UNITED NATIONS DISPUTE TRIBUNAL

Cases No.:	UNDT/GVA/2016/102, 103, 104, 105, 106, 107 and 108
Order No.:	248 (GVA/2016)
Date:	29 December 2016
Original:	English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

TOUALBIA
SALAMONE
BOI
FRANCHETTO
DREVON
STRIDE
MELLET

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 applications filed on 22 December 2016, the Applicants seek suspension of the implementation, pending management evaluation, of the decision to exclude them from recruitment against Job Vacancy No. 57893.

2. Given that the 7 applications are challenging the same administrative decision, i.e., the decision to exclude the Applicants from recruitment against Job Vacancy No. 57893, and as they involve similar issues, the Tribunal considers that they should be joined and ruled upon in a single order, in the interest of judicial economy and proper administration of justice.

Facts

3. The Applicants are Security Agents, at the GS-3 and GS-4 level, at the Security and Safety Service ("SSS") at the United Nations Office at Geneva ("UNOG").

4. On 31 May 2016, Job Vacancy No. 57893 for ten posts of Security Corporal (GS-4 level) located in the SSS, UNOG, was advertised. Under Special Notice, the Job Vacancy stated the following:

> Appointment for this post is on a local basis, whether or not the candidate is a resident of the duty station. … Internal and external candidates with the required qualifications must pass the written entrance test for United Nations security and safety staff. An invitation to sit the test will be sent by e-mail to candidates with the required qualifications.

5. Under "Education", the Job Vacancy stated, *inter alia*, "[m]ust have passed the United Nations Security Officer Test". It further noted under "Assessment" that "[e]valuation of qualified applicants may include an assessment exercise which may be followed by a competency-based interview".

6. The Applicants applied to the Job Vacancy and were invited to take the written assessment test. The invitation for the test stated, *inter alia* (emphasis in the original):

> This test contains **60 questions** to be answered in **40 minutes**. Each question is worth 1 point (for a total of 60 points) and the passing grade is of 65%.
>
> Only the **20 best candidates** successful in the written test will be brought forward to the next stage of the recruitment process, which will entail a competency-based interview.

7. Eighteen candidates scored 90% or more in the test. Since the next six candidates all scored 88,3%, it was decided that instead of inviting twenty candidates for the interview, a total of twenty-four would be invited. Although all the Applicants scored more than the passing grade of 65%, none of them was in the group of the twenty-four best scoring candidates.

8. Amongst the twenty-four best scoring candidates, some had not previously passed the United Nations Security and Safety Test. The email inviting them for the interview therefore indicated the following (emphasis in the original):

> Please note that this interview will be held provided that you have successfully passed the Security test for which you were convoked. … Upon receipt of your Security test results, we will send you a confirmation or cancellation of your interview by email. … As stated above, **your interview will take place only if you have successfully passed this test**.

9. Those candidates, subsequently, after passing the United Nations Security and Safety Test, received another email, informing them that they had successfully passed it and, hence, confirming their interview for the Job Vacancy.

10. Out of the total twenty-four candidates who were interviewed, seventeen were internal from UNOG, 3 were internal candidates from the United Nations Assistance Mission for Iraq and from the United Nations Multidimensional Integrated Stabilization Mission in Mali, and 4 were external candidates.

Parties' contentions

11. The Applicants' 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

b. Candidates from outside the Geneva region have been called for interviews, and such advancement in the recruitment of candidates who do not fulfil the requirements of staff rule 4.4 renders the decision to exclude the Applicants unlawful;

c. Furthermore, candidates who do not meet the minimum requirements—namely the educational requirement of "[m]ust have passed the United Nations Security Officer Test" of the VA—have been unlawfully advanced in the process, whereas they should have been screened out. Since a decision had been made to interview a finite number of candidates, rather than to apply a pass or fail requirement to the written test, the advancement of candidates not meeting the minimum requirement prejudiced candidates who did meet those requirements but were not advanced, which includes the Applicants, who were thus denied an opportunity to compete through an interview;

d. The Administration failed to comply with its own guidelines regarding the age of candidates ("below 32"). In light of the decision to only interview a finite number of candidates, advancing candidates who did not meet the age requirement for employment has prejudiced the Applicants' candidacies; where the Administration enacts guidelines, it is obliged to

follow them even if they do not have the force of law attached to promulgated administrative issuances;

e. The decision to interview only the top twenty candidates constitutes an arbitrary exercise of discretion by the Administration. The written test exists to assess the technical competence of candidates; by establishing a passing grade on the test, the Administration indicates that any candidate who passed that mark was deemed to have the relevant technical competence. The decision to exclude from the process candidates who had demonstrated the required technical competence is arbitrary;

f. The Job Vacancy was issued for the recruitment for ten posts. Limiting the number of candidates to be interviewed to only two candidates for each post constitutes a manifestly unreasonable narrowing of the pool of potential candidates;

Urgency

g. For the purpose of a suspension of action, 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 Applicants' rights are observed. The exclusion from a recruitment exercise may damage the Applicants' career prospects in a way that could not be compensated with financial means.

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

Receivability

a. The applications are not receivable *ratione materiae*, since no final selection decision has been made; hence, there is no administrative decision under the Tribunal's Statute that can be challenged at this point. The request for suspension of action is therefore premature;

Prima facie unlawfulness

b. The decisions are not *prima facie* unlawful, the Secretary-General's broad discretion in promotions and appointment decisions was correctly exercised and the Applicants' candidacies received full and fair consideration;

c. The Applicants, like all other candidates, were informed before taking the written assessment test that only the twenty best candidates would be invited for a competency-based interview. The Applicants did not pass that stage of the selection process and, therefore, were not invited for the interview;

d. Although recruitment for GS-1 to GS-4 posts takes place outside the scope of ST/AI/2010/3 (Staff Selection System), the practice at UNOG is to apply the principles of the Staff Selection System for recruitment at that level. In the present case, the posts were advertised in *Inspira*, the screening was made by the Human Resources Management Service ("HRMS"), UNOG, candidacies were released to the Hiring Manager, who established a short-list and a long list, and the assessment comprised a written test and a competency-based interview. The Applicants were excluded from the selection exercise because they were not among the twenty best candidates following the written test. All candidates released by HRMS, UNOG met the requirements for the vacant positions;

e. The United Nations Security and Safety Test can only be taken by external candidates in the context of a selection exercise. It cannot be administered to *all* external candidates before the screening and eligibility review. Excluding candidates who have not taken the test at the time of their application would *de facto* exclude all external candidates. Therefore, as indicated in the Job Vacancy, candidates with the required qualifications were invited to take the United Nations Security and Safety Test. All 4 external candidates successfully passed it before the interview, as this was a condition to be interviewed. The order in which the written test and the UN Security and Safety Test was administered was not prejudicial to the Applicants, as it did not change their position in the list of successful candidates at the written test, nor did it affect the pre-established criteria to only further assess the twenty best candidates at the written test. If external candidates had failed at the Security and Safety Test, consideration would have been given to the other candidates in the list in accordance with their score;

f. The decision to only invite the best twenty candidates was not manifestly unreasonable;

g. The contested decision does not contradict staff rule 4.4. The practice over the last years has been that applications of current United Nations Secretariat employees, regardless of their local addresses, are accepted, as staff members from other duty station may seek employment in Geneva. If selected, General Service staff members from other duty stations have to be separated and are required to have a 31-day break-in-service as they cannot be travelled at the expense of the United Nations or temporarily assigned to another duty station;

h. The guidelines with respect to the age of candidates are from 2008 and only apply to the entry level of Security Officers, which is GS-3 in Geneva. Therefore, the age limitation did not apply in the case at hand. Furthermore, the Applicants are beyond that age and would not have been eligible if that limitation had been applied.

Consideration

Preliminary issue

13. The Respondent filed Annexes 3, 5 and 6 to his replies *ex parte*.

14. Article 18.4 of the Dispute Tribunal's Rules of Procedure reads:

> The Dispute Tribunal may at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

15. Article 19 (Case management) further states:

> The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

16. Regarding the principle governing the confidentiality of evidence, the Appeals Tribunal held in *Bertucci* 2011-UNAT-121 that:

> In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case. The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

17. Having reviewed the Respondent's replies and the annexes filed *ex parte*, the Tribunal notes that the latter are relevant for the Applicants' cases. Therefore, as these documents were not previously available to the Applicants, the Tribunal finds it appropriate that they be given access to them. The Tribunal is mindful that annexes three contain sensitive information that requires protection. Accordingly, the Tribunal's Registry will duly redact them. However, in light of the timelines involved, the Tribunal will not give the Applicants the opportunity to comment on the documents filed *ex parte* by the Respondent for the purpose of the present proceedings of suspension of action.

Receivability

18. The Tribunal further has to assess the Respondent's argument that the decision not to invite the Applicants for an interview is not a final administrative decision, but merely a preparatory step, and that the applications are irreceivable *ratione materiae*.

19. 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.

20. 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).

21. In *Melpignano* UNDT/2015/075, the Tribunal stated 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". The Tribunal found:

> [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).

22. The Tribunal sees no reason to depart from such a position in this case and finds that the applications are receivable. It will, thus, 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 in connection with applications for suspension of action.

23. 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 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)).

Prima facie unlawfulness

24. The Tribunal recalls that the threshold required in assessing the first condition, *prima facie* unlawfulness, 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)).

25. The Tribunal also notes 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).

26. 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.

27. 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

28. The Applicants argue that the selection exercise violated staff rule 4.4, since candidates from outside the Geneva region were called for interviews. The Tribunal recalls that staff rule 4.4 relevantly provides:

> (a) All staff in the General Service and related categories … shall be recruited in the country or within commuting distance of each office, irrespective of their nationality and of the length of time they may have been in the country. The allowances and benefits available to staff members in the General Service and related categories shall be published by the Secretary-General for each duty station.
>
> …
>
> (c) A staff member subject to local recruitment under this rule shall not be eligible for the allowances or benefits indicated under staff rule 4.5 (a).

29. Whereas staff rule 4.5(a), related to Staff in posts subject to international recruitment, provides that:

> Staff members other than those regarded under staff rule 4.4 as having been locally recruited shall be considered as having been internationally recruited. Depending on their type of appointment, the allowances and benefits available to internationally recruited staff members, may include: payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children; removal of household effects; home leave; education grant; and repatriation grant.

30. Staff rules 4.4(a) and (c), read together with staff rule 4.5(a), show that the question of local recruitment is one of entitlements, and not one of the actual residency of the candidate. In other words, while persons who are locally recruited can reside elsewhere during the selection process, if they are successful, their contract will be issued locally and does not create any entitlements, such as travel expenses, or removal of household effects. This is reflected in the Job Vacancy with the statement that "[a]ppointment for this post is on a local basis, whether or not the candidate is a resident of the duty station". Therefore, the advancement in

the recruitment of candidates who reside outside Geneva does not render the decision to exclude the Applicants *prima facie* unlawful.

31. The Applicants further argue that the decision to invite candidates who had not passed the United Nations Security Officer Test for the written assessment test and then for the interview was illegal, since passing the security test constitutes a minimum requirement for the Job Vacancy.

32. The Tribunal closely examined the terms of the Job Vacancy, as quoted above under para. 4. It found that the wording of the Job Vacancy was ambiguous, when it states, on the one hand—under "Special Notice"—that "[i]nternal and external candidates *with the required qualifications must pass* the written entrance test for United Nations security and safety staff" (emphasis added), and, on the other hand—under "Education"—that candidates "[m]ust *have passed* the United Nations Security Officer Test" (emphasis added).

33. The wording under "Education" may lead to conclude that the Job Vacancy contains an education requirement according to which candidates must have passed the United Nations Security Officer Test to be eligible. While this ambiguity is unfortunate, the Tribunal considers that the Job Vacancy has to be read as "one", and the text under "Education" cannot be read in isolation from the "Special Notice". The Tribunal is further satisfied that the "Special Notice" makes it clear that the passing of the United Nations Security Officer Test is not an actual requirement that candidates must fulfil *prior* to their application (condition precedent), but rather a condition subsequent, which candidates must fulfil once they are found to meet the requirements for the post.

34. Therefore, the Tribunal finds that inviting candidates, who meet the requirements of the post/Job Vacancy, to participate in the written assessment test before passing the United Nations Security Officer Test falls within the Administration's discretion.

35. The Tribunal is further satisfied that the order of the tests, as it was administered in the case at hand, did not prejudice other candidates. Indeed, those candidates who had not previously passed the United Nations Security Officer Test, and who ranked between the first twenty (*de facto* twenty-four) candidates in the written assessment test, were asked to pass the United Nations Security Officer Test *prior* to the competency-based interview. In fact, their being interviewed was conditional upon them successfully passing the United Nations Security Officer Test, albeit after the written assessment test. As such, if these candidates had failed the United Nations Security Officer Test, the list of candidates to be invited for the interview would have been adjusted accordingly, taking into account the scoring of the next candidates on the list and the limitation of candidates to be invited for an interview to a finite number of twenty. The Tribunal notes that since all the candidates successfully passed the United Nations Security Officer Test, prior to the interview, the order of the administration of the tests did not have an impact on the Applicants' candidatures and their chances to be invited for the competency-based interview.

36. The Applicants further argue that the Administration failed to comply with its own guidelines regarding the age of candidates, and that in light of the decision to only interview a finite number of candidates, advancing candidates who did not meet the age requirement for employment prejudiced the Applicants' candidacies.

37. As this Tribunal held in *Simmons* UNDT/2015/033:

> In *Korotina* UNDT/2012/178 (not appealed), the Tribunal stated as follows:
>
> As the Tribunal stated in *Villamoran* UNDT/2011/126, at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

> Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043).
>
> Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance which it elaborates (Administrative Tribunal of the International Labour Organization, Judgment No. 486, In re Léger (486)). It is also important to highlight that a distinction must be made between matters that may be dealt with by way of guidelines, manuals, and other similar documents, and legal provisions that must be introduced by properly promulgated administrative issuances (*Villamoran*, *Valimaki-Erk* UNDT/2012/004).

38. Indeed, the purpose of guidelines is to implement superior norms, such as administrative instructions. As such, guidelines cannot add additional criteria not contained in the norms they are supposed to implement. There does not seem to be any legal basis for the introduction in a guideline of an age limitation for posts in the Security Section, be it at the entry or at any other level.

39. This being the principle, the Tribunal is concerned that the guidelines concerning the United Nations Security Officers Recruitment and Selection Process, approved by OHRM on 17 July 2008, do not appear to make much sense with respect to such age limitation. They provide, under section 2 (Vacancy Announcement):

> 2.1 Prepare the Vacancy Announcement
>
> OHRM/HRMS and SSS draft and finalize the VA based on the following criteria:
>
> 2.1.1 Age: between 22 and 35, except when candidates have served with SSS at other locations*
>
> *Exceptions will also be considered in cases where special expertise is required and not available in-house or for any other

> unforeseen reasons. Such cases should be presented to the Division of Headquarters Security and Safety Services (DHSSS) in New York for approval on a case-by-case basis.

40. Interestingly, communications on file from the Director, DHSSS, suggest that the actual meaning and extent of that limitation is not clear to the main decision-makers.

41. Indeed, on the one hand, the Director, DHSSS, in a memorandum dated 2 November 2016 to the Chief, Security and Safety Service Geneva, DHSS, UNOG, mentions as an important issue requiring attention, under para. 2(f) of the memorandum, to "fill other vacancies with candidates less than 32 years of age, according to existing guidelines." On the other hand, in an email of 19 December 2016 to the Executive Secretary, UNOG Staff Coordinating Council, the Director, DHSSS, stressed that "[he has been] informed that there [was] no age limit applied to G4 posts in Geneva, the entry level being G3 (Security Officer), unlike other duty stations where the entry level [was] G4. Furthermore, the age limit in [his] memo is incorrect. It should be 35, and not 32".

42. The Tribunal is concerned by this level of confusion, which results, partly, from the poor drafting of the "guidelines", which, in turn, do not appear to have any legal basis in an administrative instruction or any other superior norm. The Tribunal is also concerned that the guidelines of 2008 were submitted by the Respondent on an *ex parte* basis, without any indication as to their publication. Any lack of publication, on its own, would void the guidelines from having legal force. The age of thirty-two (or thirty-five) can thus not be used as a valid criteria/restriction for the present selection exercise. It follows that the fact that some of the candidates who advanced to the interview stage are beyond age thirty-two (or thirty-five), as are all the Applicants, does not constitute a *prima facie* illegality for the purpose of the present suspension of action applications.

43. Finally, the Tribunal considers that the decision to limit the number of candidates who are invited for an interview to the twenty best scoring candidates,

to the exclusion of other candidates who nevertheless scored above the 65% passing threshold, lies within the discretionary authority of the Administration and was not manifestly unreasonable. This is particularly so since the finite number of candidates who were to be invited for an interview was communicated to all the candidates prior to passing the written assessment test—which is a matter of transparency—and thus was not determined *post facto*.

44. In view of the foregoing, the Tribunal finds that it has not been established that the contested decisions are *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

45. In view of the foregoing, the applications for suspension of action are rejected.

(*Signed*)
Judge Rowan Downing
Dated this 29th day of December 2016

Entered in the Register on this 29th day of December 2016
(*Signed*)
René M. Vargas M., Registrar, Geneva