



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

FAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES UNDER ART. 10.2 OF
THE STATUTE**

Counsel for Applicant:
Self-represented

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

Introduction

1. On 30 December 2014, the Applicant, a Staff Representative at the United Nations Joint Staff Pension Fund (“UNJSPF”) filed an application contesting the “implementation of Job Opening 14-ADM-UNJSPF-33681-R-New York (R): Chief of Section, Client Services, Records Management and Distribution Section, P5 [(“the JO”)]”.

2. On 31 December 2014, the Applicant filed a motion for interim measures pending the proceedings with the Dispute Tribunal, describing the contested decision as follows:

- (i) Implementation of new policy of filing post at P-5 level within the Pension Fund with a waiver of the mandatory lateral moves (mobility) neither granted by ST/AI/2010/3 nor by the 2000 Memorandum of Understanding [and].
- (ii) Finalization of the first case of “promotion” to P-5 position within the UNJSPF for a candidate that does not meet the criteria of mobility as per ST/AI/2010/3.

3. The Applicant seeks the suspension of the implementation of this promotion case “(Personnel Action/letter of appointment to the candidate selected without the mobility requirements have not yet issued at the time of the filing)” and the suspension of the new policy of mobility waiver to P-5 post within UNJSPF.

Procedural background

4. On 16 December 2014, the Applicant filed a request with the Management Evaluation Unit (“MEU”) for management evaluation of the decision regarding the “[i]mplementation of a new policy for filling posts in the Pension Fund without prior consultation with designated Staff Representatives recently reflected in the issuance of a vacancy announcement pursuant to the new policy: [the JO]”.

5. That same day, the Applicant also filed an application, pursuant to art. 2.2 of the Dispute Tribunal’s Statute, requesting the suspension of action pending

management evaluation of the implementation of the JO. This case was registered as *Faye* UNDT/NY/2014/074.

6. On 18 December 2014, the MEU informed the Applicant that, in their view, this matter did not constitute a reviewable administrative decision. The MEU concluded that the Applicant's request for management evaluation was not receivable as it did not have any direct legal effect on his terms of appointment.

7. Order No. 349 (NY/2014), dated 24 December 2014, stated that the Respondent, in his 19 December 2014 reply to the Applicant's application for suspension of action, submitted that the management evaluation having been completed on 18 December 2014, there was no longer any basis for the Dispute Tribunal to consider the Applicant's request for suspension of action pending management evaluation.

8. On 24 December 2014, in view of the fact that the MEU had completed its review of the Applicant's request for management evaluation, the Dispute Tribunal, by Order No. 349 (NY/2014) dismissed the Applicant's request for suspension of action.

9. On 30 December 2014, the Applicant filed an application on the merits before the Dispute Tribunal pursuant to art. 2.1(a) of the Dispute Tribunal's Statute contesting the implementation of the JO. In response to his application, the Dispute Tribunal, on 31 December 2014 informed the Applicant that it was not clear "whether, by this application, he also intend[ed] to file a motion for interim measures pending proceedings pursuant to art. 10.2 of the Statute". The Dispute Tribunal noted that "if the Applicant wishe[d] to file such motion, the Duty Judge instructs the Applicant to file a separate motion" for interim measures. That same day, the Applicant confirmed his "intention to file a motion for interim measures pending proceedings pursuant to art. 10.2 of the Statute" and he filed the present motion together with a copy of the application on the merits filed the previous day.

10. The Registry acknowledged receipt of the Applicant's application and request for interim measures and served them on the Respondent on 31 December 2014. In accordance with art. 14.2 of the Dispute Tribunal's Rules of Procedure, the Respondent was directed to file a reply to the request for interim measures by 1:00 p.m. on Monday 5 January 2015, which he duly completed.

11. The facts presented in the Applicant's motion for interim measures requesting the suspension pending proceedings mirror the facts presented by the Applicant in support of his request for suspension of action pending management evaluation (see paras. 4–13 of Order No. 349 (NY/2014)).

12. On 7 January 2015, the Tribunal, by Order No. 1 (NY/2015), instructed the parties to inform it by 5:00 p.m. that same day whether they were aware if the selection decision for the JO had been implemented. The parties filed their responses by 5:00 p.m. on the same day.

13. In response to Order No. 1, the Applicant submitted that at 3:40 p.m. on 7 January 2015, the UNJSPF Executive Officer informed him orally that the UNJSPF had not issued a Personnel Action Plan or a letter of appointment regarding the JO. The Respondent submitted that:

2. In accordance with section 10.2 of ST/AI/2010/3 (Staff selection system), "the decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions."

3. By email dated 4 November 2014, the Executive Office of the Pension Fund informed the selected candidate that she had been selected for the position of Chief of Section and requested to confirm her continued interest in and availability for the position. On the same day, the selected candidate responded by email, confirming her continued interest in, and availability for, the position.

4. The issuance of a letter of appointment or a Personnel Action is not required to implement the selection decision under

ST/AI/2010/3. Rather, it is an administrative process. The selected candidate holds a permanent appointment with the Organization. A separate letter of appointment will not be issued as a consequence of her selection. Under the administrative process that applies, a selected candidate holding a permanent appointment is assigned to the new position, which is reflected in a Personnel Action

14. On 8 January 2015, the Applicant filed a reply to the Respondent's response stating that the Respondent failed to provide valid proof of the implementation of the selection decision for the JO through the production of a letter of appointment signed by the selected candidate and the Organization and the applicable personnel action plan. The Applicant further stated that:

... the implementation of "this action with a view of making this application moot constitute additional motives to substantiate the requirement of "particular urgency" as contained in art. 10.2 of the [Dispute Tribunal's Statute], since the intention of the Administration to give effect to these actions as a way of putting both the Tribunal and the Applicant in a *fait-accompli* situation is difficulty sustainable by the affected staff members who responsibility is to implement this improper implementation.

Applicant's submissions

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

Prima facie unlawfulness

a. The General Assembly and the United Nations Joint Staff Pension Board did not approve that staff members applying to P-5 level posts within the UNJSPF be exempt from sec. 6.3 of ST/AI/2010/3 (Staff selection system) requiring that staff members have at least two prior lateral moves prior to applying to P-5 level posts;

b. The Administration's lack of consultation on the mobility exemption unilaterally granted by OHRM without any consultations with UNJSPF Staff Representatives denied and breached the Applicant's rights as a staff representative;

c. The Administration's failure to adhere to its own rules on consultation (staff regulations 8.1 and 8.2 and ST/SGB/274) represents a violation of his due process rights;

Urgency

d. The first promotion following the change of this mobility requirement for promotion to the P-5 level has yet to occur or been finalized and the new policy has yet to be implemented;

Irreparable damage

e. The implementation of the decision to promote a staff member under this new policy will result in the creation of a two class system of staff members who will be appointed under different contractual arrangements, benefiting from different treatment resulting in the creation of unequal competition and career advancement within the UNJSPF;

f. Further, "[w]hile both the Fund Management and the Staff Representative are looking forward to hold consultations on the [M]emorandum of Understanding under consideration in the future, the implementation of one of the exemptions thought in the MoU before such consultation is held, does not amount to meaningful consultation in good faith, hence undermine[s] the tenure of such future consultation before it even takes place".

Respondent's submissions

16. The Respondent's principal contentions may be summarized as follows:

a. The Applicant, a staff member at the G-5 level, has no standing to challenge this decision as he was not eligible to apply for a position in the Professional category;

b. The Applicant's motion is not receivable *ratione personae* as the only instance in which a staff representative may file a case before the Dispute Tribunal is on behalf of an incapacitated or deceased staff member. In the present case, the Applicant does not challenge the contested decision in a personal capacity but instead in his capacity as an elected representative of staff members of the UNJSPF's Unit 39;

c. The Dispute Tribunal does not have jurisdiction to grant interim measures under art. 10.2 of its Statute in cases such as the present, namely cases of appointment, promotion or termination.

Consideration

Applicable law

17. Article 10.2 of the Dispute Tribunal's Statute states:

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

18. Article 14 of the Dispute Tribunal's Rules of Procedure states:

Suspension of action during the proceedings

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

2. The Registrar shall transmit the application to the respondent.

3. The Dispute Tribunal shall consider an application for interim

measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

19. The Tribunal considers that an order on interim measures may be granted at the request of the parties when the following cumulative conditions are met:

a. The motion for interim measures is filed in connection with a pending application on the merits before the Tribunal, anytime during the proceedings;

b. The application does not concern issues of appointment, promotion or termination;

c. The interim measure(s) sought from the Tribunal must provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed;

d. The contested administrative decision appears *prima facie* to be unlawful;

e. There is a particular urgency in requesting the interim measures;

f. The implementation of the contested administrative decision would cause irreparable damage.

Findings

20. The Tribunal notes that the Applicant's motion for interim measures is filed in connection with a currently pending application on the merits before the Tribunal filed on 30 December 2014. The first condition mentioned above is therefore fulfilled.

21. The Tribunal considers that a request to suspend the implementation of a contested administrative decision pending proceedings cannot be granted when the request for suspension concerns issues of appointment, promotion or termination,

pursuant art. 10.2 from the Dispute Tribunal's Statute and art. 14 from its Rules of Procedure, as these issues are expressly excluded from being suspended by the Dispute Tribunal's Statute and Rules of Procedure.

22. The Applicant's request for interim measures relates to the suspension of: (1) the implementation of the first promotion procedure to a P-5 level post within UNJSPF of a candidate that does not meet the mobility criteria per ST/AI/2010/3, and (2) the implementation of a new policy waiving the lateral move mobility requirement with respect to the filing of P-5 level posts within the UNJSPF.

23. By its own terminology and purpose, the issues raised by the Applicant concern issues of promotion and appointment and the requested relief concerns the suspension of the implementation of a promotion and/or policy relating to promotions. Consequently, the second condition identified above is not fulfilled as the issues raised by the Applicant are excluded from being suspended by the Dispute Tribunal.

24. Seeing that at least one of the above-mentioned cumulative conditions is not fulfilled, the Tribunal therefore need not consider whether the remaining requirements, namely temporary relief, *prima facie* unlawfulness, urgency and irreparable damage, are met.

In the light of the foregoing,

IT IS ORDERED THAT:

25. The motion for the suspension of action during the proceedings is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 8th day of January 2015