



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

FAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a Benefits Assistant at the GS-5 level at the United Nations Joint Staff Pension Fund (“UNJSPF”) and a staff representative. He contests what he describes as the “implementation” of job opening number 14-ADM-UNJSPF-33681-R-New York (R) (“the JO”) for the P-5 post of Chief of Section, Client Services, Records Management and Distribution Section, UNJSFP (“the Post”).

2. The Applicant submits that it is unlawful for the UNJSPF to waive the requirement in the United Nations staff selection system that staff members must have two lateral moves in the Professional category before they are eligible to be considered for promotion to the P-5 level. He submits that he should have been consulted about the waiver of the policy in his capacity as a staff representative. The Respondent submits that the application is not receivable *ratione personae* (because the Applicant lacks legal standing), *ratione materiae* (because the contested decision does not fall within the Tribunal’s jurisdiction) and *ratione temporis* (because the request for management evaluation was not submitted within the applicable time limit).

Relevant background

3. Section 6.3 of ST/AI/2010/3 (Staff selection system) provides:

Staff members in the Professional category shall have at least two prior lateral moves, which may take place at any level in that category, before being eligible to be considered for promotion to the P-5 level
...

4. The JO was published on 16 April 2014 with a closing date of 15 June 2014. It included the following statement under the heading “Special Notice”:

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. On

the basis of that MoU and in light of the status of the UNJSPF, it was decided that staff members applying to posts at the P-5 level in the UNJSPF are exceptionally not subject to the lateral move requirement for purposes of eligibility. However, selected candidates who do not meet the lateral move requirements will be granted appointments strictly limited to service with the [UNJSPF].

Procedural history

Motion for interim measures

5. The application was filed on 30 December 2014. The next day, the Applicant filed a motion for interim measures pending proceedings, requesting the suspension of the promotion of any staff member to the Post and the suspension of the policy exempting staff applying to P-5 level posts in the UNJSPF from the lateral move requirement set out in ST/AI/2010/3 (Staff selection system).

6. The Respondent filed a response to the motion on 5 January 2015, submitting that the motion was not receivable *ratione personae* because the Applicant does not have standing to contest the decision. The Respondent submitted that the Applicant does not have any right or interest at stake because he is not eligible to apply for the Post.

7. By Order No. 3 (NY/2015), dated 8 January 2015, the Tribunal dismissed the motion for interim measures noting that the Applicant's motion concerned issues of promotion and appointment. Article 14 of the Dispute Tribunal's Rules of Procedure provides that interim measures may include the suspension of the implementation of the contested administrative decision "except in cases of appointment, promotion or termination".

Reply and response to reply

8. The Respondent's reply to the application was filed on 30 January 2015.

9. By Order No. 18 (NY/2015), dated 3 February 2015, the Applicant was ordered to file a response to the reply addressing the Respondent's claim that the application is not receivable. The Applicant filed a response to the reply on 3 February 2015.

10. This case was assigned to the undersigned Judge on 20 July 2015.

Case management

11. By Order No. 153 (NY/2015), dated 20 July 2015, the parties were ordered to attend a case management discussion ("CMD") to discuss the factual and legal issues arising in Cases No. UNDT/NY/2014/087 and UNDT/NY/2015/033 and to give any directions or orders that may be necessary for an expeditious and just disposal of the cases.

12. At the CMD, held on 22 July 2015, the Tribunal strongly advised the Applicant to consider the issues of law raised by the Respondent in his reply to the applications and to read the case law cited therein. He was advised to then consider whether he was in a position to advance any persuasive arguments regarding the jurisdiction of the Tribunal to consider his claims.

13. The Applicant was advised that if he wished to proceed with his claims, notwithstanding the advice received from the Tribunal, and he was unable to present an effective challenge to the legal contentions of the Respondent, he may face an order for costs under art. 10.6 of the Dispute Tribunal's Statute, which states:

Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

14. The Tribunal asked the Applicant to indicate whether he wished to continue with his claims or take time to reflect on the guidance provided by the Tribunal. The Applicant indicated that he wished to pursue his claims. He confirmed that he wished to make further written submissions in light of the advice given by the Tribunal.

15. By Order No. 159 (NY/2015), dated 22 July 2015, the Tribunal granted the Applicant leave to file any submissions in addition to those he had already filed in response to the Respondent's reply.

16. On 28 July 2015, the Applicant filed nine pages of additional submissions.

Consideration

17. Despite clear guidance from the Tribunal, the Applicant continues to assert that he has legal standing to challenge a decision as a staff representative. He submits that a distinction can be drawn between the role of a staff union as a legal entity and his standing to assert rights that pertain to his official functions as a staff representative. He submits that in *Campos* 2010-UNAT-001, the Appeals Tribunal implicitly recognized the standing of a staff member to bring an application in connection with a staff representational role on the Internal Justice Council.

18. The Appeals Tribunal did not rule on receivability in *Campos*; however, when considering the case at the first instance level, the Dispute Tribunal held in Judgment No. UNDT/2009/21:

...the applicant's candidacy was not for election as a representative of a staff association but as a staff representative to a council created by a General Assembly resolution. The applicant's candidacy is therefore directly linked to his status as a United Nations staff member and the dispute arising from his non-election is thus related to the rules governing his contract within the meaning of [art. 2] of the Tribunal's statute.

The Tribunal finds that the present case is distinguishable. The Applicant challenges the application of a policy that has no direct legal consequences affecting him, because he is not eligible to apply for the Post.

19. In *Pellet*, 2010-UNAT-073, the applicant challenged the decision not to advertise a number of vacant posts. The Appeals Tribunal upheld the Dispute Tribunal's ruling that the applicant did not have legal standing to challenge the decision because he was not eligible to apply for any of the vacant posts.

Accordingly, he had no stake in the administrative decision and his rights and terms of employment were not affected.

20. The Respondent submits that the facts of this case are indistinguishable from *Pellet*. The Tribunal agrees. As a General Service staff member at the GS-5 level, the Applicant was not eligible to apply for the vacancy advertised in the JO, which was a post in the Professional category at the P-5 level. Section 6.1 of ST/AI/2010/3 (Staff selection system) states that staff members holding a permanent, continuing, probationary or fixed-term appointment shall not be eligible to apply for positions more than one level higher than their personal grade. Staff rule 4.16(b)(ii) also states that recruitment to the Professional category of staff from the General Service category of staff shall be made exclusively through competitive examination.

21. The Applicant has also tried to frame his case as challenging a breach of his rights as an individual staff member. He refers to art. 2.1(a) of the Dispute Tribunal's Statute which states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

22. The Applicant notes that, in accordance with the above-referenced provision, his terms of terms of appointment and contract of employment include, staff regulations 8.1 and 8.2 on "staff relations". Staff regulation 8.1(a) provides:

(a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies;

The Applicant submits that he has legal standing, as an individual staff member, to challenge the breach of his contractual rights under staff regulations 8.1 and 8.2. However, he does not claim that he has a right to be consulted as an individual staff member, but rather, in his capacity as a staff representative.

23. The Tribunal has previously held that, based on the clear wording of its Statute, it does not have jurisdiction to consider applications filed by or on behalf of the Organization's staff unions (*Kisambira* Order No. 36 (NY/2011)). As noted by the Respondent, the General Assembly considered and rejected a proposal to grant staff associations standing before the Dispute Tribunal to bring applications to (a) enforce the rights of staff associations; (b) appeal an administrative decision on behalf of a group of named staff members, or (c) support an application filed by one or more staff members (see Annex I of the Report of the Secretary-General on Administration of Justice, A/62/782, 3 April 2008). The proposed articles were not included in the Dispute Tribunal's Statute.

24. The Tribunal considers that the Applicant is acting in his capacity as a staff representative to enforce his rights as a staff representative, and the rights of staff associations in general, to be consulted about human resources policies. This Tribunal has held that non-compliance with the duty to maintain consultations with staff representatives is reviewable in the context of assessing the legality of an administrative decision affecting the rights of an individual staff member (*Matadi et al.* UNDT/2014/132). However, in this case, the Applicant is not identified as an individual staff member whose rights were affected by the contested decision. Accordingly, the Tribunal does not have jurisdiction to consider such a claim. Having found the application not receivable *ratione personae*, it is not necessary for the Tribunal to consider the Respondent's other receivability arguments, or the merits of the application.

Costs

25. In *Bi Bea* 2013-UNAT-370, the Appeals Tribunal stated that in order to award costs against a party, it is necessary for the Dispute Tribunal to be satisfied on the evidence that there was clearly and unmistakably a wrong or improper use of the proceedings of the court. The Appeals Tribunal noted that frivolous or vexatious conduct would satisfy this requirement.

26. In *Machanguana* 2014-UNAT-476, the Appeals Tribunal stated that it is incumbent on a Tribunal awarding costs to state the reasoning upon which its award of costs is based.

27. In *Terragnolo* 2015-UNAT-566, the Appeals Tribunal upheld a costs award against the applicant in the sum of USD1,500 for abuse of process noting that the filing of a frivolous application that was clearly not receivable by a staff member who has prior experience before the tribunals of the United Nations' internal justice system is a manifest abuse of the Dispute Tribunal's process.

28. In *Gehr* 2013-UNAT-328, the Appeals Tribunal ordered costs against the applicant, noting that it had previously indicated that he should be prepared to face an award of costs if he filed an appeal lacking in merit.

29. The Tribunal provided guidance to the Applicant at the CMD on 22 July 2015 and by Order No. 159 (NY/2015), issued on the same day. The Tribunal also issued a clear warning that he risked facing an order for costs under art. 10.6 of the Dispute Tribunal's Statute if he was unable to present an effective challenge to the legal contentions set out in the Respondent's reply. There is nothing in the Applicant's additional submissions dated 27 July 2015 to persuade the Tribunal that there is any merit in his application.

30. The Tribunal finds that the Applicant has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered at the CMD on the applicable legal principles settled by UNAT.

The Applicant may well be frustrated by what he perceived as a failure to consult the staff representatives on a matter over which they feel that they had a right to be consulted. However, a challenge before the Tribunal is wholly inappropriate in circumstances where it is clear that the Tribunal does not have power to grant the relief sought. The manner in which these proceedings have been conducted by the Applicant constitutes a manifest abuse of process. In assessing the amount of costs, the Tribunal has taken into account the fact that the Applicant is self-represented and acted in his capacity as a staff representative.

Judgment

31. The application is dismissed.

32. In exercise of power under art. 10.6 of its Statute, the Tribunal orders costs against the Applicant in the sum of USD500.

(Signed)

Judge Goolam Meeran

Dated this 2nd day of September 2015

Entered in the Register on this 2nd day of September 2015

(Signed)

Hafida Lahiouel, Registrar, New York