



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

NEMETH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES PENDING
PROCEEDINGS**

Counsel for Applicant:
Marisa MacLennan, OSLA

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

Introduction

1. On 10 October 2017 at 12.27 p.m., the Applicant filed an application on the merits contesting a decision identified as follows “the procedure of the selection process for JO 76088 and the determination of her ineligibility to continue in the process due to her written test score”.

2. On 10 October 2017 at 12.17 p.m., the Applicant also filed, as a separate case in the Tribunal’s eFiling portal, a document titled “Motion for interim measures pending proceedings”. The Applicant requested that the Tribunal order the suspension of the selection process for the post as “Security Lieutenant, S5 ([Job Opening, “JO”] 76088)” in the Safety and Security Service (“SSS”), Department of Safety and Security (“DSS”) as per art. 14 of the Rules of Procedure pending the duration of the proceedings before the Dispute Tribunal.

3. By notification dated 11 October 2017 issued at 10.34 a.m., 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/2017/097 which was assigned to the undersigned judge. The Respondent was instructed to submit his reply by 5:00 p.m. on Friday, 10 November 2017.

4. In a separate notification dated 11 October 2017, issued at 3:42 p.m., the Registry acknowledged receipt of the Applicant’s motion for interim measures in accordance with art.14 of the Dispute Tribunal’s Rules of procedure, noting that:

This serves as confirmation that, on 10 October 2017, at 12:17 p.m., the Tribunal received a motion for interim measure in accordance with art. 14 of the Dispute Tribunal's Rules of Procedure from the Applicant.

Counsel for the Applicant had initially filed the motion for interim measures in the eFiling portal as a separate case as an application for suspension of action under art. 13 of the Rules of Procedure. However, on 10 October 2017, at 3:16 p.m., Counsel for the Applicant has

confirmed that this was an error and that it is to be considered a motion for interim measures pending the Dispute Tribunal's proceedings pursuant to art. 14 of the Rules of Procedure and requested the registry to reject it as a separate filing. On 10 October 2017, at 5:10 p.m. and 5:32 p.m., the Registry advised the Applicant's Counsel that the application on the merits was registered under Case No. UNDT/NY/2017/097 and that the motion for interim measures could be re-filed under this case number.

Having reviewed the motion related to the application on the merits assigned to her on 10 October 2017, on 11 October 2017, at 12:41 p.m., the assigned Judge instructed the Registry, due to the urgency of the motion, to upload the motion with annexes in the present case and, consequently, it was no longer necessary for the Officer-in-Charge to process the motion and to register it under a separate case number of the Dispute Tribunal. On 11 October 2017, at 1:59 a.m., the Applicant re-filed the motion for interim measures in the present case.

By this notification, the motion for interim measures has been transmitted to the Respondent.

Further to Judge Greceanu's instructions, the Respondent shall submit his reply by 5:00 p.m. on Thursday, 12 October 2017.

5. On 12 October 2017, the Respondent filed a response to the motion for interim measures.

Relevant background

6. In her motion for interim measures, the Applicant states the facts that she seeks to rely on are as follows (references to annexes omitted):

... [The Applicant] joined the United Nations in 2001. In June 2009, she received a permanent appointment. She is currently a Security Sergeant at the S4 level, Step VIII.

... On 25 March 2017, [the Applicant] applied to the position of Security Lieutenant, S5 (JO 76088).

... On 3 July 2017, [the Applicant] was invited to take the written exam (along with 10 other candidates). It was later rescheduled to 4 August 2017, for which she received a reminder on 2 August 2017, including pre-assessment instructions. She took the exam on 4 August 2017; all applicants were given a unique assessment letter to identify each candidate, so that the test could be graded without personally identifying the candidates. This meant the administration kept one

ticket with an identifying number, and the candidate kept one. The test consisted of 50 questions: several multiple-choice questions, and only a few questions with fill-in answers.

... On 27 September 2017, [the Applicant] received an email from the Office of the Chief, requesting a meeting the following day, in connection with the written exam, and asking candidates to bring their assessment numbers, if they were in possession of them.

... On 28 September 2017, [the Applicant] went to the meeting, where all candidates were informed that the master list that included 11 candidates' names and assessment numbers, as well as signature, was lost. Candidates were informed that management was in the process of identifying and matching candidates to each exam. Some candidates had two identifying numbers.

... Later that day, [the Applicant] received an email from ... [the] Administrative Officer SSS/DSS, in which [the Administrative Officer] asked [the Applicant] to come and identify her written test. She was asked to view the various exam papers and identify her paper, which she declined to do. [the Applicant] expressed her concerns in a reply email.

... On 29 September 2017, [the Administrative Officer] informed [the Applicant] that her test had been identified by "process of elimination" and assured her that the promotion exercise had been a "model of honesty, fairness, and transparency." [The Applicant] replied again, noting her concerns.

... The same day, [the Applicant] received an email which informed her that she was not successful on the written assessment due to a score of 60/100, and that she was no longer eligible to continue to the next stage of the process.

... On 2 October 2017, [the Applicant] requested management evaluation of the contested decisions, representing herself. The same day, [the Applicant] submitted an application for suspension of action before the UNDT.

... On 3 October 2017, [the Management Evaluation Unit, "MEU"] issued a letter which found that [the Applicant's] request was not receivable.

... On 9 October 2017, [the Dispute Tribunal, "UNDT"] issued Order No. 224 (NY/2017), which rejected [the Applicant's] application for suspension of action pending management evaluation.

... On 10 October 2017, [the Applicant] filed a UNDT application on the merits.

Applicant's submissions on motion for interim measures

7. The Applicant's principal contentions are as follows:

Receivability

... [The Applicant] expects that the Respondent will raise the issue of receivability, arguing that because no final selection has been made, it is premature for [the Applicant] to raise this appeal. She respectfully disagrees with this stance, and counters as follows.

... The Tribunal has defined an administrative decision:

[A] unilateral decision taken by the Administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (*Schook* 2010-UNAT-013, *Tabari* 2010-UNAT-030, *Planas* 2010-UNAT-049, *Al Surkhi et al.* 2013-UNAT-304, *Tintukasiri et al.* 2015-UNAT-526).

... For [the Applicant], the selection process in JO 76088 is over; her ineligibility has been communicated to her and she contests the actions which have led to that determination. This ineligibility has final and adverse effects for her. She does not, per se, contest her non-selection, which might be framed as such once a final candidate has been selected.

... Her factual situation is akin to that of the Applicant in *Melpignano* (UNDT/2015/075), where this Tribunal found that the decision to declare the Applicant ineligible “produces direct legal consequences affecting the Applicant’s terms of appointment, in particular, that of excluding the Applicant from any possibility of being considered for selection for this particular vacancy.” (para. 33).

... [19] The *Melpignano* Tribunal continued:

34. Thus, the impugned decision has direct and very concrete repercussions on the Applicant’s right to be fully and fairly considered for the post through a competitive process (see *Liarski* UNDT/2010/134). From this perspective, it cannot be said to be merely a preparatory act, since the main

characteristic of Page 5 of 11 Form UNDT/F.11E rev. 31 January 201 preparatory steps or decisions is precisely that they do not by themselves alter the legal position of those concerned (see *Ishak* 2011-UNAT-152, *Elasoud* 2011-UNAT-173).

... The Tribunal further distinguished the *Ivanov* case (2013-UNAT-378) which the Respondent typically relies on in submitting that a selection process can only be challenged once it is completed (See paras. 36-38).

... The Tribunal also made the following observations on the subject in the Order for [the Applicant's] suspension of action:

19. The MEU determined that the Applicant's request was premature since the administrative decision constituted steps preliminary in nature as the Applicant had not received a final notification of her non-selection. The Tribunal, however, notes that, by email dated 29 September 2017, the Applicant received confirmation that her exam paper had been identified by management and that she was "not successful in the written technical assessments for the S5 vacancy conducted on Friday, 4 August 2017 ... As a result, you are no longer eligible to continue to the next stage of the process ...".

20. The Applicant does not challenge the selection of any candidate to the post or the decision not to select her, rather she requests suspension of the "[c]ontinuation of a compromised promotion exercise", which she alleges has been tainted by the mishandling of the examination and the results. To characterize the subject matter and reduce cases like the present case to one of non-selection or non-promotion in these particular circumstances and at this stage of the process could result in an absurdity and miscarriage of justice. This would mean that the Tribunal could never grant any urgent temporary relief—no matter how serious the alleged violations, or how flawed or unlawful a decision—so long as such decisions are presented in the broader context of what is perceived as preparatory steps in a selection or promotion exercise (see also *Singh* Order No. 50 (NY/2015)). The prejudice that may be suffered by an applicant is further compounded by the limited relief that can be provided, where specific performance is essentially unavailable.

21. Even if one were to accept the contention in the present case that the selection exercise is ongoing and these are preparatory steps, one must look at the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision. As stated by the Appeals

Tribunal, at para. 50, in *Michaud* 2017-UNAT-761 (emphasis added and references to footnotes omitted):

... Before an administrative decision can be held to be in noncompliance with the contract of employment of a staff member it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. A decision to initiate an investigation, in itself, ordinarily, will not immediately affect the rights of a staff member nor be of direct legal effect. Judicial review is concentrated pragmatically on the more important administrative decisions and thus avoids allowing challenges to preliminary or intermediate decisions. Where a decision requires several steps to be taken by different authorities, but only the last of which is directed at the staff member, the earlier decisions or actions lack direct effect, and only the last decision maybe taken to the Dispute Tribunal for review. Preparatory decisions, therefore, are normally not reviewable by administrative tribunals. This accords with the general principle that tribunals should not interfere with purely internal matters of departmental administration or organisation, or processes that have not reached finality.

22. A decision which is preliminary in nature is “generally speaking” not receivable at the initial stage when it does not affect the legal rights of the staff member. Preparatory decisions are “normally not reviewable.” It is instructive that the language of [the Appeals Tribunal] is qualified in these matters indicating that there may be exceptions to the rule, which must be determined on a case by case basis. In this instance, the Applicant has already received a finite decision excluding her entirely from consideration for selection. The consequences of the decision are that the Applicant’s terms of appointment/contract of employment have been directly impacted as she is disqualified from the ongoing exercise. Whilst preparatory decisions are not normally reviewable, there are serious allegations regarding the legality of the decision in this instance, allegedly tainting the process thus far reached. Is such decision not reviewable?

... Thus, [the Applicant] respectfully submits that her challenge to the procedure of the selection process for JO 76088 and the determination of her ineligibility to continue in the process due to her written test score are appropriately made at this time and can be properly reviewed by this Tribunal.

Prima facie unlawfulness

... [The Applicant] respectfully submits that the procedure of the selection process for JO 76088 and the determination of her ineligibility to continue in the process due to her written test score are prima facie unlawful because 1) there was a procedural flaw; 2) there was the possibility of contamination of tests and identifying information; 3) candidates were improperly asked to view each other's tests; and 4) anonymous grading cannot be determined or verified.

... First, when DSS misplaced the master list which identified candidates via their assessment number, a serious procedural flaw occurred. This flaw compromised the integrity of the entire process, no matter the subsequent efforts that were made to rectify the situation. This flaw also calls into question the steps leading up to and following the identification of candidates. Additionally, because of the procedural flaw, [the Applicant's] right to appeal the process is compromised because we cannot even be entirely sure that hers is the exam which was graded in her name. The only way to ensure procedural fairness and certainly would be to restart the process of the written assessment.

... Second, once the error was discovered and DSS asked candidates to engage in assisting to identify their tests, it created the possibility that the tests and/or the corresponding identities of the candidates could be tampered with or contaminated. Based on the observation that some candidates had two tickets, they could easily have identified another test as their own. Candidates could have switched assessment numbers or purposefully not brought their assessment numbers in order to change their test, or examine other candidates' tests. It is also unknown whether originals of the tests were shown to candidates, or copies. [The Applicant]'s request for evidence also addresses her ability to fully litigate this point.

... Third, when candidates were asked to go and view the tests en masse, it created an additional impropriety. It was not proper to allow candidates to view each other's tests. It was irregular of DSS to put the staff members in that position in the first place.

... Finally, because the results were issued only after the re-identification of the tests, it is unknown whether they were graded anonymously. Anonymous grading would be a hallmark of a fair and transparent selection process. Without this guarantee, [the Applicant] faces the additional possibility that her identity was a factor in the grading of her test, which she allegedly failed. This grading could have also been done once she raised her concerns and spoke out again the process. This risk could have been avoided by restarting the written exam process. To fully allow [the Applicant] to litigate this

point, she makes the below request regarding evidence which the Administration possesses.

... Therefore, [the Applicant] respectfully submits that the above reveals at least serious and reasonable doubts as to the contested decision, for purposes of a suspension of action.

Urgency

... In the case of *Ba* UNDT/2012/025 a decision to place a staff member on administrative leave without pay was suspended. Regarding the urgency of the decision the learned judge found that: “the continuing legal effect of the unlawful decision means that at any stage during its continuance, there is an element of urgency.”

... The Tribunal went on to state that: “The urgency derives from the nature of the effect on the Applicant, and is also on-going. For each day that the administrative leave continues, the Applicant suffers a renewed assault on her reputation and her career prospects.”

... In this case, the continuance of the flawed selection process means the illegality continues; and it is urgent that [the Applicant] seek suspension now, before the process is allowed to be finalized and a candidate selected. At that point, it is a point of no return.

... Furthermore, [the Applicant] comes to the Tribunal at the first possible opportunity and has not self-created any urgency.

Irreparable damage

... Regarding irreparable harm, the UNDT held in *Corna* Order No. 80 (GVA/2010) of 16 December 2010 (citing with approval *Fradin de Bellabre* UNDT-2009-004, *Tadonki* UNDT- 2009-016 and *Utkina* UNDT-2009-096) that the harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant’s rights are observed.

... The UNDT further noted in *Tadonki* UNDT-2009-016, that “a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision making process.”

... In the instant case, if selection process continues and a candidate is selected, [the Applicant] can no longer have the

possibility to continue in the process; money alone will not be able to compensate for this lost opportunity.

Respondent's submissions on motion for interim measures

8. The Respondent's principal contentions are as follows:

Receivability

a. The Dispute Tribunal does not have jurisdiction to suspend the selection and promotion exercise for JO 76088 as the case concerns a matter of "appointment or promotion". Under art. 10.2 of its Statute, the Dispute Tribunal may order temporary relief by suspending the implementation of a contested administrative decision during the proceedings, except in cases of appointment, promotion or termination. The current case is one of appointment or promotion. In adopting the Dispute Tribunal's Statute, the General Assembly decided to not grant the Dispute Tribunal jurisdiction to suspend the implementation of an administrative decision pending proceedings in such cases. The General Assembly has reiterated that the Dispute Tribunal shall not have any powers beyond those conferred under its Statute;

b. In the case of *Benchebbak* 2012-UNAT-256, the Appeals Tribunal held that the words of the Statute are clear, and that an interim order under art. 10.2 is specifically prohibited in the case of appointment, promotion or termination. The Appeals Tribunal reiterated that point in the *El-Komy* case 2013-UNAT-324. In both cases, the Appeals Tribunal made clear that the express words of the Statute must be followed.

Prima facie unlawfulness

c. Should the Dispute Tribunal find that it is competent to review the motion for interim measures, it should be dismissed as the Applicant has not demonstrated that the decision to continue with the selection exercise for JO 76088 and determine that she had failed the written assessment was *prima facie* unlawful, caused her irreparable harm and is a matter of urgency;

d. The Applicant candidacy has been fully and fairly considered. The error in the procedure for identifying the candidates to their test paper had no impact on the fairness of the process;

e. The grader of the test papers had no knowledge of the identities of the test takers when grading the test. When the master list was lost, all of the job applicants, with the exception of the Applicant, cooperated in reconstructing the list. Of the 11 job applicants, nine retained tickets, as such only two tests had to be reviewed to determine the identity of the test taker. Two candidates, including the Applicant, were requested to review the remaining 2 tests. The Applicant refused to cooperate, and the other staff member readily identified his test through his handwriting and the answers on the test. As such, the remaining test paper was determined to be the Applicant's with absolute certainty;

f. There was no incentive or reason for the job candidates to mislead DSS as they were not aware of which tests received passing/failing grades. Nor has the Applicant produced any evidence that this has occurred;

Urgency

g. There is no evidence of urgency. No administrative decision has been taken, and none is imminent. There are several remaining steps in the selection process, including a review by the central review body, which will include an examination of the correctness of the process relied on in

conducting the written assessment. Such review could potentially lead to the re-administration of the written test;

Irreparable harm

h. The Applicant has provided no evidence of irreparable harm. The Applicant's contractual situation is not adversely affected, and she continues to be employed as a staff member. The Applicant is on full time release as a staff representative. For the duration of her term in office as a staff representative, she would not be able to assume the functions of the position, if she were selected. The Applicant's elected term of office expires on 31 March 2019.

Consideration

Applicable law

9. Article 10.2 of the Dispute 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.

10. 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.

11. 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. ...

12. 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?

13. The Applicant's motion for interim measures is filed in connection with an application on the merits filed on 10 October 2017, which was registered under Case No. UNDT/2017/097 and is 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 Dispute Tribunal's Statute?

14. 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 Dispute Tribunal's Statute.

15. The Tribunal notes that even if the selection process for the JO for the selection process for "Security Lieutenant, S5 (JO 76088)" is ongoing, the Applicant was clearly informed on 29 September 2017 that she was not successful on the written assessment and that she was no longer eligible to continue to the next stage of process due to her written test score.

16. It results that, in the present case, the selection process for a promotion to an S-5 level position ended for the Applicant when, based on the assessment of her written test, she was not selected for the next step in the selection process, namely the interview. This decision cannot be considered preparatory, since is final and applies individually to the Applicant, who was not deemed suitable to proceeding to the next step in the selection process, namely the interview (see also *Baldini* Order No. 103/NY/2013 para. 17).

17. The Tribunal further notes that, in *Siri* 2016-UNAT-609, 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.

18. The present case is distinguishable from *Siri*. In her application on the merits and motion for interim measures, the Applicant contests the legality and validity of the selection process for a job opening, namely JO 76088.

19. The Tribunal concludes that since the contested selection process in the present case is directly related to a new appointment and promotion (in the Applicant’s case from the S-4 level, step 8, to the S-5 level), it is a clear “case of appointment and promotion” under art. 10.2 of the Statute.

20. 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.

21. 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

22. The motion for interim measures is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 16th day of October 2017