



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

YI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Camila Nkwenti, UNEP

The Application and Procedural History

1. The Applicant holds a fixed term appointment at the P4 level at the United Nations Environment Programme (UNEP). She serves UNEP as a Programme Officer/Social Safeguard Advisor.¹
2. On 24 June 2014, the Applicant filed a substantive application challenging UNEP's decision to exclude her from the "oral stage of the recruitment and selection process for the position of Senior Programme Officer P5".
3. Later on the same day, the Applicant filed an Application for Suspension of Action pursuant to article 10.2 of the Statute of the United Nations Dispute Tribunal seeking a suspension of the recruitment process to "preserve the Applicant's entitlement vis-à-vis the current recruitment and selection process".
4. The Application for Suspension of Action was served on the Respondent on 24 June 2014, and a Reply was received by the Registry on 25 June 2014. One of the annexes (Annex K) filed by the Respondent was however inaccessible on the Tribunal's e-filing portal, and was re-filed on 30 June 2014.
5. Following the resubmission of Annex K by the Respondent, the Tribunal advised the Applicant that she may make any submissions in response to the Respondent's Reply by 1 July 2014.
6. On 1 July 2014, the Applicant filed her submissions in response to the Respondent's Reply.

¹ The Application however states that the Applicant holds a permanent appointment. See para. 6.

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31. The Applicant has not shown the impugned decision to be *prima facie* unlawful. The Applicant has failed to show how Ms. Aggarwal Khan's receipt of the completed test affected the decision to exclude her from the next stage of the application process.

32. The recruitment process has been lawful and procedurally and substantially fair. Applications were submitted fairly; an initial analysis of the candidates' profiles were undertaken by a panel, a written test was individually taken by each candidate, administered and circulated to panel members by Violet Ngarachu, not Ms. Aggarwal-Khan. The selection process is well documented; markers provided their scores which were then tabulated to shortlist 18 candidates for the oral interview.¹⁰ After the written test was conducted, the written answers were marked independently by a panel of seven markers and she was graded together with other candidates. The evaluation records demonstrate that this was a fairly standard exercise and there is no reason to question the assessments made. The Applicant has not shown that she was not given fair and adequate consideration.

33. The Applicant's submission that there has been continued animosity between herself and her former supervisor, and that this has adversely impacted on the current recruitment and selection process is not true. The Applicant has failed to establish bias and prejudice in this case. Ms. Aggarwal Khan was only one of 7 panel members. The Applicant cannot base her arguments for prejudice on the fact that Ms. Aggarwal-Khan, her former supervisor, was a member of the panel. Each panel member marked the written test independently and awarded marks based on the written test taken by the candidates. The Panel members were not aware of which candidates they awarded the scores to as the written test only had the numbers of the candidates and not their names. The scores of the markers were tabulated by Ms Ngarachu, who administered the written test and provided the total scores for each candidate against their names. Ms. Aggarwal-Khan had no influence on the scores given by other markers as each panel member marked the written test independently

¹⁰ Annex J.

of the other panel members. Based on the scores awarded, the Applicant had a score of 130. 18 other candidates scored better than the Applicant; candidates who scored 160 and above were invited to an interview.

34. The laxity with which the Applicant filed the Application for Suspension of Action is indicative of the lack of urgency in this case.

35. The Respondent submits that the Applicant has failed to demonstrate direct consequences and irreparable harm should the decision not be suspended pending adjudication of the merits of the case.

Applicant's Response

36. The Applicant challenges the Respondent's contention that the decision not to select her should not be considered as an administrative decision having direct legal consequences as it would "mask the unique circumstances by which a recruitment process takes place".

37. The Applicant contends that the decision not to select her is final. Once a "determination is made that the Applicant is excluded from the recruitment process, there is no realistic possibility of subsequent inclusion. No additional administrative steps are necessary and no final determination must take place in order for this exclusion to come into effect".

38. When procedural irregularities are evidenced, the administrative decision to exclude the Applicant from the recruitment process has legal consequences. Specifically, it breaches the Applicant's contractual terms of employment relating to article 101.3 of the Charter of the United Nations and Staff Rules and Regulations.

Deliberations

39. Applications for suspension of action are governed by article 10.1 and 10.2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and article 14 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 10.2 of the Statute, i.e. *prima facie*unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

40. This Tribunal has previously held that¹¹

A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo*between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

41. Both Parties have made submissions as to the receivability of the Applicant’s motion for suspension of action.

42. Before entering into a discussion on whether the Applicant has met mt

aware that she did not pass the written test as no information on the written test has been communicated to any of the candidates. [Emphasis added]

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employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions

48. A selection exercise is an ongoing process until a selection decision is made. The written test is normally the first step in the process currently being challenged. 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 on a candidate's career if the unfairness of the initial step is established.

49. It is the considered view of the Tribunal that what the Applicant is challenging is the decision not to call her for an interview following what she alleges was an unfairly administered written test. The decision was "a unilateral decision taken by the Respondent in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order", the legal order being the career prospects of the Applicant.

50. There is also enough on record to persuade the Tribunal that the impugned selection exercise smacks at least *prima facie* of an unlawful act tainted by extraneous factors.¹⁵ The Hiring Manager who was also on the panel of markers used to supervise the Applicant and their relationship, according to the Applicant, was not a happy one. The Affidavit adduced by the Respondent to show otherwise, does not sufficiently disprove the Applicant's perception of bias.¹⁶

51. But the lack of clarity surrounding the implementation of the impugned decision limits what the Tribunal can do. An unlawful act will subsist because of the limitations on the court's powers for a grant of injunction. The difficulties arising from this limitation is obvious and needs little explanation.

¹⁵ Applicant's Annex E cf Respondent's Annexes J and K.

¹⁶ *Ibid.*

52. Be that as it may, it is difficult for the court to provide effective and meaningful injunctive relief on a process which has already commenced. Stopping a process which has already begun could potentially result in more harm than good. The court would be seen as meddling in the substantive functions of an office, which could in turn adversely affect the work of many staff members. In other words, granting an injunction at this stage of the process would affect more than just the Applicant.

53. The Tribunal therefore finds itself in the uncomfortable situation of having to allow a *prima facie* unlawful act to stand simply because its implementation has commenced.

54. The propriety of the recruitment process as a whole will be determined when the Tribunal comes to decide this matter on its substantive application.

55. The Application for Suspension of Action is **DISMISSED**.

(signed)

Judge Vinod Boolell

Dated this 1st day of