



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/022
Judgment No.: UNDT/2019/166
Date: 21 November 2019
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ELIAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Evelyn Kamau, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

Background

1. The Applicant, a GS-3 Security Assistant serving with the United Nations Office of the Special Coordinator for Lebanon (UNSCOL), filed an application before the Dispute Tribunal on 12 February 2018 contesting the decision to cancel job opening (JO) 73064 for the position of GS-4 Security Assistant with UNSCOL.

2. The Respondent filed his reply to the application on 15 March 2018. He argues that the application is not receivable *ratione materiae* and, should the Tribunal find the application receivable, it should be denied on its merits.

3. The Tribunal has decided to adjudicate receivability as a preliminary issue for a fair and expeditious disposal of this matter.

Summary of the relevant facts

4. The Applicant commenced service with the Organization on 7 December 2009. He currently serves as a GS-3 Security Assistant on a fixed-term appointment with UNSCOL.¹

5. On 26 January 2017, UNSCOL issued JO 73064 which yielded 209 job applications, including the Applicant's.²

6. 20 candidates, including the Applicant and one female candidate, were shortlisted for a written test held on 21 March 2017. 12 candidates, including the Applicant and the female candidate, passed the test and were invited for a competency based interview held on 10 May 2017.³ Seven candidates, including the Applicant, passed the competency based interview. The female candidate did not pass the interview.

¹ Reply, annex 1.

² Reply, annex 2.

³ Application, section VII, paras. 3-5.

7. On 12 September 2017, the Secretary-General issued a letter to all staff members announcing his System-Wide Strategy on Gender Parity. The Strategy was released on 13 September 2017.⁴

8. On 10 October 2017, in a meeting for all security staff headed by Country Security Advisor Mr. Sabir Mugal and Chief Security Officer Mr. Frazer King, the Applicant was informed orally that the JO 73064 would be cancelled and re-advertised to attract more female candidates, and that this was in line with the Secretary-General's 12 September report on gender parity.⁵

9. On 20 October 2017, the Applicant received an email that JO 73064 had been cancelled and that it would be re-advertised.⁶

10. On 24 October 2017, UNSCOL issued JO 87333 for the position of GS-4 Security Assistant.⁷

11. On 3 November 2017, the Applicant requested management evaluation of the decision to cancel JO 73064.⁸

12. On 24 January 2018, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had upheld the cancellation of the JO.⁹

Respondent's submissions on receivability

13. The Applicant does not challenge a reviewable administrative decision.

14. As held by the United Nations Appeals Tribunal (UNAT) in *Ngokeng*, 2014-UNAT-460, the decision to suspend a recruitment process, where it is later re-opened through a second and revised job opening, does not constitute an administrative

⁴ Application, annex 4 and reply, annex 3.

⁵ Application, section VII (7) and reply, para. 8.

⁶ Application, annex 1.

⁷ Reply, annex 5.

⁸ Application, annex 2.

⁹ Application, annex 3.

decision. The second job opening is considered to be a continuation of the selection process.

15. In *Ngokeng*, since the recruitment process for the position was still ongoing, no final administrative decision had been taken and therefore the decision to suspend the recruitment process was found to have had no direct consequences on the staff member's terms of appointment.

16. *Ngokeng* is directly applicable in this case. As in *Ngokeng*, there were two job openings for the position of GS-4 Security Assistant. The second JO replaced the first and was merely a continuation of one recruitment process, which is still ongoing. No final selection decision has been made. Accordingly, the application is premature. It is not receivable.

Applicant's submissions on receivability

17. The application is receivable as it challenges an administrative decision that directly affects the Applicant's terms of appointment within the meaning of art. 2.1(a) of the UNDT Statute.

18. The impugned decision is a final decision and not an intermediate or preparatory step towards a final decision.

19. The Applicant was one of several candidates being considered for JO 73064. He took the written test and proceeded to the next stage of the recruitment process, where he was further assessed through a competency-based interview. What then remained was the selection of the successful candidate. Five months later, however, the JO was cancelled. The Applicant's candidature for JO 73064 could therefore no longer be considered. This cancellation and the fact that the Applicant could no longer be considered had final and adverse effects for him.

20. The Applicant's factual situation is akin to that of the applicant in *Melpignano* UNDT/2015/075 where this Tribunal found that the decision to declare the applicant ineligible "produces direct legal consequences affecting the Applicant's terms of

appointment, in particular, that of excluding the Applicant from any possibility of being considered for selection for this particular vacancy”.

21. Since the cancellation of JO 73064 excluded the Applicant from any possibility of being considered for selection, it also created concrete repercussions on the Applicant’s right to be fully and fairly considered during the selection process. The cancellation of JO 73064 was therefore not a preparatory act or intermediate step towards a decision; it was the final decision.

22. *Ngokeng* cited by the Respondent is inapplicable in this case. In *Ngokeng* the Administration suspended the recruitment process; they did not cancel it.

23. Unlike in *Ngokeng*, in this case the candidates had been shortlisted and subjected to a written test and those who passed the test were then interviewed through a competency-based interview. What was left in this recruitment process was the selection of the successful candidate. As such, the cancellation of JO 73064 was a final decision not to select any candidate and to end the particular recruitment process. It therefore falls within the scope of the jurisdiction and competence of the UNDT.

24. In *Ngokeng*, the candidates were not subjected to any written test or interviewed, the recruitment was suspended, the qualifications in the JO revised and the JO then re-advertised.

Considerations on receivability

Receivability *ratione materiae*

25. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual against the Secretary-General as the Chief Administrative Officer of the United Nations alleging that an administrative decision

is not in compliance with terms of appointment or the contract of employment.¹⁰

26. The Tribunal has the mandate to review the decision to determine whether indeed it was made without considering the terms of appointment or in violation of the contract of employment.

27. In order to assume jurisdiction over such matter, the Tribunal must first determine, among other factors, whether there is an appealable administrative decision.

28. An administrative decision under art 2.1 (a) of the Statute of the United Nations Dispute Tribunal (UNDT) was interpreted in UNAdT Judgment No. 1157, *Andronov* (2003), para. V as:

...a unilateral decision taken by administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

29. UNAT has reaffirmed this interpretation in its subsequent decisions and therefore it is binding authority on this Tribunal to consider as a preliminary issue when faced with an application challenging an administrative decision.

30. In cases of staff selection, where the selection process is not complete as in a case where an applicant is not placed on the short list and no candidate is recommended for that particular position, the UNAT has held in *Abdellaoui* 2019-UNAT-928,¹¹ that in those circumstances the administration has not made any decision that can be subject of an appeal.

¹⁰ Article 2.1(a) of the UNDT Statute.

¹¹ At para. 17.

31. In that case the applicant contested the decision not to short list her for a position. It transpired that the applicant had not met some criteria required for the advertised position.

32. In her argument, the applicant averred that the inclusion of the “geographical” criteria was meant to exclude her from qualifying for the position. It was but for the geographical criteria and the reclassification of the post that she was not short-listed for the position.

33. During trial it transpired that the criteria used in the advertisement was applied consistently to all the candidates without discrimination. The selection process involved reviewing 23 candidates who had been released to the Hiring Manager. Of these, 17 - including the applicant and four others - serving at the applicant’s P-4 level, were deemed not suitable.

34. In considering whether failure to short-list the applicant for the post constituted an administrative decision within the meaning of art. 2 of the UNDT Statute, the UNAT found that:

...the decision not to short-list Ms. Abdellaoui is an internal step within the selection process, it is not an administrative decision. The only appealable decision ...is the decision not to select Ms Abdellaoui for the position in question. Only this decision is final and bears direct legal consequences.

35. The UNAT held that under those circumstances the UNDT “should have only received Ms Abdellaoui’s application against the selection decision, but not against the decision not to short-list her”.

36. This position restates the jurisprudence set in an earlier UNAT decision taken on a similar issue in *Kawamleh* 2018-UNAT-818¹² where the applicant and others were invited to a written test in order to be considered for a position.

¹² At para. 14.

37. The applicant raised a complaint with regard to the recruitment process. As a result, the written test was cancelled. Later the applicant filed a complaint with the UNRWA Dispute Tribunal (UNRWA DT) in which he raised issues regarding the cancelled written test.

38. The UNRWA DT dismissed the application in its entirety. UNAT upheld the decision by finding that:

...issues relating to the conduct of the first test are of no relevance to this appeal and have no legal consequences. This is so because the first test and the proposed selection exercise were cancelled...that a selection process may only be challenged in the context of an appeal against the outcome of that process. Simply put, since the selection exercise was cancelled, there was no decision for Mr Kawamleh to contest.

39. In the instant case, the Applicant challenges the cancellation of a JO. The reason for the cancellation was well articulated, justifiable and put to the Applicant and the rest of the other candidates who were equally affected by the cancellation.

40. At the time of the cancellation, the selection process had not been completed. The cancellation itself was an internal step to facilitate another lawful consideration, *to wit*, gender parity, within the selection process.

41. It did not occasion the Applicant any direct legal consequences on his terms of appointment or contract of employment.

42. The case of *Melpignano* where the Tribunal found that the decision to declare the applicant ineligible produced direct legal consequences affecting the Applicant's terms of appointment does not persuade this Tribunal.

43. In this Tribunal's judgment, which is based on the most current, relevant and binding jurisprudence, consideration of a selection process for purposes of determining whether a final decision was made or not should be based on the outcome. The question should be whether or not the outcome produced a recommended list for selection and not whether the process was suspended, or

cancelled as argued by the Applicant in distinguishing his case from *Ngokeng* relied upon by the Respondent.

44. The Tribunal is in agreement with the Secretary-General that since the process did not yield a selection list, there was no administrative decision for the Applicant to contest.

45. In the circumstances, the application must be and it is hereby dismissed in its entirety as it is not receivable *ratione materiae*.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 21st day November 2019

Entered in the Register on this 21st day November 2019

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi