



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

EVANS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Brandon Gardner, OSLA

Counsel for Respondent:

Jérôme Blanchard, UNOG

Introduction

1. On 10 April 2018, the Applicant, a Human Rights Officer (P-3) at the Office of the High Commissioner for Human Rights (“OHCHR”), requested suspension of action, pending management evaluation, of the decision to exclude her from the recruitment process for the position of Human Rights Officer (P-4), advertised under job opening 17-Human Rights Affairs-OHCHR-82086-R-Geneva (G) (“JO 82086”) in the context of the 2017 second semi-annual mobility exercise for the Political, Peace and Humanitarian job network (“POLNET”).
2. The application for suspension of action was served on the Respondent, who filed his reply on 12 April 2018 with one annex, Annex 4, filed *ex parte*.

Facts

3. On 7 August 2017, JO 82086 was published. The Applicant applied to it on 17 September 2017 and she was invited to take the Standard Pre-Selection Test (“PST”) and the Drafting Skills Test (“DST”) from 14 to 16 October 2017.
4. On 27 October 2017, the Applicant was informed that she had passed the PST. The Respondent indicated in his reply that as a result of this, the Applicant’s DST was reviewed and marked. The Respondent also confirmed in his reply that the Applicant “passed the DST and was ... further considered in the recruitment process”.
5. On 26 March 2018, the Applicant’s First Reporting Officer, who is also the hiring manager for JO 82086, informed the Applicant that she was not on the list of five candidates that the Office for Human Resources Management (“OHRM”) had put forward for interview.
6. On 10 April 2018, the Applicant requested management evaluation of the decision to “exclude [her] from interviews for the post of P-4 Human Rights Officer despite the fact that [she] met the basic evaluation criteria as outlined in the job opening and the desirable qualifications as well”.

Parties' contentions

7. 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. By failing to include the Applicant in the interview phase of the recruitment process, the Administration violated secs 7.1 and 7.2 of ST/AI/2016/1 (Staff selection and managed mobility system) and failed in its obligation to give full and fair consideration to her candidature;

c. Because a written assessment was not held and the Applicant's Personal History Profile ("PHP") clearly showed that she met all criteria for the post as stated in the job opening, it was incumbent upon OHRM to allow her to proceed to the interview phase;

d. Had the formal procedure been followed, the Applicant would have been invited for an oral interview;

Urgency

e. 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;

f. In fact, the Applicant was informed on 27 March 2018 that the five candidates invited to an oral interview had already been interviewed, and that the Programme Manager was completing his assessment;

Irreparable damage

g. As per the Dispute Tribunal's holdings in *Corna* Order No. 80 (GVA/2010) and *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 her unlawful exclusion from the recruitment process.

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

Receivability

a. The application is not receivable because "only the outcome of a selection exercise constitutes an administrative decision pursuant to the Tribunal's Statute". Since, "the selection exercise is not completed yet, there is ... no administrative decision to suspend";

Prima facie unlawfulness

b. The Administration followed the proper selection procedure pursuant to sec. 7.5(a) of ST/AI/2016/1 and, therefore, the decision is not *prima facie* unlawful. Indeed, the Applicant passed the Standard Pre-screening Selection Test ("SPT") and the Drafting Skills Test ("DST"). She was, however, not deemed suitable by the subject-matter expert and was, thus, not invited for the competency-based interview. The Applicant's candidacy was fully and fairly considered;

Urgency

c. There is no urgency in the instant case since, as per the application, the Applicant has been aware for two weeks that five candidates have been interviewed and that the Programme Manager is completing his assessment;

Irreparable damage

d. The Applicant has not demonstrated how the implementation of the decision would cause her irreparable harm, as she has failed to show that she would be the selected candidate. Indeed, five candidates have been interviewed and it remains pure speculation whether the Applicant would be selected if she were to be included in the list of suitable candidates following the MEU review; and

e. Furthermore, there are currently three P-4 Human Rights Officer Posts in OHCHR published in Inspira. The Applicant's non-selection under JO 82086 would not cause any irreparable harm for her career.

Consideration

Preliminary matter

9. The Tribunal notes that Annex 4 to the Respondent's reply, filed *ex parte*, is relevant to the Applicant's case and she shall be given access to it. The Tribunal also observes that the information in said annex only relates to the Applicant and, therefore, decides to set its confidentiality setting to "none".

Receivability

10. 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*.

11. This Tribunal has already ruled on several occasions that declaring a candidate ineligible or unsuitable 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)).

12. 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).

13. There is no doubt that, insofar as the Applicant is concerned, her 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.

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 all be met in order for a suspension of action to be granted.

Prima facie unlawfulness

15. 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)).

16. In the case at hand, the examination of *prima facie* unlawfulness focuses on the grounds in support of the decision to exclude the Applicant from the interview phase for JO 82086. In this connection, the Respondent claims that such decision is legal because it followed the statutory procedure under ST/AI/2016/1, namely:

- a. review and marking of the SPT;
- b. review and marking of the DST if successful at the SPT; and
- c. suitability review by a subject-matter expert to identify the candidates that would be invited for interview.

17. The Tribunal noted that the subject-matter expert assessed the Applicant's experience as "Partially Satisfactory" due to what he/she concluded to be insufficient experience supervising and managing a team (Annex 4 to the Respondent's reply). The Tribunal will assess whether the procedure followed in the case at hand indeed complied with the provisions of ST/AI/2016/1.

18. At the outset, it is worth noting that the Respondent admits in his reply that the selection procedure is governed by sec. 7.5 of ST/AI/2016/1. In this connection, the Respondent quoted the language in sec. 7.5(a) to support his claim of lawfulness of the procedure followed to consider the Applicant's candidature.

19. Section 7.5 at Part I (Staff selection) of ST/AI/2016/1 provides (emphasis added):

- (a) A written test, which may consist of a multiple-choice portion, a constructed-response portion and other test formats. Eligible candidates shall be requested to take the written test in the dedicated system for this purpose. Where both multiple-choice and constructed-response portion are administered, the multiple-choice portion of the test will be marked first and may be eliminatory. Candidates who are successful in the multiple-choice portion of the test shall have their constructed-response portion and any other written formats of the written test marked;

(b) **Candidates who pass the written test shall be invited to participate in an interview**, which will consist of a competency-based interview to ascertain whether the candidates possess the core values and core and managerial competencies stipulated in the job opening and may also include other oral test formats to further assess other evaluation criteria stipulated in the job opening.

20. The Tribunal observes that sec. 7.5 does not provide for an intermediary step, namely a “subject-matter expert suitability review”, between the written tests and the interviews. Furthermore, that section uses mandatory language unequivocally requiring that all candidates who pass the written tests be invited to an interview.

21. Section 18 (Suitability determination of staff members) at Part II (Managed mobility) of ST/AI/2016/1 refers to the role of OHRM and of subject-matter experts in conducting suitability reviews. There is no clear indication in ST/AI/2016/1 on how the suitability review by the subject-matter expert interplays with sec. 7.5 nor, more importantly, when such review is to be conducted. However, the mandatory language used in sec. 7.5(b) and the structure of ST/AI/2016/1 leads to the conclusion that a suitability review is conducted after the completion of the “assessment process”, which pursuant to sec. 7.5 of the administrative instruction is composed of written tests *and* interviews.

22. The Tribunal also examined the internet link of a web page with information on the “assessment process” included in the SPT result notification sent to candidates.¹ That web page informs candidates that the “assessment process has seven steps”, namely:

- a. Voluntary Self-Assessment;
- b. Eligibility Screening;
- c. General Testing/Assessment;
- d. Suitability Screening;

¹ <https://hr.un.org/page/assessment>.

- e. Substantive Test;
- f. Competency Based and/or Substantive Interview; and
- g. Review and Selection.

23. While the above seven-step workflow could support the Respondent's argument about the legality of the process followed with respect to the Applicant's candidature, the Tribunal is of the view that the seven steps set out are not *prima facie* in compliance with sec. 7.5 of ST/AI/2016/1, since that provision does not include a "suitability screening" and/or a "substantive test" between the General Testing/Assessment step, i.e., SPT and DST, and the Competency Based Interview.

24. In view of the foregoing, the Tribunal finds that the Applicant's exclusion from the interview process is *prima facie* unlawful, and it will proceed to examine the remaining two cumulative conditions for the granting of a suspension of action.

Urgency

25. As this Tribunal held in *Onana* UNDT/2009/033, "[i]t is the timeline to the date of the implementation of the impugned decision and its foreseeable consequences that make a matter urgent".

26. In view of the fact that interviews in connection with JO 82086 have concluded and that the hiring manager is in the process of completing his assessment, the Tribunal finds that the urgency criteria is met in this case.

Irreparable damage

27. The Dispute Tribunal has repeatedly held that the loss of career opportunity with the United Nations may cause harm to the affected individual that cannot be adequately remedied by financial compensation (see, e.g., *Calvani* UNDT/2009/092, *Villamorán* UNDT/2011/126, *Ullah* UNDT/2012/140, *Saffir* Order No. 49 (NY/2013) and *Zhuang* Order No. 165 (GVA/2013)).

28. In the instant case, the implementation of the contested decision would deprive the Applicant of a career opportunity, most importantly in the context of a managed mobility exercise. Furthermore, the Tribunal notes that, as per information posted in the POLNET site, there will be no new POLNET managed mobility exercises in 2018. Finally, there is no evidence that, as claimed by the Respondent, the fact that there are three other P-4 Human Rights Officer posts advertised in Inspira would prevent irreparable harm to the Applicant's career.

29. The Tribunal, therefore, finds that the potential harm to the Applicant's careers prospects is not purely financial in nature and could not be fully remedied by financial compensation.

30. In view of the foregoing, the Tribunal concludes that all three conditions for granting a suspension of action are satisfied.

IT IS ORDERED THAT:

31. The confidentiality setting of Annex 4 to the Respondent's reply be set to "none".

32. The decision not to invite the Applicant for an oral interview in connection with the recruitment process under JO 82086 be suspended pending the outcome of the management evaluation.

33. The recruitment process under JO82086 be consequently also suspended pending the outcome of the management evaluation.

(Signed)

Judge Rowan Downing

Dated this 17th day of April 2018

Entered in the Register on this 17th day of April 2018

(Signed)

René M. Vargas M., Registrar, Geneva