



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

CICEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. On 13 March 2018, the Applicant, a Public Information Assistant (GS-5) at the United Nations Peacekeeping Force in Cyprus (“UNFICYP”), requested suspension of action, pending management evaluation, of the decision to exclude him from the recruitment process for the position of Associate Civil Affairs Officer (NO-B), advertised under job opening #6/2017 (“JO 6/2017”).

2. The application for suspension of action was served on the Respondent, who filed his reply on 16 March 2018. Annexes three and five to the Respondent’s reply were filed *ex parte*. Since Annex three contains confidential information about other candidates involved in the selection process for JO 6/2017 and the Tribunal did not take it into consideration in its determination of the present application for suspension of action, it is not necessary or appropriate to share it with the Applicant and it shall remain *ex parte*.

3. With respect to Annex five, the Tribunal notes that it is relevant to the Applicant’s case and he shall be given access to it on an under seal basis. The Applicant shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate the under seal documents—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by the Tribunal.

Facts

4. On 31 August 2016, job opening #17/2016 for the position of Associate Civil Affairs Officer (NO-B) in UNFICYP was advertised. Following the written assessment phase for this vacancy, the candidates who had applied to it—the Applicant being one of them—were informed that the job opening had been cancelled due to an insufficient number of candidates to proceed to the interview stage.

5. On 11 August 2017, the above-mentioned position was re-advertised through JO 6/2017, and the Applicant applied again for the position.

6. On 18 January 2018, the Applicant was invited to take a written test. Subsequently, on 2 March 2018, the Applicant informally received information that candidates were called for interviews and he was not invited.

7. On 13 March 2018, the Applicant requested management evaluation of the decision not to invite him for an interview in connection with JO 6/2017.

8. By electronic notification dated 20 March 2018, the Tribunal informed the parties about its ruling concerning the confidentiality setting of the Annexes that the Respondent filed *ex parte* (cf. paras. 2 and 3 above).

Parties' contentions

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

Receivability

a. The application is receivable because "exclusion from [a] recruitment process represents a completed administrative decision that impacts on the legal order", and the UNDT has ruled that "a finding that a staff member was ineligible for a given post is a reviewable decision";

Prima facie unlawfulness

b. The Hiring Manager has been acting in a prejudiced and retaliatory manner against him, seeking to exclude him, for non-professional related reasons, from being hired in the Civil Affairs Section, despite the Applicant's demonstrated high performance during three recruitment processes. The Hiring Manager has acted in a retaliatory manner against the Applicant on all occasions, not giving him the opportunity to participate in recruitment processes on an equal basis;

c. One of the internal candidates, who was the only internal candidate selected to participate in the interviews, stated after the written test that she did not answer all of its questions, which indicates that the score for selecting candidates for the interviews was quite low. Since the Applicant,

by contrast, answered all the questions and did so thoroughly, he should have passed the test. Had the formal procedure been followed, the Applicant would have been selected for an oral interview;

Urgency

d. If the implementation of the administrative decision is not suspended, the selection process will continue and the Applicant will not have the possibility of being selected as a candidate for the advertised post;

Irreparable damage

e. As per the Dispute Tribunal's holdings in *Corna* Order No. 80 (GVA/2010) and Judgment *Tadonki* UNDT/2009/016, there is irreparable damage in the instant case. Indeed, suspending the contested administration decision and re-evaluating the written assessment by an independent party outside the mission are the only remedies available to the Applicant that can prevent his unlawful exclusion from the recruitment process.

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

Receivability

a. The application is not receivable *ratione materiae* because there is no reviewable decision excluding the Applicant from the selection process. Preliminary or preparatory steps in a selection process are not administrative decisions and can only be disputed upon challenging a final selection decision. The selection process for the position is ongoing and the fact that the Applicant was not invited to a competency-based interview following the written assessment does not mean that a final selection decision has been taken;

Prima facie unlawfulness

b. The Applicant has not discharged his burden of proving that the decision he contests is *prima facie* unlawful because he has failed to present a “fairly arguable case” in this respect;

c. The selection procedures have been followed and the Applicant’s candidacy has received full and fair consideration. His answers to the written assessment were evaluated anonymously, through a fair and transparent process and he failed to reach the pre-determined pass mark of 65% to be invited for a competency-based interview;

d. The Applicant’s allegations that the evaluation of his answers to the written assessment was flawed have no merit. The hearsay statement from another job applicant, who was invited to an interview despite not completing the written assessment in full, is not a sufficient foundation to infer that there are serious and reasonable doubts about the fairness of the written assessment. It is not beyond the realms of possibility for a job applicant to pass a written assessment despite not completing all questions in it;

e. Finally, the Applicant’s assertion of alleged retaliation by the Hiring Manager is unsubstantiated. The Applicant’s answers to the written assessment were evaluated anonymously by the Hiring Manager and another evaluator, in a fair and transparent process. Furthermore, the alleged retaliation that the Applicant claims relates to a challenge against a 2013 selection process that the Dispute Tribunal dismissed in Judgment *Cicek* UNDT/2015/043, affirmed by the Appeals Tribunal in Judgment *Cicek* 2016-UNAT-636;

Urgency

f. Any alleged urgency in this case is self-created. The Applicant claims to have been informed that he “was no longer a viable candidate” on 2 March 2018, and he filed his application for suspension of action 11 days later without explaining this delay;

Irreparable damage

g. The Applicant has not made any persuasive arguments regarding irreparable damage. He has a right to challenge the selection process once a selection decision is taken. Mere economic loss in connection with a possible non-selection for a locally-recruited position is not sufficient to satisfy the requirement of irreparable damage.

Consideration

Receivability

11. The Tribunal first has to assess the Respondent's argument that not inviting the Applicant for an interview is not a final administrative decision but merely a preparatory step, and that the application is therefore not receivable *ratione materiae*.

12. This Tribunal has already ruled on several occasions that declaring a candidate non-eligible or non-suitable constitutes an "administrative decision" under art. 2.1(a) of its Statute, since it results in the exclusion from a recruitment exercise before the final selection of a successful candidate (*Gusarova* UNDT/2013/072, *Willis* UNDT/2012/044, *Nunez* Order No. 17 (GVA/2013), and *Essis* Order No. 89 (NBI/2015).

13. 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 further held 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 through 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).

14. There is no doubt that insofar as the Applicant is concerned, his elimination from the recruitment process after the written assessment constitutes a final decision. Therefore, the application is receivable and the Tribunal will examine 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.

15. 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.

Prima facie unlawfulness

16. The Tribunal recalls that the threshold required in assessing this 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)).

17. With respect to judicial review in appointment and promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265 that:

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.

18. The Applicant's case for *prima facie* unlawfulness rests on two grounds:
 - a. Discriminatory treatment and retaliation by the Hiring Manager; and
 - b. The fact that another candidate who was invited for a competency-based interview acknowledged not having answered the written assessment in full.

19. On the first ground, this Tribunal recalls that the Appeals Tribunal has consistently held that the burden of proof to establish that a decision was motivated by improper motives falls on the Applicant (*Badawi* 2012-UNAT-261, *Pirnea* 2013-UNAT-311). The Applicant failed to provide any evidence in support of his claim of discrimination and retaliation. He merely referred to a matter dating back to 2013 where, in respect of another selection process, he *inter alia* alleged that the Hiring Manager was biased against him. The Tribunal adjudicated and dismissed this matter in Judgment *Cicek* UNDT/2015/043. It does not in any way support the Applicant's current allegations of discrimination and retaliation.

20. On the second ground, the Tribunal is of the view that inviting for an interview a candidate who allegedly failed to answer all the questions of a written test is not sufficient to raise serious and reasonable doubts about the legality of a selection process and, thus, cannot support in itself a claim of *prima facie* unlawfulness.

21. Moreover, the available documentary evidence does not support this claim. Annex 5 to the Respondent's reply lists the scores (per question, totals, average totals and in percentages) of the 19 candidates invited to take the written test. It

shows that one candidate did not take the test, and that the remaining 18 candidates received points for *each* of the five questions in the written test. There is no indication that any of the candidates failed to answer all the questions in the written test.

22. Accordingly, the Tribunal finds that the requirement of *prima facie* unlawfulness is not met in the present case.

23. Since one of the three cumulative conditions to grant a suspension of action is not met, it is not necessary to address the two other conditions.

Conclusion

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

(Signed)

Judge Teresa Bravo

Dated this 21st day of March 2018

Entered in the Register on this 21st day of March 2018

(Signed)

René M. Vargas M., Registrar, Geneva