



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

NOBERASCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Cornelius Fischer, UNOG

Introduction

1. On 11 October 2017, the Applicant, a Senior Staff Assistant at the GS-6 level, step 11, with the Library in the United Nations Office in Geneva, filed the application in which she contests the decisions (a) not to select her for the position of Personal Assistant to the High Commissioner at the G-7 level with Job Opening no. 68685 and (b) to exclude her from the recruitment process on the ground that she did not submit the written test within the specified time.
2. The case was registered with the Dispute Tribunal's Registry in Geneva under Case No. UNDT/GVA/2017/076 and assigned to Judge Bravo.
3. On 13 November 2017, the Respondent duly filed the reply in which he contends that the application is without merit.
4. By email of 16 November 2018, the Geneva Registry informed the parties that case was transferred to the New York Registry to ensure judicial efficiency and the expeditious disposal of cases.
5. By email of 10 January 2019, the New York Registry informed the parties that the case had been registered in New York under Case No. UNDT/NY/2018/65.
6. On 4 November 2019, the case was assigned to the undersigned Judge.

Consideration

The issues of the present case

7. The Appeals Tribunal has consistently held that the Dispute Tribunal's judicial review is limited and often refers to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further

held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.

8. Specifically regarding promotion (and selection) cases, the Appeals Tribunal has adopted the principle of regularity by which if the Respondent is able “to even minimally show that [an applicant’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied” after which the applicant “must show through clear and convincing evidence that [s/he] was denied a fair chance of promotion” in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

9. Regarding how to define the issues at stake, the Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

10. In the present case, in essence, the Applicant submits that a number of alleged irregularities rendered the selection exercise unlawful, whereas the Respondent contends that the Applicant’s candidature received a full and fair consideration and that even if any of these irregularities had actually occurred, the Applicant would not have been eligible for the interview round as she did not pass the written test.

11. Accordingly, the basic issues of the present case can be defined as follows:

- a. Was the written test properly administered or did any irregularities, procedural or substantive, occur?
- b. Were any of the alleged irregularities in the assessment process of “such a nature that, had [they] not occurred, [the Applicant] would have had a

foreseeable and significant chance for promotion” (see para. 48 of *Ross* 2019-UNAT-926)?

c. If the selection process was flawed, what remedies is the Applicant entitled to?

Case management

Evidence

12. The Tribunal notes that neither party has requested production of any further evidence. Appended to the reply, the Respondent, however, filed various annexes on an *ex parte* basis in an apparent effort to hide personal or otherwise confidential information of some of the other candidates in the selection exercise.

13. The Tribunal observes that, it is not its function to plead the parties’ cases, including by redacting the written evidence that they file when relevant and necessary. The Tribunal further observes that written evidence should only be filed on an *ex parte* basis in genuinely exceptional cases (see, for instance, *Abu Jarbou* 2013-UNAT-292, para. 33: “Generally, *ex parte* communications between parties and the Tribunal are the antitheses of transparency and should never take place during a proceeding”). Not even intending to undertake the most basic and obvious redactions of the relevant written documentation or providing any explanations why an annex should be accepted *ex parte* is therefore a waste of judicial resources, which leads to unnecessary delays instead of a “fair and expeditious disposal of the case” in accordance with art. 19 of the Dispute Tribunal’s Rules of Procedure.

14. The Tribunal will therefore order the Respondent to refile those annexes that he finds relevant in a redacted form and amend his reply accordingly.

Factual submissions

15. In the reply, the Respondent submits that he “contests all facts or matters brought forth by the Applicant except where expressly admitted in this Reply”. When

perusing the reply, the Respondent, however, nowhere expressly admits anything submitted by the Applicant, which leads the Tribunal to the conclusion that the Respondent is challenging all submissions made in the application, including those factual stipulations that appear to be uncontroversial (some are even repeated in the reply, but not admitted) or directly corroborated by written documentation.

16. Based on the reply, it is therefore impossible for the Tribunal to understand what the Respondent is actually contesting. The Tribunal notes that the approach of the Respondent to purely challenge everything in the application is entirely unhelpful under art. 19 of the Dispute Tribunal's Rules of Procedure, as quoted above, and further notes that art. 4 of the Code of conduct for legal representatives and litigants in person before the Dispute Tribunal regarding "basic standards" provides that:

1. Legal representatives and litigants in person shall maintain the highest standards of integrity and shall at all times act honestly, candidly, fairly, courteously, in good faith and without regard to external pressures or extraneous considerations.
2. Legal representatives and litigants in person shall act diligently and efficiently and shall avoid unnecessary delay in the conduct of proceedings.
3. Legal representatives should encourage and facilitate dialogue between the parties with a view to settling disputes in appropriate cases.
4. Legal representatives shall maintain the highest standards of professionalism and shall act in the best interests of the party they represent, subject always to upholding the interests of justice and ethical standards.

17. Accordingly, the Tribunal will order the parties to file a jointly-signed submission in which they outline the agreed and contested facts.

Closing

18. As the Tribunal otherwise finds that the case is fully informed, subsequent to the Respondent amending his reply and redacting the appended annexes and the

parties filing the jointly-signed submission, the Tribunal will order the parties to file their closing statement in a sequenced order.

IT IS ORDERED THAT:

19. By **4:00 p.m. on Tuesday, 19 November 2019**, the Respondent is to file an amended reply and, as relevant and necessary, redact all personal and otherwise confidential information in the appended annexes. The Respondent is only to file written documentation on an *ex parte* basis in genuinely exceptional cases;

20. By **4:00 p.m. on Tuesday, 26 November 2019**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

21. By **4:00 p.m. on Tuesday, 3 December 2019**, the Applicant is to file her closing statement that is solely to be based on the submissions and evidence already on record. The statement is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

22. By **4:00 p.m. on Tuesday, 10 December 2019**, the Respondent is to file his closing statement as a response to the Applicant's closing statement. The statement is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

23. By **4:00 p.m. on Friday, 13 December 2019**, the Applicant is to file her final observations responding to the Respondent's closing statement. The statement is to be two pages maximum, using Times New Roman, font 12 and 1.5 line spacing.

(Signed)

Judge Joelle Adda

Dated this 5th day of November 2019