UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/076
Order No.: 179 (NBI/2021)
Date: 3 September 2021
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHAWLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, AAS/ALD/UN Secretariat
Maureen Munyolo, AAS/ALD/UN Secretariat

Introduction

1. The Applicant holds a fixed-term appointment at the P-5 level at the United Nations Support Office in Somalia ("UNSOS").

2. On 27 August 2021, the Applicant filed an application before the United Nations Dispute Tribunal sitting in Nairobi to suspend the implementation of the Respondent's decision not to shortlist him for the Competency Based Interview ("CBI") following a technical assessment for a position of D-1 Chief of Service, Supply Chain Management.

3. The Respondent filed his reply to the application on 31 August 2021.

Facts and Submissions

4. The position of D-1 Chief of Service, Supply Chain Management was advertised through position-specific Job Opening No.152801. The Applicant was video-interviewed on 2 August 2021. He submits that there is "strong possibility of bias" against him because he has also challenged another decision by the Mission. It was irregular for the technical assessment to not have been conducted anonymously, as recommended in the staff selection system manual. There was no compelling reason for the assessment to have been conducted using the video assessment method; the questions asked could have been responded to in writing, anonymously, and did not require any presentations by the candidates being examined.

5. The application must urgently be granted to preserve the *status quo*, so that the recruitment process does not proceed any further. Allowing the selection exercise to proceed will irreparably deny the Applicant the opportunity to be rostered for a position in this job category.

6. The Respondent takes the position that this application is not receivable. He submits that the Tribunal does not have the jurisdiction to suspend a selection exercise midway as there is no "administrative decision" with "direct legal consequences" affecting the Applicant as yet. In cases such as these, it is the

selection decision that constitutes an administrative decision for the purposes of a challenge. He argues that the jurisprudence is replete and firm on this point.

7. In addition to being not receivable, the application does not meet the requirements of the tripartite test that must be satisfied for a suspension of application to the successful. The Applicant's candidacy for the position, the Respondent argues, was fully and fairly considered such that the process cannot be faulted as having been *prima facie* unlawful. The method of conducting a technical assessment lies within the hiring manager's discretion. The Applicant has not produced any "clear and convincing evidence" to rebut the presumption of regularity or any evidence in support of his allegations of bias and ill motive.

8. There was no procedural or substantive breach of his rights; and the matter cannot be said to be urgent nor to portend irreparable harm.

Considerations and Order

9. This application has been filed pursuant to art. 2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal. Art. 13 provides, in the relevant part:

> 1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

10. All three elements of the test must be satisfied before the impugned decision can be stayed. Accordingly, an application for suspension of action must be adjudicated against the stipulated cumulative test, in that an applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

11. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by

an applicant to show that there is a triable issue before the court.[1]

Receivability

12. The Tribunal will first consider the Respondent's submissions on the material receivability of this application.

13. The Tribunal finds the Respondent's submissions on this point to be untenable. The position adopted by the Respondent in effect means that a selection exercise can only be subject to scrutiny at the end of the process because that is when a final selection decision is made. As a corollary to this position, the Respondent contends that until the decision is final, it does not carry "direct legal consequences" for the staff member and cannot - as such – be subject to challenge.

14. In disagreeing with the Respondent on this point, the Tribunal agrees with the findings in *Melpignano* in 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."[2]

15. The Tribunal in *Melpignano* went on to find 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 though 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).

16. The Respondent refers the Tribunal to, and relies on, the Appeals Tribunal's statement in *Abdellaoui*.[3] In that case, however, the Applicant was a rostered

[1] See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.
[2] UNDT/2015/075. *See also Ba* Order No. 095 (NBI/2021).
[3] 2019-UNAT-928.

candidate who was found unsuitable for the advertised position on grounds that she did not have significant management experience; and the decision not to shortlist her was examined as part of the eventual non-selection. Whereas the Applicant had filed two applications: one against not shortlisting her in the process and another one against her non-selection at the end of it, in both applications the remedy sought had been to be selected and appointed to the position. In the situation of parallel applications, it was certainly appropriate for the claim to have been adjudicated at the end of the selection exercise.

17. On the facts before this Tribunal, however, the decision to exclude the Applicant from the selection process at this stage certainly results in consequences which are both *direct* and *final* for him. Not only does the Applicant already now lose any chance to be appointed to the advertised position, but also, not being allowed in the competency-based interview, he loses a chance to be placed on a D-1 roster. There will be no further administrative act required to produce this negative result.[4]

18. The Tribunal finds this application receivable *ratione materiae.*

The Tripartite Test

Whether the impugned decision is prima facie unlawful

19. The Respondent's argument on the lawfulness of the impugned decision is devoted almost entirely - in 6 out of 7 paragraphs - to invoking the Respondent's wide discretion in staff selection, including its method. The Respondent concludes that "[t]he Applicant has not produced clear and convincing evidence to rebut the presumption of regularity" and "has not produced clear and convincing evidence to the contrary [that the decision was rational and legal].[5]

20. It would help to clarify a few issues. Indisputably, the matter concerns the Respondent's decision taken in the field of wide discretion. This discretion is not

[4] *See Gusarova* UNDT/2013/072; *Willis* UNDT/2012/044; *Nunez* Order No. 17 (GVA/2013); *Essis* Order No. 89 (NBI/2015), *Korotina* UNDT/2012/178; *Melpignano* UNDT/2015/075 (not appealed); *Maystre* Order No. 206 (GVA/2016).
[5] Reply, para. 14.

unfettered and is subject to review pursuant to the general *Sanwidi* test, i.e., if an exercise of discretion is legal, rational, procedurally correct and – where it involves the balancing of competing interests - proportional.[6] The preliminary question in the present case concerns the distribution and the standard of proof.

21. The application concerns suspension of action pending management evaluation under art 2 of the UNDT Statute. The standard of proving unlawfulness is that of *prima facie*, that is, such as is appropriate under the circumstances. Given the preliminary phase of the dispute pending management evaluation, rarely will the *prima facie* standard amount to a showing by clear and convincing evidence.

22. The Respondent's reliance on the line of jurisprudence originating from *Rolland*[7], that is, "following a minimal showing by the Administration that the candidacy of a staff member was given full and fair consideration, the burden of proof shifts to the applicant who must be able to show through clear and convincing evidence that he or she was denied a fair chance of appointment"[8], is misplaced. First, the standard was expressed in the context of the dispute on the merits, and not a suspension of action under art. 2 of the UNDT Statute. Second, and more importantly, it presupposes the presence of the "minimal showing" by the Administration. Only then does the onus shift to the applicant.

23. As concerns presumption of regularity relied upon by the Respondent, it serves to reasonably limit the scope of judicial review but not to shield the administration from examining their actions where validity of administrative action turns on rationale. Doctrinally, presumption of regularity may extend over the administrative organ's subject matter competence, adherence to procedure and absence of improper motive. It does not extend over substantive validity of a decision, especially where a decision is lacking reasoning, or the reasoning offered is *prima facie* inadequate. Jurisprudence on point confirms that the Tribunals

[6] *Sanwidi* 2010-UNAT-084.
[7] *Rolland*, 2011-UNAT-122.
[8] Reply, para, 9.

undertook inquiry into the merits of staff selection, and that the depth of the review turned on the coherence of reasons provided for it.[9]

24. Review of discretionary decisions for rationality, and the primary onus on the Administration to show the rationale, is described in the recent Appeals Tribunal judgment in *Applicant*:

> When a tribunal is called upon to judicially review an administrative decision on the ground of irrationality, it is required to examine whether the decision is rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the Administration, or the reasons given for it by the Administration. That task of judicial review depends on the furnishing of adequate and coherent reasons for the decision. The giving of reasons is one of the fundamentals of good administration. It encourages rational and structured decision-making and minimizes arbitrariness and bias.
>
> The requirement for coherent reasons compels the decision-maker to properly consider the relevant statutory provisions, the grounds for taking the decision, the purpose of the decision, all the relevant considerations and the policy to be implemented. Coherent reasons also encourage open administration and contribute to a sense of fairness. Reasons also critically provide the basis for judicial review of the decision. By requiring coherent reasons supported by the evidence one ensures that there is a rational connection between the premises and the conclusion. The decision-maker must be able to show that he or she has considered all the serious objections to the decision and has answers that plausibly meet those objections, which justify discarding them. The reasons have to show that the decision-maker did not take account of irrelevant considerations or add undue weight to a specific consideration.[10]

25. The Tribunal observes that the Respondent did not provide any substantive justification whatsoever for non-shortlisting of the Applicant, other than stating that he was "unsuccessful in the video assessment". This does not amount to a minimal showing.

26. Moving on to the question of procedure, as stated above, normally it is presumed that the administrative decision was issued in adherence to the applicable procedure. The significance of adherence to procedure varies dependent on the

[9] E.g., *Ross* 2019-UNAT-926, *Ngokeng* 2017-UNAT-747.
[10] *Applicant* 2021-UNAT-1097.

substance of the decision, however in staff selection the propriety of procedure is paramount. In the present case, the question is not that much about non-adherence to a prescribed procedure as about the choice of the procedure by the hiring manager. The Tribunal disagrees with the Respondent who maintains that "[i]t is not for the […] Dispute Tribunal to determine the correctness of that choice."[11] Rather, in accordance with *Sanwidi* and *Applicant* cited above, the proper subject of the inquiry in this case is whether the elected procedure was rationally connected to the purpose for which it was applied as well as the reasons given for it by the Administration.

27. On the latter score, the Respondent's position, again, is only that "[t]he hiring manager may choose from various forms of assessments" and that the Hiring Manager's Manual on the Staff Selection System (Manual), which recommends anonymity and transparency in disclosing of the scoring sheets to the candidates, has no legal force.[12]

28. The Tribunal, obviously, agrees that the Manual has no legal force. Manuals cannot create rights and entitlements or impose binding obligations. They are, however, presumed to be a codification of recommended practices. While the hiring manager was not bound to follow the Manual, the Respondent was obliged to - even minimally - explain the rationale for the choice to depart from the Manual, once challenged. This has not been done.

29. On the score of rationality, the resort to a "video assessment" for the purpose of shortlisting candidates for a competency-based interview does not defend itself on its own. First, as recognized by the Manual and argued by the Applicant, it resigns from anonymity and the attaching warranty of impartiality. Second, it resigns from insulating the assessment panel from being influenced by irrelevant subliminal impressions such as appearances. Third, it resigns from having any sample of the candidates' ability to write clearly and concisely under time pressure. Fourth, in most situations, it is not needed for the assessment of technical knowledge. Fifth, to the extent the candidate's competence in oral expression and

[11] Reply, para. 10.
[12] Ibid., para. 13.

general demeanour might be material for the advertised position, these may be ascertained in the next stage, that is, a competency-based interview, which is held orally and may be by videoconferencing. As such, the rationality of employing this impugned modality remains unexplained and invites speculation about pre-conceived ideas about persons allowed or not allowed to the next stage of the selection process.

30. As concerns the question of bias, and the Respondent's claim that the Applicant did not prove it through clear and convincing evidence, the Tribunal recalls that bias and improper motive is rarely articulated expressly; rather, it needs to be inferred from the surrounding circumstances. For the purpose of a *prima facie* showing in the context of an application under art. 2 of the UNDT statute, the Tribunal finds it appropriate to echo the judgment in *Simmons*[13] in that where circumstances show that the possibility of bias, prejudice or improper considerations may possibly have infected the process, the onus shifts to the Respondent to show that bias or prejudice did not in any sense taint the selection process and its outcome.

31. In the present case, a possibility of bias results from the fact the Applicant had challenged an administrative decision of UNSOS management, specifically, authored by one of the panel members. As the case was subject to an application for suspension of action before the Tribunal, it is known to this Tribunal *ex officio*, just as it is known to the Respondent, that the dispute had not been about a technicality but had a long history and concerned a multi-step challenge to the exercise of discretion of the panel member regarding personal circumstances of the Applicant. While this Tribunal would not endorse a proposition that a dispute about an administrative decision automatically disqualifies its author from having a supervisory role or participating in the selection exercise, the disputed matter could nevertheless have caused personal resentment, in particular, given its time proximity to the selection exercise. As such, the allegation of bias deserved a substantive response which it did not receive.

[13] *Simmons* UNDT-2013-050.

32. Overall, lacking a responsive answer from the Respondent, the Tribunal finds that the Applicant has demonstrated the *prima facie* unlawfulness.

Urgency and irreparable harm

33. The prongs of urgency and irreparable harm are satisfied given the progression of the selection process, where exclusion of the Applicant from the competency-based interviews means that he will lose the opportunity to be included in the roster.

Conclusion

34. The Application is GRANTED and the decision to not include the Applicant in the competency-based interview for Job Opening No.152801 is suspended pending management evaluation.

(*Signed*)

Judge Agnieszka Klonowiecka-Milart
Dated this 3rd day of September 2021

Entered in the Register on this 3rd day of September 2021
(*Signed*)
Abena Kwakye-Berko, Registrar, Nairobi