



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

TAVORA-JAINCHILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES UNDER ART. 10.2
OF THE STATUTE**

Counsel for Applicant:
George Irving

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 14 March 2014, the Applicant, a Forest Affairs Officer in the Secretariat of the United Nations Forum on Forests in the Department of Economic and Social Affairs, United Nations Secretariat, filed a motion for interim measures, pursuant to art. 10.2 of the Tribunal's Statute.

2. The Applicant seeks an order "directing the Respondent to abide by the terms of the Statute and Regulations of the United Nations Staff Union ["UNSU"] and Administrative Instruction ST/AI/293 of 15 July 1982," and to "cease withholding appropriate facilities from the Applicant to which she is entitled as an official of the Staff Union". The Applicant states that she is not "requesting the Tribunal to make a ruling with respect to the election for the 45th Staff Council but merely to order the Secretary-General to follow the rules he had mandated until he can certify the results of such an election". The Applicant submits that such matter does not fall within the purview of the Arbitration Committee.

3. The Registry transmitted the present motion to the Respondent on the same day and the Respondent filed its response on 18 March 2014. The Respondent submits that the motion should be rejected as not receivable and without merits on the grounds that not only does the Tribunal have no jurisdiction over matters concerning internal affairs of the UNSU but the requirements of art. 10.2 of the Tribunal's Statute are not satisfied.

Procedural Background

4. On 12 February 2014, the Applicant filed an application for suspension of action pending management evaluation of the refusal to provide her, as an alleged elected official from UNSU, with facilities including intranet access via iSeek while, allegedly, according such facilities to persons who are not properly designated

UNSU officials. The application was registered under case number UNDT/NY/2014/007. The Respondent submitted his reply on 18 February 2014, arguing that the request for management evaluation having been completed on 17 February 2014 and thus no longer being pending, the application for suspension of action was not receivable.

5. The Tribunal dismissed the request for suspension of action in Order No. 36 (NY/2014) of 21 February 2014, finding that:

18. It is clear to the Tribunal that the Applicant's requests to the iSeek team to publish UNSU related announcements are directly related to the December 2013 UNSU elections. In the present case, the Applicant is seeking a judicial decision to confirm her personal views on matters which can only be decided by the Arbitration Committee. Seeing that the Tribunal has no jurisdiction on such matters, the application is not receivable.

Pending management evaluation

19. The request for management evaluation having been completed on 17 February 2014, it is no longer pending. It follows from art. 2.2 of the Statute of Tribunal and art. 13 of its Rules of Procedure that the suspension of a challenged decision may only be ordered when the management evaluation of that decision is ongoing (*Igbinedion* 2011-UNAT-159 and *Benchebbak* 2012-UNAT-256).

20. The Tribunal therefore considers that two of the cumulative conditions required for the purpose of suspending an administrative decision pending management evaluation, namely that the application (1) concerns an administrative decision and (2) that management evaluation be pending, are not fulfilled. It is therefore not necessary for the Tribunal to further examine the remaining requirements, namely the *prima facie* unlawfulness, urgency and the irreparable damage caused by the decision.

6. On 24 February 2014, the Applicant filed an application on the merits, registered under case number UNDT/NY/2014/009, contesting the administration's "refusal of the Respondent to provide facilities, including intranet access via iSeek [UN's intranet portal] to the Applicant to carry out her official functions while according such facilities to persons who are not properly designated UNSU officials". The Applicant submitted that the contested decision had been

communicated via email on 6 February 2014. The Tribunal directed the Respondent to file its reply by 27 March 2014. The matter is currently pending before the Tribunal.

7. In her motion for interim measures, the Applicant identified the contested decision as “the refusal of the Respondent to provide facilities including intranet access to all staff via iSeek” and stated that “the decision is in the nature of a refusal to respond to a communication of the President of the Staff Union requesting access to iSeek conveyed by email of [iSeek Team leader]”.

8. The facts presented by the Applicant are as follows:

3. On 6 February 2014 the Applicant was advised by ... [the] Team Leader for iSeek that she was unable to fulfill her request for posting an official communication on behalf of the Staff Union, that the decision did not rest with her and that she was awaiting further guidance from authorities she did not identify. (Annex 2) There has been no subsequent communication from the decision makers.

4. This is the first and only occasion on which requests to post notifications to staff through iSeek by the Staff Union President had not been honored. The Applicant replied challenging the refusal to allow her access to iSeek (Annex 3).

5. In spite of requests to clarify the basis for the decision, over the subsequent month there has been no further response and to date no request for access to iSeek by the Applicant has been honored.

6. On 11 February 2014, the Chair of the Electoral Unit Chairpersons announced the election of nine Polling Offices. (Annex 4) On the same date the Applicant, in her official capacity, requested the publication of an Executive Board Bulletin announcing the new Polling Officers. (Annex 5) There has been no posting on iSeek.

7. The newly appointed Polling Officers require access to iSeek in order to conduct the election of an Arbitration Committee. To the best of the Applicant's knowledge that access has not been granted. On information and belief access to the Staff Union web page has been cut off to all parties regardless of the nature of the communication.

8. There is currently no Arbitration Committee in place, the former members having resigned at the end of 2013. Efforts to have them return in order to

complete the review of outstanding matters from the 44th Staff Council have been fruitless.

9. The Applicant filed her application to the Tribunal on 12 February 2014 challenging the decision to deny her access to iSeek in her capacity as President of the Staff Union.

9. With respect to the *prima facie* unlawfulness of the contested decision, the Applicant submits, *inter alia*, that:

1. The Statute and Regulations of the United Nations Staff Union were approved by the Secretary-General as Chief Administrative Officer of the Organization and promulgated on 14 December 2007. ST/AI/293 on Facilities to be provided to staff representatives was issued on 15 July 1982. The Applicant contends that these issuances form an important element of her conditions of her service and are contractual in nature.

2. Under Section 6.12 of the UNSU Regulations, outgoing office bearers shall remain in office and continue to function in caretaker capacity until such time as the electoral process has been concluded and the mandate of the new Leadership and Council commences. (Annex 6) Due to unresolved conflicts over the conduct of the recent electoral process, no new Leadership has been finalized for the 45th Staff Council or its Leadership and therefore the officers of the 44th Staff Council are still authorized to represent the staff and are entitled to proper facilities. Regardless of the ultimate determination of the disputes over the election of the 45th Staff Council and its Leadership, until the Secretary-General is prepared to validate the results and recognize a newly constituted Leadership, the prior Leadership of the Union is entitled to function with the provision of proper facilities.

...

4. ... The goal is to ensure the proper application of the right of representation provided in the Staff Regulations.

...

6. The Applicant is not requesting the Tribunal to make a ruling with respect to the elections for the 45th Staff Council but merely to order the Secretary-General to follow the rules he has mandated until he can certify the results for such an election.

7. Nor is this a matter that could even be resolved by the Arbitration Committee, if it could be established since that body has no authority over the actions of the Secretary-General.

10. With regard to the requirement of particular urgency of the matter, the Applicant states that:

1. The work of the Staff Union has not ceased. There are many issues that require ongoing communication with staff apart from the issue of the elections. The contested decision does not differentiate between communications related to the electoral process and other necessary communications with staff. Significantly it impedes the process of finding an ultimate solution in accordance with the Statute of the Union by denying all access to communication facilities.

2. At the same time in order to resolve the present impasse, it is critical that the Polling Officers be allowed to exercise their mandate to conduct a proper election of an Arbitration Committee without interference in order to resolve any outstanding matters. The actions of the Respondent threaten to impede that critical process and to create further confusion among staff that will further compromise the attempt to reach a solution to outstanding claims consistent with the UNSU Statute and Regulations

3. The longer this situation remains unresolved, the longer the Staff Council and its Leadership will be prohibited from effectively representing the staff as required by the Staff Regulations. The consequence is that the properly constituted Polling Officers, who have now been designated, will be unable to carry out their functions, creating a deadlock. There is currently no way to resolve outstanding grievances internally until a properly constituted Arbitration Committee is established. This is the first order of business of the newly appointed Polling Officers. That process is being interfered with.

11. With respect to the requirement of irreparable harm, the Applicant submits that:

1. The Applicant's personal right to freedom of association, as well as the ability to carry out her official functions have been compromised. This is not a lost right that may easily be remedied at a later time through compensation.

2. The decision of the Respondent is on-going and renders the Applicant unable to carry out her functions effectively thereby denying staff the right to proper representation through their staff association. The possibility of resolving outstanding claims through arbitration as envisaged in the Statute will be thwarted unless the Statute and Regulations are fully respected and the provision of facilities is accorded in a proper manner.

3. The refusal to honor the procedures established in the Statute and Regulations of the Staff Union undermines the credibility of the Union,

creates further divisions and confusion and represents a direct and unwarranted interference by the Respondent in Staff Union affairs. The refusal to properly allocate faculties for communication with staff violates the provisions of ST/AI/293. The irreparable harm caused in the immediate future will not be amenable to remedy later even if the contested actions of the Respondent are found to be unwarranted.

12. The Respondent submits that there was no final consideration concerning posting on iSeek. Further, the application is based on ST/AI/293 (Facilities to be provided to staff representatives). The Respondent also referred to Order No. 36 (NY/2014), whereby the Tribunal held that it has no jurisdiction over matters concerning the internal affairs of UNSU and that, therefore, the motion for interim measures in that case was not receivable. With respect to the Applicant's claim that as President of the UNSU prior to the elections she is entitled to remain in office, as observed by the Tribunal in Order No. 36 (NY/2014), "two persons currently claim to be President of the UNSU" and "[s]uch matters and disputes fall under the jurisdiction of the Arbitration Committee and not of this Tribunal" (para. 24).

13. Regarding the statutory requirements of art. 10.2 of the Statute, the Respondent submits that the Applicant fails to demonstrate that the impugned decision is *prima facie* unlawful, and to establish any serious or reasonable doubt as to the lawfulness of the iSeek team leader's position. The Respondent also considers that there is no irreparable harm resulting from the contested decision because the applicant continues to have access to email and is able to disseminate all information and messages she wishes to distribute as she is continuing de facto to act as President of UNSU. Further, since the Applicant continues to communicate with staff via email there is no particular urgency in the matter.

Consideration

Applicable law

14. Art. 10.2 of the Tribunal's Statute states:

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.

15. 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.

Discussion

16. The Tribunal observes that the Applicant's motion for interim measures is filed in connection with a currently pending application on the merits before the Tribunal filed on 24 February 2014 and does not pertain to issues relating to appointment, promotion or termination. The first and second conditions mentioned above are accordingly fulfilled.

17. With respect to the third condition, the Tribunal observes that the application on the merits refers to the "refusal of the Respondent to provide facilities including intranet access via iSeek to the Applicant to carry out her official functions while according such facilities to persons who are not properly designated UNSU officials" whilst the motion for interim measures refers to the "refusal of the Respondent to provide facilities including intranet access to all staff via iSeek", the decision being "in the nature of a refusal to respond to a communication of the President of the Staff Union requesting access to iSeek conveyed by email of [...] [the] Team leader [of] iSeek".

18. In her motion for interim measures, the Applicant further points out that "[t]he newly appointed Polling Officers require access to iSeek in order to conduct the election of an Arbitration Committee. To the best of the Applicant's knowledge, that access has not been granted. On information and belief access to the Staff Union web page has been cut off to all parties regardless of the nature of the communication."

19. It results that, in her motion for interim measures, the Applicant refers not only to her right as alleged President of the Staff Union to have access to iSeek but

also to the right of the newly appointed Polling Officers to have access to iSeek in order to conduct the election of an Arbitration Committee.

20. Regarding the Applicant's right to have access to iSeek as the alleged President of UNSU, the Tribunal observed in Order No. 36 (2014/NY), in relation to the Applicant's previous request for suspension of action, that:

24. ... the Applicant is raising issues directly related to the UNSU elections, and her claims are in direct contradiction with those of the applicant in Case No. UNDT/NY/2014/006. It appears that two persons currently claim to be President of UNSU. Such matters and disputes fall under the jurisdiction of the Arbitration Committee and not of this Tribunal. Further, any decision regarding the facilities to be afforded to UNSU staff representatives, even in the form of temporary relief such as a suspension of action, would result in the Tribunal adjudicating on a contested electoral issue over which it does not have jurisdiction.

21. Accordingly, the issue raised in the motion for interim measures appears to be still in contention and currently unresolved by the Arbitration Committee which, as stated above, is the only body having the competence to decide over an unresolved dispute arising over the interpretation of UNSU Statute and its Regulations (art. 17.2 and 8.3 of the UNSU Statute).

22. Furthermore, the right of the new Polling officers to have access to iSeek is related to a pending case (UNDT/NY/2014/004) where another applicant is contesting the "decision rejecting the request to suspend the provision of official facilities to the polling officers who had been recalled by the Unit Chairpersons of the 44th Staff Council [of United Nations Staff Union ("UNSU")], thereby consenting to [the] improper electoral process" held in December 2013. In this case the Tribunal rejected two motions for interim measures filed on 16 January 2014 and 24 January 2014 (in, respectively, Order No. 18 (NY/2014) and Order No. 31 (NY/2014)). The Tribunal held that the recall of the Polling officers by the Union Chairpersons, whether lawfully or unlawfully, is in dispute and the request for the withdrawal of official facilities to prevent the recalled Polling Officers from conducting any further business in relation to UNSU matters on an ongoing basis,

cannot be the subject of interim measures as it would result in a final ruling rather than one of temporary nature.

23. The Tribunal also considered that there was no indication on whether the Arbitration committee has made any findings regarding the recall of the Polling officers, or if and when it intends to do so. This is still currently the case.

24. The Tribunal further notes that the present motion for interim measures is based on the administrative instruction ST/AI/293, dated 15 July 1982, which addresses the issue of facilities that may be provided to staff representatives. Sections 13 and 14 of ST/AI/293 state:

13. Staff members duly designated or elected by the Staff Council, Staff Committee or corresponding staff representative body to perform representational functions may be accorded such facilities as may be required to perform those functions under arrangements to be determined in accordance with the procedures set out in chapter VIII of the Staff Rules.

14. Disagreements concerning the implementation of the above provisions shall be discussed and resolved in accordance with the procedures set out in chapter VIII of the Staff Rules.

25. The right to have access to iSeek is therefore a derivative right only of the *duly designated* or *elected* UNSU staff member with representational functions. A decision pertaining to such a right will automatically have consequences on the recognition of their official function and the Tribunal shall refrain to make such findings in relation to a motion seeking interim measures.

26. Further, according to art. 8.2.3 and 8.2.5 of the UNSU Statute and Regulations, the Arbitration Committee has exclusive competence to receive, consider and issue binding rulings upon matters related to violations of the UNSU Statute and Regulations. Consequently, and, as already mentioned by the Tribunal, all alleged violations of the UNSU Statute, including those referring to the UNSU

elections, are to be referred only to the Arbitration Committee, these provisions being mandatory.

27. The purpose of an interim measure is not to grant final resolution but only temporary relief, pending the outcome of substantive proceedings. The Tribunal finds that, in the present case, should the interim measure sought be granted, the Tribunal would effectively be adjudicating on the merits on two contested issues relating to (1) the election of the President of UNSU, and (2) the recall of the Polling officers by the Unit Chairperson of the 44th Staff Council, thereby in effect disposing of the application on the merits in relation to which the application for interim measures is filed.

28. Furthermore, a ruling on the interim measures sought by the Applicant in relation to her alleged right to access iSeek in her declared official function as President of UNSU would also amount to making a finding on the right of the new elected Polling Officers to have access to iSeek. The latter will directly impact upon the substance of another pending case (UNDT/2014/004) concerning the decision of the Administration to reject the request to suspend the provisions of similar facilities to the Polling Officer who have been recalled by the Unit Chairperson of the 44th Staff Council.

29. The Tribunal will therefore not solely provide a temporary relief as required. Since one of the above-mentioned cumulative conditions is not fulfilled, the Tribunal need not consider whether the remaining requirements, namely *prima facie* unlawfulness, urgency and irreparable damage, are met.

Order

30. The present application for interim measures is rejected

(Signed)

Judge Alessandra Greceanu

Dated this 21st day of March 2014