



Before: Judge Alessandra Greceanu, Duty-Judge

Registry: New York

Registrar: Hafida Lahiouel

FAYE

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 4 June 2015, the Applicant, a Benefits Assistant at the GS-5 level, 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 of 2 June 2015 made by the Chief Executive Director (“CEO”) of the UNJSPF to submit to the UNJSPF Board Budget Committee (“Board”) the UNJSPF’s budget estimates for the biennium 2016-2017, without consulting the Applicant in his capacity as staff representative, thus affecting the Applicant’s terms of appointment.

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 an order to “the Administration (UNJSPF CEO/Secretary of the Board) to withdraw the 2016-2017 Fund budget estimate dated 02 June 2015 from the [UNJSPF] web portal until the required consultation on the budget has taken place” (emphasis in original). The Applicant further seeks an order to “the [UNJSPF Board] to refrain from reviewing and making any decision on the 2016-2017 budget estimates dated 02 June 2015 under the record JSPB/62/R.16 submitted by the UNJSPF CEO until formal consultation with the Applicant has taken place”.

3. The Registry transmitted the motion to the Respondent on the same day. The Respondent filed its response on 8 June 2015 and submits that the motion should be rejected as not receivable and without merits.

4. On 8 June 2015, the Applicant submitted his comments to the Respondent’s response to the motion for interim measures.

Factual background

5. The facts presented by the Applicant are as follows (emphasis in original):

1. The United Nations Assistant Secretary-General for OHRM reminded all heads of departments in the context of their respective Proposed Budgets for 2016-2017, to consult with the staff representatives as provided for in *ST/SGB/172* and *ST/SGB/274*.

2. For the past three months, the UNJSPF Staff Representatives have requested the proposed draft budget for the Fund without success. ... The requests were made in the following sequences:

- UNJSPF Alternate Staff Representative email to UNJSPF Executive Officer dated 10 February 2015.

- UNJSPF Executive Officer's message to Deputy CEO dated 2 February 2015.

- UNJSPF Alternate Staff Representative follow up request to Deputy CEO dated 24 March 2015.

- UNJSPF Alternate Staff Representative follow up email to Executive Officer dated 28 April 2015.

- UNJSPF Alternate Staff Representative follow up email to Budget Officer dated 7 May 2015.

- UNJSPF Alternate Staff Representative follow up email to Deputy CEO Executive Officer dated 8 May 2015.

3. On 26 May 2015, the Applicant filed a Management Evaluation Request with the [Management Evaluation Unit ("MEU")] for having been denied his rights of consultation as a staff member and as a staff representative in accordance with Staff Regulations 8.1 8.2 and *STS/GB/172* and *ST/SGB/274*.

4. On 02 June 2015, [the MEU] submitted a reply to the Applicant's [management evaluation request] via email 'Closing Letter - Case of Mr. Ibrahima Faye (MEU/260-15R) ...

The MEU contends in its reply that *'After consulting with the UNJSPF, the MEU ascertained that no decision has been taken by the Fund Management to forego consultation with staff representatives regarding the 2016-2017 budget proposals. Rather, UNJSPF advised that staff representatives were advised most recently on 13 May 2015, that consultations would be held in due course. Although staff were recently invited to a town-hall meeting on the subject, UNJSPF Management is in fact still in the process of finalizing its internal consultations prior to scheduling the necessary consultations with staff representatives. As no administrative decision has been taken regarding your request, the MEU concluded that your request for management evaluation is premature. In the light of the above, we will proceed to close your case.'*

5. On 02 June 2015, the Applicant, was informed and then provided with a copy of the said budget document by various sources, confirmation that the CEO of the UNJSPF, Secretary of the Board has submitted to the Governing Body of the Fund, through the Board Budget Committee members, for consideration of the budget estimates for the biennium 2016-2017.

The same day, the budget document JSPB/62/R.16 dated 02 June 2015 has been uploaded to the UNJSPF Website portal for access by the Pension Board members.

6. The Applicant being Mindful of UNJSPF article 15 ‘Administrative Expenses’

...

7. The Applicant being cognizant [of] ... Section A.4 [of the UNJSPF rules of procedures]

8. The Applicant being further aware that the budget estimates for the biennium 2016-2017 need to be submitted to the Budget Committee members of the UNJSPB no later than 45 days prior to the intended Board session. ... i.e. 5 June 2015. The 2015 UNJSPB meeting is scheduled to be held in Geneva from 20 to 24 July 2015 while the Budget committee meeting is scheduled for 15 and 16 July 2015. ...

Submissions of the parties

6. With respect to the *prima facie* unlawfulness of the contested decision, the Applicant submits that:

a. The denial of an opportunity to be consulted during the preparation phase of the biennial budget violated the Applicant’s rights to consultation reaffirmed by the former United Nations Administrative Tribunal and the Dispute Tribunal, which held that: (i) staff-management consultations are an indispensable element of due process; (ii) parties to the consultation must have the opportunity to express their views; (iii) consent or agreement of the consulted parties need not be obtained; (iv) consultation must be full, effective and meaningful in that staff members are to be given proper notice, a say in the process and their interests have to be taken into consideration; and

(v) consultations must be carried out in good faith and should generally occur before a final decision is made;

b. The Administration's non-compliance with the duty to hold consultation on the budget is *prima facie* unlawful and affected the Applicant's terms of appointment, particularly chapter VIII of the Staff Regulations, the Staff Rules, ST/SGB/172 and ST/SGB/274;

c. The Applicant's request for management evaluation was not premature given that the biennium estimates were officially submitted for review, which further disregarded the ASG/OHRM's instruction to hold required consultation on the 2016-2017 budget with staff representatives.

7. With regard to the requirement of particular urgency of the matter, the Applicant states that:

Once the UNJSPF Board Budget Committee Working Group study the budget and issue its recommendation for the approval of the ACABQ/Fifth Committee and General Assembly, there is no more need for consultation on the document which by that stage cannot be reviewed, amended or changed to take into consideration the Applicant's views, commentary or input in his quality of UNJSPF Staff Representative. Thus meaningful consultation would be undermined in clear violation of the Applicant's right amounting to irreparable harm. The document endorsed by the board goes directly to the General Assembly main bodies ([the Committee on Administrative and Budgetary Questions] & Fifth Committee) for further endorsement by the General Assembly.

8. With respect to the requirement of irreparable harm, the Applicant submits that:

1- Violation of Staff Regulations 8.1 and 8.2 on the lack of consultations as prescribed in the Secretary General bulletins ST/SGB/172 and ST/SGB/274. One paramount criteria of fair consultation requires that each party to the consultation must have the opportunity to make the other party aware of its views (UNADT Judgment No.518, Brewster). The Applicant was not given a say in the process of the Fund's formulation of the biennium budget and its

submission to the Governing Body of the Fund for further submission to the General Assembly.

2- The Applicant's views have not been taken into consideration (*UNDT/2012/118*) Adundo et al. Order No. 126 (NYI2013). While the MEU in its reply to the Applicant's request for Management Evaluation is of the view that ... UNJSPF Management is in fact still in the process of finalizing its internal consultations prior to scheduling the necessary consultations with staff representatives... [t]he holding of consultation after the budget document is submitted to the fund Governing Body does not amount to meaningful consultation in good faith.

9. The Respondent submits that the requirements of arts. 2.1(a) and 8.1(c) of the Tribunal's Statute are not met and the Dispute Tribunal is not competent to rule on the application on the merits or on the motion for interim measures on the grounds that:

a. The Applicant failed to request management evaluation of one of the contested decisions, namely the CEO's decision to submit the budget estimates;

b. No administrative decision has been taken to forego consultations which are still ongoing;

c. It is well established in the jurisprudence of the Dispute Tribunal that it does not have jurisdiction *ratione personae* in relation to applications filed by staff representatives or on behalf of staff unions;

d. The Applicant does not have standing to contest the submission of the biennium in his capacity as an individual staff member since the submission has no direct legal consequences on the Applicant's terms of appointment (reference is made to *Lee* 2014-UNAT-481).

10. Further, the Respondent relies on *Terragnolo* 2015-UNAT-517 to submit that the Dispute Tribunal has no competence with respect to the CEO of the Fund under art. 2.1 of the Statute and cannot issue orders that require him or her to take any

action under a process that is governed exclusively by art. 15 of the UNJSPF Regulations.

11. Regarding the statutory requirements of art. 10.2 of the Tribunal's Statute, the Respondent submits that the Applicant fails to demonstrate that the impugned decision is *prima facie* unlawful, that the implementation of the contested decision would cause irreparable harm or that there is a particular urgency in the matter. The contested decision has already been implemented, further consultation will be held in June and the Administration is not required to hold consultation with regard to a particular document or a step in the budget process.

12. In his comments submitted on 8 June 2015, the Applicant contends that "the submission of the budget by the ... CEO is ... the exemplification of the administrative action challenged through the application for management evaluation". On the alleged lack of standing, the Applicant submits, *inter alia*, that he has the right, as an individual staff member, to bring claims relating to his official capacity as staff representative insofar as these relate to his own rights and conditions of service. The Applicant reiterates that the contested decision has direct legal consequences on his terms of appointment since his contractual rights that are being violated are regulated by the Staff Regulations and the Staff Rules, not by the UNJSPF Regulations (staff regulations 8.1, 8.2; staff rule 8.1. ST/SGB/I72 and 274). Furthermore, given that the Board meets once a year, the budget might be submitted to the General Assembly at which stage no further changes could be made. Any meaningful consultation may only occur prior to the Board's examination of the biennium. The contested decision has therefore not been fully implemented since the Board has not yet convened.

Consideration

Applicable law

13. Article 10.2 of the 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.

14. Article 14.1 (Suspension of action during the proceedings) of the Dispute Tribunal's Rules of Procedure states that:

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

15. 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) ordered by 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

16. 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 4 June 2015. The contested administrative decision does not pertain to issues relating to appointment, promotion or termination. The first and second conditions mentioned above are accordingly fulfilled.

17. Regarding the third condition, the Tribunal notes that the section entitled "grounds for contesting the administrative decision" in the application on the merits has an identical structure and content to the motion for interim measures pending proceedings.

18. The relief sought by the Applicant in his motion for interim measures reads as follows:

- The Applicant requests the [Tribunal] to order the Administration (UNJSPF CEO/Secretary of the Board) to withdraw the 2016-2017 Fund budget estimate dated 02 June 2015 from the [UNJSPF] web portal until the required consultation on the budget has taken place.
- The Applicant request[s] the [Tribunal] to order to the [UNJSPF Board] to refrain from reviewing and making any decision on the 2016-2017 budget estimates dated 02 June 2015 under the record JSPB/62/R.16 submitted by the UNJSPF CEO until formal consultation with the Applicant has taken place;

19. The relief sought by the Applicant his application reads as follows:
- The Applicant requests the [Tribunal] to order the Administration (UNJSPF CEO/Secretary of the Board) to withdraw the 2016-2017 Fund budget estimate dated 02 June 2015 from the [UNJSPF] portal until the required consultation has taken place.
 - The Applicant request[s] the [Tribunal] to order to the [UNJSPF Board] to refrain from reviewing and making any decision on the 2016-2017 budget estimates dated 02 June 2015 under the record JSPB/62/R.16 submitted by the UNJSPF CEO until formal consultation with the Applicant has taken place;
 - The Applicant request the [Tribunal] to consider awarding the Applicant any compensation deemed appropriate for the stress, pain and suffering and the time and effort undertaken to file this application as a result of the Respondent's violation of his rights under UN Staff Regulations 8.1, 8.2.

20. In his response to the motion for interim measures, the Respondent contended that both the motion for interim relief and the application are not receivable and that the motion for interim measures is without merits. The Respondent contends, *inter alia*, that the Applicant lacks standing both in his capacity as an individual staff member and a staff representative, no administrative decision was made to forgo consultations and the Dispute Tribunal has no jurisdiction with respect to matters regulated by the UNJSP Regulations. The Respondent also submits that the Applicant failed to demonstrate the *prima facie* unlawfulness of the contested decision, that its implementation would cause irreparable harm or that there is a particular urgency in the matter.

21. The Tribunal underlines that the purpose of an interim measure is not to grant a relief which would constitute a final resolution, but only a temporary relief, pending the outcome of substantive proceedings of the case. The Tribunal finds that in the present case, should the interim measure sought be granted, the Tribunal would effectively be adjudicating the issues in contention in the application on the merits, including the receivability *rationae personae* and *rationae materiae*. It results that

the Tribunal will not solely provide a temporarily relief as mandatory required by art. 10.2 of the Dispute Tribunal's Statute and art. 14.1 of its Rules of Procedure.

Conclusion

22. Since the Dispute Tribunal may only order, pursuant to art. 10.2 of its Statute, an interim measure to provide *temporary relief* and that the relief requested, if granted, would not be temporary by nature, one of the cumulative conditions to grant a motion for interim relief is not fulfilled. Consequently, the Tribunal need not consider whether the remaining requirements, namely *prima facie* unlawfulness, urgency and irreparable damage, are met.

In light of the foregoing, the Tribunal

ORDERS

23. The application for interim measures is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 11th day of June 2015