



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

TERRAGNOLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM

Introduction

1. On 16 June 2013, the Applicant filed an application with the New York Registry of the Tribunal, contesting the decision “to grant time release and related administrative assistance to ineligible staff representatives to [the United Nations] Staff Pension Committee in breach of applicable term limits”, and the refusal “to take action on the notification that one [of] these members was officing under an insufficiently disclosed conflict of interest to the favour of the Respondent and broke electoral regulations during the polls.” He noted that “the decision was presumably made by Catherine Pollard, [Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”)] and Yukio Takasu, [Under Secretary-General, Department for Management (“USG/DM”)], and communicated to the Applicant by Christine Asokumar, Assistant to the ASG/OHRM”.

Facts

2. In its resolution 44/23 of 27 September 2012, the Staff Council of the United Nations Staff Union (“UNSU”) decided to authorize payment to an external company, Election Services Corp, for logistical assistance in the worldwide elections of representatives at the United Nations Staff Pension Committee (“UNSPC”) and the Pension Board of the United Nations Joint Staff Pension Fund (“UNJSPF”), on grounds, *inter alia*, that the elections were long overdue and that electronic voting was the most efficient way to conduct the elections in question. The Polling Officer of the United Nations Staff Union (“UNSU”) called for nominations to the UNSPC in November 2012.

3. From 13 to 18 December 2012, the elections for the UNSPC took place, under the auspices of the UNSU and its Polling Officer, who coordinated the nomination, identification of eligible voters and material aspect of the election for all participating organizations. The results were announced by the Polling Officer of the UNSU on 20 December 2012. The Applicant, who was a candidate in these

elections, was ranked seventh, behind four candidates elected as members and two candidates elected as alternate members of the UNSPC.

4. The Applicant filed a note on the conflict of interest of one of the elected candidates to the Chief Executive Officer (“CEO”) of the United Nations Joint Staff Pension Fund (“UNJSPF”) on 17 January 2013, for submission to the UNSPC and the Standing Committee of the Pension Fund.

5. On 23 January 2013, the Applicant lodged a complaint with the Arbitration Committee of the UNSU, under art. 8.3.1 of the UNSU Regulations, *inter alia*, with respect to apprehended electoral violations, conflicts of interest and ineligibility of some candidates. In his complaint to the Arbitration Committee, the Applicant stated, *inter alia*, that since the UNDT had ruled (Order No. 139 (NY/2011)) that it was not competent under art. 2.1(a) of its Statute for matters relating to internal differences of the Staff Union, which ought to be resolved through the Arbitration Committee, the latter was the only competent body for staff election grievances. The Applicant was heard by the Arbitration Committee on 28 February 2013.

6. In an email of 23 January 2013, the Applicant expressed his concern about the eligibility of some candidates to the Polling Officer, with respect to the term limit (hereinafter “the term limit”) provided for in General Assembly resolution A/RES/51/226 (Human resources management), and noted that in accordance with the regulations of the UNSU, the matter would at best be resolved at the Polling Officer’s level.

7. In an email to the Pension Fund of 13 February 2013, the Applicant noted that in the absence of any other competent body, the Standing Committee/Pension Board should make a determination on its own governance and reiterated his request that his note on the conflict of interest of one of the elected candidates be transmitted to the UNSPC and the Standing Committee. By email of 21 February 2013, the Chief, Legal Office, UNJSPF, recommended to the Applicant to raise his concern on a possible conflict of interest situation with one of the newly elected participant members of the UNSPC, and noted that it was for

the UNSPC to raise the matter with the Pension Fund's Board or its Standing Committee.

8. By email of 28 February 2013 to the Arbitration Committee and the Polling Officer, the Applicant noted that the enforcement of the term limit of resolution A/RES/51/226 does not fall under the notion of art. 2.1(a) of the Tribunal's Statute, and that elections are not decisions made by the Administration.

9. On 7 May 2013, the Applicant wrote to the Assistant of the ASG/OHRM, to request OHRM to enforce the term limits provided for in General Assembly resolution A/RES/51/226 with respect to the election of staff representatives to the UNSPC, which would result in that the affected members would not be qualified to attend the UNSPC meeting and that relevant administrative support should not be provided to them. He also expressed his ethical concern about one of the elected member's conflict of interest and violation of electoral rules. The Applicant indicated that failing a response by 14 May 2013, he would submit a request for management evaluation.

10. On 15 May 2013, not having received a response, the Applicant submitted a request for management evaluation of OHRM/Office of the ASG ("OASG") decision to "decline to

a. Enforce, as regards those ineligible representatives elected by staff to the [UNSPC] in December 2012, the 4-year term limit on continuous staff representational activities contained in sect. ii, paras. 11-12 of General Assembly resolution 51/226, and discussed at SMCC-XX (para. 13) and SMCC-XXI (paras. 23, 24 and 26), in breach of Article 101.1 and 101.2 of the UN Charter, as well as of ST/SGB/176/Rev.1, para.1.2 – resolution 51/226 was recalled or reaffirmed in the preambles of resolutions 53/221, 55/258, 57/305, 59/266, 60/238, 61/244, 63/250, 65/247 and 66/234;

b. Implement para. 12 of resolution 51/226 following the modalities agreed at SMCC-XXI (para. 24), and formalized in paras. 3 and 4 of the ASG/OHRM's memo of 28 August 1997;

c. Use its central interpretive authority vested in ST/SGB/2011/4, para. 2.2 (a) (ii), (e), (f) and (h) as well as its leadership in the Human Resources Network of the Chief Executives Board to achieve the implementation of the said term limits by the two other specialized agencies affected by their breach by ineligible staff representatives elected to the Staff Pension Committee, namely UNICEF and UNDP, whose human resources administration is also bound by SMCC agreements and governed by General Assembly regulations under Staff Regulation 1.1 (e).”

11. By letter dated 17 May 2013, the CEO of the UNJSPF responded to a query of the President of the Association of Former International Civil Servants, noting that the worldwide elections of representatives of the United Nations participants in the UNJSPF have always been conducted by the UN Polling Officers, in coordination with UN/OHRM, and that the UNJSPF Secretariat had a limited role therein, namely to verify the eligibility of nominees and/or voters.

12. On 30 May 2013, the Assistant of the ASG/OHRM responded to the Applicant’s request of 7 May 2013, clarifying that the four-year term limit of A/RES/51/226 was not applicable to staff representation at the UNSPC, and that the matter was regulated by art. 6 of the UNJSPF Regulations. She noted that if he had any questions with respect to the eligibility of candidates, the Applicant should speak to the relevant polling officers.

13. By letter of 7 June 2013, the Applicant received a response to his request for management evaluation whereby the Management Evaluation Unit found that there was no contestable administrative decision and that the request for management evaluation was therefore not receivable.

14. On 17 June 2013, the Applicant submitted an application on the merits to the New York Registry of the Tribunal which, upon the Registry’s request, he re-submitted on 25 June 2013.

15. On 21 June 2013, the Applicant filed a motion for leave to inform the Tribunal *ex parte* of his reports to the Office of Internal Oversight Services.

16. On 3 July 2013, the Applicant filed a motion for interim relief. The same day, the Applicant informed the New York Registry that he had no objections to the reassignment of the case to another Registry.

17. On 5 July 2013, the New York Registry of the Tribunal served the application and the motion for interim relief to the United Nations Secretariat (ALS/OHRM) as Respondent; two other entities, the United Nations Development Programme (“UNDP”) and the United Nations Children’s Fund (“UNICEF”), were also served the motion for interim relief, for comments, since the Applicant had referred to both Organisations. The Respondent’s reply by ALS/OHRM to the application on the merits and on the motion for interim relief, as well as UNDP and UNICEF comments on the motion were filed on 9 July 2013; with his response, the Respondent also filed a motion for summary judgement, requesting the Tribunal to determine the issue of its jurisdiction and the receivability of the application. The Applicant submitted two motions for leave to respond to these replies on 9 July 2013.

18. By Order No. 168 (NY/2013) on change of venue, of 10 July 2013, the New York Registry of the Tribunal transferred the case to the Geneva Registry, where it was registered under case No. UNDT/GVA/2013/035.

19. By Order No. 96 (GVA/2013) of 11 July 2013, the Tribunal rejected the Applicant’s motion for interim relief and, by Order No. 102 (GVA/2013) of 19 July 2013, it rejected the Respondent’s motion for summary judgment.

20. Also on 19 July 2013, the Respondent filed a motion for leave to have receivability considered as a preliminary matter and, hence, to file a reply limited to this issue. On that same day, the Applicant submitted comments on the Respondent’s motion and requested the Tribunal to order the production of additional documents.

21. By Order No. 104 (GVA/2013) of 24 July 2013, the Tribunal granted the Respondent’s motion for leave to have receivability considered as a preliminary issue; it thus ordered that the Respondent file additional comments on receivability, if any, which he did on 5 August 2013.

22. On 6 August 2013, the Applicant filed a motion for leave to rectify misrepresentation of facts and errors of law in the Respondent's submission on the preliminary determination of receivability, to which he already added his additional comments.

23. By Order No. 3 (GVA/2014) of 9 January 2014, the Tribunal informed the parties that it would decide the case on the basis of the parties' written pleadings.

Parties' submissions

24. The Applicant's principal contentions are:

a. He is not contesting OHRM failure to determine the eligibility of candidates, including his own, prior to the election, but its refusal to apply its own regulations on candidates' term limits; the failure by OHRM to ascertain the eligibility of candidates is relevant to the administrative decision he is appealing, namely the decision to grant time release and administrative assistance to three elected candidates in excess of the term limit set by General Assembly resolution A/RES/51/226; this failure is proof of the improper motives of OHRM, namely to undermine legitimate staff representation mechanisms;

b. The decision was made by OHRM and not the Standing Committee of the Pension Fund, as such, it is the Dispute Tribunal and not the Appeals Tribunal that is competent to hear his case; at best, there could be a decision of the UNSPC that the three staff representatives could continue to serve the UNSPC despite their ineligibility under General Assembly resolution 51/226, sect. II, para. 10-12, and the conflict of interest and electoral violations of one of these representatives;

c. His application is not time-barred; he became certain of the ongoing decision to grant time release and related administrative decision only on 1 May 2013;

d. The decision of which he sought management evaluation is the same one he challenged before the Tribunal; the application is receivable *ratione materiae* and *ratione temporis*;

e. One of the three staff representatives committed electoral violations, *inter alia*, he failed to properly disclose his conflict of interest as a “direct ASG/OHRM report” to the electorate;

f. The main issue in this case is the compliance with General Assembly resolution 51/226, sect. II, para. 10-12, which is clearly applicable to all elected staff representatives at the UN and its separately funded organs; the Secretary-General bears the ultimate responsibility for the fairness and regularity of polls and to ensure that all staff rights are respected, including the “right to the integer representation of their interests in the Pension Fund”;

g. Though he exhausted all out-of-court remedies and made every effort to inform the Administration about the irregularities, the Administration, which had improper motives, did not react;

h. The Arbitration Committee did not make any pronouncement on his complaint; one of the members of the Arbitration Committee has equally a conflict of interest, since she is a lawyer within OHRM;

i. He requests the Tribunal “to order the respondent and the related agencies to deny time release and any other form of administrative assistance ... in connection with UNSPC and Pension Board activities to those three staff representatives on the UN [SPC] in excess of their term limits until the end of the 2013-2017 term” and monetary compensation of USD 5,166 for the time spent in preparing the various submissions and exhibits.

25. The Respondent’s principal contentions are:

a. The application is not receivable because the issue raised in the application does not carry direct legal consequences to the Applicant’s

terms of appointment and does not concern an administrative decision under the terms of art. 2.1 of the Tribunal's Statute; the rights put forth by the Applicant either do not exist or do not apply;

b. Also, the composition and the determination of the members of the UNSPC and of the United Nations Joint Staff Pension Board are not a term or condition of employment of staff members and the UN Staff Regulations and Rules do not apply to the UNJSPF and on how members of the UNSPC and of the Pension Fund Board are elected by the Fund's participants; rather, the composition and determination of the members of the UNSPC and the Board are exclusively governed by the Rules and Regulations of the UNJSPF, more specifically by art. 6 (a) of the UNJSPF Regulations;

c. One criterion for a decision to be an administrative decision for the purpose of art. 2.1 of the Tribunal's Statute is that it must be taken by the Secretary-General; the Secretary-General has no role in the administration of the UNJSPF;

d. The Applicant does not contest that the elections to the UNSPC and to the UNJSPF Board were conducted by the UNSU Polling Officers; the Secretary-General had no role in these elections; as such, he does not contest an administrative decision taken by the Secretary-General;

e. The Appeals Tribunal, and not the Dispute Tribunal, has limited jurisdiction over certain matters relating to the administration of the UNJSPF;

f. The ASG/OHRM has no legal basis and is not in a position to apply the term limits provided for in General Assembly resolution 51/226 to the terms of office of the members of the UNSPC and as such of the UNJSPF Board; the latter has the exclusive authority to administer the Fund under its Regulations and Rules; the email to the ASG/OHRM seeking clarification on the Regulations of the UNSPC cannot serve to create an implied or affirmative decision by the Secretary-General on eligibility of the members of the UNSPC; it cannot change the fact that the Secretary-General has no

say in the elections of UNJSPF participants to the UNSPC, including the enforcement or implementation of term limits or other restrictions with respect to the candidacy or service on the UNSPC;

g. Also, the administrative support provided to elected members of the UNSPC by the Secretary-General does not create an independently appealable decision; rather, it is a predictable and natural outcome of the UNSPC elections which does not change the legal order;

h. In his request for management evaluation, the Applicant did not contest the granting of time release and other related administrative assistance to the elected members of the UNSPC, any claims against these decisions are therefore not receivable; moreover, he does not have standing to contest the time release or administrative support granted to other staff members, since there is no direct relation between the granting of such time release and administrative support and the Applicant's terms of appointment;

i. The application is time-barred, since the candidates for staff representatives were announced on iSeek on 11 December 2012 and if it were admitted that the candidacy of staff representatives to the UNSPC could be considered an administrative decision by the Secretary-General, the Applicant failed to contest such decision within the statutory time limit of 60 calendar days, since he filed his request for management evaluation only on 15 May 2013, and not on 11 February 2013; the Applicant cannot overcome the time-bar by creating an implied decision by the Secretary-General on the eligibility of those candidates to serve on the UNSPC;

j. The application constitutes a manifest abuse of proceedings and the Tribunal should award costs against the Applicant; the application should be rejected in its entirety.

Consideration

26. As a preliminary matter, the Tribunal firstly rejects the Applicant's request for disclosure of documents, since the voluminous documents and submissions on file provide it with more than enough information to adjudicate the case.

27. Secondly, the Tribunal did not consider it necessary to entertain the Applicant's motion on an *ex parte* filing of 21 June 2013, since it did not find the *ex parte* submission made by the Applicant in a prior application relevant and did not use it to decide upon the present case.

28. Thirdly, in its considerations, the Tribunal took into account the Applicant's additional comments of 6 August 2013, thus implicitly granting his motion of the same day.

Scope of the application

29. The Tribunal now has to determine the scope of the present case. The Tribunal recalls what the Appeals Tribunal held in *Massabni* 2012-UNAT-238, namely that:

2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

30. In his application, the Applicant identifies the first contested decision as the Secretary General's decision "to grant time release and related administrative assistance to ineligible staff representatives to UN Staff Pension Committee in breach of applicable term limits". In his subsequent submission of 6 August 2013,

the Applicant clarified that he did not contest “[OHRM] failure to determine the eligibility of candidates prior to the election on 11 December 2012” but “the fact that OHRM failed to discharge its duty to ascertain [that] eligibility ... [was] relevant to the administrative decision under appeal on the granting of time release...”. Therefore, the Tribunal considers that the first part of the application has to be interpreted to be addressed only against the decision to grant time release and related administrative support to the elected participants, and not against the determination of eligibility of these candidates.

31. Secondly, the Applicant contests the failure by the ASG/OHRM, on behalf of the Secretary-General, to take action on an alleged conflict of interest and electoral irregularities allegedly committed by one of the elected participants.

Decision to grant time release and administrative support to elected members

32. The scope of the Tribunal’s jurisdiction is clearly determined and limited by its Statute, which provides in art. 2.1(a) that it is competent to hear and pass judgment on applications against administrative decisions “alleged to be in non-compliance with the terms of appointment or the contract of employment”.

33. It is a general principle of law that a litigant must have legal capacity and legal standing in order to invoke the jurisdiction of a court or a tribunal. A party who litigates must show that he has sufficient interest in the matter, the basic element of which is that a party must show that he has a right or interest at stake. A litigant will have legal standing if the right on which he bases his claim is one that he individually and personally enjoys or if he has a sufficient interest in the person or persons whose rights he seeks to protect (*Hunter* UNDT/2012/036).

34. The Appeals Tribunal has confirmed that in case an Applicant has no stake in the contested administrative decision since his rights and terms of employment were not affected by it, the application has to be rejected for lack of legal standing (*Pellet* 2010-UNAT-073).

35. In view of the scope of the application determined above, the Tribunal has to examine if the decision to grant the three elected members representing the UNJSPF participants time release and related administrative support to attend to matters of the UNSPC and the Pension Board, might impact on any individual right of the Applicant under his terms of appointment or contract of employment. It is obvious that this is not the case. Therefore, the Applicant lacks legal standing with respect to the first claim, hence his application is not receivable in this respect.

Decision not to take action on alleged conflict of interest and breach of electoral regulations

36. The Tribunal now has to assess the Applicant's second claim. The Tribunal held in *Ginivan* UNDT/2013/110 that while its Statute does not contain an express or implied provision for referral of any electoral challenge to the Tribunal, for which the Tribunal is not competent, a claim against the refusal by the Secretary-General to carry out an investigation in connection with Staff Union elections may fall within the Tribunal's jurisdiction. While the case at hand differs from the case of *Ginivan*, *inter alia*, since the elections which are at stake are those of representatives of participants at the UNSPC, which is not a staff representative body, the Tribunal has to equally determine whether the application, in so far as it concerns the decision not to take action on the alleged conflict of interest and breach of electoral regulations by one of the members, is receivable.

37. The Appeals Tribunal has clarified that the failure or omission of the Administration to take a decision can also constitute an appealable administrative decision (*Tabari* 2010-UNAT-030).

38. The Applicant wrote to the Assistant of the ASG/OHRM, on 7 May 2013, requesting OHRM to take action with respect to the alleged conflict of interest and breach of electoral regulations of one of the elected members to the UNSPC. When he did not get a response within the one week time limit he had set in his email of 7 May 2013, he submitted a request for management evaluation, addressing, *inter alia*, the issue of conflict of interest and violation of electoral

regulations. While he had received no response before he submitted his request for management evaluation, he subsequently received a response to his email of 7 May 2013 on 30 May 2013, which did not address his concern. The Tribunal finds that the Applicant could not be requested, after he received the response of 30 May 2013, to submit another request for management evaluation, since it merely confirmed the implicit decision, attributable to the Secretary-General, that the Administration was not going to take action with respect to the alleged conflict of interest and violation of electoral regulations.

39. The Tribunal has to assess whether that implicit decision was susceptible to affect the rights the Applicant holds from his terms of appointment or contract of employment. It noted that staff regulation 6.1 provides that “Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund”, while staff rule 6.1 states:

Staff members whose appointments are for six months or longer or who complete six months of service under shorter appointments without an interruption of more than 30 calendar days shall become participants in the United Nations Joint Staff Pension Fund, provided that participation is not excluded by their letters of appointment.

40. The Tribunal finds that it results from these provisions of the Staff Rules and Regulations that each staff member who is a participant in the Fund, like the Applicant, detains a right to proper representation of participants in the Fund’s governance structure. Therefore, the decision not to take action on the Applicant’s claim for conflict of interest and breach of electoral regulations is susceptible to affect the rights he detains from his terms of appointment, and as such constitutes an administrative decision for the purpose of art. 2 of the Tribunal’s Statute. The application with respect to the second decision is therefore receivable, *ratione materiae*. Since the Applicant respected the statutory time limits, the application is also receivable *ratione temporis*.

41. The Tribunal now has to determine whether the decision by the Secretary-General not to take action on the alleged irregularities in the elections and conflict of interest was lawful. According to art. 4 of the UNJSPF Regulations, the Pension Fund, as a multimember organisation, is administered by the Pension Board, a staff pension committee for each member organization, and a secretariat to the Board and to each such Committee. As such, the UNSPC is an integral part of the administration of the Fund and its governance structure. Art. 6 (a) and (b) of the Fund's Regulations provide for the composition of the UNSPC and the duration of the term of its elected members and alternate members. The Tribunal notes that the actual eligibility of candidates to represent participants at the UNSPC, including any potential conflict of interest or length of term, is to be determined exclusively under the Regulations and Rules and other administrative issuances of the UNJSPF, which is a self-contained regime, into which the Secretary-General cannot interfere.

42. As a consequence, the Tribunal can only conclude that in the case at hand, the Secretary-General, who had the duty to facilitate the holding of the elections to the UNSCP, had no power, whatsoever, to interfere in the actual conduct and results of the elections, and to take action with respect to any alleged irregularities and/or conflict of interest. Therefore, it was correct for the Secretary-General to refuse to interfere in the conduct of the elections and the election results and the Applicant's second claim has to be equally rejected.

Costs

43. The Tribunal does not find that the Applicant has manifestly abused the proceedings before it; hence, the Respondent's request to award costs against the Applicant, under art. 10.6 of the Tribunal's Statute, has to be rejected.

Conclusion

44. In view of the foregoing, the Tribunal DECIDES that:

- a. The application is rejected;
- b. The Respondent's claim for abuse of proceedings and costs against the Applicant is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 20th day of January 2014

Entered in the Register on this 20th day of January 2014

(Signed)

René M. Vargas M., Registrar, Geneva