



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/069
Order No.: 140 (NY/2017)
Date: 24 July 2017
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KAMARA-JOYNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON SUSPENSION OF ACTION

Counsel for Applicant:
Natalie Dyjakon, OSLA

Counsel for Respondent:
Alister Cumming, ALS/OHRM

Introduction

1. On 14 July 2017, the Applicant, a Conflict Resolution Officer at the P-4, step 13, level in the Office of the United Nations Ombudsman and Mediation Services (“UNOMS”) in New York, filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the decision, pending management evaluation, not to select her but another candidate, for the temporary position of Regional Ombudsman at the P-5 level in Vienna. The Applicant alleges that the decision was based on the discriminatory and unlawful grounds of her ethnicity.

2. Together with her application, referring to arts. 19 and 36.1 of the Dispute Tribunal’s Rules of Procedure and the Appeals Tribunal’s judgment in *Villamorán* UNAT-2011-160, the Applicant also filed a motion requesting that the contested decision be suspended pending the Tribunal’s consideration of the suspension of action proceedings. She submitted that the selected candidate “will enter into a formal contract with the Administration and begin working as a Regional Ombudsman in Vienna within the next few days” and that, once such decision is implemented, she will have no recourse.

3. By Order No. 133 (NY/2017) dated 17 July 2017, the Tribunal granted, without prejudice to its determination of the application for suspension of action under art. 2.2 of the Tribunal’s Statute, the interim suspension order requested by the Applicant.

4. In the 1.5 page reply, together with two annexes, timeously filed on 19 July 2017, and consisting of some very brief averments, and a bare denial of all the Applicant’s allegations, the Respondent contended that the contested decision had already been implemented and therefore the Dispute Tribunal cannot suspend the contested decision.

5. On the same day, the Tribunal requested that the Respondent file a copy of a document, the Human Resources Action (“HRAR”) form referred to, but omitted, in Annex R/2 of the Respondent’s reply. The Respondent filed the requested document on 19 July 2017.

6. On 19 July 2017, the Applicant’s counsel indicated to the Tribunal by email that the Applicant wished to file further submissions in support of the application for suspension of action. By Order No. 135 (NY/2017) dated 19 July 2017, the Tribunal ordered the Applicant to file a response to the Respondent’s reply before 5:00 p.m. on Wednesday, 19 July 2017.

7. The Applicant’s response to the Respondent’s reply was timeously filed on 19 July 2017.

8. By Order No. 139 (NY/2017) dated 21 July 2017, the Tribunal ordered the Respondent to file a response to the Applicant’s last response, providing further particulars together with relevant documentation, which the Respondent duly filed. On the same day, the Applicant submitted an additional filing responding to the Respondent’s response, maintaining that the contested decision has not been implemented.

Background

9. In her application for suspension of action, the Applicant presents the facts as follows:

... The Applicant in this case [...] is currently serving as a Conflict Resolution Officer at the Office of the United Nations Ombudsman and Mediation Services (“UNOMS”) in New York at the P-4 level. She holds a Fixed-Term appointment.

... On 1 October 2016, [the Applicant] was temporarily reassigned to serve as an Acting Regional Ombudsman in Vienna for

an initial period of three months which was extended to a period of six months.

... On or about 27 February 2017, a Temporary Job Opening was advertised for the position of Regional Ombudsman at the P-5 level in Vienna which [the Applicant] was currently occupying [reference to annex omitted].

... On or about 3 March 2017, [the Applicant] applied for the above post.

... During the period within which [the Applicant] was an Acting Regional Ombudsman, she was evaluated by her First Reporting Officer as successfully meeting expectations.

... On 21 March 2017, during a brief meeting that [the Applicant] participated in along with the Acting Chief of Office, [name redacted, he] announced that the recruitment for the post that [the Applicant] had applied for would be finalised by 31 March 2017.

... On 23 March 2017, shortly before the expiration of the original temporary re-assignment, [the Applicant] received an email from [name redacted, the Administrative Officer from the Executive Office of the Secretary-General (“EOSG”)], requesting information on [the Applicant’s] plan to return to New York on 1 April 2017.

... On 27 March 2017, [the Applicant] responded to [the Administrative Officer] explaining that she was awaiting the outcome of her application for the temporary position of Regional Ombudsman [reference to annexes omitted].

... On 28 March 2017, [the Applicant] repeated her e-mail to [the Administrative Officer] informing her that she was awaiting the outcome of the recruitment exercise for her post. On this occasion [the Applicant] copied in certain staff members in her office in the email including [the Acting Chief of Office]. [The Applicant] did not receive a response to this email [reference to annex omitted].

... On or about 30 March 2017, [the Applicant] was informed by [the Acting Chief of Office] that the Ombudsman’s office had not received her application for the post of Regional Ombudsman.

... Also on 30 March 2017, [the Applicant] forwarded to [the Acting Chief of Office] and separately to the Director of Mediation Services [name redacted] the confirmation notification from Inspira that her application had been received [reference to annex omitted].

... On 1 April 2017, [the Applicant] received her itinerary from American Express for travel that morning.

... On 3 April 2017, [the Applicant] again enquired with [the Acting Chief of Office] with regard to the post of Regional Ombudsman. [The Applicant] was informed by [the Acting Chief of Office] that a memo had been sent to EOSG recommending a candidate for the position. [The Acting Chief of Office] also stated that they had not received her application for the post.

... On 9 June 2017, [the Applicant] had a discussion with [the Administrative Officer] and she was informed that yet another candidate had been selected following a second desk review.

... On 13 June 2017, [the Applicant] had a meeting with [the Acting Chief of Office and the Director of Mediation Services]. During this meeting [the Applicant] recalls that the following statements were made: [the Applicant]: Why was I not selected for the post? [The Acting Chief of Office]: The issue is not a matter of qualifications or experience. No one can contend that you have the most years of experience in this Office. It is a question of suitability for the region. [The Director of Mediation Services]: We will raise the issue with the Ombudsman upon his return next week and we will relay your concerns to him. We cannot make any decision without further consultation with the Ombudsman.

... On the same day, [the Applicant] wrote to [the Acting Chief of Office] repeating her understanding that the Administration will, “defer all decisions and actions on this matter [relating to the recruitment for the post] until the further views of the Ombudsman is solicited upon his return from leave next week” [reference to annex omitted].

... On 16 June 2017, [the Acting Chief of Office] sent an email confirming that [name redacted] was selected for the post [reference to annex omitted]. [The Applicant] was under the impression following on from the meeting with [the Acting Chief of Office and the Director of Mediation Services] that the recruitment for the post of Regional Ombudsman had been suspended.

... Between 14 June 2017 and 13 July 2017, [the Applicant] attempted to convene a further meeting with both Human Resources and senior management to discuss the recruitment for the post of Regional Ombudsman. Despite these attempts no meeting ever took place [reference to annex omitted].

... On 5 July 2017, [the Applicant] submitted a Management Evaluation Request challenging the decision not to select her for the temporary position of Regional Ombudsman at the P-5 level in Vienna [reference to annex omitted].

10. In the reply filed on 19 July 2017, the Respondent presents no specific particulars regarding the selected candidate in the pleading, save to submit that the contested decision has already been implemented as the selected candidate entered into official travel status to assume her duties on 15 July 2017. The presented facts are as follows:

... At a meeting held on 23 May 2017, the selected candidate was notified of the selection. On 16 June 2017, the selection was announced to UNOMS staff.

... On 15 July, the selected candidate entered into official travel status, and she commenced her journey to Vienna to assume her duties [R1]. On 17 July 2017, she arrived at the United Nations office in Vienna to take up her duties [R2].

... Accordingly, the appointment of the selected candidate took effect on 15 July 2017 i.e. the date she entered into official travel status. The contested decision was implemented on that date. The Dispute Tribunal cannot suspend the decision.

11. It is only subsequently, in the Respondent's submission pursuant to Order No. 139 (NY/2017), consisting of 4 pages and 10 annexes) that the Respondent presents the further particulars and facts as follows:

... On 29 April 2007, the selected candidate joined the Organization. On 1 April 2009, the selected candidate was granted a permanent appointment [reference to annex omitted].

... During the course of [her] career, the selected candidate has served in various capacities, such as Conflict Resolution Officer, Team Leader (Communications) (HR Change Initiatives), Human Resources Officer, Governance and Public Administration Officer, and Information Officer, in the Office of Human Resources Management (OHRM), UNOMS and the Department of Economic and Social Affairs [reference to annex omitted].

... On 27 February 2017, a temporary job opening for the position of Regional Ombudsman, Vienna, was issued [reference to annex omitted]. On 4 March 2017, the selected candidate applied [reference to annex omitted].

... At a meeting held on 23 May 2017, the selected candidate was notified of her selection.

... On 31 May 2017, the Assistant Secretary-General and Head of UNOMS (ASG/UNOMS) instructed the Executive Office of the Secretary-General (EOSG) to make the necessary arrangements for the selected candidate to assume the responsibilities of Regional Ombudsman, Vienna [reference to annex omitted].

... On the same day, the ASG/UNOMS wrote to the EOSG regarding the selected candidate's onboarding in Vienna. The selected candidate was copied on this email [reference to annex omitted].

... On 8 and 9 June 2017, the selected candidate corresponded with the EOSG regarding her date of travel to Vienna [reference to annex omitted].

... On 21 June 2017, the EOSG wrote to the Executive Office of the Department of Management regarding the selected candidate's release date from OHRM. On 24 June 2017, the Director of the Division in which the selected candidate was working approved a release date of 14 July 2017 [reference to annex omitted].

... On 24 June 2017, the ASG/UNOMS wrote to the Director-General of [United Nations Office in Vienna, "UNOV"] to advise him of the selected candidate's arrival in Vienna on 15 July 2017 [reference to annex omitted].

... On 10 July 2017, a broadcast was sent to UNOV staff members, introducing the selected candidate as the Regional Ombudsman and mediator, indicating her location and phone number [reference to annex omitted].

... On 14 July 2017, the selected candidate's travel was authorized, and her ticket to Vienna was issued [reference to annex omitted].

... On 15 July 2017 at 17:50, the selected candidate departed from New York to Vienna, arriving on 16 July 2017 at 08:25 [reference to annex omitted].

... On 17 July 2017, prior to the service of the Application on the Respondent, the selected candidate took up her duties in Vienna [reference to annex omitted].

Applicant's submissions

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

a. This Tribunal may order a suspension of the implementation of an administrative decision pending management evaluation if it is satisfied that: (i) implementation of the impugned decision will cause irreparable harm, (ii) administrative decision is *prima facie* unlawful; and (iii) the matter is urgent.

Implementation of the impugned decision will cause irreparable harm

b. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action. Nonetheless, this Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage. In the instant case, if the impugned decision is implemented, the Applicant will suffer harm with respect to career prospects. Specifically, she will lose the opportunity to advance her career as a Regional Ombudsman in Vienna. Such harm cannot be compensated for by a monetary award.

c. The implementation of the decision, which was made on a discriminatory basis, would adversely affect her personally and she is unlikely to have the confidence to apply for future posts in European duty stations.

d. The selection process was unfair and not transparent and, as a result, such a decision may damage the Organization's reputation and in particular the Office of the Ombudsman.

Prima facie unlawfulness

e. It is well-established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation and renewals.

f. In determining whether an administrative decision is *prima facie* unlawful, the Tribunal has found that this condition does not require more than serious and reasonable doubts about its illegality. In cases relating specifically to appointments the Tribunal must examine whether the procedures as laid down in the staff regulations and rules were followed and whether the staff member was given fair and adequate consideration.

g. The decision not to select the Applicant for the Regional Ombudsman post was *prima facie* unlawful as it was founded on a discriminatory basis. Such consideration being unlawful pursuant to the existing Staff Regulations and Rules.

h. It is well-known that recruitment and selection decisions must comply with the principles enshrined under art. 101.3 of the Charter of the United Nations. This principle is reflected in staff regulation 4.2.6 and also contained in the prohibition of discrimination in recruitment contained in staff regulation 4.3 and 4.4. As a consequence all staff members are required to be appointed on merit and selection decisions must be made in accordance with the Charter of the United Nations together with any relevant provision governing staff selection.

i. Pursuant to *Rolland* 2011-UNAT-122, the Dispute Tribunal is to uphold a selection decision when candidates have received full and fair consideration, when discrimination and bias are absent, and proper procedures have been followed. In the present case, the Administration's decision not to select her for the post was not based on merit but on the unlawful ground of bias and specifically in that she was not considered "suitable" for the region. Such reasoning could only be viewed as discriminatory and based on race.

j. The Applicant, born in Sierra Leone, is a United States national. The duty station for the post is Vienna, Austria. The decision not to select her for

the post was clearly discriminatory against her, namely for the following three reasons:

- i. At the time when the post was advertised, the Applicant was already in Vienna and was performing the functions required for the advertised post. The Applicant served in this post for a period of six months. In addition, there was no indication that the Applicant performed her role in a less than satisfactory manner. To date, the Applicant continues to perform the functions that she assumed whilst working in Vienna relating to the case work and she continues to serve Vienna and the neighboring duty stations. To date, no official hand-over has taken place;
- ii. During the meeting that the Applicant had with the Acting Chief of Office and the Director of Mediation Services on 13 June 2017, the Applicant was explicitly told that, “The issue is not a matter of qualifications or experience. No one can contend that you have the most years of experience in this Office. It is a question of suitability for the region”. The Applicant inferred that the reason that she was not considered was related to whether she would be “suitable” for the region, an implicit reference to her race and colour of her skin.;
- iii. It appears that the successful candidate previously worked at UNOMS, but her experience and functions related mainly to that of a Communications Officer and Special Assistant. Any effective desk review would have clearly evaluated the Applicant’s skills and experience higher than someone who had never performed similar roles and responsibilities.

k. Accordingly, there was evidence of bias in the selection process in that she was discriminated against and effectively excluded from the recruitment process. Moreover, she had to provide proof from Inspira that she had applied for the post as she was informed that no application had been received from her. In consequence, there are serious and reasonable doubts about the lawfulness of the decision, specifically the process by which she was excluded on account of her race. Such a decision is *prima facie* unlawful.

Urgency

l. Pursuant to *Tadonki* UNDT/2009/016, there is urgency where “the decision contested [may be] implemented before the consideration of the substantive appeal on the merits, [and as a result] the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled”.

m. The Applicant’s case is urgent due to the impending recruitment of the selected candidate. It is the Applicant’s understanding that the selected candidate has not yet commenced employment as the Regional Ombudsman in Vienna and the Applicant continues to perform the functions of an Acting Regional Ombudsman relating to case work and no official hand-over has taken place to date.

n. The Administration was aware that she had concerns with respect to the manner of the recruitment. Following a meeting with the Acting Chief of Office and the Director of Mediation Services on 13 June 2017, the Applicant believed that the recruitment process had been suspended until the head of unit had returned. At the same time, following the announcement of the selected candidate on 16 June 2017, the Applicant exchanged various emails with staff members in the EOSG from mid-June to early July 2017 and, as a

result, believed that the matter would be resolved internally and that she would have a meeting with both Human Resources and senior management. Once no reciprocal steps were taken by the Administration the Applicant realised that no genuine efforts were being made to resolve this matter, she immediately took steps to file a request for management evaluation and suspension of action. This is not a case of self-created urgency in that legitimate steps were taken by her to try to resolve the matter informally, but it would appear that the Applicant was misled by the Administration.

Applicant's submissions on receivability: implementation

13. The Applicant's further submissions dated 19 July 2017 and 21 July 2017 may be summarized as follows:

o. The Applicant disputes the Respondent's submission that the contested decision has already been implemented and therefore cannot be suspended.

p. There is no official guidance as to when a selection decision is implemented for a temporary job opening.

q. In the Dispute Tribunal's case of *Abdul Ghafour* Order No. 103 (GVA/2017), the Tribunal found that it is not sufficient that the Organization make an offer and that the selected candidate unconditionally accepts. It is also necessary that the selected candidate meet the conditions contained in the offer. In particular it is contended that such conditions include that the selected candidate meets the job specification requirements contained in the original job opening.

r. At the same time it is accepted that, in cases of selection, a decision is implemented at the time that an employment contract is agreed between the parties. Regarding the timing of the formation of an employment contract, the Appeals Tribunal in *Tiwathia* 2013-UNAT-327 determined that it runs from

the date that an agreement is reached between the parties establishing an employment relationship.

s. The Dispute Tribunal noted in *Sareva* Order No. 142 (GVA/2017), that an email notification was sent to the selected candidate and found that, “This is the very first step of the recruitment process where no reference was made to the terms and conditions of appointment, nor to the expected date of entry on duty. Absent any agreement on these fundamental elements of an offer of appointment, the contested decision cannot be considered as having been implemented”.

t. The contested decision, in light of the above jurisprudence, has not been implemented as at 17 July 2017 for the following reasons:

- i. No letter of offer or letter of appointment was given to the selected candidate as of 17 July 2017. Therefore, no valid contractual relationship formally existed between the parties.
- ii. There was no official communication to the United Nations Office in Vienna regarding the appointment or arrival of the selected candidate and no reassignment process, (known as HRAR) was initiated. The successful candidate was not issued with any documentation or identification reflecting her status as a Regional Ombudsman in Vienna and the absence of any administrative process lends weight to the argument that the decision had not yet been fully implemented.
- iii. The selected candidate did not meet the conditions of the letter of appointment and/or letter of offer as she did not retain the requisite qualifications and experience required for the position.

iv. The selected candidate did not obtain medical clearance in accordance with the mandatory requirement for implementation of a selection decision. Pursuant to Section 4 of Administrative Instruction ST/AI/2010/4/Rev. 1 governing temporary appointments, a selected candidate is required to receive medical clearance prior to the issuance of the letter of appointment.

u. Staff rule 4.2 cannot be read in isolation. It must be considered along with staff rule 4.1 which mandates that a staff member receive a letter of appointment prior to travel. Such a letter of appointment expressly contains all terms and conditions of employment. In the absence of such a letter of appointment there is not full implementation of the contested decision.

14. The successful candidate traveled to Vienna with undue haste having submitted her travel request on 13 July 2017, which was approved on 14 July 2017, after which she traveled to Vienna on 15 July 2017, one day after the Applicant had filed her application. It is clear that UNOV were completely unprepared and unaware of the selected candidate's arrival since the necessary information regarding the selected candidate was not communicated to UNOV as evident from the Respondent's own Annex R2 of the reply, where it is stated by a UNOV Human Resources Assistant that "the information is only announced in an email and not through the usual route. I, therefore, do not have any information for the selected candidate nor the position she would be assigned to".

15. In addition, in the further submission dated 19 July 2017, the Applicant requested disclosure of the following documents:

a. All contractual documents and written communications pertaining to the appointment of the selected candidate, including but not limited to any

offer of appointment, letter of appointment and email correspondence to the selected candidate;

b. Any communications sent to UNOV regarding the selection of the selected candidate, her travel to Vienna and commencement date; and

c. The Personal History Profile of the selected candidate.

16. In relation to the Respondent's submission dated 21 July 2017, the Applicant contends that no documentation has been filed which would indicate that a formal offer has been made to the selected candidate and that the offer was formally accepted. The Applicant, separate from Counsel, submitted that:

a. In order for a selection decision to be concluded, the Executive Office is required to authorise the selection in UMOJA and this was not done by 17 July 2017;

b. The Executive Office had not signed off on the selection decision by 17 July 2017;

c. The Applicant's application on Inspira continues to say "Under Consideration".

Respondent's submissions

17. The Respondent's contentions in response to the application, limited to the question of receivability, may be summarized as follows:

a. The contested decision has already been implemented. At a meeting held on 23 May 2017, the selected candidate was notified of her selection which was announced to UNOMS staff on 16 June 2017.

b. On 15 July 2017, the selected candidate entered into official travel status, when she commenced her journey to Vienna to assume her duties. On 17 July 2017, she arrived at the United Nations Office in Vienna to take up her duties. Staff rule 4.2 provides that “the appointment of a staff member shall take effect from the date on which he or she enters into official travel status to assume his or her duties”.

c. Accordingly, the appointment of the selected candidate took effect on 15 July 2017, i.e., the date she entered into official travel status.

d. The Tribunal, therefore, cannot suspend the implementation of the contested decision pursuant to art. 2.2 of the Statute of the Dispute Tribunal.

18. The Respondent’s further submission dated 21 July 2017, following the Tribunal’s Order No. 139 (NY/2017) may be summarized as follows:

a. The implementation of the contested decision took place when the selected candidate entered into official travel status.

b. In the case of a staff member holding a permanent appointment, implementation of a temporary selection decision does not take place when a contract of employment is formed. A contractual relationship already exists between the selected candidate and the Organization. No new contractual relationship is created by her selection for a temporary job opening. Pursuant to sec. 3.7(a) of ST/AI/2010/4/Rev.1 (Administration of temporary appointments), the selected candidate retains her permanent appointment. She was administratively assigned to the temporary position of Regional Ombudsman, Vienna.

c. As a result, there is no offer or letter of appointment for the temporary position. As there was no offer, there were no conditions that the selected candidate had to meet.

d. The Applicant's reliance on section 4 of ST/AI/2010/4/Rev.1 is misplaced. That section applies to new staff members receiving a temporary appointment. As no new letter of appointment was to be issued, medical clearance is not required.

e. The selected candidate's release date of 14 July 2017 was agreed already on 24 June 2017. UNOV was notified of her arrival on that same day. Accordingly, there is no merit in the Applicant's suggestion that the selected candidate's travel arrangements were expedited to frustrate her Application. The date of the authorization of the Applicant's travel and the date of the Application are coincidental.

Consideration

Legal framework

19. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal *to suspend*, during the pendency of the management evaluation, *the implementation* of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

20. It follows from art 2.2 that if a contested decision has already been fully implemented, there is no longer any decision for the Tribunal to suspend. However, in cases where the implementation of the decision is of an ongoing nature (see, e.g., *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al.* Order No. 8 (NY/2013); *Gallieny* Order No. 60 (NY/2014), the Tribunal may grant a request for a suspension of action.

Receivability

Implementation of the contested decision

21. As a preliminary matter, the Tribunal notes therefore that art. 2.2 of the Tribunal's Statute states that where an administrative decision has been implemented, a suspension of action may not be granted (*Gandolfo* Order No. 101 (NY/2013)).

22. The Applicant maintains, *inter alia*, that the procedures laid down in the Staff regulations and Rules were not complied with, thus she did not receive full and fair consideration as evident from the alleged non receipt of her application and other circumstantial factors/conditions; that there is no official guidance as to when a selection decision is implemented for a temporary job opening, and most importantly, that there has been no letter of offer or appointment or contract of employment signed by the selected candidate. She contends that the failure by the administration to properly complete and regularize the reassignment process lends weight to the argument that the decision has not been fully implemented.

23. To support his argument that the contested decision has already been implemented, the Respondent contends that the implementation of the contested decision took place when the selected candidate entered into official travel status. It is argued that in the case of a staff member holding a permanent appointment, implementation of a temporary selection decision does not take place when a contract of employment is formed. A contractual relationship already exists between the selected candidate and the Organization. No new contractual relationship is created by her selection for a temporary job opening. Pursuant to section 3.7(a) of ST/AI/2010/4/Rev.1, the selected candidate retains her permanent appointment. As a result, there is no offer or letter of appointment for the temporary position, as there was no offer and no conditions that the selected candidate had to meet.

24. Section 3.7 of ST/AI/2010/4/Rev.1 stipulates that:

3.7 The selected candidate shall be offered a temporary appointment unless he/she already holds another type of appointment, in which case the following rules apply:

(a) Candidates holding a permanent or continuing appointment would retain their permanent or continuing appointment and will be assigned to the position to be temporarily encumbered;

(b) Candidates holding a fixed-term appointment will retain their fixed term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

25. The selected candidate in the instant matter is not a new staff member and holds a permanent appointment and was assigned to the position in Vienna. Section 3.7(a) of ST/AI/2010/4/Rev.1 contemplates the temporary assignment of such a permanent staff member who continues to retain his or her permanent appointment under his or her permanent contract.

26. The implementation of the contested decision was completed when the selected candidate entered into official travel status on 15 July 2017. Consequently, as the contested decision in this case has been implemented, the Tribunal is not in a position to order its suspension.

27. The Tribunal notes that the Applicant highlights a number of procedural irregularities relating to the implementation of the contested decision. In this regard, the Appeals Tribunal held in *Castelli* 2010-UNAT-037 (para. 26) as follows:

.... Where the administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member's situation. It is only where such correction is manifestly impossible to effect owing to the nature or gravity of the irregularity that the administration may terminate a staff member. However, if the staff member has acted in good faith, he or she is entitled to compensation for the damage suffered as a result. In this case, in view of the irregularity referred to by the administration and the fact that Mr. Castelli's good faith was never called into question, the administration could not have created an artificial break in service, in violation of the Staff Regulations and Mr.

Castelli's rights, in order to deny him the entitlement of a relocation grant.

28. In the instance case, the Tribunal notes that the selected candidate's good faith has not been in question. It follows that even if it is established that the Administration improperly or irregularly handled the procedure regarding the implementation of the contested decision, the implementation nevertheless remains, and gives rise to lawful entitlements for the selected candidate.

29. The Tribunal having found that the contested decision has already been implemented and cannot be suspended, it is not required to examine if the three statutory requirements specified under art. 2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure are met.

Applicant's request for production of evidence

30. The Applicant seeks disclosure of various documents in relation to the contested decision. In light of the findings made herein, and in view of the urgent nature of these proceedings, the Tribunal does not find it necessary to order production of further records.

Observation

31. The Tribunal finds it appropriate to make the following observations regarding disclosure requests in the context of urgent proceedings. Under arts. 13 and 14 of its Rules of Procedure, the Tribunal is required to conclude proceedings for suspension of action and interim measures within five working days due to their urgent nature. Such applications disrupt the normal day-to-day business of the Tribunal and the parties' schedules. They also divert the Tribunal's attention from considering other cases filed under standard application procedures, some of which are long outstanding.

32. Accordingly, when dealing with interdict proceedings, often there is no time for the Tribunal or parties to entertain extensive production requests as it may delay the proceedings well beyond the statutory five-day period. Therefore, when appearing before the Tribunal parties should bear in mind that an application or reply may well stand or fall on the initial papers filed. It is only in particular cases that the Tribunal will find it necessary to order the parties to make further submissions or document productions in the context of urgent proceedings.

33. Therefore, parties approaching the Tribunal for a suspension of action order 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. In particular, a Respondent's reply should be complete to the extent possible in all relevant respects, but also bearing in mind that the matter is not at the merits stage at this point of the proceedings.

34. Whilst the Tribunal should not be overburdened with unnecessary documentation, sufficient documentary evidence, especially that which is material and within the domain of one party, should be placed before the Tribunal in order for an urgent justiciable finding.

35. In this instance, the travel authorization form annexed to Respondent's initial reply gave a small print indication of the Applicant's contract type as "permanent" and travel activity as a "temporary assignment". None of these essential averments were pleaded in the narrative of the reply, nor was there any reference to the applicable law other than staff rule 4.2, which speaks of appointment and not assignment. Furthermore, the second incomplete Annex R2 of the reply illustrates that the receiving duty station indicated that onboarding formalities for the assignment had not been completed and that there was no information as to what post the selected candidate who had arrived in Vienna was to occupy. Even after the Applicant had requested further documentation, on 19 July 2017, the Respondent did

not file or seek leave to furnish countervailing papers such as to clarify the position and facilitate the conduct of this matter. As a result, much valuable time was spent reviewing a lengthy discernable factual background, and seeking additional submissions of the Respondent in order to properly adjudicate the final outcome.

Order

36. The impugned decision having been implemented, the application for suspension of action pending management evaluation is rendered impossible, and the application for suspension of action is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of July 2017