



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BALDINI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

6. Following the advertisement of the Posts, 17 candidates were shortlisted to take a written test. Three members of the assessment panel blind-marked the tests. The panel members did not know the identity of the applicants. Without knowing the Applicant's identity, the three panel members each, and independently, assessed the Applicant's test and the Applicant received an average grade ranking her 15th out of 17 applicants. This information is corroborated by the written documentation filed by the Respondent.

7. Six of the 17 applicants passed the written test and were invited for an interview. The interviews of the six candidates were conducted on 8 and 9 April 2013. The Applicant submits that no female candidates were selected for the interview and that all six male candidates to be interviewed were "former police" and formerly worked for "the Director" and /or are friends of him.

8. Regarding the further process, the Respondent submitted in his reply, as revised according to his subsequent "Corrigendum to the Respondent's reply to the application for suspension of action", that:

In [the] next two weeks, time permitting, the Hiring Manager [the Director mentioned in para. 7 above] and the other panel members

- b. The contested decision has not yet been implemented;
- c. The Applicant has submitted a request for management evaluation of the contested decision, which is currently pending;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable harm.

Receivability

10. The Respondent submits that the application is not receivable and argues as follows, as revised according to his subsequent “Corrigendum to the Respondent’s reply to the application for suspension of action”:

... Article 2.2 of the UNDT statute empowers the Tribunal to suspend the implementation of an administrative decision that is the subject of an ongoing management evaluation request. In the case of *Planas* UNDT/2009/086 (upheld on appeal, 2010-UNAT-049) the Tribunal ruled that the conduct of a recruitment exercise is not an administrative decision and stated, in para. 16, that “[a] selection process, being a process of decision-making, involves a series of steps or findings which lead to an administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process but cannot be, alone, the subject of an appeal to the Tribunal”.

... Furthermore, in *Planas*, the Tribunal observed the longstanding jurisprudence of the United Nations Administrative Tribunal that: “It is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one’s interest is predicated upon the condition that the impugned decision is stated in precise terms”.

... In her Application the Applicant fails to state the administrative decision she seeks to suspend in precise terms. Instead, she asserts her opinion that the selection exercise has been “tainted from the start”. She states “there should be an investigation in

order to determine who is responsible for the violation of the UN's Rules and Regulations, ST/SGB's and Guidelines". The Applicant is making a general allegation of misconduct. She has not identified any administrative decision that may be the subject of appeal. At this stage of the process, there has been no selection decision that has a direct impact on her terms of appointment (See *Andati-Amwayi* 2010-UNAT-058).

... In the ordinary course, pursuant to Sections 8.1 and 8.2 of ST/AI/2010/3 (Staff Selection System), the selection exercise will be reviewed by the CRB before it is approved and the recommended forwarded to [the Under-Secretary-General for OIOS] for her selection decision. Should the CRB identify flaws in the conduct of the selection exercise, the selection exercise will be cancelled and/or the flaws in the process will be rectified. As a result, *arguendo*, should the Applicant's allegation that the process is flawed be correct—which is denied—it should be detected by the CRB prior to any selection decision being taken. For this reason, the Application is premature. In light of the internal safeguards and procedures built into the selection process, it is important that the selection exercise be allowed to run its course.

11. The Applicant contends, in her comments from 15 April 2013, that the application is receivable by, in essence, arguing that the present case is distinguishable from *Planas*.

12. The Appeals Tribunal in *Planas* stated, in para. 2, that the case concerned:

the alleged non-application of paragraph 48(a) of the UNHCR Procedural Guidelines for Appointments, Postings and Promotions (Procedural Guidelines), which establishes the rotation eligibility requirements for appointments, postings and promotions in duty stations grouped into three categories, H/A, B/C and D/E.

13. In upholding the Dispute Tribunal's judgment in UNDT/2009/086, the Appeals Tribunal set out the following considerations in *Planas*:

19. Regardless of whether all the specific occasions on which *Planas* reportedly applied but was not considered as a candidate were detailed or justified, even assuming that in the selection process for each post she did indeed apply but was not considered, that situation in itself would not enable the proposed claim, which in large measure exceeds the powers of the UNDT, to be made.

20. In effect, the claim that she was passed over and discriminated against could only be made if the staff member, feeling that she had suffered injury after she had submitted a specific candidacy and after another person had been selected, had contested the results of the selection process, that is, the specific appointment made.

21. Therefore, the UNDT was correct in finding that, as Planas did not contest in precise terms her non-selection for any post, she did not identify any administrative decision in her application.

22. Advancement of a claim like the one being made requires verification that a particular administrative decision taken with respect to a specific application by Planas to fill one or more specific posts, was taken contrary to law, causing her direct harm. Thus, the violation of the right she invokes would be compared with the applicable norms and with the rights of the other candidates, in order to determine whether or not the alleged violation took place.

14. The Applicant contests the conduct of the selection process for the Posts from outset and its “outcome” thus far. She explains that, following the interview, four candidates are to be recommended and that the list of recommended candidates is shortly to be submitted to the CRB. As for the selection exercise, she points at different specific incidents, which she claims were unlawful, including that:

a. One of the interviewed candidates who was working in “the O/USG under the direction of the Director was intimately involved in the development, changing the requirements of the Job Opens (JO) for [the Posts]” and “the education requirements were downgraded to allow ... internal OIOS candidates to be included in the shortlist”;

b. No female candidates were selected for the interview; and

c. It was incorrect not to invite her for the interview, based on the assessment that she had failed her written test, in that she contends that one of the members of the assessment panel was apparently not a United Nations staff member. The panel member should therefore have been banned from participating as a full member of the assessment panel.

15.

20. Accordingly, the Tribunal finds that the contested administrative decision is yet to be implemented.

Pending management evaluation request

21. Before she filed her application for suspension of action to the Tribunal, on 10 April 2013, the Applicant submitted a request for management evaluation.

22. Since neither party has informed the Tribunal that the management evaluation has been completed, the Tribunal finds that that the Applicant's request for such evaluation is still pending.

Prima facie unlawfulness

23. For the Tribunal to find that the contested administrative decision is *prima facie* unlawful, it is enough for the Applicant to present a fairly arguable case that the decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith (see, for instance, *Saffir* Order No. 49 (NY/2013), *Villamoran* UNDT/2011/126 and *Jaen* Order No. 29 (NY/2011)). Since the suspension of action is only a temporary measure until the management evaluation is finalised, the *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision (*Corcoran*

c. The composition of the panel that assessed the written test was unlawful because it would appear that one of the assessors was not a United

In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

ST/AI 2010/3 para. 7.8 states in pertinent part: "... the hiring manager shall transmit, ... preferably, a list of qualified, unranked,

Urgency

29. The Applicant contends, in essence, that her case is particularly urgent in that the selection process is still ongoing and the final selection decision could be taken at any given time.

30. The Respondent submits that the selection exercise will not be completed, and the selection decisions will not be made, within the 30-day time limit for the management evaluation. The Respondent contends that, as such, any order for suspension of the selection decisions during the pendency of the management evaluation will not delay, or affect in any way, the timing of the selection decisions. The Respondent further argues that, if the selection exercise is allowed to run its course, the CRB will be given a chance to detect and remedy any flaw in the process prior to a selection decision being taken and that, given this safeguard in the process, there is no urgency or need to suspend the process.

31. The Tribunal finds that, however unlikely, there is no guarantee that the selection process for the Posts may not be completed before the management evaluation is rendered. As a matter of fact, it is unknown when the selection decisions are to be made and, in principle, the Under-Secretary-General may make these decisions at any given moment.

32. Furthermore, it is clear that the urgency is not inflicted by the Applicant as the timing of the selection decisions does not depend on her own making (see *Dougherty* UNDT/2011/058, *Jitsamruay* UNDT/2011/206 and *Evangelista* UNDT/2011/212).

33. Regarding the CRB, the Tribunal notes that the Applicant already filed her request for management evaluation on 10 April 2013 and that the Management Evaluation Unit (“MEU”) has 30 days to review this request which, based on the Applicant’s submissions before the MEU, may include a review of the entire selection process. In the meantime, there is no need for the CRB to simultaneously

review the same aspects of the selection process if the list of recommended candidates should be forwarded to it before the management evaluation is complete.

34. Accordingly, the Tribunal finds that the present case is particularly urgent.

Irreparable damage

35. The Applicant contends that she will have no remedy should the selections decisions be implemented.

36. The Respondent submits that, only after the CRB has confirmed that the selection exercises were conducted properly, will the list of recommended candidates be submitted to the Under-Secretary-General for OIOS for her selection decisions. The Respondent further argues that, as such, any flaw in the selection process for the Posts could be rectified prior to any administrative decision being taken and impacting on the Applicant's rights.

37. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the involved individual (see, for instance, *Saffir* Order No. 49 (NY/2013), para. 24). As much as this applies to the situation where an applicant may lose her/his employment with the Organization, the effect is similar if, as in the present case, a staff member ineradicably losses out on a promotion

Conclusion

39.