



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

AUDA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**  
Self-represented

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

## **Introduction**

1. The Applicant, a former Principal Officer with the Department for General Assembly and Conference Management (“DGACM”) at the D-1 level, contests “[t]he decision of the Under-Secretary-General, Department of Management (DM), not to cancel then make a selection pursuant to invalid Job Opening number 15-IST-OICT-41653-R-NEW YORK (R) [“JO 41653”] for the defunct position of Chief of Service (D1), Strategic Information and Communication Technology Management, in the Office of Information and Communications Technology (OICT)”. The Applicant specifically states that he does not contest “that he has not been selected to fill the vacant position, or, for that matter, the selection of anyone, but rather the making of selection pursuant to an invalid job opening for a defunct position”. The Applicant alleges the contested decision deprived him of a career opportunity with the United Nations, and of a “fair and adequate consideration for a position [he] is rostered for currently and will be subsequently when it is reclassified and reposted”.

2. As remedies, the Applicant seeks the cancellation of JO 41653 and the rescission of the selection decision. In addition, the Applicant seeks compensation for the alleged violation of his due process rights.

3. The Respondent submits that the Applicant’s appeal against the contested decision is not receivable because: (a) the Applicant has no standing to contest the selection decision as he did not apply for the job opening while he was a staff member; and (b) the Applicant is no longer a staff member and that he has not identified any right under the terms of his former appointment that was breached.

## **Facts**

4. The following outline of facts is based on the parties’ submissions and the documentation on the record and only reflects those circumstances that are relevant to the issue of the receivability.

5. The Applicant is a former staff member, who held the position of Principal Officer, at the D-1 level, with the DGACM until he separated from the Organization on 31 December 2015.

6. According to the Office of Human Resources Management (“OHRM”), the Applicant was placed on the roster of Principal Administrative Officer at the D-1 level in the Administration job family effective 23 January 2015 as a result of the selection process for Chief of Office, Office of the Under-Secretary-General, at the D-1 level, at the DGACM. This job opening required education in international relations, economics, social science, or related field, and relevant work experience including in conference servicing and conference management.

7. It appears that the Applicant has never been rostered at the D-1 level in the job network of Information and Telecommunication Technology. The Management Evaluation Unit (“MEU”) noted in its response that the Applicant was “apparently on a roster in the administrative job family, [but] there is no indication that [the Applicant] ha[s] roster status for a job related to the work of OICT”. The Applicant contends that he was rostered for the vacant position in question.

8. On 27 February 2015, Job Opening No. 38496 (“JO 38496”) was posted for the position of Chief of Service, Strategic Information and Communication Technology Management (“Chief, SICTM”), Office of Information and Communications Technology (“OICT”) at the D-1 level. The deadline for applications was 28 April 2015. In a section titled, “Special Notice”, the job opening stated, “This post will become available on 1 July 2015”. The Applicant applied for the job opening, but it was later cancelled at an unknown date.

9. On 23 April 2015, the proposed programme budget for the biennium 2016-2017 by the Secretary-General was published (A/70/6), of which sec. 29E concerned the proposed programme budget for the OICT. The Applicant claims that when this proposed budget was approved later in December 2015 by General Assembly resolution 70/247, the post in question, Chief, SICTM, became defunct as the post was “consumed into the new structure through internal redeployment”.

10. According to the Applicant, JO 41653, the subject matter JO, was posted for the same position from 2 June 2015 to 1 August 2015. The job opening included the same, “Special Notice”, stating, “This post will become available on 1 July 2015”. In essence, therefore, this position was initially posted under JO 38496 (with a posting period 27 February 2015 to 28 April 2015), subsequently cancelled, then re-advertised under JO 41653. Both job openings required relevant education in IT-related field, such as computer science/engineering, mathematics, business administration or related field, and work experience in ICT systems and services. The Applicant had previously applied for JO 38496, but did not apply for JO 41653.

11. On 7 August 2015, the first report on the proposed programme budget for the biennium 2016-2017 of the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) was published (A/70/7). On 23 December 2015, the General Assembly resolution 70/247 was adopted, which approved the programme budget of OICT for the biennium 2016-2017.

12. Both the Applicant and the Respondent agree that Chief, SICTM was originally situated in the Strategic Management Service (Subprogramme 5). The Applicant claims that following the adoption of General Assembly resolution 70/247, a new organizational structure and post distribution took effect on 1 January 2016, and SICTM and its posts were “consumed into the new structure through internal redeployment” and no longer existed.

13. On the other hand, the Respondent submits that the position continued to exist following the restructuring of OICT, pursuant to General Assembly resolution 70/247, under the Enterprise Service Desk in the Global Operations Division (Subprogramme 6).

14. By email dated 14 June 2016, the selected candidate was informed that he had been selected for the position of Chief, SICTM, advertised through JO 41653. He was asked to confirm, via return email, his continued interest in and availability for the position, which he did the same day.

15. On 15 June 2016, the Applicant came to know about the selection of Chief, SICTM, apparently through an automatically generated email notification sent to unsuccessful candidates who applied for JO 41653, the post he did not apply for.

16. On 16 June 2016, the Applicant submitted a request for management evaluation of the contested decision.

17. On 21 June 2016, the MEU completed the management evaluation and informed the Applicant that his request was not receivable. The MEU noted that the Applicant was rostered in the administrative job family, but that there was no indication that he had a roster status for a job related to the work of OICT. Nevertheless, even assuming that the Applicant were on a relevant roster, to the degree that the Applicant asserts any rights under his former appointment, the MEU found no direct effect on any rights the Applicant had under the terms of his former contract. The MEU further found that, to the degree the Applicant meant to ground his challenge on any current right to compete for the positions, as a former staff member, the Applicant enjoyed no such legal standing.

18. By letter dated 27 June 2016, the selected candidate was offered a one-year fixed-term appointment “effective as soon as possible” for the position of Chief, SICTM. The letter further stated:

Your appointment is subject to satisfactory completion of pre-recruitment formalities through the United Nations Secretariat procedures, including medical clearance and verification of qualifications. Upon confirmation of your highest degree and medical clearance, you will receive a provisional confirmation of the offer. On this basis and with your concurrence, the United Nations will proceed with the on-boarding process.

...

This offer may be withdrawn if no reply is received after seven (7) days from the date of this offer.

19. On 28 June 2016, the selected candidate signed the offer of appointment, confirming his acceptance of the offer.

### **Procedural background**

20. On 23 June 2016, the Applicant filed the current application. On the same day, the Applicant also filed, as a separate case in the Dispute Tribunal's eFiling portal, a document titled "application for interim relief". On 24 June 2016, upon the request of the Registry, the Applicant refiled the motion for interim measures under Case No. UNDT/NY/2016/028.

21. By notification dated 24 June 2016, the New York Registry of the Dispute Tribunal acknowledged receipt of the application and transmitted it to the Respondent, requesting him to file a reply by 27 July 2016.

22. On 27 June 2016, the case was assigned to Judge Greceanu.

23. On 29 June 2016, the Respondent filed a response to the motion for interim measures and, in addition, a motion for summary judgment, submitting that the application is not receivable and should be dismissed by way of summary judgment.

24. By Order No. 156 (NY/2016) dated 30 June 2016, the Tribunal rejected the Applicant's motion for interim measures on the grounds of non-receivability, finding that the Applicant was contesting the legality and validity of the selection process for JO 41653 and thus the Tribunal was not competent to grant relief since this was a case of appointment under art. 10.2 of the Statute.

25. By Order No. 157 (NY/2016) dated 30 June 2016, the Tribunal ordered the Applicant to file a response to the Respondent's motion for summary judgment by 11 July 2016.

26. On 3 July 2016, the Applicant filed a motion for extension of time to comply with Order No. 157 (NY/2016), requesting that he be granted until 29 July 2016 to file a response to the Respondent's motion for summary judgment.

27. On 5 July 2016, the Respondent filed a response to the Applicant's motion for extension of time, submitting that the Applicant had ample time to comply with

the order and that, in any event, the three-week extension sought was excessive. The Respondent requested that the motion be rejected.

28. By Order No. 161 (NY/2016) dated 7 July 2016, the Tribunal granted in part the Applicant's motion for extension of time and directed that he file a response to the Respondent's motion for summary judgment by 22 July 2016.

29. On 22 July 2016, the Applicant filed his response to the Respondent's motion for summary judgment in which he contended, *inter alia*, that summary judgment was inappropriate in this case since the facts were in dispute and neither the factual matters nor the legal issues were straightforward and clear such as to justify summary consideration of the matter.

30. On 27 July 2016, the Respondent filed his reply to the application in which he contends that the application is not receivable arguing that: (a) the Applicant has no standing to contest the selection decision as he did not apply for the job opening while he was a staff member; and (b) the Applicant is no longer a staff member and he has not identified any right that was breached under the terms of his former appointment. In any event, the Respondent submits that the application is without merit, because *inter alia*, the Applicant's claim that the post no longer existed at the time of selection is incorrect as the position in question, Chief, SCITM, continued to exist under the same post number even after a new OICT structure was approved by the General Assembly resolution 70/247 adopted on 23 December 2015. The Respondent maintains that the position was deployed from the Strategic Management Service (Subprogramme 5) to Enterprise Service Desk in the Global Operations Division (Subprogramme 6), and after deployment it continued to be funded through Post Number 6912 under the regular budget of OICT. The Respondent further submits that the Applicant's claim that the contested decision deprived him of fair and adequate consideration for a position he is currently rostered for has no merit since: (1) he is not rostered for positions in the Information Management System and Technology job family; (2) even if he were on a relevant roster, a roster membership does not give him a right to be selected nor any priority over non-rostered candidates;

and (3) the Applicant did not apply to the Job Opening, and in the absence of an application he could not be considered for the position.

31. By Order No. 187 (NY/2016) dated 29 July 2016, the Tribunal instructed the parties to attend a Case Management Discussion (“CMD”) on 15 August 2016.

32. At the request of the Applicant, by Order No. 196 (NY/2016) dated 11 August 2016, the Tribunal postponed the CMD scheduled for 15 August 2016 until 7 September 2016.

33. On 7 September 2016, the parties attended the CMD at which the parties informed the Tribunal that they had agreed to engage in *inter partes* discussions and that the proceedings to be suspended until 21 October 2016.

34. By Order No. 211 (NY/2016) issued on 7 September 2016, the Tribunal suspended the proceedings until 21 October 2016.

35. On 24 October 2016, the parties filed a joint submission informing the Tribunal that their efforts to have the present case resolved informally had not been successful.

36. The Applicant having filed an appeal with the Appeals Tribunal of a judgment rendered by another Dispute Tribunal Judge (Judgment No. UNDT/2016/106) in a matter pertaining to the application for interim relief, by Order No. 256 (NY/2017) dated 4 November 2016, Judge Greceanu recused herself from the present case and ordered it to be assigned to another Judge in due course, directing that the parties be informed accordingly.

37. By emails of 2 and 3 March 2017, the Registry informed the parties that the case had been reassigned to the undersigned Judge and remained registered with the Dispute Tribunal in New York.

38. On 4 May 2017, the Applicant filed a motion to resume the CMD of 7 September 2016. At this time the Appeals Tribunal was still seized of the



Applicant's appeal concerning the matter pertaining to the application for interim relief.

39. On 31 March 2017, the Appeals Tribunal pronounced the outcome of the appeal on the matter pertaining to the application for interim relief hereinbefore mentioned, but only rendered and published its reasoned judgment on 26 May 2017.

40. On 10 July 2017, the Applicant resubmitted his "Motion to Resume the [CMD] Suspended on 7 September 2016".

41. By Order No. 130 (NY/2017) dated 11 July 2017, the Tribunal ordered the parties to attend a CMD on 18 July 2017 to discuss the further proceedings and inform about their availability by 14 July 2017.

42. On 12 July 2017, the Applicant informed the Tribunal that he was not available on 18 July 2017 but would be available "from 2:30 pm onward on Monday, 17 July 2017, and Wednesday, 19 July 2017, and all day on Friday, 21 July 2017" and "all day on Tuesday, 25 July 2017, onward during the following week".

43. By email of 13 July 2017, Counsel for the Respondent responded that he was available to attend the CMD on the following proposed alternative dates: 25, 26 or 27 July 2017.

44. By Order No. 134 (NY/2017) dated 17 July 2017, the Tribunal ordered the parties to attend a CMD on 25 July 2017. At the CMD, the parties confirmed that they wanted the assigned Judge to handle the present case and that it would not be possible to resolve the case informally.

45. By Order No. 96 (NY/2018) dated 11 May 2018, the Tribunal ordered the Applicant to file his comments on the receivability submissions set out in the Respondent's reply.

46. On 1 June 2018, the Applicant filed his submission in response to the receivability issues raised in the reply as directed by Order No. 96 (NY/2018).

### **Respondent's submissions**

47. The Respondent's contentions may be summarized as follows:
- a. The application is not receivable as the Applicant does not have legal standing or a right to contest the selection decision;
  - b. Firstly, the Applicant does not have any right or interest at stake in the outcome of the selection process. The Dispute Tribunal has jurisdiction to hear appeals by an individual against an administrative decision that is alleged to be in non-compliance with his or her terms of appointment or contract of employment under art. 2.1(a) of its Statute. It is well-established that administrative decisions are characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences;
  - c. As held by the Appeals Tribunal, an applicant is not entitled to a review of an administrative decision if he or she has no stake in the administrative decision in issue (*Pellet* 2010-UNAT-073). In other words, a staff member must show that he or she has a sufficient interest in the matter, the basic element of which is that he or she has a right or interest at stake (*Hunter* UNDT/2012/036). In the context of a selection decision, a staff member's right to full and fair consideration generally derives from the submission of his or her application for the position (*Li* UNDT/2014/056);
  - d. The Applicant did not apply for JO 41653, and therefore has no stake in the contested decision. Contrary to his assertion, he is not a roster candidate for the position, nor would a roster membership grant him any rights (*Krioutchkov* UNDT/2016/091);
  - e. Secondly, the jurisdiction of the Dispute Tribunal under art. 3.1 of its Statute is limited to an appeal filed by a former staff member against an administrative decision that is connected to the terms of his or her former appointment (*Ghahremani* 2011-UNAT-171 and *Shkurtaj* 2011-UNAT-148);

f. The Applicant is no longer a staff member. He has not identified any right under the terms of his former appointment that was breached by the selection decision. The Appeals Tribunal explained in *Shkurtaj* that there must be a sufficient nexus between the former employment and the impugned action. There is no nexus between the Applicant's former terms of appointment and the contested decision;

g. To the degree the Applicant grounds his challenge on a current contractual right to compete for future vacancies, as a former staff member he has no ongoing contractual relationship with the Organization.

#### **Applicant's submissions**

48. The Applicant's principal contentions may be summarized as follows:

a. The application contests confirmed administrative decisions and has been submitted in accordance with the established procedure;

b. In his reply, the Respondent submits that the Applicant has no stake in the matter given that he has not applied for the position. While it is undisputed that the Applicant would have legal standing to contest the impugned decisions had he applied for the vacant position pursuant to JO 41653, applying for a job opening is not the only way nor the requirement to have legal standing in this matter. As per *Hunter* UNDT/2012/036, it is a general principle of law that a litigant must have legal capacity in order to invoke the jurisdiction of a court or a tribunal. A party who litigates must show that he or she has sufficient interest in the matter, the basic ingredient of which is that a party must show that he or she has a right or interest at stake. A litigant will have legal standing if the right on which he or she bases a claim is one that this individual personally enjoys, or if he or she has a sufficient interest in the person or persons whose rights he seeks to protect;

c. A job application to a vacant position is not the sole condition required to gain legal standing; otherwise the Applicant would be necessarily without such standing if he did not apply to the vacant position. There is not an all-inclusive list of such rights or conditions anywhere, and it is up to the Tribunal to determine each case on its merits. The Respondent's reliance on *Abbassi* 2011-UNAT-110 and *Rolland* 2011-UNAT-122 are misplaced as the referenced cases do not support the Respondent's claim;

d. The Applicant has, in fact, sufficient interest in the matter having previously applied to the defunct position of Chief, SICTM. Clearly, the Applicant has sufficient interest in protecting his own rights, given that the unlawful decisions will deprive him of a career opportunity with the United Nations, and fair and adequate consideration for a position he was eligible to apply to and qualified to hold. Given the budget proposal pending in the General Assembly at the time, and that JO 41653 was posted in Inspira from 2 June 2015 to 1 August 2015, the Applicant has correctly determined that the position would be abolished before it was filled, and has therefore not applied for it;

e. Further, contrary to the Administration's assertion, the Applicant is rostered for the vacant position in question. Being rostered was an earned right the Applicant had as a staff member at the time of the adoption of General Assembly resolution 70/247 on 23 December 2015 and which he retained when separated on 31 December 2015 and will carry over for the position if reclassified and reposted. Given that there are very few opportunities at the D-1 level, it is in the interest of the Applicant that this position is not encumbered unlawfully, so he can be afforded fair and adequate consideration. While a roster membership would not grant any applicant any rights concerning the selection as per *Krioutchkov* UNDT/2016/091, it may indeed underline the Applicant's interest or stake in the matter;

f. There is sufficient nexus between the Applicant's former employment and the impugned decisions, as per *Shkurtaj* 2011-UNAT-148, which held, "a former staff member has standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned action";

g. The application partly arises from the disregard of General Assembly resolution 70/247 adopted on 23 December 2015 (at which time the Applicant was still employed by the United Nations). A General Assembly resolution is only preceded by the United Nations Charter at the top of the legal hierarchy of the United Nations (see *Villamorán* UNDT/2011/126). The Applicant possesses information of intensive discussions by senior management on the cancellation of JO 41653 pursuant to the General Assembly resolution, before deciding to proceed with the unlawful recruitment.

### **Consideration**

49. The Applicant clarified, at paras. 13 and 14 of his submission dated 22 July 2016, that he is contesting:

... two distinct albeit interlinked administrative decisions by the [Under- Secretary-General for Management]:

a. First, the decision not to cancel Job Opening number 15-IST-OICT-41653-R-NEW YORK (R) for the defunct position of Chief of Service (D1), Strategic Information and Communication Technology Management, Office of Information and Communications Technology (OICT), DM, which has become invalid starting 1 January 2016 as a result of the General Assembly resolution 70/247 adopted on 23 December 2015; and

b. Subsequently, and as a result of the failure of the Administration to implement its own rules, the decision to make a selection for a defunct position which no longer has an established post pursuant to an invalid Job Opening.

... That is, the Applicant is contesting a recruitment process which knowingly and flagrantly contravened the rules of the Organization and a General Assembly resolution. In [*Siri UNAT-2016-609*], the UNAT has held that:

... the recruitment process cannot be a case of appointment within the meaning of Article 10(2) of the UNDT Statute, as there can be no appointment before the end of a recruitment process[.]

50. The Tribunal notes that the Respondent had initially filed a motion for summary judgment on the grounds of non-receivability, stating that the Applicant lacked standing to contest the decision since, *inter alia*, he did not apply for the JO while he was a staff member, he is no longer a staff member, and he has not identified any right under the terms of his former appointment that was breached. The appropriateness of an application for summary judgment has been discussed in several cases where issues of receivability were raised (see *Cooke UNDT/2011/216*, *Kalashnik UNDT/2015/087*, *Prisacariu UNDT/2014/045*), where the Tribunal found that the appropriate procedure would be to deal with the matter as a receivability issue rather than as one for summary judgment under art. 9 of the Tribunal's Rules of Procedure.

51. In any event, in this case, following Judge Greceanu's self-recusal and the reassignment of this case to the current Presiding Judge, the motion for summary judgment was overtaken by events, in particular the filing of the Respondent's reply raising issues of receivability, whereupon the parties agreed following the CMD that the Tribunal may dispose of that as a preliminary matter in the substantive case. The Tribunal will therefore proceed to consider the receivability issues raised by the Respondent as a special plea which is contested by the Applicant.

#### *Legal Framework*

52. Article 2 of the Tribunal's Statute states:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

53. Article 3.1 of the Tribunal’s Statute states:

An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

54. Article 2.1(a) of the Tribunal’s Statute therefore provides that the Dispute Tribunal is competent to hear and pass judgment on an application filed by an individual, as provided for in art. 3.1, to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. In other words, the impugned decision must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect (*Kazazi* 2015-UNAT-557, para. 28; *Lee* 2014-UNAT-481, para. 49).

55. Article 3.1 of the Statute provides that an application may be filed by a staff member, a former staff member, or a person making claims in the name of an incapacitated or deceased staff member of the United Nations.

56. The Appeals Tribunal has held that a former staff member has standing to contest an administrative decision if the facts giving rise to a complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned action (*Shkurtaj* 2011-UNAT-148, para. 29).

57. In the present case, since he is a former staff member who separated from the Organization on 31 December 2015, the Applicant's application is receivable to the extent that he is challenging an administrative decision that is allegedly in non-compliance with the terms of his former appointment.

*The Applicant's failure to apply for JO 41653*

58. The Respondent contends, citing *Pellet* 2010-UNAT-073 and *Hunter* UNDT/2012/036, that the Applicant is not entitled to a review of the contested administrative decision since he has no stake or interest in the administrative decision in issue. The Respondent submits that in the context of a selection decision, a staff member's right to full and fair consideration generally derives from the submission of his or her application for the position (*Li* UNDT/2014/056) and yet the Applicant did not apply for JO 41653.

59. In response, the Applicant submits that he has sufficient interest in the matter having previously applied for the same position, namely, Chief, SICTM (JO 38496). Given the budget proposal pending in the General Assembly at the time, the Applicant determined that the position would be abolished before it was filled, and therefore did not apply.

60. In case of a selection, a staff member does not have a right to an automatic selection or promotion, only a right to be fully and fairly considered (see *Rolland* 2011-UNAT-122, paras. 20-21). The Dispute Tribunal held in *Li* UNDT/2014/056 that a staff member's right to full and fair consideration generally derives from the submission of his or her application for the position. Also, the Appeals Tribunal



cautioned in *Luvai* 2010-UNAT-014, at para. 29, that “someone who did not even apply for a position has a heavy burden to contest the result of the process”.

61. In *Li* UNDT/2014/056, an applicant did not apply to the contested job opening because he believed that the job opening was drafted to intentionally favour a particular candidate and to exclude him and other staff members. The Dispute Tribunal held that the applicant had no standing to bring a claim in the absence of his application as his justification was based solely on his subjective assessment of his eligibility and his suspicion, unproven at that stage.

62. Similarly, in *Rockliffe* UNDT/2015/086, the Dispute Tribunal held that an applicant had no standing when an applicant decided not to apply for the contested job opening based on her subjective assessment as to how her submission of the application would be perceived when she was challenging the validity of the job opening itself.

63. In contrast, the Dispute Tribunal found the application receivable in *Singh* UNDT/2015/114 despite the applicant’s not applying for the job opening because one of the requirements in the contested job opening (i.e. a Chartered Financial Analyst (“CFA”) certification requirement) made him clearly ineligible for the post and thus his rights to full and fair consideration were affected from the outset.

64. In the present case, the Applicant, as a staff member at the relevant time period, had a right to be fully and fairly considered as part of the terms of his former employment. Since the Applicant decided not to apply for JO 41653 in the belief that the post in question would be abolished according to the budget proposal for OICT, the question is whether he is entitled to a review of the contested decision despite his decision not to apply for the job opening.

65. When JO 41653 closed on 1 August 2015, only the budget proposal by the Secretary-General was published, and the General Assembly resolution approving the budget for OICT (70/247) was adopted a few months later, on 23 December 2015. Therefore, even if the budget proposal intended to abolish the post in question, which

is contested by the Respondent, it was only the Applicant's subjective assessment that the post in question would be abolished. Further, the Respondent contends that the post in question continued to exist having been redeployed to the Global Operations Division following the restructuring of OICT, pursuant to the General Assembly resolution 70/247, and where it continued to be funded through Post Number 6912 under the regular budget of OICT.

66. Whether the impugned JO preceded the establishment of the post or not is a matter for the merits. However, it is not disputed that the budget proposal for OICT was not adopted at the time of the publication and closing of JO 41653. In that regard, the present case is similar to *Li* and *Rockliffe*, who lacked standing, and distinguishable from *Singh* in that the Applicant decided not to apply for JO 41653 based on his subjective assessment of the possible OICT structure following the General Assembly resolution, which was not adopted at the time.

*The Applicant's roster membership*

67. Additionally, the Applicant claims that he has standing to bring a claim based on his roster membership for the post in question since being rostered is an earned right he had as a staff member during the relevant time period. The Respondent contends that the Applicant is not a roster candidate for the position in question as he was rostered at the D-1 level in the Administration job family and the post in question is in the job network of Information and Telecommunication Technology. The Respondent, relying on *Krioutchkov* UNDT/2016/091, further submits that regardless, a roster membership does not grant the Applicant any rights.

68. Section 9.4 of ST/AI/2010/3 provides that “[c]andidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body ... shall be placed on a roster of candidates pre-approved for *similar functions* at the level of the job opening” (emphasis added) and “[c]andidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.”

69. The Inspira Manual on Rosters (November 2013) provides that “[r]osters are defined by job codes” and “[t]here is one job code associated with every job profile (i.e. functional title/family/category and level)”. It further provides that “roster candidates must express their interest and availability by submitting an updated PHP and cover letter to the relevant Job Opening in [I]nspira”.

70. In the present case, the Respondent presented the job opening under which the Applicant was rostered at the D-1 level. It shows that this job opening was for the post in the DGACM, and required education in international relations, economics, social science, or related field, and relevant work experience including in conference servicing and conference management. On the other hand, JO 41653 required relevant education in the IT related field, such as computer science/engineering, mathematics, business administration or related field, and work experience in ICT systems and services. According to OHRM, the former post belongs to the Administration job family and the latter belongs to the job network of Information and Telecommunication Technology. While the Applicant claims that he is rostered for the position in question, he did not present any supporting evidence.

71. Considering that ST/AI/2010/3 provides that a candidate is rostered for similar functions at the level of the job opening and that the evidence does not support that the Applicant is rostered for JO 41653, the Tribunal finds that the Applicant’s claim that he has standing to bring a claim based on his roster membership for the post in question fails.

#### *Impugning the JO*

72. Finally, the Tribunal notes that the Applicant from the outset explained that he is not contesting “that he has not been selected to fill the vacant position, or, for that matter, the selection of anyone, but rather the making of a selection pursuant to an invalid job opening for a defunct position”. In other words, although apparently conceding that there was indeed a vacant position to be filled, the Applicant is primarily contesting the legitimacy of an advertised JO as the position was “defunct”.

73. Generally, a series of steps or findings involved in a selection process “may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT” (*Ishak* 2011-UNAT-152, para. 29). In *Nemeth* Order No. 224 (NY/2017), the Dispute Tribunal cited the often-quoted seminal decision *Andati Amwayi* 2010-UNAT-058 regarding an administrative decision, which at para. 19 states “[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.” In *Nemeth*, the applicant was not challenging the selection of any candidate to the post or the decision not to select her but rather requested the suspension of an alleged compromised promotion exercise allegedly tainted by the mishandling of an examination and its results. The Tribunal at para. 20 observed that:

... To characterize the subject matter and reduce cases like the present case to one of non-selection or non-promotion in these particular circumstances and at this stage of the process could result in an absurdity and miscarriage of justice. This would mean that the Tribunal could never grant any urgent temporary relief—no matter how serious the alleged violations, or how flawed or unlawful a decision—so long as such decisions are presented in the broader context of what is perceived as preparatory steps in a selection or promotion exercise (see also *Singh* Order No. 50 (NY/2015)). The prejudice that may be suffered by an applicant is further compounded by the limited relief that can be provided, where specific performance is essentially unavailable.

... Even if one were to accept the contention in the present case that the selection exercise is ongoing and these are preparatory steps, one must look at the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision. As stated by the Appeals Tribunal, at para. 50, in *Michaud* 2017-UNAT-761 (emphasis added and references to footnotes omitted):

... Before an administrative decision can be held to be in non-compliance with the contract [or] employment of a staff member it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. A decision to initiate an investigation, in itself, ordinarily, will not immediately affect the rights of a staff member nor be of direct legal effect. Judicial review is concentrated pragmatically on the more important administrative decisions and thus avoids allowing challenges to preliminary or intermediate

decisions. Where a decision requires several steps to be taken by different authorities, but only the last of which is directed at the staff member, the earlier decisions or actions lack direct effect, and only the last decision may be taken to the Dispute Tribunal for review. *Preparatory decisions, therefore, are normally not reviewable* by administrative tribunals. This accords with the general principle that tribunals should not interfere with purely internal matters of departmental administration or organisation, or processes that have not reached finality.

74. As the Dispute Tribunal stated in *Nemeth, supra*, the language of the Appeals Tribunal is qualified indicating that there may be exceptions to the rule, which must be determined on a case by case basis. Several decisions of the Dispute Tribunal illustrate this principle. For example, in *Korotina* UNDT/2012/178, the Dispute Tribunal found the application receivable when the Applicant was found ineligible for the post, even though the selection was not made, finding that “the decision that the Applicant was ineligible signified the end of the process as far as she was concerned”. Similarly, in *Melpignano* UNDT/2015/075, the Dispute Tribunal held that the decision to declare the applicant ineligible for the post was open to challenge before the Tribunal as it was not merely a preparatory step but had direct and very concrete repercussions on the applicant’s right to be fully and fairly considered for the post.

75. In the matter of *Singh* UNDT/2015/114 (see also the proceedings for interim measures in *Singh* Order No. 50 (NY/2015)), an applicant challenged the legality of a job opening and requested its rescission and the suspension of the recruitment process until a lawful JO was issued, alleging that the JO, *inter alia*, contained criteria requiring specific CFA certification, which was not only discriminatory in its effect, but such that it disqualified him and other staff members from applying for the position. The Dispute Tribunal found the application receivable despite the Respondent’s submission that it was not a final administrative decision. Upon the applicant’s timely challenge, the impugned JO was cancelled (on 24 March 2015) within a short period of time of the application on the merits (on 19 March 2015), and a new JO was issued to which the applicant applied.

76. In the matter of *Li* UNDT/2014/056, an applicant challenged the legality of a job opening and requested its suspension, alleging that the JO, *inter alia*, deviated from the relevant generic job profile, did not adequately represent the functions and responsibilities of the position, and contained criteria requirements such as to exclude him and other staff members from qualifying for the position. In that case the impugned JO was posted on 28 February 2014 with the closing date of 29 April 2014 and the applicant filed his application on 16 March 2014.

77. In this instance the Tribunal notes that the impugned JO 41563 was posted from 2 June 2015 to 1 August 2015. The Applicant alleges that the post no longer existed and/or that in any event, it became defunct in December 2015. However, unlike the applicants in *Singh* and *Li* who challenged the job openings, which they believed to be unlawful, without delay, the Applicant only challenged the impugned JO in June 2016, almost a year after the posting of JO 41563. While the Tribunal does not rule on the merits of the claim, if the Applicant were seeking to impugn the JO itself, the matter should have been brought to the Dispute Tribunal when the issue was still live. The Applicant's claim in this instance is therefore time barred.

**Conclusion**

78. In view of all of the foregoing, the present application is rejected as not receivable.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 2<sup>nd</sup> day of October 2018

Entered in the Register on this 2<sup>nd</sup> day of October 2018

*(Signed)*

Nerea Suero Fontecha, Registrar, New York