



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

VALENTINE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Simon Buettner, UNOG

Introduction

1. By application filed on 30 May 2014, the Applicant, an Economic Affairs Officer (P-4) and Officer-in-Charge (“OIC”) of the Transport Section (“TS”) in the Trade Logistics Branch, (“TLB”), Division on Technology and Logistics (“DTL”) at the United Nations Conference on Trade and Development (“UNCTAD”), seeks suspension of action of his “exclusion from a recruitment exercise as a result of a written test” regarding the position of Senior Economic Affairs Officer-Chief of TS (P-5), TLB/DTL/UNCTAD, Job Opening No. 13-ECO-UNCTAD-28179-R-GENEVA (R).

Facts

2. On 1 February 2007, the Applicant was appointed to the position of Economic Affairs Officer (P-4), TLB/DTL/UNCTAD, and on 1 January 2010, he was designated OIC of the TS, a position at the P-5 level, following the appointment of the previous incumbent as OIC of the TLB.

3. On 6 February 2013, the position of Chief of TS (P-5) was advertised in *Inspira* under Job Opening No. 13-ADM-UNCTAD-26288-R-GENEVA (R), but was later cancelled.

4. On 19 June 2013, the post of Chief of TS (P-5) was re-advertised under a revised Job Opening No. 13-ECO-UNCTAD-28179-R-GENEVA (R) (“the post”), and the Applicant applied for it on 13 August 2013. Following the closure of the job opening, 76 candidates, including the Applicant, were released as “eligible” to the Hiring Manager (“HM”), the Head, TLB/DTL/UNCTAD.

5. On 1 December 2013, all shortlisted candidates, including the Applicant, were invited for a written assessment. They were informed by email about the test passing modalities and the composition of the Assessment Panel, which included three members. The Applicant scored 52 out of 100 points in the test, which was below the passing grade of 60, and was therefore not invited to the interview

stage; eight other candidates passed the test and were invited for a competency-based interview.

6. In a memorandum dated 26 May 2014 addressed to the Chief, Human Resources Management Section, UNCTAD, the Head, TLB/DTL/UNCTAD asked for the grant of a Special Post Allowance (“SPA”) for the Applicant from 1 January 2014 until 30 June 2014, indicating that the “Inspira process on this regular post is pending HRMS’ review of the interview evaluations”. The Applicant understood from that memorandum that interviews for the post had already taken place, and deduced that he had been excluded from further consideration in the recruitment process.

7. On 28 May 2014, the Applicant, through his Counsel, filed a request for management evaluation of the “implied administrative decision to exclude him from the recruitment exercise for Job Opening No. 13-ECO-UNCTAD-28179-R-GENEVA (R) on the basis of a written assessment”, and on 30 May 2014 he filed the present application for suspension of action pending management evaluation.

8. On 4 June 2014, the Respondent provided his reply to the application; Annexes 2 to 7 of which—with the exception of Annex 5b—were filed *ex parte*. On the same day, the Applicant, through his Counsel, sought leave from the Tribunal to make comments on the Respondent’s reply, while already submitting such comments in his request for leave.

Parties’ contentions

9. The Applicant makes substantive contentions regarding the three criteria for suspension of action, as follows:

- a. With respect to *prima facie* illegality, the requirement of anonymity of the written test was “subverted”, in that the questions were formulated in such a way that answers to them would inevitably identify the candidates. The questions did not evaluate the candidates’ skills, technical knowledge or competencies, but were rather deemed to identify the candidates at an early stage in order to exclude him personally from the recruitment process;

- b. His exclusion from the recruitment exercise is the result of the HM's bias against him and is evidence of the HM's preference for an alternative candidate with less experience who had been directly recruited into the TS by the HM;
 - c. He also calls into question the assessment of his written test as such, since he had performed the functions of the post for a significant period of time during which he had received good performance appraisals;
 - d. With respect to urgency, the selection procedure is ongoing and a decision will occur in the near future;
 - e. As regards irreparable damage, his exclusion from the recruitment exercise will damage his professional reputation and career prospects, because his work area is extremely specialized and the opportunity to compete for a P-5 post rarely occurs.
10. The Respondent's primary contentions may be summarized as follows:
- a. The application is irreceivable *ratione materiae* and should be dismissed, because the alleged "decision" is a preparatory decision only and as such is not appealable under the terms of the Tribunal's Statute. The recommended list of candidates has not even been forwarded to the relevant Central Review Body ("CRB") hence the selection process has not been completed at this stage. In previous selection cases, the review by the CRB has led to the inclusion or exclusion of certain candidates, also with additional interviews being conducted;
 - b. In the event that the Tribunal deems it necessary to examine the three cumulative conditions for the granting of a suspension of action in the present case, he contends that none of those conditions is met:
 - i. First, with regard to *prima facie* unlawfulness, all allegations made by the Applicant with respect to the alleged bias against him by the HM are unsubstantiated. Moreover, the Applicant did not raise this issue when he was informed about the written test and the

composition of the Assessment Panel; he only came forward when he learned that he did not pass the test. Finally, contrary to the Applicant's assertions, his responses to the written test questions do not match his PHP in such a way as to allow him being identified;

ii. In addition to the above, the evaluation of the written test was not done by the HM alone but by an Assessment Panel, which was a sufficient safeguard for the Applicant's right to full and fair consideration, and the grades given to the Applicant by all three Panel members do not considerably vary or indicate any improper influence on the side of the HM on the Applicant's overall score;

iii. The condition of urgency is not met since the selection process has not yet proceeded to the CRB; hence, there is no evidence of an imminent selection decision and of its implementation thereof;

iv. Finally, as regards the requisite of irreparable damage, the Applicant does not demonstrate how the implementation would cause him irreparable harm, since he failed to show that he would be the selected candidate should he be included in the next stage of the selection procedure.

Consideration

11. Article 2.2 of its Statute and art. 13 of its Rules of Procedure provide that the Dispute Tribunal 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.

12. It follows from these provisions that an application for suspension of action may only be granted if it concerns an "administrative decision", which has not yet been implemented and which is the subject of an on-going management evaluation. The Appeals Tribunal (see e.g. *Al Surki et al.* 2013-UNAT-304) has

adopted the definition of an administrative decision based on the jurisprudence of the former Administrative Tribunal, which held in *Andronov* (Judgment No. 1157 (2003)) that:

It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Emphasis added)

13. Pursuant to a well-established jurisprudence, preparatory decisions are not considered administrative decisions, as they merely constitute one of the steps and/or findings leading to an administrative decision and do not in themselves adversely affect a staff member’s legal situation, since they modify neither the scope nor the extent of a staff member’s rights. As regards a selection process, the Appeals Tribunal has held that it “involves a series of steps or findings which lead to the administrative decision”, and that “[t]hese steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT” (*Ishak* 2011-UNAT-152). In the same vein, the Appeals Tribunal held in *Elasoud* 2011-UNAT-173 that “Departmental Recommendations” within a selection process do not constitute administrative decisions, thus confirming *Elasoud* UNDT/2010/111, where the Dispute Tribunal stated that “[w]hile staff members are entitled to request the quashing of decisions not to appoint them to a post for which they have applied and, at that time, to criticise the future supervisor’s recommendation, that recommendation is only a preliminary to the administrative decision not to appoint them and therefore has no direct legal consequence for their terms of appointment”.

14. The Appeals Tribunal has also highlighted that there is only one administrative decision that completes the selection process (see *Ivanov*

2013-UNAT-378). The selection procedure ends with the selection of the successful candidate, and it is this administrative decision that may be contested by other candidates. All other decisions within the selection procedure are preparing the final selection and do not amount to a contestable administrative decision.

15. In the present case, the Applicant is challenging his exclusion from the step of the recruitment process following that of a written test, namely the interview stage, as a result of him not reaching the passing mark. As stated by the Tribunal in *Xu* Order No. 92 (GVA/2010) “[a]lthough 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”. The ‘decision’ contested by the Applicant is for the time being only a preparatory decision and does not carry any direct legal consequence on his rights. Its legality could only be disputed in the light of the final decision on the selection procedure for the post at stake (see also *Skourikhine* Order No. 45 (GVA/2014)).

16. In addition, as the Respondent rightfully emphasizes, the lack of finality is demonstrated by the fact that the mandatory review of the selection process by the CRB has not even taken place yet. Indeed, the Tribunal has already been confronted with a case in which the intervention of the CRB led to the inclusion of a candidate—who had initially not been invited for an interview—back into the selection process (see *Dhanjee* UNDT/2014/029 and *Hayashi* UNDT/2014/030).

17. In view of the above and the stage at which the recruitment process in question is, it can only be concluded that the application for suspension of action is premature and, thus, not receivable. It follows that it is not necessary for the Tribunal to ascertain whether the other prerequisites for the granting of a suspension of action, namely *prima facie* unlawfulness, urgency and irreparable damage, are met in the case at hand.

18. Finally, the Tribunal finds no compelling reasons to grant the Applicant access to the Annexes filed *ex parte* by the Respondent, since it did not base its decision on those documents.

Conclusion

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

The application for suspension of action be rejected.

(Signed)

Judge Thomas Laker

Dated this 6th day of June 2014

Entered in the Register on this 6th day of June 2014

(Signed)

René M. Vargas M., Registrar, Geneva