UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2011/016
Judgment No.:	UNDT/2011/110
Date:	24 June 2011
Original:	English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

IGBINEDION

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR SUSPENSION OF ACTION PURSUANT TO ARTICLES 13 AND 14 OF THE UNDT RULES OF PROCEDURE

Counsel for applicant:
Samson Omweri Nyaberi

Counsel for respondent:
Saidou A. N’Dow, UN-HABITAT

Introduction

1. On 9 May 2011, the United Nations Dispute Tribunal in Nairobi ("the Tribunal") heard the parties on the matter of the Applicant's Motion for Suspension of Action. On 12 May 2011, the Tribunal issued Order 33 (NBI/2011) suspending the implementation of the impugned decision until the case is finally determined on its merits.

Facts

2. The Applicant commenced employment with the United Nations Human Settlements Programme ("UN-Habitat") on a three-month fixed-term appointment on 22 January 2004 as an Editorial Officer in the Information System Service Branch ("ISS"). This appointment was renewed continuously through 21 December 2004.

3. From 4 January 2005 to 11 October 2008, the Applicant held fixed-term appointments for varying periods short of one year, with four mandatory breaks-in-service.

4. From 20 October 2008 through 14 December 2009 (13.5 months), the Applicant's fixed-term appointment was continuously renewed.

5. Following another break-in-service, on 18 December 2009, the Applicant was given a twelve (12) month fixed-term appointment.

6. On 15 September 2010, the Applicant's immediate supervisor Mr Chris Mensah, recommended that the Applicant's contract be extended for another twelve months. The Applicant's performance for the period 1 April 2008 to 31 March 2009 was rated as 'excellent.' On 28 September 2010, the certifying officer signed-off on the recommendation for renewal. The certification process on the system is designed to indicate whether or not there are sufficient post-funds for the continued retention of a staff member.

7. Between October and the end of November 2010, several emails were exchanged between the Applicant and his supervisor on the status of the latter's recommendation for

extension. Further action/approval was expected from the Director of the Programme Support Division (D/PSD), Mr. Antoine King.

8. Subsequent discussions involving Ms Felista Ondari (Chief, Management Support Section, PSD), Mr Antoine King and Mr Mensah culminated in an email dated 1 December 2010 indicating that the Applicant's contract would not be extended as recommended. Correspondence made available to the Tribunal show that budgetary reasons and the insufficiency of funds were being cited as reasons for this decision.

9. The Applicant's appointment was then renewed from 20 December 2010 to 31 December 2010, and for another four months from 1 January 2011 to 18 April 2011.

10. On 30 December 2010, the Applicant wrote to the Executive Director of UN-Habitat protesting and seeking a review of the decision to renew him for only four months.

11. On 18 March 2011, Mr Mensah wrote to the Applicant to inform him that his contract would not be renewed beyond 18 April 2011. A further email dated 31 March 2011 informed the Applicant that the difficult financial situation faced by the Organisation and the "imminent commencement of the organizational review" had "compelled the Executive Director to issue directives freezing recruitment" and curtailing the extension of certain types of appointments. Memoranda from the Executive Director dated 17 and 21 February 2011 were cited as the basis for the decision not to renew his appointment.

12. On 9 April 2011, the Applicant requested management evaluation of the decision by UN-Habitat not to extend his appointment beyond the expiry of his current contract on 18 April 2011.

13. On 11 April 2011, the Applicant filed a motion for suspension of action with the Tribunal seeking a suspension of the decision not to extend his appointment. The Applicant's motion was served on the Respondent on 12 April 2011 with a deadline for any submissions in response to be filed by 13 April 2011.

14. On 15 April 2011, on the basis of the written submissions of the parties, the Tribunal suspended the decision not to renew the Applicant's contract by Order No. 030 (NBI/2011). In so doing, the Tribunal concluded that an oral hearing of the matter was necessary and the parties were ordered to attend a hearing on 4 May 2011.. The Tribunal further ordered that; (i) the Applicant appear as a witness; and (ii) for the Respondent to make available Mr Antoine King, the author of the impugned decision as a witness. Parties wishing to call any other witnesses were directed to submit their respective lists of witnesses to the Registry no later than Friday, 29 April 2011.

15. On 27 April 2011, Counsel for the Applicant moved for an adjournment of the hearing, which was then rescheduled for 9 May 2011 to allow Counsel to attend to his cases pending before the Kenyan courts (Order No. 031 (NBI/2011).

16. On 6 May 2011, the Management Evaluation Unit (MEU) wrote to the Applicant indicating that his request for review may be time-barred and sought clarification from him. The Applicant responded to the MEU on 8 May 2011 that his request was not time-barred.

17. At the hearing on 9 May 2011, the Tribunal was informed that a substantive application had also been filed with the Registry. Counsel for the Applicant sought directions from the court on whether the Tribunal wished to proceed with the hearing of the application for suspension of action or further suspend the impugned decision until the matter was heard and determined on the merits.

18. The Tribunal decided to hear the matter and directed the parties to make their submissions on the application for suspension of action as filed pursuant to Articles 13 and 14 of the Rules of Procedure.

19. Following the hearing, the parties were directed to file their respective closing briefs by 10 May 2011.

20. On 10 May 2011, the Applicant's request for review by the MEU was rejected on grounds of receivability. The MEU found that the Applicant was time-barred in the submission of his request. The MEU took the position that the impugned decision was that of

1 December 2010, when the Respondent renewed the Applicant's contract for only four months. While the Applicant's attempt to have the matter internally and informally resolved were noted, the MEU cited existing UNDT jurisprudence to support the position that this does not absolve an applicant of the responsibility to adhere to the statutorily established time-limits.[1]

21. On 11 May 2011, following the MEU decision and on the basis of the same, the Respondent filed additional submissions moving the Tribunal to vacate the first Order No. 030 (NBI/2011) of suspension issued on 15 April 2011.

Deliberations

22. Applications for suspension of action are governed by Article 2.2 of the Statute and Articles 13 and 14 of the Rules of Procedure of the Tribunal. Article 13 provides as follows:

> 1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears **prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.**
>
> 2. […]
>
> 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.** [Emphasis added]

23. Article 14, in relevant part, provides:

> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief 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.
>
> 2. […]
>
> 3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

[1] *Johnson* UNDT/2009/037 *Zewdu* UNDT/2011/043;*Costa* 2010-UNAT-036; *Sethia* 2010-UNAT-079.

> 4. **The decision of the Dispute Tribunal on such an application shall not be subject to appeal.** [Emphasis added]

24. The wording of Articles 13 and 14 contains one critical difference: the *stage* at which the application for suspension of action should be filed. In the present case, the Tribunal is seized with an application pending both a review by the MEU and the substantive application. The test for an application under both Articles is the fact that appeals against an order made under either article is statutorily proscribed.

25. The current Application must therefore be adjudicated against the stipulated cumulative test.

26. A suspension of action order is, in substance and effect, akin to an *interim* order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing the applicant/plaintiff with temporary relief by maintaining the *status quo* and thereby regulating the position between the parties to an application pending trial. An order for suspension of action cannot therefore be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

27. To grant an application for suspension of action, the Court must be satisfied that there is a serious legal issue(s) to be tried on the merits and whether damages would not adequately compensate the applicant in the event that his or her application succeeds at trial.[2] An application for an injunction would therefore normally fail where a court finds that the payment of damages would be an adequate remedy for the harm suffered.

28. Within the present context of the United Nations, a suspension of action application will only succeed where the Applicant is able to establish: (i) a *prima facie* case on a claim of right; (ii) that the case he has made out is one which the opposing party would be called upon to answer; (iii) that it is just, convenient and urgent for the Tribunal to intervene; and (iv) that

[2] *American Cyanide Co v Ethicon Ltd* (1975) AC396; *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033.

without which intervention, the Respondent's action or decision would irreparably alter the *status quo*.

29. A suspension of action application may be brought and considered only where the Applicant has filed a request for Management Evaluation.

The test for suspension of action

30. The elements of a suspension of action, as outlined in Article 2 of the UNDT Statute, are: (i) *prima facie* unlawfulness; (ii) urgency; and (iii) that implementation of the contested decision would cause irreparable damage

Prima facie Unlawfulness

31. The following is the Applicant's case:

a) The decision not to renew his contract was motivated by extraneous factors. He cites the hostile and difficult relationships he had hadwith Ms. Ondari and Mr. King. The Applicant told the court that he had experienced difficulties and obstacles at almost each of his appointments.

b) Having been afforded a fixed-term appointment of twelve (12) months, he cannot be considered a temporary staff member; whose rules governing such an appointment are being erroneously applied to him. Citing General Assembly Resolution 63/250 and the Transitional Measures for staff members as at 30 June 2009,[3] the Applicant argues that he falls under the category of staff governed by the following provision: "than one year of cumulative service in the last 2 years will be transitioned to a fixed-term appointment limited to the Department/Office and lever for up to two years."

[3] The Tribunal understands the cited 'Transitional Measures' to be the *Interim Guidelines for the Implementation of Transitional Measures for the United Nations Contractual Reform for Currently Serving Staff Members Other Than Those Serving in United Nations Peacekeeping and Political Missions, 1 July 2009.*

32. The following is the Respondent's case:

a) The Applicant has misunderstood the General Assembly Resolution and the Transitional Measures. Neither of these documents creates an expectancy that a staff member in the Applicant's position will be provided with an extension for a maximum of two-years. This decision was informed by an organisational need and was not motivated by extraneous factors and therefore the Applicant had no expectancy of renewal.

b) The previous extensions of the Applicant's contract was a show of goodwill on the part of the Organisation. The repeated difficulties that the Applicant had encountered at the time of renewal were due only to the fact that there was no post against which he could be placed. Posts always had to be "borrowed" from different sections within the Organisation to facilitate his extensions.

33. The Tribunal notes that as at 14 December 2009, the Applicant was on a continuous fixed-term appointment for 13.5 months. He was then made to take a mandatory break in service. He was thereafter given a 12 month fixed-term appointment on 18 December 2009, after the issuance of the transitional measures and the new rules governing staff selection and appointments. The Tribunal is curious as to the reason for giving a staff member who is supposed to be on a temporary post a fixed-term appointment after the advent of the new rules.

34. The memo from the Executive Director dated 21 February 2011 clearly states that there will be no recruitment or extension of contracts for *temporary staff*.

35. Given the Respondent's repeated submission that the Applicant had always and continued to be on a temporary post, and had never been competitively recruited for any of his appointments with UN-Habitat, the Tribunal finds it contrary that the Applicant was given a fixed-term rather than a temporary appointment on 18 December 2009.

36. If the contract was that of a fixed-term appointment, as evidenced by the document filed with the application, the Tribunal finds it peculiar that the Respondent would label it a temporary appointment. The Respondent's stand is that the Applicant is not being subjected to the rules governing temporary appointments but that the provision for renewal of up to two years does not create an expectancy of a renewal. At the end of the day, it is clear that at the time the recommendation for a year's extension was made, there was funding available and that no reasonable explanation has been given to the Tribunal as to how this funding evaporated two weeks later. The Tribunal uses two weeks as a gauge to reflect the amount of time that elapsed between the certification of funding by the Certifying Officer and the decision of Mr King not to approve the one-year extension.

37. In response to a question from the Bench, Mr. King stated that the approval by the Certifying Officer in September 2010 meant that there was funding for the post. When pressed upon to explain how the funding had deteriorated so dramatically in those two weeks, Mr. King tried to rely on the case of 23 other staff members who were axed or on the point of being axed. He was at pains to give a rational and coherent explanation.

38. The Tribunal considers that the issue of UN-Habitat's finances became live when the Inter-Office Memorandum of February 2011, signed by the Executive Director, was sent out. The Tribunal cannot but state in no uncertain terms that the financial crunch was used as a colourable device to get rid of the Applicant. This is made more compelling by the fact that the Respondent did not rebut any of the allegations of countervailing circumstances which the Applicant argued motivated the impugned decision. The Tribunal has previously ruled that in the absence of a rebuttal on the part of the Respondent, the court has little choice but to accept the Applicant's assertions as *prima facie* proven.[4]

39. The Tribunal therefore considers the *prima facie* unlawfulness element to have been met.

[4] *See inter alia Omondi* Order No. 017 (NBI/2010) *Kasmani* UNDT/2009/063.

Urgency

40. The Respondent argues that as the Applicant was aware of the tenuous nature of his contract as far back as December 2010, his delayed request for management evaluation and application to the UNDT clearly indicates that the matter is not urgent or considered as urgent by the Applicant.

41. The Tribunal finds however the element of urgency to be met. Having found that the impugned decision is that of 18 March 2011 and bearing in mind the expiry of the Applicant's appointment, the urgency of the matter at hand is patently obvious.

Irreparable Harm

42. The Applicant is due to retire in 2013. He submits that allowing the impugned decision to survive will cause irreparable harm to him and his family; damage his professional reputation and damage any prospect of future employment within the Organization.

43. The Tribunal notes that it has previously held that:

> [m]onetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process…An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.[5]

44. The Tribunal finds that monetary compensation alone in the face of decision-making found to be *prima facie* unlawful would not do justice to the Applicant. Under the circumstances of this case, the Tribunal is satisfied that implementation of the contested decision would cause the Applicant irreparable damage.

Motion on Receivability

45. At the oral hearing, Counsel for the Respondent sought to challenge the Applicant's motion for suspension of action on grounds of timeliness. In response to a question from the

[5] *Tadonki* UNDT/2009/016.

Bench as to why this objection was not made earlier, Counsel told the Tribunal that he was "in communication with the Management Evaluation Unit" on this matter and thought it would be appropriate for MEU to first decide on the matter before the Respondent raised the objection formally.

46. The oral motion was supplemented by written submissions on 11 May 2011. The Respondent submitted that MEU's finding on the issue of receivability rendered the Applicant's motion for suspension of action time-barred and moot, and should therefore be dismissed in its entirety.

47. There are therefore two issues before the Tribunal on the question of receivability. The first pertains to whether an application that has been found to be time-barred by MEU is automatically time-barred before the UNDT; the second pertains to the validity of the court's order once MEU has conducted its review of the application before it.

The Impugned Decision and Receivability before the UNDT

48. The condition precedent for the filing of a suspension of action of an impugned administrative decision is that it must be "subject [to] an ongoing management evaluation"[6]. It is therefore for the Tribunal to be satisfied that this condition has been complied with.

49. Following an email dated 29 November 2010 from the Applicant, Mr Mensah confirmed that he had requested the extension of the contract. There is on record a document entitled Extension of Appointment in which Mr Mensah recommended on 15 September 2010 an extension of the contract up to 18 December 2011.

50. According to the procedure explained by Mr Antoine King, the recommendation then went to the Certifying Officer who on 28 September 2010 certified as follows: Certified Extension through date: 18/12/11 and Remarks: S/M (Staff Member) charged against vacant post for budgetary purposes only.

[6] Article 2, Statute of the United Nations Dispute Tribunal.

51. In an email dated 1 December 2010, two months after the Certifying Officer had processed the Extension of Appointment document, Mr Antoine King wrote the following to Mr Chris Mensah:

> After our discussion, I am now confirming that we can extend his contract for another 4 months. This is to take him to just after the GC, (the Governing Council of UN-Habitat) i.e. 19/4/2011 and will help you out as you approach the GC. Please inform him urgently. This should also be in writing afterwards.

52. Much later, on 18 March 2011 Mr Mensah informed the Applicant in an email that his contract will not be renewed after 18 April 2011. This is what Mr Mensah wrote:

> Dear Mr. Igbinedion,
>
> With reference to my discussion with you on 14 March 2011 and following the Memo to (sic) the Executive Director of UN Habitat to all Directors dated 21 February, this is to **confirm**, with pain that your post is among those that we will not be renewed (sic) when your contract expires on 18 April 2011. A formal letter to that effect will be coming from the relevant office. (Emphasis added).

53. In an email dated 31 March 2011 Mr. Mensah wrote to the Applicant and stated:

> As you may recall from our discussions in December 2010 when the duration of your contract extension arose, you were informed that the organization was only able to extend your contract on an exceptional basis to cover the Governing Council by four months (up to 18 April 2011) with no expectation of further extension.

54. The issue that arises from the above is the date the Applicant was officially informed that his contract would not be renewed. The Respondent cites financial constraints as the principal reason for the decision not to renew his appointment. As at December 2010, when Mr. King decided on a four month extension, the issue of financial constraints had not been mooted. It is only on 21 February 2011, that the Executive Director brought the financial difficulties of the Organisation to the fore.

55. Further, if a final communication had been made to the Applicant in December about the decision of the administration on the fate of his contract for financial reasons why would

there have been a need for a discussion with the Applicant by Mr. Chris Mensah as is mentioned in the email dated 18 March 2011?

56. The Tribunal finds that the Applicant found himself in a situation comprising a continuum of events, beginning with the decision to significantly shorten the recommended period of extension from twelve months to four, attempts to clarify the situation and the eventual decision to not renew that four month appointment.

57. The Tribunal finds that the impugned administrative decision is the decision which was communicated to the Applicant on 18 March 2011. The fact that the MEU found the Applicant's request for review to be out of time, does not automatically render the application for suspension of action before the Tribunal time-barred.

Validity of a UNDT Order for Suspension of Action: Respondent's Motion for Dismissal of Application and Duration of Suspension

58. The Redesign Panel established by the General Assembly,[7] was fully alive to the weaknesses of the internal justice system prevailing before the new system came into operation on 1 July 2009. Using unambiguous language, the Panel told the General Assembly that[8]

> [T]he United Nations internal justice system is outmoded, dysfunctional and ineffective and that it lacks independence…"
>
> Effective Reform of the United Nations cannot happen without an efficient, independent and well resourced internal justice system that will safeguard the rights of staff members and ensure the effective accountability of managers and staff members.

59. It should be noted that the Redesign Panel emphasised the independence of the new system.

60. Rule 11.2(a) of the new Staff Rules[9] provides that:

> A staff member wishing to formally contest an administrative decision alleging non compliance with his or her contract of employment or terms of appointment, including all

[7] A/RES/59/283.
[8] A/RES/61/205.
[9] ST/SGB/2011/1 dated 1 January 2011.

> pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

61. It is interesting to note that draft Article 2 of the UNDT Statute as recommended in the Report of the Ad Hoc Committee on the Administration of Justice at the United Nations[10] read as follows:

> The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by a staff member requesting a suspension of action in respect of a contested administrative decision that is the subject of an ongoing management evaluation. The Dispute Tribunal's decision on such an application shall not be subject to appeal.

62. The question that arises is whether that power vested in the administration is fully compliant with the rule of law either in the light of general principles of international law and/or in the light of the numerous conventions generated by the Organisation itself on human and fundamental rights.

63. In *Omondi* Order No. 017 (NBI/2010) this Tribunal concluded that:

> The management evaluation system is designed to give management a chance to correct an improper decision, or provide acceptable remedies in cases where the decision has been flawed, thereby reducing the number of cases that proceed to formal litigation. It affords the staff member an opportunity to have their grievance addressed internally and objectively.
>
> The processes at the UNDT and the Management Evaluation Unit are distinct processes, independent of each other, and it is imperative that they be seen as such.

64. Article 2.2 of the Dispute Tribunal's Statute states that a staff member may request the suspension of the implementation of an administrative decision during the pendency of the management evaluation. A suspension of action is in the nature of an interim relief given by a judicial order. The Tribunal has five days to decide the issue whereas the Management Evaluation Unit has 30 or 45 days to provide a response to the staff member depending on whether the request emanated from Headquarters in New York or an office outside New York, respectively (Article 8.1.(i)(b) of the UNDT Statute). In practical terms, MEU will either have the benefit of viewing the Tribunal's decision while it is conducting its own

[10] General Assembly Official Records, Sixty-third Session, Supplement No.55, A/63/55/Add.1

review or decide not to respond at all to the request for management evaluation. This is the conclusion that flows from a reading of Article 8.1(i)(b).

65. MEU, when faced with a request for review, has two options. It may find that the decision was unlawful and take appropriate remedial measures. It may also decide that the administrative decision was lawful notwithstanding a finding by a court that the administrative decision was unlawful. The irony of the situation is that when the staff member challenges the same matter substantively, the Tribunal may again find that the administrative decision was unlawful and make the appropriate consequential orders. In the event of an appeal, one may ask whether the finding of lawfulness of MEU would be an argument for the Respondent and what weight that argument would be accorded.

66. The question arises whether it is consonant with the concept of the independence of the judiciary and the concept of the separation of powers for an administrative body to, in effect, overrule a judicial order by holding it to be lawful.

67. In the case of *Kasmani* 2010-UNAT-011, the United Nations Appeals Tribunal ("UNAT") held that the UNDT is limited by the powers conferred upon it by the Statute and also observed that the UNDT has no power to order the suspension of action beyond the deadline for management evaluation.If the Statute and the Rules are interpreted to mean that the duration of a suspension can only last while the management evaluation is pending, it would mean that a judicial order would be put to an end by an administrative decision. Should article 2.2 be read literally or should it be interpreted by applying the general principles of law, being the concept of the separation of powers between the judiciary, and the executive?.

> It is with regard to the general principles of law and practice that problems may arise. General principles of law are normally applied in order to supplement the written law or as being implied in the interpretation of the written law. Where the written law reflects a general principle of law, there is no problem. However, it is possible that a conflict may arise with the written law, where, for example, a general principle of law requires the administrative authority not to take a certain course of action but the written law expressly permits the administrative authority to take that action, as where the written law

> expressly permits discriminatory treatment as between the sexes but the general principles of law prohibit such discrimination.[11]

68. The Statute of the UNDT gives power to the Tribunal to order a suspension of an administrative action which is *prima facie* unlawful and where the elements of urgency and irreparable damage are met. It is argued by the Respondent that such a suspension cannot extend beyond the date of an MEU decision.

69. That provision would be against the philosophy embodied in the Preamble to Resolution 62/228 on the "Administration of Justice at the United Nations" where the General Assembly reaffirmed its decision

> "to establish a new, independent, transparent, professionalised, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process, to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike".

70. The Tribunal reiterates the view it took, and the concern it expressed in *Kasmani*:[12]

> The Appeals Tribunal's reading of the Rules in effect means that a judicial finding of *prima facie* unlawfulness may be reversed, or in any case come to nought, by a decision of the Management Evaluation Unit of the Department of Management of the Secretariat. It is difficult to see why a court must be seised of an application to suspend when its decision can, in anything from 30 to 45 days, be reversed by a decision of the administration endorsing its own impugned decision. The framers of the new system and drafters of the Statute could not have intended for the new system to be one in which the Secretary General's review of his own decision would result in a preceding judicial order, on the same set of facts, being rendered empty and therefore useless. If the sanctity of the judicial process and all that it entails is to mean anything at all, such a reading of the Statute and Rules must not be correct.

71. The Tribunal also endorses what was stated in *Abosedra* Order No. 010 (NBI/2011)

> Article 2.2 as it stands would be against the general principle of law relating to the independence of the judiciary. By making the Administration the judge of the duration of the management evaluation, the Article is thereby curtailing the power conferred on the Tribunal to decide in its wisdom the duration of the suspension. General principles of law have been applied in a number of cases in spite of the existence of rules when it was

[11] *Principles of the Institutional Law of International Organisations,* C. F. Amerasinghe, 2nd ed. 2005/7 at. p. 295.
[12] Oder No. 75 (NBI/2010).

> considered that these rules were not in conformity with basic fundamental principles of the rule of law.

72. When the UNAT stated that the UNDT has no more power than what is conferred upon it by virtue of Article 2 of the Statute, it interpreted that section literally and opened the door for appeals against Article 13 orders, which appeals are statutorily proscribed. Ascribing a literal interpretation to Article 2 could effectively result in a judicial order of suspension being terminated at any time by a subsequent decision of MEU. In this regard, the Tribunal finds Rule 105 of the Rules of Procedure of the European Civil Service Tribunal (ECST) to be salient and instructive. With regard to decisions on "interim measures", Rule 105 provides that "unless the order fixes a date on which the interim measure is to lapse, the measure shall lapse when final judgment is delivered."

73. Any other reading of the Rules and Statute governing the workings of the UNDT would make a mockery of the laborious judicial process that ensues upon the filing of an Article 13 application. The International Court of Justice (ICJ) made the following observations, which are relevant to this case::[13]

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I. *J.,* Series B, No. II,P. 39) : "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.

74. A suspension of action, as has been observed above, is in the nature of an injunction that maintains the *status quo* between parties. Article 2 of the Statute would serve no useful purpose otherwise. In view of this, the literal interpretation of Article 2.2 of the Statute would as stated by the quote from the ICJ above "lead to something unreasonable or absurd". A

---

[13] *Advisory Opinion of 3 March 1950 - Competence of the General Assembly for the Admission of a State to the United Nations.*

purposive approach should be taken when interpreting Article 2.2 so as to give the result it is meant to achieve, respecting therefore the concept of the separation of powers.

The Tribunal's Observations

75. With regard to the process for management evaluation, there is one matter which the Tribunal must address. The Applicant's request for review to MEU was decided upon, and dismissed as time-barred and therefore not receivable, with exceptional speed. At the hearing of the present Application, Counsel for the Respondent told the Tribunal that the Respondent was in communication with MEU, and sought to move the Tribunal to dismiss the current proceedings on grounds of timeliness.

76. While the Tribunal appreciates the efficiency displayed in this matter, the Tribunal finds it necessary to remind all parties and components of the system, that the process of management evaluation is designed to give the Secretary-General the opportunity to *objectively and impartially* assess the merits of a claim made against his decision-making agent. It necessarily calls for a measure of independence, the exercise of which is critical to the efficient and effective functioning of the system. In the circumstances of the present case, the Tribunal will resist the conclusion that the required levels of impartiality was tampered with.

Conclusion

77. The Respondent's oral Motion to Dismiss on Grounds of Timeliness and Supplementary Filing Following Receipt of Management Evaluation Decision dated 11 May 2011 are dismissed.

78. The impugned decision is suspended until the matter is heard and determined on the merits.

(*Signed*)

Judge Vinod Boolell

Dated this 24th day of June 2011

Entered in the Register on this 24th day of June 2011

(*Signed*)

Jean-Pelé Fomété, Registrar, Nairobi