



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

GORBYLEV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION PENDING THE
CONSIDERATION OF AN
APPLICATION FOR SUSPENSION OF
ACTION UNDER ART. 2.2 OF THE
DISPUTE TRIBUNAL'S STATUTE**

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA
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Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 7 December 2018, the Applicant, a G-4 Senior Legal Assistant working for the Office of Legal Affairs in New York, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal's Rules of Procedure, requesting that the decision of the Administration that he did not pass the first part of the 2018 Young Professional Programme ("YPP") written examination in Legal Affairs, and to exclude him from the second stage of which is scheduled to take place on 13 December 2018, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant art. 19 and 36 of the Dispute Tribunal's Rules of Procedure requesting the Tribunal to suspend the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute.

2. On 7 December 2018, the case was assigned to the undersigned Judge.

3. On the same day, the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 12:00 p.m. on 11 December 2018, together with all documentation related to the written test, including the job opening, the content of the written test, the marking guide for each element of the written test and the matrix with the results (containing total points for each part of the written test) for each candidate.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 13 December 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure, the Applicant's motion on suspension pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute was granted and that a reasoned written Order was to follow, which is the present Order.

Background

5. In the application for suspension of action, the Applicant submitted the following facts.

6. The Applicant joined the United Nations on 11 October 2017 as a G-4 Legal Assistant working for the Office of Legal Affairs in New York. On 11 July 2018, the Applicant applied for the YPP examination in Social Affairs as a “G to P” candidate.

7. On 7 August 2018, the Applicant applied for the YPP examination in Legal Affairs as an external candidate. At the time of his application, the Applicant did not fulfil the eligibility criteria to apply as a G to P candidate, although met all the eligibility requirements as an external candidate.

8. On 17 September 2018, the Applicant was convoked to sit the first part of the YPP written examination in Legal Affairs to be held on 25 October 2018. He was further informed that “[o]nly those who meet the cut-off set from this stage will be invited to the second stage (to take place online on 13 December 2018).”

9. In preparation for the exam, the Applicant registered for a YPP Test Preparation Webinar to be held on 8 October 2018. However, when the Applicant attempted to participate in the webinar, he was unable to join the webinar due to a connection failure, even though the webinar was broadcast from New York and he was located in New York. The applicant understands that other colleagues who had registered for the same webinar were also unable to participate in the session because of similar connection failures.

10. On 16 October 2018, the Applicant received instructions on how to take the exam online. He was provided with access to the online testing system and informed that he had 2 hours and 30 minutes to complete the exam. He was also informed that a practice exam had been made available. He was encouraged to attempt the practice exam through the same online testing system prior to the actual exam.

11. On 24 October 2018, the Applicant attempted the practice exam. However, halfway through the practice exam, the testing platform became unresponsive and gave the blank window and error message “504 Gateway Timeout”. He refreshed the browser repeatedly but still the problem was not resolved. In the meantime, he was able to access other websites. It was clearly a problem only with the YPP testing system. The Applicant immediately submitted a ticket to report the error he received.

12. The Applicant received a response to the ticket he raised only the following day, at 4:32 a.m. on 25 October 2018, the date of the actual exam and just 28 minutes before the start of the exam window. He was advised to try several steps, including, to refresh the webpage, restart network devices, change his DNS servers and try a different VPN.

13. The Applicant had attempted some of these steps, including refreshing the web page and restarting his network devices. However, he did not know how to try the other more sophisticated steps of changing his DNS servers or trying a different VPN.

14. He did not have the chance to attempt the practice exam again to verify whether the problem had been solved because the time window to do so ended on 25 October 2018 at 05:00 a.m.

15. On 25 October 2018, the Applicant sat for the exam. The test itself comprised of two sections. The first part consisted of two written papers and the second was a multiple-choice exercise.

16. While the Applicant was answering the multiple-choice question part of the exam, he again faced the same connection issues as he did with the practice exam. Sometimes he was unable to enter his answers and to click to proceed to the next page. As a consequence, the Applicant lost some time during the exam when the webpages became unresponsive.

17. The following day, on 26 October 2018, the YPP team acknowledged the technical problems with the test site. It announced that they “have records through the testing system of all those that experienced technical issues and will make sure that candidate outcomes are not negatively affected by this.”

18. On 3 December 2018, the Applicant was informed that he did not pass the first part of the written examination and will not be invited to the second part of the written exam on 13 December 2018.

19. On 7 December 2018, the Applicant submitted a request for Management Evaluation challenging the Office of Human Resource Management (“OHRM”) decision to exclude him from the second stage of the YPP written examination.

Applicant’s submissions

20. The Applicant’s principal contentions are as follows:

Prima facie unlawfulness

a. It is trite law that a selection exercise is an ongoing process until a selection decision is made. The written test is normally the first step in the process. 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 a candidate’s career if the unfairness of the initial step is established.

b. In this instance, the Applicant seeks to challenge the conduct of the written assessment. As enunciated by Appeals Tribunal in the case of *Riecan* 2017-UNAT-802, there is a presumption of regularity in which any staff member challenging a non-selection must establish at the *prima facie* level that there were serious and reasonable doubts regarding the process of recruitment.

c. In this case, the Applicant contends that the technical failures in the online test as well as subsequent treatment of this matter by the OHRM serve to challenge the presumption of regularity. First, numerous server failures that occurred during the on-line examination prevented the Applicant from being having sufficient time to respond to the questions. Second, although OHRM states that they will make sure that “candidate outcomes are not negatively affected by this”, it is not clear what steps, if any, have been taken to guarantee this.

d. When reviewing these irregularities, the Tribunal must address whether the Applicant had a likelihood of promotion had the Organization adhered to the applicable Rules and Regulations and/or treated all the candidates equally. In the UNAT case of *Vangelova* 2011/UNAT/172, and *Bofill* 2011/UNAT/174, the Appeals Tribunal held that:

“An irregularity in promotion procedures will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation”.

e. In this case, the Applicant submits that he would have had a significant chance of being selected for a professional post through the YPP roster were it not for the irregularities in the written examination exercise as highlighted above. The Applicant did not take this exercise lightly as such an opportunity for General Staff members to access the Professional category comes only once every two or four years. The Applicant would have been shortlisted for the second phase of the written test but for the technical failures in conducting a fair recruitment process, for which the Administration should take the full responsibility.

Urgency

f. On 3 December 2018, the Applicant received a notification that he had not reached the passing threshold of the first stage of the written assessment. The second stage of the written assessment is to be held on 13 December 2018.

g. On 7 December 2018, the Applicant filed a Management Evaluation Request challenging OHRM's decision.

h. If the implementation of the examination process is not suspended, the Applicant will stand no chance of being properly considered for the position. This gives rise to urgency and justifies the granting of an order staying the implementation of the administrative decision.

Request for suspension pending proceedings on suspension of action

i. The circumstances of the case are of such urgency that the Applicant respectfully requests an order be made as in *Villamorán* 2011-UNAT-160. In this case, the Applicant is aware that the next stage of the YPP examination is scheduled for 13 December 2018. If the Administration does not rescind its decision or find an alternative solution to allow the Applicant to compete for a Professional grade by 13 December 2018, the Applicant will suffer the harm described above.

Irreparable damage

j. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual. It is submitted that the implementation of the selection decision at this stage would damage the Applicant's career prospects in a way that could not be compensated through financial means.

Consideration

21. Articles 13.3, 19 and 36.1 of the Dispute Tribunal's Rules of Procedure state as follows:

Article 13 Suspension of action during a management evaluation

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

...

Article 19 Case management

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

Article 36 Procedural matters not covered in the rules of procedure

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

22. In *Villamorán* Order No. 171 (NY/2011) dated 7 July 2011, the Dispute Tribunal suspended the implementation of two decisions pending its consideration of an application for suspension of action concerning those decisions filed before the Tribunal on 5 July 2011. The Tribunal stated:

7. In view of the fact that 7 July 2011 is the last working day before the Applicant's separation, I directed at the hearing, before 5 p.m. (close of business in New York), that the implementation of the contested decisions be suspended until further order.

8. Having considered the facts before it and the submissions made by both parties, the Tribunal determines that, in view of the complex issues in the present case, further submissions are required for the fair and expeditious disposal of the application and to do justice to the parties.

9. The Tribunal further considers that, given that the contested administrative decisions are due to be implemented today, it is

appropriate, in the special circumstances of the present case, to order the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action.

23. The Tribunal ordered that the implementation of the contested decisions be suspended until 5:00 p.m. on 12 July 2011, the deadline for the Tribunal to consider and decide on the application for suspension of action in accordance with art. 13 of the Rules of Procedure. The Respondent appealed the order.

24. In *Villamoran* 2011-UNAT-160, the Appeals Tribunal stated:

36. The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence [footnote omitted].

...

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

44. The Secretary-General contends that “[t]he last minute submission of an application for a suspension of action does not provide a legally sustainable basis to grant such a suspension, as was the approach of the Dispute Tribunal in the present case”. While we agree that the UNDT should have explicitly addressed this matter, a review of the record reveals that the decision to impose a break in service following the expiration of Villamoran’s fixed-term appointment was notified to her only on 23 June 2011. She made her request for management evaluation the same day and filed her request for suspension one week later, on 1 July 2011. The UNDT Registry informed her that she had used the wrong form and Villamoran refiled her submission, using the correct form, on 5 July 2011, two days prior

to the date the decision would be implemented. In light of the foregoing, we do not find that the urgency was self-created.

...

46. It follows from the above that the UNDT's decision to order a preliminary suspension of five days pending its consideration of the suspension request under Article 13 of the UNDT Rules was properly based on Articles 19 and 36 of the UNDT Rules. We find that the UNDT did not exceed its jurisdiction in rendering the impugned Order. The interlocutory appeal is therefore not receivable.

25. The Tribunal is of the view that, in accordance with the Appeals Tribunal's jurisprudence in *Villamorán* 2011-UNAT-160, the Dispute Tribunal has the competence to order a preliminary suspension of a contested administrative decision for up to five days pending its consideration of a suspension request under art. 13 of the Rules of Procedure in cases where the following cumulative conditions are fulfilled:

- a. The implementation of the contested administrative decision is imminent, that is, it will take place before the five days provided for under art. 13 of the Rules of Procedure have elapsed;
- b. The contested administrative decision is subject to the management evaluation review, which is ongoing; and
- c. The contested administrative decision subject to a preliminary suspension is the same administrative decision that is the subject of the application for suspension of action pending management evaluation.

26. Regarding the first condition, the Tribunal notes that, in accordance with art. 13 of the Rules of Procedure, the Tribunal has five working days from the date of service of the application for suspension of action on the Respondent, namely on 13 December 2018, to consider the request for suspension of action pending management evaluation of the contested decision. In the present case, the effective date of the second stage of the written assessment is 13 December 2018, on the

deadline provided for the Tribunal to consider the application for suspension of action and therefore the implementation is imminent.

27. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 7 December 2018, which is still ongoing.

28. In the form for the Applicant's request for management evaluation, he identified the decision subject to management evaluation as "the decision of the Administration that he did not pass the first part of the 2018 YPP written examination in Legal Affairs, and to exclude him from the second stage of which is scheduled to take place on 13 December 2018".

29. It results that the contested administration decision subject to management evaluation is the same administrative decision as the one that is subject of the present application for suspension of action.

30. The Applicant indicated that, if the implementation of contested administrative decision is not suspended and the second stage of the written assessment is held on 13 December 2018, the Applicant will stand no chance of being properly considered for the position and the urgency appears not to be self-created. The Tribunal underlines that this matter is not at the merits stage.

31. The second and third conditions are therefore satisfied.

32. Pursuant to arts. 19 and 36.1 of the Dispute Tribunal's Rules of Procedure,

IT IS ORDERED THAT:

33. Without prejudice to the Tribunal's determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute, the implementation of the contested decision shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

Judge Alessandra Greceanu

Dated this 10th day of December 2018