UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/018
Order No.: 105 (NY/2018)
Date: 29 May 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

MCINTOSH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

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

Counsel for Applicant:
Natalie Dyjakon, OSLA

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

Introduction

1. On 23 April 2018, the Applicant, a former 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 contesting the decision of the Administration to not 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. Further, pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure, the Applicant submitted in his application a motion for joinder/consolidation with Case No. UNDT/NY/2018/012.

2. On 24 April 2018, the New York Registry sent an acknowledgment email to the parties informing them that the Tribunal has received the Applicant's application on 23 April 2018, that it has been assigned to Judge Alessandra Greceanu under Case No. UNDT/NY/2018/018, and that the application has been transmitted to the Respondent in accordance with art. 8.4 of the Dispute Tribunal's Rules of Procedure. The email also informed the parties that pursuant to art. 10 of the Dispute Tribunal's Rules of Procedure, the Respondent has 30 days from the date of receipt of the application to submit his reply, including on the Applicant's request for consolidation of the present case with case number UNDT/NY/2018/012, and that the reply should therefore be filed by 24 May 2018.

3. On 24 April 2018, the New York Registry emailed the parties to confirm that Mr. Steven Dietrich has been listed as Counsel for the Respondent in Case No. UNDT/NY/2018/018.

4. On 21 May 2018, the Applicant filed a motion for interim measures requesting, as interim relief pursuant to art. 10.2 of the Dispute Tribunal's Statute, the

suspension of the implementation of the contested decision until a final judgment has been rendered in the present case.

5. On 21 May 2018, the New York Registry sent an acknowledgment email to the parties informing them that the Tribunal has received the Applicant's application for interim measures and instructing the Respondent to submit a response to the application for interim measures by 23 May 2018.

6. The Respondent provided his response to the application for interim measures on 23 May 2018 stating that the motion should be rejected as it is not receivable *ratione materiae*.

7. On 23 May 2018, the Applicant provided a response to the Respondent's reply in which she stated as follows (emphasis in the original):

> […]
>
> … In relation to the argument that no final selection decision has been taken, [the Applicant] maintains firstly that, he was informed of his non-selection and exclusion from the recruitment process in the email dated 26 February 2018. Contrary to the Respondent's submission, [the Applicant] was invited to sit a written assessment on 21 February 2018, that is, prior to him being informed that the selected candidate was already on board. [The Applicant] did subsequently complete the exam on 1 March 2018, however at that stage, he was already notified that he was excluded from the recruitment process and, the assessment appeared to be simply a formality while the real intention of the Administration was to select the candidate already on board.
>
> … Further evidence that a decision has been made not to select [the Applicant] can be taken from the Management Evaluation decision dated 15 May 2018 which expressly stated that he was not invited for an interview due to his written assessment results. This confirms the notion that a decision already has been taken to exclude [the Applicant] from the selection process for the Engineering Technician Position.
>
> … [The Applicant] maintains that he is not contesting a decision of appointment but rather one of reassignment.

> … [The Applicant] submits that the Respondent's reliance on the case of *Elzarov* [UNDT/NBI/2018/028] is misplaced. That case is clearly distinguishable in relation to the facts. In *Elzarov*, the applicant, while a continuing appointment holder, was seeking a promotion from a P-5 to a D-1 position. In such circumstances, a suspension of action is not permissible. In the case of [the Applicant] the subject matter is a lateral reassignment upon selection and not a promotion or appointment.
>
> … The Engineering Technician Position is at the same level and grade as his previous post and therefore cannot be seen as one of promotion. As a result, [the Applicant] submits that the case of *Elzarov* is irrelevant to the current case.
>
> … [The Applicant] maintains that, although he has been separated from service, he could still be laterally reassigned to the Engineering Technician Position without the need for a new appointment.
>
> … Should the Tribunal find in favour of [the Applicant], it could, if the selection has been suspended rescind the decision of the Administration not to recruit him to the post. [The Applicant] is currently challenging his separation before the same Tribunal and should a judgment determine that [the Applicant] has been unlawfully separated and unlawfully not considered for the Engineering Technician Position, the Tribunal could rescind both decisions. In such circumstances, [the Applicant] would regain his continuing appointment status and could be reassigned to the Engineering Technician Position. Therefore, the suspension of action is critical in safeguarding the rights of [the Applicant] so that any possible favourable judgment allows him to regain entitlements which the Administration unlawfully deprived him of.
>
> […]

Factual background

8. In his motion for interim relief, the Applicant presented the following chronology of facts on which his motion relies upon:

> … [The Applicant] was a staff member of the United Nations, serving as an Engineering Technician/Chief EMU at the [MINUSTAH] at the FS[-]5 level. [The Applicant] worked at the United Nations for approximately 12 years.
>
> … On 1 October 2014, [the Applicant] was granted a continuing appointment effective 30 September 2014 […].

… [The Applicant] has had an impeccable work record as exemplified by his latest two performance evaluations […].

… On 31 July 2017, [the Applicant] was notified that MINUSTAH was closing down and that as a result his post would be abolished.

… On 9 October 2017, [the Applicant] received a formal notification of termination of his continuing appointment […].

… During this period, [the Applicant] applied for a number of posts in Inspira [a United Nations online jobsite] which remain "Under Consideration" […] including the Engineering Technician Position which he applied for on or around 16 July 2017 […].

… On 18 January 2018, [the Applicant] was separated from service.

… On 21 February 2018, [the Applicant] received an email inviting him to complete a written assessment for the Engineering Technician Position […].

… On or about 26 February 2018, [the Applicant] was required to leave Haiti and return to East Timor […].

… 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 [emphasis omitted],

> "If he failed to complete the exam [Position Specific Job Opening ("PSJO")], th[e]n he is not considered for the position […]. We already have on board the selected candidate" […].

… On 27 February 2018, an Application was filed at the [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 the same day, [the Applicant] submitted a Management Evaluation Request (MER) challenging the decision of the Administration not to select him for the Engineering Technician Position. At the same time, [the Applicant] filed a suspension of action application […].

> … On 2 March 2018, the Tribunal granted an interim order suspending the implementation of the contested decision pending the Tribunal's determination of the suspension of action […].
>
> … On 8 March 2018, the Tribunal ordered that the application for suspension of action be granted and that the contested decision be suspended pending management evaluation […]. The Tribunal concluded that there were, [emphasis omitted] "serious and reasonable concerns as to whether this selection exercise was lawful."
>
> … On 23 April 2018, [the Applicant] filed an Application and Motion for Joinder/Consolidation at the [Dispute Tribunal] […].
>
> … On 15 May 2018, [the Applicant] received a response to his MER […]. The Management Evaluation Unit ["MEU"] determined that the matter was not receivable because the selection exercise had not been finalised.
>
> … In relation to the merits of the matter, the MEU observed that [the Applicant] scored 64% in the written assessment however, the passing score was 84%. In addition, the MEU provided an explanation for the email from Ms. ED, stating that, (emphasis omitted)
>
> > "…the Administrative Assistant in question, who is not the Hiring Manager and is not familiar with the progression of the selection exercise, clarified that she meant to state that the post has an incumbent on board, i.e., a serving staff member on the post, for which the job opening was advertised as a result of the classification of the post at the FS-5 level."

9. The Respondent, in his reply of 23 May 2018 to the motion for interim measures, states as follows:

> a. No final selection decision has been taken as the selection exercise is on-going;
>
> b. Should the Dispute Tribunal find that a selection decision has been made in respect of the Position, the Dispute Tribunal does not have jurisdiction to suspend the implementation of that decision under art. 10.2

of the Dispute Tribunal's Statute as it is incompetent to grant interim relief in cases of appointment;

c. The Applicant's argument regarding assignment versus appointment is misplaced and hypothetical as the Applicant is no longer a United Nations staff member, he separated from the Organization on 18 January 2018, and thus he cannot be assigned to a new position.

Parties' submissions

10. The Applicant's contentions in the motion for interim measures may be summarised as follows:

Receivability

a. Under art. 14.1 of the Dispute Tribunal's Rules of Procedure, the Tribunal may, at any time during the proceedings, order temporary relief including an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination;

b. The request for suspension of action deals primarily with the issue of non-selection and that as such it is a matter which the Tribunal can render a decision on;

c. In the present case, as a continuing appointment holder, had the Applicant been selected for this position he would have been reassigned. As a result, the Applicant contends that the request for suspension of action does not relate to either appointment or promotion;

d. The term "appointment" is not specifically defined within the Staff Regulations and Rules. However, what is apparent when reviewing the Staff Regulations and Rules is that the characteristics of appointment

are clearly enunciated. Pursuant to staff regulation 4.1, "Upon appointment, each staff member…shall receive a letter of appointment…";

e. At the same time, under staff regulation 3.4 provides that, "On appointment, a staff member shall normally be placed at the first step on the level of his or her post, unless otherwise decided by the Secretary-General";

f. In this case, as a continuing appointment holder, the Applicant would not receive a new appointment. Instead, pursuant to staff regulation 1.2(c), the Applicant would be laterally reassigned. This should be contrasted with a fixed-term appointee or a newly appointed staff member who would receive a formal letter of appointment to any new position upon selection and would be placed at the first step on the level of his or her post;

g. Once a selection of a candidate has been made, the Administration can either appoint or assign a staff member to the position. In this case, as a continuing appointment holder, the Applicant would have been assigned to the post, retaining his step and salary and not receiving any new letter of appointment. As a result, in these circumstances, the Applicant is eligible to seek a suspension of action in line with his continuing appointment status;

h. The post to which the Applicant applied for is at the FS-5 level, the same grade to which he previously had been on. As such, the Engineering Technician Position cannot be seen as a promotion but rather one relating to lateral reassignment;

i. In the MEU decision, the Administration concluded that the matter was not receivable as there was no outcome to the selection process. However, the MEU confirmed that the Applicant had effectively failed the written test and that he was not invited to the interview. At the same time,

the Applicant received an email which notified him that the selected candidate was already onboard;

j. Pursuant to the Appeals Tribunal in *Luvai* 2010-UNAT-014, the Applicant does not need to wait until the final inevitable notification to challenge the non-selection. It is evident from the email and reinforced by the MEU decision that the Applicant had already been excluded from the final selection process. As a consequence, his exclusion constitutes an administrative decision subject to challenge. To argue that the Applicant must await a final inevitable notification of his non-selection, sacrifices form over substance and diminishes the Applicant's right to challenge his non-selection. The Applicant contends that it is self-evident that a decision has been made not to select him for the Position and to contend otherwise and to submit that the Applicant is still being considered, is pure fiction and indefensible;

Irreparable damage

k. 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;

l. Nonetheless, this Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage;

m. In this case, it is accepted that the Applicant has been separated from the Organization. This separation is subject to challenge before the Tribunal. As a result, the Applicant has lost his continuing appointment status;

n. Nevertheless, what is evident is that were the Applicant selected for the Engineering Technician Position at the FS-5 level, he could have an opportunity to regain his continuing appointment. Were the Applicant

successful before the Dispute Tribunal, the Tribunal could order rescission of the decision regarding non-selection. However, such a decision is dependent on the Engineering Technician Position not being filled. Were the Administration in a position to implement the decision and select an alternative candidate, the Applicant would lose the opportunity of rescission and in so doing, would prevent any possible step to re-establish his continuing appointment status within the United Nations;

o. As a consequence, such harm cannot be compensated for by a monetary award. The Applicant would have permanently lost his continuing appointment status and the associated entitlements accompanying his long service in the United Nations. Effectively, if the Applicant obtained new employment within the United Nations then he would be starting again. The consequence for the Applicant is that he would not have the stability of employment associated with a continuing appointment and he would have to commence the lengthy process of obtaining continuing appointment status;

Prima facie *unlawfulness*

p. 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;

q. 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. 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. The decision not to select him for the Engineering

Technician Position was *prima facie* unlawful because he was not given full and fair consideration;

r. Specifically, the Tribunal should consider the following:

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 completed the written assessment on 1 March 2018;

iv. The Applicant was not laterally assigned to the Engineering Technician Position notwithstanding that his post was being abolished and he was a continuing appointment holder; and

v. On 26 February 2018, after being invited to sit the exam and before he was required to sit the exam, the Applicant was expressly notified in writing that UNSOS had already selected a candidate and therefore it appears that the entire recruitment process was a sham;

s. In light of the above, there have been significant procedural irregularities in the recruitment process for the Engineering Technician 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;

t. The email from Ms. ED is clear and unambiguous in that the selected candidate for the post had already been onboarded;

u. In contrast, the explanation given by the MEU provides little by way of clarity. According to the MEU, the Administrative Assistant, Ms. ED, actually meant in her email that, "the post has an incumbent on board i.e., a serving staff member on the post, for which the job opening was advertised as a result of the classification of the post at the FS-5 level". The MEU's reinterpretation of this email constitutes at best a lawyer's defense and bears little resemblance to what Ms. ED actually stated. It is self-evident that a candidate had been identified and would be selected and then either appointed, assigned or promoted. Whatever method the Administration chose, it was clear that the intention was to not consider the Applicant;

v. Accordingly, as the decision regarding the selected candidate was predetermined even possibly prior to the commencement of the recruitment process, the Applicant contends that he 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;

w. As a result, any reference to the results of the written assessment should be regarded by the Tribunal as irrelevant. The Administration retained an intent not to select the Applicant and therefore, any review of his performance should take into account a pre-determined decision to select a preferred candidate;

x. Ultimately, in accordance with established jurisprudence, the Applicant should have been considered for such a position on a preferred or non-competitive basis and should have simply been reassigned to the post

considering his qualifications, experience, continuing appointment status and the fact that his post was to be abolished;

y. 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

z. 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";

aa. In this case, the Applicant submits that the matter is urgent due to the impending final decision 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 Engineering Technician Position imminently;

bb. Furthermore, it is likely that the recruitment process for the Engineering Technician Position will be finalized prior to the conclusion of these proceedings. Indeed it should be noted that the commencement of the selection process began in July 2017 and so it is inevitable that the selection will be concluded shortly.

11. The Respondent's submissions in reply to the motion for interim measures may be summarised as follows:

Receivability

Any allegations that are not specifically admitted in the Respondent's reply are denied.

a. No selection decision exists:

The selection exercise regarding the Position is ongoing. The Applicant's reliance on the 26 February 2018 email to demonstrate otherwise is misguided. The email does not demonstrate that the selection exercise for the Position has been finalized with the selection of a successful candidate. Neither does the email show that the Applicant has been informed of the outcome of the selection exercise. It defies logic that the Applicant would be informed on 26 February 2018 that he was not selected for the Position and then be invited to sit a written assessment for the same Position six days later, on 1 March 2018. The selection exercise is ongoing. Critical steps of the selection exercise remain to be undertaken. This includes conducting competency-based interviews and review by the central review body under sec. 8.1 of ST/AI/2010/3;

b. Article 10(2) of the Dispute Tribunal's Statute prohibits suspension of the implementation of a selection decision:

Should the Dispute Tribunal find that a selection decision has been made in respect of the Position, the Tribunal does not have jurisdiction to suspend the implementation of the selection decision under art. 10.2 of its Statute. The General Assembly, in adopting the Dispute Tribunal's Statute, para. 36, decided to not grant the Dispute Tribunal jurisdiction to suspend the

implementation of an administrative decision in cases concerning appointment. It is well established that a selection decision is a case of "appointment" under Article 10(2) of the Statute. This was recently confirmed in *Elzarov* para. 11, where the Dispute Tribunal held:

> [T]he Applicant contests the decision not to select him for the position […] which is, in fact, a decision involving an eventual appointment […]. Accordingly, the Dispute Tribunal does not have jurisdiction to grant the relief the Applicant is seeking and the motion is therefore not receivable.

The practice of both the Dispute and Appeals Tribunals under Articles 10(5) of their respective Statutes, which contains the same wording, also demonstrates that a selection decision is a case of "appointment";

c. The Applicant could not be assigned to a new position:

The Applicant's argument relating to appointment versus assignment is misplaced and hypothetical. The Applicant is a former staff member. He separated from service on 18 January 2018. As the Applicant is no longer a staff member, he could not be assigned to a new position, following his successful participation in any selection exercise. Rather, the Applicant would be given a new appointment.

Consideration

Applicable law

12. Art. 10.2 of the Dispute Tribunal's Statute provides that:

> 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. The Tribunal considers that an order on interim measures may be granted at the request of the parties when the following cumulative conditions are met:

a. The motion for interim measures is filed in connection with a pending application on the merits before the Tribunal, anytime during the proceedings;

b. The application does not concern issues of appointment, promotion or termination;

c. The interim measure(s) ordered by the Tribunal must provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed;

d. The contested administrative decision appears *prima facie* to be unlawful;

e. There is a particular urgency in requesting the interim measures;

f. The implementation of the contested administrative decision would cause irreparable damage.

Discussion

14. The Tribunal notes that the Applicant filed an application on the merits on 23 April 2018 contesting the administrative decision consisting in his non-selection for the position of Engineering Technician at the FS-5 level in UNSOS which was registered before the Dispute Tribunal as Case No. UNDT/NY/2018/018. On 21 May 2018, the Applicant filed a motion for interim measures in the same case. The Respondent provided his response to the motion for interim measures on 23 May 2018 and his reply to the application on the merits on 24 May 2018.

15. The Tribunal concludes that the present motion for interim measures is filed in connection with a currently pending application on the merits before the Tribunal filed on 23 April 2018.

16. Regarding the second condition mentioned above, the Tribunal notes the following relevant factual aspects:

> a. The Applicant was granted a continuing appointment in the United Nations Secretariat effective on 1 October 2014. A job opening ("JO") to fill a vacancy for the position of Engineering Technician at the FS-5 level in UNSOS in Mogadishu was advertised between 15 July 2017 and 13 August 2017. The Applicant applied for the JO on 19 July 2017. On 31 July 2017, the Applicant was informed that according to Security Council resolution 2350 (2017), the mandate of MINUSTAH would end on 15 October 2017 and that according to the approved drawdown plan, his functions would be reduced by 30 September 2017, and that subject to the approval of the termination of his continuing appointment by the Under-Secretary-General for Management ("USG/DM"), MINUSTAH would initiate the termination of his appointment with the proposed effective date of 30 September 2017. On 9 October 2017, the Applicant received a notice of termination informing him that "[…] efforts by Field Personnel Division for [his] lateral re-assignment under the delegation of the Under-Secretary-General for Field Support ("USG/DFS") ha[ve] not been successful and therefore the [USG/DM] has approved termination of [his] appointment with the United Nations in accordance with Staff Regulation 9.3(a)(i) and Staff Rule 9.6(c)(i)" and that this letter was "[…] an official notice that [his] appointment [would] be terminated in line with Staff Rule 9.7, and [his] separation [would] be effective on 31 December 2017". Another JO for the position of Engineering Technician at the FS-5 level (Classification) in the United Nations Organization Stabilization Mission in the Democratic

Republic of the Congo, in Goma, was advertised from 14 November 2017 to 13 December 2017 and the Applicant applied to it on 19 November 2017;

b. The Applicant was effectively separated on 18 January 2018 when the Organization implemented the termination decision issued on 9 October 2017. On 27 February 2018, the Applicant filed an application on the merits contesting the failure of the Administration to make good efforts to find him an alternative post. On 1 March 2018, the Applicant filed a suspension of action seeking to suspend the decision, pending management evaluation, not to select him for the Position in Mogadishu;

c. The Tribunal notes that the present motion for interim measures was filed on 23 April 2018, three months after the effective implementation of the decision to terminate the Applicant's permanent appointment, on 18 January 2018.

17. The Tribunal notes that according to art. 101 of the United Nations Charter, staff regulation 4.1 and staff rule 4.1, upon appointment, a staff member must ("shall") receive a letter of appointment. Staff regulation 4.5 and staff rule 4.11 state that staff members are to be granted either a temporary, fixed or continuing appointment, except the Under-Secretary-Generals and Assistant Secretary-Generals who are normally to be appointed for a period for up to five years subject to prolongation or renewal. Staff regulation 1.2(c) provides that "[s]taff members are subject to the authority of the Secretary-General and to assignment by him/her to any of the activities or offices of the United Nations".

18. The Tribunal considers that, in light of the above-mentioned provisions, only if appointed, a staff member can be assigned and/or re-assigned. Therefore, a staff member can be assigned/re-assigned only during his/her appointment with the United Nations. Once the staff member is separated, without distinction of what kind of contract s/he was employed under (permanent/continuing, fixed-term and/or temporary), s/he can no longer be assigned/re-assigned since s/he no longer

has an appointment with the Organization. It results that the notion "appointment" is different from "assignment" and they have different legal consequences.

19. Further, the Tribunal notes that according to the mandatory provisions of staff rule 4.17(a) and (b), a former staff member who is re-employed under conditions established by the Secretary-General must ("shall") always be given a new appointment unless s/he is reinstated under staff rule 4.18. Staff rule 4.18 provides that "[a] former staff member who held a fixed-term or a continuing appointment and who is re-employed under a fixed-term or a continuing appointment within twelve (12) months of separation from service may be reinstated if the Secretary-General considers that such reinstatement can be in the interested of the Organization" and that "[i]f the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment". If re-instated, "[t]he staff member services shall be considered as having been continuous and the staff member shall return any monies s/he received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 3.19 and payment for accrued annual leave under staff rule 9.9. The interval between separation and reinstatement shall be charged, to the extent possible, to annual leave, with any further period charged to special leave without pay. The staff member's sick leave credit under staff rule 6.2 at the time of separation shall be re-established; the staff member's participation, if any, in the United Nations Joint Staff Pension Fund shall be governed by the Regulations of the Fund".

20. The Tribunal concludes that a former staff member who is to be re-employed and/or reinstated, in any post including in a post at the same level as his previous post, is always receiving a new letter of appointment issued by the Secretary-General. Consequently, the Applicant could have been re-assigned to another position only while still being a staff member, namely before 18 January 2018, when he was separated from the Organization. The Applicant, as a former permanent staff member, if he is to be selected for a new post at any level, including at his former level (FS-5), and re-employed and/or reinstated, he is to receive a new letter of appointment.

21. The Tribunal concludes that the present application relates to an appointment and therefore the second condition is not fulfilled.

22. Since one of the above-mentioned cumulative conditions is not fulfilled, the Tribunal need not consider whether the remaining requirements, namely if: the interim measure(s) ordered by the Tribunal would provide solely a temporary relief to either party, such relief being neither definitive by nature nor having the effect of disposing of the substantive case in relation to which the application for interim measures is filed; and if the conditions of *prima facie* unlawfulness, urgency and irreparable damage, are met.

23. In the light of the foregoing,

IT IS ORDERED THAT:

24. The present application for interim measures is rejected.

(*Signed*)

Judge Alessandra Greceanu

Dated this 29th day of May 2018