



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

MELPIGNANO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON A MOTION FOR  
INTERIM MEASURES**

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**Counsel for Applicant:**

Marisa Maclellan, OSLA

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

## **Introduction**

1. In the context of a substantive application contesting the decision to find him ineligible for a post advertised under Vacancy Announcement (“VA”) VA-13-14 (046), Human Resources Assistant (GS-6), Reference Verification Unit with the United Nations Logistics Base/Global Service Centre (“UNLB/GSC”), in Brindisi, the Applicant filed a motion requesting the suspension of the recruitment process at issue during the proceedings.

## **Facts**

2. The Applicant joined UNLB in 1999 as an Administrative Clerk (GS-3). Since then, he has held several different positions, and was promoted to the GS-4 and later to the GS-5 level. He currently holds a fixed-term appointment as a Human Resources Assistant (GS-5).

3. On 3 June 2014, the Applicant applied to Temporary Job Opening (“TJO”) TJO 13-14 (048), Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC. On 21 June 2014, he was notified of his selection for this TJO and he took up these functions on a temporary assignment as from July 2014.

4. On 26 June 2014, the Applicant applied for VA-13-14 (046), Human Resources Assistant (GS-6), Reference Verification Unit, UNLB/GSC.

5. On 5 February 2015, the Applicant was informed that he had been found ineligible for VA-13-14 (046) due to the time-in-grade requirements contained therein.

6. The Applicant submitted a request for management evaluation on 31 March 2015. On the same day, he filed an application for suspension of action pursuant to art. 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure.

7. By letter dated 7 April 2015, the Management Evaluation Unit (“MEU”) informed the Applicant that his request for management evaluation was deemed irreceivable. Also on 7 April 2015, the Respondent filed his reply to the application for suspension of action, pointing out that the management evaluation had already been rendered.

8. The contested decision no longer being under management evaluation, the Tribunal rejected the suspension of action, by Order No. 81 (GVA/2015) of 9 April 2015.

9. On 20 April 2015, the Applicant submitted an application on the merits on the matter, together with a motion for interim measures under art. 14 of the Tribunal’s Statute.

10. The motion in question was transmitted to the Respondent, who was instructed by the Tribunal to refrain from taking any further decision or action relating to the decision(s) for which the Applicant sought relief until the Tribunal’s determination on the motion for interim measures.

11. The Respondent filed his response on the motion for interim measures on 22 April 2015. His reply to the substantive application is due on 20 May 2015.

### **Parties’ contentions**

12. The Applicant’s primary contentions may be summarized as follows:

#### *Receivability*

a. The decision to rule him ineligible for the VA at issue was not a preparatory decision. As far as the Applicant is concerned, it was the final adverse determination of his eligibility for the VA, which resulted in his being taken out of the respective selection process . Thus, it had direct legal consequences for the Applicant, specifically in this recruitment process, i.e., not only he did not get a chance to further compete and be selected, but also it affects his ability to apply for and obtain any GS-6 position;

*Prima facie unlawfulness*

b. While UNLB holds that the VA at issue reflects the time-in-grade requirements of four years for a G-5 candidate to apply to a G-6 position as articulated in the Guidelines on Placement and Promotion of Locally Recruited General Service Staff Members, dated 8 August 1996 (“Guidelines”), the Guidelines do not apply to UNLB. UNLB/GSC is not a mission, but a hybrid operation (as expressly stated e.g., in the Frequently Asked Questions for Executive Offices/Local Personnel Offices regarding Continuing Appointments). As such, the application of ST/AI/2010/3 to recruitments of UNLB staff is not excluded by virtue of sec. 3.2(h) of the instruction;

c. Sec. 6 of Administrative Instruction ST/AI/2010/3 (Staff Selection System) does not require that General Service staff serve a specific number of years at a particular level to be eligible to apply for posts at the next higher level. Any interpretation of the Guidelines inconsistent with sec. 6 should be void, pursuant to sec. 2.6 of the same instruction;

d. The Administration’s reliance on the Guidelines, which do not rise to the level of the Staff Rules or even administrative instructions, cannot be the basis of an additional and new requirement that experience must be gained for five years at one level before being able to apply to the next higher level. Based on *Johnson* 2012-UNAT-240, not only must inferior issuances not supersede superior ones, but they must not add substantive requirements, unless expressly permitted to do so;

e. The time-in-grade requirement amounts factually and legally to a type of discrimination, in that locally recruited staff would be penalised vis-à-vis external candidates. Moreover, such requirement is no longer applicable at headquarters;

f. The application of the Guidelines imposes too specific a requirement for internal candidates. It places undue restrictions on internal candidates, rendering the VA dangerously narrow, as noted in para. 5.5.1.6 of the Inspira Recruiter's Manual;

g. UNLB has waived this requirement in other recruitments, including the TJO for the same post, in which the Applicant currently serves;

*Urgency*

h. According to the Tribunal's case law, urgency exists when an applicant may be denied the chance of regaining the position he was occupying or should be occupying despite being successful on the substantive case, especially if the position is filled. If the Administration is allowed to implement the decision, another candidate will be selected;

*Irreparable damage*

i. Suspension of action is the only remedy available to him to suspend the recruitment process and selection of another candidate and review the use of the time-in-grade rule. Pursuant to the Tribunal's case-law, harm is irreparable if it can be shown that the suspension of action is the only way to ensure that an applicant's rights be observed; also, a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage inflicted.

13. The Respondent's primary contentions may be summarized as follows:

*Receivability*

a. The Applicant challenges a preliminary decision taken within a selection exercise for appointment and promotion to the GS-6. The Tribunal is not competent to order the relief sought, as the present matter concerns a case of appointment and promotion. In catering for the Tribunal's power to order temporary relief, art. 10.2 of its Statute provides an exception for cases of appointment, promotion or termination. Such cases may only be

suspended pending management evaluation, not during the proceedings before the Tribunal. The General Assembly has reiterated in its Resolution 69/203 that the Tribunal shall not have any powers beyond those conferred under its Statute;

b. The consideration to find him ineligible is not a final administrative decision and is therefore not reviewable under art. 2 of the Statute. No final administrative decision on the outcome of the selection exercise has been made, hence, the contested decision is not one that carries any direct legal consequences for the Applicant's contract of employment;

*Prima facie unlawfulness*

c. The four-year time-in-grade requirement is set out in the Guidelines. They were correctly applied to the selection exercise at issue;

d. UNLB was established by General Assembly resolution 49/233 on *Administration and budgetary aspects of the financing of the United Nations peace-keeping operations*, and it is reviewed by the General Assembly under the item of the same title. In it, the General Assembly welcomed its establishment as “the first permanent United Nations logistics base to support peace-keeping operations”. UNLB is financed from the existing budgets of various peacekeeping operations. Its functions are to support such operations;

e. For that, the Department of Field Support treats UNLB in the same manner as peacekeeping missions. Regarding recruitment and management of locally recruited GS staff of UNLB, the Guidelines—and not Administrative Instruction ST/AI/2010/3 (Staff Selections System)—apply. By memorandum of 29 October 2012, the Director, GSC, informed all UNLB staff that the Guidelines, in particular the four-year time-in-grade requirement, applied to promotions in UNLB. This eligibility requirement was included in the VA and lawfully applied in the Applicant's assessment;

*Urgency*

f. Any urgency in this case is self-created. The Applicant was aware of the time-in-grade requirement since the VA was advertised and was informed of the decision on 5 February 2015. Yet, the Applicant waited some two months to file the motion for interim measures;

*Irreparable damage*

g. The Applicant provides no evidence of irreparable harm. His mere assertion that he VA is unique is unsupported by evidence and contradicted by his assertion that GS-6 levels are “more rare” than GS-5 job openings.

**Consideration**

*Receivability*

14. Art. 10.2 of its Statute confers the Tribunal the power to order interim measures in the course of the proceedings before it, in the following terms:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

15. Along the same lines, art. 14 of the Tribunal’s Rules of Procedure reads:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

16. Both of these provisions contain nevertheless a proviso reading:

This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

17. On these grounds, the Respondent argues that the motion at hand is irreceivable as this case concerns appointment and promotion. However the Tribunal observes, on the one hand, that the contested decision, i.e., declaring the Applicant ineligible for VA-13-14 (046), is not a decision to appoint and/or promote another candidate to the litigious post, or not to select/appoint the Applicant, but rather one preventing the Applicant to compete as a candidate for the post, which is different in nature and scope. In this regard, it should be recalled that the exclusion of these specific categories of cases constitutes an exception to the more general power conferred to the Tribunal to order interim measures and, as such, it must be interpreted restrictively (see *Kamani* 2010-UNAT-011, *Abu-Hawaila* 2011-UNAT-118, *Cremades* 2012-UNAT-271).

18. On the other hand, the Tribunal notes, based on the plain reading of the above-quoted proviso, that its authority regarding cases of appointment, promotion or termination is only limited as far as it concerns the suspension of the implementation of the contested decision. This does not prevent the Tribunal from ordering others kinds of interim measures. Relevantly, in this case, the Applicant does not seek suspension of the implementation of the decision deeming him ineligible; quite differently, he requests the selection procedure to be put on hold.

19. In summary, the present application is not a “case of appointment, promotion or termination” within the meaning of arts. 10.2 of the Tribunal’s Statue and 14 of its Rules of Procedure, and even if it were, the Tribunal is entitled to order measures falling short to suspension of the implementation of the contested decision.

20. The Respondent further submits that the Applicant failed to identify an appealable administrative decision within the meaning of art. 2 of the Tribunal’s Statute.



21. According to the definition adopted by the Appeals Tribunal (*Planas* 2010-UNAT-052, *Al Surkhi et al.* 2013-UNAT-304), an “administrative decision” is:

[A] unilateral decision taken by the Administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

22. The Tribunal finds that the decision to declare the Applicant ineligible for the post at issue falls within the above definition and is, hence, open to challenge before the Tribunal in accordance with the Tribunal’s Statute. In particular, said decision produces direct legal consequences affecting the Applicant’s terms of appointment. Indeed, the impugned decision has the effect of taking from the Applicant the possibility of being considered for selection.

23. Thus, the contested decision has direct and very concrete repercussions on the Applicant’s rights; it affects his right to be fully and fairly considered for the post through a competitive process (see *Liarski* UNDT/2010/065). From this perspective, it cannot be viewed as a preparatory act, since the main characteristic of preparatory steps or decisions is precisely that they do not by themselves alter the legal position of those concerned (*Ishak* 2011-UNAT-152).

24. Accordingly, the Tribunal has found that the determination that a staff member was ineligible for a given post is a decision reviewable on the merits (*Gusarova* UNDT/2013/072, *Willis* UNDT/2012/044, *Nunez* Order No. 17 (GVA/2013), *Essis* Order No. 89 (NBI/2015)), and it stated in *Korotina* UNDT/2012/178, that:

[T]he decision that the Applicant was ineligible signified the end of the process as far as she was concerned, and in fact the end of the entire selection process as she was the recommended candidate, and thus this decision cannot be described as merely preparatory. The fact that the particular vacancy was never filled does not necessarily mean that the Applicant lacks standing to claim that her rights were violated.

25. For all these reasons, the Tribunal is of the view that the present motion for interim measures falls within its jurisdiction, and will proceed to examine if the cumulative conditions to grant the temporary relief sought are met.

*Prima facie unlawfulness*

26. It is the Respondent's line of argument that the time-in-grade requirement was included in the relevant VA in application of the Guidelines. He holds, in this connection, that the Guidelines were correctly applied to this selection procedure, which concerns a GS locally-recruited post in UNLB, and submits a series of administrative and budgetary considerations, tending to justify that UNLB is assimilated to a mission for staffing purposes.

27. However, the Administration has clearly distinguished UNLB from field missions in official public issuances concerning specifically appointment and selection matters. Question 16, and its related answer, of the document entitled *Continuing Appointments. Frequently Asked Questions for Executive Offices/Local Personnel Offices*, reads (emphasis added):

How would GS staff in UNLB, Brindisi be treated in terms of eligibility i.e. national staff are excluded and these are national staff, but *Brindisi is not a "mission"*.

*UNLB is not a field mission* and therefore does not fall under 2.3 of the ST/AI/2012/3. UNLB has its own subsidiary panel for appointment and promotion of locally-recruited staff which was established in 1996, pursuant to former staff rule 104.14(d). for the purpose of the review of staff eligible for consideration of a continuing appointment, the UNLB review body will be considered equivalent to the established Secretariat Central Review Bodies. Under section 2.1 of ST/SGB/2011/9.

28. Likewise, the memorandum of the then Under-Secretary-General, Department of Field Support, dated 13 October 2008 and entitled *Delegation of Recruitment Authority and Responsibility for National Professional Officers* (“NPOs”), states, at para. 4 (emphasis added):

While flexibility has been exercised in the functions for which NPOs are engaged, the locations where NPOs can be employed are limited to those where there is a need to strengthen national development. Accordingly, NPOs may not be employed at *headquarters duty stations such as the United Nations Logistics Base, Brindisi* or the United Nations Peacekeeping Force, Cyprus.

29. In light of such unambiguous statements by the Administration recognizing that UNLB is not a field mission, the Tribunal considers sufficiently established that the Guidelines were not applicable to the selection exercise at issue.

30. Additionally, if the Administration acted on the assumption that UNLB was equivalent to a peacekeeping or special political mission, it is unclear how the Administration could lawfully omit the time-in-grade requirement in the TJO for the same post for which the Applicant successfully applied and currently serves.

31. Having made this finding, the Tribunal cannot but conclude that the *prima facie* illegality condition is fulfilled.

#### *Urgency*

32. The Tribunal considers there to be urgency in the circumstances of the case at hand, given the fact that the selection procedure, which started in June 2014, is likely to result shortly in the selection and subsequent appointment of a candidate before the application at hand is heard on the merits.

33. The Applicant, on his own initiative, sought clarification as to the applicability and specific repercussion on him of the time-in-grade requirement. He requested management evaluation within weeks after coming to know about the contested decision, and immediately filed an application for suspension of action pending management evaluation. Merely 11 days after this application was rejected, the Applicant filed his application on the merits as well as his motion for

interim measures. In these circumstances, urgency in this case cannot be said to be self-created.

*Irreparable damage*

34. The Tribunal finds that, should the selection process proceed without the Applicant being given a fair chance to compete for the post, this would entail a considerable loss of career opportunity for him, which could hardly be redressed by way of financial compensation.

35. Although the post at issue may not be “unique”, it appears that the Administration’s position regarding the Applicant’s eligibility for GS-6 vacancies is currently—and will foreseeable continue for years—barring him from being considered for any comparable post.

**Conclusion**

36. In view of the foregoing, it is ORDERED that the selection procedure for VA-13-14 (046) be put on hold until the consideration of the present application on the merits by the Tribunal be completed.

*(Signed)*

Judge Rowan Downing

Dated this 27<sup>th</sup> day of April 2015

Entered in the Register on this 27<sup>th</sup> day of April 2015

*(Signed)*

René M. Vargas M., Registrar, Geneva