



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CHAWLA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant is a staff member of the United Nations Support Office in Somalia (“UNSOS”). He filed an application on 20 October 2021 seeking suspension of the decision to not select him for the position of Chief of Service, Supply Chain Management, D-1, UNSOS (Job Opening 152801). He amended his application on 21 October 2021.
2. The Respondent filed a reply on 25 October 2021.
3. Without seeking leave and/or receiving permission from the Tribunal, the Applicant filed additional submissions on 25 October 2021 and a response to the Respondent’s reply on 26 October 2021.

## **Facts**

4. On 26 and 27 August 2021, the Applicant requested management evaluation and filed an application for suspension of action with the Tribunal to suspend implementation of the decision not to shortlist him for the Competency Based Interview (“CBI”) for Job Opening 152801.
5. On 3 September 2021, the Tribunal granted the Applicant’s application for suspension of action pending management evaluation.<sup>1</sup> On 8 September 2021, the Management Evaluation Unit (“MEU”) informed the Applicant that his 26 August 2021 request for management evaluation was moot because UNSOS had decided to: invite all 28 long-listed candidates, including the Applicant for the CBI; and have one panel member, CT, recuse himself from participating in the Applicant’s interview to avoid any perceived bias.
6. The Applicant participated in the CBI on 23 September 2021.

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<sup>1</sup> Order No. 179 (NBI/2021).

7. On 18 October 2021, the Director of Administration (“DOA”) of UNSOS informed the Applicant of the decision not to select him for Job Opening 152801.

8. The Applicant requested management evaluation on 20 October 2021.

### **Applicant’s submissions**

9. Relying on paragraphs 24 and 25 of *Sareva* Order No. 142 (GVA/2017), the Applicant submits that his application is receivable because a formal offer letter has not been issued to the selected candidate.

10. The contested decision is *prima facie* unlawful because:

a. UNSOS violated ST/AI/2010/3 (Staff selection system) by failing to conduct a technical assessment before hurriedly inviting all long-listed candidates for the CBI. UNSOS should have conducted an anonymous written test of all long-listed candidates.

b. UNSOS violated: sec. 7.3 of ST/AI/2016/1 (Staff selection and managed mobility system) because while one of the panel members for his interview was a female, it is unclear if this requirement was met for the interviews of other candidates and whether it was the same female member for all the interviews; and sec. 7.4 of ST/AI/2016/1 because it is unclear whether all the interview panel members have completed CBI training.

c. UNSOS violated para. 42 of *Mianda* UNDT/2018/060 because one of the panel members, CT, recused himself from the Applicant’s interview but was present for other interviews. Hence, there were four panel members for some interviews but only three for his interview. Since CT recused himself, a new panel should have been constituted to interview all the candidates.

11. Although the selection decision has not yet been implemented nor has any announcement been made yet, it is urgent that any further action of onboarding of the selected candidate be suspended immediately. He has not created the urgency.

12. He would suffer irreparable harm if the administrative decision is implemented because he will be deprived of the opportunity to be placed on the roster.

### **Respondent's submissions**

13. The application is not receivable because the Applicant failed to request management evaluation of the non-selection decision. In his application, the Applicant contests his non-selection for Job Opening 152801; whereas his management evaluation request ("MER") contests the decision not to include him in the roster for Job Opening 152801. The decision not to roster the Applicant for Job Opening 152801 is separate and distinct from the decision not to select him for the position.

14. The Respondent submits further that the Dispute Tribunal lacks jurisdiction under article 2.2 of its Statute because the contested decision has been implemented.<sup>2</sup> The selected candidate for Job Opening 152801 was officially notified of the selection decision on 17 October 2021 and is currently being onboarded. She has confirmed her continued interest and availability for the position. Inspira reflects that an offer has been initiated. Pursuant to section 10.2 of ST/AI/2010/3, the selection decision was implemented with the formal notification of the selection to the selected candidate.

### **Receivability**

15. The Tribunal finds the current application receivable for the following reasons.

#### *Management evaluation*

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<sup>2</sup> See *Passarelli* Order No. 57 (NY/2020), paras. 16-20; *Lackner* Order No. 138 (GVA/2018), paras. 13-15; *Samra* Order No. 195 (GVA/2015), paras. 19-20.

16. The Tribunal rejects the Respondent's submission that the application is not receivable due to the absence of a management evaluation request. While the Applicant's language may have been imprecise, a proper reading of the management evaluation request clearly indicates that he is contesting the non-selection decision contained in the UNSOS DOA's communication of 18 October 2021.

### *Implementation*

17. A suspension of action is only possible regarding decisions that have not yet been implemented. There is rich jurisprudence of the Dispute Tribunal which stresses that, in order for the suspension of action to be a meaningful relief, implementation must not be seen in a mere notification of the dispositive part of a decision; rather, it is required that the impugned decision has produced irreversible consequences.<sup>3</sup> With regard to selection and promotion processes, it has been accepted that a decision is not implemented until the selected candidate has unconditionally accepted the offer.<sup>4</sup> In *Finniss* Order No. 116 (GVA/2016), the Tribunal held that:

15. [...] there is no dispute that a selection decision has to be considered as implemented when the Administration receives the selected candidate's unconditional acceptance of an offer of appointment [...]. However, the Tribunal finds that such a procedure is reserved for selection decisions involving an external candidate. In such cases, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate.

16. With respect to selection procedures that entail promotion of internal candidates, like in the present case, the Tribunal recalls that sec. 10.2 of ST/AI/2010/3 clearly states that:

When the selection entails promotion to a higher level, the earliest possible date on which such promotion may

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<sup>3</sup> *Harris* Order No. 135 (NBI/2017), *Kandil* Order No. 060 (NBI/2018), *Cox* Order No.150 (NBI/2018), *Gavazzo* Order 165(NBI) 2020.

<sup>4</sup> *Wang* UNDT/2012/080; *Murnane* UNDT/2012/128 quoting *Tiwathia* UNDT/2012/109; *Quesada-Rafaraso* Order No. 20 (GVA/2013); *Basaly* Order No. 296 (NY/2014); *Samra* Order No. 195 (GVA/2015); *Wilson* Order No. 147 (NY/2016); contrariwise *Nwuke* UNDT/2012/116.

become effective shall be the first day of the month following the decision.

17. It follows from this provision that the implementation of the contested selection decision, which was taken on 2 June 2016, cannot be implemented before 1 July 2016. Therefore, the contested decision has not yet been implemented, and the application for suspension of action is receivable.

18. Based on the jurisprudence, the Tribunal finds the Respondent's assertion that the selection decision has been implemented to be unfounded. The Respondent's Annex R/3 indicates that the selected candidate is an external candidate subject to interagency movement. Thus, a contractual relationship between the Organization and an external candidate does not exist before the offer has been accepted by the selected external candidate. In the present case, while the selected candidate has confirmed her continued interest and availability to assume the functions of Job Opening 152801 and an offer has been initiated in *Inspira*, the Respondent has not placed any evidence before the Tribunal that an offer of appointment has, in fact, been accepted by the selected candidate.

### **Merits**

19. Article 2.2 of the Statute of the Dispute Tribunal (Statute) and art. 13 of the Rules of Procedure (Rules) empower the Tribunal to grant an interim relief by way of a suspension of action in relation to an administrative decision that impacts on the contract or terms of employment of an individual provided the criteria of *prima facie* unlawfulness, urgency and irreparable damage are satisfied. Since the test is cumulative, the three elements must be satisfied for the Tribunal to grant this relief.

20. When reviewing administrative decisions regarding appointments and promotions, the Tribunal considers: (a) whether the procedure in the Staff Regulations and Rules was followed; (b) whether the staff member was given fair and adequate consideration; and (c) whether the applicable rules were applied in a fair, transparent

and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration.<sup>5</sup>

*Prima facie* unlawfulness

21. The Applicant avers that the CBI was conducted in violation of section 7.3 of ST/AI/2016/1 because his assessment panel comprised of three staff members due to the recusal of Mr. CT whereas at least one other candidate was assessed by a panel comprised of four staff members. The Respondent admits to this sequence of events at paragraph 10 of his reply.

22. Section 7.3 of ST/AI/2016/1 states:

7.3 Assessments will be conducted by assessment panels, which will be set up by the Office of Human Resources Management. Each assessment panel shall have a minimum of three staff members at the same or at a higher level than the vacant position and shall hold appointments under the Staff Regulations and Rules other than temporary appointments. The programme manager of the vacant position may participate in the assessment panel. There shall be at least one female staff member, one male staff member and one staff member from outside the organizational unit where the vacant position is located. An assessment panel shall also include an ex officio member. The ex officio members of the assessment panels shall prepare a reasoned and documented record of the assessment process in Inspira.

23. While ST/AI/2016/1 does not contemplate absence or substitution of panel members, it is implicit that the panel composition must be stable in order to ensure fair, just and transparent process in that all the candidates are evaluated under the same conditions. In *Mianda*<sup>6</sup>, the Tribunal frowned on the change of panel members without notification to the candidates and held that:

42. When selecting members of a panel, the Administration must guarantee that they are available for the duration of the whole process and are not liable to be unable to continue due to work commitments. If a panel member cannot continue, in exceptional circumstances—e.g. in case of death or if a Panel member ceases to work for the

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<sup>5</sup> *Savadogo* 2016-UNAT-642, para. 40.

<sup>6</sup> UNDT/2018/060 (this judgment was not appealed).

Organization—the whole process must recommence from the beginning, by a newly constituted panel.

24. Stability of the panel is all the more important where the sole basis for the selection decision is an interview.

25. In the present case, in the face of the Respondent's choice to only advance the unfounded argument on receivability, the Tribunal is not convinced that the absence of one panel member would have been adequately compensated by the other members. In particular, there are questions whether the candidates were rated upon the sum of points from all members or just the median score; whether the panel asked questions in the recusing member's stead, whether the criteria for rating these questions were agreed beforehand etc. On the other hand, it is questionable why, if the three-member panel was deemed to be sufficiently equipped to interview the Applicant, the recused panel member was still needed to interview the other candidates. If the expertise of Mr. CT was indispensable, he should have been replaced by a person with a similar one; if the preference of Mr. CT was decisive, then the whole exercise was biased.

26. In light of the foregoing, the Tribunal finds that the contested decision was *prima facie* unlawful.

27. The Tribunal finds no merit in the other submissions advanced by the Applicant.

#### *Urgency*

28. The Tribunal finds that there is urgency because the offer has been initiated in *Inspira*, which means an offer of appointment may be issued and accepted by the selected candidates imminently.



*Irreparable harm*

29. The Tribunal is satisfied that implementation of the selection decision at this stage would harm the Applicant's career prospects in a way which could not be compensated financially at a later stage.<sup>7</sup>

**Observation**

30. The Tribunal has taken note of the Applicant's submissions of 25 and 26 October 2021, which were filed without the Applicant seeking leave or being instructed by the Tribunal to do so. Unfortunately, these impulsive filings impede proper cognizance of a case. In the future, the Applicant should allow himself time for reflection prior to making submissions, to ensure that they are comprehensive.

**ORDER**

31. The application for suspension of action is granted pending management evaluation.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 28<sup>th</sup> day of October 2021

Entered in the Register on this 28<sup>th</sup> day of October 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>7</sup> *Tadonki* UNDT-2009-016; *Farrimond* Order No. 200 (GVA/2013).