



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/012

Order No.: 68 (NY/2013)

Date: 8 March 2013

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 1 March 2013, the Applicant, a staff member of the Procurement Division of the Department of Management, United Nations Secretariat in New York, filed an application for suspension of action, pending management evaluation, of the decision not to select him “to fill vacant post of Procurement Officer (P-4), [Job Opening] No. 12-PRO-UNON-24393-R-Nairobi (X)”.

2. The Applicant alleges that the evaluation of his candidacy was marred by bias and prejudice against him and that the failure to give his candidacy full and fair consideration would undermine his career prospects and cause him significant stress. The Applicant suggests that, although he took a written test, his answers may have been viewed as submitted after the deadline and therefore rejected. He states that the matter is urgent because “management is still in the process of finalizing the selection”.

3. The Respondent submits that the Applicant received full and fair consideration. The Respondent states that Applicant’s answers to the written exercise for the post were accepted but his scores, including scores for his answers to “key questions”, were lower than the scores of the seven candidates who were invited to an interview. The Respondent submits that the decision to select another candidate for the advertised position was lawful. According to the Respondent, the contested decision has been implemented and is no longer capable of suspension as “the Organization and the selected candidate have entered into an agreement through an exchange of electronic correspondence that the selected candidate’s first day at the United Nations Office at Nairobi (“UNON”) will be on or around 18 March 2013, subject to medical clearance”. The Respondent further submits that the Applicant failed to satisfy the requirements of irreparable harm and particular urgency.

Procedural matters

4. Article 13 (Suspension of action during a management evaluation) of the Tribunal's Rules of Procedure provides that the Tribunal "shall consider an application for interim measures within five working days of the service of the application on the respondent".

5. The application was served on the Respondent on Friday, 1 March 2013. Therefore, the Tribunal had until Friday, 8 March 2013, to consider the present application.

6. On 1 March 2013, the Tribunal issued Order No. 61 (NY/2013), directing the Respondent to file and serve a reply to the application, addressing, *inter alia*, the following matters (i) whether the selection of the successful candidate with regard to the contested post had taken place; (ii) whether the selected candidate had been informed of this decision; (iii) whether the selected candidate had accepted the offer; and (iv) whether the Applicant's answers to the written test were rejected as submitted after the deadline. The Tribunal also ordered that "the Respondent shall not undertake, as from the time and date of service of the present Order, any further steps regarding the recruitment against the contested position until the determination of the suspension of action" (see *Villamorán* UNDT/2011/126, *Villamorán* 2011-UNAT-160). The Respondent replied to Order No. 61 (NY/2013) on 5 March 2013.

7. On 6 March 2013, the Tribunal issued Order No. 66 (NY/2013), directing the Respondent to produce further information and documentation. The Respondent's reply to Order No. 66 (NY/2013) was duly filed on 7 March 2013.

Background

8. The following background information is based on the parties' written submissions and the record.

9. The contested job opening was advertised in July 2012. The Applicant was among 177 candidates who applied for the position.

10. Twenty-two candidates, including the Applicant, were invited to take a written test on 3 December 2012. The test was originally scheduled for 3–5 p.m. Nairobi time, but the Applicant was permitted to take the test at 5–7 p.m. Nairobi time (9–11 a.m. New York time). On the day of the test, the Applicant received the test and submitted his answers with some delay due to technical difficulties. However, his answers were accepted and evaluated together with the answers of other candidates.

11. According to the signed statement of the Chief of the Procurement Section of UNON, provided by the Respondent, when marking the answers submitted anonymously by the candidates who took the written test, she was not aware of which candidates had written which answers. The test consisted of one long essay question and 14 short questions. The review of the answers was conducted in five rounds, each of them resulting in elimination of some of the candidates based on different criteria. The Applicant's answer to the essay question scored well enough for him to advance to the next round of evaluation together with 11 other candidates. However, his score for the short questions section was lower than the scores of 17 other candidates. He did not answer five of the 14 short questions. Further, with respect to six questions that were identified for the purposes of the evaluation process as "key questions", the Applicant received only 2.5 points, whereas the selected candidate received 6 points. Together with three other candidates, the Applicant was eliminated from further consideration

during the fifth round of review, whilst the remaining seven candidates were invited for an interview.

12. According to the above-mentioned statement of the Chief of the Procurement Section of UNON, the names of the candidates were released to the Chief of the Procurement Section of UNON only after the seven remaining candidates were identified for interviews.

13. The successful candidate was informed of his selection by email on 11 February 2013. He received another email notification confirming his selection on 14 February 2013. He replied the same day, confirming his interest in the position. On 20 February 2013, the selected candidate and the Chief of the Procurement Section of UNON exchanged emails regarding the selected candidate's proposed starting date.

14. Following an enquiry by the Applicant on 27 February 2013, he was informed by the Administration that "we are just about to finalize the selection process. Please be informed that you were not successful in the test and as such were not further considered".

15. On 28 February 2013, the Applicant submitted a request for management evaluation of the "administrative decision not to give full and fair consideration to [his] candidature to fill the [contested job opening]".

Consideration

16. Article 2.2 of the Statute of the Tribunal provides that it may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable

damage. The Tribunal can suspend the contested decisions only if all three requirements of art. 2.2 of its Statute have been met.

Prima facie unlawfulness

17. For the *prima facie* unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamorán* UNDT/2011/126).

18. The selection process appears to be well documented. The Tribunal has no basis on the record currently before it to suggest that the Applicant was not given full and fair consideration. His written answers were accepted and evaluated. The evaluation records appear to demonstrate that this was a fairly standard exercise with no apparent reasons at this stage to question the assessments made.

19. Although the Applicant did well on the essay question, seventeen other candidates did better than him on the short questions section. Each of the seven candidates who were invited for an interview received higher scores than the Applicant for the short questions section as well as higher scores for the "key questions". The candidate who was ultimately selected received scores that were higher than those of the Applicant with respect to the essay, short answers, and "key questions" in particular.

20. There is currently no evidence to support the Applicant's allegation of bias and prejudice against him. The Applicant's dissatisfaction with the outcome of the selection process is not sufficient on its own for a finding of *prima facie* unlawfulness. Notably, his test answers were accepted, and it appears that

the names of the candidates were not known to the test scorer until the interview stage and therefore the Applicant could not have been prejudiced by any alleged bias. The fact that he made it to the fifth round of evaluation process is *prima facie* indicative of the absence of bias against him.

21. The Tribunal finds that the Applicant has not satisfied the requirement of *prima facie* unlawfulness of the contested decision.

22. As one of the three conditions required for temporary relief under art. 2.2 of the Statute has not been met, the Tribunal need not determine whether the remaining two conditions—irreparable damage and particular urgency—have been satisfied. The Tribunal also need not consider whether the contested decision is capable of being suspended at this stage.

Conclusion

23. The present application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 8th day of March 2013