the Applicant in the event the selection exercise is found to be flawed;

b. The application should hence be dismissed in its entirety.

Consideration

16. Article 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure provide that it may order the suspension, during the pendency of management evaluation, of the implementation of a contested administrative decision that is the subject of an on-going management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

17. It follows from these provisions that an application for suspension of action may only be granted if the contested decision has not yet been implemented and is the subject of an on-going management evaluation.

18. In the present case, the decision that is challenged is the decision to select Mr. Z. Y. for the position of Senior Interpreter (Chinese), P-5, advertised under Job Opening No. 13-LAN-UNOG-27762-R-GENEVA (L), for which the Applicant applied. That decision, as acknowledged by the Respondent himself, has not been implemented yet because the post is currently occupied until the retirement of its incumbent.

19. The Tribunal will hence proceed with the examination of the three cumulative conditions of *prima facie* unlawfulness, urgency and irreparable damage.

Prima facie unlawfulness

20. The facts as presented to the Tribunal indicate that the promoted candidate had been selected following the recommendation made on 20 August 2013 by the Hiring Manager, the then Officer-in-Charge of the Interpretation Service, DCM. The Applicant asserts that there was no justification for the position at stake to be advertised 11 months before the planned retirement of the current post incumbent in March 2014, and that this anticipated advertisement demonstrates the Hiring Manager's willingness to be in charge of the selection process in order to recommend the successful candidate for promotion.

21. Section 1 (a) of ST/AI/2010/3 defines an "anticipated job opening", for which a vacancy announcement has to be issued and which is subject to the rules governing selection as foreseen by ST/AI/2010/3, as follows:

Anticipated job openings: job openings relating to positions expected to become available as identified through workforce planning or forecasting, for example due to the retirement of the incumbent within six months or for meeting future requirements.

22. It follows from that text that the Administration is authorized to publish a vacancy announcement for a position on which the incumbent is due to retire only when said retirement is planned to happen within less than six months. Even if the Tribunal admits that some exceptions could be made to that rule in the interest of the Organization, in the instant case the Respondent did not give any reason for starting the selection procedure 11 months ahead of the retirement of the post incumbent, and selecting the successful candidate already seven months before the post becoming effectively vacant. Such a way of doing is contrary to the obligation imposed on the Administration to select the best qualified candidate for a position since it prevents potential candidates of being able to apply for the position, while they would have been entitled to do so if the post would have been

advertised at a later stage, *e.g.* for potential candidates wishing to acquire sufficient experience before applying for the position or to pass some certificates.

23. In view of the above, the Tribunal considers that it was the intention of the Hiring Manager, who was at the time Officer-in-Charge of the Interpretation Service and ceased his functions in this regard on 23 August 2013, to organize the selection procedure while he was still serving in those functions in order to influence the final choice of the successful candidate.

24. The Tribunal is hence of the view that the decision to select Mr. Z. Y. appears to be *prima facie* unlawful for the reason exposed above. It is therefore not necessary for the Tribunal to decide upon the other irregularities in the selection process that were raised by the Applicant.

Urgency

25. In view of the fact that the selected candidate had been informed of his selection in September 2013, and that he was told that a Personnel Action would be issued “in due time” to implement his promotion, the Tribunal considers that the condition of urgency is fulfilled.

26. The Respondent’s contention that there is no urgency to decide on a suspension of action in this matter since the reply of the Management Evaluation Unit would be issued before the date of implementation of the contested decision is without merit. One of the goals of the suspension of action procedure is to allow the Judge, by suspending the implementation of a decision, to draw the attention of the Administration on possible irregularities identified in a case, in order for the Administration to take such irregularities into account before the issuance of the reply to the management evaluation request.

Irreparable damage

27. The Applicant explained that the implementation of the contested decision would cause him moral damage and would have an impact on his career prospects.

28. In the Tribunal's view, harm to professional reputation and career prospects may constitute irreparable damage. In the present case, it considers that the Applicant would suffer irreparable damage to his career prospects should the contested decision be implemented. A subsequent monetary compensation, if any, would not compensate all his damage in this regard.

29. In view of the above, the Tribunal considers that the three statutory requirements to grant suspension of action are fulfilled in the instant case.

30. Finally, in view of its conclusion, the Tribunal considers that it is not necessary for the disposal of this request for suspension of action to share with the Applicant Annex 2 to the Respondent's reply filed *ex parte*.

Conclusion

31. In view of the foregoing, the application for suspension of action is granted, and it is ORDERED that the implementation of the decision to select Mr. Z. Y. for the position of Senior Interpreter (Chinese), P-5, advertised under Job Opening No. 13-LAN-UNOG-27762-R-GENEVA (L), be suspended pending the outcome of the management evaluation.

(Signed)

Judge Jean-François Cousin

Dated this 25th day of October 2013

Entered in the Register on this 25th day of October 2013

(Signed)

René M. Vargas M., Registrar, Geneva