



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SINGH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES**

Counsel for Applicant:
Robert Appleton, Esq.

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

Introduction

1. On 19 March 2015, the Applicant, Director at the D-1 level, Investment Management Division (“IMD”) at the United Nations Joint Staff Pension Fund (“UNJSPF”) in New York, filed an application on the merits, under art. 2.1 of the Dispute Tribunal’s Statute, contesting the decision allegedly made by Ms. Carolyn Boykin, Programme Manager, UNJSPF, to include in the educational requirement of the Job Opening (“JO”) for the D-2 post of Director, Investment Management (“IM”), that the candidate must be the holder of Chartered Financial Analyst (CFA) certification to be eligible for consideration for the post.

2. On 20 March 2015, the Applicant filed a motion for interim measures pending the substantive proceedings, pursuant to art. 10.2 of the Dispute Tribunal’s Statute. The Applicant’s submissions and allegations may be summarized as follows:

a. With regard to the *prima facie* unlawfulness of the contested decision, the Applicant contends that the contested decision contravenes art. 101.3 of the United Nations Charter (emphasizing the importance of recruiting staff on as wide a geographical basis as possible) and para. 4 sec. III of the General Assembly resolution 68/247 (calling for a broad recruitment to allow for a competitive pool of candidates). He contends that the inclusion of the CFA requirement as opposed to previous JO for the same type of position also violates sec. 4.5 of ST/AI/2010/3 (Staff selection system) and, in any event, the deviation from the Generic Job Profile (“GJP”) would not be permitted when the drafter(s) is influenced by extraneous or ulterior motives. Also that the CFA requirement is discriminatory in that it unfairly and impermissibly favours North American Males (who make up 65% of CFA charterholders worldwide) over otherwise equally qualified women and men in North America and worldwide (including the Applicant) who are not necessarily CFA charterholders. Whilst the JO encourages women to apply for the position, it excludes at the same time 81% of women from applying to

the position since only 19% of women were CFA charterholders in 2010. This requirement leads to an absurd result since extremely qualified candidates would not be eligible to be considered for the position. The Applicant alleges that the evidence in the form of a witness testimony will show that the contested decision was tainted by bias and improper considerations and is therefore unlawful: the Programme Manager, responsible for the preparation of the JO, was overheard stating that the CFA requirement was included so as to exclude certain staff members (including the Applicant) from being eligible to apply for the position.

b. With regards to the urgency requirement under art. 10.2 of the Statute, the Applicant submits that the closing date for application in the JO is imminent (31 March 2015), after which the selection process may lead to the appointment of a candidate and the impossibility for reversal or suspension of the contested decision.

c. The Applicant contends that the contested decision would lead to irreparable damage given that although he is well qualified for the position, he is not eligible to apply and will not be able to be considered for the position. Furthermore, a recruitment tainted by bias, including against the Applicant, would be allowed to proceed leading to harm to his professional reputation and career prospects. The enforcement of an unlawful JO is contrary to the values of the Organization and undermines its credibility and that of the UNJSPF.

3. The Applicant seeks the following interim relief:

1. Suspension and rescission of the implementation of the [JO] ...
2. An Order requiring immediate cessation of further recruitment action based on this unlawful VA, including but not limited to, suspension of the creation of a short list of candidates;
3. An Order instructing the Administration to redraft and re-issue the VA to bring it into compliance with applicable UN rules and administrative issuances, including but not limited to 1) Section 4.5 of

the Administrative instruction: Staff selection system, (ST/AI/2010/3); 2) paragraphs 4 and 5 of Section VIII of GA Resolution (A/RES/68/247 B); 3) Art. IV, Regulation 4.2 of the Staff Regulations and Rules, (ST/SGB/2014/1); and 4) Art. 101(3) of the U.N. Charter;

4. Reimbursement of expenses including attorney's fees as a result of the egregious conduct by the Administration in this case, and the fact that the Applicant had no choice but to seek outside, private counsel, to vindicate his rights.

Procedural History

4. The JO for the D-2 post of Director, IM, was posted on Inspira on 30 January 2015 with a closing date for application of 31 March 2015.

5. On 3 February 2015, the Applicant sent an email to the Office of Human Resources Management ("OHRM") expressing his concerns over the decision to include the CFA certification as a requirement to be eligible for consideration for the post of Director, D-2, IM.

6. In an e-mail dated 20 February 2015, OHRM informed the Applicant that it approved the JO and that no further action would be taken.

7. On 2 March 2015, the Applicant filed an application for suspension of action pending management evaluation. By Order No. 36 (NY/2015), dated 3 March 2015, the Tribunal held that "there being no pending management evaluation, the application for suspension of action is fatally defective and stands to be dismissed."

8. On 3 March 2015, the Applicant filed a request for management evaluation wherein the Applicant requested: (a) suspension of the job posting; (b) review of the job requirement by both the "IC" and the Chief Executive Officer of the Pension Fund; and (c) republishing the job posting so that the eligibility requirements are lawful and fair to all candidates.

9. The Management Evaluation Unit (“MEU”) replied by email dated 6 March 2015, that “the MEU only has the authority to suspend administrative decisions related to determinations of appointment and separations from service”.

10. On 6 March 2015, the Applicant filed a second request for suspension of action.

11. By Order No. 39 (NY/2015), dated 9 March 2015, the Tribunal dismissed the Applicant’s second request for suspension of action as there was no longer any matter pending before the MEU, given the clear message that MEU considered that it has no authority to grant a suspension of a job posting and that therefore the relief sought by the Applicant will not be further pursued by the MEU.

12. On 17 March 2015, the MEU notified the Applicant that since the advertisement of the job opening is one step in the selection exercise, and does not, in itself, constitute a challengeable administrative decision, the Applicant’s request for management evaluation was deemed premature, and thus not receivable. However, the MEU made the following observations:

Following communications with the UNJSPF, the MEU noted that the job opening for the Post was exceptionally approved by [OHRM] and later reviewed and approved by the Central Review Board. The MEU learned that the CFA exception was granted because the future incumbent will be in charge of managing all investments of the [IMD], which are valued at USD 53 billion. Accordingly, due to the substantial responsibility of the job and the high risks associated with it, the requirement for the incumbent to possess a CFA was granted on an exceptional basis.

13. As stated before, the application on the merits was filed on 20 March 2015, followed by the motion for interim measures.

14. On 23 March 2015, the Registry acknowledged receipt of the motion for interim measures pending the substantive proceedings and served it on the Respondent, directing that he files a response to the motion by 12:00 p.m., on Wednesday, 25 March 2015.

15. By email dated 24 March 2015, Ms. Christine Asokumar in the Office of Human Resources Management informed the Respondent that the JO for the post of Director, D-2, IM, was cancelled.

16. The Respondent filed his reply to the motion for interim measures on 25 March 2015, reproduced in its entirety below (emphasis in original):

1. By Application dated 20 March 2015, the Applicant challenges the education requirements in the job opening for the D-2 position of Director, Investment Management, United Nations Joint Staff Pension Fund (UNJSPF) (Job Opening No. 15-INV-UNJSPF-38429-R-NEW YORK (R)). The Respondent denies all of the Applicant's allegations. The Applicant's request for interim measures should be rejected.

2. First, the Dispute Tribunal does not have competence to order the relief sought by the Applicant. Under Article 10(1) (*sic*), of the Dispute Tribunal's Statute the temporary relief ordered by the Dispute Tribunal "may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination".

3. This case is a case of appointment and promotion. The Dispute Tribunal therefore does not have jurisdiction under Article 10(1) (*sic*) of the Statute to grant temporary relief (*El-Komy*, 2013-UNAT-324). The Applicant, who is at the D-1 level, challenges a selection process for an appointment at the D-2 level. Specifically, the Applicant seeks to challenge a requirement within the job opening which may exclude him from promotion from the D-1 level to the D-2 level.

4. Second, the Motion is moot. The Job Opening has been cancelled (**annex R/1**, extract from *Inspira*). As the contested decision is no longer in effect, it is not capable of being suspended.

RELIEF

5. In view of the foregoing, the Respondent requests the Dispute Tribunal to reject the Motion.

17. On 26 March 2015, the Applicant filed an application seeking leave to comment on the Respondent's response and incorporating the said comments, which is hereby granted. The Applicant submits, in substance, that all issues raised in the motion for interim relief are not resolved by the withdrawal of the JO. The Applicant, now requesting new relief in the form of the recusal of the hiring managers, stresses that

If only the Application [on the merits] is allowed to proceed, and the Motion [for interim measures] is deemed moot, the recruitment process will continue with the same hiring managers in charge, and the position will likely be filled before the Application is fully adjudicated. The Applicant requests that the hiring managers be recused, based on the violations in the recruitment exercise identified in the Application and Motion. Therefore, the matter remains urgent.

18. As the aforesaid new relief for removal of the hiring managers was not previously requested by the Applicant, and is improperly before the Tribunal, the Tribunal shall say no more about it.

Consideration

19. The Respondent submits that following the cancellation of the JO, the contested decision is no longer in effect and it is not capable of being suspended. Accordingly, the motion is now moot.

20. The Tribunal notes that whilst contending that the matter is moot, the Respondent at the same time “denies all of the Applicant’s allegations” and submits that the “Applicant’s request should be rejected.” The Respondent therefore denies that the contested decision appears *prima facie* to be unlawful, that it is a case of particular urgency and that the implementation of the contested decision would cause irreparable damage. In this regard, the Respondent acknowledges that there are issues remaining but provides no argument in support of this contention.

21. It is trite that courts will not readily decide cases in which there is no longer any actual controversy. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy, so that a court need not give opinions on abstract propositions of law. Some courts do exercise their discretion to consider a “moot” case depending on the interests of justice, the importance of the issue, its complexity, and the nature and extent of the practical effect any possible order might have. Does the cancellation of the JO in this case render the motion moot such that it is not justiciable as submitted by the Respondent?

22. Black's Law Dictionary Deluxe Ninth Edition defines "moot" as:

"1. Archaic: open to argument; debatable 2. Having no practical significance; hypothetical or academic (The question on appeal became moot once the parties settled a case)."

Blacks also defines a "moot case" as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."

23. It is questionable whether the Applicant's motion has been rendered moot by the cancellation of the JO which addressed only partly the relief sought by the Applicant.

24. The Tribunal considers that the following findings of the former UN Administrative Tribunal in *Judgment No. 1344* (2007) in relation to a claim that the applicant's claim in that case was moot are similarly applicable to the determination of the present motion for interim measures:

The Applicant, as a staff member, was entitled to be fully and fairly considered for any position for which he was eligible and applied. Any failure by the Organization to accord him that right, be it as a result of discrimination, extraneous motives or, as allegedly in this case, procedural violations, violated his rights to due process at the time of the alleged failure. The fact and timing of his promotion to another post at the D-1 level does not negate the violation: it is only relevant in terms of the severity of the consequences of such violation, in terms of compensation awarded therefore. Thus, the Tribunal finds that the Application is not moot and turns its full attention to the allegations raised by the Applicant.

25. Suspending the implementation of the contested decision is only one form of relief sought by the Applicant. The following two forms of relief sought by the Applicant remain unaddressed and arguably are still in contention unless, and until, the Respondent concedes them, or the Applicant withdraws his motion: (1) the instruction to the Administration to redraft and re-issue the JO to bring it into compliance with applicable UN rules and administrative issuances and

(2) the reimbursement of expenses incurred as a result of the publication of an unlawful JO.

26. Whether the Tribunal would grant the remaining reliefs sought is not at point. However, the Tribunal does not consider that the Applicant's requests in that respect have been automatically rendered moot by the cancellation of the JO, as notified by OHRM to ALU on 24 March 2015 and after the filing of the motion for interim relief.

27. Furthermore, the cancellation of the JO does not cover the full extent of the Applicant's motion and the central issues of the case as set out in para. 25 below. It certainly does not render it moot. The fact and timing of the cancellation of the JO does not negate the alleged violations of the Applicant's rights. Moreover the Respondent has denied all the Applicant's allegations indicating that there are still live issues which need to be addressed.

28. The Respondent contends that the Tribunal does not have jurisdiction pursuant to art. 10.2 of its Statute, to order the relief sought by the Applicant on the grounds that it is a case of appointment and promotion since the Applicant "challenges a selection process for an appointment at the D-2 level" and "seeks to challenge a requirement within the job opening which may exclude him from promotion from the D-1 level to the D-2 level." The Respondent relies on *El-Komy* 2013-UNAT-324.

29. 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.

30. The present case is, however, clearly distinguishable from that of *El-Komy*, which concerned a case of separation. In the present case, a finite decision has been

rendered which precludes the Applicant from applying for the position and excludes him entirely for consideration. Further, contrary to the Respondent's contention, the Applicant's claim is not limited solely to either the issue of appointment or promotion. The Respondent has misinterpreted the subject-matter of the motion for interim relief and disregards, briefly in four paragraphs, the central issues in this case which are (1) whether it is discriminatory to require a candidate to be the holder of CFA certification in order to be eligible for consideration for the post and (2) whether the decision to include the contested educational requirement was ill-motivated so as to exclude specific candidates, including the Applicant, and whether it constituted an abuse of authority. Furthermore, as indicated earlier, all allegations are denied, including that of the alleged unlawfulness. These may well be matters for the merits.

31. Reducing the present case to a case of appointment or promotion so as to argue the Tribunal's lack of competence to order interim relief would lead to an absurdity whereby serious allegations of violations of the Staff Regulations, Staff Rules and Secretary-General's Bulletin prohibiting conduct amounting to discrimination or abuse of authority would never lead to any temporary relief so long as they are presented in the broader context of what is perceived as appointment or promotion related matters. The Respondent's broad interpretation of the exclusionary provision of art. 10.2 of the Tribunal's Statute is untenable, particularly on the facts of this case.

32. In the present case, the Applicant does not challenge the decision not to appoint him to the post or the decision to promote another staff member to this position. He contests the discriminatory condition of eligibility in the JO as well as the improper motives behind the inclusion of the CFA requirement that have allegedly tainted the preparation of the JO. Further, the contested decision is finite in its nature, since it has already excluded him from eligibility to any further process and has direct legal consequences upon him as it was allegedly designed to exclude him, amongst others, to apply for the post. The Tribunal therefore finds that

the exclusionary provision of art. 10.2 of the Statute does not apply to the present case.

33. The Applicant sought the rescission of the implementation of the vacancy announcement or job opening. The Respondent has cancelled the JO and the Tribunal trusts that this cancellation means that the entire selection and recruitment process has indeed been cancelled. Consequently, the contested decision need no longer be suspended as the relief sought by the Applicant in that respect has, *de facto*, been granted by the Administration. However, should the Administration choose to re-advertise the JO, the Applicant may file a claim and a motion for interim relief in respect of the new JO if necessary.

34. The Tribunal observes that it is arguable whether the removal of the contested decision by way of cancellation of the JO means that there are no longer any direct legal consequences for the Applicant. However, this is a matter to be determined in relation to issues touching upon the merits of the case.

35. As the Applicant highlighted in his application to comment on the Respondent's response, "[i]n addition to the suspension of the [JO], [the Applicant] sought review and correction of the unlawful process that resulted in the [JO]. Correction cannot be achieved without addressing the merits of his claims and ultimately, without requiring the recusal of Ms. Boykin from the recruitment process." With respect to this and the other relief sought by the Applicant, namely the instructions to the Administration and the compensation for harm suffered, the Tribunal observes that they are related to matters to be determined on the merits in the context of the application, and the Applicant's rights, if any, are reserved.

Costs

36. There is no doubt that the Applicant has been put to unnecessary costs as evident from the history of the procedural background to this case. His protestations have been ignored since his first intervention on 3 February 2015 until the cancellation of the JO on 24 March 2015, and he has had to incur the costs of

private counsel. The Tribunal is not aware what costs the Applicant has incurred, but trusts that common sense will prevail, and that the parties will explore all possibilities to informally resolve the case, including by way of the Mediation Division in the Office of the Ombudsman, and the Respondent may tender costs in a sum to be agreed between the parties, failing which this matter shall be reserved to be dealt with as a remaining claim for the Applicant in the context of judicial review of his application on the merits.

Conclusion

37. As the Administration cancelled the JO on 24 March 2015, the first and second reliefs sought by the Applicant, as set out in para. 3 of this Order, have been *de facto* granted. The motion for interim relief is therefore dismissed in that respect.

38. The remaining reliefs sought by the Applicant are inter-related to matters which will be under judicial review in the context of the application on the merits and are hereby reserved.

39. The Tribunal encourages the parties to explore all possibilities to informally resolve the case, including by way of the Mediation Division in the Office of the Ombudsman and to inform the Tribunal without delay should they choose to seek suspension of the proceedings on the merits pending mediation.

(Signed)

Judge Ebrahim-Carstens

Dated this 30th day of March 2015