



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

EL-AWAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Saidou N'dow, UN-Habitat

Introduction

1. By application filed on 1 June 2017, the Applicant, a Senior Coordination Officer (P-5) of the United Nations Human Settlements Programme (“UN-Habitat”), challenges the decision which he claims had the effect of stripping him of the majority of his functions and duties.

2. The Respondent filed his reply on 3 July 2018.

3. On 25 September 2018, the Tribunal held a Case Management Discussion (“CMD”) for the purpose of clarifying the claim and identifying the issues that need to be determined to arrive at a just and expeditious disposal of the application, taking into account the overall scheme underpinning the system of internal justice including the emphasis on alternative dispute resolution in various resolutions of the General Assembly. In the event that an amicable resolution of the dispute is not achieved, the Tribunal identified, in discussion with the parties, further particulars and information required and ordered the production of documents that are relevant and necessary to a judicial determination.

4. The practice of proactive case management by the judges of the Dispute Tribunal is an important process directed at ensuring a just and expeditious outcome as well as to facilitate, in appropriate cases, an alternative dispute resolution as recognised by the General Assembly in its Resolution 69/203 of 21 January 2015, where the General Assembly encouraged the “practice of proactive case management by the judges of the United Nations Dispute Tribunal in the promotion and successful settlement of disputes within the formal system”. The distinct advantage in CMDs being held in private is that it facilitates an open discussion between the judge and the parties directed at narrowing down the issues in contention and providing an opportunity for constructive dialogue between the parties.

5. The Tribunal considered it pertinent in this case to point out to the parties that orders on applications for suspension of action are only a preliminary indication as to whether or not there may be, on the basis of the material presented, a *prima facie* case. Any such indication does not constitute a definitive finding, which is a matter left to be determined in the event that a substantive claim is filed. Further, given references to the opinions expressed in the response to the Applicant's request for a management evaluation, the Tribunal considered it appropriate to remind the parties that it is no part of the purpose of the Tribunal to address the merits or otherwise the opinions expressed by the Management Evaluation Unit ("MEU"). The Tribunal's task is to carry out an independent and objective analysis of the facts in order to determine the reasons for the decision at the time that the decision was made and to review these reasons in light of the applicable law, without reference to opinions expressed by any other entity.

Constructive dismissal

6. After discussion it was agreed that any reference to constructive dismissal was misplaced since the Applicant did not resign as a result of what he regarded as a fundamental breach of contract by the alleged deprivation or removal of his core functions. However, if the Applicant is able to show that he was subjected to a significant diminution of his core functions, it would be for the decision maker to provide an explanation and reasons for the decision and in particular to show that it was taken for sound and *bona fide* reasons, in the interest of the Organization, and that the measures taken were a proportionate response to legitimate management concerns.

Disclosure of documents

Report of the fact-finding mission

7. The Tribunal enquired as to the terms of reference and the findings of the fact-finding mission mandated to undertake a "management review" of the Global Water Operators Partnerships Alliance ("GWOPA") (see reply, para. 28) with particular reference to any of the issues in this case. Does the report contain any material which had a significant bearing on the decisions communicated to the

Applicant by memoranda dated 16 February 2017, from Dr Joan Clos, former Executive Director, UN-Habitat, and Mr Raf Tuts, Director, Programme Division, UN-Habitat? It appeared that the report may be relevant and its disclosure is ordered, subject to redactions that may be carried out by the Respondent.

Applicant's performance appraisal reports

8. The Tribunal considered that the Applicant's performance appraisal reports covering the period during which his managers said that they had concerns about his conduct were relevant. The Applicant agreed that he had copies and was prepared to disclose them.

Minutes of Senior Management meeting(s)

9. The Tribunal considered that the minutes or notes of any Senior Management meeting, held prior to and subsequent to the decisions notified on 16 February 2017, were disclosable insofar as they refer to the issues in this case, with appropriate redactions in respect of names and particulars which have no bearing on this case.

Secretary-General's decision on the Applicant's complaint against the former Executive Director, UN-Habitat

10. The Respondent requested disclosure of the decision of the Secretary-General dismissing the Applicant's complaint against the former Executive Director, UN-Habitat, pursuant to ST/SGB/2008/5, apparently sent to the Applicant in April 2018. The Applicant undertook to look for the decision and, if he can retrieve it, to disclose it to the Respondent.

Statement by Mr Andrew Cox, Director, Management and Operations Division, UN-Habitat

11. The Tribunal considered that a sworn statement by Mr Cox, detailing any matters of concern about the Applicant's conduct and/or performance of which he had direct knowledge, would be helpful both in relation to any discussions that may take place between the parties with a view to a resolution of this matter or to the Tribunal in the event that a judicial determination is to take place.

Notice of Non-Renewal

12. The Tribunal was informed that, on 31 August 2018, the Applicant was served with a notice that his fixed-term appointment will not be renewed when it comes to an end on 30 September 2018. There is an application for suspension of action currently pending before the Dispute Tribunal in Nairobi. If the MEU were to uphold the decision, the Applicant indicated that he will file an application before the Tribunal in connection with his non-renewal. He nevertheless asked that preparation of the present application continues but that its determination be deferred until the outcome of his request for management evaluation is known, indicating his belief that this case and the non-extension of his appointment are connected and that it would be a just and effective use of the Organization's resources to combine the cases in the event that his request for a review is unsuccessful. Counsel for the Respondent submitted that there is no causal link between the cases and that the non-renewal decision was based on funding limitations and was a decision taken by the new Executive Director, UN-Habitat, who was not involved in the decision being challenged in this case. He submitted that any new application arising from the non-renewal of the Applicant's appointment should stand alone.

13. The Tribunal considers that it would not be appropriate nor an efficient use of judicial resources to determine the merits of this application while the Applicant's request for management evaluation of the decision not to renew his appointment is pending, given the Applicant's assertion, which cannot lightly be disregarded, that there is a connection between the two cases. However, in the meantime, case management of this application should proceed and the matter will be reviewed as soon as practicable and no later than Tuesday 30 October 2018 when a telephone CMD will be held at 10 a.m. (Geneva time). If and/or when a new case is filed, the issue of joinder will be considered at the CMD or at the first available opportunity thereafter.

14. The Tribunal reminded the parties that in the event that they were to decide to explore an alternative resolution of this dispute, they should notify the Tribunal without delay.

IT IS ORDERED THAT:

15. On or before **Tuesday, 2 October 2018**:

a. The Respondent is to disclose a copy of the report of the fact-finding mission referred to in para. 7 above suitably redacted, as necessary, to remove references to matters not relevant to this claim with an unredacted copy for the Tribunal;

b. The Respondent is to submit a statement from Mr. Cox as indicated at para. 11 above;

c. The Applicant is to file his performance appraisals report(s) for the period covered by the matters relating to the written instructions of 16 February 2017; and

d. The Applicant is to file the decision of the Secretary-General on his complaint against the former Executive Director, UN-Habitat.

16. As soon as practicable, and within seven days if possible, but no later than 14 days, the Respondent is to identify all the notes and/or minutes of Senior Management meetings where the concerns about the manner in which the Applicant was discharging his functions was discussed and to disclose the same, redacted as necessary, with unredacted copies for the Tribunal, to include a contemporaneous record of the decision(s) taken with reasons thereof leading to the instructions notified to the Applicant on 16 February 2017.

17. The parties attend a CMD on **Tuesday, 30 October 2018, at 10 a.m. (Geneva time)** by telephone.

(Signed)

Judge Goolam Meeran

Dated this 27th day of September 2018

Case No. UNDT/GVA/2017/035

Order No. 154 (GVA/2018)

Entered in the Register on this 27th day of September 2018

(Signed)

René M. Vargas M., Registrar, Geneva