



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

ROCKCLIFFE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES**

Counsel for Applicant:
Self-represented

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

Introduction

1. On 9 February 2015, the Applicant, a Budget/Project Officer, at the P-4 level, and an alternate staff representative at the United Nations Joint Staff Pension Fund (“UNJSPF”), filed an application on the merits, under art. 2.1 of the Dispute Tribunal’s Statute, contesting a decision set out as follows (emphasis in original):

On 16 December the UNJSPF management decided to fill the P5 position of Chief of Client Services and Records Management Unit

- refusing to suspend implementation of appointments that are contrary to the existing [memorandum of understanding (“MoU”)] signed in 2000 which does not cover a mobility exception, and states that staff would be “appointed under a contract limited to service with the UNJSPF”.
- implementing an MoU for which the required staff-management consultations have not taken place as set forth in Staff Rules 8.1 and 8.2 and ST/SGB/274.
- vacancy announcement 14-ADM-UNJSPF-33581-R-New York in which this post was advertised, referred to an unsigned MoU as the basis for a mobility exception. The MoU signed in June/July 2000 is still in force and therefore the decision to implement any section of a draft is illegal.

2. On the same day, the Applicant filed a motion for interim measures pending the substantive proceedings, pursuant to art. 10.2 of the Dispute Tribunal’s Statute, seeking the following interim relief:

- i. That the Tribunal would order the Administration [Office of Human Resources Management (“OHRM”), the Chief Executive Officer of the UNJSPF (“CEO/PF”) and the Representative of the Secretary-General for the UNJSPF (“RSG/PF”)] to refrain from signing any MoU without staff-management consultation prescribed under Articles 8.1 and 8.2 of the Staff Regulations as it would be a violation of such rules;
- ii. That the Administration should refrain from signing the MoU without first reporting to the General Assembly in its seventieth session as per their request in A/RES/68/247 VII;

- iii. That no part of the unsigned MoU would be implemented prior to endorsement by the General Assembly in its seventieth session.

3. The Registry acknowledged receipt of the application for interim measures pending the substantive proceedings on Tuesday, 10 February 2015, and served it on the Respondent directing that he file a response to the motion by 4:00 p.m., on Wednesday 11 February 2015. In his reply, in which the Respondent did not address the facts or the elements required for an application for interim measures, the Respondent submitted that there is no connection between the contested decision and the relief requested in the motion. The Respondent further submitted that interim relief could not be granted because the application was not receivable. The Respondent contends that the Applicant does not, *inter alia*, have standing to contest the decision because she did not apply for the post and that, in accordance with the Dispute Tribunal's jurisprudence, she cannot challenge the selection process in her capacity as a staff representative. Accordingly, the motion for interim relief should be rejected.

Brief Procedural History

4. On 19 December 2014, the Applicant filed a request with the Management Evaluation Unit ("MEU") for management evaluation of the decision, relating to the job opening, "to implement promotion to P-5 of certain applicant who did not meet the usual criteria of lateral moves for the P-5".

5. On 23 December 2014, in response to the Applicant's request for management evaluation dated 19 December 2014, the Chief of the MEU responded to the Applicant's request for management evaluation of the decision concerning:

- (The) CEO's decision to implement promotion to P-5 of certain applicant who did not meet the usual criteria of lateral moves for the P-5.
- This (...) new policy for filling posts in the Pension Fund which affects the conditions of service, and therefore should be implemented only following staff management consultation.

- This concession is not covered by the current MoU with OHRM.

6. The MEU found that the 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 a staff member, as she did not apply for the post in question, nor had she any standing, as a staff representative to submit requests on behalf of staff members of UNJSPF.

7. It is to be recalled that on 29 December 2014, by Order No. 355 (NY/2014) in Case No. UNDT/NY/2014/075, the Dispute Tribunal dismissed the Applicant's request, pursuant to art. 2.2 of the Dispute Tribunal's Statute, for suspension of action pending management evaluation of the contested decision herein, on the grounds that the management evaluation having been completed, there was no longer any basis for the Applicant's request for suspension of action.

8. As stated above, on 9 February 2015, the Applicant filed her application on the merits and also this motion for interim measures pending proceedings.

Background Facts

9. Essentially, the Applicant is challenging the selection of a staff member following an exemption from the requirement of mobility, which is allegedly not authorised by the current MoU with respect to the United Nations Personnel Procedures applicable to the UNJSPF. The Applicant maintains that a new draft MoU has not undergone the required staff management consultations or been finalised, and the selected candidate has been promoted in contravention of the relevant administrative instruction and MoU in force at the time. The Applicant has set out a summary of the facts relied upon in the application for interim measures, which the Respondent has not denied. As the factual background to this motion was set out in Order No. 355 (NY/2014), it need not be repeated in light of the findings herein.

Consideration

Applicable law

10. 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.

11. In terms of art. 10.2, the Dispute Tribunal may order an interim measure, to provide temporary relief to either party; which relief may include an order to suspend the implementation of the contested administrative decision; 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. 10.2 of its Statute have been met. The application for interim measures is ill fated for several reasons.

12. In her management evaluation request of 19 December 2014, the Applicant requested "suspension of action and evaluation of the CEO's decision to implement promotion to P-5 of certain applicant who did not meet the usual criteria of lateral moves for the P-5".

13. In the application for interim measures, the Applicant states that "the decision was implemented on 2 February 2015 retroactive to 1 December 2014." The application for interim measures was filed on 9 February 2015.

14. In *Riecan* Order No. 89 (NBI/2014), dated 2 May 2014, the Dispute Tribunal stated:

A suspension of action order is, in substance and effect, akin to an *interim* order of injunction in national jurisdictions. It is

a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

15. The challenged decision, the subject matter of the interim measures application in this case, is the already implemented decision to promote a candidate to the P-5 post, the alleged illegality of which lies in the alleged failure to consult and the alleged non-compliance with the relevant administrative instruction and the MoU. It is settled law that where a contested decision has been fully implemented, suspension of action cannot be granted to restore the situation or reverse an allegedly unlawful act (*Tadonki* UNDT/2009/016; *Applicant* UNDT/2011/158; *Kweka* UNDT/2011/122; *Tiwathia* UNDT/2012/109; *Laurenti* Order No. 243 (NBI/2013)). Furthermore, temporary relief by way of suspension of action is not permissible in cases of promotion. The application for interim measures therefore stands to be rejected.

16. In the relief claimed under her motion for interim measures, the Applicant acknowledged that the promotion decision had already been implemented, and so requested instead that the Tribunal order the Administration—OHRM, the CEO/PF and RSG/PF—to refrain from signing any new MoU without first engaging in staff-management consultation and reporting to the General Assembly in its seventieth session as per their request in A/RES/68/247 VII. She further requests that the Tribunal order that no part of the unsigned MoU may be implemented prior to receiving the endorsement of the General Assembly. These matters are related to issues in relation to which the Applicant is seeking the Tribunal's review on the merits under art. 2.1 (a). To this end, the Applicant's motion filed on 13 February 2015, to submit additional evidence consisting of an email from the Administration confirming the general need for consultations with staff representatives, if relevant, need not be addressed at this stage.

Conclusion

17. The application for interim measures pending proceedings is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 18th day of February 2015