



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

NEMETH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**ORDER**

**ON SUSPENSION OF ACTION**

---

**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 2 October 2017, the Applicant, a Security Sergeant at the S-4 level, step 8, with the Security and Safety Service in the Department of Safety and Security (“SSS/DSS”), filed an application under art. 2.2 of the Dispute Tribunal’s Statute as read with art. 13 of the Rules of Procedure, for the suspension, pending management evaluation, of the decision for the “[c]ontinuation of a compromised promotion exercise”.
2. The same date (2 October 2017), the Registry acknowledged receipt and, upon the instruction of the undersigned Judge, requested the Respondent to file a reply by 5:00 p.m., 4 October 2017.
3. On 4 October 2017, the Respondent filed his reply stating that on 3 October 2017, the Management Evaluation Unit (“MEU”) had determined that the Applicant’s request for management evaluation was not receivable as no final selection decision has been made.
4. The Respondent therefore contends in his reply that the Tribunal “does not have jurisdiction to issue an order suspending the contested decision” as the Applicant’s request is no longer pending management evaluation.

## **Background**

5. The Applicant presents the facts as follows:
  - ... On 4<sup>th</sup> August 2017, applicant sat an Exam for promotion to Lieutenant within the Safety and Security Service, Department of Safety and Security. All applicants were given a Unique assessment letter to identify each candidate for the propose of transparency.
  - ... On Thursday, 28 September 2017 I received an email from [Ms. NK, name redacted] that [Mr. MB, name redacted] Chief

of Service of the Safety and Security service have requested to meet all candidates to the recently written promotion exam on Thursday, 28 September regarding the Lieutenant promotion Exercise (JO#76088). All candidates were advised to bring their uniquely assigned assessment number.

- ... During the meeting, candidates to the exam were informed that the master list that included the candidates' (11 total) and assessment numbers as well as signature was lost. Candidates were informed that management were in the process of identifying, and attaching candidates to each exam paper. Some candidates had in possession two identifying numbers in contrast to the single number issued to each candidate during the exam process. The loss of the list which is used to identify each candidate to a particular exam paper compromises the intent of fair practice, and every semblance of prejudice. I expressed my concerns regarding the process in an email on Thursday, 28 September at 11:38 p.m. (Please see chain of emails).
- ... I was asked to view the various exams papers and identify my paper to which I rejected because such act of viewing other candidate's exams compromises the intent of transparency. Subsequently I was told that my exam was identified by management on 29 September, at 11:39 a.m. (please see email). The process of randomly attaching an exam paper to my name compromises the principle of transparency and fair play because in the absence of identification numbers previously given it is difficult if not impossible to randomly attach a unidentified exam paper to any person especially that I had no number. (I was also advised by Ethics Office not to look at anyone's exams due to transparency) and was informed by [Ms. G, name redacted] they move forward with the process despite my arguments and reasoning.
- ... On 29 September, at 13:44 p.m. I was advised my management that I have failed the exam.
- ... I responded on 29 September at 8:23 p.m. and expressed my disappointment and the lack of communication of management with [the Office of Human Resources] or other entities to establish what procedure should be followed in such situations such as this. I informed them that I will take this matter forward and bring it to the attention of the appropriate platforms as well as file a claim with Ethics Office.

6. On 2 October 2017, the Applicant filed her request for management evaluation of the contested decision with the MEU.

7. On 3 October 2017, the MEU rejected the Applicant's request for management evaluation on the basis that it was not receivable, arguing that it is "premature" because the Applicant has "not received a final notification of [her] non-selection".

### **Applicant's submissions**

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

#### *Prima facie unlawfulness*

a. Referring to staff regulation 4.2, the discriminate apportioning of exam papers to names without any bases of identifying who wrote the exam compromises the integrity of the exam and hence renders such application null and void;

b. To promote efficiency and integrity, each candidate was given a unique number to be identified with a specific paper. The loss of such list identifying the unique number of each candidate compromises the integrity of the exam and its result. Management does not possess the competence to identify each person to a written exam using personal opinion and the apportioning of exam papers deprived the Applicant of a chance for promotion;

#### *Urgency*

c. The process, if allowed to progress forward, would compound the injury of unfair practice, loss of opportunity to be promoted and will run contrary to the United Nations' principles of efficiency and integrity;

d. If management is allowed to proceed with the selection of candidates, using an already tainted process, a selection of candidates to fill the vacancy is expected to be made within a reasonably short period of time;

e. After a candidate is selected, the issue becomes moot and no judicial remedy will be available to the Applicant;

f. If management intends to begin the process of interviewing candidates, to whom management have prescribed passing marks, this would be in complete disregard of the efficiency and integrity of the promotion process;

*Irreparable damage*

g. The continuation of a compromised selection exercise will cause a loss of chance to be fairly appraised for an exam;

h. The unfair appraisal will cause a loss of income as the Applicant will be held to the present grade for a considerable amount of time;

i. Considering that promotion within the SSS/DSS is a very rare event, the Applicant will be deprived of a promotion opportunity for an undeterminable number of years;

j. Also, the Applicant will lose an opportunity of arithmetically progressive contribution to her pension.

**Respondent's submissions**

9. The Respondent claims that the Dispute Tribunal does not have jurisdiction to issue an order suspending the contested decision. He submits that the Applicant's request for suspension of action is no longer pending management evaluation and

that, pursuant to art. 2.2 of its Statute, the Dispute Tribunal may only suspend the implementation of a decision “during the pendency of the management evaluation”, referring to *Igbinedion* 2011-UNAT-159, para. 23.

## **Conclusion**

### *Legal framework*

10. Article 2.2 of the Statute of the Dispute Tribunal provides (emphasis added):

... 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.

11. Thus, in accordance with art. 2.2, 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 cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

12. It also follows that the suspension of action of a challenged decision under art. 2.2 may only be ordered when management evaluation for that decision has been duly requested and is still ongoing (see, for instance, *Igbinedion* 2011-UNAT-159 and *Benchebbak* 2012-UNAT-256).

13. In the present case, the MEU completed its review of the Applicant’s 2 October 2017 request for management evaluation on 3 October 2017 and concluded

that it was not receivable as the request was “premature” because the Applicant has “not received a final notification of [her] non-selection”.

14. Since an application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation, and as the management evaluation in this case is no longer pending and has been completed, there is no longer any legal basis upon which the Tribunal may grant the Applicant’s request for suspension of action, and the application is dismissed.

15. Consequently, it is not necessary for the Tribunal to examine if the three statutory requirements specified in art. 2.2 of its Statute, namely *prima facie* unlawfulness, urgency and irreparable damage, are met in the case at hand.

### **Observations**

16. In the MEU’s rejection of the Applicant’s request, the MEU relied on the case of *Hamad* 2012-UNAT-269 for the definition of an administrative decision. This case is not entirely on point: it concerned the calculation of interest in a pension fund matter emanating from the United Nations Relief and Works Agency for Palestine Refugees in the Near East Tribunal (“UNWRDT”). In that case, the UNWRDT decided, and the Appeals Tribunal upheld, that the manner in which the Secretariat calculated the Provident Fund balance of separating participants did not constitute an administrative decision alleging the non-observance of the Appellant’s terms of appointment, and was, therefore, not within its jurisdiction.

17. The MEU also cited the case of *Nguyen-Kropp & Postica* 2015-UNAT-509 finding that steps that are preliminary in nature may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences for an applicant. The Tribunal notes that this case concerned the initiation of an investigation, in which the Appeals Tribunal found that (emphasis added), at para. 31:

*Generally speaking*, appeals against a *decision to initiate* an investigation are not receivable as such a decision is preliminary in nature and does not, *at that stage*, affect the legal rights of the staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

18. The often quoted seminal decision regarding an administrative decision is the case of *Andati-Amwayi* 2010-UNAT-058, which at para. 19 states, “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” (see also at para. 29 of *Nguyen-Kropp & Postica*, *supra*).

19. The MEU determined that the Applicant’s request was premature since the administrative decision constituted steps preliminary in nature as the Applicant had not received a final notification of her non-selection. The Tribunal, however, notes that, by email dated 29 September 2017, the Applicant received confirmation that her exam paper had been identified by management and that she was “not successful in the written technical assessments for the S5 vacancy conducted on Friday, 4 August 2017 ... As a result, you are no longer eligible to continue to the next stage of the process ... ”.

20. The Applicant does not challenge the selection of any candidate to the post or the decision not to select her, rather she requests suspension of the “[c]ontinuation of a compromised promotion exercise”, which she alleges has been tainted by the mishandling of the examination and the results. To characterize the subject matter and reduce cases like the present case to one of non-selection or non-promotion in these particular circumstances and at this stage of the process could result in an absurdity and miscarriage of justice. This would mean that the Tribunal could never grant any urgent temporary relief—no matter how serious the alleged violations, or how flawed or unlawful a decision—so long as such decisions are presented in the broader context of what is perceived as preparatory steps in a selection or promotion exercise (see also *Singh* Order No. 50 (NY/2015)).



The prejudice that may be suffered by an applicant is further compounded by the limited relief that can be provided, where specific performance is essentially unavailable.

21. Even if one were to accept the contention in the present case that the selection exercise is ongoing and these are preparatory steps, one must look at the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision. As stated by the Appeals Tribunal, at para. 50, in *Michaud* 2017-UNAT-761 (emphasis added and references to footnotes omitted):

... Before an administrative decision can be held to be in non-compliance with the contract of employment of a staff member it must be shown to adversely affect the rights or expectations of the staff member and have a direct legal effect. A decision to initiate an investigation, in itself, ordinarily, will not immediately affect the rights of a staff member nor be of direct legal effect. Judicial review is concentrated pragmatically on the more important administrative decisions and thus avoids allowing challenges to preliminary or intermediate decisions. Where a decision requires several steps to be taken by different authorities, but only the last of which is directed at the staff member, the earlier decisions or actions lack direct effect, and only the last decision may be taken to the Dispute Tribunal for review. *Preparatory decisions, therefore, are normally not reviewable* by administrative tribunals. This accords with the general principle that tribunals should not interfere with purely internal matters of departmental administration or organisation, or processes that have not reached finality.

22. A decision which is preliminary in nature is “*generally speaking*” not receivable at the initial stage when it does not affect the legal rights of the staff member. Preparatory decisions are “*normally not reviewable.*” It is instructive that the language of the UNAT is qualified in these matters indicating that there may be exceptions to the rule, which must be determined on a case by case basis. In this instance, the Applicant has already received a finite decision excluding her entirely from consideration for selection. The consequences of the decision are that the Applicant’s terms of appointment/contract of employment have been directly

impacted as she is disqualified from the ongoing exercise. Whilst preparatory decisions are not normally reviewable, there are serious allegations regarding the legality of the decision in this instance, allegedly tainting the process thus far reached. Is such decision not reviewable?

23. Nevertheless, the Tribunal wants to make it clear that the above are only observations and since management evaluation has already been rendered, the Tribunal will not entertain this matter further.

**Order**

24. There being no ongoing management evaluation, the application for suspension of action is dismissed.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 9<sup>th</sup> day of October 2017