



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

MAHON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Mariam Munang, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 7 December 2018, the Applicant, a G-6 Senior Legal Assistant working for the Office of Legal Affairs in New York, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal's Rules of Procedure, requesting that the decision of the Administration to exclude her from the second stage of the 2018 Young Professional Programme ("YPP") written examination in Social Affairs, which is scheduled to take place on 13 December 2018, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure requesting the Tribunal to suspend the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute.

2. On 7 December 2018, the case was assigned to the undersigned Judge.

3. On the same day, the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 12:00 p.m. on 11 December 2018, together with all documentation related to the written test, including the job opening, the content of the written test, the marking guide for each element of the written test and the matrix with the results (containing total points for each part of the written test) for each candidate.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 13 December 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure, the Applicant's motion on suspension pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute was granted and that a reasoned written Order was to follow.

5. On 10 December 2018, by Order No. 241 (NY/2018), the Tribunal confirmed that the contested decision was suspended pending its consideration of the application for suspension of action, or until further order.

6. On 11 December 2018, the Respondent filed his reply in which he contends that the application is moot as following the Dispute Tribunal's instructions on 7 December 2018, the Organization notified the Applicant that she will be allowed to sit the second stage of the examination on 13 December 2018, pending management evaluation.

Background

7. In the application for suspension of action, the Applicant submitted the following facts.

8. On 11 July 2018, the Applicant applied for the YPP examination in Social Affairs as a "G to P" candidate.

9. On 17 September 2018, the Applicant was informed that her application was rejected because she had not met the education criteria specified in the job opening. On 18 September 2018, the Applicant contested this decision demonstrating that she does meet the education criteria.

10. On 2 October 2018, the Applicant received a confirmation that the previous decision was reversed and that she was now invited to sit the first part of the YPP written examination in Social Affairs. The first stage of the YPP examination was to be administered on-line on Thursday, 25 October 2018. The Applicant was further informed that, "[o]nly those who meet the cut-off set from this stage will be invited to the second stage (to take place online on 13 December 2018)".

11. On 25 October 2018, the Applicant undertook the first stage of the on-line written test.

12. The test itself comprised of two sections. The first part consisted of two written papers and the second was a multiple-choice exercise.

13. However, immediately upon commencing the test at 7:00 a.m. New York time, the IT system failed. As a consequence, the Applicant was not able to respond to any questions. The communications the Applicant saw on the screen mentioned as follows: “A required parameter (attempt) was missing”, “Network connection lost”, and “504 Gateway Time-out” to “Error loading site config. Error: Database connection failed. It is possible that the database is overloaded or otherwise not running properly”.

14. When finally allowed to log back into the system, the Applicant answered all remaining multiple-choice questions in a hurry since she understood from the YPP Manual that candidates would not be penalized for wrong answers.

15. Immediately after encountering the first technical issues, the Applicant contacted YPP Technical Support. However, only automatic replies were received from an email account of the Office of Human Resources Management (“OHRM”) in the Department of Management (“DM”).

16. Finally, on 3 December 2018, the Applicant received a notification that she had not reached the passing threshold of the written part required for convocation to the second stage of the exam.

17. The OHRM further informed the Applicant of the following:

We recognize that you were completing a portion of the exam during the time period when the testing site experienced some load difficulties. As such, your scores were compensated based on a number of factors that were examined. These include, whether there were any missing responses, the amount of time that you were in the testing site during this period, and your responses to questions completed outside of the time period in question. Through detailed analysis of this information and the score compensation, we were able to mitigate any potential impact of the website incident. ... Due to the

heavy volume of applicants, we are unfortunately not able to provide further feedback on an individual basis.

18. On 7 December 2018, the Applicant, submitted a request for management evaluation challenging the OHRM's decision to exclude her from the second stage of the YPP written examination.

Parties' submissions

19. The Applicant's principal contentions are as follows:

Prima facie unlawfulness

a. It is trite law that a selection exercise is an ongoing process until a selection decision is made. The written test is normally the first step in the process. Success at the written test determines whether a candidate can proceed to the next stage in the selection exercise. An improperly or unfairly conducted written test can be challenged as an administrative decision that may impact a candidate's career if the unfairness of the initial step is established.

b. In this instance, the Applicant seeks to challenge the conduct of the written assessment. As enunciated by Appeals Tribunal in the case of *Riecan* 2017-UNAT-802, there is a presumption of regularity in which any staff member challenging a non-selection must establish at the *prima facie* level that there were serious and reasonable doubts regarding the process of recruitment.

c. In this case, the Applicant contends that the technical failures in the online test as well as subsequent treatment of this matter by the OHRM serve to challenge the presumption of regularity. Consideration needs to be given to the following:

- i. First, numerous server failures that occurred during the on-line examination prevented the Applicant from being able to be in a position to meaningfully respond to the questions;
 - ii. Second, it transpires from the notification sent to the Applicant on 3 December 2018, that, contrary to the information provided in the YPP Manual, it would have been less prejudicial for the Applicant to leave some questions unanswered rather than trying to quickly finalize as many multiple-choice questions as she could have.
- d. Finally, it further transpires from the notification sent to the Applicant on 3 December 2018, that in order to assess their eligibility, the candidates were rated not only based on their performance on the test day but also on “the amount of time [they] were in the testing site during this period, and [on their] responses to questions completed outside of the time period in question”. It therefore appears that in assessing candidates’ eligibility, OHRM took into consideration extraneous and irrelevant factors such as how many times a candidate took a training test.
- e. When reviewing these irregularities, the Tribunal must address whether the Applicant had a likelihood of promotion had the Organization adhered to the applicable Rules and Regulations and/or treated all the candidates equally. In the cases of *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.
- f. In this case, the Applicant submits that she would have had a significant chance of being selected for the professional post were it not for

the irregularities in the written examination exercise as highlighted above. The Applicant did not take this exercise lightly provided that such an opportunity for General Staff members to access the Professional category comes only once every two or four years. With seventeen years of experience and months of studying for the examination, the Applicant would have been shortlisted for the second phase of the test but for the technical failures in conducting a fair recruitment process, for which the Administration should take the full responsibility.

Urgency

g. On 3 December 2018, the Applicant received a notification that she had not reached the passing threshold of the first stage of the written assessment. The second stage of the written assessment is to be held on 13 December 2018.

h. On 7 December 2018, the Applicant filed a Management Evaluation Request challenging the OHRM's decision to exclude her from the second stage of the YPP written examination.

i. If the implementation of the examination process is not suspended, the Applicant will stand no chance of being properly considered for the position. This gives rise to urgency and justifies the granting of an order staying the implementation of the administrative decision.

Request for suspension pending proceedings on suspension of action

j. The circumstances of the case are of such urgency that the Applicant respectfully requests an order be made as in *Villamorán* 2011-UNAT- 160. In this case, the Applicant is aware that the next stage of the YPP examination is scheduled for 13 December 2018. If the Administration does not rescind its decision or find an alternative solution to allow the Applicant to compete for a

Professional grade by 13 December 2018, the Applicant will suffer the harm described above.

Irreparable damage

k. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual. It is submitted that the implementation of the selection decision at this stage would damage the Applicant's career prospects in a way that could not be compensated through financial means.

20. The Respondent submits that the application is moot because the contested decision will not be implemented pending management evaluation. The Respondent states that following the Dispute Tribunal's instructions on 7 December 2018, the Organization notified the Applicant that she will be allowed to sit the second stage of the examination on 13 December 2018, pending management evaluation. The Applicant has been provided with the relief she is seeking, and there is therefore no matter for the Dispute Tribunal to adjudicate.

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

21. Article 2.2 of the Dispute Tribunal's Statute states:

... The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

22. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

23. Article 13.1 of the Tribunal's Rules of Procedure states:

... The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

24. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

Whether application concerns an administrative decision that may properly be suspended by the Tribunal

25. The Tribunal notes that it is uncontested that the contested decision in the present case, namely the decision of the Administration to exclude the Applicant

from the second stage of the 2018 YPP written examination in Social Affairs, which is scheduled to take place on 13 December 2018, is an administrative decision subject to being reviewed by the Tribunal, including being suspended pending management evaluation and concludes that the first condition is fulfilled.

Whether the Applicant requested management evaluation of the contested decision

26. The Tribunal notes that the Applicant filed a management evaluation request of this decision on 7 December 2018 which is currently pending and concludes that the second condition is fulfilled.

Whether the contested decision has not been implemented

27. The Tribunal notes that the contested decision is to be implemented on 13 December 2018 and the third condition is fulfilled.

28. Further the Tribunal notes that the Respondent, on behalf of the Secretary-General has informed the Tribunal that the Administration has decided—and, consequently, obliged itself—not to implement the contested administrative decision and has notified the Applicant that she will be allowed to sit the second stage of the examination on 13 December 2018, pending management evaluation.

29. The Tribunal considers that it results that the relief the Applicant has requested, namely the suspension of the decision to exclude her from the second stage of the 2018 YPP written examination in Social Affairs, has already been granted by the Administration and there is no need to further consider the remaining uncontested conditions (*prima facie* unlawfulness, irreparable harm and urgency).

30. Consequently, the Tribunal also considers that since the implementation of the contested decision pending management evaluation was suspended by the Administration pending management evaluation, there is no further determination to be made by the Tribunal in the present case. The Tribunal commends the Administration for its decision to suspend the implementation of the contested

decision pending management evaluation and expresses its trust that this measure will allow the Management Evaluation Unit to carefully review all the circumstances invoked by the Applicant in order to prevent future litigation.

Conclusion

31. In the light of the above, the Tribunal notes that the Administration has already granted the requested relief, and that the implementation of the contested decision is already suspended pending management evaluation.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of December 2018