



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

AUDA

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

Introduction

1. On 23 June 2016, the Applicant filed an application on the merits contesting a decision identified as follows:

The decision of the Under-Secretary-General, Department of Management (DM), not to cancel then make a selection pursuant to Job Opening number 15-IST-OICT-41653-R-NEW YORK (R) for the defunct position of Chief of Service (D1), Strategic Information and Communication Technology Management, in the Office of Information and Communications Technology (OICT).

2. On 23 June 2016, the Applicant also filed, as a separate case in the Tribunal's eFiling portal, a document titled "Application for interim relief". The Applicant requested that the Tribunal order the suspension of the implementation of the same decision identified above for the duration of the proceedings before the Dispute Tribunal.

3. By notification dated 24 June 2016, the New York Registry of the Dispute Tribunal ("Registry") acknowledged receipt of the application on the merits and transmitted the application to the Respondent. The parties were informed that the application on the merits had been assigned Case No. UNDT/NY/2016/028.

4. In a separate notification dated 24 June 2016, the Registry noted that the Applicant had filed the "Application for interim relief", referred to by the Registry as a motion for interim measures, on 23 June 2016, and that the motion pertained to the application on the merits. The Applicant was requested by the Registry to re-file the motion in Case No. UNDT/NY/2016/028, which he did on the same day.

5. On 27 June 2016, this case was assigned to the undersigned Judge. By notification to the parties dated 27 June 2016, the Registry acknowledged receipt of the Applicant's motion for interim measures "filed by the Applicant on

24 June 2016”. The Respondent was directed to file a response by 1:00 p.m. on 29 June 2016.

6. Following email correspondence from the Applicant on 27 and 28 June 2016, the Registry, as instructed by the Judge assigned to the case, clarified, via email dated 29 June 2016, that the Applicant’s document titled “Application for interim relief” was received on 23 June 2016. The Registry further stated:

In accordance with article 14 of the Rules of Procedure, a motion for suspension of action during the proceedings must be filed within the substantive case and thus you were requested by the Registry to refile the motion in case number UNDT/NY/2016/028. We appreciate your diligence in refiling the motion on 24 June 2016.

In order to clarify the acknowledgement sent on 27 June 2016, the Tribunal confirms that both the application on the merits and the “application for interim relief” were received on 23 June 2016 in two separate cases.

7. On 29 June 2016, the Respondent filed a response to the motion for interim measures.

Relevant background

8. On 27 February 2015, Job Opening No. 38496 was posted for the position of Chief of Service, Strategic Information and Communication Technology Management (“Chief, SICTM”) at the D-1 level. The deadline for applications was 28 April 2015. In a section titled “Special Notice” the job opening stated: “This post will become available on 1 July 2015”. According to the Applicant, the job opening was later cancelled.

9. Later in 2015, on an unknown date, Job Opening No. 41653 (“JO 41653”) was posted for the same position—Chief, SICTM. The job opening included the same “Special Notice”, stating: “This post will become available on 1 July 2015”.

10. By email dated 14 June 2016, the selected candidate was informed that he had been selected for the position of Chief, SICTM, advertised through JO 41653. He was

asked to confirm, via return email, his continued interest in and availability for the position, which he did the same day.

11. On 15 June 2016, the Applicant was informed via email that he had not been selected for the position of Chief, SICTM, advertised through JO 41653. The Tribunal notes, however, the Applicant's statement in his motion for interim measures that he "is rostered for the vacant position ... and had previously applied for it, but has not applied to the Job Opening [number 41653] referenced" (square brackets in original).

12. On 16 June 2016, the Applicant submitted a request for management evaluation of the decision identified in para. 1 of this order.

13. On 21 June 2016, the Management Evaluation Unit completed the management evaluation and informed the Applicant that his request was not receivable.

14. By letter dated 27 June 2016, the selected candidate was offered a one-year fixed-term appointment "effective as soon as possible" for the position of Chief, SICTM. The letter further stated:

Your appointment is subject to satisfactory completion of pre-recruitment formalities through the United Nations Secretariat procedures, including medical clearance and verification of qualifications. Upon confirmation of your highest degree and medical clearance, you will receive a provisional confirmation of the offer. On this basis and with your concurrence, the United Nations will proceed with the on-boarding process.

...

This offer may be withdrawn if no reply is received after seven (7) days from the date of this offer.

15. On 28 June 2016, the selected candidate signed the offer of appointment, confirming his acceptance of the offer.

Applicant's submissions on motion for interim measures

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

Receivability

a. The Applicant is not contesting that he has not been selected, or, for that matter, the selection of anyone to fill the vacant position, but rather the making of a selection pursuant to an invalid job opening for a defunct position. The case is therefore not a case of appointment;

Prima facie unlawfulness

b. The decision contravenes ST/AI/2010/3 (Staff selection system). The selection made pursuant to a job opening is valid only if the post is an established post at the time of the selection decision. The post of Chief, SICTM, was "defunct" at the time of the selection decision for JO 41653;

c. By virtue of General Assembly resolution 70/247, a new organizational structure and post distribution have existed in the Office of Information and Communication Technology since 1 January 2016, in which the defunct Strategic Management Service and its posts have been consumed into the new structure through internal redeployment;

d. The new post structure and positions at the D-2 and D-1 level for sub-programme 5 approved by the General Assembly are all reclassified posts, and can only be encumbered pursuant to their own job openings detailing the specific responsibilities, knowledge, attributes and skills, and competencies required, as identified through a classification review;

Urgency

e. The selection decision cannot be implemented before 1 July 2016. If the contested decision is implemented, reversal is not possible;

f. This is not a case of self-created urgency, as prior to 15 June 2016, the Applicant had no reason to believe that JO 41653 had not been cancelled;

Irreparable damage

g. The selection decision, if allowed to stand, will deprive the Applicant of a career opportunity with the United Nations. He will be deprived of fair and adequate consideration for a position for which he is rostered currently and for which he will subsequently be rostered when the position is reclassified and reposted. The selected candidate will encumber a post that should have been reclassified and reposted.

Respondent's submissions on motion for interim measures

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

Receivability

a. The Applicant has no standing to contest the selection decision. He separated from the Organization on 31 December 2015. A former staff member may only challenge an administrative decision that is connected to the terms of his or her former appointment. There is no nexus between the Applicant's former terms of appointment with the Organization and the contested decision. The Applicant did not apply for the contested job opening;

b. In order to have standing before the Tribunal, a staff member must show that a contested administrative decision affects their legal rights. The contested decision does not affect the Applicant's legal rights;

c. An applicant may only appeal a failure to properly consider their candidacy for a job opening. The Applicant cannot seek to impugn

the consideration of the candidacy of other staff member to a selection process;

d. The Tribunal does not have competence to order the relief sought by the Applicant. In accordance with sec. 10.2 of the ST/AI/2010/3 (Staff selection system), the contested decision has been implemented, and can no longer be suspended;

e. The Tribunal does not have jurisdiction under its Statute to grant temporary relief in cases of appointment. This is a case of appointment.

Consideration

Applicable law

18. Article 10.2 of the Tribunal's Statute states:

2. 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.

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

Article 14 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.

20. Section 10.2 of ST/AI/2010/3 (Staff selection system) states:

Notification and implementation of the decision

...

10.2 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. ...

21. 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.

Is the motion for interim measures filed in connection with a pending application on the merits?

22. The Applicant's motion for interim measures is filed in connection with an application on the merits filed on 23 June 2016 and currently pending before the Tribunal. The first condition above is accordingly fulfilled.

Is this a case of appointment and/or promotion under art. 10.2 of the Statute?

23. Having reviewed the content of the Applicant's motion for interim measures, the Respondent's response, and the documents provided by both parties, the Tribunal considers that this is a case of appointment (and/or promotion) under art. 10.2 of the Statute.

24. In his motion, the Applicant stated: "The Applicant is not contesting that he has not been selected, or, for that matter the selection of any one, to fill the vacant position, but rather the making of a selection pursuant to an invalid Job Opening for a defunct position. The case is therefore not a case of appointment". The Applicant cites *Siri* 2016-UNAT-609 in support of his submission. In *Siri*, the Appeals Tribunal stated (footnotes omitted):

33. The Appeals Tribunal has previously found that cases of separation following non-renewal constitute a case of appointment and fall under the exclusionary clause of Article 10(2) of the UNDT Statute. In these cases, the reversal of the underlying contested decision results in the issuance of a new appointment reflecting "expressly or by reference all the terms and conditions of employment" as provided for in Staff Rule 4.1. Conversely, the rescission of a transfer or appointment does not constitute an "appointment" under Article 10(2) of the UNDT Statute and its reversal does not result in a new appointment.

34. As Mr. Siri correctly points out, all matters before the UNDT, in some way, "relate" to appointment, as without an appointment, there is no standing before the Tribunals. However, a matter "related" to an appointment is not the same as a "case of appointment" under Article 10(2) of the UNDT Statute.

35. In the present case, Mr. Siri is not asking for a renewal of his appointment. Rather, he contests the decision to separate him from service based on what he considers to be an erroneous calculation of his retirement age. While necessarily linked to his appointment, his retirement age is a term of his current appointment and, as such, does not constitute “a case of appointment” under Article 10(2) of the UNDT Statute.

36. Finally, the decision to conduct a recruitment exercise for Mr. Siri’s position is a direct consequence of the decision to separate him from service, and as such cannot fall under the narrow definition of “appointment” under Article 10(2) of the UNDT Statute.

25. The present case is distinguishable from *Siri*. In his application on the merits and motion for interim measures, the Applicant contests the legality and validity of the selection process for JO 41653.

26. As clearly results from the evidence filed by the Respondent, the selection process was finalized on 14 June 2016 when the candidate selected for the post was informed of his selection and confirmed his interest and availability for the post. The selection decision was followed by a new appointment. An offer of appointment was issued by the Organization on 27 June 2016, and accepted and signed by the selected candidate on 28 June 2016.

27. The Tribunal concludes that since the contested selection process in the present case is directly related to a new appointment it is a clear “case of appointment” under art. 10.2 of the Statute and does not concern a matter that is merely “related” to an appointment as stated by the Applicant.

28. It results that the motion for interim measures concerns a “case of appointment [and/or] promotion” and the Tribunal is not competent to order the relief requested by the Applicant.

29. The Tribunal finds that the second cumulative condition is not fulfilled and it is therefore not necessary for the Tribunal to further analyze the remaining three requirements for granting a suspension of action pending proceedings: *prima facie* unlawfulness, urgency, and irreparable harm.

Conclusion

30. The motion for interim measures is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 30th day of June 2016