



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GOODWIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON
SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

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

Introduction

1. On 15 January 2016, the Applicant, a Chief of Operations at the P-5 level with the United Nations Support Office in Somalia (“UNSOA”), currently on special leave without pay in New York in the United States of America, filed via email a request to suspend “the continuation of the current recruitment process for the post of Chief of Air Transport Section, [Department of Field Support, United Nations Headquarters] (“the Post”), until such time that [he is] included in a fair and transparent testing process” pursuant to art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure. In support of his claim, the Applicant submits, in essence, that he did not receive the written test for the position because it was not sent to his private email address as requested.

2. The application was forwarded by the Nairobi Registry to the New York Registry on 19 January 2016 and, on the same day, the Applicant was directed via email to file his application for suspension of action through the Dispute Tribunal’s eFiling portal.

3. The Applicant filed his application through the eFiling portal on 20 January 2016. On the same date, the Registry transmitted the application for suspension of action to the Respondent. The Respondent was instructed to file and serve a response by 5:00 p.m. on 21 January 2016.

4. In his timely filed response, the Respondent claims that the application for suspension of action is not receivable, contending that staff members may only challenge a final selection decision and that they cannot challenge the preparatory steps taken during the course of an ongoing selection exercise. In addition, the Respondent claims the prerequisite of prima facie unlawfulness, in accordance with art. 2.2 of the Tribunal’s Statue and art. 13 of its Rules of Procedure, for suspending the recruitment process is not satisfied. In support thereof, he contends that the written online test was actually sent to the Applicant’s private email address on 23

September 2015 at “09:05:39” and appends, amongst other annexes, a screen shot of an incomplete text of an email inviting the Applicant to complete a 2 hours and 30 minutes online written test for the Post as well as providing him with some instructions on how to do so. The Respondent submits that “[t]he Applicant failed to return the written assessment within the time specified for completion and return” and that “the Administration cannot provide additional time to any candidate to complete a test”. However, in his response, the Respondent failed to provide full information and documentation on what was the time limit for the candidates, including the Applicant, to complete and return the online written test.

5. In Order No. 4 (NY/2016) dated 22 January 2016, the Tribunal instructed the Respondent to file and serve, by 12:00 p.m. (noon), Monday, 25 January 2016, a copy of the full message sent to the Applicant’s private email on 23 September 2015 at 9:05:39 a.m., including the time limit for completing and returning the online written test for the Post.

6. On 24 January 2016, the Applicant filed and served a “Reply to Respondent’s Answer”, in which he provided some additional submissions.

7. On 25 January 2015, the Respondent requested an extension of the time limit provided in Order No. 4 (NY/2016) till 12:00 p.m. (noon), Wednesday, 27 January 2016, as it had not been possible to retrieve the requested email message. By Order No. 16 (NY/2016) dated 16 February 2016, the Tribunal granted the request in part, extending the time limit till 9:00 a.m., Wednesday, 27 January 2016 for the Respondent to file all relevant information and documentation on what the time limit was for the candidates, including the Applicant, to complete and return the online written test for the Post, including a copy of the full email message sent to the Applicant’s personal email on 23 September 2015 at 9:05:39 a.m.

8. By Order No. 17 (NY/2016) dated 27 January 2016, the Tribunal further ordered the Respondent to file all relevant information and documentation on the

current stage of the relevant selection process for the Post by 9:00 a.m., Wednesday, 27 January 2016.

9. As per Orders No. 16 and 17 (NY/2016), on 27 November 2016, the Respondent filed a submission in which he stated that he had not been able to retrieve further documentation but provided the requested information as follows:

Order 16:

... As detailed in the Respondent's submission of 25 January 2015, the written assessment for the position was administered by the Exam and Test Section (ETS) in OHRM. The ETS used Verint/Vovici platform (through: assessments@un.org) to administer the written assessment exercise. The documentation produced at R/5 to the Respondent's Reply and R/6 to the Respondent's Additional Submission, is the full record retained by ETS verifying that the test was sent to the Hotmail address. Accordingly, the best evidence available to the Respondent has been produced to the Tribunal.

... In addition, ETS has requested the Office for Information and Communications Technology (OICT) and the Verint Support System (VSS) to obtain additional evidence tracking the E-Mail. Currently, VSS is seeking to retrieve data from the internal servers that support the system to track the E-Mail. They have been advised of the urgency of the matter and the Respondent has been assured that they are making their best endeavours to retrieve the information as soon as possible. Despite these efforts, to date, VSS has been unable to obtain the data. As soon as this information is accessed, it will be provided to the Tribunal.

... The Respondent confirms that the E-Mail was sent to the Applicant on 23 September 2015 and he was informed that the assessment link was active and he could take the assessment until Friday 25 September 2015 at 11 A.M. (New York Time). These instructions are verified by the E-Mail, which will be produced as soon as it is available to the Respondent.

Order 17:

... With regards to the status of recruitment process for JO42096, Chief, ATS, D1, the evaluation and assessment process for the position has been completed and the list of recommended applicants

has been submitted to the Central Review Body (CRB) for review and endorsement. The CRB is currently conducting its review.

10. Later the same date, at 12:27 p.m., the Respondent filed an additional submission in which he informed that:

... On 27 January 2016, in response to Order No. 17 (NY/2016), the Respondent informed the Tribunal that the list of recommended applicants for the position of Chief, ATS, D1, had been submitted to the Central Review Body ["CRB"] for review and endorsement. Subsequent to this filing, at around 10am this morning, the Executive Office of the Departments of Peacekeeping Operations and Field Support received notification that the CRB had endorsed the selection process.

... On 29 November 2015, the Under-Secretary-General for Field Support (USG/DFS) made a conditional selection decision of one of the candidates for the position subject to the CRB endorsing the selection exercise. Upon endorsement by the CRB, this conditional selection decision became final. Accordingly, the selection exercise is completed and a selection decision has been made.

... The Respondent will not implement the selection decision prior to receiving the ruling of the Tribunal in this matter.

11. At 4:08 p.m. on the same date, the Respondent filed a further submission with the following content:

On 27 January 2016, in response to Order No. 16 (NY/2016), the Respondent informed the Tribunal that the Verint Support System (VSS) located in Valencia, Spain, was seeking to obtain additional evidence tracking the e-mail sent to the Applicant on 23 September 2015 (E-Mail). Appended as R/7 is a screenshot of the record held in Valencia, verifying that the E-Mail was sent out from the Examination and Tests Section (ETS) Server, using the Verint/Vovici platform, to the Hotmail Address. VVS cannot provide a copy of the E-Mail. Respondent's Counsel has been advised that the records filed as R/5, R/6 and R/7 are the complete records held by ETS and VVS verifying that the E-Mail was sent.

Background

12. The following outline of facts is based on the parties' submissions as well as the documentation on file.

13. On 19 June 2015, the Applicant applied for the Post, Job Opening No. 42096, Chief of Air Transport Section at the D-1 level, through Inspira (the online United Nations jobsite). In the Personal History Profile ("PHP") submitted with his application, the Applicant noted his email address as his United Nations address and also indicated his personnel email account, which is listed as an alternative account in his Inspira profile.

14. At an unknown time, before 23 September 2015, the Exam and Test Section in the Office of Human Resources Management ("ETS/OHRM"), which was responsible for administrating the written test for the Post, sent it to the Applicant's United Nations email address. The Respondent further submits that:

... In response, ETS/OHRM received a delivery failure notification. Despite the terms of the Manual for Applicants, ETS/OHRM proactively undertook steps to identify an alternative email address for the Applicant. Specifically, ETS/OHRM reviewed the Applicant's data ... and identified the Applicant's alternative Hotmail Address [the Applicant's private email address], then contacted the office of the Hiring Manager to verify that this Hotmail Address was active and in use. The office of the Hiring Manager confirmed that the Applicant had recently communicated with them using the Hotmail Address.

... Albeit that the instructions to candidates indicate that circulation of the test will be limited to the email address nominated as the primary address, ETS/OHRM emailed the written assessment to the Applicant's [private email address] ... The screenshot appended ... demonstrates that the written test was sent to both the United Nations Address and [the Applicant's private email address].

15. The Respondent submits in evidence a screen shot from "the Verint/Vovici platform" by which the written test was administered and which shows that, on 23

September 2015 at 9:05:39 a.m., the written test was sent to the Applicant's private email address along with an invitation to complete it. According to the submissions of the Respondent, the deadline for completing the test was on 25 September 2015.

16. In his 24 January 2016 submission, the Applicant contends that,

While a Respondent has produced a screen shot of the test campaign status and the details written in the email, there is no evidence of a delivery receipt and or read receipt. With evidence of either the Applicant would immediately withdraw the case. The Respondent clearly states the Administration had received a delivery failure to the [United Nations] email address; therefore, a delivery receipt should also be available for the email sent to the Hotmail account. While the screen shots show an input, as with many emails, there are occasions when the mail is held in the "outbox", but never actually sent. Additionally, I notice on the screen shot of the actual drafted email there are options for another 4 reminder emails. If there was not an acknowledgement from the Applicant's side, why were these not used?

17. On 29 November 2015, the Under-Secretary-General for Field Support made a conditional selection decision of one of the candidates for the Post, subject to the CRB endorsing the selection exercise.

18. On 9 December 2015, the Applicant emailed a staff member in the Department of Peacekeeping Operations ("DPKO") and/or the Department Field Support ("DFS"), stating his surprise that he did "not get a look in" for the Post as he had answered "no" to some of the screening questions, for which reason, he speculated, he was "probably screened ... out in Inspira".

19. On 14 December 2015, the DPKO/DFS staff member responded to the Applicant by email explaining that the Applicant had been shortlisted and invited to take the written test for the Post but that "the system shows that you did not participate". The staff member asked the Applicant whether he had received the written test.

20. On 15 December 2015, the Applicant responded via email to the DPKO/DFS staff member, stating that,

Re [the Post] I never received an invite for the test. My Inspira application clearly stated that my contact was my hotmail account. If the invite was sent mistakenly to my UN lotus account it was deactivated in UNSOA and my new OUTLOOK account has only been recently re-opened.

21. On the same date, the DPKO/DFS staff member responded the Applicant by email that “the recruitment, tests etc were done by the hiring manager, and unfortunately it is too late”.

22. On 28 December 2015, of relevance to the present case, the Applicant emailed a number of United Nations staff members as follows:

... Lastly, and more importantly, referring to the email below concerning the D1 Chief of Air Transport, I had passed the screening but never received the test and now have been ruled out of the process. I checked with [...] and she informed me that the test had first been sent to my suspended UN account and had bounced back. She then mentioned that the test was then sent to my Hotmail account from “Assessment”. My PHP clearly states that my contact email is my Hotmail account. I have received emails in Hotmail from the United Nations “Assessment” account before for other vacancies, and I did check junk and I never received the test. I would be grateful if you could look into this issue as a matter of urgency and if indeed an email was sent please could you give me the time and date so I can check once again. There should be an electronic footprint if the test was sent.

I ask this because as a rostered D1 and ex Chief of Aviation of one of the largest UN aviation fleets and as an internal candidate, I would be a competitive candidate. As the recruitment process is ongoing I am planning to submit a case to [Management Evaluation Unit, “the MEU”] for a Suspension of Action against this recruitment and I have a strong argument that the process it is not fair and transparent. However, I do not want to start the process if the mistake is mine and I somehow missed the email.

23. To his application for suspension of action, the Applicant appends a copy of his undated request for a management evaluation. In the application, the Applicant

indicates that he submitted the request on 15 January 2016, which the Respondent does not contest in his submissions.

24. On 27 January 2016, the Executive Office of the Departments of Peacekeeping Operations and Field Support received notification that the CRB had endorsed the selection process. According to the Respondent, the selection decision will not be implemented prior to receiving the ruling of the Tribunal in the present case.

Consideration

The competence of the Dispute Tribunal

25. The United Nations Appeals Tribunal ruled in *O'Neill* 2011-UNAT-182 (affirming UNDT/2010/203) that “the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties”. The Tribunal is therefore mandated to review its competence.

26. Pursuant to art. 2.2 of its Statute, the Dispute Tribunal:

... shall be competent to hear and pass judgment 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 ...

27. Article 8.1(c) of the Tribunal’s Statute states that an application shall be receivable if:

... (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

28. Staff rule 11.2 (Management evaluation) of ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations) provides that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of

employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

29. Article 13.1 of the Tribunal's Rules of Procedure states that:

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.

30. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- c. The impugned administrative decision appears *prima facie* to be unlawful;
- d. The case is of particular urgency;
- e. The contested decision has not yet been implemented; and
- f. Its implementation would cause irreparable damage.

Ongoing management evaluation

31. An application under art. 2.2 of the Statute is predicated upon an ongoing management evaluation of the contested decision.

32. The Applicant submits that he forwarded his request for management evaluation on 15 January 2016. This is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation has been initiated by the Applicant prior to the filing of the application for suspension of action. The Tribunal notes that there is no evidence on the record that the MEU has completed its evaluation. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending, that the contested decision is the subject of an ongoing management evaluation and that the first condition is fulfilled.

The application concerns an administrative decision that may be properly suspended by the Tribunal

33. As the Dispute Tribunal stated in *Hocking et al.* 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 the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision.

34. The Respondent contends that:

... In the case of *Nguyen-Kropp & Postica*, 2015-UNAT-509, the Appeals Tribunal held that as a general principle, "tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and [...] the Administration must be left to conduct these processes in full and to finality" (para. 32). The Appeals Tribunal observed that "certain administrative processes, such as a selection process ... are preparatory decisions or one of a series of steps which lead to an administrative decision. Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences". (para. 33).

... In *Ishak*, 2011-UNAT-152, the Appeals Tribunal ruled that a selection process involved a "series of steps of findings which lead to the administrative decision' and these steps can only be challenged in

the context of an appeal against the outcome of the selection process['] (paras. 19,26 and 29; Also see, *Ngokeng*, 2014-UNAT-460).

... In this case, the administration of the written assessment for the [Job Opening] was one of a series of preparatory steps which will, eventually, lead to a final selection decision. This final selection decision, when it is made, may be appealed. At this time, no administrative decision has been taken and no appeal may be brought. The Administration must be left to complete its internal processes and conduct the selection exercise to its finality.

35. The Applicant contends that:

To have a recruitment process that cannot be challenged until its conclusion when another candidate has been chosen or Rostering has been taken place seems to go against the United Nations philosophy and an open fair and transparent process. All that Applicant is asking is to be included retroactively in the process especially when he was deemed eligible and the process is not complete

36. The Tribunal notes that the Appeals Tribunal in *Abassi* 2011-UNAT-110 decided that:

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

37. In *Luvai* 2014-UNAT-417, the Appeals Tribunal further stated that:

31. It is established in the jurisprudence of this Tribunal that with regard to promotion cases, every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

38. The Tribunal concludes that the findings in *Ishak* 2011-UNAT-152 are no longer valid in the light of the latest jurisprudence with regard to promotion cases, according to which every stage of the selection procedure is subject to judicial review/appeal (*Luvai* 2014-UNAT-417). Therefore, a decision taken in any stage of

the selection process is an administrative decision which can be the object of an application for suspension of action pursuant to art.2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure if the case is deemed to be of particular urgency, is filed to prevent irreparable damage, and when the decision appears to be *prima facie* unlawful. The Tribunal is of the view that the main scope of the entire procedure established for a suspension of action pending management evaluation in promotion cases is to prevent at any stage, through the Tribunal's prompt intervention (as soon as possible), the continuation of a selection process which appears to be unlawful and ultimately the finalization of it by the issuance of an illegal selection decision.

39. Moreover, the Tribunal notes that, in the present case, the contested administrative decision is the decision to exclude the Applicant from the selection process following his failure to complete the online written test within the deadline, namely 25 September 2015. It results that the selection process for the Post ended for the Applicant when, based on his failure to complete the online written test within the deadline of 25 September 2015, he was not invited for any further assessment(s). This decision cannot be considered preparatory since it is final and applies individually to the Applicant, who was then not able to further participate in the selection process.

40. The Tribunal concludes that the application concerns an administrative decision that may properly be suspended by the Tribunal and the second condition is fulfilled.

Urgency

41. The Tribunal notes that according to art. 2.2 of the Dispute Tribunal's Statute and 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

42. The Tribunal notes that it is uncontested that, on 14 December 2015, the Applicant was informed that, "Although after the selection, for the Chief Air

Transport LSD, you were short listed and invited to take the written test, and the system shows that you did not participate”.

43. The present application for suspension of action was filed on 15 January 2016, a month after the date when the Applicant was first informed about the status of his candidacy for the Post. The Applicant has provided no reasons as to why he waited nearly four weeks to file the management evaluation request and the application for suspension of action. The Tribunal further notes that the Applicant indicated in his email from 28 December 2015 that he is planning to submit a case to the MEU for a suspension of action against the recruitment, but that this filing was only made two weeks later.

44. The Tribunal concludes that, also in the light of relevant jurisprudence, the urgency in the present case is self-created and the application therefore fails to meet the test of urgency.

45. Since one of the cumulative conditions required for ordering temporary relief under art. 2.2 of the Dispute Tribunal’s Statute and 13 of its Rules of Procedure has not been met, the Tribunal does not need to examine the remaining conditions, including the implementation of the decision, *prima facie* unlawfulness and irreparable damage.

Conclusion

46. In the light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 27th day of January 2016