



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2017/018

Judgment No.: UNDT/2018/066

Date: 14 June 2018

Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

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

LATIMER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alister Cumming, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. The Applicant, a former staff member holding a temporary appointment on a “when actually employed” (“WAE”) basis as a Reviser at the T-

















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... The decision to request that the Applicant resign was lawful.

... Staff rule 4.7(a) prohibits the Organization from employing a father and daughter at the same time. There is no exception to this rule for staff members recruited through a competitive recruitment examination, or for language staff.

... Section 1.1 of ST/AI/2003/8/Amend.2 [(Retention in service beyond the mandatory age of separation and employment of retirees)] provides that “[r]etention in service of staff members beyond the mandatory age of separation is an exception [...] which may be approved by the Secretary-General only when it is in the interest of the Organization.”

... The Applicant was a retired staff member, whose continued employment with the Organization was subject to the interests of the Organization. Retention of staff beyond the age of retirement is solely at the discretion of the Organization. As his continued employment would violate the clear terms of staff rule 4.7(a), the

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Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

[...]

#### Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

[...]

#### Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

30. The International Covenant on Economic, Social and Cultural Rights adopted by General Assembly on 16 December 1966 A/RES/2200A (XXI) and entered into force on 3 January 1976 provides as follows:

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

31. The International Labour Organization (“ILO”) C122 - Employment Policy Convention of 1964 states as follows:

Preamble

Considering that the Declaration of Philadelphia [concerning the aims and purposes of the ILO] recognises the solemn obligation of the [ILO] to further among the nations of the world programmes which will achieve full employment and the raising of standards of living, and that the Preamble to the Constitution of the [ILO] provides for the prevention of unemployment and the provision of an adequate living wage, and

Considering further that under the terms of the Declaration of Philadelphia it is the responsibility of the [ILO] to examine and consider the bearing of economic and financial policies upon employment policy in the light of the fundamental objective that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”, and

Considering that the Universal Declaration of Human Rights provides that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”, and

Noting the terms of existing international labour Conventions and Recommendations of direct relevance to employment policy, and in0 GT7w-169(spirit)4(e)4(-)

the Discrimination (Employment and Occupation) Convention and Recommendation, 1958,

[...]

Article 1

1. With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.

2. The said policy shall aim at ensuring that:

(a) there is work for all who are available for and seeking work;

(b) such work is as productive as possible;

(c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use

his skills and endowments in, a job for which he is well suited/F1 12 Tf1 0 0 1 4it



Rules and in the relevant resolutions and decisions of the General Assembly, are respected;

(d) The Secretary-General shall seek to ensure that the paramount consideration in the determination of the conditions of service shall be the necessity of securing staff of the highest standards of efficiency, competence and integrity;

(e) The Staff Regulations apply to all staff at all levels, including staff of the separately funded organs, holding appointments under the Staff Rules;

[...]

[Staff regulation 4.1]

As stated in Article 101 of the [United Nations] Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

[Staff regulation 4.2]

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Staff regulation 4.3

In accordance with the principles of the [United Nations] Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

Staff regulation 4.4

Subject to the provisions of Article 101, paragraph 3, of the [United Nations] Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply, on a reciprocal basis, to the specialized agencies brought into relationship with the United Nations. The Secretary-General may limit eligibility to apply for vacant posts to internal candidates, as defined by the Secretary-General. If so, other candidates shall be allowed to apply, under conditions to be defined by the Secretary-General, when no

internal candidate meets the requirements of Article 101, paragraph 3, of the [United Nations] Charter as well as the requirements of the post.

33. Staff rule 4.7 on family relationships provides as follows:

(a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

(b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

(c)

(a) The operational requirements of the Organization cannot be met by staff members who are qualified and available to perform the required functions;

(b) The proposed employment would not adversely affect the career development or redeployment opportunities of other staff members and represents both a cost-effective and operationally sound solution to meet the needs of the service.

When such employment is approved, it shall begin only after a period of at least three months has elapsed since the date of retirement of the staff member.

5.2 In deciding whether to employ a retiree, due regard shall be given to the requirements of geographical and gender balance.

5.3 No retiree may be employed without a prior medical clearance.

5.4 Provided the above conditions are met, such former staff may be re-employed under the following contractual arrangements:

(a) For service specifically with a United Nations mission or to replace staff on mission service under a 300 series appointment of limited duration or a 100 series appointment, as appropriate;

(b) For service as technical cooperation personnel under a 200 series appointment;

(c) For conference and other short-term service under a 300 series short-term appointment;

(d) As an individual contractor or as a consultant, in accordance with the conditions of administrative instructions (ET/Conf)-738/140055/170059/

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of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute).

41. The Tribunal will further analyze if the two cumulative and mandatory conditions mentioned above are fulfilled.

42. Regarding the first condition, namely if the contested decision is an administrative decision which can be appealed before the Dispute Tribunal,

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professional level than the ones specific to the staff member's terms of reference with the potential to result in low performance(s).

46. The employer's direct and/or indirect acts of coercion causes the impossibility for the employee to remain in the post leaving him/her with no other option than to resign and results in a constructive dismissal. Such a coerced resignation is equivalent from a legal point of view to the termination of a contract due to an unlawful request for resignation and/or intolerable employment conditions for the employee to continue working, as created by the employer.

47. The Tribunal underlines that a coerced offer made to an employee to resign and/or to choose between resigning and being dismissed followed by a resignation is different







2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

59. The Tribunal also notes that the Universal D

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

62. Universal legal conventions/treaties establishing the fundamental principles of international human rights law, such as the ones mentioned above, constitute the legal foundation of and are directly applicable to and by all organizations and entities



68. Consequently, the Staff Rules cannot limit in part or in whole or extend the area of application of Staff Regulation(s), including the ones regarding appointments. Further, as results from staff regulation 1.1(c), the Secretary-General must exercise his mandate in adopting Staff Rules that consistent/conform to and follow the Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly, and he must ensure that the rights and obligations of the staff members, as set out in Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly, are fully respected.

69. The Tribunal considers that any Staff Rules which introduce modifications/changes consisting in limitations and/or extensions of area of application of the United Nations Charter, the Staff Regulations and other decisions and resolutions adopted by the General Assembly, unless corroborated (read together) with the higher legal norms, are null and void since the Staff Rules derive directly from these documents and cannot limit/exceed their letter and spirit. As indicated previously, the United Nations Charter, the Staff Regulations and other decisions and resolutions adopted by the General Assembly are to be implemented accordingly in the Staff Rules regarding the staff members' rights and obligations and, in case there is any contradiction between them, the United Nations Charter, the Staff Regulations and the relevant resolutions and decisions adopted by the General Assembly prevail.

Procedural history of staff regulations 1(c), (d) and (e), 4.1-4.4, and SAAssembl Slimit/exceed their61 T[(

So far as practicable, appointments to posts in the Secretariat shall be made on a competitive basis.

Regulation 12

Persons appointed to permanent posts in the Secretariat shall serve such probationary periods as may be prescribed by the Secretary-General.

71. Having carefully reviewed the content of all United Nations General Assembly resolutions adopted between 1946 and 1948, the Tribunal notes that there is no staff regulation established by the General Assembly with a specific reference to employment/recruitment of staff members of the same family and/or family relationships which was to be implemented by the Secretary-General through Staff Rules.

72. Based on the above-mentioned regulations, the Provisional Staff Rules became effective on 16 February 1946





Regulation(s) established by the General Assembly with specific reference to appointment/recruitment of staff members of the same family, as formulated in the proposed staff rule 58 by the Secretary-General in May 1948, to justify the amendment of the Staff Rules by introducing this new staff rule.

77. By ST/AFS/SGB/94 (Staff Rules) adopted on 1 December 1952, staff rule 58 was revised and renumbered as staff rule 104.10, “Family relationships”, with the following content:

Staff Rule 104.10

- (a) Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: husband, wife, father, mother, son, daughter, brother or sister.
- (b) Staff members who bear any of the relationships specified in (a) above shall not be assigned to serve in the same department if one of the posts is subordinate to the other in the line of authority.
- (c) If two staff members marry, the benefits and entitlements which accrue to them shall be modified as provided in the relevant staff rules; their appointment status shall not, however, be affected.

78. The Tribunal notes that between 1952 and 1980, no changes were adopted by the General Assembly to the relevant Staff Regulations.

79. Some Staff Rules, including staff rule 104.10, were amended on 15 July 1980 retroactively from 1 January 1980 by ST/SGB/Staff Rules/1/Rev.5/Amend.1, stating that “Rule 104.10, Family relationships, is amended with effect from 1 January 1980 to provide for greater flexibility in the employment of spouses of staff members”. Prior to the adoption of ST/SGB/Staff Rules/1/Rev.5/Amend.1 on 15 July 1980, ST/AI/273 was adopted on 4 March 1980 stating as follows:

1. The purpose of the



58(a)(b) and 104.10(a)(b) and current staff rule 4.7(a)(c), the Tribunal identifies the following procedural irregularities:

a. Former staff rule 58(a)(b) was proposed by the Secretary-General in the absence of any General Assembly resolution and/or Staff Regulations adopted by the General Assembly in a report submitted in May 1948, which does not appear to have been approved in any of the published General Assembly resolutions between September and December 1948. It results that the text was drafted at the initiative of the Secretary-General without prior legal framework adopted by the General Assembly.

b. Former staff rule 58(a)(b), as an inferior document, was required to respect and reflect the mandatory and cumulative conditions for the appointment of United Nations staff members established in art. 101 paras. (1) and (3) of the United Nations Charter, namely that:

i. The staff members in the United Nations Secretariat must (“shall”) be appointed by the Secretary-General under the Staff Regulations established by the General Assembly;

ii. Given the paramount consideration in the employment of staff members and in the determination of the conditions of service, it is necessary to ensure

rule established in the Staff R

(Staff Rules) adopted on 15 July 1980, and the amendment was to be implemented retroactively on 1 January 1980, without observing the general principle of non-retroactivity of civil law, according to which a law is always enforced on the day of its promulgation and cannot be applied retroactively. The Tribunal notes that the Appeals Tribunal has addressed this general principle in *Assale* 2015-UNAT-534, para. 34, stating that:

... [...] In *Hunt-Matthes* 2014-UNAT-444/Corr.2, para. 26, “we restated the well-known principle of law against retrospective application of laws, noting: ‘The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and hold[s] that since the incident in question occurred before [the administrative issuance] was promulgated it is not applicable in this case.’” In the context of Mr. Assale’s case, the “incident in question” before the [Dispute Tribunal] was the non-renewal decision, which was made on 29 November 2010. Since the 2010 Administrative Instruction was in effect on that date, the [Dispute Tribunal] made an error of law in retroactively applying the 2011 Administrative Instruction”.

The amendment of staff rule 104.10 was adopted to provide a greater flexibility in the application of the rule with regard to the employment of spouses of staff members, and resulted in establishing different legal regimes among the individuals of the same group of relatives of United Nations staff members indicated in para. (a), namely maintaining the prohibition for the father, mother, son, daughter, brother or sister to be appointed in the United Nations Secretariat, and removing the “husband and wife” from this category in order to allow a larger flexibility regarding the appointment of spouses.

e. In 1984, ST/SGB/StaffRules/1/Rev.6 removed the mention of “wife, husband” from staff rule 104.10(a), and the exception for the husband or wife was added in staff rule 104.10(b) as follows (emphasis added):

(a) *Except* where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to

a staff member: father, mother, son, daughter, brother or sister.

(b) The husband or wife of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

Former staff rule 104.10(b) (emphasis added)

(b) Staff members who bear any of the relationships specified in (a) above shall not be assigned to serve in the same department if one of the posts is subordinate to the other in the line of authority.

became staff rule 104.10(c), and it was amended as follows:

(c) A staff member who bears to another staff member any of the relationships specified in (a) and (b) above:

- (i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;
- (ii) Shall disqualify himself or herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

The Tribunal notes that all the individuals identified in para. (a), who were allowed to be appointed as staff members, were no longer allowed to serve in posts in the same department as their relative or spouse, limiting the area of employment and excluding them from being appointed in the same department as their relative, even if his/her post was not superior or subordinate in the line







OHRM in the sense that the individuals who had a parent or sibling already working for the United Nations Secretariat or one of the Funds and Programmes could be allowed to take a competitive recruitment examination, even though they had a family relationship referred to in staff rule 104.10(a), and that they could be appointed if they passed the examination. DGACM proposed that Human Resources Officers in OHRM be made fully aware of the policy so that no difficulties were to be raised based on the family relationship of a candidate successful in a competitive recruitment examination.

89. Further, as results from the present case, the previous inherited restrictive interpretation of the plain language of former staff rule 58 and staff rule 104.10(c) continues to apply in the same manner to staff rule 4.7(a) as prohibiting (“shall not”) the appointment of a person who is the father, mother, son, daughter, brother or sister of a United Nations staff member, while staff rule 4.7(b) is interpreted as allowing (“may”) the appointment of the spouse of a United Nations staff member.

90. The OHRM manuals reaffirmed this interpretation and extended the area of application of staff rule 4.7(a) also to “step-children or step-siblings” of a United Nations staff member (secs. 7.4.1.3 – Family Relationships from both the Hiring Manager’s Manual and the Recruiter’s Manual).

91. The Tribunal notes that, as results from the uncontested facts, the Applicant, a retired United Nations staff member who was previously working as a Translator in ETS/DGACM and who is part of the free-lance/WAE pool used by ETS/DGACM, was regularly hired between 2012-2016 by ETS/DGACM on annual temporary

a short-term contract in ETS/DGACM from 15 October 2012 to 23 November 2012. On 27 September 2012, the Applicant presented his resignation effective close of business on 5 October 2012, but he expressly mentioned that his resignation applied only to his WAE contract expiring on 1 December 2012, and that it was to be without prejudice to any possible future offer of employment with the Organization. In the Applicant's statement of 11 November 2012, he mentioned that his last period of employment in ETS/DGACM ended on 5 October 2012, before the recruitment of his daughter, and that there was no reason for him to be requested to resign. The Applicant considered that the determination of the EO/DGACM that he must resign from his WAE contract appeared to be the result of an erroneous interpretation.

93. Ms. SL was offered two temporary contracts with ETS/DGACM in 2012 and 2013, and she was placed on a roster of Translators after having passed the 2015 LCE for English translators/précis-writers.

94. The Applicant received the offer of a temporary appointment on 22 December 2015 and signed it on 1 January 2016; the contract was due to expire on 31 December 2016. The offer of the temporary appointment contained the following clause: "Under [s]taff [r]ule 4.7(a), 'An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member'. By accepting this offer, [the Applicant] certify[ies] that [he has] no relationship with any staff member of the United Nations Secretariat that contravenes [s]taff [r]ule 4.7(a)". On 1 January 2016, when the Applicant signed his Offer of a Temporary Appointment on a WAE contract made on 22 December 2015, his daughter was not yet employed by the United Nations Secretariat.

95. On 12 January 2016, the Chief of ETS/DGACM requested clarification from [name redacted, Mr. MRT-P], Acting Director of DD/DGACM as follows:

Dear [Mr. MRT-P],

As you know, [Ms. SL] has been rostered after passing the 2015 LCE for English translators/précis-writers. [Ms. SL's] father,



was offered another WAE contract for one-year for 2017, which he accepted on the same day.

99. The EO/DGACM, Mr. MMG, expressly requested the Applicant to resign immediately in a 17 November 2016 email to (name redacted, Ms. CE), copying Ms. KD, Chief of ETS/DGACM, based on the following reasons (emphasis in the original):

Dear [Ms. CE],

In light of the above, we see no merits in raising the matter with [the Office of Legal Affairs, (“OLA”)] or with OHRM. DGACM is obliged to adhere to the staff rules. Under the circumstances [the Applicant] needs to tender his resignation immediately.

Sorry that I am unable to be more helpful with this one.

With best regards,

[Mr. MMG]

100. On 17 November 2016, Ms. KD sent an email to the Applicant, copying Ms. CE, the EO/DGACM, which read as follows:

Dear [Applicant],

In accordance with the e-mail below from the [EO]/DGACM, please send your letter of resignation from your current WAE contract, effective immediately.

Best regards,

[Ms. KD]

101. On 17 November 2016, Ms. KD, based on the EO/DGACM’s email of 17 November 2016, expressly requested the Applicant to give his resignation with immediate effect, based on the clause from his contract related to staff rule 4.7(a).

102. It results that in the Applicant’s case staff rule 4.7(a) was interpreted incorrectly without being corroborated (read together) with art. 101 paras. (1) and (3) of the United Nations Charter, art. 23 of the Universal Declaration of Human rights, art. 6 of the International Covenant on Economic, Social and Cultural Rights and art. 26 of the International Covenant on Civil and Political Rights.

103. The Tribunal notes that staff rule 4.7 on family relationships in the theibunal notes theibunal and





108. This Tribunal concludes in the above considerations that any individual, including the father, mother, son, daughter, brother or sister and/or the spouse of a United Nations staff member, has the inalienable right to work, to a free choice of employment, including within the United Nations, to be protected against unemployment and discrimination based on any ground such as race, color, gender/sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including family status. Consequently, the Tribunal is of the view that any individual, including the father, mother, son, daughter, brother or sister and/or the spouse of a United Nations staff member, has the right to apply, to be fully and fairly considered through a competitive meritorious process, to be shortlisted and selected as the best candidate, and to be appointed under any type of contract (temporary/WAE, fixed-term, and/or continuous/permanent appointments), to any post within the United Nations, including in the United Nations Secretariat, in the same department/unit and/or in a different department/unit, except the post(s) in the same department(s)/unit(s) which is/are superior and/or subordinate in the line of authority to the staff member to whom s/he is related.

109. Furthermore, there is no legal basis for the Organization/Administration to refuse to:

- a. Automatically reject the candidacy of any individual based on her/his family status;
- b. Appoint an individual as a staff member in the United Nations to post(s) in any department(s), including in the same department where his/her relative/spouse was previously appointed, except the ones which are superior or subordinate in the line of authority to the staff member to whom s/he is related;
- c. Request the resignation and/or to terminate the contract of a staff member who has a family relationship with another staff member (father, mother, brother, sister, son, daughter, spouse); and/or





and given his extensive experience of 35 years in ETS/DGACM related to the working sessions of the Fifth Committee, had the right to be employed in the interest of the Organization at the same time as his daughter, Ms. SL, in the same unit, namely ETS/DGACM, being therefore excepted, in the interest of the Organization, from the application of staff rule 4.7(a). The Tribunal considers that, even if the interpretation given by the Administration of staff rule 4.7(a) had been considered to be correct and in accordance with the higher norms, the request for the Applicant's resignation still ignored that the application of staff rule 4.7(a) was previously waived in favor of the Applicant.

c. The Tribunal notes that staff rule 4.7(a) is not applicable to individuals who are already staff members but to their relatives, namely father, mother, son, daughter, brother or sister, who applied to vacant positions within the United Nations, who passed or who were selected through a competitive selection process, and who are to be appointed as United Nations staff member(s).

d. Further, the Tribunal considers that since, in the present case, both the Applicant and his daughter, Ms. SL, were already staff members within the same unit—ETS/DGACM—staff rule 4.7(a) was not applicable to any of them, but their assignments were subject to the application of staff rule 4.7(c), which provides that:

- ... A staff member who bears to another staff member any of the relationships specified in para. (a) and (b) above:
- (i) Shall not be assigned to serve in a post which is





the case, the effective reinstatement no longer constitutes a possible option, the remedy can consist solely in compensation.

115. The Tribunal considers *mutatis mutandis*, in the present case, as an *ope legis* effect of the rescission of the constructive dismissal that, since currently both 2016 and 2017

119. The Tribunal finds that the moment the process of implementing the selection decision comes to an end and is to be considered final is when the employment contract is formed (this is also the employment contract to which art. 2.1 of the Dispute Tribunal's Statute refers). The selection decision is therefore implemented at the juncture at which the Administration and the staff member formally establish an employment relationship by reaching an agreement under which each one of them derives legal rights and obligations. Consequently, the critical moment for the implementation of the selection decision is the time when the Administration receives the staff member's unconditional acceptance of the offer.

120. When formed, the employment contract is a legally binding bilateral act which is agreed upon by the consensual will of the contracting parties and which does not require to be in a written form for it to be valid. It is a contract in which the successful candidate cannot be replaced as this person has been selected after a competitive selection process based on her/his personal skills and competencies (*intuitu personae*) and where this candidate works under the supervision and instruction of the employer. Characteristically, the terms of the employment contract are implemented throughout the entire contractual period by each of the parties when they satisfy their respective and reciprocal contractual obligations, most importantly by the staff member reporting to work and the Administration paying her/him for her/his labor.

121. The Tribunal notes that as relief, the Applicant requested material damages resulting from the non-execution of his 2017 contract as an alternative relief to his request to be considered for future WAE contracts with the United Nations Secretariat. The Tribunal considers that it is no longer necessary to pronounce itself on this request for alternative relief, since the Tribunal has already granted the Applicant's request to be considered eligible for future WAE contracts within the United Nations Secretariat.

122. In light of the above considerations, the appeal is to be granted and the contested decision representing a constructive dismissal is to be rescinded.

123. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part. The contested decision consisting in the Applicant's constructive dismissal is rescinded. As an alternative to the rescission of the decision, the Respondent is to pay to the Applicant the amount of USD10,000.
- b. The Respondent is to pay to the Applicant a compensation consisting in the salary corresponding to the period from 17 November 2016 to 31 December 2016 and up to 125 days according to ST/AI/2003/8/Amend.2.
- c. The Applicant is considered eligible for future WAE contracts within the United Nations Secretariat.

### **Observations**

124. The Tribunal observes that there is an immediate need for staff rule 4.7 to be amended and recommends that its paras. (a) and (b), which have a discriminatory content, to be removed in order to prevent any future erroneous application and

the IAEA's Secretariat Notice SEC/NOT/1325 (on Employment of Spouses in the IAEA's Secretariat), having an identical content to staff rule 4.7(b), was found to be "[...] unenforceable because it is contrary to fundamental principles of law", stating as follows: "[...] In fact, the provision improperly discriminates between candidates for appointment based on their marital status and family relationship". The ILOAT also found that discrimination on such grounds is contrary to the United Nations Charter, general principles of law and those which govern the international civil service as well as international instruments on human rights. Further, the ILOAT found that according to the principles and terms of art. 26 of the International Covenant on Civil and Political Rights, which includes a "[...] list [the



OHRM, and to be disseminated to all United Nations Human Resources Offices/Departments, including in the United Nations Secretariat, in order to ensure, until the staff rule is effectively amended, a uniform application of the existing provisions of staff rule 4.7, and for the United Nations online application system (Inspira) to be updated in order to eliminate the automatic rejection of the applications filed by individuals who are indicating in their application that they are related to a United Nations staff member, including in the United Nations Secretariat, namely father, mother, son, daughter, brother, sister, or spouse.

*(Signed)*

Judge Alessandra Greceanu

Dated this 14<sup>th</sup> day of June