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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/097  
Order No.: 232 (NY/2017)  
Date: 16 October 2017  
Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

NEMETH

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON MOTION FOR INTERIM  
MEASURES PENDING  
PROCEEDINGS**

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**Counsel for Applicant:**  
Marisa MacLennan, OSLA

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



confirmed that this was an error and that it is to be considered a motion for interim measures pending the Dispute Tribunal's proceedings pursuant to art. 14 of the Rules of Procedure and requested the registry to reject it as a separate filing. On 10 October 2017, at 5:10 p.m. and 5:32 p.m., the Registry advised the Applicant's Counsel that the application on the merits was registered under Case No. UNDT/NY/2017/097 and that the motion for interim measures could be re-filed under this case number.

Having reviewed the motion related to the application on the merits assigned to her on 10 October 2017, on 11 October 2017, at 12:41 p.m., the assigned Judge instructed the Registry, due to the urgency of the motion, to upload the motion with annexes in the present case and, consequently, it was no longer necessary for the Officer-in-Charge to process the motion and to register it under a separate case number of the Dispute Tribunal. On 11 October 2017, at 1:59 a.m., the Applicant re-filed the motion for interim measures in the present case.

By this notification, the motion for interim measures has been transmitted to the Respondent.

Further to Judge Greceanu's instructions, the Respondent shall submit his reply by 5:00 p.m. on Thursday, 12 October 2017.

5. On 12 October 2017, the Respondent filed a response to the motion for interim measures.

### **Relevant background**

6. In her motion for interim measures, the Applicant states the facts that she seeks to rely on are as follows (references to annexes omitted):

... [The Applicant] joined the United Nations in 2001. In June 2009, she received a permanent appointment. She is currently a Security Sergeant at the S4 level, Step VIII.

... On 25 March 2017, [the Applicant] applied to the position of

ticket with an identifying number, and the candidate kept one. The test consisted of 50 questions: several multiple-choice questions, and only a few questions with fill-in answers.

... On 27 September 2017, [the Applicant] received an email from the Office of the Chief, requesting a meeting the following day, in connection with the written exam, and asking candidates to bring their assessment numbers, if they were in possession of them.

... On 28 September 2017, [the Applicant] went to the meeting, where all candidates were informed that the master list that included 11 candidates' names and assessment numbers, as well as signature, was lost. Candidates were informed that management was in the process of identifying and matching candidates to each exam. Some candidates had two identifying numbers.

... Later that day, [the Applicant] received an email from ... [the] Administrative Officer SSS/DSS, in which [the Administrative Officer] asked [the Applicant] to come and identify her written test.



Case No. UNDT/NY/2017/097

Order No. 232

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 noncompliance 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 maybe 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 is “generally” not reviewable at the initial stage of the process. Preparatory decisions are “generally” not reviewable. It is striking that the Appeals Tribunal 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 final decision excluding her entirely from consideration for selection. The consequences of the decision are that the Applicant’s terms 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?

... Thus, [the Applicant] respectfully submits that her challenge to the procedure of the selection process for JO 76088 and the determination of her ineligibility to continue in the process due to her written test score are appropriately made at this time and can be properly reviewed by this Tribunal.

*Prima facie unlawfulness*

[The Applicant] respectfully submits that the procedure of the selection process for JO 76088 and the determination of her ineligibility to continue in the process due to her written test score are prima facie unlawful because 1) there was a procedural flaw; 2) there was the possibility of contamination of tests and identifying information; 3) candidates were improperly asked to view each other's tests; and 4) anonymous grading cannot be determined or verified.

... First, when DSS misplaced the master list which identified candidates via their assessment number, a serious procedural flaw occurred. This flaw compromised the integrity of the entire process, no matter the subsequent efforts that were made to rectify the situation. This flaw also calls into question the steps leading up to and following the identification of candidates. Additionally, because of the procedural flaw, [the Applicant's] right to appeal the process is compromised because we cannot even be entirely sure that hers is the exam which was graded in her name. The only way to ensure procedural fairness and certainly would be to restart the process of the written assessment.

... Second, once the error was discovered and DSS asked candidates to engage in assisting to identify their tests, it created the possibility that the tests and/4(nd)] TJ8p00 1 13-19(to )-23 1 1 ofies 1 13-13643(oc)4(e)4tes via







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2. The Registrar shall transmit the application to the respondent.
3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.
4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

11. Section 10.2 of ST/AI/2010/3 (Staff selection system) states:

**Notification and implementation of the decision**

...

10.2 The decision to select a candidate shall be implemented upon its official communication to the individual concerned. When the selection entails promotion to a higher level, the earliest possible date on which such promotion may become effective shall be the first day of the month following the decision, subject to the availability of the position and the assumption of higher-level functions. ...

12. 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;

Case No. UNDT/NY/2017/097

Order No. 232 (NY/2017)

17. The Tribunal further notes that, in *Siri* 2016-UNAT-609

Case No. UNDT/NY/2017/097

Order No. 232 (NY/2017)