



Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

ROCKCLIFFE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

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

Introduction

1. On Sunday, 21 December 2014, the Applicant, an Alternate Staff Representative at the United Nations Joint Staff Pension Fund (“UNJSPF”), filed an application, pursuant to art. 2.2 of the Statute of the Dispute Tribunal, requesting the suspension of action pending management evaluation of the “[f]inalization of the selection for the Job Opening number: 14-ADM-UNJSPF-33681-R-NEW YORK (R): Chief of Section, Client Services, Records Management and Distribution Section, P5 [“the JO”] under a new policy which is subject to staff management consultations and which has not been properly promulgated”.

2. The Applicant contends that she has been denied:

... her right to continuous contact and communication, to ensure effective consultation through her elected representatives, with respect to issues affecting the conditions of service [of] the Pension Fund staff under Staff Regulation 8.1(a); ii) her right to consultation as Alternate Staff Representative of the UNJSPF in accordance with Staff Regulations 8.1 & 8.2 has been violated and iii) her rights as a P4 staff member to ensure such representation and due process in the matters concerning her welfare as a staff member have been thwarted (ST/SGB.172 paragraph. 3. iv) Applicant’s right to work in a non-hostile environment in the knowledge that issues which affect my welfare on the job can be resolved through staff management consultations without the necessity for escalation, meant to be diminished by same ST/SGB/172 have been denied.

3. The Registry acknowledged receipt of the application on Monday, 22 December 2014, and served it on the Respondent directing that the reply be submitted by 12:00 p.m., 24 December 2014. In his reply, duly filed by said date and time, the Respondent filed a point *in limine* submitting that the management evaluation was completed on 23 December 2014, and, therefore, there is no longer any basis for the Applicant’s request for suspension of action, and no scope for any order suspending the alleged decision pursuant to art. 2.2 of the Dispute Tribunal’s Statute. Accordingly, the application should be rejected.

Background

4. In 2000, the currently applicable “Memorandum of Understanding with respect to the United Nations Personnel Procedures applicable to the [UNJSPF]” was adopted as “UNJSPF is not part of the UN Secretariat” (sec. 1). For recruitments to posts such as the JO in question, the current MoU provides that “Staff of the Fund recruited to ... P-5 ... levels ... shall be selected through the normal appointment and promotion procedures applicable to the UN Secretariat” (sec. 11).

5. On 22 April 2010, ST/AI/2010/3 (Staff selection system) entered into force. Section 6.3, which governs the question of mandatory lateral moves for recruitment at the P-5 level, provides, as a general rule, that (emphasis added):

Staff members in the Professional category *shall have at least two prior lateral moves*, which may have taken place at any level in that category, before being eligible to be considered for promotion to the P-5 level.

6. The possibility of granting a general exception for UNJSPF staff is not contemplated anywhere in sec. 6.3. Rather, sec. 6.3 clearly stipulates that the general rule is “subject to the following provisions”:

(a) In order to meet the General Assembly’s concern about high job opening rates in some regional commissions and duty stations, particularly those in developing countries, the requirement shall be reduced to one lateral move when a staff member has served in the Professional category in Nairobi or a regional economic commission other than the Economic Commission for Europe or any duty station with a hardship classification of A, B, C, D or E13 for one year or longer, or when a staff member is applying for a P-5 position at those duty stations from another duty station;

(b) Staff recruited at the P-4 level shall become eligible for promotion to the P-5 level after one lateral move at the P-4 level;

(c) The requirement for lateral moves is waived when a staff member has served in the Professional and above or Field Service categories in a non-family mission or non-family duty station for one year or longer;

(d) The requirement for lateral moves is waived for staff serving against language positions that are subject to the provisions of the administrative instruction setting out special conditions for recruitment or placement of candidates successful in a competitive examination for positions requiring special language skills when applying for another such language position.

7. On 4 December 2013, in an email to the “UNJSPF Staff Group”, the CEO/UNJSPF informed the UNJSPF staff that the Office of Human Resources Management at the United Nations Secretariat (“OHRM”) had “approved that the requirement be waived for lateral moves for P-4 staff members to be considered eligible for P-5 posts in the Fund”. He further explained that:

In the message, dated 29 November 2013, the Director of the Strategic Planning and Staffing Division, OHRM, [United Nations] recalled that in accordance with the existing Memorandum of Understanding (MoU) between the Fund and the [United Nations] Secretariat signed in 2000, the [United Nations] [S]ecretariat administers the staff of the Fund. However, the Fund remains an entity not considered as part of the Secretariat. With this in mind, and after a thorough internal review, [the Assistant Secretary-General, (“ASG”)] OHRM has agreed to consider that applicants, from within the Fund as well as from the United Nations Secretariat, applying for P-5 positions in the Fund, would not be subject to the two lateral moves requirement. Should this exception be applicable to the selected candidate, the selected staff members would be required to sign letters of appointment, which would clearly provide that their service is limited to the Fund. This exception would be strictly limited to eligibility for P-5 positions only.

As a result of this decision, the Fund will now advertise all P-5 posts henceforth, with appropriate indication of the exception and the ensuing requirements concerning the limitation to service with the Fund. All Hiring Managers should take note of this and ensure that the proper language is included in the Job Opening when building it. The Executive Office will assist in the implementation of the new policy and liaise with OHRM officials as needed to ensure that OHRM Recruiter releases all eligible candidates to be considered for the Job Opening(s).

8. On 16 April 2014, the JO was advertised on Inspira (the United Nations online job site) with a posting period of 16 April to 15 June 2014. Regarding the requirement of lateral moves for staff members applying for posts at the P-5 level, the JO stated in a “Special Notice” that:

The United Nations Joint Staff Pension Fund (UNJSPF) is an independent inter-agency body established by the United Nations General Assembly. The applicable human resources procedures are governed by a Memorandum of Understanding (MoU) between the Fund and the UN Secretariat. On the basis of that MoU and in light of the status of the UNJSPF, it was decided that staff members applying to posts at the P-5 level in the UNJSPF are exceptionally not subject to the lateral move requirement for purposes of eligibility. However, selected candidates who do not meet the lateral move requirements will be granted appointments strictly limited to service with the United Nations Joint Staff Pension Fund.

9. On 12 June 2014, the Applicant, in her capacity as Alternate Staff Representative, together with the Staff Representative, wrote to the CEO/UNJSPF requesting that the JO be withdrawn and re-advertised in accordance with “the normal [United Nations] recruitment procedures”, explaining that:

The revised MOU and related documentation cannot be presented to the Pension Board in July 2014 without the requested staff management consultations in accordance with Staff Regulations 1, 8.1 and 8.2.

In addition since you stated in your letter and in the three town hall meetings of April 4 that the current MoU is “out of date” and “is not working”, all decisions based on this MoU have become null and void. Moreover the MoU issued in 2000 has never exempted staff members from the lateral move requirement for applying to posts at the P5 Level, and specifies that UNJSPF recruitment would follow standard UN recruitment procedures.

10. On 19 June 2014, the Deputy CEO, on behalf of the CEO/UNJSPF, responded to the Applicant and the Staff Representative that the draft MoU “remains in the drafting stage in OHRM” and that:

With regard to [the JO], please be advised that it was advertised in accordance with the normal UN recruitment procedures, including the exception to the two lateral moves requirement for P-5 positions in the Fund, as granted by the ASG/OHRM on 29 November 2013.

11. On 19 June 2014, the Applicant and the Staff Representative responded to the CEO/UNJSPF, reiterating their request that the JO “be canceled and reissued after the matter is resolved” and further explaining that:

We respectfully submit that the issuance of [the JO] is illegal, as in the first instance it violates Staff Regulation 1.1 para.(e) “The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs, holding appointments under the Staff Rules.” In the second instance it is not in compliance with regulations 8.1 and 8.2 as there were no staff management consultations on this change.

The change of 29 November 2013 referenced in your response, itself goes against OHRM’s own mobility policy as described in ST/AI/2006/3 [the Administrative Instruction preceding the currently applicable ST/AI/2010/3 to which reference is made in paras. 5 – 6 above]. This deviation together with the limitation of service of the P5 incumbents to the UNJSPF creates a two-tiered system within the same department, again in violation of Staff Regulations and the Secretary-General’s advocacy of “ONE UN”.

12. On 2 July 2014, the ASG/OHRM was requested to provide “the legal reasoning behind the granting of exemption to the Pension Fund” regarding the JO.

13. In the Report of the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) dated 22 October 2014 (A/69/528) regarding the “United Nations pension system”, at para. 26, the ACABQ confirmed that the draft MoU was yet to be concluded and that:

... While [ACABQ] understands that the review is an internal management exercise, it is of the view that some of the specific requirements proposed by the Pension Fund include exceptions to United Nations human resources policies and procedures about which the General Assembly should be informed through the Pension Board.

14. On 4 November 2014, the successful candidate was notified about her selection for the post advertised in the JO. On the same date, she confirmed her continued interest and availability for this post.

15. By email of 5 November 2014, the Chief of Operations, UNJSPF, informed the successful candidate that her date of appointment would be “as from 1 December 2014”. On the same date, the Administrative Officer, Executive Office, UNJSPF, emailed the Applicant to disregard the previous email from the Chief of Operation.

16. In the Fifth Committee's report of 5 December 2014 on the United Nations pension system (A/69/637), referring to the ACABQ's 22 October 2014 report, the Pension Board was requested to "inform the General Assembly of the outcome of the revisions" of the draft MoU.

17. On 17 December 2014, the UNJSPF Chief of Operation emailed the Administrative Officer, Executive Office, UNJSPF, informing her that the successful candidate had assumed the function of the post advertised in the JO "as from 1 December 2014".

18. On 17 December 2014, the UNJSPF Staff Representative in an email to a UNJSPF staff member, copied also to the Applicant, the CEO/UNJSPF and the UNJSPF Chief of Operation, indicated, with reference to the filing of the JO, that:

There has been no consultation in accordance with ST/SGB/172 and ST/SGB/274 which is the regulated format for any consultation at the Departmental level.

However I do confirm that we have had several informal discussions and courteous and fruitful chatting and exchange of views on various matters of common interest with the Deputy CEO either one on one or sometimes with the participation of the Fund Chief of Operation.

The only consultation we had so far in accordance to the organization's mandated format for Staff Management meeting at a departmental level with the participation of both Management Representatives and all Staff Representatives along with the Executive Officer, the Administrative Officer and the Director of IMD and focal point representatives from IMD was the one of 09 September 2014.

19. In response, the UNJSPF Chief of Operation sent an email to the UNJSPF Staff Representative on the same day, stating as follows:

Thank you for your accurate description of events and for the constructive discussions we have been having, all of which is most appreciated.

Unfortunately, in this particular case, we had to weigh the urgent needs of the business, the increasing requirements of the IPAS [abbreviation unknown] project and the important services we need to be providing to the participants and beneficiaries of the Fund that in many cases provides the basis for important and irrevocable financial

decisions. It was decided therefore that this recruitment could not be put off any longer.

20. On 19 December 2014, the Applicant filed a request with the Management Evaluation Unit (“MEU”) for management evaluation of the decision, relating to the JO, “to implement promotion to P-5 of certain applicant who did not meet the usual criteria of the P-5”.

21. On 23 December 2014, in response to the Applicant’s request for management evaluation dated 16 December 2014, the Chief of the MEU responded that her request for management evaluation “is not receivable, as the matters you submitted do not constitute a reviewable administrative decision affecting your contract terms as a Staff Member”. The MEU further found that the Applicant had no legal standing as she did not apply for the post in question, nor had she any standing to submit requests on behalf of staff members.

22. On 26 December 2014, the Applicant sent an email to the MEU, in response to the evaluation contending, *inter-alia*, that she could not ethically or morally make application for a post based on an illegal JO, and that she had an individual right as a staff member to staff management consultations in accordance with the staff rules. As the management evaluation had found her application not receivable, she concluded in her email that since she “was unable to receive a ruling on the substance of my request, I would respectfully ask the Dispute Tribunal to review the matter of the suspension of action on the merits of this case under article 2.1(a)”.

23. On 26 December 2014, the Applicant thereafter filed (under the same Case No. UNDT/NY/2014/075 as this matter) what appears to be a substantive application relating to the same subject matter and on the same facts, as:

The MEU was not able to receive my request for suspension of action-finalising the Letter of Appointment for the P5 post pending the outcome of staff management consultations and proper promulgation of this new policy to allow promotion to P5 posts without mobility.

24. Whilst the Applicant has submitted this latter application on the standard form for an application on the merits (form UNDT/F.1E), she does appear to request as an interim measure the suspension of the promotion of the selected candidate, pending completion of staff management consultations and the report of the Pension Board to the General Assembly as requested in A/RES/68/247 (the standard form for such request would be UNDT/F.11E). The Registry therefore sought clarification from the Applicant by email on 26 December 2014, advising her to file her substantive application as a new case and, upon the direction of the Judge seized of the matter, to confirm to the Tribunal by 29 December 2014, whether she was withdrawing her request for suspension of action pending management evaluation. However, the Applicant has not responded.

Consideration

25. Article 2.2 of the Dispute Tribunal's Statute states:

... The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

26. Thus, in accordance with art. 2.2, the Dispute Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

27. It also follows that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly requested

and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256). Furthermore, according to *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010-UNAT-011, *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no circumstances order “the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed” (para. 19).

28. In this case, the MEU completed its review of the request for management evaluation on 23 December 2014 and concluded that it was not receivable. The MEU found, *inter alia*, that the impugned administrative decision had no direct legal consequences for the Applicant; that the Applicant did not apply for the P-5 post in question; and that the Applicant had no capacity as a staff representative to file a claim on behalf of other staff members, nor to submit an application before the Dispute Tribunal in her capacity as staff representative.

29. Without considering the merits of the application, or commenting on the findings of the MEU, the Tribunal notes that the management evaluation has been completed. Since an application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation, and as the management evaluation in this case is no longer pending and has been completed, there is no longer any basis for the Applicant’s request for suspension of action, and the application is dismissed.

30. Consequently, the Tribunal is unable to examine if the three statutory requirements specified in art. 2.2 of its Statute, namely *prima facie* unlawfulness, urgency and irreparable damage, are met in the case at hand.

Order

31. The application for suspension of action is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of December 2014