UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/021
Judgment No.: UNDT/2015/114
Date: 20 November 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SINGH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robert Appleton, Esq.

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is one of two Directors at the D-1 level in the Investment Management Division ("IMD") of the United Nations Joint Staff Pension Fund ("UNJSPF") in New York. On 19 March 2015, he filed an application contesting the decision, allegedly made by the Representative of the Secretary-General ("RSG") for the Investments of the UNJSPF, to include as one of the requirements in the Job Opening ("JO") for an advertised D-2 level post of Director, Investment Management, IMD, that candidates must hold Chartered Financial Analyst ("CFA") certification. As relief, the Applicant requested that the impugned JO be rescinded, the recruitment process be suspended, that a lawful JO be issued, that the RSG be removed from the recruitment process, and, "in lieu of compensation, reimbursement of expenses including attorney's fees as a result of the egregious conduct by the Administration in this case, and the fact that the Applicant had no choice but to seek outside, private counsel, to vindicate his rights".

2. On 24 March 2015, while the case was pending before the Dispute Tribunal, the Administration cancelled the impugned JO. A revised JO was subsequently issued with no requirement of CFA certification. The Applicant applied for this new JO.

3. On 17 April 2015, the Applicant filed a motion to amend the application, seeking the following forms of relief: referral of the case to the Secretary-General for possible enforcement of accountability measures, pursuant to art. 10.8 of the Dispute Tribunal's Statute; removal of the RSG in the recruitment process and replacement with a neutral party; re-drafting and re-circulation of the JO; compensation for severe stress, reputational damage, and anguish from enduring systemic discrimination; and compensation for loss of chance/opportunity resulting from the Administration's procedural violations; costs, "for reimbursement of expenses including attorney's fees".

Factual and procedural background

4. The Applicant joined the Organization in January 2009 as Director at the D-1 level, IMD/UNJSPF. He holds a Master's degree in Business Administration and Finance, and while he is not a CFA charter holder, he holds a Chartered Alternate Investment Analyst ("CAIA") certificate and a Financial Risk Manager ("FRM") certificate.

5. The impugned JO was posted on Inspira (the online United Nations jobsite) on 30 January 2015 with a closing date for application of 31 March 2015. The JO listed under the educational requirements that "[CFA] charterholder is required". Whilst the Applicant is not a CFA charter holder, the only other D-1 level Director in IMD is.

6. On 3 February 2015, the Applicant sent an email to the Office of Human Resources Management ("OHRM") expressing his concerns over the decision to include the CFA certification as an educational requirement in the initial JO for the contested post.

7. On 20 February 2015, OHRM responded that it had already approved the JO and that no further action would be taken in response to his concerns.

8. On 2 March 2015, the Applicant (who was self-represented at the time) filed an application for suspension of action pending management evaluation (Case No. UNDT/NY/2015/010) of the decision to include CFA certification as an educational requirement in the impugned JO.

9. By Order No. 36 (NY/2015) dated 3 March 2015, the Tribunal (Judge Ebrahim-Carstens) held that "there being no pending management evaluation, the application for suspension of action is fatally defective and stands to be dismissed".

10. On 3 March 2015, the Applicant filed a request for management evaluation requesting: (i) suspension of the JO; (ii) review of the job requirement by the UNJSPF; and (ii) re-publishing of the job posting to ensure that the eligibility requirements were lawful and fair to all candidates.

11. By email of 6 March 2015, the Management Evaluation Unit ("MEU") replied that "[u]pon a preliminary review of your request for management evaluation … [p]lease note that the MEU only has the authority to suspend administrative decisions related to determinations of appointment and separations from service".

12. On 6 March 2015, the RSG received an email in which another potential candidate expressed interest in the contested D-2 position and expressed "surpris[e] that [a CFA certification was] a requirement as I [this potential candidate] don't believ[e] this has ever been a requirement for any position offered through the UN system". The potential candidate further stated that, "I would like to be considered for this D-2 position, this JO however as it stands … is problematic. Having the CFA Charter holder as desirable would allow this? Is it possible to alter this at this time?"

13. On the same date, the RSG replied that the potential candidate's "background sounds impressive. The CFA Charter is a firm requirement for the position".

14. On 6 March 2015, the Applicant (who was self-represented at the time) filed a second request for suspension of action (Case No. UNDT/NY/2015/015).

15. By Order No. 39 (NY/2015) dated 9 March 2015, the Tribunal (Judge Meeran) dismissed the Applicant's second request for suspension of action as there was no longer any matter pending before MEU after its finding that it only had authority "to suspend administrative decisions related to determinations of appointment and separations from service".

16. On 12 March 2015, the Applicant sought the advice of the Office of Staff Legal Assistance ("OSLA"). On the same day, OSLA advised the Applicant to apply for the position.

17. By email dated 13 March 2015, the Applicant responded to OSLA that he had created an application for the JO but did not initially apply "knowing that it would be screened out". However, the Applicant concluded the email by stating that he would apply.

18. On 13 March 2015, the Applicant sought the assistance of private counsel, namely counsel of record for the Applicant.

19. On 17 March 2015, MEU notified the Applicant that since the advertisement of the JO was one step in the selection exercise, and did not in itself constitute a challengeable administrative decision, the Applicant's request for management evaluation dated 3 March 2015 was deemed premature and not receivable. MEU further observed that:

> Following communications with the UNJSPF, MEU noted that the job opening for the Post was exceptionally approved by [OHRM] and later reviewed and approved by the Central Review Board. The MEU learned that the CFA exception was granted because the future incumbent will be in charge of managing all investments of the [IMD], which are valued at USD53 billion. Accordingly, due to the substantial responsibility of the job and the high risks associated with it, the requirement for the incumbent to possess a CFA was granted on an exceptional basis.

20. On 19 March 2015, the Applicant filed the application on the merits.

21. The following day, 20 March 2015, the Applicant filed a motion for interim measures pending the substantive proceedings, pursuant to art. 10.2 of the Dispute Tribunal's Statute, seeking, *inter alia*, suspension and rescission of the impugned JO, cessation of further recruitment action; re-issuance of the JO; and reimbursement of expenses, including counsel's fees.

22. By email of 24 March 2015, OHRM informed Counsel for the Respondent that the impugned JO had been cancelled, the UNJSPF Audit Committee having noted that the CFA Charter requirement "may not attract job applicants from all parts of the globe".

23. The Respondent filed his response to the motion for interim measures on 25 March 2015, stating that the impugned JO had been cancelled. The Applicant provided his comments on the Respondent's response on 26 March 2015.

24. By Order No. 50 (NY/2015) dated 30 March 2015, the Tribunal (Judge Ebrahim-Carstens) found that following the cancellation of the impugned JO on 24 March 2015, the first two heads of relief sought by the Applicant in the motion for interim measures (withdrawal of the JO and immediate cessation of the recruitment exercise) were *de facto* granted, and dismissed the motion. The remaining heads of relief sought—namely request for reimbursement of legal costs and for an order directing the Administration to re-draft and re-issue the JO—were matters reserved for consideration in the context of the application on the merits. The Tribunal encouraged the parties to explore all possibilities to informally resolve the case.

25. By email of 30 March 2015, OHRM informed Counsel for the Respondent that the Applicant had not applied for the impugned, and now cancelled, JO.

26. On 17 April 2015, the Applicant filed a motion to amend the application, reiterating his willingness to seek informal resolution of the matter.

27. By Order No. 66 (NY/2015) dated 20 April 2015, the Duty Judge (Judge Greceanu) directed the Respondent to file a response, if any, to the Applicant's motion to amend the application by 24 April 2015. No response was filed by the Respondent.

28. On 20 April 2015, the Respondent duly filed the reply to the initial application, dated 19 March 2015, submitting, *inter alia* that (i) the application is not

receivable *ratione personae* and *ratione materiae*; (ii) the application is moot as the JO was cancelled; (iii) the Tribunal does not have jurisdiction to investigate allegations of prohibited conduct and the Applicant is required to follow the Organization's procedures with respect to such conduct; and (iv) the application is without merit.

29. By Order No. 71 (NY/2015) dated 28 April 2015, the Duty Judge (Judge Greceanu) granted the Applicant's uncontested motion to file an amended application and ordered the Respondent to file a reply to the amended application by 29 May 2015. The Applicant was ordered to file a response to the receivability issues raised in the Respondent's reply by the same date.

30. On 4 May 2015, the Applicant sought an extension of the deadline until 10 June 2015 for the submission of his response.

31. By Order No. 74 (NY/2015) dated 5 May 2015, the Duty Judge (Judge Greceanu) ordered the Respondent to file a response to the Applicant's motion for extension of time by 12 May 2015.

32. On 8 May 2015, a new, and second, JO was advertised for the D-2 post of Director, Investment Management, UNJSPF, on Inspira with a closing date for application of 7 July 2015. In the new JO, the CFA requirement was removed.

33. On 12 May 2015, the Respondent stated that he had no comments on the Applicant's motion for extension of time.

34. By Order No. 82 (NY/2015) dated 12 May 2015, the Duty Judge (Judge Greceanu) granted leave to the Applicant to file a response to the Respondent's initial reply of 20 April 2015 and the Respondent's forthcoming reply to the amended application, if any, by 12 June 2015.

35. On 29 May 2015, the Respondent filed his reply to the amended application.

36. On 5 June 2015, the Applicant applied for the D-2 position of Director, Investment Management advertised through the new JO.

37. On 9 June 2015, the Applicant filed his submission pursuant to Order No. 82 (NY/2015) and his response to the Respondent's reply to the amended application.

38. This case was assigned to the undersigned Judge on 22 June 2015.

Consideration

Issues

39. The Tribunal notes that this matter has become unduly and unnecessarily complicated due to the many filings and submissions, resulting in a reiteration of issues and contentions, as well as amendments to heads of relief.

40. It is common cause that the impugned JO has been cancelled and that a new JO has been issued without the offending requirement. Unlike *Ngokeng* 2014-UNAT-460, upon which the Respondent relies, the recruitment in this case was not suspended but cancelled, all previous candidates having been notified that they may apply again under the new JO if they so wish.

41. In Order No. 50 (NY/2015), dated 30 March 2015, the Tribunal found that only two heads of relief sought were reserved for consideration in the context of the application on the merits, namely the Applicant's request for reimbursement of legal costs and for an order directing the Administration to re-draft and re-issue the JO. It is therefore surprising that, after Order No. 50 (NY/2015) had been issued, the Applicant submitted his amended application (dated 17 April 2015), reiterating and further amending his claims for relief.

42. The Tribunal finds that, the only live issues in the present case are:

a. Whether the application is receivable;

b. Whether the inclusion in the impugned JO of the requirement of CFA certification was lawful;

c. If the inclusion of that requirement was not proper:

i. Whether the Tribunal should refer the case to the Secretary-General for accountability under art. 10.8 of its Statute;

ii. Whether the RSG should be removed from the new recruitment exercise;

iii. Whether the Applicant is entitled to compensation for his Counsel's fees and non-pecuniary damages.

Receivability

43. The Respondent submits that the application is not receivable pursuant to arts. 2.1(a) and 3 of the Tribunal's Statute because, *inter alia*: (i) the application is moot as the contested JO has been cancelled and a new JO was issued; (ii) the Applicant does not have standing or an interest at stake as he did not apply for the initially issued JO; (iii) the contested decision is not appealable as no final administrative decision has been taken; and (iv) the Tribunal does not have jurisdiction to investigate whether the RSG engaged in prohibited conduct.

Is the application moot?

44. Subsequent to the motion for interim measures, the Respondent cancelled the impugned JO and issued the revised JO resulting in a new selection being underway. The Respondent contends that as the impugned JO has been cancelled, there is no matter left to be adjudicated by the Dispute Tribunal and the matter is moot. The Applicant states that the cancellation of the impugned JO and its re-

advertisement did not render the application moot and that the Respondent has unduly mischaracterized the Applicant's case as one of selection.

45. In Order No. 50 (NY/2015), the Tribunal found that:

> 21. It is trite that courts will not readily decide cases in which there is no longer any actual controversy. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy, so that a court need not give opinions on abstract propositions of law. Some courts do exercise their discretion to consider a "moot" case depending on the interests of justice, the importance of the issue, its complexity, and the nature and extent of the practical effect any possible order might have. Does the cancellation of the JO in this case render the motion moot such that it is not justiciable as submitted by the Respondent?
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> 22. Black's Law Dictionary Deluxe Ninth Edition defines "moot" as:
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> > "1. Archaic: open to argument; debatable 2. Having no practical significance; hypothetical or academic (The question on appeal became moot once the parties settled a case)."
>
> Blacks also defines a "moot case" as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights".
>
> 23. It is questionable whether the Applicant's motion has been rendered moot by the cancellation of the JO which addressed only partly the relief sought by the Applicant.
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> 24. The Tribunal considers that the following findings of the former UN Administrative Tribunal in Judgment No. 1344 (2007) in relation to a claim that the applicant's claim in that case was moot are similarly applicable to the determination of the present motion for interim measures:
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> > The Applicant, as a staff member, was entitled to be fully and fairly considered for any position for which he was eligible and applied. Any failure by the Organization to accord him that right, be it as a result of discrimination, extraneous motives or, as allegedly in this case, procedural violations, violated his rights to due process at the time of the alleged failure. The fact and timing of his promotion to another post at the D-1 level does not negate the violation:

> it is only relevant in terms of the severity of the consequences of such violation, in terms of compensation awarded therefore. Thus, the Tribunal finds that the Application is not moot and turns its full attention to the allegations raised by the Applicant.
>
> 25. Suspending the implementation of the contested decision is only one form of relief sought by the Applicant. The following two forms of relief sought by the Applicant remain unaddressed and arguably are still in contention unless, and until, the Respondent concedes them, or the Applicant withdraws his motion: (1) the instruction to the Administration to redraft and re-issue the JO to bring it into compliance with applicable UN rules and administrative issuances and (2) the reimbursement of expenses incurred as a result of the publication of an unlawful JO.
>
> 26. Whether the Tribunal would grant the remaining reliefs sought is not at point. However, the Tribunal does not consider that the Applicant's requests in that respect have been automatically rendered moot by the cancellation of the JO, as notified by OHRM to ALU on 24 March 2015 and after the filing of the motion for interim relief.

46. Consequently the Tribunal found that there were still some live issues. Notably, following the issuance of Order No. 50 (NY/2015), the Administration issued a revised JO. However, not all remedies sought by the Applicant have been addressed by the issuance of the revised JO. Accordingly, the Tribunal finds that the matter is justiciable with respect to the issues identified below.

Does the Applicant have standing?

47. The Respondent contends that the Applicant has no right or interest at stake in the issuance of the JO since he did not apply for the position despite being advised to do so by a representative of OSLA. The Respondent contends that the "Applicant was not precluded from applying for the position simply because he determined he did not meet the education requirement of a CFA charter holder". The Applicant uncontrovertibly states that he prepared his application to the impugned JO on 20 February 2015 and was ready to submit it following the advice from OSLA, when he received notification it had been cancelled prior to the closing date. The Applicant

contends that his rights were in any event violated by the inclusion of the unlawful CFA requirement, even before he had the opportunity to apply. Since the Respondent failed to specify any alternate certification, he was therefore precluded from applying as he simply did not qualify, and would have been screened out in any event, as clearly evidenced by the RSG's email to another potential candidates of 6 March 2015 regarding the CFA "requirement".

48. The Tribunal finds that this case is clearly distinguishable from *Li* UNDT/2014/056, as unlike the applicant in *Li*, the Applicant in this case did not fail to apply for the position based solely on his own subjective assessment of his eligibility. In the present case, the Applicant was precluded from applying as he was clearly ineligible as he did not have the CFA certification which, as evident from the RSG's 6 March 2015 email addressed to another prospective candidate, was "a firm requirement". This requirement has been shown, as highlighted by the Audit Committee, to have placed unwarranted limitations on the eligibility of applicants. The Tribunal accepts the Applicant's undisputed statement that he had created an application but was unable to apply as the JO was cancelled prior to the closing date. The Tribunal finds that the Applicant has standing as his rights to full and fair consideration were clearly affected from the outset by the impugned JO.

Does the Applicant contest an appealable administrative decision?

49. The Respondent contends that no final administrative decision has been taken regarding the recruitment of the Director, Investment Management, and that the issuance of the JO did not have any direct legal consequences for the Applicant's terms of employment. The Applicant, on the other hand, maintains that the contested decision had direct legal consequences for him and that he is not merely challenging a selection exercise, but that a finite decision was rendered by way of the impugned JO which precluded him from applying.

50. In Order No. 50 (NY/2015) on interim measures, the Tribunal stated that the eligibility condition in the impugned JO was finite in nature, since it excluded the Applicant from being eligible to partake in any further process and thus had direct legal consequences for him. The Tribunal sees no reason to depart from this reasoning and finds that the exclusion of the Applicant from the impugned JO is not merely a preparatory step but was a final decision having final effects for him. Consequently, the decision which produced a direct legal consequence upon the Applicant's terms of appointment is appealable.

Inclusion of CFA certification as a JO requirement

51. It is established jurisprudence that the Secretary-General has broad discretion in selection matters and that, in the absence of evidence of bias, discriminatory practices or *mala fides*, it is not the role of the Tribunal to substitute its judgment for that of the Secretary-General (*Charles* 2013-UNAT-285; *Terragnolo* 2014-UNAT-445).

52. However, it is the contractual right of every staff member to receive full and fair consideration for job openings to which they apply. A staff member should be able to challenge criteria which are unlawful, where criteria may be directly or indirectly discriminatory, or would appear to be manifestly unreasonable or imposing unwarranted limitations on qualification or other requirements such as to constitute an unfair restriction on the eligibility of a group of staff members for appointment or promotion, especially if there is no proper basis in any promulgated issuance (see *Korotina* UNDT/2012/178). Where any exception is granted under the Staff Rules, the Respondent is to ensure that it is not prejudicial to the interests of any other staff member or group of staff members.

53. Section 4.5 of ST/AI/2010/3 (Staff selection system) states that "[t]he job opening shall reflect the functions and the location of the position and include the qualifications, skills and competencies required". The Applicant contends that

the inclusion of the CFA requirement, without recognition of any alternate certification such as CAIA, was unlawful and contrary to art. 101.3 of the United Nations Charter and staff regulation 4.2, which state that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible". The Applicant avers that the complete omission of the CFA requirement in the revised JO illustrates that its inclusion as a limiting requirement in the initial JO was, at best, arbitrary and ill informed, and, at worst, intentionally discriminatory.

54. In particular, the Applicant submits that the CFA requirement was discriminatory in that it unfairly and impermissibly favored North American males over otherwise equally qualified women in North America and both men and women worldwide (including the Applicant) who are not necessarily CFA charter holders. This has never been disputed by the Respondent. The Audit Committee agreed that potentially credible candidates may be excluded.

55. In response, the Respondent contends that the inclusion of the CFA certification in the first JO as an educational requirement was justified in view of the fiduciary responsibilities and the specialized experience required to manage and oversee the investment of assets, currently valued at approximately USD53 billion.

56. The Applicant has cited examples of substantially sized pension funds that do not have this requirement; the Respondent has not denied this. The Respondent has made no submissions as to why candidates with educational qualifications other than a CFA certification, such as CAIA or FRM certification as held by the Applicant, should not be able to undertake the responsibilities of the contested D-2 post. Nevertheless, it follows from the 6 March 2015 email correspondence between the RSG and another prospective candidate for the D-2 post that the CFA certification was "a firm requirement for the position".

57. At the same time, it is an established fact that, in the new JO, the CFA certification is no longer listed as an educational requirement. Inasmuch as

the Respondent may not have expressly conceded that this amounts to the first JO being flawed, it is instructive that the Administration obviously no longer finds that such certification is necessary or even desirable. It is therefore clear that the inclusion of a CFA certification requirement in the first JO was unwarranted, a mistake, and prejudicial to and even discriminatory against candidates holding other educational certifications, such as CAIA or FRM.

58. The decision to issue the impugned JO with the CFA requirement constituted an administrative decision which in itself not only hindered the Applicant from full and fair consideration but also entirely excluded him from participating in the selection exercise. The Applicant has demonstrated in his papers that the inclusion of the CFA certification requirement was prejudicial to his interests and discriminatory, whether directly or indirectly, as it excluded him in violation of article 101.3 of the United Nations Charter, which provides that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible". Having considered the very particular circumstances of this case, the Tribunal therefore finds that the introduction of the CFA certification requirement was improper.

Remedies

Removal of the RSG from the new recruitment process

59. Much of the additional relief claimed by the Applicant is connected to the issuance of the new JO and not the cancelled one. While the Applicant has the right to full and fair consideration of his candidature, the removal of the RSG in this new selection process cannot be subsumed under his claim in the present case. The extent and involvement of the RSG in the new exercise is unknown, and all processes flowing from the new JO are not matters that are before the Tribunal in the instant case. All such claims and relief are therefore dismissed.

Referral for accountability

60. Pursuant to art. 10.8 of the Statute of the Dispute Tribunal, the Tribunal may refer "appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability". While the inclusion of the CFA certification requirement was improper, there is no factual basis for the Tribunal to find that this was done to deliberately harm the Applicant and any other candidates or that anyone involved is the process engaged in conduct warranting a referral to the Secretary-General under art. 10.8 of the Statute. The Applicant indicated he had a witness who is willing to testify in this regard. However, in light of the circumstances herein and the scope of the present case, as reflected in the Applicant's management evaluation request and application, the Tribunal does not consider that such a referral should be ordered.

Applicant's remaining claims

61. By Order No. 50 (NY/2015) dated 30 March 2015, the Tribunal found that the only remaining issues under consideration in this case were whether the Tribunal should grant the following: (i) an order to the Administration to re-draft and re-issue the JO to bring it into compliance with applicable UN rules and administrative issuances; and (ii) the reimbursement of expenses incurred as a result of the publication of an unlawful JO.

62. In his amended application filed on 17 April 2015, after Order No. 50 (NY/2015), the Applicant raises new claims not requested previously, including, *inter alia*, compensation for moral damages for severe stress, reputational damage, discrimination, loss of chance/opportunity compensation, and procedural violations. Further, whereas in the amended application the Applicant seeks "costs, for reimbursement of expenses" in addition to the compensation claims raised above, in

the original application the Applicant requested an order granting him, "[i]n lieu of compensation, reimbursement of expenses including attorney's fees".

63. Although by Order No. 71 (NY/2015) the Tribunal granted the Applicant's uncontested motion to file an amended application, the effect of that order was that the amended application was made part of the record, but it certainly did not mean that every claim and contention proffered by the Applicant in the amended application was accepted and granted by the Tribunal. Whether or not such claims are to be found receivable and properly before the Tribunal, and whether they are to be granted, are obviously issues for the Tribunal to consider.

64. Just as the Tribunal cannot adjudicate cases involving decisions of a changing nature (*Adundo et al.* UNDT/2012/118), it will also not allow the parties to continuously amend their substantive claims and claims for relief throughout the course of the proceedings. It is the responsibility of the party advancing any specific claim to clearly identify at the outset of the litigation process the contested administrative decision, pertinent issues, and heads of relief sought (*Planas* 2010-UNAT-049; *Siaw* UNDT/2012/149). It is regrettable that this matter became unduly and unnecessarily cumbersome due to the many superfluous filings and submissions resulting in a reiteration and explanation of issues and contentions as well as additional or amended heads of relief.

65. As stated by the Appeals Tribunal, "[n]ot every violation will necessarily lead to an award of compensation" and "compensation may only be awarded if it has been established that the staff member actually suffered damages" (*Antaki* 2010-UNAT-095; *Obdeijn* 2012-UNAT-201; *Nyakossi* 2012-UNAT-254). The party who suffered damages from a breach of her or his rights also has a duty to mitigate their losses (*Mmata* 2010-UNAT-092; *Tolstopiatov* UNDT/2011/012).

66. The Tribunal finds that, even if it were to allow amended pleas on issues of relief, there is insufficient evidence in this case, particularly considering that

the contested JO was withdrawn shortly after the filing of the application, to substantiate an award of moral damages.

67. With respect to the Applicant's request for costs, the Tribunal makes the following findings. Although costs have generally been granted for abuse of process pursuant to art. 10.6 of the Tribunal's Statute, there may well be cases warranting an award of costs under the heading of loss (art. 10.5(b)), particularly if such costs resulted from vexatious submissions. However, having considered the totality of the circumstances in this case, the Tribunal finds that no award of costs is warranted. The Tribunal will not examine the issue of whether the availability of OSLA should be considered as a factor in cases where staff members decide to retain the services of private counsel. It is sufficient in this case to take note of the following factors: (i) the Tribunal does not find that the Respondent engaged in an abuse of process in the course of the proceedings before the Tribunal; (ii) the impugned JO was cancelled within a relatively short period of time of the application on the merits, and a new JO was issued, as requested by the Applicant; (iii) with the issuance of the new JO, to which the Applicant applied, his position regarding the impugned JO has been assuaged and mitigated; (iv) the Applicant sought the assistance of private counsel only on 13 March 2015, and was notified of the cancellation of the contested decision twelve days later, on 25 March 2015; and (v) the proceedings thereafter were fraught with extensive and largely unnecessary pleadings, including those filed by the Applicant. Accordingly, no order for costs will be made in this case.

68. Thus, although the Tribunal finds that the inclusion of the CFA certification as one of the requirements in the original JO was improper, in view of the particular circumstances of this case, including the relatively prompt re-issuance of a revised JO, no further relief orders are warranted.

Conclusion

69. The application is dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 20th day of November 2015

Entered in the Register on this 20th day of November 2015

(*Signed*)

Hafida Lahiouel, Registrar, New York