



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

GAUDIN DE VILLAINÉ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Mariam Munang, OSLA

Counsel for Respondent:

Cornelius Fischer, UNOG

Introduction

1. On 1 June 2018, the Applicant, a Human Rights Officer (P-4) at the Office of the High Commissioner for Human Rights (“OHCHR”), requested suspension of action, pending management evaluation, of the decision to exclude him from the recruitment process for the position of Human Rights Officer (P-4), advertised under job opening 17-Human Rights Affairs-OHCHR-82094-R-Geneva (G) (“JO 82094”) 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 6 June 2018.

Facts

3. On 7 August 2017, JO 82094 was published. The Applicant applied to it on 20 September 2017 and he was invited to take the Standard Pre-Selection Test (“SPT”) and the Drafting Skills Test (“DST”) from 14 to 16 October 2017.
4. By “Invitation Email” of 9 October 2017, the Applicant was *inter alia* informed that the first step in the assessment process was the administration of “two separate tests”, namely the POLNET SPT and the POLNET DST. The number of tests to take (two) is further supported by two previous emails addressed to the Applicant on 6 October 2017 entitled, respectively, “Enrolment Email-SPT” and “Enrolment Email-DST”, as well as by reminders about the test window emailed to him on 11 and 14 October 2017.
5. On 27 October 2017, the Applicant was informed that he had passed the SPT.
6. On 31 May 2018, the hiring manager for JO 82094 informed the Applicant that he was not on the list of seven candidates that the Office for Human Resources Management (“OHRM”) had put forward for interview.

7. On 1 June 2018, the Applicant requested management evaluation of the decision to “not short list him and allow him to sit for the interview assessment for [JO 82094] despite the fact that he met the basic evaluation criteria as well as the defined desirable criteria for the position”.

Parties’ contentions

8. 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 this Tribunal 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 shortlist the Applicant for 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 his candidature;

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

d. The decision not to invite the Applicant for interview is also a violation of sec. 7.5 of ST/AI/2016/1. Indeed, he avers that “[o]nly one written test was conducted[, which he passed,]” and that pursuant to sec 7.5 “candidates who pass the written test shall be invited to participate in an 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 31 March 2018 that seven candidates who passed the SPT, other than the Applicant, had already been interviewed, and that the selection process was being finalised;

Irreparable damage

g. As per this Tribunal's holdings in *Corna* Order No. 80 (GVA/2010) and *Tadonki* UNDT/2009/016, there is irreparable damage in the Applicant's case. As a result of budget cuts/restructuring at OHCHR, his fixed-term appointment "is not linked to a regular post" and since 2014 he "has been on temporary assignments". It follows that the JO in question was "a unique opportunity for him to find a more lasting solution to his current situation of uncertainty"; and

h. Suspending the contested administration decision is the only remedy available to the Applicant that can prevent the unlawful exclusion of his candidacy at the eligibility stage.

9. 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". In view that 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 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”) but failed the Drafting Skills Test (“DST”). Pursuant to sec. 7.5(b) he was, therefore, not invited for interview. Furthermore, his candidature’s status in *Inspira* was set to “Not Suitable”. The Applicant’s candidacy was fully and fairly considered;

Urgency

c. There is no urgency in the instant case as required by the Tribunal’s Statute;

Irreparable damage

d. The Applicant has not demonstrated how the implementation of the decision would cause him irreparable harm, as he has failed to show that he would be the selected candidate. Several candidates were found more suitable than him and it remains pure speculation whether the Applicant would be selected if he were to be included in the list of suitable candidates following the MEU review.

Consideration

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, 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.

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 82094. In this connection, the Respondent claims that such decision is legal because it followed the statutory procedure under sec 7.5 of ST/AI/2016/1, namely:

- a. review and marking of the SPT; and
- b. review and marking of the DST if successful at the SPT.

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

The assessment may include:

(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.

18. The Tribunal observes that for the mandatory language under sec. 7.5(b) to become operative, a candidate must pass the SPT and the DST. The Respondent indicated in his reply that as a result of the Applicant passing the SPT, his DST was reviewed and marked. The Respondent documented and confirmed also in his reply that the Applicant “did not attain the established cut off score for the DST” and that, as a result of this, “his application was not considered for the next stages in the competitive recruitment process”.

19. The Tribunal is satisfied with the evidence showing that the Applicant passed the SPT but failed the DST. This distinguishes the Applicant’s case from that of *Evans* (see *Evans* Order No. 76 (GVA/2018)), on which the Applicant relied to support his application.

20. In closing, the Tribunal notes that it is unfortunate that the email notifying the Applicant about him passing the SPT did not refer to an upcoming marking of his DST and could, understandably, have misled him to believe that he had successfully been through the written test phase of the assessment process, when in fact he had not.

21. In view of the foregoing, the Tribunal finds that the Applicant’s exclusion from the interview process is not *prima facie* unlawful.

22. Having found that one of the three cumulative conditions to grant a suspension of action is not met, the Tribunal will not address the remaining two conditions, namely urgency and irreparable harm.

IT IS ORDERED THAT:

23. The application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 8th day of June 2018

Entered in the Register on this 8th day of June 2018

(Signed)

René M. Vargas M., Registrar, Geneva