

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ADUNDO et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON INTERIM MEASURES
UNDER ART. 10.2 OF THE
STATUTE

Counsel for Applicant:
Lennox S. Hinds
Claire Gilchrist

Counsel for Respondent:
Sarahi Lim Baró, ALS/OHRM, UN Secretariat
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 17 May 2012, the Applicants, a group of 25 Security Officers serving at the S-1 and S-2 level in the Security and Safety Service (“SSS”) Department of Safety and Security (“DSS”), United Nations Secretariat, filed an application on the merits under art. 2.1 of the Dispute Tribunal Statute, contesting the decision “to reduce the number of staff within SSS by subjecting all security officers recruited since November 2008 to an identical elimination process regardless of a security officer’s appointment status or conditions of employment”. The Applicants submit that the first step in the “elimination process” will take place on 2 June 2012, and the process is expected to be completed by mid-July 2012.
2. On 21 May 2012, the Applicants also filed a motion for interim measures under art. 10.2 of the Tribunal’s Statute requesting suspension of the implementation of the contested decision mentioned above. This application is considered in the present Judgment.
3. On 22 May 2012, the Registry transmitted the motion to the Respondent. The Respondent was informed that his reply to the motion for interim measures was due by 5 p.m., Friday, 25 May 2012. The Respondent’s reply to the motion was duly filed.
4. Having reviewed the parties’ submissions, and given the time limitations imposed by art. 14.3 of the Rules of Procedure, the Tribunal has determined that it has sufficient information before it to decide the present motion on the papers before it without a hearing.
5. It should be highlighted that the application filed by the Applicants is not a class action, which are not covered by the Tribunal’s Statute. Each of the 25 Applicants requested management evaluation and filed a joint application on the merits with the Tribunal. Each Applicant also provided the Tribunal with copies of legal authorization for their Counsel. The Tribunal accepts that the Applicants make

identical claims and share common issues of law and fact. The Respondent not making any objections to the filing of a joint application, the Tribunal found it appropriate to dispose of the application for suspension of action in a single judgment.

Background

6. The following factual information is725ge Thd ise appaifaes' writtenuspb8(en)6(-sio)5 toT

decision. This petition was subsequently provided to, inter alia, the Secretary-General and senior members of the Administration.

15. On 10 April 2012, one of the Staff Representatives sent a letter to the Chief of SSS expressing her disappointment that staff had not been consulted regarding the decision to post the vacancy announcement, highlighting the deficiencies in staff consultations that had occurred in March 2012.

16. A series of meetings took place in April and May 2012 between the staff representatives, the Chief of SSS, the Office of the Ombudsman, and OHRM. However, the Applicants submit that these meetings did not amount to an effective consultation process that should have taken place.

17. On 23 April 2012, the Applicants filed a request for Management Evaluation to contest the Chief's decision.

18. The Applicants submit that, on 2 May 2012, they were informed that the written examination to fill vacancies would be held on 2 June 2012 (which is a Saturday).

19. According to the Applicants, on 8 and 10 May 2012, the Chief of SSS met with several Security Officers. The Chief of SSS allegedly stated that there were 85 so-called "CMP Officers", 24 of whom were holding regular budget posts. He further said that there will be 49 regular budget posts available after CMP, including 25 posts that will be vacant and 24 regular budget posts that are currently held. He further stated that an additional number of posts likely become available from buyouts and retirements of senior security officers for a total of around 60 posts. All "CMP Officers" will be allowed to compete to replace the 24 officers currently occupying these posts in addition to the 25 vacant posts.

20. The Applicants submit that the Chief of SSS stated at the meetings that the written exam was scheduled for 2 June 2012. Those who do not pass with a mark of 65% or greater will not continue the competition. Those officers who pass the test

CaseNo. UNDT/NY/2012/037

JudgmenNo. UNDT/2012/077

c. Pursuant to art. 10.2 of the Tribunal's Statute, the Tribunal does not have jurisdiction to suspend decisions concerning appointment or non-renewal of staff members. In so far as the Applicants seek impacts on future appointment or renewal decisions, the relief sought cannot be granted;

Prima facie unlawfulness

d. The decision is *prima facie* unlawful. The Applicants, in effect, seek suspension of the implementation of SSS's post-CMP staff restructuring plan. The Applicants' appointments will not be terminated, they will run their full term. Approaching the expiry of their appointment, the Administration must make a decision on whether the appointments will be renewed, and if so, for what period. This decision not only concerns each individual Applicant, but also concerns the 60 Security Officers hired in connection with CMP who also will be competing for the vacant posts. In light of the cutbacks, all 85 affected Security Officers must be given an equal opportunity to demonstrate their relative suitability for renewal against the available posts. It is for this reason that it is essential that the comparative selection exercise proceed. If it does not proceed, the Administration will

g. In anticipation of the funding ~~cuts~~ ~~cuts~~, the Administration has engaged in consultations with staff ~~representatives~~ ~~representatives~~ and the affected Security Officers. The Chief of SSS has met 58 of

CaseNo. UNDT/NY/2012/037

JudgmenNo. UNDT/2012/077

Particular urgency

not be frivolous or an abuse of process, or else the requesting party will be mulcted in costs.

25. Due to the nature of urgent requests, both parties and the Tribunal are under pressure of time in such situations. Currently, with only one Judge in the New York duty station, the Tribunal is seized of a suspension of action cases. The Tribunal has to deal with these matters as best it can on a case-by-case basis, depending on the particular circumstances and facts of each case, within five working days.

26. Since the Applicants filed their motion for interim measures shortly after filing their application on the merits, the suspension proceedings must be considered under art. 10.2 of the Tribunal's Statute and art. 14 of the Rules of Procedure. Article 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.

27. Pursuant to art. 10.2 of its Statute, the Tribunal may order interim relief only if it is satisfied that all three requirements set out in that article have been met—i.e., that the case is of particular urgency, that the implementation of the contested decision would cause irreparable damage, and that the decision appears prima facie to be unlawful.

Receivability

Nature of contested decision and receivability of the application

28. Having carefully considered the parties' submissions, the Tribunal finds that the administrative decision contested in this case is the decision requiring the Applicants, as a condition of future employment, to undergo an ad hoc competitive process regardless of their contractual status.

29. Although staff members do not have an automatic right to renewal, they have a right to a fair consideration for renewal and for a decision based on proper reasons (ObdeijnUNDT/2011/032, Obdeijn2012-UNAT-201). For instance, a decision not to renew may be based on documented poor performance or genuine lack of funding. As explained below, there are strong indications that some of the Applicants are on regular budget posts not funded through CMP-associated funds. By being required to participate in this competitive exercise, they are deprived of the right to a fair consideration for renewal and for a decision based on proper reasons. The moment the competitive process is put in motion, the rights of these staff members are affected by that decision. Thus, to change (ve ad comi0(e)-ire aetitiaat decisioMoreovent)]T

CaseNo.

CaseNo. UNDT/NY/2012/037

JudgmenNo. UNDT/2012/077

certainty as to which of the affected Security Officers encumber these 24 regular budget posts.

40. The Respondent submits that, at some point in time—it is unclear when—there will remain only 49 available posts for the group of 85 affected Security Officers. These 49 posts will consist of (i) 24 regular budget posts and (ii) 25 of 61 remaining posts that are currently held by the 85 affected Security Officers.

41. Positions in the Organization may be funded through different means, such as regular budget and extra-budgetary funds, such as

vacant. It is an important question as it arguably concerns some of the Applicants' posts (whether or not they are, in fact, ~~encumbr~~ ~~ing~~ those regular budget posts is yet to be determined—at this stage, it can only ~~be~~ ~~said~~ that it is likely that they are and

CaseNo.

Order

57.