



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

ROCKCLIFFE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **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 exception to the lateral move requirement.

3. The Applicant states that UN Secretariat and UNJSPF management have been preparing a new MOU, which would apparently allow for exceptions to various human resources policies. The Applicant submits that UNJSPF

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 properly taken place under ST/SGB/172 [Staff management relations: decentralization of consultation procedure] and ST/SGB/274 [Procedures and terms of reference of the staff–management consultation machinery at the departmental or office level] and the Staff Rules.

2. Suspension of any actions that would be pertinent to the unsigned MOU pending the completion of staff–management consultations and presentation of the outcomes by the Pension Board to the General Assembly as requested in A/RES/68/247.

3. Rescinding of any administrative action enacted by the UNJSPF or OHRM without a signed MOU and which is therefore unlawful.

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.

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 United Nations Joint Staff Pension Fund.

10. By letter dated 12 June 2014, the Applicant and another staff member, Mr. IF, advised the CEO of UNJSPF that they had been appointed as staff representatives. They stated in the letter that the MOU issued in 2000 had never exempted staff members from the lateral move requirement for applying to P-5 posts. They requested the withdrawal of the job opening prior to 15 June 2014 (its expiration date) so that it could be re-advertised in accordance with normal United Nations recruitment procedures.

11. The job opening for the P-5 post closed on 15 June 2014. The Applicant did not apply for it.

12. In the period of June–December 2014, staff representatives (including the Applicant) engaged in communications with UNJSPF management, requesting, without success, to be provided with the draft of the new MOU under consideration by UNJSPF management and OHRM. Staff representatives also requested to be provided with the reasoning behind the proposed exception to the lateral move requirement and raised concerns regarding lack of staff–management consultations.

13. On 4 November 2014, the selected candidate was asked to confirm her continued interest and availability for the P-5 post. The selected candidate confirmed her interest and availability the very same day, and assumed the functions of the Chief of Section, Client Services, Records Management and Distribution Section, on 1 December 2014.

14. The Applicant submits that, on 17 December 2014, she became aware through one of the UNJSPF staff representatives, Mr. IF, of the decision of the CEO of UNJSPF to implement promotion of the selected candidate for the P-5 post.

15. On 19 December 2014, the Applicant filed a request for management evaluation, contesting the decision “to implement promotion to P-5 of [a] certain applicant who did not meet the usual criteria of lateral moves for the P-5”.

16. On 23 December 2014, the Chief of the Management Evaluation Unit responded to the Applicant stating that her requests for suspension of action and for management evaluation were not receivable, since the matters referred did not constitute a reviewable administrative decision affecting the Applicant’s rights as a staff member.

17. On 9 February 2015, the Applicant filed the present application. On the same day, she filed a motion for interim measures pending the substantive proceedings, pursuant to art. 10.2 of the Dispute Tribunal’s Statute. The Applicant requested the Tribunal to order the Administration to refrain from signing any MOU without staff–management consultation, further that no part of the unsigned MOU be implemented prior to it receiving endorsement from the General Assembly.

18. By Order No. 31 (NY/2015), dated 18 February 2015, the Tribunal rejected the motion for interim measures, finding that the contested decision, to promote a candidate to the P-5 post, had already been implemented. The Tribunal also noted that, under sec. 10.2 of its Statute, temporary relief by way of suspension of action was not permissible in cases of promotion.

19. By Order No. 58 (NY/2015), dated 9 April 2015, the Tribunal ordered the Applicant to file a response to the reply addressing the contentions,

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/2012/036 (not appealed)). It is a general principle of law that a litigant must have legal capacity and legal standing in order to invoke the jurisdiction of a court or a tribunal. A party who litigates must show that he has sufficient interest in the matter, the basic ingredient of which is that a party must show that he has a legal right or interest at stake. Generally, a litigant will have legal standing if the right on which he bases his claim is one that he personally enjoys.

25. It is not disputed that the Applicant was eligible and had the right and opportunity to apply for the post, but she chose not to do so. In her application, the Applicant explained that she did not apply for the post

[d]ue to the fact that these communications [i.e., her communications with UNJSPF management as staff representative] were known to all P-4 staff in the Fund[, she]

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 infringed. There is no question that the Applicant could have applied for the job, and it was her choice not to do so. The Applicant’s explanations for not applying are based on her subjective assessment that, by taking part in the process, she would have exhibited a lack of integrity and would have been viewed as disingenuous by other P-4 level staff at the UNJSPF.

28. Staff members have a right to be fully and fairly considered for appointments within the Organization. However, the exercise of this right is generally contingent on the staff member’s submission to the recruitment process by applying for the job. In this particular case, the Applicant has not declared her interest in being considered for the post as she chose not to apply for it despite being eligible. Notably, the Applicant does not articulate what actual harm was suffered by her as a result of the selection of this particular candidate for the advertised P-5 post. Absent a job application, and absent any alleged infringement of her right to submit her candidature, the Applicant has no standing to invoke the jurisdiction of the Tribunal. Furthermore, as explained below, the Applicant cannot allege infringement of rights on behalf of other staff members (*Hunter*; *Li* UNDT/2014/056 (not appealed)).

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

“believed it would have been disingenuous and unreasonable of her to apply for this post while professing its illegality”, which would be “an exhibition of a total lack of integrity”. The result of that decision, however, is that now the Applicant has no standing to contest the appointment of the selected candidate, because she chose not to apply for the job and thus her legal rights cannot be affected by the outcome of that selection process.

33. The Applicant has cited two judgments of the Administrative Tribunal of the International Labour Organization (“ILOAT”), namely ILOAT Judgment No. 3342 (2014) and Judgment No. 3344 (2014). The Applicant referred, in particular, to consideration 10 of Judgment No. 3342, in which the ILOAT stated:

Earlier judgments [of ILOAT] decide that members of a Staff Committee can invoke the Tribunal’s jurisdiction to enforce rights conferred on them by their terms of appointment or by the Service Regulations. ... This has been recognised in a number of judgments since which have accepted that individual officials can act as representatives to preserve what have been described as “common rights and interests” (see Judgment 2562, consideration 10). However the expression “common rights and interests” is a reference to enforceable legal rights and interests derived from terms of appointment or under the Service Regulations. As the Tribunal said in Judgment 2649, consideration 8, “in order for a complaint submitted to the Tribunal on behalf of a Staff Committee to be receivable, it must allege a breach of guarantees which the Organisation is legally bound to provide to staff ...”.

34. Indeed, it appears that the jurisprudence of the ILOAT allows for staff associations to bring cases before the ILOAT as “representatives of the staff” in matters involving “common rights and interests” (see ILOAT Judgment No. 1147, *In re Raths* (1992); ILOAT Judgment No. 2562 (2006); ILOAT Judgment No. 2563 (2006)). This jurisprudence undoubtedly developed in view of the language of the Statute of the ILOAT and the gradual process of its

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.

**Conclusion**

37. The Applicant lacks legal standing to invoke the jurisdiction of the Tribunal. Having determined that the Applicant lacks *locus standi* to institute the present application, the Tribunal finds that the application is not receivable. In light of this finding, the Tribunal need not address the remaining issues of receivability or the merits of the case, including the Respondent's submission that the lateral move requirement was removed under the exception clause of staff rule 12.3(b).

38. The present application is dismissed.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 17<sup>th</sup> day of September 2015

Entered in the Register on this 17<sup>th</sup> day of September 2015

*(Signed)*

Hafida Lahiouel, Registrar, New York