UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2017/024
Order No.:	72 (NY/2017)
Date:	7 April 2017
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Sophie Lange, ALS/OHRM

Introduction

1. On 31 March 2017, the Applicant, a former staff member with the United Nations, filed an application contesting, “The decision of the Administration to unilaterally amend [Chapter] X of the Staff Rules and Regulations covering Disciplinary Measures and then threaten to notify [the Applicant’s] new employer, of an incomplete disciplinary investigation”. As a remedy, the Applicant requests “that the Administration’s decision to threaten to contact his new employer […] to disclose contents of an outstanding investigation be rescinded”. As part of his application, the Applicant further requested to have “his name anonymised in any orders or final judgment”.

2. Together with his application, the Applicant also filed a motion for interim measures pursuant to art. 10.2 of the Dispute Tribunal’s Statute and art. 14 of its Rules of Procedure, requesting that the contested decision be suspended during the proceedings before the Dispute Tribunal. Referring to arts. 19 and 36.1 of the Dispute Tribunal’s Rules of Procedure and the Appeals Tribunal’s judgment in *Villamoran* 2011-UNAT-160, the Applicant also requested the Tribunal to suspend the contested decision during the Tribunal’s deliberation of his motion for interim measures.

3. On 31 March 2017, the Registry served the application and transmitted the motion for interim measures to the Respondent, instructing him to file a response to the motion by 1:00 p.m. on 4 April 2017 and, pursuant to art. 10 of the Dispute Tribunal’s Rules of Procedure, to file a reply to the substantive application by 1 May 2017.

4. By Order No. 68 (NY/2017) dated 3 April 2016, the Tribunal: (a) suspended the implementation of the contested decision pending its consideration of the Applicant’s motion for interim measures; and (b) granted the Applicant’s request for anonymity.

5. On 4 April 2017, the Respondent filed his response to the motion for interim measures, claiming that the motion is not receivable as there has been no administrative decision taken yet to refer the matter to the new employer, the only step being the issuance of the letter to the Applicant seeking his comments, which is preparatory in nature. In any event, the motion for interim measures is groundless.

6. Much of the background, history and legal submissions in this matter have been previously set out in Order No. 62 (NY/2017), dated 30 March 2017, and Order No. 68 (NY/2017), but are set out again herein for clarity and for ease of reference.

Background

7. The Applicant was a United Nations staff member until he resigned from his position to assume a job with an employer outside of the United Nations common system ("the new employer") in February 2017.

8. In a letter, dated 2 March 2017, the Chief of the Disciplinary Unit, Administrative Law Section, Office of Human Resources Management, Department of Management ("the Chief") wrote to the Applicant that "you were issued allegations of misconduct and were provided with a copy of the documentation referred in this matter". Of relevance, the Chief also stated that:

> Effective […] February 2017, you resigned from service with the Organization. Given that this matter had not been resolved at the time of your separation, the attached note will be placed on your Official Status File [reference to annex omitted]. In accordance with ST/AI/292 (Filing of adverse material in personnel records), a copy of which is also enclosed, you are hereby requested to provide, within two weeks of receiving this letter, any comments you might wish to make in relation to the note.
>
> In addition, it is proposed that the matter will be referred to [the new employer] for their consideration. Please also provide, within two weeks of receiving this letter, any comments you wish to be taken into consideration regarding the proposal to refer the matter to [the new employer].
>
> You may refer to the documentation, previously provided to you, to assist you in providing comments on the note to be placed on

> your Official Status File. Please note that a copy of the documentation provided to you will not be placed on your Official Status File; only the note will be placed on your file.
>
> Please be advised that, after the two-week period, the note will be placed on your Official Status File, together with any comments provided. No other documents relating to this matter will be placed on your Official Status File.
>
> If a decision is made to refer this matter to [the new employer], you will be informed.

9. As for receipt of the aforesaid letter of 2 March 2017, the Respondent contends that it was "delivered" to the Applicant's email on 3 March 2017. The Applicant, however, submits that he only received it on 21 or 22 March 2017.

Applicant's submissions

10. The Applicant's principal contentions may be summarized as follows:

Receivability and prima facie *unlawfulness*

a. The requirement for *prima facie* unlawfulness does not require anything more than serious and reasonable doubts regarding the lawfulness of the contested decision (*Hepworth* UNDT/2009/003; *Corcoran* UNDT/2009/071; *Corna* Order No. 90 (GVA/2010); *Berger* UNDT/2011/134; *Chattopadhyay* UNDT/2011/198; *Wang* UNDT/2012/080; *Wu* Order No. 188 (GVA/2010));

b. It is trite law that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms or conditions of appointment (*Wasserstrom* 2014-UNAT-457). Pursuant to *Bauzá Mercére* 2014-UNAT-404, "what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision";

c. In the present case, the Administration unilaterally decided to assume a legal authority it does not have. Specifically, it assumed the right to notify another employer of incomplete disciplinary matters, and then used this unlawful legal authority to threaten the Applicant to reply to its 2 March 2017 letter, which had one intention—to elicit a response. The *modus operandi* of the Administration is to threaten the Applicant that it will consider notifying his new employer with regard to an incomplete disciplinary investigation;

d. The act or decision to issue such a threat on 2 March 2017, and to assume an authority that finds no basis in the legal framework of the Organization, can be seen as an unlawful and unscrupulous abrogation of the Administration's obligation to comply with its Staff Rules and Regulations. There is no doubt that such action constitutes *per se* a decision capable of review;

e. It is widely accepted in the civil law tradition that an administrative act that attains a degree of flagrant illegality can be challenged and suspended as a *voie de fait*, which clearly arises from the present case where the Administration (i) has issued threats to a former staff member notifying him of the possibility of contacting his current employer and disclosing his disciplinary record; and (ii) has clearly acted outside its sphere by assuming an authority that it does not have, i.e., the authority to refer confidential employment-related information to external entities as an alternative disciplinary measures;

f. What the Administration is proposing is for the Applicant to respond in relation to the suggested note to file and why he thinks that contacting his new employer is essentially not a good idea. Such intent to seek the views of the Applicant regarding contacting his current employer is by its definition rhetorical. The Applicant, and indeed any staff member, would be unlikely to agree that notifying his/her current employer of an incomplete investigation

would be a good thing to do. Effectively, this farcical attempt at due process masks the essentially unlawful character of the decision;

g. Implicit in the 2 March 2017 letter is the Administration's decision that it retains the legal authority to contact the new employer and that such authority can be exercised and threatened if the Applicant does not adhere to what is demanded of him in relation to the communication;

h. Whilst the 2 March 2017 letter is silent on what action would be taken, it is obvious to any reader of the document that should the Applicant not reply, the Administration would contact the new employer and notify them of the incomplete investigation. Such a decision notifying the Applicant of an unlawful action is in itself irregular and subject to challenge;

i. The decision to threaten the Applicant with contacting his new employer cannot be regarded as a preparatory decision. The Administration has communicated an altered legal position in which it retains authority to sanction a staff member with notification to another employer. Such a position ignores the following:

i. That no conclusion of the investigative/disciplinary process has actually occurred. The Applicant has never been notified that the Administration have found clear and convincing evidence of his misconduct and that an appropriate sanction should be administered;

ii. Within Chapter X of the Staff Rules and Regulations, no provisions exist that entitle the Administration to administer a sanction of notification to another employer; and

iii. Within the Staff Rules and Regulations, no provisions or procedures exist that permit the Administration to initiate such

contact and share what it deems important to another employer;

Urgency

j. The Applicant has been given two weeks to reply to the 2 March 2017 letter in the circumstances where the Administration has no legal authority to put forward the recommended course of action. It is unclear whether the Administration would wait until the disciplinary process is concluded before referring the matter to the new employer. The implementation of the contested decision could therefore be imminent and its suspension is appropriate and necessary at this stage;

Irreparable harm

k. Harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage (*Corcoran* UNDT/2009//071 and *Calvani* UNDT/2009/092). The irreparable harm in this case is two-fold:

i. The continuing fear and anxiety caused to the Applicant as a result of not knowing whether the Administration will carry out this unlawful action and contact the new employer;

ii. If the Administration is to exercise this threat, the Applicant would suffer direct damage to his reputation with the new employer and possibly his current and future employment;

l. It cannot be right to wait until the Administration carries out such an unlawful action in order to challenge the decision. By the time the Administration has contacted the new employer, the damage would have been done and cannot be rectified. There is no way of knowing whether the Applicant will be notified sufficiently in advance, or at all, prior to the

Administration taking the course of action threatened, nor the nature of the proposed communication to the new employer. All that is certain is that the consequence of such a communication would be to amplify the irreparable harm that the Applicant continues to suffer as a result of the Administration's decision.

Respondent's submissions

11. The Respondent's principal contentions may be summarized as follows:

Receivability

a. There is no factual basis for the Applicant's assertion that any administrative decision has been taken. No decision has been made to refer the matter to the new employer. The 2 March 2017 letter was issued in order to seek the Applicant's comments on a proposal that the matter should be referred to the new employer, which is evident in the letter. The letter informed the Applicant that "[i]f a decision is made to refer this matter to [the new employer, the Applicant] will be informed". The decision was not made and, accordingly, the Applicant was not informed of a decision;

b. Contrary to the Applicant's contention, the letter did not state that, if the Applicant did not respond, the Organization would contact the new employer. The Applicant may have misunderstood that part of the letter advising him that "after the two-week period, the note will be placed on [his] Official Status File, together with any comments provided". This does not mean that the Organization would contact the new employer regardless of his response to the letter. The letter rather specifically informed the Applicant that he would be informed if a decision was made to refer this matter to the new employer;

c. The Applicant's characterization of 2 March 2017 letter, as a "decision to issue [...] a threat [that the Organization will consider notifying his new

employer with regard to an incomplete disciplinary investigation]" is not correct. First, the investigation was complete by June 2016. Further, a decision has not yet been made to notify the new employer of the disciplinary matter. Finally, a decision to "consider" a matter does not constitute an administrative decision until a final decision is made;

d. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal, referring to *Harb* 2016-UNAT-643, paras. 25 and 27, and *Andati-Amwayi* 2010-UNAT-058, paras. 17-19. The issuance of the 2 March 2017 letter lacks the key characteristics of a challengeable administrative decision, as the letter itself does not affect the terms and conditions of the Applicant's former appointment or his former contract. The Applicant appears to have recognized this by stating that the 2 March 2017 letter had "one intention—to elicit a response". The Applicant further stated that the letter was "to threaten the Applicant that it will consider notifying his new employer with regard to an incomplete disciplinary investigation". Contrary to the Applicant's contention that the letter "unilaterally changed his terms and conditions of appointment by introducing an administrative measure that has no basis", no administrative measure was introduced by the letter;

e. Contrary to the Applicant's contention, the Administration has not communicated "an altered legal position in which it retains authority to sanction a staff member with notification to another employer" in the letter. Again, no "legal position" has been taken about the proposed referral and the letter can be only viewed as a preparatory step in initiating internal consideration of the proposed matter. Again, the letter did not state that the matter would be referred to the new employer, regardless of whether he submitted comments;

f. Referring to *Nguyen-Kropp and Postica* 2015-UNAT-509, paras. 33 and 34, the Applicant sought relief that the decision to "initiate a referral

process, including the request to provide a response" be suspended. Initiating a process to consider a matter cannot be a challengeable administrative decision. In *Nguyen-Kropp and Postica*, the Appeals Tribunal held that "initiating an investigation is merely a step in the investigative process and it is not an administrative decision which [the Dispute Tribunal] is competent to review";

Prima facie *unlawfulness*

g. The Applicant mischaracterised a possible referral to the new employer "as an alternative disciplinary measure" and challenged that the Administration "assume[d] a legal authority it does not have". However, the proposal to refer the matter to the new employer was considered in light of the Administration's authority to declassify confidential information. The 2 March 2017 letter sought comments on the possibility of the Organization's exercising its authority under ST/SGB/2007/6 (information sensitivity, classification and handling) concerning confidential information entrusted to or originating from the United Nations;

h. First of all, the information pertaining to a disciplinary process originates from the United Nations and the information is subject to ST/SGB/2007/6. No legal instrument of the Organization allows a subject staff member to own or exercise absolute control over information about a disciplinary referral. Rather, ST/SGB/2007/6 opens a possibility that reasonable discretion may be exercised in considering a referral of a disciplinary matter;

i. ST/SGB/2007/6 generally declares the overall approach of being "open and transparent" with regard to the information emanating from the Organization (sec. 1.1) and designates categories of "sensitive information" which may be classified as "confidential" or "strictly confidential" (sec. 2.2) and later declassified (sec. 4). As a general rule, confidential information, for

which no date or event of declassification was specified, is subject to discretionary declassification at any time, by the originator or its recipient if the information is received from an outside source, by the Secretary-General or by such officials as the Secretary-General so authorizes (sec. 4.2). No specific criteria are given in terms of the considerations that should be taken into account when determining the declassification;

j. In addition, specific rules exist in disclosing original versions of the reports of the Office of Internal Oversight Services ("OIOS") to a Member State in accordance with paras. 1(c) and 2 of A/RES/59/272 (Review of the implementation of General Assembly resolutions 48/218 B and 54/244), adopted on 23 December 2004;

k. Strict confidentiality of a disciplinary matter is not absolute under the current legal framework. While the confidential nature of disciplinary matters should be duly respected, discretion may be exercised in order to declassify confidential information pertaining to a disciplinary process within the restrictions set out in the legal framework relating to disciplinary matters, e.g., protection of the privacy and safety of individuals concerned, and procedural fairness issues;

l. It is considered that obtaining new employment and resigning from the Organization during a disciplinary process does not necessarily give a staff member immunity to his or her liability arising from his or her conduct. Ensuring accountability of staff is one of the primary goals of the Organization. Contrary to the Applicant's contention, a possible referral of this matter to the new employer is not beyond the authority of the Organization;

Urgency

m. Given that no administrative decision was taken, there is no need to further consider the requirement of particular urgency. Furthermore, the

Application did not specify a reason why the matter is of particular urgency. The two-week period was given to the Applicant for submission of his comments, and not for the decision as to the proposed referral to the new employer. After the two weeks, the Respondent would consider the comments, if any, also taking into account other considerations pertaining to confidentiality requirements and accountability aspects of the matter to determine an appropriate course of action. This obviously takes more time than the two-week period specified in the letter dated 2 March 2017;

n. The record shows no indication of particular urgency, which would lead to an urgent referral of this matter to the new employer. The evidence in this case was already collected by the fact-finding panel and provided to the Applicant together with the allegations of misconduct memorandum before his resignation. There is no indication that the Organization would not give due consideration to the Applicant's comments, if any, on the proposed referral before a final decision is made. Contrary to the Applicant's contention that a referral of the matter to the new employer was imminent and may occur "without any prior warning", the 2 March 2017 letter clearly informed the Applicant that, if a decision is made to refer this matter to the new employer, he would be informed;

Irreparable harm

o. Given that there is no administrative decision to contest in this case, no consideration is necessary as to whether there is irreparable harm. Contrary to the Applicant's contention about the "continuing fear and anxiety", the 2 March 2017 letter clearly informed the Applicant that, if a decision is made to refer this matter to the new employer, he would be informed. This relieves the Applicant from the alleged fear and anxiety as a result of not knowing whether the Administration will contact new employer;

p. The second harm alleged by the Applicant, namely direct damage to his reputation with the new employer and possibly his current and future employment, is speculative, depending on an outcome of any process at the new employer, if any. It appears that the Applicant assumed that action would be taken by the new employer following a possible referral. Such action, if taken by new employer, should not be labelled as irreparable harm to his reputation, but be regarded as him taking responsibility/accountability, which constitutes the very basis for the proposal for referring the matter to the new employer.

Consideration

Legal framework for granting interim measures

12. Article 10.2 of the Statute of the Dispute Tribunal provides:

> … At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

13. In line therewith, art. 14.1 of the Dispute Tribunal's Rules of Procedure states:

> … At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

14. In accordance with art. 10.2 of the Dispute Tribunal's Statute and 14.1 of its Rules of Procedure, the Tribunal may suspend the implementation of a contested administrative decision during its proceedings where the decision appears *prima facie*

to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 10.2 of its Statute have been met.

15. Under art. 10.2 of the Statute, an interim measures order is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending the Dispute Tribunal's consideration of the contested decision.

16. Parties approaching the Tribunal for interim measures must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's response to the motion for interim measures should be complete to the extent possible in all relevant respects, and be succinctly and precisely pleaded, bearing in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable.

Receivability

17. As for receivability, the Respondent, in essence, contends that he

> … opposes the Motion because it is not receivable *ratione materiae* as there has been no administrative decision taken to refer the matter to [the new employer]. The only step taken so far was to issue a letter, dated 2 March 2017, to the Applicant which is preparatory in nature and does not have direct legal consequence on the terms of his former appointment or contract of employment.

18. In *Harb* 2016-UNAT-643 (affirmed in *Faye* 2016-UNAT-654, *Faye* 2016-UNAT-657 and *Kalashnik* 2016-UNAT-661), the Appeals Tribunal defined the key characteristics of an administrative decision that may be appealable under art. 2.1(a) of the Dispute Tribunal's Statute as follows:

> 27. In short, as held by this Tribunal in [*Lee* 2014-UNAT-481] the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences

> affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

19. In addition, pursuant to *Kalashnik* (following the Appeals Tribunal's consistent jurisprudence of, for instance, *Andati-Amwayi* 2010-UNAT-058, *Bauza Mercere* 2014-UNAT-404, *Harb*, *Faye* 2016-UNAT-654 and *Adundo* 2016-UNAT-670), the Appeals Tribunal held that:

> 25. … Further, a reviewing tribunal should consider "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" in determining whether an application challenges an administrative decision which is subject to judicial review.

20. The Appeals Tribunal has also held that, at least in some cases, only final and not preparatory decisions are appealable as, for instance, in *Nguyen-Kropp & Postica* 2015-UNAT-509, where it was found that:

> 33. The Appeals Tribunal has previously held that certain administrative processes, such as a selection process in [*Ishak* 2011-UNAT-152] and the Administration's proposal of an alternative rebuttal panel in an ongoing performance appraisal rebuttal process in [*Gehr* 2013-UNAT-313] are preparatory decisions or one of a series of steps which lead to an administrative decision. Such steps are preliminary in nature and may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences. [See also *Ngokeng* 2014-UNAT-460 and *Wasserstrom* 2014-UNAT-457. The Dispute Tribunal, by its well settled case law, has also ruled that preparatory decisions are not subject to appeal. For instance, *Hashimi* Order No. 93 (NY/2011); *Balakrishnan* 2012/UNDT/041].

21. In the present case, in its 2 March 2017 letter, the Chief "proposed that the matter will be referred to [the new employer] for their consideration" and requested the Applicant to "provide within two weeks of receiving this letter, any comments you wish to be taken into consideration regarding the proposal to refer the matter to [the new employer]. Nevertheless, the Administration advised the Applicant in the letter that "[i]f a decision is made to refer this matter to the [the new employer], you

will be informed", and nothing was stated as to the process as to how the Chief would consider the Applicant's comments or what impact they would have on this "decision", or indeed when he would be so informed.

22. As the contested decision is framed as a proposal rather than as a final decision, the Respondent appears to argue that it is not appealable under art. 2.1(a) of the Dispute Tribunal's Statute, referring to the Appeals Tribunal's jurisprudence in *Nguyen-Kropp & Postica*.

23. The Tribunal finds that, simply by issuing the 2 March 2017 letter to the Applicant, the Administration took an administrative decision that directly impacted the Applicant's terms of appointment or contract of employment rights with the United Nations because, by this letter, he is, for all intents and purposes, required to provide "any comments [he wished] to be taken into consideration regarding the proposal to refer the matter to [the new employer for consideration]"; the "matter" in hand being an incomplete disciplinary process. In addition, the 2 March 2017 letter does not spell out how, or even if at all, the Administration is to give any proper consideration to the Applicant's comments. The tone and content of the letter suggests that, regardless of the Applicant's response, the matter will be referred to the new employer for "*consideration*"—the plain meaning of which would suggest that the new employer is to consider whether the Applicant is to be sanctioned for the alleged misconduct. The Applicant has been given Hobson's choice pending referral to his new employer. Instead of a proposal, which would provide the Applicant some genuine choice and influence over the matter, the uncertainty surrounding the Administration's referral decision leaves the Tribunal with the impression that, by its 2 March 2017 letter, the Administration is basically informing the Applicant of a decision that has already been taken and further that the Respondent is authorized and can refer the incomplete disciplinary matter to a third party, including by sharing information and documentation, but providing him with an option to comment on it before it is effectuated—a *fait accompli*.

24. In reviewing the key characteristics of an administrative decision, a reviewing tribunal should consider the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision. Whilst the Respondent concedes that within the legal framework "protection of the privacy and safety of individuals concerned, and procedural fairness issues" are of paramount importance in matters pertaining to a disciplinary process, the Respondent has already determined that, in terms of the Applicant's terms of appointment, the Respondent is authorized to refer an incomplete disciplinary matter to a third party employer and/or to share information and documentation relating to the former staff member. There is no legal basis for such referral in either the Staff Rules or Regulations and the Tribunal is not satisfied on the papers before it that there is any other legal basis for such referral within the current legal framework (see more below). The consequences of such a decision to refer an incomplete disciplinary matter to a third party have far reaching implications for the Applicant's right to privacy, to work, and to a livelihood.

25. In line with the jurisprudence in *Harb* and *Kalashnik*, as cited above, the contested decision is therefore appealable under art. 2.1(a) of the Statute of the Dispute Tribunal.

Prima facie *unlawfulness*

26. When establishing the current system of administration of justice in the United Nations, the General Assembly emphasized that the system must be consistent with the principles of the rule of law (see para. 4 of resolution 61/261 (Administration of justice at the United Nations), adopted on 4 April 2007). To the principles of the rule of law, it is fundamental that any administrative decision that affects a person's rights and obligations must have a proper legal basis. If the decision is adverse to the said person, as the present case, this only underpins the need to strictly adhere to this principle.

27. Referring to the 2 March 2017 letter, it is unclear what the Administration purports to do when stating "that the matter will be referred to [the new employer] for

their *consideration*". One assumes that it means contacting the new employer to share an incomplete and pending disciplinary record, or, as the Applicant contends, to refer a sanction of notification. On the other hand, as also stated above, the plain meaning of the sentence would suggest that the new employer should "consider" the alleged infraction, which is also what is contended by the Respondent. Indeed, under the submission on irreparable harm the Respondent states that the very basis for referring the matter to the Applicant's new employer is for him to take responsibility and accountability for his actions and that the referral may not cause any reputational damage depending on the outcome of any "process" that may be undertaken by the new employer. However, as set out in the following, there is nothing in the legal framework governing the employment of the Applicant that authorizes the referral of an ongoing disciplinary process against a former United Nations staff member for *consideration* by, or to, his new employer:

a. The United Nations Charter in art. 97 states that, "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require" and that the Secretary-General "shall be the chief administrative officer of the Organization". As a point of departure, the authority to handle administrative matters, such as disciplinary proceedings, therefore rests with the Secretary-General and no one else. This has further been confirmed by the General Assembly, which in staff regulation 10.1(a) has declared that, "The Secretary-General may impose disciplinary measures on staff members who engage in misconduct";

b. In the Staff Rules, by which the Secretary-General implements the Staff Regulations, in Chapter X on "Disciplinary measures", the Secretary-General details how the disciplinary proceedings are to be undertaken and the possible sanctions that may be imposed against a staff member for misconduct. In staff rule 10.1(c), the Secretary-General clarifies that, "The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the

discretionary authority of the Secretary-General or officials with delegated authority";

c. The Secretary-General may therefore delegate his authority in the administration of the Staff Regulations and Rules, which then may be further delegated to others. In this regard, in ST/SGB2015/1 on "Delegation of authority in the administration of the Staff Regulations and Staff Rules", the Secretary-General states that:

> 2.1 As the chief administrative officer of the Organization, the Secretary-General holds the primary authority and accountability for the administration of the Staff Regulations and Rules. The Secretary-General's authority may be delegated in accordance with the principles set out in the present bulletin.
>
> …
>
> 2.3 Delegated authority may be further delegated, unless such further delegation has been excluded in writing.

d. By ST/SGB2015/1, para. 3.2, the Secretary-General delegates the authority to administer all matters in relation to the Staff Regulations and Rules to the Under-Secretary-General for Management "[w]ith the exception of the matters reserved exclusively for the Secretary-General or as otherwise indicated in the annex [to ST/SGB2015/1]". From this annex, follows that the Secretary-General only retains the authority to make decisions "to launch an investigation into allegations of misconduct of staff", "to initiate the disciplinary process concerning staff" and "to impose disciplinary measures on staff" for staff at the level of Assistance Secretary-General and Under-Secretary-General;

e. The decision to undertake and complete the pending disciplinary process against the Applicant therefore rests with the Under-Secretary-General for Management. Pursuant to sec. 3.3 of ST/SGB2015/1, the Under-Secretary-General for Management may further delegate this authority, but only under certain conditions:

> 3.3 The Under-Secretary-General for Management may delegate such authority further as he or she deems appropriate, through the issuance of an administrative instruction, including to heads of departments and offices, offices away from Headquarters, regional commissions and other entities. In urgent cases, the Under-Secretary-General for Management may delegate authority through a memorandum. Officials to whom the Under-Secretary-General delegates authority may further delegate such authority in writing.

f. The Tribunal notes that, while sec. 3.3 of ST/SGB/2015/1 provides the Under-Secretary-General for Management with a certain scope of discretion, it does not state that s/he may refer or delegate the consideration of an ongoing disciplinary process to an entity outside the United Nations, a third party. Also, no other administrative issuance has been issued allowing her/him to do so—neither, as referred to by the Respondent, ST/SGB/2007/6 or General Assembly resolution A/RES/59/272, nor ST/AI/371 (Revised Disciplinary Measure and Procedures, as amended by ST/AI/371/Amend.1) even as much as mention such a possibility.

g. ST/SGB/2007/6 (which the Respondent primarily appears to rely on as the legal basis for referring the Applicant's ongoing disciplinary process to the new employer for consideration) stipulates how the Organization is to handle sensitivity and classification of information that it generates or receives, including issues such as classification principles, classification levels, identification and markings, declassification and the Organization's internal handling of classified information (see secs. 1 to 5), but contains no guidance or instructions, not even implicitly, about referrals of ongoing disciplinary processes at the United Nations for the consideration of new employers. Neither does General Assembly resolution A/RES/59/272, paras. 1(c) and 2, have any relevance in this context as these provisions only relate to the possible sharing of reports of the OIOS with Member States, which is not the issue in the present case;

h. It is instructive that ST/IC/2016/26 recalls, at III, para, 79, that, in its resolution 59/287, "the General Assembly requested the Secretary-General to take action expeditiously in cases of *proven misconduct* and/or criminal behavior and to inform Member States about the actions taken" (emphasis added). In the Applicant's case, the investigations report was completed in June 2016, the matter was referred to the Office Of Human Resources Management on 8 July 2016, and the allegations of misconduct were made by letter of 2 February 2017; the Applicant apparently leaving the service of the UN in February 2017. In this instance, the misconduct remains unproven and it has not been alleged that there was any criminal behavior.

i. Furthermore, ST/IC/2016/26 (Practice of the Secretary-General in disciplinary matters in cases of criminal behavior, 1 July 2015 to 30 June 2016) states, in sec. 15, that:

> Not every case brought to the attention of the Secretary-General indicating possible misconduct results in disciplinary or other measures being taken. When a review by the Office of Human Resources Management reveals that there is insufficient evidence to pursue a matter as a disciplinary case, or when a staff member provides a satisfactory explanation and response to the formal allegations of misconduct, the case is closed. Cases will also typically be closed when a staff member retires or otherwise separates from the Organization before an investigation or the disciplinary process is concluded, unless continuation is in the interest of the Organization. In the vast majority of cases involving former staff members, a record is made and placed in the former staff member's official status file so that the matter can be further considered if and when the staff member rejoins the Organization. In that regard, section 3.9 of the administrative instruction on the administration of fixed-term appointments (ST/AI/2013/1) provides that a former staff member will be ineligible for re-employment following resignation during an investigation of misconduct or institution of a disciplinary process, unless the former staff member agrees to cooperate with an ongoing investigation or disciplinary process until its conclusion. Where relevant, that provision is noted in records placed in official status files.

j. It is evident from the aforesaid that a pending case may ultimately result in no disciplinary measures, and the case is closed. In other words, the staff member must be presumed innocent until proved otherwise. Furthermore, when a staff member separates from the Organization before the process is concluded, the case is closed unless its continuation is in the interests of the United Nations. The only reason a record is made on the official status file is for further consideration by the United Nations itself, if and when the staff member rejoins service. There is no provision for consideration by or referral to a third party, such as a new employer. Indeed, the sharing of such information with third parties transgresses the fundamental right of innocent until proven guilty, and the right to privacy, particularly when the disciplinary matter has not been concluded, let alone the Applicant not having had an opportunity to respond. In this regard, the Tribunal notes that the Appeals Tribunal in *Faust* 2016-UNAT-695 held that all exceptions "must be interpreted restrictively" (para. 34) and affirmed "the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish" (para. 34). In any event, the Respondent has not pleaded any exception nor remotely alleged that it is in the interests of the United Nations to hold the proverbial Sword of Damocles over the head of a departed staff member;

k. Even if the Under-Secretary-General for Management were considered to possess an authority to refer the consideration of a pending disciplinary process to the new employer, neither ST/SGB/2010/9 (Organization of the Department of Management), ST/SGB/2011/4 (Organization of the Office of Human Resources Management) nor any other official United Nations document demonstrate that, in the case of the Applicant, the Under-Secretary-General for Management has delegated this authority to the Chief.

28. Accordingly, the Respondent has not been able to show, and there does not appear to exist, any direct or implicit legal basis that would allow—or even as much

as contemplate—the referral of a United Nations instigated incomplete disciplinary process against a former United Nations staff member for alleged misconduct committed while in United Nations employment to a new non-United Nations employer for consideration. The Administration therefore appears to be in breach of the very principles on which the internal justice system is founded, notably the rule of law, and the contested decision is therefore *prima facie* unlawful.

29. The Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948. Article 23.1 of the Declaration states that everyone has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment. If indeed a former employer is allowed to refer pending proceedings to future employers, this would have a devastating effect on the right to work and livelihood of the former staff member; even in situations where the purported misconduct would have no direct relation to the applicant's ability or capacity to carry out his duties. Even under ST/IC/2016/26, the Applicant would be eligible for re-employment and have a right to return to work at the United Nations if he agrees to cooperate with an ongoing investigation or disciplinary process until its conclusion. Yet, in this instance, the consequence of the referral to his new employer may effectively deprive the Applicant of his current employment without any due process even though he has not been found guilty of any misconduct.

Urgency

30. According to art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure, an interim measures motion is only to be granted in cases of particular urgency.

31. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case

into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamoran* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

32. In the present case, the Applicant received the 2 March letter on 3, 21 or 22 March 2017 and had merely two weeks, i.e., at most, until 5 April 2017, to provide his comments. Now, the matter may therefore immediately be referred to the new employer's consideration. Accordingly, the case is clearly urgent and the urgency is not self-inflicted.

33. In the circumstances, and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

34. It is generally accepted that mere economic loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

35. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013); *Finniss* Order No. 116 (GVA/2016)). Such reasoning would apply similarly to the Applicant's current situation as an employee of the new employer.

36. In the circumstances, and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

Conclusion

37. In light of the foregoing, the Tribunal ORDERS:

a. The motion for interim measure is granted and the contested decision is suspended pending the Dispute Tribunal's proceedings; and

b. Anonymity remains as per Order No. 68 (NY/2017).

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of April 2017