Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

LATIMER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a former staff member holding a temporary appointment on a "when actually employed" ("WAE") basis as a Reviser at the T-IV level in the English Translation Service, Department of General Assembly Conference Management ("ETS/DGACM"), contests "the termination of [his] WAE contract", alleging that the Organization's request that he resign when his daughter accepted a fixed-term appointment with the Organization was a constructive dismissal. In the application, the Applicant requests the following remedies (reference to annexes omitted):

> 37. Restoration of [the Applicant's] eligibility to work at the United Nations:
>
> > (a) Specifically, a formal offer of a WAE for 2017 as informally offered and accepted on 27 October 2016; and
> >
> > (b) To be considered eligible for further short-term employment.
>
> 38. An equivalent remedy in respect of the period of the WAE for 2016 from the date of [the Applicant's] induced resignation (17 November 2016) to the agreed end-date (16 December 2016): specifically, compensation in an amount equivalent to the amount [the Applicant] would have earned over that period.
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> 39. If the relief in paragraph 37 is granted, no further relief other than that requested in paragraph 38 is sought.
>
> 40. If not, compensation is requested in an amount equivalent to the potential earnings in 2017 of which [the Applicant] had reasonable expectation, viz., at or close to the permitted maximum of 125 days in a calendar year, bearing in mind the heavy programme of work of the Fifth Committee and that [the Applicant has] worked at or near to that maximum most years since retirement, other than in 2012 and 2013 when [the Applicant] forwent contracts in order to allow [his] daughter to accept short-term contracts in ETS/NY.

2. The Respondent contends that the application is not receivable *ratione materiae* because the Applicant's separation from service was voluntary and not a result of an administrative decision. In the alternative, the Respondent requests the Dispute

Tribunal to dismiss the application on the basis that it lacks merits, as the Organization's request that the Applicant resign was lawful pursuant to staff rule 4.7(a), which prohibits the Organization from simultaneously employing a parent and child.

Factual and procedural background

3. The Applicant joined the Organization on 30 August 1979. He reached the mandatory age of retirement on 31 January 2008. However, he was retained in service from 1 February 2008 to 31 May 2008. He then separated from service.

4. After his separation from service, the Applicant was engaged on a series of temporary appointments with ETS/DGACM on a WAE basis.

5. The Applicant's daughter (name redacted, Ms. SL) joined the Organization on a temporary appointment on 15 October 2012 until 24 November 2012. Prior to Ms. SL's appointment, the Applicant was engaged on a WAE appointment. On 5 October 2012, prior to Ms. SL's offer of appointment, the Applicant resigned as requested.

6. Ms. SL received another temporary appointment from 7 October 2013 to 22 November 2013. At that time, the Applicant was not a staff member of the Organization.

7. The Applicant was re-appointed on a WAE appointment on 25 November 2013. He received four further WAE appointments, including his most recent appointment, which was from 1 January 2016 to 31 December 2016.

8. On 2 March 2016, Ms. SL accepted and signed an offer of a fixed-term appointment ("FTA"), and started work in ETS/DGACM on 9 June 2016.

9. On 27 October 2016, ETS/DGACM made an offer of a WAE to the Applicant for the whole year of 2017, which he accepted on the same day.

10. On 17 November 2016, the Chief of ETS/DGACM wrote to the Applicant requesting his resignation pursuant to art. 4.7(a). The Applicant sent his resignation on the same day mentioning that he was already a staff member when his daughter was appointed.

11. On 14 December 2016, the Applicant requested a management evaluation of the alleged constructive dismissal.

12. On 3 January 2017, the Management Evaluation Unit ("MEU") sent its decision to the Applicant informing him that his request for management evaluation was not receivable, *inter alia*, for the following reasons:

> […] as a retiree, [the Applicant] continued service was already subject to the restrictions in ST/AI/2003/8/Amend.2 [Retention in service beyond the mandatory age of separation and employment of retirees], which provides that "[r]etention in service of staff members beyond the mandatory age of separation is an exception ... which may be approved by the Secretary-General only when it is in the interest of the Organization" […] "due to the exigencies of the service concerned". Thus, [the Applicant was] a temporary appointee contracted by the Organization under exceptional circumstances. It was ultimately within the Administration's discretion to decide whether those circumstances required a further exception to Staff Rule 4.7(a), and, given the bright-line prohibition in the [r]ule against employing family relations, the MEU found nothing patently arbitrary or absurd in not granting such a further exception. Importantly, the MEU observed that, irrespective of [the Applicant's] professional qualifications, the determination of the Organization's interest in maintaining a pool of suitably qualified language staff ultimately does not give rise to any corresponding right on the part of a staff member. Consequently, the MEU would have found no basis to recommend rescission of [the Applicant's] separation.

13. On 9 March 2017, the Applicant filed the present application with the Tribunal.

14. On 10 March 2017, the case was assigned to the undersigned Judge. On the same day, the New York Registry transmitted the application to the Respondent instructing him to file his reply by 10 April 2017.

15. On 10 April 2017, the Respondent filed his reply requesting the Dispute Tribunal to dismiss the application as not receivable, or in the alternative for lacking merit.

16. By Order No. 78 (NY/2017), the Tribunal invited the Applicant to file his comments by 12 May 2017, addressing the issue of receivability raised in the Respondent's reply.

17. On 12 May 2017, the Applicant submitted his comments on the issue of receivability.

18. On 29 June 2017, by Order No. 123 (NY/2017), the Tribunal instructed the parties as follows (emphasis omitted):

> … By 5:00 p.m. on Friday, 21 July 2017, the parties shall file a joint submission informing the Tribunal whether they agree to enter into discussions for an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions and whether they seek the suspension of the proceedings;
>
> … In the event the parties do not agree to pursue informal resolution, by 5:00 p.m. on Monday, 31 July 2017, the parties shall file separate statements informing the Tribunal if any additional evidence is requested to be produced in the present case and, if so, stating its relevance and if the case can be decided on the papers;
>
> … If the parties agree that no further evidence is requested and that the Tribunal may decide the case on the papers before it, the parties are instructed to file their closing submissions, based only on the evidence before the Tribunal, by 5:00 p.m. on Friday, 18 August 2017.

19. On 30 June 2017, by way of email to the New York Registry, the Applicant requested a 45-day extension to the above-ordered dates on account of his upcoming study trip to China where he would not have regular access to the internet. The Respondent had no objection to the Applicant's request.

20. Also on 30 June 2017, by way of email, the New York Registry communicated to the parties that the undersigned Judge granted the Applicant's request stating:

> The dates set forth in Order No. 123 [(NY/2017)] shall be extended as follows:
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> > 21 July 2017 is extended to Monday, 4 September 2017;
> >
> > 31 July 2017 is extended to Friday, 15 September 2017;
> >
> > 18 August is extended to Tuesday, 3 October 2017.
>
> A formal Order will follow upon the return of the Judge from her scheduled leave.

21. The Tribunal issued Order No. 179 (NY/2017) on 30 August 2017, which confirmed the extension of the deadlines previously established by the Tribunal in conformity with the information the New York Registry had communicated via email.

22. On 4 September 2017, the parties filed a joint submission in response to Order No. 123 (NY/2017) in which they indicated that the Applicant was willing to enter into discussions for an informal resolution of the case, while the Respondent was of the view that there was no scope for an informal resolution of the present case.

23. On 15 September 2017, both parties informed the Tribunal that they had no additional evidence to present and that the case could be decided on papers.

24. On 3 October 2017, the parties filed their closing submissions.

Parties' submissions

25. The Applicant's principal contentions, submitted in his application, in paras. 14-28 and 31-36, are as follows (emphasis, references to footnotes and annexes omitted):

> […]
>
> ... The clear intent of staff rule 4.7(a), prohibiting employment of a person with a close relative already employed by the Organization, is to guard against nepotism or favouritism, in the interest of the Organization. Logically, this concern does not arise in the case of persons who have passed competitive recruitment examinations (Language Competitive Examination or Junior Professional Examination, for example), which are administered and marked on

an anonymous basis and which yield a roster of successful candidates established solely on the basis of merit, thereby rendering concerns about nepotism or favouritism moot. In its resolutions on human resources management, the General Assembly has long urged the Secretariat to make exclusive use of competitive examinations as a fair, objective and transparent recruitment tool and an effective safeguard against extraneous considerations in the recruitment of staff (see, for example, General Assembly resolution 51/226, sect. III.B, para. 15).

... Staff rule 4.7 is not absolute. There is a specific exception for spouses (4.7 (b)), and an implied exception for other family members (4.7 (c)).

... Rather, then, it is couched in terms that clearly imply that "a staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above" (i.e. father, mother, son, daughter, brother, sister or spouse) may be recruited provided that, as specified in paragraphs (c)(i) and (ii), the staff member "[s]hall not be a assigned to (...) a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related" and "[s]hall not participate in [any] process (...) or (...) decision affecting the status or entitlements of [that] staff member". In the language services, compliance with these requirements can be easily assured.

... As to the issue of exceptions or exemptions, it is well established that exceptions have consistently been made in the case of language staff. The most fundamental exception is that language posts, although in the [p]rofessional category, are not subject to geographical distribution.

... Further confirmation of the need for exceptions for language staff is to be found in the legislative history of the limit imposed on the United Nations earnings of retirees in receipt of a United Nations pension who are re-employed by the Organization. When such a limit was first established by the General Assembly in 1982, by its resolution 37/237, the representative of the Secretary-General (the Under-Secretary-General for Administration and Management) placed on record the Secretariat's understanding that the decision applied only to retired staff members employed as consultants, inasmuch as the Organization had a continuing need for experienced temporary language staff.

... Retired language staff members re-employed by the language services are not consultants or individual contractors, and the provisions governing those categories of employees do not apply to them. Their contractual status is different (temporary appointments) to that of consultants and experts. The representative of the Secretary-General

further placed on record the Secretariat's understanding that the decision that had been adopted was not intended "to bar the Secretary-General from making exceptions if he felt them to be absolutely necessary in the light of the exigencies of the Organization's work programme" (A/C.5/37/SR.72, paras. 42 and 43). As a result, since that time, retirees re-employed in language functions have always been treated differently and have been subject to a different (higher) limit on their permissible United Nations earnings.

... Moreover, an exchange of notes in 2003/[20]04 between the Officer-in-Charge/[Office of Human Resources Management, ("OHRM")] and various subordinates makes it clear that the practice of OHRM has been to authorize exceptions to the immediate family prohibition in respect of language staff, as by passing the competitive examination successful candidates demonstrated that no person equally well qualified could be recruited.

... Retired language staff are employed by the Organization because they are needed to cope with surges in workload that cannot be handled by the regular staff, and the supply of qualified language specialists in the market is very limited. The General Assembly has expressed legitimate concerns about the employment of temporary staff in substantive areas and in decision-making positions, but this is never the case in the language services. Nor do temporary staff block the advancement of regular staff or the recruitment of new staff members. Because the permanent establishment of the various language services is small and deliberately set below the level of peak workloads that occur throughout the year, making it necessary to resort to temporary assistance, temporary staff are not taking work away from the regular staff, but, rather, are doing work that would otherwise go undone.

... It follows that an exception to staff rule 4.7(a) to permit appointment of persons whose unique competence has been demonstrated by success in the language competitive examinations works to the benefit of the Organization. A restrictive interpretation of the rule is not consonant with its legislative intent, and runs counter to the well-established principle that no rule should be interpreted to arrive at an absurd or counterproductive result.

Incoherent interpretation by the [Executive Office, ("EO")]/DGACM of staff rule 4.7(a)

... The demand by the [EO]/DGACM that [the Applicant] resign from [his] 2012 WAE to permit [his daughter's] employment in 2012 on a short-term contract demonstrates fundamental incoherence. The [EO/DGACM] was fully aware that the WAE explicitly stated that the holder of a WAE was a staff member only on days actually

employed, and that [the Applicant and his daughter] would not have been staff members at the same time.

... There was no response, reasoned or otherwise, to [the Applicant's] informal approach pointing this out.

Recruitment timeline 2015/[20]16

… Conversely, that the [EO]/DGACM (endorsed by OHRM), being well aware that [the Applicant] had a valid WAE for the period 4 January-31 December 2016 (offered on 22 December 2015 and accepted on 1 January 2016), proceeded to make a formal offer of a two-year fixed-term contract to [the Applicant's daughter] (on 24 February 2016, accepted [on] 2 March 2016) constitutes a *prima facie* indication that it did not view staff rule 4.7(a) as a bar to [their] being employed at the same time.

… In accordance with Article 101 of the [United Nations] Charter, all United Nations staff members must meet the highest standards of efficiency, competence, and integrity. It follows that the only rational interpretation of the 2015/[20]16 recruitment timeline is that DGACM, conscious of the operational requirements of the [name redacted, Documentation Division, ("DD")] and the limited availability of suitably qualified specialists, sees an exception to staff rule 4.7(a) in the case of language staff as being in the interest of the Organization.

… The [EO/DGACM] acted improperly in later citing the staff rule in demanding [the Applicant's] resignation, and, moreover, implying that [he] was at fault for having accepted the WAE as [his daughter] was a staff member when [he] did so – an assertion that is manifestly at variance with the recruitment timeline and fundamentally flawed.

… It is patently illogical to take two mutually exclusive positions, and an abuse of authority to expect staff to bear the consequences. The [EO/DGACM] has thus displayed a pattern of variously acting in an erroneous and incoherent manner.

[…]

… The reality is that the DGACM actions – "tender … resignation immediately" (EO), "send your letter of resignation ... immediately" (Chief /ETS) – can reasonably be construed as constituting a breach of trust between employer and employee and exerting improper pressure to induce [the Applicant] to act as he, a staff member with 37 years (August 1979-November 2016) of dedicated service at an exemplary professional level, would otherwise not have.

… The need for highly qualified language staff has long been recognized by the Organization. The Committee on Conferences has consistently requested the Secretary-General to redouble his efforts to

> ensure the highest quality of translation services (see, for example, A/71/32, sect. V, para. 89). Equally, as long ago as the fifty-second session the General Assembly requested the Secretary-General to ensure that summary records of the Fifth Committee were prepared by experienced language staff thoroughly familiar with developments in the Organization, as well as to give special significance to the quality of translation (General Assembly resolution 52/214 B, paras. 13 and 14).
>
> … […] [O]ver a 35-year period (1981-2016) [the Applicant] gained unparalleled experience in Fifth Committee matters, served as team leader and principal reviser for its summary records, originated the Service's approach to such records and authored the ETS guide to their preparation, in addition to training many neophyte translator/précis-writers. Based on [the Applicant's] professional record before and after retirement from a permanent post in 2008 [he] had reasonable expectation of continued employment on short-term contracts.
>
> … The Administration has discretion to make exceptions to staff rule 4.7(a), and historically has done so with regard to [Language Competitive Examinations, ("LCEs")] appointees.
>
> … A claim by the [EO/DGACM] in his e-mail of 17 November 2016 demanding [the Applicant's] resignation that revision of the staff rule in 2009 made such exceptions irrelevant fails to take into account the objective operational need, in the interest of the Organization, for such exceptions to be made, a need implicitly recognized by DGACM when it offered [the Applicant's] daughter a contract when [he] was already under contract. The General Assembly, in its resolution 70/9 (sect. V, para. 114), explicitly noted the difficulty of recruiting language professionals, in particular translators, at the main duty stations, particularly New York and Nairobi.
>
> … Lastly, as demonstrated *supra*, the [EO/DGACM] has been incoherent in its application of the staff rule in [the Applicant's] case.
> […]

26. The Respondent's contentions, submitted in his response to the application, in paras. 2-3 and 10-19 are as follows (emphasis omitted and references to footnotes and annexes omitted):

> […]
>
> ... The Application is not receivable *ratione materiae*. The Applicant does not challenge an administrative decision that produced direct legal consequences to the terms and conditions of his

employment. Instead, he chose to resign. Accordingly, his separation from service was initiated by him. It was therefore not the result of an administration decision.

... Should the Dispute Tribunal find the Application to be receivable, then it is without merit. The Administration's request was lawful. The Applicant was employed on a temporary WAE contract. His daughter accepted a fixed-term appointment within DGACM. Staff rule 4.7(a) prohibits the Organization from employing a father and daughter at the same time. In those circumstances, the Administration asked the Applicant to resign.

[…]

... The Application is not receivable *ratione materiae*. The Applicant's separation from service was the result of his voluntary resignation. It was not the result of an administrative decision.

... Under Article 2.1(a) of its Statute, the Dispute Tribunal has jurisdiction to hear applications challenging administrative decisions that are alleged to be in non-compliance with the terms of appointment or the contract of employment. An administrative decision is a unilateral decision taken by the administration in a precise individual case which produces direct legal consequences to the legal order (*Hamad*, 2012-UNAT-269). The Appeals Tribunal has held that "to be reviewable, the administrative decision must have direct legal consequences on an individual's terms of appointment" (*Nguyen-Kropp & Postica*, 2015-UNAT-509).

... Under Staff rule 9.2, resignation is "separation initiated by a staff member." The Applicant chose to resign. Accordingly, his separation was initiated by himself. It was not the result of an administrative decision.

... Having recognized that the Organization could not employ the Applicant and his daughter at the same time, the Chief, ETS, wrote to the Applicant to request that he resign. This request did not amount to duress or constructive dismissal, such as to negate his voluntary resignation.

... Duress requires some unlawful coercion or compulsion to force a person to perform an act. Constructive dismissal occurs when an employer wrongfully imposes working conditions so intolerable that an employee is forced to resign. The email from the Chief, ETS was phrased as a request. It was open to the Applicant to refuse to comply. Instead, he chose to resign. Accordingly, the Applicant's resignation was voluntary. There was no coercion or compulsion, or imposition of intolerable working conditions. There was therefore no duress or constructive dismissal.

> ... The decision to request that the Applicant resign was lawful.
>
> ... Staff rule 4.7(a) prohibits the Organization from employing a father and daughter at the same time. There is no exception to this rule for staff members recruited through a competitive recruitment examination, or for language staff.
>
> ... Section 1.1 of ST/AI/2003/8/Amend.2 [(Retention in service beyond the mandatory age of separation and employment of retirees)] provides that "[r]etention in service of staff members beyond the mandatory age of separation is an exception […] which may be approved by the Secretary-General only when it is in the interest of the Organization."
>
> ... The Applicant was a retired staff member, whose continued employment with the Organization was subject to the interests of the Organization. Retention of staff beyond the age of retirement is solely at the discretion of the Organization. As his continued employment would violate the clear terms of staff rule 4.7(a), the Organization requested that he resign. There was no basis to grant an exception to the rule.
>
> ... It is for the Organization to determine where its own interests lie. It is not for the Applicant to decide that the Organization's interests lie in granting exceptions to the clear terms of the staff rule for language staff.
>
> […]

Considerations

Applicable law

27. The United Nations Charter, which was signed on 26 June 1945 and entered into force on 24 October 1945, provides, in relevant parts, as follows:

> Article 101
>
> 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
>
> 2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
>
> 3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity

> of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

28. The Universal Declaration of Human Rights adopted by United Nations General Assembly resolution 217 (III) (International Bill of Human Rights) on 10 December 1948 provides as follows (emphasis omitted):

> Preamble
>
> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> […]
>
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
>
> Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
>
> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
>
> […]
>
> Now, therefore, the General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.
>
> Article 1
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Article 2

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
>
> […]
>
> Article 7
>
> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
>
> […]
>
> Article 23
>
> 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
>
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
>
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> 4. Everyone has the right to form and to join trade unions for the protection of his interests.
>
> […]

29. The International Covenant on Civil and Political Rights adopted by General Assembly on 16 December 1966 A/RES/2200A (XXI) and entered into force on 23 March 1976 states as follows:

> Article 26
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race,

> colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

30. The International Covenant on Economic, Social and Cultural Rights adopted by General Assembly on 16 December 1966 A/RES/2200A (XXI) and entered into force on 3 January 1976 provides as follows:

> Article 6
>
> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

31. The International Labour Organization ("ILO") C122 - Employment Policy Convention of 1964 states as follows:

> Preamble
>
> Considering that the Declaration of Philadelphia [concerning the aims and purposes of the ILO] recognises the solemn obligation of the [ILO] to further among the nations of the world programmes which will achieve full employment and the raising of standards of living, and that the Preamble to the Constitution of the [ILO] provides for the prevention of unemployment and the provision of an adequate living wage, and
>
> Considering further that under the terms of the Declaration of Philadelphia it is the responsibility of the [ILO] to examine and consider the bearing of economic and financial policies upon employment policy in the light of the fundamental objective that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity", and
>
> Considering that the Universal Declaration of Human Rights provides that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment", and
>
> Noting the terms of existing international labour Conventions and Recommendations of direct relevance to employment policy, and in particular of the Employment Service Convention and Recommendation, 1948, the Vocational Guidance Recommendation, 1949, the Vocational Training Recommendation, 1962, and

the Discrimination (Employment and Occupation) Convention and Recommendation, 1958,

[…]

Article 1

1. With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.

2. The said policy shall aim at ensuring that:

(a) there is work for all who are available for and seeking work;

(b) such work is as productive as possible;

(c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.

3. The said policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.

32. Staff regulations 1.1(c)(d)(e), 4.1, 4.2, 4.3 and 4.4 provide as follows:

[Preamble]

Under the Charter of the United Nations, the General Assembly provides staff regulations which set out the broad principles of human resources policy for the staffing and administration of the Secretariat and the separately administered funds and programmes. The Secretary-General is required by the staff regulations to provide and enforce such staff rules, consistent with these principles, as he considers necessary.

[Staff regulation 1.1 (c)(d)(e)]

[…]

(c) The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and

Rules and in the relevant resolutions and decisions of the General Assembly, are respected;

(d) The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity;

(e) The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs, holding appointments under the Staff Rules;

[…]

[Staff regulation 4.1]

As stated in Article 101 of the [United Nations] Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

[Staff regulation 4.2]

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Staff regulation 4.3
In accordance with the principles of the [United Nations] Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Staff regulation 4.4
Subject to the provisions of Article 101, paragraph 3, of the [United Nations] Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations. The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no

> internal candidate meets the requirements of Article 101, paragraph 3, of the [United Nations] Charter as well as the requirements of the post.

33. Staff rule 4.7 on family relationships provides as follows:

> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.
> (b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.
> (c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above;
>
> > (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
> > (ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.
>
> (d) The marriage of one staff member to another shall not affect the contractual status of either spouse, but their entitlements and other benefits shall be modified as provided in the relevant [s]taff [r]egulations and [s]taff [r]ules. The same modifications shall apply in the case of a staff member whose spouse is a staff member of another organization participating in the United Nations common system of salaries and allowances. Where both spouses are staff members and maintain separate households because they are assigned to different duty stations, the Secretary-General may decide to maintain such separate entitlements and benefits, provided that this is not inconsistent with any staff regulation or other decision of the General Assembly.

34. Administrative instruction ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees), as amended in 2006 and 2009, states that (emphasis omitted):

> […]
>
> Section 5
>
> General conditions and contractual arrangement
>
> 5.1 Former staff members above the mandatory separation age of 60, or 62 for staff appointed on or after 1 January 1990, shall not be employed by the Organization, unless:

(a) The operational requirements of the Organization cannot be met by staff members who are qualified and available to perform the required functions;

(b) The proposed employment would not adversely affect the career development or redeployment opportunities of other staff members and represents both a cost-effective and operationally sound solution to meet the needs of the service.

When such employment is approved, it shall begin only after a period of at least three months has elapsed since the date of retirement of the staff member.

5.2 In deciding whether to employ a retiree, due regard shall be given to the requirements of geographical and gender balance.

5.3 No retiree may be employed without a prior medical clearance.

5.4 Provided the above conditions are met, such former staff may be re-employed under the following contractual arrangements:

(a) For service specifically with a United Nations mission or to replace staff on mission service under a 300 series appointment of limited duration or a 100 series appointment, as appropriate;

(b) For service as technical cooperation personnel under a 200 series appointment;

(c) For conference and other short-term service under a 300 series short-term appointment;

(d) As an individual contractor or as a consultant, in accordance with the conditions of administrative instruction ST/AI/1999/7.

5.5 Former staff members above age 55 who have not reached the mandatory age of separation may be employed under one of the contractual arrangements enumerated in section 5.4, subject to the following conditions:

(a) At least three months have elapsed since their retirement at or after age 55. This limitation shall not apply in the case of reinstatement under staff rule 104.3 (b) [currently staff rule 4.17];

(b) In cases of agreed termination, after the period during which the relevant agreement precludes re-employment or, in the absence of a specific clause, after a period of three years from the date of separation from service.

> Section 6
>
> Restrictions concerning former staff in receipt of a pension benefit
>
> 6.1 Employment of former staff who are in receipt of a pension benefit from the United Nations Joint Staff Pension Fund shall be subject to the following restrictions:
>
> (a) Except for language services staff, such former staff may not earn more than US$ 22,000 for work performed and/or services provided during a calendar year. Their cumulative period of service shall not exceed six months per calendar year;
>
> (b) Language services staff may not be re-employed for more than 125 days actually worked during a calendar year;
>
> (c) In all cases, former staff may not be re-employed at a level higher than that at which they separated from the organization concerned, or be remunerated at a level higher than that at which regular staff are remunerated for the same function at the same duty station.

Receivability framework

35. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases which are not receivable.

36. The Dispute Tribunal's Statute and Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations

Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

37. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

38. The Applicant is a former staff member holding a temporary WAE appointment and therefore the application is receivable *ratione personae*.

Receivability ratione temporis

39. The Tribunal notes that the Applicant filed the present application on 9 March 2017, within 90 days from the date he received the response from the MEU, on 3 January 2017, thereby rendering the application receivable *ratione temporis*.

Receivability ratione materiae

40. As mentioned above, an application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1

of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute).

41. The Tribunal will further analyze if the two cumulative and mandatory conditions mentioned above are fulfilled.

42. Regarding the first condition, namely if the contested decision is an administrative decision which can be appealed before the Dispute Tribunal, the Tribunal notes that the Respondent contends that the application is not receivable *ratione materiae* because:

> ... The Applicant does not challenge an administrative decision that produced direct legal consequences to the terms and conditions of his employment. Instead, he chose to resign. Accordingly, his separation from service was initiated by him. It was therefore not the result of an administration decision.

43. The Tribunal notes that a resignation is a separation from service initiated by the staff member which puts an end to the employment contract and it is opposite to a termination of the employment contract which is always initiated by the employer. The Tribunal underlines that the fundamental element of a resignation is that it consists in a staff member's voluntary, unconditional and express will to put an end to his/her employment contract before its expiration (in case of temporary or fixed-term appointments) or before retirement (in case of permanent/continuing appointments) for reasons which are not related to the employment contract and/or employment environment.

44. Further, the Tribunal underlines that a constructive dismissal is the resignation of a staff member with or without notice which is not the expression of his/her free will to put an end to the employment contract, but is a coerced resignation. A request and/or an offer made to an employee to resign and/or to choose between resigning and being dismissed constitutes constructive dismissal depending on the circumstances in which such a request and/or offer was made, as presented below.

45. An employer can coerce/force an employee to resign:

a. Directly by making an express unlawful request/demand orally or in writing for the employee to present her/his resignation; and/or

b. Indirectly by:

i. Exerting undue pressure on the employee to resign consisting in excessive and/or unwarranted insistence and/or pressure due to the employer's authority; or

ii. Exerting different unlawful acts of coercion to determine/convince the employee and/or another staff member who is the father, mother, brother, daughter, son or spouse of the staff member to choose between resigning and being dismissed, including but not limited to: threats of dismissal; unlawful deductions of his/her salary; different forms of harassment, including sexual harassment; unjustified disciplinary actions and/or administrative measures; creation of a hostile working environment; non-promotion; offer of an inferior employment in the same or a different duty station coupled with a threat of dismissal if the employee does not accept the offer; repeated and unjustified lower performance evaluations of the employee; disguised abolition of post(s); retaliation during or after exercising his/her legal right to contest different administrative decisions; filing of complaints (e.g. in front of rebuttal panels, the Office of Internal Oversight Services ("OIOS") and other investigative bodies, the Ethics Office, Heads of Unit pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority)) and/or applications before the United Nations Dispute Tribunal and/or the United Nations Appeals Tribunal, including testifying before the competent bodies and/or the Dispute Tribunal and the Appeals Tribunal; progressive, unjustified partial and/or total reduction of assigned tasks; repeatedly assigning tasks corresponding to a higher

professional level than the ones specific to the staff member's terms of reference with the potential to result in low performance(s).

46. The employer's direct and/or indirect acts of coercion causes the impossibility for the employee to remain in the post leaving him/her with no other option than to resign and results in a constructive dismissal. Such a coerced resignation is equivalent from a legal point of view to the termination of a contract due to an unlawful request for resignation and/or intolerable employment conditions for the employee to continue working, as created by the employer.

47. The Tribunal underlines that a coerced offer made to an employee to resign and/or to choose between resigning and being dismissed followed by a resignation is different from a separation based on the parties' agreement prior to the expiration of the contract, pursuant to staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi).

48. An agreed termination of a staff member followed by his/her separation is based on a lawful offer presented by the employer and freely accepted by the employee and can only take place if the action is not contested by the staff member. In other words, such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of the legal symmetry rule and the Secretary-General's initiative to terminate the staff member's contract is, in this case, an offer to the staff member. If the staff member accepts freely and unequivocally, the offer is then an agreed termination and the parties can come to an agreement orally or in writing.

49. When alleging that his/her resignation is a constructive dismissal, a former employee must generally prove that s/he was requested to resign by the employer and this request was unlawful and/or s/he resigned because s/he was subjected to coercion, duress, and/or undue influence to resign, or her/his working conditions deteriorated to such a level that it became intolerable for her/him to continue working for the employer in question.

50. In light of the above considerations, the Tribunal will firstly analyze whether the Applicant's resignation constitutes a constructive dismissal and therefore an administrative decision appealable before the Tribunal.

51. As results from the uncontested facts, on 17 November 2016, the Chief of ETS/DGACM expressly requested the Applicant to "[…] send [his] letter of resignation from [his] current WAE contract, effective immediately", based on the reasons set out in an email dated 17 November 2016 from the EO/DGACM, [name redacted, Mr. MMG], to [name redacted, Ms. CE], copying [name redacted, Ms. KD, Chief of ETS/DGACM].

52. Noting that, pursuant to staff rule 9.2, a resignation is a separation initiated by a staff member, the Tribunal considers that, in the present case, the Applicant's resignation was not an act of his free will, but was instead a response to an express request/demand of the Administration. Even though the act of resignation appeared to be voluntary, in reality the Applicant had no real alternative since he was requested to resign immediately, and it was reasonable for him to believe that, in case of a refusal to do so, the alternative would have been either his dismissal and/or his daughter's separation. The Tribunal considers that the Applicant's fear was reasonable due to the fact that in 2012, while the Applicant was having an ongoing WAE contract, he was requested to resign before a temporary contract was offered to his daughter and accepted by her, which he did. In the email the Applicant sent on 17 November 2016 in which he presented his resignation, he clearly indicated that he was a staff member prior to the employment of his daughter, Ms. SL, and expressed in this way his disagreement with the interpretation provided by the EO/DGACM related to the application of staff rule 4.7(a) to his contract.

53. The Tribunal further considers that as results from the Respondent's submissions, the Applicant's separation was a result of the request for his resignation and the parties at any point did not enter into discussions/negotiations for an agreed termination based on an offer presented by the Organization.

54. It results that, in these circumstances, the Applicant's resignation was not an exercise of free will, but a response to the Administration's request for his resignation, which had a direct effect on the Applicant's 2016 employment contract that ended on 17 November 2016, approximately one-and-a-half month earlier than the contract's expiration date—31 December 2016 and on his 2017 contract which was not executed—and this constitutes a constructive dismissal. As a consequence, the application concerns an administrative decision which can be contested before the Dispute Tribunal.

55. Regarding the second condition, the Tribunal notes that the Applicant filed a management evaluation request of the contested decision on 14 December 2016, within 60 days since 17 November 2016, and in which the Applicant stated that his resignation was a constructive dismissal, and this condition is fulfilled.

56. Consequently, both conditions for the application to be receivable *ratione materiae* and *ratione temporis* are fulfilled.

*On the merit*s

57. In light of the above conclusion that the contested administrative decision is a constructive dismissal, the Tribunal will analyze its lawfulness, namely if the request for the Applicant's resignation pursuant to staff rule 4.7(a) was legitimate.

Universal legal provisions regarding the right to work and to freely choose or accept an employment

58. The Tribunal notes that the United Nations Charter adopted by the General Assembly in 1945 provides as follows:

> Article 101
>
> 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

> 2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
>
> 3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

59. The Tribunal also notes that the Universal Declaration of Human Rights adopted by the General Assembly in 1948 provides that:

> Article 23
>
> 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
>
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
>
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> 4. Everyone has the right to form and to join trade unions for the protection of his interests.

60. The Tribunal further notes that the International Covenant on Civil and Political Rights adopted by the General Assembly in December 1966 states that:

> Article 26
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

61. Moreover, the Tribunal notes that the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966 states as follows:

> Article 6
>
> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

62. Universal legal conventions/treaties establishing the fundamental principles of international human rights law, such as the ones mentioned above, constitute the legal foundation of and are directly applicable to and by all organizations and entities founded/created after their adoption by the United Nations General Assembly, at the international, regional and national level, in order for them to promote, protect and monitor the implementation of fundamental human rights, including the United Nations—the leading promoter of human rights around the world.

63. The Tribunal considers that it clearly results from these universal conventions/treaties, which constitute universal legal instruments, that the right to work, which is one of the equal and inalienable rights of all members of the human family, cannot be denied and/or limited. Moreover, discrimination of individual(s) on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (including but not limited to family relationships), is prohibited.

64. The Tribunal considers, in light of the mandatory provision of staff regulation 1.1(c) and jurisprudence established by the Dispute Tribunal in *Villamoran* UNDT/2011/126 (confirmed by the Appeals Tribunal in *Villamoran* 2011-UNAT-160 and *Korotina* UNDT/2012/178 – not appealed) that at the top of the hierarchy of the Organization's internal legislation is the United Nations Charter, which was signed on 26 June 1945 and entered into force on 24 October 1945, together with other universal conventions/treaties, including but not limited to the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the United

Nations General Assembly on 16 December 1966 and entered into force respectively on 3 January 1976 and 23 March 1976, followed by Staff Regulations adopted by the United Nations General Assembly and Staff Rules adopted by the Secretary-General and other relevant resolutions and decisions adopted by the General Assembly, Secretary-General's bulletins and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

65. Further, the Tribunal considers that, from the mandatory provision of staff regulation 1.1(c), it results that the Secretary-General is mandated by the General Assembly to adopt Staff Rules which must follow the principles established in the United Nations Charter, in the Staff Regulations and in other relevant resolutions and decisions adopted by the General Assembly with the purpose of implementing them, and the Secretary-General must ("shall") exercise his mandate ensuring that the rights and obligations of the staff members as set out in these texts are fully respected.

66. The Tribunal notes that the Appeals Tribunal has ruled in this sense in *Ovcharenko et al.* 2015-UNAT-530, para. 35, stating as follows:

> … Decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision […] must be considered lawful, having been taken by the Secretary-General in accordance with the content of higher norms.

67. The Tribunal considers that, *per a contrario*, the decisions taken by the Secretary-General, including the decisions to implement and/or execute Staff Regulations established by the General Assembly, General Assembly resolutions and/or decisions, which are not in accordance with the content of higher norms, are unlawful.

68. Consequently, the Staff Rules cannot limit in part or in whole or extend the area of application of Staff Regulation(s), including the ones regarding appointments. Further, as results from staff regulation 1.1(c), the Secretary-General must exercise his mandate in adopting Staff Rules that consistent/conform to and follow the Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly, and he must ensure that the rights and obligations of the staff members, as set out in Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly, are fully respected.

69. The Tribunal considers that any Staff Rules which introduce modifications/changes consisting in limitations and/or extensions of area of application of the United Nations Charter, the Staff Regulations and other decisions and resolutions adopted by the General Assembly, unless corroborated (read together) with the higher legal norms, are null and void since the Staff Rules derive directly from these documents and cannot limit/exceed their letter and spirit. As indicated previously, the United Nations Charter, the Staff Regulations and other decisions and resolutions adopted by the General Assembly are to be implemented accordingly in the Staff Rules regarding the staff members' rights and obligations and, in case there is any contradiction between them, the United Nations Charter, the Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly prevail.

Procedural history of staff regulations 1(c), (d) and (e), 4.1-4.4, and staff rule 4.7, and comparative analysis

70. The Tribunal notes that in 1946, the General Assembly adopted the first Provisional Staff Regulations which entered into force on 13 February 1946 containing the following provisions in relation to appointments:

> Regulation 10
> Men and women are equally eligible for all posts in the Secretariat.
>
> Regulation 11

> So far as practicable, appointments to posts in the Secretariat shall be made on a competitive basis.
>
> Regulation 12
>
> Persons appointed to permanent posts in the Secretariat shall serve such probationary periods as may be prescribed by the Secretary-General.

71. Having carefully reviewed the content of all United Nations General Assembly resolutions adopted between 1946 and 1948, the Tribunal notes that there is no staff regulation established by the General Assembly with a specific reference to employment/recruitment of staff members of the same family and/or family relationships which was to be implemented by the Secretary-General through Staff Rules.

72. Based on the above-mentioned regulations, the Provisional Staff Rules became effective on 16 February 1946, prior to the publication of Secretary-General Bulletin ST/SGB/3 on 9 March 1946 with the following relevant provisions regarding appointments (emphasis omitted):

> Rule 1 - Application
>
> A record shall be kept of the current applications for employment in the Secretariat which appear to merit consideration. Definite time periods shall be established for each main category of posts after which applications shall be considered to be invalid. The valid applications of persons who appear to possess suitable qualifications shall be examined whenever it is proposed to make a new permanent appointment.
>
> […]
>
> Rule 3 – Assignment to duties
>
> Members of the staff shall be assigned their duties by the Secretary-General or by his authorized representatives. Subject to the terms of his appointment a staff member may be required to work in any department or activity of the [United Nations] Secretariat, but in making assignments the qualifications of each individual shall receive consideration.

73. These Provisional Staff Rules were in accordance with the Provisional Staff Regulations and no limitations were established by the Secretary-General regarding

the appointments in the United Nations Secretariat of individuals who were relatives (father, mother, son, daughter, brother or sister) or spouses of a staff member.

74. Between February 1946 and May 1948, no amendments were adopted by the General Assembly to the Provisional Staff Regulations regarding the appointment of United Nations staff members. However, in May 1948, the Secretary-General introduced a new mandatory staff rule regarding appointments stating that appointments should not be granted to a father, mother, son, daughter, brother or sister, "except in extraordinary circumstances where another person equally well-qualified cannot be recruited", which entered into force on 1 July 1948. The new staff rule 58 was included in the Secretary-General's report A/551 of 13 May 1948 submitted, as requested, to the General Assembly, and titled "Codification of Staff Rules – Secretary-General's Report and stated as follows:

> Rule 58 - Employment of staff members of the same family
>
> (a) Appointments shall not be granted to a person who is closely related by blood or marriage to a staff member, except in extraordinary circumstances where another person equally well-qualified cannot be recruited.
> (b) Normally, only one member of a closely related family group shall be granted an indeterminate appointment.
> (c) Staff members closely related by blood or marriage shall not be assigned to serve in the same department if one of the posts is subordinate to the other in the line of authority.410-

75. No resolution was adopted by the General Assembly between May and December 1948 to approve the proposed amended Staff Rules. On 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights.

76. The above-mentioned staff rule 58 of 1948 was not revised after the adoption of the Universal Declaration of Human Rights. Further, having carefully reviewed the content of all resolutions adopted by the General Assembly between January 1949 and December 1952, the Tribunal notes that there was no amendment to the relevant Staff Regulations established by the General Assembly or new additional Staff

Regulation(s) established by the General Assembly with specific reference to appointment/recruitment of staff members of the same family, as formulated in the proposed staff rule 58 by the Secretary-General in May 1948, to justify the amendment of the Staff Rules by introducing this new staff rule.

77. By ST/AFS/SGB/94 (Staff Rules) adopted on 1 December 1952, staff rule 58 was revised and renumbered as staff rule 104.10, "Family relationships", with the following content:

> Staff Rule 104.10
>
> (a) Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: husband, wife, father, mother, son, daughter, brother or sister.
>
> (b) Staff members who bear any of the relationships specified in (a) above shall not be assigned to serve in the same department if one of the posts is subordinate to the other in the line of authority.
>
> (c) If two staff members marry, the benefits and entitlements which accrue to them shall be modified as provided in the relevant staff rules; their appointment status shall not, however, be affected.

78. The Tribunal notes that between 1952 and 1980, no changes were adopted by the General Assembly to the relevant Staff Regulations.

79. Some Staff Rules, including staff rule 104.10, were amended on 15 July 1980 retroactively from 1 January 1980 by ST/SGB/Staff Rules/1/Rev.5/Amend.1, stating that "Rule 104.10, Family relationships, is amended with effect from 1 January 1980 to provide for greater flexibility in the employment of spouses of staff members". Prior to the adoption of ST/SGB/Staff Rules/1/Rev.5/Amend.1 on 15 July 1980, ST/AI/273 was adopted on 4 March 1980 stating as follows:

> 1. The purpose of the [Administrative Instruction ("AI")] is to introduce, with effect from 1 January 1980 to provide for greater flexibility in the application of staff rule 104.10 with regard to the employment of spouses and to provide guidelines in regard to the assignment of married couples to the same duty station, with a view

> to fostering equal employment and career development opportunities for women in the [United Nations] Secretariat. […]
>
> Conditions for recruitment and service of spouses
>
> 2. The limitation of staff rule 104.10 (currently staff rule 4.7) on the appointment of persons related to a staff member shall no longer apply to the appointment of a spouse of a staff member provided that (a) the spouse is fully qualified for the post for which he or she is being considered, (b) the spouse is not given preference by virtue of the relationship and (c) under no circumstances shall either spouse be assigned to a post which is supervised or administered by the other. Furthermore, staff members whose official functions would involve them in the process of reaching or reviewing any decision affecting their spouses, shall disqualify themselves from undertaking or participating in such processes.
>
> […]
>
> 3. Staff rule 104.10 [currently] and other relevant [S]taff [R]ules will be amended as appropriate.
>
> […]

80. The Tribunal notes that between 1948 and 1980, the content of former staff rule 58 and staff rule 104.10 was identical, even if the last part of staff rule 58 was repositioned at the beginning of staff rule 104.10.

81. The Tribunal notes that the relevant Staff Regulations remained unchanged between 1980 and 2009. The text of staff rule 104.10 remained the same until 2009 when, by ST/SGB/2009/7, staff rule 104.10 was replaced by staff rule 4.7. The content of former staff rule 104.10(a) was changed in the sense that the part "[e]xcept where another person equally well qualified cannot be recruited" was removed from staff rule 4.7(a), which then contained the following: "An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member".

82. Based on a comparative analysis of the text of art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 26 of the International Covenant on Civil and Political Rights, art. 6.1 ofthe International Covenant on Economic, Social and Cultural Rights, the Staff Regulations adopted by the General Assembly, and the text of former staff rules

58(a)(b) and 104.10(a)(b) and current staff rule 4.7(a)(c), the Tribunal identifies the following procedural irregularities:

a. Former staff rule 58(a)(b) was proposed by the Secretary-General in the absence of any General Assembly resolution and/or Staff Regulations adopted by the General Assembly in a report submitted in May 1948, which does not appear to have been approved in any of the published General Assembly resolutions between September and December 1948. It results that the text was drafted at the initiative of the Secretary-General without prior legal framework adopted by the General Assembly.

b. Former staff rule 58(a)(b), as an inferior document, was required to respect and reflect the mandatory and cumulative conditions for the appointment of United Nations staff members established in art. 101 paras. (1) and (3) of the United Nations Charter, namely that:

i. The staff members in the United Nations Secretariat must ("shall") be appointed by the Secretary-General under the Staff Regulations established by the General Assembly;

ii. Given the paramount consideration in the employment of staff members and in the determination of the conditions of service, it is necessary to ensure that the appointed staff members adhere to the highest standards of efficiency, competence, and integrity. Due regard shall also be paid to the importance of recruiting the staff members on as wide a geographical basis as possible.

c. Staff rule 58 was introduced in July 1948 modifying the previous staff rules by denying in its para. (a) the right to employment in the United Nations Secretariat of persons who were relatives of a staff member, namely a father, mother, son, daughter, brother and sister or a spouse of a staff member in case they were equally well-qualified as another individual, and was contrary to the previous Staff Regulations adopted by the General Assembly. The general

rule established in the Staff Regulations that "[m]en and women are eligible for all posts in the [United Nations] Secretariat" and that "[a]ppointments shall be made on a competitive basis" was changed into an exception for the category of persons indicated above, indicating that they are to be appointed if they are the only qualified candidates and another person equally well-qualified could not be recruited, and their right to work and to freely choose their place of employment was flagrantly breached. The Tribunal notes that the staff rule which was exceeding the Staff Regulations established by the General Assembly in January 1946 was never approved by a General Assembly resolution. The Tribunal also notes that staff rule 58 was not revised after December 1948 when the General Assembly adopted the Universal Declaration of Human Rights, which defined in its art. 23 the right to work and to free choice of employment as being inalienable human rights.

d. The text of former staff rule 58 continued to exist in an identical form in all subsequent Staff Rules adopted by the Secretary-General between 1948 and 1952. This staff rule, which was renumbered and amended in 1953 as staff rule 104.10, maintained a similar prohibition of the right to work and to freely choose the place of employment for any person who was having the following relationship to a staff member: husband, wife, father, mother, son, daughter, brother or sister, and introduced a new mandatory requirement that any of the persons indicated above were not to be assigned to serve in the same department if one of the posts was subordinate to the other in the line of authority. Staff rule 104.10 was not revised in 1976 when the 1966 International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights entered into force in 1976 to reflect the mandatory content of art. 6 and art. 26 of each Covenant respectively, and it remained applicable to all individuals mentioned previously until 1980 when the staff rule was amended. The Tribunal notes that the amendment of this staff rule in 1980 was introduced firstly by ST/AI/273 (Employment of spouses) adopted on 4 March 1980 followed by ST/SGB/StaffRule/1/Rev.5/Amend.1

(Staff Rules) adopted on 15 July 1980, and the amendment was to be implemented retroactively on 1 January 1980, without observing the general principle of non-retroactivity of civil law, according to which a law is always enforced on the day of its promulgation and cannot be applied retroactively. The Tribunal notes that the Appeals Tribunal has addressed this general principle in *Assale* 2015-UNAT-534, para. 34, stating that:

> … […] In *Hunt-Matthes* 2014-UNAT-444/Corr.2, para. 26, "we restated the well-known principle of law against retrospective application of laws, noting: 'The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and hold[s] that since the incident in question occurred before [the administrative issuance] was promulgated it is not applicable in this case.'" In the context of Mr. Assale's case, the "incident in question" before the [Dispute Tribunal] was the non-renewal decision, which was made on 29 November 2010. Since the 2010 Administrative Instruction was in effect on that date, the [Dispute Tribunal] made an error of law in retroactively applying the 2011 Administrative Instruction".

The amendment of staff rule 104.10 was adopted to provide a greater flexibility in the application of the rule with regard to the employment of spouses of staff members, and resulted in establishing different legal regimes among the individuals of the same group of relatives of United Nations staff members indicated in para. (a), namely maintaining the prohibition for the father, mother, son, daughter, brother or sister to be appointed in the United Nations Secretariat, and removing the "husband and wife" from this category in order to allow a larger flexibility regarding the appointment of spouses.

e. In 1984, ST/SGB/StaffRules/1/Rev.6 removed the mention of "wife, husband" from staff rule 104.10(a), and the exception for the husband or wife was added in staff rule 104.10(b) as follows (emphasis added):

> (a) *Except* where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to

> a staff member: father, mother, son, daughter, brother or sister.
>
> (b) The husband or wife of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

Former staff rule 104.10(b) (emphasis added)

> (b) Staff members who bear any of the relationships specified in (a) above shall not be assigned to serve in the same department if one of the posts is subordinate to the other in the line of authority.

became staff rule 104.10(c), and it was amended as follows:

> (c) A staff member who bears to another staff member any of the relationships specified in (a) and (b) above:
>
> > (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
> > (ii) Shall disqualify himself or herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

The Tribunal notes that all the individuals identified in para. (a), who were allowed to be appointed as staff members, were no longer allowed to serve in posts in the same department as their relative or spouse, limiting the area of employment and excluding them from being appointed in the same department as their relative, even if his/her post was not superior or subordinate in the line of authority to the staff member to whom s/he was related.

f. The amended text of staff rule 104.10 was applied until 2009, when the staff rule was renumbered as staff rule 4.7 and amended in its para. (a) as follows: "[a]n appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member".

83. The Tribunal notes that the previous part of the text "[e]xcept where another person equally well qualified cannot be recruited", which was regulating the possibility to appoint individuals such as father, mother, son, daughter, brother or sister of a staff member in the United Nations Secretariat in cases where they were the only qualified candidates for the post, was completely eliminated without the General Assembly amending the existing relevant Staff Regulations or adopting new Staff Regulations regarding appointments in this sense.

84. The Tribunal notes that the only administrative instruction adopted regarding the application of former staff rule 104.10 (currently staff rule 4.7) which is still in effect is ST/AI/273 (Employment of spouses) adopted on 4 March 1980 which states as follows:

> 1. The purpose of the [Administrative Instruction ("AI")] is to introduce, with effect from 1 January 1980, greater flexibility in the application of staff rule 104.10 with regard to the employment of spouses and to provide guidelines in regard to the assignment of married couples to the same duty station, with a view to fostering equal employment and career development opportunities for women in the [United Nations] Secretariat. […]
>
> <u>Conditions for recruitment and service of spouses</u>
>
> 2. The limitation of staff rule 104.10 (currently staff rule 4.7) on the appointment of persons related to a staff member shall no longer apply to the appointment of a spouse of a staff member provided that (a) the spouse is fully qualified for the post for which he or she is being considered, (b) the spouse is not given preference by virtue of the relationship and (c) under no circumstances shall either spouse be assigned to a post which is supervised or administered by the other. Furthermore, staff members whose official functions would involve them in the process of reaching or reviewing any decision affecting their spouses, shall disqualify themselves from undertaking or participating in such processes.
>
> […]
>
> 9. Staff rule 104.10 [currently staff rule 4.7] and other relevant [S]taff [R]ules will be amended as appropriate.

85. The Tribunal concludes that staff rule 4.7 has no legal basis in the Staff Regulations and that the content of staff rule 4.7(a), which denies the right to work of

the individuals who are the father, mother, son, daughter, brother or sister of a United Nations staff member, and the content of staff rule 4.7(b) which limits the right to work of the spouse of a United Nations staff member, is contrary to art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 6 of the International Covenant on Economic, Social and Cultural Rights and art. 26 of the International Covenant on Civil and Political Rights, cannot have legal effect, unless corroborated (read together) with these higher norms.

Whether the Administration's application and interpretation of staff rule 4.7(a), based on which the Chief of ETS/DGACM requested the Applicant's resignation, was lawful

86. The Tribunal notes that over the years, the issue of applicability and/or interpretation of former staff rule 58 and staff rule 104.10, currently staff rule 4.7, to the individuals recruited in the Organization, including in the United Nations Secretariat, through a competitive recruitment/selection examination, including through the National Competitive Recruitment Examination ("NCRE") or the LCE like it is the case in ETS/DGACM, was subject to different and contradictory approaches, all of them based exclusively on the plain language of the staff rule, especially regarding its para. (a), which was interpreted and applied as an isolated and discriminatory legal provision without being corroborated (read together) with para. (c) of the staff rule and/or with the higher/superior legal norms, as presented above.

87. ST/AI/2010/3 (Staff selection system) establishes the procedures applicable to the staff selection process (sec. 2.6). The staff selection system manuals for the Recruiter's Manual, the Hiring Manager's Manual, the Applicant's Manual, the Department Head's Manual and the Central Review Bodies Manual include specific provisions regarding the interpretation and application of staff rule 4.7.

88. As results from letters issued in 2003 by [name redacted, Mr. M] and by [name redacted, Ms. JB] that the Applicant filed in the present case, DGACM proposed the reinstitution of the policy which was applied for a considerable period of time by

OHRM in the sense that the individuals who had a parent or sibling already working for the United Nations Secretariat or one of the Funds and Programmes could be allowed to take a competitive recruitment examination, even though they had a family relationship referred to in staff rule 104.10(a), and that they could be appointed if they passed the examination. DGACM proposed that Human Resources Officers in OHRM be made fully aware of the policy so that no difficulties were to be raised based on the family relationship of a candidate successful in a competitive recruitment examination.

89. Further, as results from the present case, the previous inherited restrictive interpretation of the plain language of former staff rule 58 and staff rule 104.10(c) continues to apply in the same manner to staff rule 4.7(a) as prohibiting ("shall not") the appointment of a person who is the father, mother, son, daughter, brother or sister of a United Nations staff member, while staff rule 4.7(b) is interpreted as allowing ("may") the appointment of the spouse of a United Nations staff member.

90. The OHRM manuals reaffirmed this interpretation and extended the area of application of staff rule 4.7(a) also to "step-children or step-siblings" of a United Nations staff member (secs. 7.4.1.3 – Family Relationships from both the Hiring Manager's Manual and the Recruiter's Manual).

91. The Tribunal notes that, as results from the uncontested facts, the Applicant, a retired United Nations staff member who was previously working as a Translator in ETS/DGACM and who is part of the free-lance/WAE pool used by ETS/DGACM, was regularly hired between 2012-2016 by ETS/DGACM on annual temporary assignments under WAE contracts, primarily to revise summary records from the Fifth Committee.

92. The Applicant was granted a WAE contract from 1 April 2012 to 31 December 2012 as a Reviser in ETS/DGACM in the United Nations Secretariat. Pursuant to staff rule 4.7(a), which was included in his 2012 contract, he was required to resign effective 5 October 2012 to permit the initiation of the recruitment of his daughter, Ms. SL, on

a short-term contract in ETS/DGACM from 15 October 2012 to 23 November 2012. On 27 September 2012, the Applicant presented his resignation effective close of business on 5 October 2012, but he expressly mentioned that his resignation applied only to his WAE contract expiring on 1 December 2012, and that it was to be without prejudice to any possible future offer of employment with the Organization. In the Applicant's statement of 11 November 2012, he mentioned that his last period of employment in ETS/DGACM ended on 5 October 2012, before the recruitment of his daughter, and that there was no reason for him to be requested to resign. The Applicant considered that the determination of the EO/DGACM that he must resign from his WAE contract appeared to be the result of an erroneous interpretation.

93. Ms. SL was offered two temporary contracts with ETS/DGACM in 2012 and 2013, and she was placed on a roster of Translators after having passed the 2015 LCE for English translators/précis-writers.

94. The Applicant received the offer of a temporary appointment on 22 December 2015 and signed it on 1 January 2016; the contract was due to expire on 31 December 2016. The offer of the temporary appointment contained the following clause: "Under [s]taff [r]ule 4.7(a), 'An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member'. By accepting this offer, [the Applicant] certify[ies] that [he has] no relationship with any staff member of the United Nations Secretariat that contravenes [s]taff [r]ule 4.7(a)". On 1 January 2016, when the Applicant signed his Offer of a Temporary Appointment on a WAE contract made on 22 December 2015, his daughter was not yet employed by the United Nations Secretariat.

95. On 12 January 2016, the Chief of ETS/DGACM requested clarification from [name redacted, Mr. MRT-P], Acting Director of DD/DGACM as follows:

> Dear [Mr. MRT-P],
>
> As you know, [Ms. SL] has been rostered after passing the 2015 LCE for English translators/précis-writers. [Ms. SL's] father,

> [the Applicant], is a retiree who is regularly hired by ETS/[DGACM, United Nations Headquarters] on annual WAE contracts, primarily to revise summary records of the Fifth Committee. Further to our discussion at the Chiefs' meeting yesterday, I would appreciate having confirmation from you that current policy does not preclude the recruitment of [Ms. SL] by any office of the United Nations Secretariat.
>
> Best regards,
>
> [Ms. KD]

96. On the same day, the Acting Director DD/DGACM, in his response, confirmed that:

> […] what [he] said at yesterday's Chiefs' meeting, i.e. the fact that [Ms. SL's father] is a retired staff member who is part of the free-lance/WAE pool used by the English Service does not preclude [Ms. SL] from being recruited following her success at the 2015 [LCE].
>
> Best regards,
>
> [Mr. MRT-P]

97. Ms. SL received an offer for a two-year fixed-term appointment with the United Nations Secretariat on 24 February 2016, which she accepted on 2 March 2016, and which did not include any reference to staff rule 4.7(a). Before Ms. SL was offered the two years fixed-term contract, Ms. KD, the Chief of ETS/DGACM, received confirmation from the Acting Director of DD/DGACM, Mr. MT-P, that her father's ongoing WAE contract would not constitute an impediment for her being employed by the United Nations Secretariat and for the Applicant to continue working until the expiration of his contract.

98. Unlike in 2012, when Ms. SL received the temporary offer of employment only after her father submitted his resignation as requested, in 2016 she received the offer for a two-year fixed-term appointment and accepted it, without the Applicant being requested to resign before or after the offer having been made, and the offer did not include any reference to staff rule 4.7(a). Moreover, the Applicant continued to work after March 2016, when his daughter signed her contract, and, on 27 October 2016, he

was offered another WAE contract for one-year for 2017, which he accepted on the same day.

99. The EO/DGACM, Mr. MMG, expressly requested the Applicant to resign immediately in a 17 November 2016 email to (name redacted, Ms. CE), copying Ms. KD, Chief of ETS/DGACM, based on the following reasons (emphasis in the original):

> Dear [Ms. CE],
>
> I would like to refer to your message […] and bring this case to closure.
>
> I would like to reiterate that [s]taff [r]ule 4.7(a) prohibits the employment of a person who is the father, mother, son, daughter, brother or sister of a staff member. Such is the case of [the Applicant] whose daughter, [name redacted, Ms. SL] who was recently recruited by the Organization on a two year fixed-term appointment. While the father, [the Applicant], is a retiree, he becomes a staff member once employed by the Organization. Therefore, employing both father and daughter at the same time clearly contravenes the staff rules.
>
> To further avert this situation, in 2010, OHRM incorporated the specific statement on the offers of appointment that staff (retirees, former staff) sign accepting the offer of appointment; […] [the Applicant] is well aware of this provision.
>
> > **<u>ACCEPTANCE</u>**
> >
> > Under [s]taff [r]ule 4.7(a) "An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member." By accepting this offer, I certify that I have no family relationship with any staff member of the United Nations Secretariat that contravenes [s]taff [r]ule 4.7(a).
> >
> > I hereby accept this offer of appointment and the conditions herein specified, subject to any modifications to the Staff Regulations and Rules.
> >
> > […]
>
> OHRM's waiver dated December 2003 that has been referred to in previous emails has been superseded with the introduction of the revised staff rule in 2009.

> In light of the above, we see no merits in raising the matter with [the Office of Legal Affairs, ("OLA")] or with OHRM. DGACM is obliged to adhere to the staff rules. Under the circumstances [the Applicant] needs to tender his resignation immediately.
>
> Sorry that I am unable to be more helpful with this one.
>
> With best regards,
>
> [Mr. MMG]

100. On 17 November 2016, Ms. KD sent an email to the Applicant, copying Ms. CE, the EO/DGACM, which read as follows:

> Dear [Applicant],
>
> In accordance with the e-mail below from the [EO]/DGACM, please send your letter of resignation from your current WAE contract, effective immediately.
>
> Best regards,
>
> [Ms. KD]

101. On 17 November 2016, Ms. KD, based on the EO/DGACM's email of 17 November 2016, expressly requested the Applicant to give his resignation with immediate effect, based on the clause from his contract related to staff rule 4.7(a).

102. It results that in the Applicant's case staff rule 4.7(a) was interpreted incorrectly without being corroborated (read together) with art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human rights, art. 6 of the International Covenant on Economic, Social and Cultural Rights and art. 26 of the International Covenant on Civil and Political Rights.

103. The Tribunal notes that staff rule 4.7 on family relationships in the first three paras. states as follows:

> (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.
>
> (b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

> (c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:
>
> > (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
> >
> > (ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

104. The Tribunal considers that staff rule 4.7(a), which provides that "[a]n appointment shall not be granted to a person who is a father, mother, son, daughter, brother or sister", must be read together with para. (c)(i) and (ii) in case an appointment is to be granted to a person who is the father, mother, son, daughter, brother or sister of a United Nations staff member. Further, staff rule 4.7(a) and (c) must be interpreted and applied together with art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 6 of the International Covenant on Economic, Social and Cultural Rights and art. 26 of the International Covenant on Civil and Political Rights.

105. Similarly, staff rule 4.7(b) which provides that "[t]he spouse of a staff member may be appointed provided that s/he is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member" is also to be read, applied and interpreted together with staff rule 4.7(c)(i) and(ii) together with art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 6 of the International Covenant on Economic, Social and Cultural Rights and art. 26 of the International Covenant on Civil and Political Rights, in case an appointment is to be granted to a person who is the spouse of a United Nations staff member.

106. The Tribunal considers that staff rule 4.7(c) determines the area of application of staff rule (a) and (b), namely identifying expressly what appointments are excepted and therefore not to be granted to a person who is the father, mother, son, daughter, brother or sister of a United Nations staff member, or to a person who is the spouse of

a United Nations staff member, namely the appointments to posts which are superior or subordinate in the line of authority to the staff member to whom s/he is related. According to the general principle "*exception est strictissimae interpretationis*" (an exception has a strict interpretation), as any exception, staff rule 4.7(c) has a strict interpretation.

107. It results that staff rule 4.7(a) and (b) has a limited and express area of application as established in staff rule 4.7(c) and that, *per a contrario*, a person who is the father, mother, son, daughter, brother or sister of a staff member and who applied to a post, was considered and was selected through a competitive selection process as being the best candidate, can be assigned to any post, including in the same department/unit which is not superior or subordinate in the line of authority to the staff member to whom s/he is related. This interpretation is in line with art. 101 of the United Nations Charter (which establishes that the paramount consideration in recruiting and appointing United Nations staff members is their competence). Further, art. 23 of the Universal Declaration on Human Rights, art. 26 of the International Covenant on Civil and Political Rights and art. 6 of the International Covenant on Economic, Social and Cultural Rights, which define the rights of any individual to work, to free choice of employment, to just and favourable conditions of work, as being inalienable and fundamental human rights which are to be effectively protected by law, including but not limited to, any prohibition and/or denial on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, birth or other status. It results that staff rule 4.7(c), by establishing that the posts which are superior or subordinate in the line of authority to a United Nations staff member, are not to be assigned to another staff member to whom s/he is related, institutes an exception with a strict area of application which cannot be extended and transformed in a general rule. Such an interpretation will breach the fundamental rights to work and to free choice of employment of any individual who is the father, mother, brother, sister, son or daughter.

108. This Tribunal concludes in the above considerations that any individual, including the father, mother, son, daughter, brother or sister and/or the spouse of a United Nations staff member, has the inalienable right to work, to a free choice of employment, including within the United Nations, to be protected against unemployment and discrimination based on any ground such as race, color, gender/sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including family status. Consequently, the Tribunal is of the view that any individual, including the father, mother, son, daughter, brother or sister and/or the spouse of a United Nations staff member, has the right to apply, to be fully and fairly considered through a competitive meritorious process, to be shortlisted and selected as the best candidate, and to be appointed under any type of contract (temporary/WAE, fixed-term, and/or continuous/permanent appointments), to any post within the United Nations, including in the United Nations Secretariat, in the same department/unit and/or in a different department/unit, except the post(s) in the same department(s)/unit(s) which is/are superior and/or subordinate in the line of authority to the staff member to whom s/he is related.

109. Furthermore, there is no legal basis for the Organization/Administration to refuse to:

a. Automatically reject the candidacy of any individual based on her/his family status;

b. Appoint an individual as a staff member in the United Nations to post(s) in any department(s), including in the same department where his/her relative/spouse was previously appointed, except the ones which are superior or subordinate in the line of authority to the staff member to whom s/he is related;

c. Request the resignation and/or to terminate the contract of a staff member who has a family relationship with another staff member (father, mother, brother, sister, son, daughter, spouse); and/or

Conclusion

110. The Tribunal concludes that the request for the Applicant's resignation, which constitutes a constructive dismissal, is unlawful for the following reasons:

a. The decision was based on staff rule 4.7(a) which is of discriminatory nature in itself and the Administration failed to apply and interpret this provision (staff rule 4.7(a)) together with staff rule 4.7(c) and in accordance with the higher norms, namely art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 26 of the International Covenant on Civil and Political Rights, and art. 6 of the International Covenant on Economic, Social and Cultural Rights.

b. The Administration's (EO/DGACM) request for the Applicant's resignation made by OHRM eight (8) months after the Applicant's daughter, Ms. SL, signed a two years fixed-term contract with the same unit—ETS/DGACM—was not legal since it was based not only on an erroneous interpretation of staff rule 4.7(a), which was made without observing the higher norms and staff rule 4.7(c), but also on a wrongful interpretation of the mandatory provisions of sec. 5.1 of ST/AI/2003/8. According to sec. 5.1(a) and (b) of ST/AI/2003/8, former staff members are to be employed when the operational requirements of the Organization cannot be met by staff members who are qualified and available to perform the required functions, and a proposed employment would not adversely affect the career development or redeployment opportunities of other staff members, representing both a cost-effective and operationally sound solution to meet the needs of the service. The EO/DGACM, who issued the request for the Applicant's resignation in November 2016 to the Chief of ETS/DGACM, was of the view that staff rule 4.7(a) was applicable to the Applicant, ignoring the correct decision made on 12 January 2016 by Mr. MRT-P, the Acting Director of DD/DGACM, who, on behalf of the Organization, decided that the Applicant, as a retiree from the Organization working on a temporary WAE appointment

and given his extensive experience of 35 years in ETS/DGACM related to the working sessions of the Fifth Committee, had the right to be employed in the interest of the Organization at the same time as his daughter, Ms. SL, in the same unit, namely ETS/DGACM, being therefore excepted, in the interest of the Organization, from the application of staff rule 4.7(a). The Tribunal considers that, even if the interpretation given by the Administration of staff rule 4.7(a) had been considered to be correct and in accordance with the higher norms, the request for the Applicant's resignation still ignored that the application of staff rule 4.7(a) was previously waived in favor of the Applicant.

c. The Tribunal notes that staff rule 4.7(a) is not applicable to individuals who are already staff members but to their relatives, namely father, mother, son, daughter, brother or sister, who applied to vacant positions within the United Nations, who passed or who were selected through a competitive selection process, and who are to be appointed as United Nations staff member(s).

d. Further, the Tribunal considers that since, in the present case, both the Applicant and his daughter, Ms. SL, were already staff members within the same unit—ETS/DGACM—staff rule 4.7(a) was not applicable to any of them, but their assignments were subject to the application of staff rule 4.7(c), which provides that:

> … A staff member who bears to another staff member any of the relationships specified in para. (a) and (b) above:
>
> (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
>
> (ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

e. As clearly results from the facts, the Applicant or his daughter, due to the specificity of their work, act independently within ETS /DGACM, none of them was assigned to serve in a post which is superior or subordinate in line of

authority to each other and they have no duties based on which they can participate in the process of reaching or reviewing an administrative decision affecting each other status or entitlements.

f. The Tribunal underlines that in the situation when a United Nations staff member who bears to another staff member any of the family relationships mentioned in staff rule 4.7 is appointed without the correct application of staff rule 4.7(c), the only legal remedy is to reassign one of the two staff members to a different post within the same department, subject to availability of suitable posts, or to another department, if possible, on a consensual basis. Such a measure, however, must cover only the situations/exceptions from staff rule 4.7(c)(i) and (ii), which are to be strictly applied and cannot be extended to other situations different from the ones expressly mentioned in the text. A request for the resignation of one or both of them and/or the measure to dismiss one or both of them would constitute an arbitrary and therefore, in accordance with the constant jurisprudence of both the United Nations Appeals Tribunal and the Dispute Tribunal, an unlawful exercise of the Administration's discretion.

111. Based on the above considerations, the Tribunal concludes that the request for the Applicant's resignation, which constitutes a constructive dismissal, is unlawful. Consequently, the appeal is to be granted and the contested decision is to rescinded. Pursuant to art. 10.5(a) of the Dispute Tribunal's Statute, since the contested decision concerns a termination decision, the Respondent is to pay to the Applicant, as an alternative to the rescission of the decision, the amount of USD 10,000.

Relief

112. In his application, the Applicant requests the following:

37. Restoration of eligibility to work at the United Nations:

(a) Specifically, a formal offer of a WAE for 2017 as informally offered and accepted on 27 October 2016; and

> (b) To be considered eligible for further short-term employment.
>
> 38. An equivalent remedy in respect of the period of the WAE for 2016 from the date of [the Applicant's] induced resignation (17 November 2016) to the agreed end-date (16 December 2016) […]: specifically, compensation in an amount equivalent to the amount [the Applicant] would have earned over that period.
>
> 39. If the relief in paragraph 37 is granted, no further relief other than that requested in paragraph 38 is sought.
>
> 40. If not, compensation is requested in an amount equivalent to the potential earnings in 2017 of which [the Applicant] had reasonable expectation, viz., at or close to the permitted maximum of 125 days in a calendar year, bearing in mind the heavy programme of work of the Fifth Committee and that [the Applicant has] worked at or near to that maximum most years since retirement, other than in 2012 and 2013 when [the Applicant] forwent contracts in order to allow [his] daughter to accept short-term contracts in ETS/[DGACM]/NY.

Rescission and pecuniary compensation

113. As results from the above considerations, the contested decision consisting in the Applicant's constructive dismissal is unlawful and, pursuant to art. 10.5 (a) of the Dispute Tribunal's Statute, it is to be rescinded. The Tribunal considers that the rescission of an unlawful termination decision has the *ope legis* effect of the parties being retroactively placed in the same contractual relationship as the one that existed before the issuance of the contested decision. In line herewith, as a basis for any form of compensation, the Appeals Tribunal stated in *Warren* 2010-UNAT-059 (para. 10) that "[…] the very purpose of compensation is to place the staff member in the same position s/he would have been in had the Organization complied with its contractual obligations […]".

114. It results that, in case a termination decision is rescinded, the separated staff member is, in principle, to be reinstated in her/his formal position and s/he is to receive his/her salary and other entitlements from the date when s/he was separated until his/her likely date of separation, as determined by the Dispute Tribunal. However, when a party or both parties expressly indicate that, due to the particular circumstances of

the case, the effective reinstatement no longer constitutes a possible option, the remedy can consist solely in compensation.

115. The Tribunal considers *mutatis mutandis*, in the present case, as an *ope legis* effect of the rescission of the constructive dismissal that, since currently both 2016 and 2017 Applicant's temporary WAE appointments have expired, the Applicant cannot be reinstated. However, the Applicant is entitled to receive compensation, as requested for the period 17 November-31 December 2016, and the Tribunal will grant this part of relief. The Respondent is to pay to the Applicant the salary corresponding to this period and up to 125 days according to ST/AI/2003/8/Amend.2.

116. Regarding the Applicant's request to be considered eligible for further short-term employment with the United Nations Secretariat, the Tribunal concludes that, in light of the above-mentioned considerations included in para. 112(a), the Applicant is eligible to be reemployed by the Organization under a WAE contract in ETS/DGACM since the current employment of his daughter and a future extension of her fixed-term contract cannot adduce any limitation to the Applicant's right to be re-employed with the Organization, pursuant to sec. 5.1 of ST/AI/2003/8, as previously concluded in para. 112(b).

117. Regarding the Applicant's WAE contract from 2017, the Tribunal notes that it was a valid contract which was never executed due to the fact that the Applicant was requested to resign after signing his Letter of Appointment for 2017.

118. The Tribunal considers that an employment contract is an agreement which is established by an offer and a subsequent acceptance by the contracting parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Sprauten* 2011-UNAT-111 determined that "a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate".

119. The Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Dispute Tribunal's Statute refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member's unconditional acceptance of the offer.

120. When formed, the employment contract is a legally binding bilateral act which is agreed upon by the consensual will of the contracting parties and which does not require to be in a written form for it to be valid. It is a contract in which the successful candidate cannot be replaced as this person has been selected after a competitive selection process based on her/his personal skills and competencies (*intuitu personae*) and where this candidate works under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contractual period by each of the parties when they satisfy their respective and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labor.

121. The Tribunal notes that as relief, the Applicant requested material damages resulting from the non-execution of his 2017 contract as an alternative relief to his request to be considered for future WAE contracts with the United Nations Secretariat. The Tribunal considers that it is no longer necessary to pronounce itself on this request for alternative relief, since the Tribunal has already granted the Applicant's request to be considered eligible for future WAE contracts within the United Nations Secretariat.

122. In light of the above considerations, the appeal is to be granted and the contested decision representing a constructive dismissal is to be rescinded.

123. In light of the foregoing, the Tribunal DECIDES:

a. The application is granted in part. The contested decision consisting in the Applicant's constructive dismissal is rescinded. As an alternative to the rescission of the decision, the Respondent is to pay to the Applicant the amount of USD10,000.

b. The Respondent is to pay to the Applicant a compensation consisting in the salary corresponding to the period from 17 November 2016 to 31 December 2016 and up to 125 days according to ST/AI/2003/8/Amend.2.

c. The Applicant is considered eligible for future WAE contracts within the United Nations Secretariat.

Observations

124. The Tribunal observes that there is an immediate need for staff rule 4.7 to be amended and recommends that its paras. (a) and (b), which have a discriminatory content, to be removed in order to prevent any future erroneous application and interpretation contrary to the universal legal provisions regarding the rights of an individual to work and for him/her to freely choose his/her place of employment, as presented above. These provisions, if maintained, can result in discriminatory and therefore unlawful decisions relating to selection/promotion/separation of individuals and/or staff members based on family relationships in the United Nations, including in the United Nations Secretariat. Further, the Tribunal observes that ST/AI/273 of 1980 and the derivated legal provisions (manuals/guidelines), together with the other relevant administrative instructions, are also to be amended in light of the new provisions to be adopted in relation to staff rule 4.7.

125. The Tribunal underlines that in 2002, the International Labour Organization's Administrative Tribunal ("ILOAT") decided in Judgment No. 2120 (Mr. I.M.B. against the International Atomic Energy Agency, ("IAEA")) (according to General Assembly resolution 1145 (XII) of 14 November 1957, the General Assembly approved the Agreement governing the relationship between the United Nations and the IAEA) issued on 15 July 2002, that staff rule 3.03.5 on Family Relationships included in

the IAEA's Secretariat Notice SEC/NOT/1325 (on Employment of Spouses in the IAEA's Secretariat), having an identical content to staff rule 4.7(b), was found to be "[…] unenforceable because it is contrary to fundamental principles of law", stating as follows: "[…] In fact, the provision improperly discriminates between candidates for appointment based on their marital status and family relationship". The ILOAT also found that discrimination on such grounds is contrary to the United Nations Charter, general principles of law and those which govern the international civil service as well as international instruments on human rights. Further, the ILOAT found that according to the principles and terms of art. 26 of the International Covenant on Civil and Political Rights, which includes a "[…] list [that] is not limitative ("… any grounds such as …") all forms of such improper discrimination are prohibited. What is improper discrimination? It is, at least in the employment context, the drawing of distinctions between staff members or candidates for appointment on the basis of irrelevant personal characteristics".

126. The Tribunal expresses its trust in the existing competitive selection system which contains all the legal guarantees to ensure that all individuals applying for United Nations posts are to be selected and appointed based exclusively on their competence without due regard to their family relationships, if any, with a United Nations staff member.

127. The Tribunal expects that the present Judgment is to be presented to the Secretary-General promptly after its publication in order for him to exercise his power to review and amend staff rule 4.7 in line with art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human Rights, art. 26 of the International Covenant on Civil and Political Rights, and art. 6 of the International Covenant on Economic, Social and Cultural Rights, as recommended by the Tribunal.

128. The Tribunal also recommends for the present Judgment to be presented to the Under-Secretary-General of OHRM and to the Assistant Secretary-General of

OHRM, and to be disseminated to all United Nations Human Resources Offices/Departments, including in the United Nations Secretariat, in order to ensure, until the staff rule is effectively amended, a uniform application of the existing provisions of staff rule 4.7, and for the United Nations online application system (Inspira) to be updated in order to eliminate the automatic rejection of the applications filed by individuals who are indicating in their application that they are related to a United Nations staff member, including in the United Nations Secretariat, namely father, mother, son, daughter, brother, sister, or spouse.

(Signed)

Judge Alessandra Greceanu

Dated this 14th day of June 2018

Entered in the Register on this 14th day of June 2018

(Signed)

Morten Albert Michelsen, Officer-in-Charge, New York