



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

BALDINI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Stephen Margetts, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 10 April 2013, the Applicant, a Chief of Section at the P-5 level in the Investigations Division of the Office of Internal Oversight Services (“ID/OIOS”), filed an application for suspension of action pending management evaluation under art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure.

2. In this application, the Applicant challenged the conduct of the selection process for two posts at the D-1 level with ID/OIOS in Vienna and Nairobi (“the Posts”) and especially the fact that she was not included on the interview list.

3. On 11 April 2013, after the Applicant had filed her application through the Dispute Tribunal’s e-Filing portal, the Registry served the application on the Respondent requesting him to file a reply by 12:00 p.m., 12 April 2013. The Respondent did so and, on the same date, the Applicant was provided with the opportunity to file and serve her written observations/comments, if any, by 9:30 a.m., 15 April 2013. On 15 April 2013, the Applicant filed her comments on time and, on the same date, the Respondent was provided with the opportunity to file and serve his written observations/comments by 5:30 p.m., 15 April 2013. The Respondent did not file and serve any further written observations/comments.

## **Background**

4. The following factual chronology is based on the parties’ submissions to the Tribunal and the written documentation before it.

5. Amongst all the applicants to the Posts, the Applicant explains that there were “four internal OIOS candidates, including .., only two of the candidates invited to take the written exam were women”. She submits that at least one of the internal candidates was “intimately involved in the [job opening’s] development and recruitment process” and that “[t]he education requirements were downgraded to allow these OIOS internal candidates to be included in the shortlist”.

6. Following the advertisement of the Posts, 17 candidates were shortlisted to take a written test. Three members of the assessment panel blind-marked the tests. The panel members did not know the identity of the applicants. Without knowing the Applicant's identity, the three panel members each, and independently, assessed the Applicant's test and the Applicant received an average grade ranking her 15<sup>th</sup> out of 17 applicants. This information is corroborated by the written documentation filed by the Respondent.

7. Six of the 17 applicants passed the written test and were invited for an interview. The interviews of the six candidates were conducted on 8 and 9 April 2013. The Applicant submits that no female candidates were selected for the interview and that all six male candidates to be interviewed were "former police" and formerly worked for "the Director" and /or are friends of him.

8. Regarding the further process, the Respondent submitted in his reply, as revised according to his subsequent "Corrigendum to the Respondent's reply to the application for suspension of action", that:

In [the] next two weeks, time permitting, the Hiring Manager [the Director mentioned in para. 7 above] and the other panel members will prepare and finalize the evaluations of the recommended candidates for submission to the OIOS Review Board. In the ordinary course, the Central Review Board ("CRB") will require between four to six weeks to review the selection exercise. Following approval by the CRB, the recommendations will be submitted to the Under-Secretary-General [for] OIOS for selection. No selection decision will be made within the next 30 days.

### **Consideration**

9. Pursuant to art. 2.2 of the Statute of the Dispute Tribunal, the Applicant's application for suspension must satisfy the following cumulative conditions to succeed:

a. The application is receivable because it concerns an administrative decision that may properly be suspended by the Tribunal;

- b. The contested decision has not yet been implemented;
- c. The Applicant has submitted a request for management evaluation of the contested decision, which is currently pending;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable harm.

*Receivability*

10. The Respondent submits that the application is not receivable and argues as follows, as revised according to his subsequent “Corrigendum to the Respondent’s reply to the application for suspension of action”:

... Article 2.2 of the UNDT statute empowers the Tribunal to suspend the implementation of an administrative decision that is the subject of an ongoing management evaluation request. In the case of *Planas* UNDT/2009/086 (upheld on appeal, 2010-UNAT-049) the Tribunal ruled that the conduct of a recruitment exercise is not an administrative decision and stated, in para. 16, that “[a] selection process, being a process of decision-making, involves a series of steps or findings which lead to an administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process but cannot be, alone, the subject of an appeal to the Tribunal”.

... Furthermore, in *Planas*, the Tribunal observed the longstanding jurisprudence of the United Nations Administrative Tribunal that: “It is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one’s interest is predicated upon the condition that the impugned decision is stated in precise terms”.

... In her Application the Applicant fails to state the administrative decision she seeks to suspend in precise terms. Instead, she asserts her opinion that the selection exercise has been “tainted from the start”. She states “there should be an investigation in

order to determine who is responsible for the violation of the UN's Rules and Regulations, ST/SGB's and Guidelines". The Applicant is making a general allegation of misconduct. She has not identified any administrative decision that may be the subject of appeal. At this stage of the process, there has been no selection decision that has a direct impact on her terms of appointment (See *Andati-Amwayi* 2010-UNAT-058).

... In the ordinary course, pursuant to Sections 8.1 and 8.2 of ST/AI/2010/3 (Staff Selection System), the selection exercise will be reviewed by the CRB before it is approved and the recommended forwarded to [the Under-Secretary-General for OIOS] for her selection decision. Should the CRB identify flaws in the conduct of the selection exercise, the selection exercise will be cancelled and/or the flaws in the process will be rectified. As a result, *arguendo*, should the Applicant's allegation that the process is flawed be correct—which is denied—it should be detected by the CRB prior to any selection decision being taken. For this reason, the Application is premature. In light of the internal safeguards and procedures built into the selection process, it is important that the selection exercise be allowed to run its course.

11. The Applicant contends, in her comments from 15 April 2013, that the application is receivable by, in essence, arguing that the present case is distinguishable from *Planas*.

12. The Appeals Tribunal in *Planas* stated, in para. 2, that the case concerned:

the alleged non-application of paragraph 48(a) of the UNHCR Procedural Guidelines for Appointments, Postings and Promotions (Procedural Guidelines), which establishes the rotation eligibility requirements for appointments, postings and promotions in duty stations grouped into three categories, H/A, B/C and D/E.

13. In upholding the Dispute Tribunal's judgment in UNDT/2009/086, the Appeals Tribunal set out the following considerations in *Planas*:

19. Regardless of whether all the specific occasions on which *Planas* reportedly applied but was not considered as a candidate were detailed or justified, even assuming that in the selection process for each post she did indeed apply but was not considered, that situation in itself would not enable the proposed claim, which in large measure exceeds the powers of the UNDT, to be made.

20. In effect, the claim that she was passed over and discriminated against could only be made if the staff member, feeling that she had suffered injury after she had submitted a specific candidacy and after another person had been selected, had contested the results of the selection process, that is, the specific appointment made.

21. Therefore, the UNDT was correct in finding that, as Planas did not contest in precise terms her non-selection for any post, she did not identify any administrative decision in her application.

22. Advancement of a claim like the one being made requires verification that a particular administrative decision taken with respect to a specific application by Planas to fill one or more specific posts, was taken contrary to law, causing her direct harm. Thus, the violation of the right she invokes would be compared with the applicable norms and with the rights of the other candidates, in order to determine whether or not the alleged violation took place.

14. The Applicant contests the conduct of the selection process for the Posts from outset and its “outcome” thus far. She explains that, following the interview, four candidates are to be recommended and that the list of recommended candidates is shortly to be submitted to the CRB. As for the selection exercise, she points at different specific incidents, which she claims were unlawful, including that:

a. One of the interviewed candidates who was working in “the O/USG under the direction of the Director was intimately involved in the development, changing the requirements of the Job Opens (JO) for [the Posts]” and “the education requirements were downgraded to allow ... internal OIOS candidates to be included in the shortlist”;

b. No female candidates were selected for the interview; and

c. It was incorrect not to invite her for the interview, based on the assessment that she had failed her written test, in that she contends that one of the members of the assessment panel was apparently not a United Nations staff member. The panel member should therefore have been banned from participating as a full member of the assessment panel.

15. The Tribunal finds that the Applicant has presented the elements of the contested administrative decision very precisely. The contested administrative decision is not vaguely defined or preparatory in nature and is capable of affecting in itself the Applicant's legal rights.

16. As the Dispute Tribunal has stated in *Hocking, Jarvis, McIntyre* UNDT/2009/077, *Wilkinson et al.* UNDT/2009/089 and *Ishak* UNDT/2010/085, in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision that is taken by the Administration in a precise individual case and which produces direct legal consequences to the legal order, including to the Applicant's contractual rights. The Tribunal has the competence to determine in any application filed by an individual before it whether the contested decision is an administrative decision and whether it was made in compliance with or contrary to an individual's terms of appointment (see *Slade* UNDT/2011/136).

17. In the present case, the selection process for the Applicant ended when, based on the assessment of her written test, she was not selected for the interview. This decision cannot be considered preparatory since it is final and apply individually to the Applicant, who was not deemed suitable to proceeding to the next step in the selection process, namely the interview.

18. Accordingly, the Tribunal finds that the application is receivable.

#### *Implementation*

19. The Respondent states that the interviews of the six candidates were to be conducted on 8 and 9 April 2013, that the members of the assessment panel is still preparing and finalising its evaluations, and that the panel is yet to submit the list of recommended candidates to the Central Review Board ("CRB"). The Respondent expects this to be done within the next two weeks. The Respondent further explains that, following approval by the CRB, which will require four to six weeks to review the selection exercise, the recommendations will be submitted to the Under-Secretary-General for OIOS for her final selection.

20. Accordingly, the Tribunal finds that the contested administrative decision is yet to be implemented.

*Pending management evaluation request*

21. Before she filed her application for suspension of action to the Tribunal, on 10 April 2013, the Applicant submitted a request for management evaluation.

22. Since neither party has informed the Tribunal that the management evaluation has been completed, the Tribunal finds that that the Applicant's request for such evaluation is still pending.

*Prima facie unlawfulness*

23. For the Tribunal to find that the contested administrative decision is *prima facie* unlawful, it is enough for the Applicant to present a fairly arguable case that the decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (see, for instance, *Saffir* Order No. 49 (NY/2013), *Villamorán* UNDT/2011/126 and *Jaen* Order No. 29 (NY/2011)). Since the suspension of action is only a temporary measure until the management evaluation is finalised, the *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (*Corcoran* UNDT 2009/071 and *Hepworth* UNDT /2009/003) .

24. The Applicant contends that the selection process for the Posts as whole was flawed for several reasons, including that (see also para. 14 above)

- a. One of the interviewed candidates had been improperly involved in the preparation of the job opening;
- b. No female candidates were selected for the interview; and



c. The composition of the panel that assessed the written test was unlawful because it would appear that one of the assessors was not a United Nations staff member. Although provided with the opportunity to comment on this latter factual submission, the Respondent did not do so. The submission therefore stands as uncontested and the Tribunal is left with no other option than accepting as it was presented by the Applicant (see also *Kasmani* UNDT/2009/063, para. 7.1.7).

25. The Applicant submits that the decision is unlawful because the selection process was not conducted in accordance with:

**ST/SGB/2012/1, Article 8**

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

**ST/SGB/2012/1 Reg. 2.1 Basic rights and obligations of staff**

(a) Staff members shall uphold and respect the principles set out in the Charter, including ... and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

(e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;

(g) Staff members shall not use their office or knowledge gained from their official functions ... private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour;

**Regulation 4.3**

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

**ST/AI 2010/3 para. 7.8** states in pertinent part: "... the hiring manager shall transmit, ... preferably, a list of qualified, unranked, candidates, normally at least 1 female candidate to the appropriate central review body..." In this case, there are no women who were selected for interview.

26. Regarding the members of an assessment panel, it follows from ST/AI/2010/3 (Staff selection system), sec. 1(c), that such a panel is:

... normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening.

27. The "Manual for the Hiring on the Staff Selection System (Inspira)", version 3.0 ("the Manual"), further specifies in sec. 9.3 that:

1. All Assessment Panels must be composed of staff members holding an appointment other than a temporary appointment, serve at the same or at a higher level than that of the job opening and shall normally not be the current position incumbent that is to be replaced. Retirees from the UN System, consultants, contractors and interns are not admissible as assessors.

Should any members of the Assessment Panel be retirees, consultants, contractors, interns or staff members holding a temporary appointment, the interviews will be void. The interviews will have to be held again.

2. It is suggested that the members participating in evaluating the assessment exercise be the same members as the panel conducting the competency-based interviews. Ideally, all applicants for one job opening are to be assessed and/or interviewed by the same assessors.

28. In light of the abovementioned legal provisions, the Tribunal finds that the Applicant presented a fairly arguable case and, accordingly, the requirement of *prima facie* unlawfulness is met.

*Urgency*

29. The Applicant contends, in essence, that her case is particularly urgent in that the selection process is still ongoing and the final selection decision could be taken at any given time.

30. The Respondent submits that the selection exercise will not be completed, and the selection decisions will not be made, within the 30-day time limit for the management evaluation. The Respondent contends that, as such, any order for suspension of the selection decisions during the pendency of the management evaluation will not delay, or affect in any way, the timing of the selection decisions. The Respondent further argues that, if the selection exercise is allowed to run its course, the CRB will be given a chance to detect and remedy any flaw in the process prior to a selection decision being taken and that, given this safeguard in the process, there is no urgency or need to suspend the process.

31. The Tribunal finds that, however unlikely, there is no guarantee that the selection process for the Posts may not be completed before the management evaluation is rendered. As a matter of fact, it is unknown when the selection decisions are to be made and, in principle, the Under-Secretary-General may make these decisions at any given moment.

32. Furthermore, it is clear that the urgency is not inflicted by the Applicant as the timing of the selection decisions does not depend on her own making (see *Dougherty* UNDT/2011/058, *Jitsamruay* UNDT/2011/206 and *Evangelista* UNDT/2011/212).

33. Regarding the CRB, the Tribunal notes that the Applicant already filed her request for management evaluation on 10 April 2013 and that the Management Evaluation Unit (“MEU”) has 30 days to review this request which, based on the Applicant’s submissions before the MEU, may include a review of the entire selection process. In the meantime, there is no need for the CRB to simultaneously

review the same aspects of the selection process if the list of recommended candidates should be forwarded to it before the management evaluation is complete.

34. Accordingly, the Tribunal finds that the present case is particularly urgent.

*Irreparable damage*

35. The Applicant contends that she will have no remedy should the selections decisions be implemented.

36. The Respondent submits that, only after the CRB has confirmed that the selection exercises were conducted properly, will the list of recommended candidates be submitted to the Under-Secretary-General for OIOS for her selection decisions. The Respondent further argues that, as such, any flaw in the selection process for the Posts could be rectified prior to any administrative decision being taken and impacting on the Applicant's rights.

37. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the involved individual (see, for instance, *Saffir* Order No. 49 (NY/2013), para. 24). As much as this applies to the situation where an applicant may lose her/his employment with the Organization, the effect is similar if, as in the present case, a staff member ineluctably loses out on a promotion opportunity. In this regard, the Tribunal observes that only few, if any, job openings similar to the Posts may be advertised in the near future. Only if the MEU finds in favour of the Applicant may she be able to obtain a new assessment of her candidature for the Posts. Otherwise, if the selection decision is made before the management evaluation process has finished, the Applicant will have no other remedy than momentary compensation under art. 10.5 of the Statute of the Dispute Tribunal. Thus, the consequential effect on the Applicant's professional career cannot adequately be compensated by money.

38. The Tribunal therefore finds that the Applicant may incur irreparable harm if the selection processes are not suspended.

**Conclusion**

39. All the conditions for suspension of action have been met and the Applicant's request for suspension of action is granted.

**Order**

40. The Tribunal orders that the selection process for the Posts, i.e., the two posts at the D-1 level with ID/OIOS in Vienna and Nairobi, are suspended during the pendency of the management evaluation process.

*(Signed)*

Judge Alessandra Greceanu

Dated this 18<sup>th</sup> day of April 2013