



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

FARRIMOND

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Simon Buettner, UNOG

Introduction

1. The Applicant is a P-4 Interpreter at the United Nations Office at Geneva (“UNOG”), with the Department for General Assembly and Conference Management, Division of Conference Management (“DGACM”). On 20 December 2013, she filed an application for suspension of action, pending management evaluation, of the decision not to select her for one of the posts of Senior Interpreter (English) P-5, Job Opening No. 13-LAN-UNOG-27767-R-GENEVA (L) (“contested posts”).

Facts

2. The Applicant was placed on the roster of pre-approved candidates (“roster”) for the post of English Interpreter at the P-5 level in May 2013. The contested posts were advertised on 16 April to 15 June 2013 and the Applicant applied in June 2013. The Human Resources Management Section (“HRMS”) at UNOG found nine eligible candidates; out of which seven—including the Applicant—were rostered candidates and their names were forwarded to the Hiring Manager for his consideration. The Hiring Manager decided to review only the seven rostered candidates.

3. Between 31 July 2013 and 20 August 2013, communication ensued between the Applicant and the Hiring Manager regarding the consideration of her candidature for the contested posts. On 20 August 2013, the Hiring Manager recommended the names of two other candidates, one male and one female, to HRMS, to fill the contested posts.

4. Consequently, on 10 September 2013, the Applicant requested management evaluation of the decision of 20 August 2013 not to include her name on the list of recommended candidates for the contested posts. On the same date, the Applicant filed an application for suspension of action with the Tribunal, which was assigned case No. UNDT/GVA/2013/049, seeking suspension of the decision not to recommend her for the contested posts.

5. In his response to this application, the Respondent submitted to the Tribunal that the Administration had reversed said decision. HRMS had submitted that the 20 August 2013 decision contained some inconsistencies in relation to the justification made by the Hiring Manager regarding the two selected candidates, lacked a detailed comparative analysis of all rostered candidates and more clarification were needed to be complied with the selection procedures.

6. In light of the rescission of the decision of 20 August 2013, the Tribunal, by Order No. 132 (GVA/2013) of 17 September 2013, found that the Applicant's request for suspension of action was moot. The Tribunal took note, however, of the Respondent's submission that the names of the rostered candidates in relation to the contested posts would be submitted to the Acting Director-General for final selection, together with an analysis on the gender representation of women in higher-level posts within UNOG.

7. On 9 December 2013, the Hiring Manager submitted to HRMS a new list of recommended candidates, which included a comparative analysis of all seven rostered candidates in alphabetical order, which was subsequently forwarded to the Acting Director-General for selection.

8. On 12 December 2013, the Acting Director-General selected Mr. A.D. and Ms. E.P. for the two contested posts. Subsequently, on 13 December 2013, the two selected candidates were informed of their selection and the Applicant became aware of this decision when she logged into her Inspira account on the same day.

9. On Friday, 20 December 2013, the Applicant requested management evaluation of the decision not to select her for one of the contested posts and also filed an application for suspension of action of the same decision with the Tribunal, after end of business.

10. Since 21 and 22 December 2013 were a weekend, the Registry received the application on 23 December 2013 and served it on the Respondent on the same date and required him to file a reply on 26 December 2013.

11. The Tribunal instructed the Respondent not to undertake, as from the date of service, any further steps regarding the appointment against the contested posts until the determination of the application for suspension of action.

12. On 26 December 2013, the Respondent filed his reply. Upon receiving the Respondent's reply, the Applicant, in an email to the Registry, requested the Tribunal to allow her to submit comments to the reply on grounds that some parts of the reply contained factual inaccuracies. By Order No. 198 (GVA/2013) of 27 December 2013, the Tribunal granted the Applicant's request and the Tribunal received the Applicant's comments on the Respondent's reply the same day.

Applicant's submission

13. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The earlier contested decision adjudicated upon in Order No. 132 (GVA/2013) was marked by bias towards the male candidate;
- b. The commitments made by the Administration in Order No. 132 (GVA/2013) have not been upheld because the two candidates selected in the flawed process contained in the 20 August 2013 decision are the same candidates that have been selected once again;
- c. The selected male candidate does not possess superior qualifications than her own;
- d. The selection decision could not have been taken in compliance with the commitment to do so based on names of the rostered candidates submitted to the Acting Director-General in alphabetical order together with a duly verified comparative analysis;
- e. The selection of the male candidate over an equally qualified female candidate contravenes ST/AI/1999/9 on Special measures for the

achievement of gender equality, because gender equality has not yet been achieved at the P-5 level in the English Interpretation Section;

f. The vacancy announcement for the contested posts was issued more than six months before the date of planned retirements, since they are aimed to fill up posts that would fall vacant after the retirement of two staff members therefore contravening ST/AI/2010/3 (Staff selection system);

Urgency

g. The decision to select the male candidate is due to be implemented on 1 January 2014;

Irreparable damage

h. Denial of fair chance of progression from the roster to a promotion for which she is better qualified than the selected candidates;

i. Given the plan to extend the retirement age in the Organization, then the next P-5 post may be expected in 2020; thus her career prospects will be severely damaged.

Respondent's submission

14. The Respondent's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The fact that the previous decision that was reversed and the current selection decision are similar is not an indication of unlawfulness;

b. All rostered candidates received full and fair consideration and the two selected candidates were the best qualified to fill the contested posts;

c. The Applicant has failed to show any procedural error or a *prima facie* case of bias towards her candidacy;

d. The Applicant's contention that she is better or equally qualified like the selected candidate is not sufficient since the Secretary-General has broad discretionary powers in making promotion and appointment decisions;

e. The comparative analysis between the Applicant and the selected male candidate Mr. A.D. indicates that the selected candidate has superior qualifications, hence fulfilling the requirement under the United Nations Charter to select the best suitable candidate for a post, therefore causing no violation of ST/AI/1999/9; and

f. The advertisement of the contested posts did not violate ST/AI/2010/3 (Staff selection system) regarding the duration of advertisement of posts to fill up posts due to become vacant as a result of retirement;

Urgency

g. The application is not urgent because the urgency is self-created by the Applicant, who filed her application for suspension of action seven days after she knew of the decision;

h. The Applicant is familiar with the internal justice system, therefore she should have been more prepared to file her application for suspension of action immediately after receipt of the decision not to select her;

Irreparable damage

i. The Applicant does not demonstrate how the implementation of the selection decision would cause her irreparable harm, because she has failed to show that she would have been selected had Mr. A.D. not been selected; and

j. There were three other female candidates on the list of recommended candidates therefore the Applicant could not prove that she would have been selected instead of Mr. A.D.

Consideration

15. Article 2.2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal provide that the Tribunal can suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage to the Applicant. All of these requirements must be met in order for a suspension of action to be granted.

16. In alleging that the selection decision is *prima facie* unlawful, the Applicant only challenges the selection of one of the successful candidates, Mr. A.D. therefore in making a determination, the Tribunal will restrict its analysis on the selection of Mr. A.D. to one of the contested posts.

Implementation of the contested decision

17. As a preliminary matter, it is worth recalling that a suspension of action is only possible regarding decisions which have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011), *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

18. The Respondent contends that the selected candidates were informed of their selection to the contested posts on 13 December 2013. However, the Tribunal notes that the letter of 13 December 2013 clearly informs Mr. A.D. that his promotion will be effective on 1 January 2014.

19. The structure of administrative instruction ST/AI/2010/3 (Staff Selection System) distinguishes between selection decisions on the one hand and their notification and implementation on the other (see sec. 9 and sec. 10 of ST/AI/2010/3).

20. Despite different jurisprudential approaches with respect to the determination of the proper date of the implementation of a selection decision, (see *Wang* UNDT/2012/080, *Tiwathia* UNDT/2012/109 and *Nwuke* UNDT/2012/116) there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's

unconditional acceptance of an offer of appointment (see *Quesada-Rafaraso* Order No. 20 (GVA/2013)). The Tribunal notes that such a procedure seems to be reserved for selection decisions which are taken in favour of an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

21. In the present case, the letters of 13 December 2013 did not contain any such unconditional offer to be accepted by the selected internal candidates, rather, it was a letter of information that required no undertaking on the candidates' part. This Tribunal is of the opinion that in matters of promotion and/or selection involving internal candidates, where the contractual relationship between the Organization and the candidate is already established, a selection and/or promotion decision is not implemented before the staff member takes up his/her functions in relation to the post and/or the intended date of promotion.

22. The Tribunal notes that promotion of the selected candidate Mr. A.D. is to take place on 1 January 2014. Accordingly, the selection decision has not yet been implemented and therefore, the application for suspension of action is receivable.

Prima facie unlawfulness

23. The Tribunal has repeatedly held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (see *Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Berger* UNDT/2011/134, and *Wang* UNDT/2012/080).

24. The Tribunal also recalls that, in reviewing decisions regarding appointments and promotions, it examines the following: (1) whether the procedure as laid down in the relevant provisions was followed; and (2) whether the staff member was given fair and adequate consideration (see *Nunez* Order No. 17 (GVA/2013), *Abbassi* 2011-UNAT-110).

25. Regarding the scope of judicial review with respect to decisions in selection and/or promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

26. The Tribunal now has to address whether the Applicant had a likelihood of promotion had the Organization adhered to the applicable Rules and Regulations and/or treated all candidates equally. In *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.

27. At the outset, there should be no doubt that the Applicant would have had a significant chance for promotion. She fulfils the requirements of the advertised posts and is one of the seven candidates who were transmitted for final decision to the Acting Director-General.

28. The Tribunal, while fully accepting the Secretary-General's broad discretion in selection and promotion matters, emphasizes that this discretion is not unfettered. Full and fair consideration of candidates requires that the assessment of their qualifications is based on established and relevant facts. With this standard in mind, in the present case, the Tribunal has serious and reasonable doubts regarding the assessment of Mr. A.D. and the Applicant as reflected in the comparative analysis, as will be further developed below.

Gender equality

29. In its examination of the actual assessment of the Applicant and Mr. A.D., the Tribunal took note of the Applicant's contention that in the English Interpretation Section where the contested posts are located, there is currently a gender imbalance and that her qualifications are superior to Mr. A.D., therefore she should have been the selected candidate, under ST/AI/1999/9 (Special measures for the achievement of gender equality).

30. The Respondent avers that the Applicant's qualifications were not substantially equal or superior to those of Mr. A.D., additionally that currently, there are three male and two female staff members at the P-5 level in the English Interpretation Section. Consequently, the selection of Mr. A.D. would leave the "gender balance untouched", implying that the two staff members whose posts are to be filled (the contested posts) are female and male, respectively.

31. Administrative instruction ST/AI/1999/9 (Special measures for the achievement of gender equality) which came into force of 1 October 1999, provides in its sec. 1.1, that:

The goal as set by the General Assembly is to achieve a 50/50 gender distribution by 2000 in all posts in the Professional category and above, overall and at each level, including posts at the D-1 level and above.

32. Section 1.8 provides for selection/appointment:

(a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

- (i) Her qualifications meet the requirements for the vacant post;
- (ii) Her qualifications are substantially equal or superior to those of competing male candidates;

(b) In accordance with staff regulation 4.4, the fullest regard shall be given to the qualifications and experience of women already in the service of the United Nations;

(c) In evaluating women candidates, particular emphasis shall be given to potential to perform at the higher level, although women

may not have been offered such an opportunity in their prior service;

(d) When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended;

[...]

1.9 The provisions of sections 1.6 and 1.8 shall apply to the selection of staff for posts in all categories where women are under-represented.

33. The Tribunal takes note of the memorandum of 10 December 2013 to the Acting Director-General, which contains the recommendation of Mr. A.D. and Ms. E.P., which indicates that “[a]s of 18 October 2013, the representation of women in all categories at UNOG is 47% and the representation of women in senior professional categories is 41.5%”.

34. It follows from the above and the above-quoted provisions of ST/AI/1999/9 that in case the Applicant was substantially equally qualified as Mr. A.D., the selection of Mr. A.D. instead of the Applicant would appear *prima facie* illegal.

Comparative analysis

a. Language

35. The advertisement for the contested post as Senior English Interpreter provided “Perfect command of English, and an excellent knowledge of French, Spanish or Russian. Proven ability to interpret from or into other official languages will be an asset.”

36. The Applicant in her PHP indicated English as her mother tongue therefore that she was fluent in reading, writing, speaking and understanding. In addition, she indicated her fluency in both French and Russian with regard to reading, writing, speaking and understanding. She also indicated that her reading and

understanding of Spanish was fluent while her speaking and writing of it was basic and that she was still taking Spanish classes and had a test scheduled to be taken in January 2014.

37. Mr. A.D. on the other hand indicated in his PHP that English and Russian were his mother tongue and therefore that he was fluent in these two languages in reading, writing, speaking and understanding. He also indicated that he was fluent and that he had passed the Language Proficiency Exam (“LPE”) in French. With regard to the Spanish language, he indicated that he was confident in reading, writing, speaking and understanding and he last undertook a Spanish course in October 2011.

38. The Tribunal notes that the contested posts are titled “Senior Interpreter English”, that the candidates were assessed based on their PHPs and that no interviews were conducted. Though it can be said to be a correct assessment that Mr. A.D. has strong skills in Russian because Russian is his mother tongue, the post is located in the English Section and the Hiring Manager does not make mention of Mr. A.D.’s perfect command of the English language, which is a requirement of the post. Though unsubstantiated, the Applicant alleges that Mr. A.D.’s command of the English language is not that of a person who claims to have English as a mother tongue.

39. In essence, both the Applicant and Mr. A.D., with the exception of Spanish, speak, read, write and understand the same number of languages with the same amount of fluency, at least as indicated in their PHPs. Therefore their knowledge of languages is substantially equal and though Mr. A.D. has sat the LPE in French, the possession of an LPE was not a requirement for the posts, since what was required was an excellent knowledge of French and the Applicant, who is currently at the P-4 level, has been working as a translator from French into English for a number of years, therefore it can be argued that her knowledge of French is excellent.

40. Additionally, in the parts of the Applicant’s description of her achievements she has indicated that she has interpreted from Russian to English and French and that she has offered bilingual English-Russian translations. However this

description of the Applicant's translation experience does not seem to have been taken into account when drafting the comparative analysis of the candidates.

b. Responsibilities and competencies

i. Mission

41. The letter of 9 December 2013 in which the Hiring Manager recommended Mr. A.D., indicated "Mr. A.D. (internal, rostered candidate USA/Russia) [...] [i]n addition he has serviced many missions and has proven leadership and management skills."

42. The Tribunal further notes that in the comparative list of the recommended candidates, the Hiring Manager indicated that Mr. A.D. "shows willingness to travel (has serviced many missions, including Human Rights missions and missions to UNHQ to work in both the English and Russian booths), serves in Geneva." While the Applicant was described as "has travelled to service some conferences abroad, serves in Geneva." Finally, in making his recommendation of Mr. A.D., the Hiring Manager wrote that Mr. A.D. has serviced many missions and disposes of proven leadership and management skills.

43. Upon reviewing Mr. A.D.'s PHP, the Tribunal finds that he does not make mention of any missions he has undertaken. However, he indicates as part of his job description that his duties require participation in missions abroad, that he is prepared for any special assignments at short notices and that he has already proved his skills on missions abroad. Additionally his PHP indicates that as part of his duties, he is required to act as a team leader when required.

44. The Applicant's PHP indicates that she has been on several missions and lists them as Chechnya, Ukraine, Turkmenistan, Vienna, Bern and most recently Namibia with "countless UNFCC missions." The Applicant also indicates in her PHP that as part of her duties, she is required to act as a team leader.

45. The Tribunal takes issue with the Hiring Manager's description of the Applicant's experience with regards to mission as "[h]as travelled to service some conferences abroad" yet the Applicant has listed more than four locations to

which she went on mission in her PHP, this is more than just “some conferences abroad.” While Mr. A.D., who other than the general statement that he has been on mission did not list a single mission in which he participated, is described as “shows willingness to travel and having serviced many missions”.

ii. Leadership and managerial qualities/skills

46. The comparative analysis further describes Mr. A.D. as “[s]erves frequently as team leader both at UNOG and on mission, and has served as Programming Officer at UNOG, project manager in OECD”, while the Applicant is merely described as “serves as team leader at UNOG and on mission”.

47. In reviewing Mr. A.D.’s PHP, the Tribunal has not found any evidence that he worked as a Programming Officer at UNOG in his life time. Rather, his experience until present is that of a former diplomatic attaché, a Policy Research Officer at the P-2 level in UNHCR, a Project manager at OECD and an Interpreter in different capacities. Mr. A.D. indicated that he supervised two consultants both while working as a P-2 in UNHCR and as Project manager in OECD.

48. The Tribunal notes that one of the qualities used by the Administration to ascribe to Mr. A.D.’s leadership and managerial quality is not based on available documentation. Therefore the managerial qualities sought to be relied upon by the Administration is that of a P-2 Policy Research Officer and as a Project manager, dating back almost 13 years ago; since then his only other supervisory capacity has been exercised as a team leader in the Interpreters Section, a function that the Applicant is also carrying out.

49. In sum, the Tribunal has reasonable and serious doubts whether the assessment of those qualifications which were used to the advantage of Mr. A.D. in drawing up the comparative analysis, is based on relevant facts and whether Mr. A.D. possesses any superior qualifications than the Applicant. Both the Applicant and Mr. A.D. speak the same number of languages; the Applicant appears to have participated in more missions than Mr. A.D.; at least according to their PHPs, they have both acted as team leaders in their Sections; they are both committed to continuous learning, though the Applicant has proof of her current

learning of Spanish and her test to be taken in January 2014, while Mr. A.D.'s PHP indicates that he last took up his Spanish training in October 2011.

50. It is recalled that it follows from the above quoted provisions of ST/AI/1999/9, if a female candidate is substantially equally qualified as the male candidates then the female candidate should be selected. It is for the management evaluation process to further inquire the qualifications of the Applicant compared to Mr. A.D. If both candidates were to be considered as substantially equally qualified, in view of the gender imbalance regarding women representation in senior positions at UNOG, which is at 41.5%, the selection of a male candidate in the presence of a substantially equally qualified female candidate would raise serious doubts regarding the spirit and letter of the ST/AI/1999/9.

51. Therefore, the decision appears to be *prima facie* illegal.

Urgency

52. The Applicant submits that the application is urgent because the selection decision is due to be implemented on 1 January 2014. The Respondent on the other hand argues that the urgency is self created, because the Applicant was informed of the decision on 13 December 2013 yet she filed her application for suspension of action on 20 December 2013 after office hours.

53. The Tribunal holds the view that given the circumstances of the present case, no self created urgency can be found. Firstly, for a self-represented full-time staff member without legal training, a period of one week to prepare an application for suspension of action is acceptable. Secondly, it was possible for the Tribunal as well as for the Respondent to deal with the application within the statutory frame of five working days before implementation of the decision (see art. 13.3 of the Tribunal's Rules of Procedure).

54. The urgency criteria is therefore met.

Irreparable harm

55. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see *Saffir* Order No. 49 (NY/2013)). The Tribunal has also found in a number of cases that harm to professional reputation and career prospects, just like harm to health, or sudden loss of employment, may constitute irreparable damage (see *Calvani* UNDT/2009/092, *Villamorán* UNDT/2011/126, *Ullah* UNDT/2012/140).

56. The implementation of the selection decision at this stage would at least damage the Applicant's career prospects in a way which could not be compensated with financial means.

Conclusion

57. In view of the foregoing, it is ORDERED that the decision of 12 December 2013 to select Mr. A.D. for one of the posts of Senior Interpreter (English) P-5, Job Opening Number 13-LAN-UNOG-27767-R-GENEVA (L) instead of the Applicant be suspended pending the outcome of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 31st day of December 2013

Entered in the Register on this 31st day of December 2013

(Signed)

René M. Vargas M., Registrar, Geneva