



**Before:** Judge Goolam Meeran

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BELFALAH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for Applicant:**

Robbie Leighton, OSLA

**Counsel for Respondent:**

Bettina Gerber, UNOG

Cornelius Fischer, UNOG

## **Introduction**

1. On 3 April 2017, the Applicant, a Translator (P-3) at the Arabic Translation Section (“ATS”), United Nations Office at Geneva (“UNOG”), requested suspension of action, pending management evaluation, of the decision to exclude her from the recruitment process against vacancy announcement 16-LAN-UNOG-69106-R-GENEVA (L) (“VA 69106”).

2. The request was served on the Respondent, who filed his reply on 5 April 2017.

## **Facts**

3. On 9 November 2016, VA 69106 for a P-4 post of Arabic Reviser, ATS, UNOG, was issued. A total of 151 applications were received. Twenty-two candidates, including the Applicant, were invited to sit a written test. The invitation for the test stated, *inter alia*, that “the five top scoring candidates will be invited to the competency-based interview”.

4. The test was administered and evaluated pursuant to the *test grading process for written evaluations of candidates for job opening 69106*. Although the Applicant scored above the passing grade of 50%, she was not ranked amongst the top five. Accordingly she was not invited to participate in the competency based interview. On 3 April 2017, she requested management evaluation of the decision to exclude her from the recruitment process.

## **Parties’ contentions**

5. The Applicant’s primary contentions may be summarized as follows:

### *Receivability*

- a. The exclusion of a candidate from a recruitment process prior to the interview stage amounts to a final administrative decision impacting on the legal order and, thus, constitutes a reviewable decision;

*Prima facie unlawfulness*

b. Two positions of P-4 Arabic revisers are to be filled through VA 69106. Therefore, the decision to limit the interview to the five best scoring candidates constitutes an arbitrary exercise of discretion on behalf of the Hiring Manager, and is contrary to the Hiring Manager's Manual;

c. In light of the nature of the work of a reviser, a written test would always be inexact, and the actual content of the test conducted in this selection exercise was not suitable to measure the technical skills of candidates. Therefore, the decision to invite only five candidates to the interview was manifestly unreasonable;

d. The procedure did not comply with the policy objective of ensuring geographical distribution, since the five candidates who were invited for the interview were all of Moroccan nationality. Furthermore, the number of Moroccan nationals amongst the staff in the ATS, UNOG, currently exceed fifty percent;

e. The procedure also failed to comply with the administrative instruction on gender equality in that two of the five candidates invited for an interview are female thereby reducing the chances of achieving gender parity;

f. The written test was taken remotely and was open to abuse.

*Urgency*

g. For the purpose of a suspension of action, there is particular urgency when the selection decision has not yet been made. In this case the successful candidates have already been interviewed, and decisions for selection are likely to be implemented in the near future. Accordingly this criterion has been met;

*Irreparable damage*

h. Harm is considered irreparable when it can be shown that suspension of action is the only way to ensure that the Applicant's rights are observed. The exclusion from a recruitment exercise may damage the Applicant's career prospects in a way that could not be compensated with financial means.

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

*Receivability*

a. The application is not receivable *ratione materiae*, since the decision to exclude the Applicant from the selection exercise merely represents a preparatory step, and does not constitute a final administrative decision subject to judicial review;

*Prima facie unlawfulness*

b. The decision is not *prima facie* unlawful. When the VA was issued, only one post of P-4 Arabic Reviser was vacant. However, shortly thereafter, a second position of P-4 Arabic Reviser, ATS, UNOG, became vacant. It was added to the existing job opening, without, however, mentioning in the VA that two posts were to be filled. Since this was not in line with procedure, the Administration corrected this mistake, and only one post will be filled through VA 69106. The other vacant post will be advertised through a new job opening. Accordingly, the Applicant's contention that it was arbitrary to limit the number of interviewed candidates to five for the two posts is moot. In any event, ST/AI/2010/3 does not impose an obligation on the Hiring Manager to interview a certain number of candidates when filling a post, and the Appeals Tribunal has ruled that the Hiring Manager's Manual, relied upon by the Applicant, has no binding force;

- c. There is no indication that the methodology used to assess the candidates was manifestly unreasonable, and any argument that taking the test remotely opened the door to possible abuse is purely speculative. The Applicant failed to provide any evidence that any candidate cheated;
- d. Considerations of gender balance or geographical distribution become relevant only at the stage of the final selection decision; and
- e. The application for suspension of action should be dismissed.

### **Consideration**

#### *Receivability*

7. The Tribunal first has to assess the Respondent's argument that the decision not to invite the Applicant for an interview is not a final administrative decision, but merely a preparatory step, and that the application is therefore not receivable *ratione materiae*.

8. This Tribunal has already ruled on several occasions that declaring a candidate non-eligible or non-suitable constitutes an "administrative decision" under art. 2.1(a) of its Statute, since it results in his/her exclusion from the recruitment exercise before the final selection of a successful candidate (*Gusarova* UNDT/2013/072; *Willis* UNDT/2012/044, *Nunez* Order No. 17 (GVA/2013), *Essis* Order No. 89 (NBI/2015), *Korotina* UNDT/2012/178 (not appealed), *Melpignano* UNDT/2015/075 (not appealed)).

9. In *Melpignano* UNDT/2015/075, the Tribunal stated that a decision to eliminate a candidate at one of the "intermediate" stages of a selection process "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 [a] particular vacancy", and that:

[T]he impugned decision has direct and very concrete repercussions on the Applicant's right to be fully and fairly considered for the post through a competitive process (see *Liarski* UNDT/2010/134). From this perspective, it cannot be said to be merely a preparatory act, since the main characteristic of preparatory steps or decisions is precisely that they do not by themselves alter the legal position of those concerned (see *Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173).

10. There is no doubt that the elimination of the Applicant from the recruitment process after the written assessment constitutes a final decision with respect to her. Therefore, the application is receivable and the Tribunal has to examine the conditions set out in art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure in connection with applications for suspension of action.

11. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to 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. These three requirements are cumulative and must all be met in order for a suspension of action to be granted.

*Prima facie unlawfulness*

12. *Prima facie* unlawfulness requires that there is "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

13. With respect to judicial review in appointment and promotion matters, the Appeals Tribunal has held in *Ljungdell* 2012-UNAT-265 that:

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.

14. Whilst noting the Respondent's contention regarding the primacy of a properly promulgated Regulation over Guidance provided to give effect to its provisions, the Tribunal has a duty to give such weight as it considers appropriate to a procedure or practice, which appears to be inconsistent with the administrative guidance, in circumstances where there would appear to be a real risk of disproportionate impact given the Organisation's policy on gender parity and geographical distribution.

15. The Tribunal notes that VA 69106 only refers to one P-4 position of Arabic Reviser to be filled at the ATS, UNOG. The Respondent has provided an assurance that the second P-4 post of Arabic Reviser, which became vacant shortly after VA 69106 was published, will be subject to a separate VA. The Applicant will have the opportunity to apply for it.

16. All candidates invited for the written test were informed that only the five best scoring candidates would be invited for an interview. That decision was made before the results of the tests were known. The Applicant was not amongst the five highest scorers.

17. There is nothing irrational in the decision to invite the five best scoring candidates for an interview for a single post since, by doing so, the Administration widened the pool of candidates who could potentially be selected for the position.

18. Whether the Administration ought to have adopted a different procedure to redress any credible concern regarding the Organisation's policies on gender parity and geographical distribution is not an appropriate issue to be explored in the context of this request for suspension of action under art. 2.2 of the Tribunal's Statute. The parties will note that the urgent temporary relief granted, or refused, by an order on suspension of action does not require the Tribunal to hear evidence and to make factual determinations. These are matters for consideration if and/or when a substantive claim is made.

19. The Respondent has provided an explanation that would appear to rebut the Applicant's contention that the decision to exclude her from further consideration was *prima facie* unlawful. Given the cumulative nature of the threefold test in requests for suspension of action, the Tribunal is not required under art. 2.2 of its Statute to consider the issues of particular urgency and irreparable damage.

**ORDER**

20. The request for suspension of action is refused.

*(Signed)*

Judge Goolam Meeran

Dated this 6<sup>th</sup> day of April 2017

Entered in the Register on this 6<sup>th</sup> day of April 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva