



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/002

Judgment No.: UNDT/2015/086

Date: 17 September 2015

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ROCKCLIFFE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. The Applicant, a budget/project officer at the P-4 level at the United Nations Joint Staff Pension Fund (“UNJSPF”), who also serves as an alternate staff representative for UNJSPF Unit 39, filed an application contesting the appointment of a candidate to the P-5 position of Chief of Section, Client Services, Records Management and Distribution Section, UNJSPF.

Parties’ submissions

2. In her application filed on 9 February 2015, the Applicant contends that, pursuant to a Memorandum of Understanding (“MOU”) signed in 2000 by UNJSPF and the UN Secretariat, UNJSPF is required to follow standard appointment and promotion procedures that are applicable in the UN Secretariat, including the requirement that staff members in the professional category have at least two prior lateral moves in order to be eligible to be considered for promotion to the P-5 level. However, in December 2013, UNJSPF staff members were informed that UNJSPF secured, from the Office of Human Resources Management (“OHRM”), an exception to that requirement. Thereafter, the selection for the contested P-5 post was carried out based on that exception (i.e., candidates were not required to have two prior lateral moves), which the Applicant contends rendered the exercise unlawful as the 2000 MOU did not envisage exceptions to the standard selection requirements. The Applicant also states that the Administration failed to carry out staff-management consultations prior to implementing the excep725 To4(t ti5.5(SPF 9 T4.9(rve))TJ-19

management has not shared the draft MOU with staff representatives. She states that the General Assembly should be made aware of the changes that the draft MOU would apparently introduce. The Applicant refers to para. 13, sec. VII (Administrative expenses of the United Nations Joint Staff Pension Fund) of its resolution 68/247 (Special subjects relating to the proposed programme budget for the biennium 2014–2015), in which the General Assembly stated (emphasis in original):

The General Assembly,

...

13. *Recalls* paragraph 12 of the report of the Advisory Committee [on Administrative and Budgetary Questions], and in this regard requests the [United Nations Joint Staff Pension] Board, in consultation with the Office of Human Resources Management of the Secretariat, to complete its review of the policies governing the recruitment, promotion and retention of the staff of the Fund and to report to the General Assembly, no later than at the main part of its seventieth session, on the outcome of the review and any measures proposed.

4. By way of relief, the Applicant requests the following (emphasis in original):

1. Suspension of the signing of a new MOU until staff-management consultations have taken place at the next session of the General Assembly.

5. In the reply to the application, filed on 12 March 2015, the Respondent submits that the application is not receivable *ratione personae*. The Applicant does not have standing to contest the outcome of the recruitment process as she did not apply for the position and, accordingly, does not have any right or interest at stake. Further, the Applicant has no standing as she challenges the recruitment process in her capacity as a staff representative. Further, the Respondent submits that the application is not receivable *ratione temporis*. The Applicant contests the December 2013 decision to grant an exception to the lateral move requirement for promotion to P-5 positions in the UNJSPF. The Applicant was notified of the decision in December 2013 and did not request management evaluation within the applicable time limit. Further, the application is not receivable *ratione materiae*. The decision to waive the lateral move requirement is not an administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute. The decision was of general application and had no direct legal effect on the Applicant's terms of appointment. Finally, the Respondent submits that the application is without merit. The Respondent submits that the exception to the lateral move requirement was properly granted by the Assistant Secretary-General, OHRM, under staff rule 12.3(b), which states:

Rule 12.3

Amendments of and exceptions to the Staff Rules

...

(b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

Background

6. In 2000, UNJSPF and the UN Secretariat concluded an MOU concerning staffing procedures to be used by UNJSPF. Paragraph 11 of the MOU states that “[s]taff of the Fund recruited or promoted to the P-4, P-5 and D-1 levels ... shall be selected through the normal appointment and promotion procedures applicable to the UN Secretariat”.

7. Sometime in 2013, UNJSPF requested from OHRM an exception to the lateral move requirement stipulated in sec. 6.3 of ST/AI/2010/3 (Staff selection system), which provides that staff members in the Professional category shall have “at least two prior lateral moves ... in order to be eligible to be considered for promotion to the P-5 level”.

8. On 4 December 2013, an email was sent to UNJSPF staff on behalf of the Chief Executive Officer (“CEO”), stating that OHRM had granted the requested exception. Specifically, the email stated that “in the context of an ongoing review of human resources policies governing the recruitment, mobility, promotion and retention of the UNJSPF staff”, OHRM had “approved that the requirement be waived for lateral moves for P-4 staff members to be considered eligible for P-5 posts in the Fund”.

9. Approximately four months later, on 16 April 2014, a job opening was issued for the P-5 position of Chief of Section, Client Services, Records Management and Distribution Section, UNJSPF. The job opening expiration date was 15 June 2014. A “Special Notice” at the beginning of the job opening stated:

The [UNJSPF] is an independent inter-agency body established by the United Nations General Assembly. The applicable human resources procedures are governed by a Memorandum of Understanding (MOU) between the Fund and the UN Secretariat.

including those on receivability, raised in the Respondent's reply. The parties were also ordered to inform the Tribunal whether they considered that the issue of receivability may be determined on the papers as a preliminary issue. The Applicant filed her submission on 5 May 2015, responding to the issues raised in the Respondent's reply. The Applicant did not object to the issue of receivability being considered on the papers before the Tribunal. On 11 May 2015, the Respondent filed a submission agreeing that the issue of receivability could be determined on the papers.

Consideration

Scope of the contested decision

20. In both her request for management evaluation and in her application, the Applicant clearly identifies the contested decision as the decision to implement the promotion of the candidate selected for the P-5 post of Chief of Section, Client Services, Records Management and Distribution Section, UNJSPF. The Applicant submits that she filed her request for management evaluation on 19 December 2014, shortly after becoming aware of the contested decision on 17 December 2014, when Mr. IF informed her of it verbally.

21. In her submission dated 5 May 2015, the Applicant reiterated that the decision contested by her was the decision

learned of on 17 December 2014, to continue with the P-5 appointment of a Chief of Section, Client Services, Records Management and Distribution Section in the UNJSPF in spite of the fact that the Memorandum of Understanding currently held with the Office of Human Resources (OHRM) did not provide an exemption for candidates who did not meet the mobility requirement under UN Staff Rules.

22. Accordingly, the only decision properly before the Tribunal is the decision to appoint the candidate who was selected for the contested P-5 post, allegedly contrary to the Staff Rules and the General Assembly's request for the Pension Board to report to it on the outcome of its review of its recruitment and promotion policies.

Applicant's failure to apply for the post

23. Article 2.1(a) of the Tribunal's Statute provides that the Tribunal is competent to hear and pass judgment on applications against administrative decisions "alleged to be in non-compliance with the terms of appointment or the contract of employment".

24. For the purposes of art. 2.1(a) of the Statute, it is not sufficient for an applicant to merely establish that there was an administrative decision that she or he disagrees with. As the Tribunal held in a number of cases, to have standing before the Tribunal, a staff member must show that the contested administrative decision affects her or his legal rights (see, e.g., *Hunter* UNDT/2012

believed it would have been disingenuous and unreasonable of her to apply for this post while professing its illegality.

26. In her submission dated 5 May 2015, the Applicant further explained that she did not apply for the job as “any application by her to this vacancy would be seen as tantamount to ‘clearing the field’ of competitors, and an exhibition of a total lack of integrity”. She further asserted in the same submission that “her individual standing derives from the fact that she was a potential candidate and had a right to apply for the post”.

27. The Applicant has not claimed that her right to apply to the advertised post has been negatively affected or

29. Accordingly, the outcome of the selection process had no direct legal effect on the Applicant's terms of appointment. The Applicant has no standing or right under the Statute to contest the appointment of the successful candidate in this case. She has no right or interest at stake, no cause of action and no available remedies.

Observations on the Applicant's staff representative status

30. Pursuant to art. 3.1 of the Tribunal's Statute, an individual may bring a claim in his own name, or in a representative capacity. However, the only representative capacity envisaged by the Statute is for applications that are filed on behalf of incapacitated and deceased staff members under art. 3.1(c) of the Statute. The Dispute Tribunal does not have jurisdiction in relation to applications filed by staff representatives on behalf of staff unions or other staff members.

31. Although the Applicant's submissions are formulated in a way that suggests that they pertain to her individual rights, her relief claims strongly indicate that, at least to some degree, her application was indeed filed in her capacity as a staff representative. The Applicant's exchanges with the Administration concerning the issues raised in the present case were signed by her as one of the staff representatives. Some of the Applicant's claims pertain to the "unsigned MOU" that is apparently being prepared by the UN Secretariat and UNJSPF and which the Applicant says must go through staff-management consultations and be brought to the attention of the General Assembly. The Applicant seeks, *inter alia*, to compel the Administration to refrain from signing this new draft MOU, which she considers detrimental to staff, and to hold staff-management consultations.

32. The Applicant makes it clear in her application that she refrained from applying for the post because of her status as a staff representative, as she

interpretation. However, the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are governed by their own statutes that were adopted by the General Assembly on 24 December 2008. Whilst the Redesign Panel, which was established in 2006 to review and redesign the system of administration of justice at the United Nations, proposed to give staff associations an independent right to bring action to enforce the Staff Rules and Regulations and to file class action and representative action cases (see paras. 77(d) and 82 of A/61/205 (Report of the Redesign Panel on the United Nations system of administration of justice), dated 28 July 2006), these proposals were not accepted by the General Assembly. Consequently these types of action are not envisaged by the Statute of the Dispute Tribunal (*Hunter*).

Additional observations

35. The Respondent averred in his reply that the Assistant Secretary-General, OHRM, granted the exception to the lateral move requirement for P-5 positions in the UNJSPF under staff rule 12.3(b). According to the Respondent, the Assistant Secretary-General, OHRM, determined that the exception was in the interests of the UNJSPF and would not be prejudicial to the interests of other staff members.

36. A plain reading of the pertinent staff rule shows that an exception to the Staff Rules may be made by the Secretary-General, provided that it is not inconsistent with any staff regulation or decision of the General Assembly, and further that it is agreed to by the staff member directly affected and is not prejudicial to the interests of other staff. In light of the Applicant's lack of standing and the finding that her application is not receivable, the Tribunal need not consider the legality of the granting of the exception or any other substantive issue in this case.

