



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/051

Order No.: 170 (NBI/2014)

Date: 1 July 2014

Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

YI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Camila Nkwenti, UNEP

The Application and Procedural History

1. The Applicant holds a fixed term appointment at the P4 level at the United Nations Environment Programme (UNEP). She serves UNEP as a Programme Officer/Social Safeguard Advisor.¹
2. On 24 June 2014, the Applicant filed a substantive application challenging UNEP's decision to exclude her from the "oral stage of the recruitment and selection process for the position of Senior Programme Officer P5".
3. Later on the same day, the Applicant filed an Application for Suspension of Action pursuant to article 10.2 of the Statute of the United Nations Dispute Tribunal seeking a suspension of the recruitment process to "preserve the Applicant's entitlement vis-à-vis the current recruitment and selection process".
4. The Application for Suspension of Action was served on the Respondent on 24 June 2014, and a Reply was received by the Registry on 25 June 2014. One of the annexes (Annex K) filed by the Respondent was however inaccessible on the Tribunal's e-filing portal, and was re-filed on 30 June 2014.
5. Following the resubmission of Annex K by the Respondent, the Tribunal advised the Applicant that she may make any submissions in response to the Respondent's Reply by 1 July 2014.
6. On 1 July 2014, the Applicant filed her submissions in response to the Respondent's Reply.

¹ The Application however states that the Applicant holds a *permanent* appointment. See para. 6.

Facts

7. On 8 February 2014, the Applicant applied for a vacancy announcement of a P-5 Senior Programme Officer within her department in UNEP.²
8. On 8 April 2014, the Applicant was invited to sit a “blind marked” written test for the position. Candidates were asked to ensure that their names did not appear on any of the test papers.³
9. Instructions for the written test required the Applicant to return the completed test to Ms. Sheila Aggarwal Khan, copying Ms. Violet Ngarachu.⁴
10. On 29 April 2014, the Applicant was “informally notified” that she had failed the written test. The Applicant states that she was also aware that other candidates who sat the test had been called for an oral interview and that Ms. Aggarwal Khan, the Applicant’s former supervisor, was one of the markers of the written test.⁵
11. The Applicant wrote to Ms. Aggarwal Khan seeking feedback with regard to her written test.
12. On 30 April 2014, Ms. Aggarwal Khan responded in the following terms:

The recruitment process is still ongoing. Written tests were blind marked by a panel of markers across the organization. As the process is still ongoing, we are not at liberty to discuss the candidates’ performance.

² Annex A.

³ Annex B.

⁴ Annex C.

⁵ Annex E.

13. On 9 June 2014, the Applicant sought request for management evaluation of the decision to exclude her from the oral stage of the recruitment and selection process.⁶

14. On 16 June 2014, the Management Evaluation Unit (MEU) responded to the Applicant stating that⁷ “the MEU considered that, as no administrative decision had yet been taken and notified [to the Applicant, it] was premature and not receivable”.

Submissions

Applicant

15. The decision of MEU as to the receivability of the Applicant’s challenge is wrong. It would result in the Applicant being able to challenge her non-selection only after she had been formally notified of the decision informing her that she has not been selected. Such a challenge would be too late as the selected candidate would already be in place.

16. The Applicant submits that she has the right to challenge the selection exercise as soon as she is aware that she has been excluded. To deny this ability to challenge the decision would violate the fundamental human right to an effective remedy.

17. The substance of the Applicant’s challenge is that there were procedural irregularities within the recruitment and selection process.

18. The Applicant “seeks judicial review of this decision so that any possible remedial relief granted will relate to her being given the opportunity to fairly compete in the process”.

⁶ Annex G.

⁷ Annex H.

19. Rescission of a selection decision would not be at the end of the recruitment exercise, and any irregularities within the process can only be remedied monetarily.

20. The Applicant in this case seeks only the opportunity to fairly compete in the recruitment and selection process.

21. The right to an effective remedy dictates that the Applicant should have a right of challenge once she is aware of an adverse administrative decision regardless of the absence of formal written determination. Such a principle should be appropriate in circumstances when any delay in contesting the decision would diminish or undermine the relief sought. In this case, the opportunity to compete fairly for a recruitment and selection process.

22. It is not disputed that the Respondent intended to issue a written test that would subsequently be blind marked. It is trite law however that once the Respondent chooses to follow a procedure, it is bound to comply with it.

23. In the present case, Ms. Aggarwal Khan was both a recipient of the completed test scripts and a member of the panel of markers. Had the formal procedure for blind marking been followed, either Ms. Aggarwal Khan would not have received the formal written responses or she would have not been one of the assessors.

24. Citing the case of *Gordon*⁸ the Applicant argues that “failure to follow the procedure decided by the Administration has the effect of vitiating the entire selection process and making the decision not to select the Applicant unlawful”.

25. With respect to the second limb of the test for an application for suspension of actions - urgency – the Applicant submits that if an order staying the recruitment process is not granted, the selection exercise will continue its course and deprive her of the opportunity to be fairly considered.

⁸ *Gordon* UNDT/2011/172.

26. Suspension of the impugned decision is the *only* remedy available to the Applicant to prevent the Respondent from “unlawfully excluding her candidacy at the stage of eligibility”.

Respondent

27. The Respondent submits that the Appeals Tribunal has confirmed and emphasised, referring specifically to selection procedures, that a selection process involves a series of preparatory decisions and that “[t]hese 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”.⁹

28. The Applicant here is contesting the decision to exclude her from the next stage of the recruitment process. She has not received any formal notification from the Organisation yet. In fact she states that the basis upon which she believes that she was informally notified of her non-selection is because she failed to pass the written test. It is uncertain how she is aware that she did not pass the written test as no information on the written test has been communicated to any of the candidates.

29. As the selection process is still ongoing, there is essentially no administrative decision with legal consequences on the Applicant’s contract of employment as provided in Section 2.2 of the UNDT Statute. The Tribunal cannot suspend a decision that does not exist.

30. An application is *prima facie* irreceivable in the absence of a challengeable administrative decision. In this case there is no administrative decision. The Applicant cannot request the Tribunal to adopt a position contrary to its Statute and jurisprudence of the United Nations Appeals Tribunal (UNAT) simply because it will have negative effects on her.

⁹ *Ishak* 2011-UNAT-152.

31. The Applicant has not shown the impugned decision to be *prima facie* unlawful. The Applicant has failed to show how Ms. Aggarwal Khan's receipt of the completed test affected the decision to exclude her from the next stage of the application process.

32. The recruitment process has been lawful and procedurally and substantially fair. Applications were submitted fairly; an initial analysis of the candidates' profiles were undertaken by a panel, a written test was individually taken by each candidate, administered and circulated to panel members by Violet Ngarachu, not Ms. Aggarwal-Khan. The selection process is well documented; markers provided their scores which were then tabulated to shortlist 18 candidates for the oral interview.¹⁰ After the written test was conducted, the written answers were marked independently by a panel of seven markers and she was graded together with other candidates. The evaluation records demonstrate that this was a fairly standard exercise and there is no reason to question the assessments made. The Applicant has not shown that she was not given fair and adequate consideration.

33. The Applicant's submission that there has been continued animosity between herself and her former supervisor, and that this has adversely impacted on the current recruitment and selection process is not true. The Applicant has failed to establish bias and prejudice in this case. Ms. Aggarwal Khan was only one of 7 panel members. The Applicant cannot base her arguments for prejudice on the fact that Ms. Aggarwal-Khan, her former supervisor, was a member of the panel. Each panel member marked the written test independently and awarded marks based on the written test taken by the candidates. The Panel members were not aware of which candidates they awarded the scores to as the written test only had the numbers of the candidates and not their names. The scores of the markers were tabulated by Ms Ngarachu, who administered the written test and provided the total scores for each candidate against their names. Ms. Aggarwal-Khan had no influence on the scores given by other markers as each panel member marked the written test independently

¹⁰ Annex J.

of the other panel members. Based on the scores awarded, the Applicant had a score of 130. 18 other candidates scored better than the Applicant; candidates who scored 160 and above were invited to an interview.

34. The laxity with which the Applicant filed the Application for Suspension of Action is indicative of the lack of urgency in this case.

35. The Respondent submits that the Applicant has failed to demonstrate direct consequences and irreparable harm should the decision not be suspended pending adjudication of the merits of the case.

Applicant's Response

36. The Applicant challenges the Respondent's contention that the decision not to select her should not be considered as an administrative decision having direct legal consequences as it would "mask the unique circumstances by which a recruitment process takes place".

37. The Applicant contends that the decision not to select her is final. Once a "determination is made that the Applicant is excluded from the recruitment process, there is no realistic possibility of subsequent inclusion. No additional administrative steps are necessary and no final determination must take place in order for this exclusion to come into effect".

38. When procedural irregularities are evidenced, the administrative decision to exclude the Applicant from the recruitment process has legal consequences. Specifically, it breaches the Applicant's contractual terms of employment relating to article 101.3 of the Charter of the United Nations and Staff Rules and Regulations.

Deliberations

39. Applications for suspension of action are governed by article 10.1 and 10.2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and article 14 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 10.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

40. This Tribunal has previously held that¹¹

A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

41. Both Parties have made submissions as to the receivability of the Applicant’s motion for suspension of action.

42. Before entering into a discussion on whether the Applicant has met the requirements for the test of suspension of action, the Tribunal must first determine whether or not the impugned decision can properly be stayed.

43. On the facts of the present case, the Respondent appears to be making contradictory submissions as to the stage at which the selection exercise is at. On the one hand, the Respondent submits that

In the present case, the Applicant is contesting the decision to exclude her from the next stage [emphasis added] in the recruitment process. She has not received any formal notification from the Organisation yet. *In fact she states that the basis upon which she believes that she was informally notified of her non-selection is because she failed to pass the written test. It is uncertain how she is*

¹¹ See *inter alia* Applicant Order No. 087 (NBI/2014).

aware that she did not pass the written test as no information on the written test has been communicated to any of the candidates.
[Emphasis added]

44. On the other hand, the Respondent has also adduced evidence to show that competency based interviews have been conducted and concluded in the impugned selection exercise.¹²

45. It is both unhelpful and misleading for the Respondent to simply suggest that the Applicant's motion is not receivable because "it is unclear how she is aware" that a decision adverse to her has in fact been made.

46. In *Ishak*, UNAT observed that¹³:

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.

47. This Tribunal takes the view that the position espoused in *Ishak* whittles down the established and serially confirmed definition of "an administrative decision" laid down in *Andronov*¹⁴

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, 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. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the

¹² Annex J.

¹³ *Ishak* 2011-UNAT-152.

¹⁴ Judgment No. 1157 (2003).

employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions

48. A selection exercise is an ongoing process until a selection decision is made. The written test is normally the first step in the process currently being challenged. Success at the written test determines whether a candidate can proceed to the next stage in the selection exercise. An improperly or unfairly conducted written test can be challenged as an administrative decision that may impact on a candidate's career if the unfairness of the initial step is established.

49. It is the considered view of the Tribunal that what the Applicant is challenging is the decision not to call her for an interview following what she alleges was an unfairly administered written test. The decision was "a unilateral decision taken by the Respondent in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order", the legal order being the career prospects of the Applicant.

50. There is also enough on record to persuade the Tribunal that the impugned selection exercise smacks at least *prima facie* of an unlawful act tainted by extraneous factors.¹⁵ The Hiring Manager who was also on the panel of markers used to supervise the Applicant and their relationship, according to the Applicant, was not a happy one. The Affidavit adduced by the Respondent to show otherwise, does not sufficiently disprove the Applicant's perception of bias.¹⁶

51. But the lack of clarity surrounding the implementation of the impugned decision limits what the Tribunal can do. An unlawful act will subsist because of the limitations on the court's powers for a grant of injunction. The difficulties arising from this limitation is obvious and needs little explanation.

¹⁵ Applicant's Annex E *cf* Respondent's Annexes J and K.

¹⁶ *Ibid.*

52. Be that as it may, it is difficult for the court to provide effective and meaningful injunctive relief on a process which has already commenced. Stopping a process which has already begun could potentially result in more harm than good. The court would be seen as meddling in the substantive functions of an office, which could in turn adversely affect the work of many staff members. In other words, granting an injunction at this stage of the process would affect more than just the Applicant.

53. The Tribunal therefore finds itself in the uncomfortable situation of having to allow a *prima facie* unlawful act to stand simply because its implementation has commenced.

54. The propriety of the recruitment process as a whole will be determined when the Tribunal comes to decide this matter on its substantive application.

55. The Application for Suspension of Action is **DISMISSED**.

(signed)

Judge Vinod Boolell

Dated this 1st day of July 2014

Entered in the Register on this 1st day of July 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi