



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

FARRIMOND

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Jérôme Blanchard, UNOG

## **Introduction**

1. By application filed on 25 May 2016, the Applicant, an Interpreter (P-4), English Interpretation Section, Interpretation Service, Division of Conference Management, United Nations Office at Geneva (“EIS/IS/DCM/UNOG”), requests suspension of action pending management evaluation of the decision not to select her for the post of Senior Interpreter (P-5), in the English Interpretation Section, published as JO No. 15-LAN-UNOG-49485-R-GENEVA (L) (“contested position”).

## **Facts**

2. The contested position was advertised on 10 November 2015 in *Inspira*, with a deadline to apply until 8 January 2016.

3. Four candidates were screened eligible for the hiring manager’s assessment, of which three were candidates from the roster, including the Applicant and the candidate eventually selected.

4. By email of 28 January 2016, the Applicant was invited to a competency-based interview and informed of the composition of the panel, which included the Director, IS, DCM, UNOG (hiring manager for the contested position), a Senior Interpreter, IES, IS, DCM, UNHQ and the Chief, EIS, Department for General Assembly and Conference Management (“DGACM”), United Nations Headquarters (“UNHQ”).

5. The competency-based interview took place on 17 February 2016, with one panel member—namely the Chief, EIS, UNHQ—participating via videoconference. In addition to the three panel members, the administrative assistant of the Director, IS, DCM, UNOG, was present and took notes of the interview.

6. On 11 April 2016, the hiring manager, through the Director, DCM, UNOG, recommended the candidate eventually selected for selection, based on her performance during the competency-based interview and her working language

combinations. There were then discussions between the Human Resources Management Section and the hiring manager as to whether or not the recommended list should be endorsed by the Central Review Body, given that a competency-based interview was held but that the recommendation list contained only rostered candidates.

7. On 13 May 2016, the Director-General, UNOG, selected the candidate proposed for selection.

8. By email of 13 May 2016, the successful candidate was requested to confirm her continued availability and interest for the position. She so confirmed by email of the same day.

9. By email of 14 May 2016, the Applicant was informed that “a candidate ha[d] been selected for [the contested position] from a roster of pre-approved candidates, and [that] as a result [the] Job Opening ha[d] been closed”.

10. On 24 May 2016, the Applicant submitted a request for management evaluation of the decision not to select her for the contested position. She received a standard acknowledgment letter the next day, but no substantive answer.

11. On 26 May 2016, a Personal Action was raised and approved in *Umoja* to reflect the fact that the successful candidate will be promoted as of 1 June 2016. The successful candidate was notified of the same on 27 May 2016.

### **Parties’ contentions**

12. The Applicant’s primary contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. The recruitment process for the contested position was tainted by bias from the hiring manager against the Applicant, which was triggered by an incident in June 2013 concerning the consideration of her candidacy for another Senior Interpreter position (JO 13-LAN-UNOG-27767), and her subsequent application before the Dispute Tribunal;

- b. From that time, the Applicant was denied the opportunity to be promoted, and to demonstrate her professional skills or have them fully recognised;
- c. The procedure for the competency-based interview was flawed and the panel was not objective and impartial as:
- i. The panel was composed of only three members, whereas the practice in the IS is to constitute panels of five;
  - ii. The “ratings to be used” were not specified, as required by sec. 9.3.4(d) of the Manual for the Recruiter on the Staff Selection System (Inspira) (“Recruiter’s Manual”);
  - iii. One panel member participated by videoconference, without this being mentioned in the invitation for the interview, and interaction with this panel member was hindered by the seating arrangements and distractions;
  - iv. The hiring manager’s administrative assistant was present during the interview, although not announced and contrary to the usual practice;
  - v. The hiring manager held undue influence over the majority of the panel members given that he was “expected to hold considerable sway” over another selection process in which one of the two other panel member was a candidate;
  - vi. One panel member had a conflict of interest as she assessed the Applicant’s performance in Spanish a month earlier, which was likely to impact on her assessment of the Applicant’s candidacy for the contested position; previous assurances had been given to the Applicant that those who would assess her level of Spanish would not sit on the assessment panel in respect of her candidacy for the contested position;

d. The selection process was delayed to incorporate an e-PAS manipulated to the Applicant's detriment.

*Urgency*

e. The decision will be implemented "in the near future, presumably on 1 June 2016";

*Irreparable damage*

f. The contested decision and the underlying hiring manager's personal animus towards the Applicant deprives her of the possibility of professional advancement, which is particularly damaging for the Applicant given the forthcoming changes in retirement age and mobility requirements;

g. The contested decision caused the Applicant demotivation, stress and loss of confidence in management at various levels; it also has broader repercussions for other staff members in the IS.

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

*Implementation of the contested decision*

a. The contested decision has been implemented given that the successful candidate was informed of her selection on 13 May 2016, and she unconditionally accepted the offer the same day; therefore, it can no longer be suspended;

*Prima facie unlawfulness*

a. The Applicant's candidacy received full and fair consideration but another rostered candidate was selected based on the results of the competency-based interviews;

- b. The proper procedures set out in ST/AI/2010/3 (Staff Selection System) were followed as:
- i. The panel for the competency-based interview was lawfully constituted of three members;
  - ii. There are no rules providing that the invitation for an interview should specify that participation of a panel member will be via videoconference; and
  - iii. The seating arrangements, the participation of one panel member through videoconference, and the questions asked at the competency-based interview were the same for all candidates;
- c. Although sec. 9.3.4(d) of the “Hiring Manager’s Manual” provides that the ratings to be used for interviews should be conveyed to candidates; this provision does not purport to vest a staff member with an entitlement and, in any event, the Applicant did not establish how this could be prejudicial to her right as all candidates were treated the same;
- d. The Applicant’s allegations of bias from all panel members are unsubstantiated and, in any event, were not raised prior to her interview when she had the opportunity to do so;
- e. Likewise, the Applicant did not object to the hiring manager’s assistant taking notes during the interview;
- f. The alleged irregularities in the Applicant’s e-PAS for 2015-2016 are not relevant to the present application as this document was not considered for the selection process;
- g. Consequently, the Respondent requests the Tribunal to reject the application for suspension of action.

## Consideration

14. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

### *Implementation of the contested decision*

15. As a preliminary matter, it is worth recalling that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

16. The structure of ST/AI/2010/3 obviously distinguishes between selection decisions on the one hand and their notification and implementation on the other (see sec. 9 and sec. 10 of ST/AI/2010/3).

17. Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision (see *Wang* UNDT/2012/080, *Tiwathia* UNDT/2012/109 and *Nwuke* UNDT/2012/116), there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment (see *Quesada-Rafaraso* Order No. 20 (GVA/2013)). However, the Tribunal notes that such a procedure seems to be reserved for selection decisions taken involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

18. With respect to selection procedures that entail promotion of internal candidates, like in the present case, the Tribunal recalls that section 10.2 of ST/AI/2010/3 clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision.

19. It follows from this provision that the implementation of the selection decision at stake, which was taken on 13 May 2016, cannot be implemented before 1 June 2016. This is also reflected in a Personnel Action of 26 May 2016 created and approved in *Umoja* to reflect the fact that the successful candidate will be promoted as of 1 June 2016. Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

*Prima facie unlawfulness*

20. The Tribunal recalls that the threshold required in assessing this first condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99(GVA/2015)).

21. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it shall examine the following: (1) whether the procedure as laid down in the relevant provisions was followed; and (2) whether the staff member was given fair and adequate consideration (see *Nunez* Order No. 17 (GVA/2013) and *Abbassi* 2011-UNAT-110).



22. 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.

23. The Appeals Tribunal further ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

Alleged procedural irregularities

24. In the present case, the Tribunal finds that the Applicant did not establish *prima facie* that the recruitment process for the contested position was procedurally flawed. Although the circumstances in which the competency-based interview took place may have caused the Applicant to feel uncomfortable, none of her grievances amount to a violation of an applicable rule for the conduct of competency-based interviews.

25. There is no evidence, or even allegations, of a violation of the procedure set forth in ST/AI/2010/3, which governed the selection process for the contested position, including the competency-based interview (*Asariotis* 2015-UNAT-496).

26. The assessment panel, composed of three members, was properly constituted pursuant to sec. 1(c) of ST/AI/2010/3 and a divergence from a previous practice in the IS does not constitute a procedural irregularity.

27. As to the presence of the hiring manager's administrative assistant during the interview as a note-taker, the Tribunal stresses that ST/AI/2010/3 provides for the mandatory presence of at least three panel members, but does not prevent the presence of additional persons, such as experts, observers or note-takers. It is indeed a common practice to have such note-takers during competency-based interviews, and this practice has not been found to be in violation of the rules (see, e.g., *Tiwathia* UNDT/2015/012 affirmed by 2016-UNAT-616). This is, of course, based on the assumption that such persons do not interfere with the interviewing process as such. No allegation in this respect has been made.

28. Insofar as the Applicant argues that she was not provided adequate information about the assessment process, as per the Recruiter's Manual, the Tribunal recalls the Appeals Tribunal's holding in *Charles* 2013-UNAT-286 that "[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances". Accordingly, the Recruiter's Manual, similar to the Instruction Manual for the Hiring Manager on the Staff Selection System, does not vest the Applicant with any entitlement (*Asariotis* 2015-UNAT-496).

29. In any event, there is no evidence of non-compliance with the procedure set forth in the Recruiter's Manual or in the Manual for the Applicant on the Staff Selection System (Inspira) ("Applicant's Manual") that would have caused prejudice to the Applicant, and raised serious and reasonable doubts about the lawfulness of the contested decision.

30. Sec. 9.3.4 of the Recruiter's Manual, referred to by the Applicant, provides that (emphasis added):

4. When inviting the applicants to participate in an assessment process, the **Hiring Manager** informs them in advance (at least 5 working days) of the anticipated date of the assessment exercises and provides them with sufficient information on the exercises which should include:
  - a. Nature of each assessment - indicates the method that will be used such as interviews and simulation exercises, with an indication of the number of questions;

- b. Duration of each assessment - indicates the expected duration of the whole exercise and request that each assessor set aside the adequate timeframe;
- c. *Location of the assessment - indicates the location of where the panel will meet for deliberations;*
- d. *Scoring/ratings to be used - provides a sample assessment record sheet;*
- e. Reconfirm the applicant's continued interest to be considered for the position.

31. Sec. 9.6 of the Recruiter's Manual entitled "Advising on Communicating with Applicants about the Interview" provides, in turn that:

- 1. Applicants convoked for interviews are normally notified at least five working days in advance. The invitation includes the date, time and means of the interview (telephone, video conference, face-to-face) and also informs the applicant of the names of the assessors.
- 2. At the beginning of the interview, the chairperson should state which competencies will be addressed and informs the applicant that the session will last from 30 to 60 minutes. The invitation includes a reference to the position and the date, time and means (eg, in person, by telephone or by video conference) of where and how the interview will be held as well as the name, functional title and department/office/mission of each assessor.

32. This last provision is repeated at sec. 10.2 of the Applicant's Manual, which makes no reference to the provision of a scoring/rating sheet.

33. There is no requirement in the aforementioned provisions that all panel members be physically present during the interview, nor that the remote participation of one of them be announced in advance to the candidates. As to the scoring/ratings to be used, sec. 9.3.4.d of the Recruiter's Manual suggests that it should be provided to the candidates, but this requirement is not entirely clear in the light of sec. 9.6 of said Manual and sec. 10.2 of the Applicant's Manual, which is more specifically addressed to candidates for positions within the UN common system and specifically set forth the information that must be provided to those candidates who are invited to an interview.

34. Even if the Applicant were to have been provided with the scoring/ratings for the assessment during the interview, there is no reason to believe that failure to provide her with this information has caused her prejudice. Knowing the rating scale was unlikely to affect her performance during the interview, and the Tribunal notes that there is no evidence that the Applicant requested such information prior to the interview. As long as all the candidates were assessed in the same way and provided with the same information, which appears to have been the case here, this alleged irregularity is not such to raise serious and reasonable doubts about the legality of the contested decision.

#### Allegations of bias

35. The Tribunal finds no *prima facie* evidence to support the Applicant's allegations of bias against her from the hiring manager, nor any conflict of interest from the two other panel members, resulting in a lack of fair and adequate consideration of her candidacy for the contested position.

36. The Applicant's assertions that the hiring manager has demonstrated animus towards her since she took an unauthorised sick leave in 2013 or brought a challenge before the Dispute Tribunal in respect of a previous selection exercise, are not substantiated by any concrete fact and/or evidence. The fact that the Applicant has not been selected for any of the P-5 vacancies since then is not, in and of itself, indicative of bias against her from the hiring manager. There is no evidence either that the hiring manager used "intermediaries" to prevent the Applicant from gaining experience relevant for promotion. The Applicant's allegations in respect of her recent assignments by the Chief of the French Section are no more than speculative and certainly not indicative of any abuse in the discretion vested in managers over the assignment of work.

37. In turn, the Applicant's assertion that the Senior Interpreter, IES, IS, DCM, UNOG "was not in a good position to withstand pressure from the [hiring manager] to drive the selection process to the Applicant's detriment" due to her own involvement in a selection process where the hiring manager had a say, are far stretching and, again, not supported by any concrete evidence.

38. As to the third panel member, the Tribunal finds no *prima facie* conflict of interest arising from her recent participation in the evaluation of the Applicant's competency in Spanish, even if the Applicant's supervisor had previously advised her that those evaluating her Spanish language test would not participate in her competency-based interview for the contested position. The fact that an assessment panel member may be apprised of some aspect of a candidate's profile or performance, as it is most often the case, does not disqualify him or her from participating in a selection process.

39. Lastly, the Applicant's assertions in respect of the manipulation of her e-PAS for 2015-2016 are misplaced given that this performance document was not considered in the selection process for the contested position—which was based on documents submitted at the latest on 8 January 2016 and on the results of the competency-based interviews—and the satisfactory explanations provided by the Respondent for the time elapsed between the interviews and the selection decision.

40. In view of the foregoing, the Tribunal finds that it has not been established that the contested decision is *prima facie* unlawful. As the first condition to grant an application for suspension of action is not met, the Tribunal does not need to address the two other cumulative conditions.

### **Conclusion**

41. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 31<sup>st</sup> day of May 2016

Entered in the Register on this 31<sup>st</sup> day of May 2016

(Signed)

René M. Vargas M., Registrar, Geneva

