



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

MUKUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION OF ACTION
PENDING MANAGEMENT
EVALUATION**

Counsel for Applicant:
Evelyn W. Kamau, OSLA

Counsel for Respondent:
Camila Fuomene Nkwenti Awa, UNEP
Isabel Martinez, UNEP
Christopher Archford Gitau, UNEP

Introduction

1. On 2 August 2019, the Applicant, an Administrative Officer at the P-3 level with the Secretariat of the Convention on Biological Diversity (“SCBD”) in Montreal, Canada, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision excluding the Applicant from participating in the competency-based interview for the position of Administrative Officer at the P-4 level and not selecting the Applicant for this position.

2. On the same day, The Tribunal granted the Applicant’s motion for interim suspension pending its final determination under the principles in *Villamorán* 2011-UNAT-160 and ordered the Respondent not to undertake any further steps regarding the contested recruitment until the determination of the present suspension of action application.

3. On 6 August 2019, the Respondent filed a reply contending that the application is not receivable and has no merit.

Factual background

4. On 14 June 2018, the job opening for the Administrative Officer at the P-4 level with SCBD in Montreal, Canada was advertised, and the Applicant submitted her job application. The Applicant submits that this position resulted from the reclassification of her position and she temporarily occupies this P-4 post.

5. The Applicant was shortlisted for having been found to meet both the required and desired elements of the evaluation criteria, and in February 2019, she was invited to take a written test in the form of multiple-choice questions to be completed within one hour. The Applicant received the highest score in the first written test.

6. After being informed of the outcome of the first written test, SCBD decided to invite the top four candidates to the interview. Subsequently, the Talent Management Center of the United Nations Office at Nairobi – Human Resources Management Services (“UNON-TMC”), who provided support for this recruitment exercise, recommended to SCBD that a second written test be administered on the grounds that two candidates, which included the Applicant, had finished the assessment in just over half an hour and had scored 90 percent or more while the remaining 27 candidates took closer to an hour to complete the test. SCBD agreed and decided to invite the top 10 candidates to the second written test.

7. On 12 April 2019, 10 candidates were invited to take the second written test. Among eight candidates who took the test, five candidates who scored the highest grade were invited to a competency-based interview. The Applicant was not among these five candidates and was not invited to a competency-based interview.

Consideration

8. Under art. 2.2 of the Dispute Tribunal’s Statute and art. 13.1 of the Rules of Procedure, the Tribunal 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 case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements have been met.

9. In the present case, the Respondent contends that the exclusion of the Applicant from the further recruitment process is not an administrative decision subject to judicial review since it constitutes a preliminary step which can be challenged only in the context of an appeal against the outcome of the selection process. In light of the Respondent’s challenge to the receivability of the application, the Tribunal will first address this issue.

Receivability

10. To challenge the receivability of the present suspension of action application, the Respondent relies on *Ishak* 2011-UNAT-152. In *Ishak*, the applicant challenged the decision not to promote him during the annual promotion session. The applicant was subsequently promoted after filing a recourse application. Nevertheless, the applicant sought administrative review and challenged the preliminary steps leading to the decision to promote him. In this context, the Appeals Tribunal held that “[t]hese steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the [Dispute Tribunal]”.

11. However, in the present case, the Applicant is not challenging the preliminary steps pending the outcome of the selection process concerning her candidacy. As far as her job application is concerned, she received the final decision which excluded her from further consideration. The decision to exclude the Applicant from further consideration has immediate effects in the Applicant’s conditions of service. Therefore, the present application is distinguishable from *Ishak*. As the Dispute Tribunal held in *Korotina* UNDT/2012/178, “the decision that the Applicant was ineligible signified the end of the process as far as she was concerned ... thus this decision cannot be described as merely preparatory”.

12. Accordingly, the Tribunal finds the present application receivable.

Prima facie unlawfulness

13. In considering whether to suspend an administrative decision pending management evaluation, the Dispute Tribunal’s Statute does not require the Tribunal to make a definitive finding that the decision is in fact unlawful. The test is not particularly onerous since all the Tribunal is required to do at this stage is to examine the material in the application and to form an opinion as to whether it appears that, if not rebutted, the claim will stand proven. Any such opinion is not a finding by the Tribunal and is certainly not binding should the matter go to trial on the merits. It is

merely an indication as to what appears to be the case at the suspension of action stage. Whether or not this initial impression is well-founded or not is a matter for determination after a full examination of the evidence in the event that a substantive claim is filed.

14. With regard to the present case, it is well established that the Secretary-General has broad discretion in matters of staff selection. When reviewing such decisions, the Tribunal shall examine “(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” (*Abbassi* 2011-UNAT-110, para. 23). The Appeals Tribunal further stated that “the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner” (*Ljungdell* 2012-UNAT-265, para. 30).

15. The selection procedure is governed by ST/AI/2010/3, as amended (Staff selection system). In particular, sec. 7.5 provides that “[s]hortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres”. While the Administration has broad discretion in choosing the assessment method under sec. 7.5 of ST/AI/2010/3, the regulations and rules should be applied “in a fair, transparent and non-discriminatory manner”.

16. In this case, after the Applicant was shortlisted and took the first written test, UNON-TMC informed SCBD the outcome of the written test, from which 10 candidates scored above 70 percent, and wrote, “[b]ased on the results the hiring team may want to consider a cut-off mark of 70 [percent]”. In response, SCBD decided to invite the top four candidates, who scored 75 percent and above, to the interview. UNON-TMC then provided SCBD with the test results with names of the applicants

so that the test score could be entered into Inspira. The Applicant was among the top four candidates for having received the highest score in the first written test.

17. Subsequently, UNON-TMC wrote back to SCBD and recommended that a second written test in the form of an open text essay be administered on the grounds that two candidates who scored above 90 percent finished the test in just over half an hour while the remainder of the candidates took closer to an hour. In response, SCBD reversed its previous decision to invite the top four candidates to the interview and decided to administer a second test to 10 candidates who scored 70 percent and above. Instead of a written test in the form of an open text essay, as recommended by UNON-TMC, SCBD decided to administer another written test in the form of multiple-choice questions.

18. Among 10 candidates who were invited to take the second written test, eight candidates took the test and SCBD decided to interview the top five candidates. The Tribunal notes that the Applicant received the sixth highest score. Based on the material before it, the Tribunal notes that there is no information as to when and how the passing grade for the second written test was determined.

19. Considering the recruitment process as described above, it appears that the Administration did not apply the regulations and rules in a fair and transparent manner. In particular, the Tribunal notes that, with regard to the first written test, the Administration initially decided the passing grade as 75 percent after learning the outcome of the test and changed the passing grade as 70 percent after learning the test results for each candidate. The Administration decided to add the second written test based on some vague and unjustified reason that two candidates finished the test too quickly and received the high scores. The Administration invited the top five candidates based on the test results of the second written test, but it did not provide any information to the Tribunal as to when and how the passing grade for the second written test was decided.

20. The Administration's conduct in administering the written tests is also inconsistent with its own Manual. Specifically, sec. 9.4.5 of the Manual for the Hiring Manager provides that "[w]ith the *pre-determined* passing grade, the assessors rate each individual applicant on the range of set indicators, using the prescribed performance scale and response guide" (emphasis added). While the Manual for the Hiring Manager does not have the legal force and does not vest a staff member with additional legal entitlement, it provides guidance on the responsibilities of the Hiring Manager (*Asariotis* 2015-UNAT-496, paras. 21-22). Therefore, the Tribunal can consider the Manual to decide whether the applicable rules were applied in a fair, transparent and non-discriminatory manner. It appears, based on the material before the Tribunal, that the Administration not only decided the passing grade after the outcome of the test was known, but also changed the passing grade and added the second written test after the test results for each candidate became known to the hiring team of SCBD.

21. In all the circumstances as described above, the Tribunal finds that the requirement of *prima facie* unlawfulness is satisfied.

Urgency

22. In light of the Administration's communication on 25 July 2019 that the recruitment process will continue, the Applicant submits that the contested selection decision can be implemented anytime and therefore urgent. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of particular urgency is satisfied.

Irreparable harm

23. The Tribunal recalls that in *Khalouta* Order No. 138 (NY/2014), para. 21, it said:

... Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in

terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money...

24. The Applicant submits that she has a continuing appointment, and she would be left without a job due to the contested decision since the contested post was upgraded from the Applicant's post. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of irreparable damage is satisfied.

25. All three elements for the grant of an order for suspension of action are satisfied.

IT IS ORDERED THAT:

26. The application for suspension of action is **GRANTED**.

(Signed)

Judge Joelle Adda

Dated this 9th day of August 2019