UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/090
Order No.: 206 (GVA/2016)
Date: 14 October 2016
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MAYSTRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 7 October 2016, the Applicants seeks the suspension of the implementation, pending management evaluation, of the decision to exclude him from the recruitment process related to Job Opening ("JO") 16-ECO-UNCTAD-58019-R-GENEVA (R).

Facts

2. The Applicant serves as Economic Affairs Officer (P-3) with the United Nations Conference on Trade and Development ("UNCTAD"), under a permanent appointment.

3. From 27 April to 25 June 2016, two Economic Affairs Officer (P-3) posts were advertised within the Trade Information Section, Trade Analysis Branch, UNCTAD. The JO enunciated the following work experience criteria:

> A minimum of five years of progressively responsible experience in economic research and analysis, policy formulation, application of economic principles in the areas of international trade, trade policy and nontariff measures. Experience in quantitative economic analysis and data processing is highly desirable. Experience in data collection in the area of non-tariff measures is desirable. Experience with technical cooperation projects and capacity building of policy makers in the area of trade control measures is desirable.

4. The Applicant applied for the posts on 21 June 2016.

5. 384 applications were received. Following a pre-screening by the Human Resources Management Section, United Nations Office at Geneva ("HRMS/UNOG"), 243 candidates were released to the Hiring Manager who, as a result of his preliminary review:

a. found 228 candidates, including the Applicant, as non-suitable;

b. placed 13 in his long-list; and

c. identified two candidates for his short-list.

6. Hiring Manager decided to assess both long-listed and short-listed candidates. Accordingly, the 15 candidates were interviewed at the end of August 2016.

7. The Respondent informed the Tribunal that the interview evaluations are currently being prepared by the assessment panel and that, hence, they have not yet been submitted to the relevant Central Review Body ("CRB") for review.

8. After the instant application was filed on 7 October 2016 and served to the Respondent on the same day, the latter filed his reply on 11 October 2016, with 17 *ex parte* annexes. The Applicant filed comments on the Respondent's reply on 12 October 2016.

9. By Order No. 204 (GVA/2016) of 12 October 2016, one of the annexes to the Respondent's reply was disclosed to the Applicant on under seal basis and redacted by the Tribunal. On 13 October 2016, the Respondent made an additional filing rectifying previous submissions.

Parties' contentions

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

Receivability

a. The exclusion of a candidate from a recruitment process prior to the interview stage amounts to a completed administrative decision impacting on the legal order and, thus, constitutes a reviewable decision;

Prima facie unlawfulness

a. The posts at stake are earmarked for two specific internal candidates serving at the Trade Analysis Branch, UNCTAD. It is to advantage them that strong candidates—like the Applicant—have been excluded from the interview stage;

b. Including fluency in Spanish as a desirable criterion in the JO supports the assertion that the recruitment exercise aims at recruiting specific candidates;

c. Both favoured candidates have worked in the Trade Analysis Branch at the P-2 level only and neither of them holds a PhD, contrary to the Applicant who holds a PhD in International Relations with a specialization in International Economics. The difference is so stark that no reasonable comparison could have led to exclude the Applicant while shortlisting for interview the above-referred candidates;

d. The Hiring Manager may not to revisit the binary determination made by HRMS/UNOG that the Applicant met the mandatory requirements specified in the JO. This amounts to an usurpation of the function of HRMS/UNOG;

e. According to the assessment matrix prepared by the Hiring Manager, the Applicant did not meet the criteria of fluency in Spanish, experience in economic research and analysis, and experience in economic policy formulation, whereas his Personal History Profile ("PHP") reflects that he does satisfy them;

f. The Hiring Manager has sought to apply a particularly demanding definition of the experience requirements. He apparently requires five years of experience in every area of expertise mentioned in the JO, particularly non-tariff measures. This is an arbitrary interpretation of the JO requirements. What is more, this standard seems not to have been applied to other applicants;

Urgency

g. For the purpose of a suspension of action, which is the case, there is urgency as long as the selection decision has not yet been made and implemented;

Irreparable damage

h. Harm is considered irreparable when it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. The exclusion from a recruitment exercise may damage the Applicant's career prospects in a way that could not be compensated with financial means.

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

Receivability

a. The Hiring Manager's determination that the Applicant was not suitable is not an administrative decision, but a preparatory step, not yet appealable under the Tribunal's Statute. The selection process has not been completed;

b. Since there is no final administrative decision, this application is premature. A selection procedure ends with the selection of a successful candidate; this is the decision that may be contested, as opposed to all other decisions within the procedure merely preparing the final selection. The application against a preparatory decision, which as such carries no direct legal consequences, is irreceivable *ratione materiae*;

c. The lack of finality of the selection process is demonstrated by the fact that the mandatory review of the process by the CRB has not yet taken place;

Prima facie unlawfulness

d. The Applicant received full and fair consideration, and the procedures set out in Administrative Instruction ST/AI/2010/3 (Staff selection system) were followed as his candidacy was properly reviewed by the Hiring Manager;

e. After review of the Applicant's PHP, the Hiring Manager concluded that he was not suitable because he did not possess the mandatory work requirements listed in the JO;

f. The Hiring Manager has broad discretion to exercise a preliminary evaluation to establish the list of candidates to be invited for further assessment, which does not have to include all pre-screened candidates but only the most qualified or promising ones;

g. The assessment matrix used by the Hiring Manager in pre-screening the candidates shows that the candidacies were reviewed on the basis of the pre-established criteria, and that the Hiring Manager deemed that the Applicant does not have the required work experience;

h. The Applicant has not presented a fairly arguable case or established "serious and reasonable doubts" that the impugned decision was influenced by improper considerations or bias, or that the procedure was not properly followed. Since the Respondent has minimally shown that the Applicant's candidature was given full and fair consideration, the presumption of legality of the decision should stand;

Urgency

i. A suspension of action would pre-empt the review of the staff selection process by the CRB.

Consideration

Receivability

12. The first question for the Tribunal is whether the present application is receivable *ratione materiae*. The Respondent argues that the Hiring Manager's determination that the Applicant is not suitable is not a final administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute, but merely a preparatory step in the recruitment exercise with no direct legal effects.

13. It is well established law (*Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030, *Planas* 2010-UNAT-049, Al *Surkhi et al.* 2013-UNAT-304, *Tintukasiri* et al. 2015-UNAT-526) 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.

14. This Tribunal has already ruled on several occasions that declaring a candidate non-eligible or non-suitable may fall into the above definition, inasmuch as it results in his/her exclusion from the recruitment exercise before the final selection of a successful candidate (*Gusarova* UNDT/2013/072; *Willis* UNDT/2012/044, *Nunez* Order No. 17 (GVA/2013, *Essis* Order No. 89 (NBI/2015), *Korotina* UNDT/2012/178 (not appealed), *Melpignano* UNDT/2015/075 (not appealed).

15. The Appeals Tribunal, while not expressly stating so, also appears to share this view in *Dhanjee* 2015-UNAT-527, a case where, like in the present one, a staff member challenged the decision not to shortlist him for interview on the ground that he fell short of the required experience. In *Dhanjee*, not only did the Appeals Tribunal enter into the merits of the case, but it seemed in fact to equate the effect of the aforesaid decision to those of a non-selection, notably as it referred to "the decision not to select the Applicant for the contested post, by not shortlisting him to be invited for an interview" (cf. paras. 46 and 47).

16. The Tribunal does not call into question that the selection process entails a series of steps or findings, one of which is the assessment of the candidates' suitability by the Hiring Manager on the basis of their PHPs. There is no doubt, either, that the end of the process, strictly speaking, is the selection of the successful candidate. Having said that, even if the selection process continues its course until the selection of a successful candidate, the fact is that for any candidate who has, at a previous stage, been deemed to be ineligible or unsuitable, his/her chances to obtain the post at stake end at the time of such determination.

As stated in *Korotina* UNDT/2012/178, such a decision "signifie[s] the end of the process as far as [that applicant] is concerned".

17. In the same vein, the Tribunal stated in *Melpignano* UNDT/2015/075 that a decision to eliminate a candidate at one of the "intermediate" stages of a selection process "produces direct legal consequences affecting the Applicant's terms of appointment, in particular, that of excluding the Applicant from any possibility of being considered for selection for [a] particular vacancy". On these grounds, the Tribunal went on to find that:

> [T]he impugned decision has direct and very concrete repercussions on the Applicant's right to be fully and fairly considered for the post though a competitive process (see *Liarski* UNDT/2010/134). From this perspective, it cannot be said to be merely a preparatory act, since the main characteristic of preparatory steps or decisions is precisely that they do not by themselves alter the legal position of those concerned (see *Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173).

18. The Tribunal sees no reason to depart from such position in this case.

19. The Respondent cites *Ivanov* 2013-UNAT-378 to back the opposite conclusion. However, this Judgment is not relevant because its facts are clearly distinguishable from those in the case at bar. Indeed, in *Ivanov* the Applicant did not contest the selection decision resulting from a selection process in which he took part ("first selection process"), but a subsequent appointment to another post of a candidate who had been rostered as a result of the first selection process. Therefore, he was found to have no standing to contest that subsequent decision. Importantly, the Appeals Tribunal made no pronouncement on the nature of a decision excluding a candidate as ineligible or unsuitable, nor did it hold that, in a recruitment process, the final selection of a candidate is the only type of decision that may carry direct legal consequences for any of the concerned candidates.

20. The Respondent also relies on *Valentine* Order No. 80 (GVA/2014) to stress that "the lack of finality [of the selection procedure] is demonstrated by the fact that the mandatory review of the selection process by the CRB has not even taken place yet", and that the CRB review may well lead to the inclusion back into the

selection process of candidates who had initially not been invited for an interview, or vice versa. The Tribunal is mindful that the CRB review has indeed the potential to prompt a rectification of the kind, and this constitutes in fact a valuable safeguard of the integrity of the selection process. However, the existence of this corrective mechanism does not change the fact that a decision excluding the Applicant from further consideration for the posts has been made in the course of a selection, and this amounts to a unilateral decision made by the Administration that carries serious legal consequences for him as a candidate.

21. For all of the above, the Tribunal considers this application receivable. Having reached this conclusion, the Tribunal may now turn to the analysis of the conditions set out in art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure.

Prima facie unlawfulness

22. The first condition to be met for the granting of a suspension of action is whether the Hiring Manager's decision not to invite the Applicant for interview was *prima facie* illegal.

23. At the core of the application are the following claims in this respect:

a. The Hiring Manager intends to grant the posts to two specific candidates—that the Applicant clearly identifies—and who are among those shortlisted for interview. This explains that the Applicant, as well as other strong candidates, were eliminated prior to the interview stage, while several others, such as the two allegedly favoured ones, who are clearly less qualified, were shortlisted;

b. It was for the Hiring Manager to revisit the binary determination made by HRMS that the Applicant met the mandatory requirements specified in the JO;

c. According to the assessment matrix, the Applicant does not meet certain requirements that his PHP indicates he does;

d. The Hiring Manager applied an arbitrary—and particularly demanding—interpretation of the experience requirements, which apparently consists in requesting five years of experience in every area of expertise mentioned in the JO, particularly non-tariff measures. Moreover, this standard seems not to have been applied to other applicants, who were deemed to meet the required experience although it is highly doubtful that they had five years of professional experience in each of these areas. Also, there are such stark differences in the merits of the Applicant and other candidates that were deemed not to satisfy the required work experience and others that were shortlisted for interview, that no reasonable comparison could have led to this result.

Bias or favouritism

24. Concerning the first of the foregoing claims, it should be emphasized that when an applicant alleges bias or improper motives, the burden is on him or her to prove it (*Jennings* 2013-UNAT-329, para. 25; *Obdeijn* 2012-UNAT-201, para. 38; *Beqai* 2014-UNAT-434, para. 23). In this case, the Applicant adduces no tangible evidence—let alone clear and convincing—of the alleged favouritism, although he submits that fluency in Spanish was introduced as a desirable criterion in the JO not because it was helpful to discharge the duties of the posts, but because the favoured candidates are native speakers of Spanish and would thus enjoy an advantage. Yet, the Respondent has provided a plausible explanation for the desirability of Spanish fluency, namely the frequent and close cooperation with the Latin American Integration Association (ALADI). Furthermore, the fact that the two candidates concerned were invited to an interview is certainly not sufficient to suggest any treatment of favour. In this light, it is the Tribunal's view that the claim of bias and favouritism is not made out.

Re-assessment of eligibility by the Hiring Manager

25. Despite some ambiguity in the language of the Respondent's reply, it has been now clarified by the Respondent, and more importantly, the documentary

evidence reflects that HRMS/UNOG pre-screened all candidacies received to check them against the minimum requirements in the JO, and that only upon completion of this stage, the Hiring Manager proceeded to the preliminary review of the released candidates to identify the most qualified ones for interview. This is in conformity with sec. 7.4 of ST/AI/2010/3, which reads:

> The hiring … manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

26. Since the Hiring Manager may—actually, must—evaluate the released candidacies against the requirements listed in the JO, he or she has to be able to take corrective action should he detect that a candidate initially believed to satisfy all requirements, turns out, upon further scrutiny, not to fulfil one or more of them. Any other interpretation would be nonsensical and, in fact, para. 9.2.2 of the *Manual for the Hiring Manager on the Staff Selection System (Inspira)* confirms that the Hiring Manager is entitled to revisit the eligibility determination, as it. It provides that (emphasis added):

> Evaluating each application [by the Hiring Manager] entails reviewing and documenting the findings of a preliminary analysis for each applicant as to *whether he/she meets all, most, some or none of the stipulated requirements* against the evaluation criteria as stated in the job opening in terms of:
>
> a. Academics
> b. Experience
> c. Language

27. Therefore, the sole fact that the Hiring Manager considered that a number of candidates who had been deemed eligible upon pre-screening by HRMS did not meet all mandatory requirements does not vitiate the process.

Discrepancies between the PHP and the assessment matrix

28. Sec. 7.4 of ST/AI/2010/3 provides that the Hiring Manager should further evaluate candidates "based on a review of their documentation". Quite clearly, the

Hiring Manager's assessment has to rely on the information contained in each candidate's PHP.

29. The Tribunal finds troubling that not only the Applicant, but in fact, the vast majority of the candidates pre-screened and released by HRSM/UNOG, were found by the Hiring Manager as not having experience in "economic research and analysis" and "economic policy formulation". This is over 200 pre-screened candidates who had been found, in principle, to meet the work experience requirements. However, it suffices to read the description of duties in the Applicant's PHP concerning his current and past positions, to find clear allusions to research and analysis, and also, albeit perhaps less clear, to "policy formulation" in the field of Economics.

30. The Tribunal is well aware that its role is not to re-assess the merits of the candidates in a recruitment process. It is a settled principle that it is not for the Tribunal to substitute its own judgment to that of the Hiring Manager (*Ljundgdell* 2012-UNAT-265, *Bofill* 2013-UNAT-383, *Niedermayr* 2015-UNAT-603, *Savadogo* 2016-UNAT-642), who is best placed to appreciate the relevance of professional experience and is expected to be an expert on whatever domain is the focus of the job to be filled. This notwithstanding, the Administration's discretion is not unfettered. Although the Tribunal should not lightly interfere in the Administration's exercise of discretion, it is, nonetheless, competent to examine if the contested decision could be tainted by extraneous factors, erroneous or irrelevant information, procedural flaws or if it resulted in a manifestly unreasonable outcome.

31. In the present case, the Tribunal cannot but notice what it perceives to be a direct and objective contradiction between the information contained in the Applicant's PHP and the Hiring Manager's evaluation records. This is sufficient to raise serious and reasonable doubts about the Hiring Manager's assessment.

Inconsistent assessment of work experience requirements

32. In view of the striking number of candidates released as eligible by HRMS/UNOG and later found by the Hiring Manager not to meet the minimum

experience requirement, the Applicant puts forward that the Hiring Manager must have applied a different definition of such minimum requirements. He suggests that what appears to have occurred is that the Hiring Manager regarded the work experience requirement as cumulative, namely that to be considered to have "five years of … experience in economic research and analysis, policy formulation, application of economic principles in the areas of international trade, trade policy and nontariff measures" a candidate ought to have had five years in each of the areas of expertise listed, and in particular of non-tariff measures.

33. While conceding that the above may not be a usual reading and interpretation of JO requirements in the United Nations, and quite obviously not the one used by HRMS/UNOG, the Tribunal is not ready to make in the context of this application for suspension of action a firm finding it would be an arbitrary or capricious standard to apply.

34. Nevertheless, having compared the PHPs of 18 of the candidates with their assessment by the Hiring Manager as per the assessment matrix, the Tribunal is concerned that the same level of exigency might not have been evenly applied to all candidates. This is likely to have resulted in an unfair outcome in terms of who was included in, or excluded from, further assessment.

35. In conclusion, in view of the above considerations, the Tribunal harbours serious and reasonable doubt concerning, on the one hand, the accuracy of the information taken into account in evaluating candidates and, on the other hand, the consistency of the assessment of the candidates' relevant experience. As per the consistent case-law of this Tribunal, finding prima facie unlawfulness requires nothing more than reasonable doubt (*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)).

Urgency

36. Given that the 15 candidates chosen for further assessment sat for their interviews nearly two months ago, it is to be expected that the list of recommended candidates will be submitted to the CRB for review in the very near future. Considering that the process is, therefore, in a late stage, the Tribunal considers there to be urgency in the case at hand.

Irreparable damage

37. The harm potentially caused by a loss of career opportunity is not of a purely financial nature. This kind of harm is of such nature that it could be hardly completely made good through financial compensation.

Conclusion

38. In view of the foregoing, the application for suspension of action is granted.

Judge Teresa Bravo
Dated this 14th day of October 2016

Entered in the Register on this 14th day of October 2016

René M. Vargas M., Registrar, Geneva