



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MUÑOZ PELÁEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:

Ludovica Moro

Counsel for Respondent:

Adrien Meubus, LPAS/HRMS/UNOG

Introduction

1. By application filed on 5 January 2023, the Applicant, a staff member of the Secretariat of the United Nations Framework Convention on Climate Change (“UNFCCC”), requests suspension of action, pending management evaluation, of the decision not to select her for the position of Communications Officer (P-3), advertised under job opening (“JO”) VA/22/036/C&E (“the Post”).

2. The application for suspension of action was served on the Respondent, who filed his reply on 10 January 2023.

Facts

3. The Applicant serves as an Associate Communications Officer at the P-2 level on a temporary appointment with UNFCCC.

4. From 28 April 2022 to 26 May 2022, UNFCCC advertised JO VA/22/036/C&E, for which the Applicant applied on 9 May 2022. She was longlisted based on her experience and other requirements of the job opening.

5. In July 2022, the Applicant was invited to complete a technical assessment, which she successfully passed.

6. On 7 October 2022, the Applicant was interviewed. She and other interviewees were asked questions that were based on the competency criteria pre-determined prior to issuing the vacancy announcement and stated in the job opening. All panel interview members had completed competency-based interview training with UNFCCC or with another organization.

7. On 6 December 2022, the selection process was reviewed by the Review Board and the selection was approved by the Deputy Executive-Secretary, UNFCCC, on the same day.

8. On 7 December 2022, the hiring manager informed the Applicant, orally, that she was not the successful candidate.

9. On 15 December 2022, the Applicant received official notification of her contract extension until 28 February 2023.

10. On 4 January 2023, the Applicant filed a request for management evaluation of the contested decision mentioned in para. 1 above.

11. By 10 January 2023, no formal offer had yet been sent to the candidate who was selected for the Post.

Consideration

Receivability

12. Relying on the Appeals Tribunal's finding in *Ishak*, the Respondent submits that the application is not receivable because there is no final administrative decision to suspend. In support of his submission, he argues that the selection process in this case has not yet been completed because a formal offer has not yet been made to the selected candidate.

13. The Tribunal notes that the Appeals Tribunal in *Ishak* 2011-UNAT-152, at para. 29, held that:

A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.

14. While the Tribunal does not question that the selection process entails a series of steps or findings, there is no doubt that insofar as the Applicant is concerned, there has been a final decision concerning her non-selection.

15. Indeed, the Applicant was informed that she had not been the successful candidate, and the evidence on record shows that another candidate was successfully selected for the Post. The record also shows that the Applicant was not in the list of recommended candidates. Therefore, even if the selected candidate were to decline the selection, the Applicant can no longer be considered for the Post.

16. It follows from the above that the contested decision amounts to a unilateral decision made by the Administration that carries legal consequences for the Applicant. Accordingly, the Tribunal finds the present application receivable and will now turn to the analysis of the conditions set out in art. 2.2 of its Statute.

Merits

17. 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; in other words, they must all be met for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

18. The Tribunal will first examine whether the non-selection decision is *prima facie* unlawful. In this respect, it 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)).

19. Moreover, it is well-established that the Secretary-General enjoys broad discretion in reaching a decision on staff selection. Accordingly, when reviewing such decisions, the role of the Tribunal is limited to examining "(a) whether the procedure as laid down in the applicable legal framework was followed; (b) whether the staff member was given fair and adequate consideration; and (c) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration" (see *Farhadi* 2022-UNAT-1206, para. 31; *Savado* 2016-UNAT-642, para. 40).

20. “If the Administration is able to show, even minimally, that the applicant’s candidature was given a full and fair consideration, then the presumption of regularity applies and the burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of promotion or selection” (see *Farhadi*, para. 31; *Rolland* 2011-UNAT-122, para. 5).

21. In the present case, the Applicant submits that she was denied full and fair consideration as an internal candidate and that the recruitment process was tainted by procedural irregularities. The Tribunal will address below these two issues in turn.

Whether the Applicant’s candidacy was given full and fair consideration

22. The Applicant argues that she has not been fully and fairly considered as she is the most suitable candidate for the Post in line with her experience with the job, performing the same duties and responsibilities required by the job opening, and as an internal candidate. In this respect, she argues that the contested decision violates staff regulation 4.4 on the recruitment of persons already in service with the Organization.

23. The Tribunal first notes that the Applicant’s argument that she is the most suitable candidate is purely speculative and not supported by evidence. The fact that she has been performing the same duties and responsibilities required by the job opening does not necessarily mean that she is the most suitable candidate for the Post.

24. Second, with respect to the Applicant’s contention regarding full and fair consideration as an internal candidate, the Tribunal recalls that art. 101(3) of the United Nations Charter provides that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

25. Staff regulation 4.4 provides in its relevant part that:

Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. [...] The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no internal candidate meets the requirements of Article 101, paragraph 3, of the Charter as well as the requirements of the post.

26. Accordingly, the right to be fully and fairly considered as an internal candidate cannot compromise “the highest standards of efficiency, competence and integrity” required in selecting staff under art. 101(3) of the Charter.

27. Moreover, the Applicant holds a temporary appointment and, thus, she is not an “internal candidate” under relevant staff rules and regulations. Indeed, under art. 5.3 of ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and sec. 2.1.2 of the UNFCCC policy on the Staff Selection System, a staff member holding a temporary appointment is regarded as an external candidate when applying for other positions within the Organization.

28. Accordingly, the Applicant failed to demonstrate that her candidacy was not given full and fair consideration.

Whether the alleged procedural irregularities rendered the contested decision *prima facie* unlawful

29. In support of her allegations of procedural irregularities, the Applicant argues that the hiring manager did not complete the competency-based interview course offered by the Human Resources Unit, and that he abruptly and rudely interrupted her several times during the interview.

30. In this respect, the Tribunal recalls that “the presumption of regularity of non-selection decisions is not rebutted simply by casting doubt, and that it is incumbent on the [applicant] to present clear and convincing evidence of any irregularity” (see *Tajik* UNDT/2021/009, para. 41; see also *Rolland*, para. 21).

31. Moreover, procedural irregularities in the decision-making process do not necessarily result in a subsequent finding of unlawfulness of the contested decision and the determination of whether a staff member was denied due process or procedural fairness must rest upon the nature of any procedural irregularity and its impact (see *Sarwar* 2017-UNAT-757, para. 87).

32. In relation to the competency-based interviewing qualifications of the hiring manager, the Tribunal notes that all panel members completed competency-based interview training with UNFCCC or with another organization prior to the interviews for the Post. Moreover, the Applicant fails to demonstrate how this alleged irregularity could have given rise to a finding of serious and reasonable doubts about the lawfulness of the contested decision.

33. Turning to the alleged inappropriate behaviour by the hiring manager, it is noted that a Human Resources professional was present in an ex-officio capacity during the interview and noted no inappropriate behaviour on the part of any panel member. Even if it were established that the hiring manager inappropriately interrupted the Applicant several times during the interview, she fails to discharge her burden of proof to show that this alleged irregularity could have rendered the contested decision *prima facie* unlawful.

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

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

Conclusion

36. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 13th day of January 2023

Case No. UNDT/GVA/2023/001

Order No. 003 (GVA/2023)

Entered in the Register on this 13th day of January 2023

(Signed)

René M. Vargas M., Registrar, Geneva