



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

GORBYLEV

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-4 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 that he did not pass the first part of the 2018 Young Professional Programme ("YPP") written examination in Legal Affairs, and to exclude him from the second stage of 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. 242 (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 he 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. The Applicant joined the United Nations on 11 October 2017 as a G-4 Legal Assistant working for the Office of Legal Affairs in New York. On 11 July 2018, the Applicant applied for the YPP examination in Social Affairs as a "G to P" candidate.

9. On 7 August 2018, the Applicant applied for the YPP examination in Legal Affairs as an external candidate. At the time of his application, the Applicant did not fulfil the eligibility criteria to apply as a G to P candidate, although met all the eligibility requirements as an external candidate.

10. On 17 September 2018, the Applicant was convoked to sit the first part of the YPP written examination in Legal Affairs to be held on 25 October 2018. He 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. In preparation for the exam, the Applicant registered for a YPP Test Preparation Webinar to be held on 8 October 2018. However, when the Applicant attempted to participate in the webinar, he was unable to join the webinar due to a connection failure, even though the webinar was broadcast from New York and he

was located in New York. The Applicant understands that other colleagues who had registered for the same webinar were also unable to participate in the session because of similar connection failures.

12. On 16 October 2018, the Applicant received instructions on how to take the exam online. He was provided with access to the online testing system and informed that he had 2 hours and 30 minutes to complete the exam. He was also informed that a practice exam had been made available. He was encouraged to attempt the practice exam through the same online testing system prior to the actual exam.

13. On 24 October 2018, the Applicant attempted the practice exam. However, halfway through the practice exam, the testing platform became unresponsive and gave the blank window and error message “504 Gateway Timeout”. He refreshed the browser repeatedly but still the problem was not resolved. In the meantime, he was able to access other websites. It was clearly a problem only with the YPP testing system. The Applicant immediately submitted a ticket to report the error he received.

14. The Applicant received a response to the ticket he raised only the following day, at 4:32 a.m. on 25 October 2018, the date of the actual exam and just 28 minutes before the start of the exam window. He was advised to try several steps, including, to refresh the webpage, restart network devices, change his DNS servers and try a different VPN.

15. The Applicant had attempted some of these steps, including refreshing the web page and restarting his network devices. However, he did not know how to try the other more sophisticated steps of changing his DNS servers or trying a different VPN.

16. He did not have the chance to attempt the practice exam again to verify whether the problem had been solved because the time window to do so ended on 25 October 2018 at 05:00 a.m.

17. On 25 October 2018, the Applicant sat for the exam. The test itself comprised of two sections. The first part consisted of two written papers and the second was a multiple-choice exercise.

18. While the Applicant was answering the multiple-choice question part of the exam, he again faced the same connection issues as he did with the practice exam. Sometimes he was unable to enter his answers and to click to proceed to the next page. As a consequence, the Applicant lost some time during the exam when the webpages became unresponsive.

19. The following day, on 26 October 2018, the YPP team acknowledged the technical problems with the test site. It announced that they “have records through the testing system of all those that experienced technical issues and will make sure that candidate outcomes are not negatively affected by this.”

20. On 3 December 2018, the Applicant was informed that he did not pass the first part of the written examination and will not be invited to the second part of the written exam on 13 December 2018.

21. On 7 December 2018, the Applicant submitted a request for Management Evaluation challenging the Office of Human Resource Management (“OHRM”) decision to exclude him from the second stage of the YPP written examination.

Parties’ submissions

22. 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. First, numerous server failures that occurred during the on-line examination prevented the Applicant from being having sufficient time to respond to the questions. Second, although OHRM states that they will make sure that "candidate outcomes are not negatively affected by this", it is not clear what steps, if any, have been taken to guarantee this.

d. 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 UNAT case 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".

e. In this case, the Applicant submits that he would have had a significant chance of being selected for a professional post through the YPP roster were it not for the irregularities in the written examination exercise as highlighted above. The Applicant did not take this exercise lightly as such an opportunity for General Staff members to access the Professional category comes only once every two or four years. The Applicant would have been shortlisted for the second phase of the written test but for the technical failures in conducting a fair recruitment process, for which the Administration should take the full responsibility.

Urgency

f. On 3 December 2018, the Applicant received a notification that he 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.

g. On 7 December 2018, the Applicant filed a Management Evaluation Request challenging OHRM's decision.

h. 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

i. 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

j. 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.

23. 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 he 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 he 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

24. 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.

25. 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".

26. 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.

27. 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

28. 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 Legal 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

29. 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

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

31. 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 he will be allowed to sit the second stage of the examination on 13 December 2018, pending management evaluation.

32. The Tribunal considers that it results that the relief the Applicant has requested, namely the suspension of the decision to exclude him from the second stage of the 2018 YPP written examination in Legal 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).

33. 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

34. 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