

Case No.: UNDT/GVA/2018/019

Introduction

1. On 13 March 2018, the Applicant, an ITS Assistant (GS-6) at the United Nations Peacekeeping Force in Cyprus (“UNFICYP”), requested suspension of action, pending management evaluation, of the decision to exclude him from the recruitment process for the position of Associate Civil Affairs Officer (NO-B), advertised under job opening #5/2017 (“JO 5/2017”).

2. The application for suspension of action was served on the Respondent, who filed his replon

Applicant on all occasions, not giving him

being considered for selection for [a] particular vacancy”. The Tribunal further held 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).

15. There is no doubt that insofar as the Applicant is concerned, his elimination from the recruitment process after the written assessment constitutes a final decision. Therefore, the application is receivable and the Tribunal will examine the conditions set out in art. 2.2 of its Statute and art. 13.1 of its Rules. Therefore, Procedure in connection with applications for suspension of

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18. 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.

19. The Applicant's case for *prima facie* unlawfulness rests on two grounds:

- a. Discriminatory treatment and retaliation by the Hiring Manager; and
- b. The fact that another candidate who was invited for a competency-based interview acknowledged not having answered the written assessment in full.

20. On the first ground, this Tribunal recalls that the Appeals Tribunal has consistently held that the burden of proof to establish that a decision was motivated by improper motives falls on the Applicant (*Badawi* 2012-UNAT-261, *Pirnea* 2013-UNAT-311). The Applicant failed to provide any evidence in support of his claim of discrimination and retaliation. He merely referred to a matter dating back to 2013 where, in respect of another selection process, he *inter alia* alleged that the Hiring Manager was biased against him. The Tribunal adjudicated and dismissed this matter in Judgment *Neocleous* UNDT/2015/042. It does not in any way support the Applicant's current allegations of discrimination and retaliation.

21. On the second ground, the Tribunal is of the view that inviting for an interview a candidate who allegedly failed to answer all the questions of a written test is not sufficient to raise serious and reasonable doubts about the legality of a selection process and, thus, cannot support in itself a claim of *prima facie* unlawfulness.

22. Moreover, the available documentary evidence does not support this claim. Annex 5 to the Respondent's reply lists the scores (per question, totals, average totals and in percentages) of the 19 candidates invited to take the written test. It shows that one candidate did not take the test, and that the remaining 18 candidates received points for *each* of the five questions in the written test. There is no indication that any of the candidates failed to answer all the questions in the written test.

23. Accordingly, the Tribunal finds that the requirement of *prima facie* unlawfulness is not met in the present case.

24. Since one of the three cumulative conditions to grant a suspension of action is not met, it is not necessary to address the two other conditions.

Applicant's motion for leave to file an additional submission

25. The Tribunal underlines that applications for suspension of action seek urgent temporary relief. Their examination does not require the Tribunal to hear evidence and to make factual determinations, which are matters for consideration if and/or when a substantive claim is made.

26. Accordingly, consideration of applications for suspension of action must be prompt, and art. 13.3 of the Tribunal's Rules of Procedure sets a short statutory deadline for their adjudication, namely "five working days [as] of the service of the application [for suspension of action] on the [R]espondent".

27. As a result of the above, parties' submissions in connection with suspensions of action are generally limited to the application and to the Respondent's reply together with their respective annexes. Although permitting otherwise can be examined on a case-by-case basis, it should only be allowed under exceptional circumstances and without hindering the Tribunal's ability to deliver timely rulings on applications for suspension of action.

28. In the instant case, the Tribunal notes that the Applicant filed his motion approximately 24 hours before the expiration of the above-mentioned deadline, and it sees no exceptional circumstance warranting its granting.

Conclusion

29. In view of the foregoing:

- a. The Applicant's motion for leave to file an additional submission is not granted; and
- b. The application for suspension of action is rejected.

(Signed)

Judge Teresa Bravo

Dated this 21st day of March 2018

Entered in the Register on this 21st day of March 2018

(Signed)

René M. Vargas M., Registrar, Geneva