Introduction

1. By application filed on 7 October 2016, the Applicants seeks the suspension of the implementation, pending management evaluation, of the decision to exclude him from the recruitment process related to Job Opening ("JO") 16-ECO-UNCTAD-58019-R-GENEVA (R).

Facts

2. The Applicant serves as Economic Affairs Officer (P-3) with the United Nations Conference on Trade and Development ("UNCTAD"), under a permanent appointment.

3.

b. Including fluency in Spanish as a desirable criterion in the JO supports

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.

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

Receivability

a. The Hiring Manager's determination that the Applicant was not suitable is not an administrative decision, but a preparatory step, not yet appealable under the Tribunal's Statute. The selection process has not been completed;

b. Since there is no final administrative decision, this application is premature. A selection procedure ends with the selection of a successful candidate; this is the decision that may be contested, as opposed to all other decisions within the procedure merely preparing

e. After review of the Applicant's PHP, the Hiring Manager concluded that he was not suitable because he did not possess the mandatory work requirements listed in the JO;

f. The Hiring Manager has broad discretion to exercise a preliminary evaluation to establish the list of candidates to be invited for further assessment, which does not have to include all pre-screened candidates but only the most qualified or promising ones;

g. The assessment matrix used by the Hiring Manager in pre-screening the candidates shows that the candidacies were reviewed on the basis of the pre-established criteria, and that the Hiring Manager deemed that the Applicant does not have the required work experience;

h. The Applicant has not presented a fairly arguable case or established "serious and reasonable doubts" that the impugned decision was influenced by improper considerations or bias, or that the procedure was not properly followed. Since the Respondent has minimally shown that the Applicant's candidature was given full and fair consideration, the presumption of legality of the decision should stand;

Urgency

i. A suspension of action would pre-empt the review of the staff selection process by the CRB.

Consideration

Receivability

12. The first question for the Tribunal is whether the present application is receivable ratione materiae

13. It is well established law (Schook 2010-UNAT-013, Tabari 2010-UNAT-030, Planas 2010-UNAT-049, Al Surkhi et al. 2013-UNAT-304, Tintukasiri et al. 2015-UNAT-526) that an "administrative decision" is:

> [A] unilateral decision taken by the 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.

14. This Tribunal has already ruled on several occasions that declaring a candidate non-eligible or non-suitable may fall into the above definition, inasmuch as it results in his/her exclusion from the recruitment exercise before the final selection of a successful candidate (Gusarova

As stated in *Korotina* UNDT/2012/178, such a decision "signifie[s] the end of the process as far as [that applicant] is concerned".

17. In the same vein, the Tribunal stated in *Melpignano* UNDT/2015/075 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

selection process of candidates who had initially not been invited for an interview, or vice versa. The Tribunal is mindful that the CRB review has indeed the potential to prompt a rectification of the kind, and this constitutes in fact a valuable safeguard of the integrity of the selection process. However, the existence of this corrective mechanism does not change the fact that a decision excluding the Applicant from further consideration for the posts has been made in the course of a selection, and this amounts to a unilateral decision made by the Administration that carries serious legal consequences for him as a candidate.

21. For all of the above, the Tribunal considers this application receivable. Having reached this conclusion, the Tribunal may now turn to the analysis of the conditions set out in art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure.

Prima facie unlawfulness

22. The first condition to be met for the granting of a suspension of action is whether the Hiring Manager's decision not to invite the Applicant for interview was *prima facie* illegal.

23. At the core of the application are the following claims in this respect:

a. The Hiring Manager intends to grant the posts to two specific candidates—that the Applicant clearly identifies—and who are among those shortlisted for interview. This explains that the Applicant, as well as other strong candidates, were eliminated prior to the interview stage, while several others, such as the two allegedly favoured ones, who are clearly less qualified, were shortlisted;

b. It was for the Hiring Manager to revisit the binary determination made by HRMS that the Applicant met the mandatory requirements specified in the JO;

c. According to the assessment matrix, the Applicant does not meet certain requirements that his PHP indicates he does;

d. The Hiring Manager applied an arbitrary—and particularly demanding—interpretation of the experience requirements, which apparently consists in requesting five years of experience in every area of expertise mentioned in the JO, particularly non-tariff measures. Moreover, this standard seems not to have been applied to other applicants, who were deemed to meet the required experience although it is highly doubtful that they had five years of professional experience in each of these areas. Also, there are such stark differences in the merits of the Applicant and other candidates that were deemed not to satisfy the required work experience and others that were shortlisted for interview, that no reasonable comparison could have led to this result.

Bias or favouritism

24. Concerning the first of the foregoing claims, it should be emphasized that when an applicant alleges bias or improper motives, the burden is on him or her to prove it (Jennings 2013-UNAT-329, para. 25; Obdeijn 2012-UNAT-201, para. 38; Beqai 2014-UNAT-434, para. 23). In this case, the Applicant adduces no tangible evidence—let alone clear and convincing—of the alleged favouritism, although he submits that fluency in Spanish was introduced as a desirable criterion in the JO not because it was helpful to discharge the duties of the posts, but because the favoured candidates are native speakers of Spanish and would thus enjoy an advantage. Yet, the Respondent has provided a plausible explanation for the desirability of Spanish fluency, namely the frequent and close cooperation with the Latin American Integration Association (ALADI). Furthermore, the fact that the two candidates concerned were invited to an interview is certainly not sufficient to suggest any treatment of favour. In this light, it is the Tribunal's view that the claim of bias and favouritism is not made out.

Re-assessment of eligibility by the Hiring Manager

25. Despite some ambiguity in the language of the Respondent's reply, it has been now clarified by the Respondent, and more importantly, the docume

evidence reflects that HRMS/UNOG pre-screened all candidacies received to check them against the minimum requirements in the JO, and that only upon completion of this stage, the Hiring Manager proceeded to the preliminary review of the released candidates to identify the most qualified ones for interview. This is in conformity with sec. 7.4 of ST/AI/2010/3, which reads:

> The hiring … manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

26. Since the Hiring Manager may—actually, must—evaluate the released candidacies against the requirements listed in the JO, he or she has to be able to take corrective action should he detect that a candidate initially believed to satisfy all requirements, turns out, upon further scrutiny, not to fulfil one or more of them. Any other interpretation would be nonsensical and, in fact, para. 9.2.2 of the

Urgency

36. Given that the 15 candidates chosen for further assessment sat for their interviews nearly two months ago, it is to be expected that the list of recommended candidates will be submitted to the CRB for review in the very near future. Considering that the process is, therefore, in a late stage, the Tribunal considers there to be urgency in the case at hand.

Irreparable damage

37. The harm potentially caused by a loss of career opportunity is not of a purely financial nature. This kind of harm is of such nature that it could be hardly completely made good through financial compensation.

Conclusion

38. In view of the foregoing, the application for suspension of action is granted.

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Judge Teresa Bravo

Dated this 14th day of October 2016

Entered in the Register on this 14th day of October 2016

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René M. Vargas M., Registrar, Geneva