



**Before:** Judge Ebrahim-Carstens  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

MCINTOSH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Natalie Dyjakon, OSLA

**Counsel for Respondent:**  
Steven Dietrich, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 1 March 2018, the Applicant, a staff member of the United Nations having served as an Engineering Technician/Chief Electrical and Mechanical Unit (“EMU”) at the United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-5 level, 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 him but another candidate for the position of Engineering Technician at the FS-5 level (“the Position”) with the United Nations Support Office in Somalia (“UNSOS”) in Mogadishu. The Applicant alleges that the decision not to select him but another candidate prior to the completion of the selection process was unlawful and that he was not given fair consideration.

2. Together with his application, the Applicant filed a motion for suspension of the contested decision pending the Tribunal’s consideration of the application for suspension of action. By Order No. 47 of 2 March 2018, the Tribunal granted this motion, noting *inter alia*, the urgency, which is not self-created, and the fact that once the decision is implemented, the Applicant will have no recourse. The Tribunal being satisfied that the requirements for an interim order pending the Tribunal’s determination of a suspension of action as set out in *Villamorán* 2011-UNAT-160 by the Appeals Tribunal had been satisfied in this case, accordingly, ordered that:

... Without prejudice to the Tribunal’s determination of the application for suspension of action under art. 2.2 of the Tribunal’s Statute, the implementation of the contested decision shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

3. On 1 March 2018, the Tribunal directed that the Respondent file his reply to the application for suspension of action pending management action by 4:00 p.m. on 6 March 2018.

4. On 6 March 2018 at 2:04 p.m., the Respondent filed his reply in which he contends, *inter alia*, that the application is premature and not receivable *ratione materiae* as no selection decision has been taken as the recruitment process is still ongoing.

5. As the Respondent's reply to the application for suspension of action raised a serious dispute of fact, and due to the urgency of the matter, at 2:32 p.m. on 6 March 2018, the Tribunal directed that the Applicant file a response to the reply by 5:00 p.m. that same day, 6 March 2018.

6. Subsequently on 6 March 2018, at 4:45 p.m., the Applicant filed a timely response, contending that, as a matter of fact, a decision had indeed been made to select someone else for the Position.

### **Factual background**

7. The Applicant presents the relevant facts as follows:

... [The Applicant] was a staff member of the United Nations, serving as an Engineering [Technician]/Chief EMU at the United Nations Stabilization Mission in Haiti (MINUSTAH) at the FS5 level. [The Applicant] worked at the United Nations for approximately 12 years. On 1 October 2014, [the Applicant] was notified that he was granted a continuing appointment which was effective 30 September 2014 [reference to annex omitted].

... [The Applicant] has had an impeccable work record as exemplified by his latest two performance evaluations [reference to annex omitted].

... On 9 October 2017, [the Applicant] received a formal notification of termination of his continuing appointment [reference to annex omitted].

... [The Applicant] applied for a number of posts in Inspira [a United Nations online jobsite] which remain "Under Consideration" [reference to annex omitted].

- ... One of the job vacancies that [the Applicant] applied for was the Engineering Technician Position [reference to annex omitted]. [The Applicant] applied for this post on or about 16 July 2017 and, according to Inspira, he remains “Under Consideration” for this position.
- ... On 21 February 2018, [the Applicant] received an email inviting him to complete a written assessment for the Engineering Technician Position [reference to annex omitted].
- ... On or about 26 February 2018, [the Applicant] was required to leave Haiti and return to East Timor [reference to annex omitted].
- ... On or about 26 February 2018, [the Applicant] was copied on an email from the Office of Chief, Service Delivery, UNSOS Mogadishu, [name redacted, Ms. ED], whereby he was informed that, “If he failed to complete the exam ... [then] he is not considered for the position (clearance). We already have on board the selected candidate.” [reference to annex omitted]
- ... On 27 February 2018, an Application was filed at the United Nations Dispute Tribunal on behalf of [the Applicant] challenging the decision of the Administration to not make good faith efforts to assist him in finding an alternative position after it decided to abolish his post.
- ... On or about 1 March 2018, [the Applicant] completed the exam for the Engineering Technician Position.
- ... On 1 March 2018, [the Applicant] submitted a Management Evaluation Request challenging the decision not to select him for the Engineering Technician Position [reference to annex omitted].

8. In the reply to the application for suspension of action, the Respondent submits that:

... There has been no final administrative decision regarding the [Job Opening, “JO”]. On 15 July 2017, the JO for two positions was circulated with an application deadline of 13 August 2017. On 19 July 2017, the Applicant applied for the JO. On 21 February 2018, a total of 252 applicants, including the Applicant, were invited to take a multiple choice written assessment. On 1 March 2018, the Applicant completed the written assessment. The next step in the recruitment process is for interviews to take place.

**Parties' submissions**

9. From the application, the Applicant's contentions may be summarized as follows:

*Prima facie unlawfulness*

a. 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.

b. 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 laid down in the Staff Regulations and Rules were followed and whether the staff member was given fair and adequate consideration.

c. The decision not to select the applicant for the Position was *prima facie* unlawful because he was not given full and fair consideration. Specifically:

- i. The Applicant was already performing the role of Engineering Technician in MINUSTAH at the FS-5 level to the full satisfaction of MINUSTAH and had several years of experience as an Engineering Technician;
- ii. The Applicant applied for the Engineering Technician Position and was invited to sit a written assessment on 21 February 2018;

- iii. The Applicant was not laterally assigned to the Engineering Technician Position notwithstanding that his post was being abolished and he is a continuing appointment holder;
- iv. On 26 February 2018, after being invited to sit the exam and before the Applicant was required to sit the exam, he was expressly notified in writing that UNSOS had already selected a candidate and therefore it appears that the entire recruitment process was a sham; and
- v. The Applicant's application for the Engineering Technician Position is still listed as "Under Consideration" in Inspira.

d. In light of the above, there has been a significant procedural irregularity in the recruitment process for the Position. Specifically, the Administration had already selected a candidate at the commencement of the recruitment process and the recruitment process was only a formality to hire the particular candidate. Accordingly, as the decision regarding the selected candidate was predetermined even possibly prior to the commencement of the recruitment process, the Applicant was not given full and fair consideration especially considering his particular circumstances including the fact that he was a continuing appointment holder on an abolished post with an exemplary work record.

e. In consequence, there are serious and reasonable doubts about the lawfulness of the decision, in particular the process by which the selected candidate was chosen for the post. Such a decision is *prima facie* unlawful.

*Urgency*

f. In *Tadonki* UNDT/2009/016, the Dispute Tribunal concluded that 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”.

g. In this case, the matter is urgent due to the impending onboarding of the selected candidate. From the email dated 26 February 2018, it appears that the selected candidate is already a staff member at UNSOS Mogadishu and will fill the Position imminently.

h. Once the Applicant was informed that a candidate had already been selected for the Position, he immediately took steps to file a management evaluation request and suspension of action. Therefore, this is not a case of self-created urgency.

*Irreparable harm*

i. 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;

j. In the instant case, if the impugned decision is implemented, as the onboarding of the selected candidate is imminent, the Applicant will suffer harm with respect to career prospects. Specifically, he will lose the opportunity to advance his career as an Engineering Technician at the United Nations. Such harm cannot be compensated for by a monetary award.

10. In the Respondent’s reply, it is averred that the application for suspension of action is not receivable because no selection decision has been taken and “[t]he Applicant has misunderstood the statements made in the email dated 26 February

2018” [reference to footnote omitted]. The writer of the email incorrectly assumed that the applicant had failed to complete the assessment. Similarly, she was incorrect in saying that “[...] the selected candidate was already on board”.

11. In essence, the Respondent therefore maintains that the selection exercise is still ongoing and that the Respondent’s representative was mistaken in authoring the email upon which the application for suspension of action is chiefly predicated. Based thereon, referring to *Ngokeng* 2014-UNAT-460, para. 27 (citing *Bauzá Mercére* 2014-UNAT-404, para. 18, as well as *Wasserstrom* 2014-UNAT-457) and *Nguyen-Kropp & Postica* 2015-UNAT-509, the Respondent argues that it is well-established that an administrative decisions must have “direct legal consequences” on an individual’s terms of appointment and that “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”. The Respondent further submits that only a final decision that carries direct legal consequences may be challenged.

12. In response to the reply, the Applicant, *inter alia*, submits that, as a matter of fact, a decision has already been rendered as demonstrated by the email of Ms. ED, who works for the UNSOS Office of Chief Service Delivery and therefore has intimate knowledge of the recruitment process. The Applicant contends that there can be no other interpretation of the 26 February 2018 email other than that the Administration has already decided, despite any supposed recruitment process, that an ideal candidate has already been selected as the email clearly states “[w]e already have on board the selected candidate”. The Applicant further submits that the objective of an interim measure sought by a staff member is for the purpose of providing him or her with temporary relief, by maintaining the *status quo* between the parties to an application pending consideration of the contested decision, in this case pending management evaluation. For the Applicant, he only needs to adduce evidence of *prima facie* unlawfulness. In other words, the Applicant has to present a



fairly arguable case that the contested decision was influenced by some improper consideration, or that it was procedurally defective. The Applicant avers that the Appeals Tribunal in *Luvai* 2014-UNAT-417 held that every stage of the selection procedure is subject to judicial review. Consequently, there is no longer a requirement to await the final notification regarding non-selection if there is evidence to suggest that a decision has already been made. Therefore, a decision taken at any stage of the selection process is an administrative decision that can be the object of an application for suspension of action pursuant to art. 13 of the Dispute Tribunal's Rules of Procedure.

### **Consideration**

#### *Legal framework*

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

... 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.

14. Article 13.1 of the Tribunal's Rules of Procedure states:

... The Dispute Tribunal shall order a suspension of action 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.

15. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation 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. 2.2 of its Statute have been met.

16. Under art. 2.2 of the Statute, a suspension of action 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 a management evaluation of the contested decision.

17. 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. An application may well stand or fall on its founding papers. Likewise, a respondent's reply 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. Any essential averments must be supported by the best evidence available for the Tribunal to do the best it can on the papers before it.

#### Prima facie *unlawfulness*

18. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for him to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (see, for instance, *Jaen* Order No. 29 (NY/2011); *Villamoran* UNDT/2011/126).

19. This matter appears to have a substantial material dispute of fact. The Applicant submits that a candidate other than him has been selected for the Position and provides as evidence an email from Ms. ED, who works in the Office of Chief, Service Delivery, UNSOS, Mogadishu, copied to and informing the Applicant that, “If he failed to complete the exam ... [then] he is not considered for the position (clearance). We already have on board the selected candidate”. In response, the Respondent contends that the Applicant has misunderstood the statements made in the email, and that Ms. ED was incorrect as no candidate has been selected, for which reason the selection process is still ongoing. In support of this contention, the Respondent provides, as an annex, an undated screen shot apparently from Inspira for the Position, with absolutely no explanation in the narrative of the reply as to its purpose, meaning or contents. The screenshot simply shows, that on an unspecified date, the “Job Opening Status” is “010 Open” (no explanation is provided as to the meaning of this code), and does not even indicate a short list of applicants invited for interview and is lacking of any sufficient material particulars.

20. At this stage of the proceedings, the Applicant only needs to adduce evidence of *prima facie* unlawfulness. The Respondent has not contested the origin or the authenticity of the email. The Respondent has simply contended that the Applicant has misunderstood the statements therein, and that the writer of the email was incorrect as to the contents she authored, nothing more nothing less. The Tribunal finds that, there is absolutely no ambiguity in the stipulation in Ms. ED’s email that “[w]e already have on board the selected candidate”. The statement cannot be understood any differently than that a candidate other than the Applicant has already been selected for the Position—again, there is absolutely no ambiguity in the meaning and purport of the email. While the Respondent submits that, as a matter of fact, Ms. ED is incorrect in stating that a selected candidate was already on board, there is no meaningful evidence before the Tribunal to substantiate this contention; if indeed there has been a mistake on the part of Ms. ED, this is simply pleaded and not substantiated by any satisfactory evidence or document.

21. Accordingly, the only reliable evidence before the Tribunal remains the smoking gun email of 26 February 2018 addressed to five individuals and copied to two others, including the Applicant. The content of the email appears to have been accepted by all the recipients, and there is no single email in rebuttal of the alleged incorrect *status quo*. Furthermore, as Ms. ED works in the Office of Chief, Service Delivery, UNSOS, Mogadishu, it is only reasonable to believe that she has particular knowledge regarding the exact status of the selection process.

22. The Tribunal therefore finds that the Applicant has presented a fairly arguable case that a selection decision was made, possibly influenced by improper considerations, particularly that a selected candidate was already “onboard” prior to the closing date for the online written assessment and the conclusion of the selection exercise, thus the Administration having predetermined the outcome of the selection process. Since this matter is not at the merits stage and in view of the lack of any information to the contrary, the Tribunal also finds that the decision is yet to be implemented in terms of art. 2.2 of its Statute and art. 13 of its Rules of Procedure.

23. Accordingly, on the papers currently before the Tribunal, there are serious and reasonable concerns as to whether this selection exercise was lawful.

24. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

#### *Urgency*

25. According to art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

26. 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 (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

27. In the present case, the Applicant filed the application on 1 March 2018, three working days after becoming aware of the contested decision on 26 February 2018. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

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

*Irreparable damage*

29. 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.

30. The Applicant submits that he will lose the opportunity to advance his career as an Engineering Technician at the United Nations if another candidate is selected for the Position.

31. 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)).

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

### **Conclusion**

33. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied. Accordingly, the decision to select a candidate other than the Applicant for the Position shall be suspended pending management evaluation.

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

The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 8<sup>th</sup> day of March 2018