



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/105

Order No.: 160 (GVA/2016)

Date: 17 August 2016

Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

VALENTINE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
CASE MANAGEMENT AND
PRODUCTION OF EVIDENCE**

Counsel for Applicant:

Shazia Akhtar

Counsel for Respondent:

Kara D. Nottingham, UNOG

Introduction

1. By application filed on 4 March 2015, the Applicant contests the decision not to select him for the position of Senior Economic Affairs Officer (Chief of Transport Section, P-5), advertised under Job Opening No. 13-ECO-UNCTAD-28179-R-Geneva (“JO 28179”).
2. By Order No. 138 (GVA/2016) of 27 June 2016, the Tribunal ordered the Respondent to produce a number of documents, and issued directions setting a timetable for the proceedings in the case.
3. On 15 July 2016, the Respondent submitted his Response to Order No. 138, together with 33 annexes (“Respondent’s response to Order No. 138”).
4. By motion filed on 2 August 2016, the Applicant requested further disclosure of documents and amendment to the Tribunal’s directions of 27 June 2016 (“Applicant’s Motion”).
5. By Order No. 158 (GVA/2016) of 10 August 2016, the Tribunal ordered the Respondent to file a response to the Applicant’s motion by 12 August 2016.
6. On 12 August 2016, the Respondent responded to the Applicant’s motion and filed additional documents, three of which were submitted *ex parte*, on the basis that they contain confidential information (“Respondent’s response to Order No. 158”).
7. By motion filed on 17 August 2016, the Respondent requested that Annex 7 to his response to Order No. 158, which was inadvertently not filed *ex parte*, be kept under seal.

Consideration

Confidentiality of documents submitted by the Respondent in his response to Order No. 158

8. Article 18.4 of the Dispute Tribunal's Rules of Procedure reads:

The Dispute Tribunal may at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

9. Article 19 (Case management) further states:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

10. Regarding the principle governing the confidentiality of evidence, the Appeals Tribunal held in *Bertucci* 2011-UNAT-121 that:

In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case.

The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

11. Having reviewed Annexes 4, 5 and 6 to the Respondent's response to Order No. 158, the Tribunal notes that they contain confidential information and are, in part, relevant for the Applicant's case. As these documents were not previously available to the Applicant, the Tribunal finds it appropriate that he be given access to them, to the extent that they are relevant for his case.

12. The Tribunal is mindful that the aforementioned documents contain sensitive information that requires protection. Accordingly, the Tribunal's Registry will duly redact them to protect all information concerning individuals other than the Applicant and the selected candidate, and make them available to the Applicant on an under seal basis.

13. The Tribunal notes that the written tests completed by the twenty-six short-listed candidates for JO 28179, filed as part of Annex 5 to the Respondent's response to Order No. 158, will not be disclosed to the Applicant as the tests completed by him and the selected candidate have already been disclosed to the Applicant and the others are not relevant for the disposal of the case.

14. The Tribunal also notes that Annex 7 to the Respondent's reply to Order No. 158 contains confidential information. Accordingly, the Tribunal grants the Respondent's motion for it to be reclassified as under seal.

Applicant's Motion

15. In his motion, the Applicant identified from the documents submitted by the Respondent in his response to Order No. 138 a number of areas where additional documents may exist. The Respondent has already submitted additional documents or answered to some of the Applicant's queries, notably in respect of paras. 4, 9 and 11 of the Applicant's motion.

16. However, in respect of the additional documents requested by the Applicant in paras. 2, 3, 5, 6, 7 and 10 of his motion, the Respondent states in his Response to Order No. 158 that he disclosed all documents responsive to said Order which were made available to him by "implicated persons with knowledge of the selection exercise, in particular, persons identified by the Applicant in his filing dated 1 June 2016". The Tribunal notes that three of the key witnesses, including the hiring manager and another member of the assessment panel, have now retired. Hence, they no longer have access to their former United Nations email account and indeed appear not to have submitted any document in response to the Tribunal's order. The Respondent submits that he has fulfilled his disclosure obligations by asking the documents to be provided by the "implicated persons" and that "accessing archives of three retired staff members would be overly burdensome and against the interests of judicial economy".

17. Art. 18.3 of the Dispute Tribunal's Rules of Procedure provides that "[a] party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence" (emphasis added).

18. Pursuant to sec. 3.1 of ST/SGB/2007/5 (Record-keeping and the management of United Nations archives), "[a]ll records, including electronic records and e-mail records, created or received by a staff member in connection with or as a result of the official work of the United Nations, are the property of the United Nations".

19. Sec. 6.2 of ST/SGB/2007/5 further provides that:

E-mail has become an important business and communication tool in the United Nations and many of the e-mail messages created and received by the Organization constitute records because they provide evidence of and information about its business transactions. Departments and offices shall ensure that e-mail records are identified, managed and stored in accordance with the requirements for record-keeping set forth in the present bulletin.
(...)

20. It is clear from the above-mentioned provisions that to satisfy its disclosure obligation, the Organization may have to go beyond documents detained and provided by individual staff members and undertake a search of its own records, notably the electronic archives safeguarded on its computer servers. Whilst this can be at times burdensome, it is necessary to ensure fairness of the proceedings before the Tribunal.

21. The Tribunal notes the Respondent's policy to retain "information pertaining to the staffing of the department including position descriptions, classifications and organization charts" for a period of one year following the filling of the position. That being said, the Tribunal recalls that the contested position was filled on 29 August 2014 and that the application was filed on 4 March 2015, less than a year later. As proceedings had been instituted before the Tribunal, it is expected that documents in respect of the selection process for JO 28179 were not destroyed.

22. Given that the documents requested by the Applicant in paras. 2, 3, 5, 7, 8 and 10 of his motion were already covered by Order No. 138 but, if they exist, have not been disclosed yet by the Respondent, and having clarified the scope of the Organization's disclosure obligation, the Tribunal finds it appropriate to order the production of said documents, pursuant to art. 18.3 of its Rules of Procedure.

23. The Tribunal notes that the documents requested in para. 6 of the Applicant's motion go beyond its Order No. 138. However, considering that the Applicant's request was triggered by documents submitted by the Respondent pursuant to this Order and that the documents appear *prima facie* relevant to the determination of the application, the Tribunal finds it appropriate to also order their production, pursuant to art. 18.3 of its Rules of Procedure.

24. The Tribunal notes, however, that the Respondent's obligation under art. 18.3 is limited to produce evidence in his possession. Therefore, if the requested documents do not exist or are no longer available, the Respondent is under no obligation to provide alternative written explanation to the questions raised by the Applicant, as requested in his motion. These issues can instead be addressed at the hearing, through witness testimonies.

25. Consequently, the Tribunal finds that the following documents, if they exist, may be relevant to the Applicant's case and, therefore, must be disclosed to him if they are still available and have not been already disclosed:

- a. All emails between Jose Rubiato and Virginia Bregger sent in respect of the written test for JO 28179;
- b. All emails between the relevant UNCTAD staff members in respect of the setting of the examination questions for JO 28179;
- c. All emails sent to Gulnora Azizova, Isabel Breclaz, Juliette Sunthorn, Anne Miroux and Claudia Barberis which relate to the written test and the test results for JO 28179;
- d. All emails in respect of the addition of the selected candidate for JO 28179 to the list of eligible candidates;

e. Any notes of the meeting of 16 January 2014 between the panel members for JO 28179;

f. All emails of Jose Rubiato, Maria Sabina Yeterian-Parisi and Anne Miroux in relation to the vacancy announcements for JO 13-ADM-UNCTAD-26288-R-GENEVA (R) and JO 28179 and in relation to the written test for JO 28179; and

g. All emails in respect of the drawing up of the second vacancy announcement for JO 28179.

26. The Applicant further requests to amend Order No. 138 in such a way that the Respondent would file his witness statements first, so the Applicant could address the matters outlined therein in the statements provided by his own witnesses.

27. The Tribunal stresses that witnesses statements are meant to highlight the substance of a testimony based on the witness' own knowledge and recollection of the facts. They are independent from one another and should not be disclosed among the witnesses, except the parties, in order to avoid them being influenced.

28. The Tribunal will therefore amend the schedule set forth in its Order No. 138 only to take into account the additional production of evidence by the Respondent.

Conclusion

29. In view of the foregoing, it is ORDERED that:

a. Annexes 4, 5 and 6 to the Respondent's response to Order No. 158, as redacted by the Tribunal, be made available to the Applicant on an under seal basis;

b. Annex 7 to the Respondent's response to Order No. 158 be reclassified as under seal;

- c. The Applicant not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate Annexes 4, 5, 6 and 7 to the Respondent's response to Order No. 158—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by the Tribunal.
- d. The Respondent submit the documents listed in para. 25 above by **Friday, 2 September 2016**;
- e. The Applicant file an amended version of his application by **Friday, 16 September 2016**;
- f. The Respondent file any reply to the amended application by **Friday, 30 September 2016**; and
- g. Each party file a list of witnesses, if any, proposed to give evidence at the hearing and indicate the information they intend to provide at the earliest opportunity and at the latest by **Friday, 7 October 2016**.

(Signed)

Judge Rowan Downing

Dated this 17th day of August 2016

Entered in the Register on this 17th day of August 2016

(Signed)

René M. Vargas M., Registrar, Geneva