



Introduction

1. The Applicant is one of two Directors at the D-1 level in the Investment Management Division (“IMD”) of the United Nations Joint Staff Pension Fund (“UNJSPF”) in New York. On 19 March 2015, he filed an application contesting the decision, allegedly made by the Representative of the Secretary-General (“RSG”) for the Investments of the UNJSPF, to include one of the requirements in the Job Opening (“JO”) for an advertised D- level post of Director, Investment Management, IMD, that candidates must hold Chartered Financial Analyst (“CFA”) certification. As relief, the Applicant requested that the impugned JO be rescinded, the recruitment process be suspended, that a new JO be issued, that the RSG be removed from the recruitment process, and, “in lieu of compensation, reimbursement of expenses including attorney’s fees as a result of the egregious conduct by the Administration in this case, and the fact that the Applicant had no choice but to seek outside, private counsel, to vindicate his rights”.

2. On 24 March 2015, while the case was pending before the Dispute Tribunal, the Administration cancelled the impugned JO. A revised JO was subsequently issued with no requirement of CFA certification. The Applicant applied for this new JO.

3. On 17 April 2015, the Applicant filed a motion to amend the application, seeking the following forms of relief: referral of the case to the Secretary-General for possible enforcement of accountability measures pursuant to art. 10.8 of the Dispute Tribunal’s Statute; removal of the RSG from the recruitment process and replacement with a neutral party; re-drafting and re-cir

Factual and procedural background

4. The Applicant joined the Organization in January 2009 as Director at the D-1 level, IMD/UNJSPF. He holds a Master's degree in Business Administration and Finance, and while he is not a CFA charterholder, he holds a Chartered Alternate Investment Analyst ("CAIA") certificate and a Financial Risk Manager ("FRM") certificate.

5. The impugned JO was posted on Inspire (the online United Nations jobsite) on 30 January 2015 with a closing date for application of 31 March 2015. The JO listed under the educational requirements that "[CFA] charterholder is required". Whilst the Applicant is not a CFA charterholder, the only other D-level Director in IMD is.

6. On 3 February 2015, the Applicant sent email to the Office of Human Resources Management ("OHRM") expressing his concerns over the decision to include the CFA certification as an educational requirement in the initial JO for the contested post.

7. On 20 February 2015, OHRM responded that it had already approved the JO and that no further action would be taken in response to his concerns.

8. On 2 March 2015, the Applicant (who was self-represented at the time) filed an application for suspension of action pending management evaluation (Case No. UNDT/NY/2015/010) of the decision to include CFA certification as an educational requirement in the impugned JO.

9. By Order No. 36 (NY/2015) dated 3 March 2015, the Tribunal (Judge Ebrahim-Carstens) held that "there being no pending management evaluation, the application for suspension of action is formally defective and stands to be dismissed".

10. On 3 March 2015, the Applicant filed a request for management evaluation requesting: (i) suspension of the JO; (ii) review of the job requirement by the UNJSPF; and (iii) re-publishing of the job posting to ensure that the eligibility requirements were lawful and fair to all candidates.

11. By email of 6 March 2015, the Management Evaluation Unit (“MEU”) replied that “[u]pon a preliminary review of your request for management evaluation ... [p]lease note that the MEU only has the authority to suspend administrative decisions related to determinations of appointment and separations from service”.

12. On 6 March 2015, the RSG received an email in which another potential candidate expressed interest in the CFA D-2 position and expressed “surpris[e] that [a CFA certification was] a requirement as I [this potential candidate] don’t believ[e] this has ever been a requirement for any position offered through the UN system”. The potential candidate further stated, “I would like to be considered for this D-2 position, this JO however as it stands ... is problematic. Having the CFA Charter holder as desirable would allow this? Is it possible to alter this at this time?”

13. On the same date, the RSG replied that the potential candidate’s “background sounds impressive. The CFA Charter is a requirement for the position”.

14. On 6 March 2015, the Applicant (who was self-represented at the time) filed a second request for suspension of action (Case No. UNDT/NY/2015/015).

15. By Order No. 39 (NY/2015) dated 9 March 2015, the Tribunal (Judge M .1sc . datedi.00vnU05 Tc .Tj /T3

16. On 12 March 2015, the Applicant sought the advice of the Office of Staff Legal Assistance (“OSLA”). On the same day, OSLA advised the Applicant to apply for the position.

17. By email dated 13 March 2015, the Applicant responded to OSLA that he had created an application for the JO but did not initially apply “knowing that it would be screened out”. However, the Applicant corrected the email by stating that he would apply.

18. On 13 March 2015, the Applicant sought the assistance of private counsel, namely counsel of record for the Applicant.

19. On 17 March 2015, MEU notified the Applicant that since the advertisement of the JO was one step in the selection exercise, and did not in itself constitute a challengeable administrative decision, the Applicant’s request for management evaluation dated 3 March 2015 was deemed premature and not receivable. MEU further observed that:

Following communications with the UNJSPF, MEU noted that the job opening for the Post was exceptionally approved by [OHRM] and later reviewed and approved by the Oral Review Board. The MEU learned that the CFA exception was granted because the future incumbent will be in charge of managing all investments of the [IMD], which are valued at USD53 billion. Accordingly, due to the substantial responsibility of the job and the high risks associated with it, the requirement for the incumbent to possess a CFA was granted on an exceptional basis.

20. On 19 March 2015, the Applicant file

22. By email of 24 March 2015, OHRM informed Counsel for the Respondent that the impugned JO had been cancelled. The UNJSPF Audit Committee having noted that the CFA Charter requirement “may attract job applicants from all parts of the globe”.

23. The Respondent filed his response to the motion for interim measures on 25 March 2015, stating that the impugned JO had been cancelled. The Applicant provided his comments on the Respondent’s response on 26 March 2015.

24. By Order No. 50 (NY/2015) dated 30 March 2015, the Tribunal (Judge Ebrahim-Carstens) found that following the cancellation of the impugned JO on

receivable *ratione personae* and *ratione materiae*; (ii) the application is moot as the JO was cancelled; (iii) the Tribunal does not have jurisdiction to investigate allegations of prohibited conduct and the Applicant is required to follow the Organization's procedures with respect to such conduct; and (iv) the application is without merit.

29. By Order No. 71 (NY/2015) dated 28 April 2015, the Duty Judge (Judge Greceanu) granted the Applicant's uncontested motion to file an amended application and ordered the Respondent to file a reply to the amended application by 29 May 2015. The Applicant was ordered to file a response to the admissibility issues raised in the Respondent's reply by the same date.

30. On 4 May 2015, the Applicant sought an extension of the deadline until 10 June 2015 for the submission of his response.

31. By Order No. 74 (NY/2015) dated 5 May 2015, the Duty Judge (Judge Greceanu) ordered the Respondent to file a response to the Applicant's motion for extension of time by 12 May 2015.

32. On 8 May 2015, a new, and second, JO was advertised for the D-2 post of Director, Investment Management, UNJSPF, Inspira with a closing date for application of 7 July 2015. In the new JO, the CFA requirement was removed.

33. On 12 May 2015, the Respondent stated that he had no comments on the Applicant's motion for extension of time.

34. By Order No. 82 (NY/2015) dated 12 May 2015, the Duty Judge (Judge Greceanu) granted leave to the Applicant to file a response to the Respondent's initial reply of 20 April 2015 and the Respondent's forthcoming reply to the amended application, if any, by 12 June 2015.

35. On 29 May 2015, the Respondent filed a reply to the amended application.

36. On 5 June 2015, the Applicant applied for the D-2 position of Director, Investment Management advised through the new JO.

37. On 9 June 2015, the Applicant filed his submission pursuant to Order No. 82 (NY/2015) and his response to the Respondent's reply to the amended application.

38. This case was assigned to the undersigned Judge on 22 June 2015.

Consideration

Issues

39. The Tribunal notes that this matter has become unduly and unnecessarily complicated due to the many filings and submissions, resulting in a reiteration of issues and contentions, as well as amendments to heads of relief.

40. It is common cause that the impugned JO has been cancelled and that a new JO has been issued without offending requirement. Unlike *Gokeng* 2014-UNAT-460, upon which the Respondent relies, the recruitment in this case was not suspended but cancelled, all previous candidates having been notified that they may apply again under the new JO if they so wish.

41. In Order No. 50 (NY/2015), dated 30 March 2015, the Tribunal found that only two heads of relief sought were reserved for consideration in the context of the application on the merits, namely the Applicant's request for reimbursement of legal costs and for an order directing the Administration to re-draft and re-issue the JO. It is therefore surprising that after Order No. 50 (NY/2015) had been issued, the Applicant submitted his amended application (dated 17 April 2015), reiterating and further amending his claims for relief.

42. The Tribunal finds that, the only live issues in the present case are:

a.

- b. Whether the inclusion in the impugned JO of the requirement of CFA certification was lawful;
- c. If the inclusion of that requirement was not proper:
 - i. Whether the Tribunal should refer the case to the Secretary-General for accountability under art. 10.8 of its Statute;
 - ii. Whether the RSG should be removed from the new recruitment exercise;
 - iii. Whether the Applicant is entitled to compensation for his Counsel's fees and non-pecuniary damages.

Receivability

43. The Respondent submits that the application is not receivable pursuant to arts. 2.1(a) and 3 of the Tribunal's Statute because, *inter alia*: (i) the application is moot as the contested JO has been cancelled and a JO was issued; (ii) the Applicant does not have standing or an interest at stake because he did not apply for the initially issued JO; (iii) the contested decision is not appealable as no final administrative decision has been taken; and (iv) the Tribunal does not have jurisdiction to investigate whether the RSG engaged in prohibited conduct.

Is the application moot?

44. Subsequent to the motion for interim measures, the Respondent cancelled the impugned JO and issued the revised JO, resulting in a new selection being underway. The Respondent contends that the impugned JO has been cancelled,

advertisement did not render the application moot and that the Respondent has unduly mischaracterized the Applicant's case as one of selection.

45. In Order No. 50 (NY/2015), the Tribunal found that:

21. It is trite that courts will not readily decide cases in which there is no longer any actual controversy. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy, so that a court need not give opinions on abstract propositions of law. Some courts do exercise their discretion to consider a "moot" case depending on the interests of justice, the importance of the issue, its complexity, and the nature and extent of the practical effect any possible order might have. Does the can

it is only relevant in terms of the severity of the consequences of such violation, in terms of compensation awarded therefore. Thus, the Tribunal finds that the Application is not moot and turns its full attention to the allegations raised by the Applicant.

25. Suspending the implementation of the contested decision is only one form of relief sought by the Applicant. The following two forms of relief sought by the Applicant remain unaddressed and arguably are still in contention unless, and until, the Respondent concedes them, or the Applicant withdraws his motion: (1) the instruction to the Administration to redraft and re-issue the JO to bring it into compliance with applicable UN rules and administrative issuances and (2) the reimbursement of expenses incurred as a result of the publication of an unlawful JO.

contends that his rights were in any event violated by the inclusion of the unlawful CFA requirement, even before he had opportunity to apply. Since the Respondent failed to specify any alternate certification, he was therefore precluded from applying as he simply did not qualify, and would have been screened out in any event, as clearly evidenced by the RSG's email to another potential candidates of 6 March 2015 regarding the CFA "requirement".

48. The Tribunal finds that this case is clearly distinguishable from *Li* UNDT/2014/056, as unlike the applicant in the Applicant in this case did not fail to apply for the position based solely on his own subjective assessment of his eligibility. In the present case, the Applicant was precluded from applying as he was clearly ineligible as he did not have the CFA certification which, as evident from the RSG's 6 March 2015 email addressed to another prospective candidate, was "a firm requirement". This requirement has been shown, as highlighted by the Audit Committee, to have placed unwarranted conditions on the eligibility of applicants. The Tribunal accepts the Applicant's undisturbed statement that he had created an application but was unable to apply as the JO was cancelled prior to the closing date. The Tribunal finds that the Applicant has standing as his rights to full and fair consideration were clearly affected from the outset by the impugned JO.

Does the Applicant contest an appealable administrative decision?

49. The Respondent contends that no final administrative decision has been taken regarding the recruitment of the Direct Investment Management, and that the issuance of the JO did not have any direct legal consequences for the Applicant's terms of employment. The Applicant, on the other hand, maintains that the contested decision had direct legal consequences for him and that he is not merely challenging a selection exercise, but that a final decision was rendered by way of the impugned JO which precluded him from applying.

50. In Order No. 50 (NY/2015) on interim measures, the Tribunal stated that the eligibility condition in the impugned JO was finite in nature, since it excluded the Applicant from being eligible to participate in any further process and thus had direct legal consequences for him. The Tribunal sees no reason to depart from this reasoning and finds that the exclusion of the Applicant from the impugned JO is not merely a preparatory step but was a final decision having final effects for him. Consequently, the decision which produced a direct legal consequence upon the Applicant's terms of appointment is appealable.

Inclusion of CFA certification as a JO requirement

51. It is established jurisprudence that the Secretary-General has broad discretion in selection matters and that, in the absence of evidence of bias, discriminatory practices or *mala fides*, it is not the role of the Tribunal to substitute its judgment for that of the Secretary-General (Charles 2013-UNAT-285; Terragnolo 2014-UNAT-445).

52. However, it is the contractual right of every staff member to receive full and fair consideration for job openings to which they apply. A staff member should be able to challenge criteria which are unlawful where criteria may be directly or indirectly discriminatory, or would appear to be manifestly unreasonable or imposing unwarranted limitations on qualification or other requirements such as to constitute an unfair restriction on the eligibility of a group of staff members for appointment or promotion, especially if there is no proper basis in any promulgated issuance (see *Korotina* UNDT/2012/178). Where any exception is granted under the Staff Rules, the Respondent is to ensure that it is not prejudicial to the interests of any other staff member or group of staff members.

53. Section 4.5 of ST/AI/2010/3 (Staff selection system) states that "[t]he job opening shall reflect the functions and the location of the position and include the qualifications, skills and competencies required". The Applicant contends that

the inclusion of the CFA requirement, without recognition of any alternate

the Respondent may not have expressly stated that this amounts to the first JO being flawed, it is instructive that the Administration obviously no longer finds that such certification is necessary or even desirable. It is therefore clear that the inclusion of a CFA certification requirement in the first JO was unwarranted, a mistake, and prejudicial to and even discriminatory against candidates holding other educational certifications, such as CAIA or FRM.

58. The decision to issue the impugned JO with the CFA requirement constituted an administrative decision which in itself not only hindered the Applicant from full and fair consideration but also entire

Referral for accountability

60. Pursuant to art. 10.8 of the Statute of the Dispute Tribunal, the Tribunal may refer “appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability”. While the inclusion of the CFA

the original application the Applicant requested an order granting him, “[i]n lieu of compensation, reimbursement of expenses including attorney’s fees”.

63. Although by Order No. 71 (NY/2015) the Tribunal granted the Applicant’s uncontested motion to file an amended application, the effect of that order was that the amended application was made part of the record, but it certainly did not mean that every claim and contention proffered by the Applicant in the amended application was accepted and granted by the Tribunal. Whether or not such claims are to be found receivable and properly before the Tribunal, and whether they are to be granted, are obviously issues for the Tribunal to consider.

64. Just as the Tribunal cannot adjudicate cases involving decisions of a changing nature (*Adundo et al.* UNDT/2012/118), it will also not allow the parties to continuously amend their substantive claims and claims for relief throughout the course of the proceedings. It is the responsibility of the party advancing any specific claim to clearly identify at the outset of the litigation process the contested administrative decision, pertinent issues, and heads of relief sought (*Makhas* 2010-UNAT-049; *Siaw* UNDT/2012/149). It is regrettable that this matter became unduly and unnecessarily cumbersome due to the superfluous filings and submissions resulting in a reiteration and explanation of issues and contentions as well as additional or amended heads of relief.

65. As stated by the Appeals Tribunal, “[i]n every violation will necessarily lead to an award of compensation” and “compensation may only be awarded if it has been established that the staff member actually suffered damages” (2010-UNAT-095; *Obdeijn* 2012-UNAT-201; *Nyakossi* 2012-UNAT-254). The party who suffered damages from a breach of her or his rights also has a duty to mitigate their losses (*Mmata* 2010-UNAT-092; *Tolstopiatov* UNDT/2011/012).

66. The Tribunal finds that, even if it were to allow amended pleas on issues of relief, there is insufficient evidence in this case, particularly considering that

the contested JO was withdrawn shortly after the filing of the application, to substantiate an award of moral damages.

67.

Conclusion

69. The application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of November 2015

Entered in the Register on this 20th day of November 2015

(Signed)

Hafida Lahiouel, Registrar, New York