



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

AL ASSAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR SUSPENSION
OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Federica Midiri, UNDP

Introduction

1. On 9 March 2020, the Applicant, an Investigation Specialist at the P-3 level in the Office of Audit and Investigation (“OAI”) with the United Nations Development Programme (“UNDP”) in New York, filed an application requesting, under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, suspension of action pending management evaluation of the decision finding her ineligible for the post of Investigation Specialist at the P-4 level in OAI (“the Post”). Due to technical issues, the Tribunal only received the application on 13 March 2020.

2. On 13 March 2020, by email, the Tribunal ordered the Respondent not to undertake any further steps regarding the contested recruitment until the determination of the present suspension of action application, under *Villamorán* 2011-UNAT-160.

3. On 17 March 2020, the Respondent filed a reply.

4. On 18 March 2020, the Applicant filed a response to the Respondent’s reply.

Factual background

5. On 17 December 2019, the vacancy announcement for the Post was advertised, and the Applicant submitted a job application on 2 January 2020. The Post required, among other things, “a minimum of 7 years of progressively responsible professional experience in complex criminal and/or administrative investigations including the investigation of sexual harassment”.

6. The Applicant was shortlisted for the Post and took a written test, which she successfully passed. Subsequently, she was interviewed for the Post.

7. According to the Respondent, after the interview, a Human Resources Specialist, one of the interview panel members, raised an objection to the candidacy of the Applicant on the basis that she did not possess the required seven years of

experience. The Human Resources Specialist objected to counting the Applicant's experience as a "resettlement interpreter" as qualifying experience, without which the Applicant only had six years and three months of qualifying experience at the date of her application for the Post.

8. On 5 March 2020, upon learning from her supervisor, who was on the interview panel, that she was found ineligible for the Post for lack of the requisite work experience, the Applicant wrote an email to the supervisor stating that she was extremely disappointed that the Office of Human Resources ("OHR") "has arbitrarily decided to deny the interview panel's decision to award [her] the open P4 investigator position" even though she "achieved the highest score". On the same day, the Applicant's supervisor responded that he spoke to the Director of OAI who said that OAI could not "go against OHR which was adamant that [she was] ineligible for the position".

9. On 6 March 2020, the Applicant requested a management evaluation of the decision to "deny [her] a P4 position" by finding her not having the requisite seven years of relevant work experience and denying OAI's request to grant her an exception to the requirement.

10. On 9 March 2020, the Director of OAI signed and submitted the selection recommendation to the Compliance Review Board, recommending another candidate. In the submission, the Director of OAI wrote that he decided to accept OHR's decision that the Applicant does not meet the minimum requirements for the Post, and therefore the interview panel decided not to recommend the Applicant for the Post. Appended to this submission was a memorandum from OHR to the Director of OAI, in which it was explained why OHR considered that the Applicant lacked the requisite relevant work experience. In the memorandum, OHR noted that while a minimum relevant experience requirement can be waived "where a business case is made" under UNDP's Recruitment and Selection Framework Policy, para. 59, "there is no compelling business case warranting an exception permitting [the Applicant] to be selected" given that the interview panel identified another fully qualified, internal

female candidate. OHR further wrote that “making such an exception would carry a high legal and reputation risk should the other fully recommended candidate challenge the outcome in favor of a candidate who did not meet the minimum criteria for consideration”.

Consideration

11. 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.

Prima facie unlawfulness

12. 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 unlawful. The test is not particularly onerous since all the Tribunal is to do at this stage is to decide as to whether it appears that, if not rebutted, the claim will stand proven on a *prima facie* basis. Any such determination is not binding should the Applicant subsequently file an application on the merits and the matter would proceed to a full judicial review. It is merely an indication as to what appears to be the case at this preliminary stage.

13. Before reviewing the application for suspension of action, the Tribunal notes that the Respondent argues that the Applicant is challenging a decision that does not exist on the ground that the Applicant is contesting a decision made by OHR. The Respondent argues that OHR did not make any decision but only gave advice to the hiring manager.

14. The Tribunal recalls 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” and as such “may consider the application as a whole ... in determining the contested or impugned decisions to be reviewed” (*Fasanella* 2017-UNAT-765, para. 20).

15. Based on the review of the application and the request for management evaluation, the Tribunal defines the contested decision as the Administration finding her ineligible for the Post because she did not meet the seven years of work experience requirement and refusing to grant her an exception to the work experience requirement. The issue is whether this decision is *prima facie* unlawful.

16. 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 decisionmaker’s decision”.

17. 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” where after 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).

18. Paragraph 59 of UNDP’s Recruitment and Selection Framework Policy provides that “[o]nly candidates who fully meet the required qualifications for the position, as specified in the vacancy announcement, may be short-listed for the post”

but “candidates who are within six months of the minimum relevant experience requirement may be considered in situations where a business case is made”.

19. In this case, the Administration found that the Applicant does not have the required seven years of relevant experience for the Post, and decided that a business case was not made to allow an exception to the minimum work experience requirement. The Applicant argues that OHR incorrectly read her resume to decide that her experience as a “resettlement interpreter” does not count, explaining her job responsibilities as a resettlement interpreter in detail.

20. However, the Tribunal’s role is not to substitute its decision for that of the Administration when it comes to the evaluation of job candidates. Considering the Administration’s broad discretion in matters of staff selection, the Tribunal is not satisfied that the decision to find the Applicant ineligible for the Post for lack of the requisite work experience and to refuse to waive such requirement is *prima facie* unlawful.

21. The Applicant further argues that OHR’s interpretation of her work experience contradicts the previous decision to select her for her current position since she would not have met the minimum requirement for the P-3 position at the time if her experience as a “resettlement interpreter” was excluded. The Tribunal also notes that under para. 59 of UNDP’s Recruitment and Selection Framework Policy, only candidates who fully meet the requirements may be shortlisted for the Post, and yet the Applicant was shortlisted, was invited to and passed the written test, and was interviewed, only to be found ineligible for the Post for not meeting the minimum requirement subsequently.

22. However, the Appeals Tribunal held that “the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration” (*Cranfield* 2013-UNAT-367, para. 36). It is not the role of the Tribunal to review the Applicant’s previous selection. However, even if, assuming *arguendo*, the

Administration made mistakes by selecting the Applicant for her current position at the P-3 level and by shortlisting her for the Post, it has the discretion to correct its earlier mistakes.

23. The Applicant also claims OHR impeded the work of the interview panel and arrogated to itself the hiring manager's responsibility for the recruitment and selection process. The Tribunal notes that para. 98 of UNDP's Recruitment and Selection Framework Policy provides that while the authority for the recruitment and selection of staff has been delegated to the Directors of Independent Offices, such as OAI, the Director of OHR "[r]etains oversight authority over the application of recruitment and selection policies and processes. This delegated authority requires that all recruitments and selection policies are made in accordance with the applicable UNDP recruitment policies and Staff Regulations and Rules".

24. It does not appear that OHR exceeded its delegated oversight authority as set forth above by advising the hiring manager that the Applicant did not meet the minimum work experience requirement. The record also shows that the Director of OAI decided to follow OHR's advice and recommend another candidate.

25. In all the circumstances as described above, the Tribunal finds that the Applicant has not satisfied the requirement of *prima facie* unlawfulness.

Urgency and irreparable harm

26. As the Applicant has not satisfied the requirement of *prima facie* unlawfulness, it is not necessary for the Tribunal to examine the two other conditions, namely urgency and irreparable harm.

IT IS ORDERED THAT:

27. The application for suspension of action is rejected.

(Signed)

Judge Joelle Adda

Dated this 19th day of March 2020