UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2010/079
Order No.:	010 (NBI/2011)
Date:	28 January 2010
Original:	English

Before: Judge Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ABOSEDRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION

Counsel for applicant:
Esther Shamash, OSLA

Counsel for respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. On 9 December 2010, the Applicant, a staff member of the United Nations Economic and Social Commission for Western Asia ("ESCWA"), requested management evaluation and suspension of the decision not to renew his fixed-term appointment. On 14 December 2010, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided not to grant his request for suspension of action.[1]

2. Consequently, on 23 December 2010, the Applicant filed an application for suspension of action with the United Nations Dispute Tribunal ("the Tribunal").[2] On 24 December 2010, the application and Order No. 246 were served on the Respondent. By Order No. 246, the Tribunal granted the application for suspension of action until 14 January 2010 to allow the Respondent an opportunity to file his response and any relevant documentary evidence. By Order No. 003, dated 13 January 2011, the Tribunal further extended the suspension of action until 28 January 2011 pending a review of the Respondent's submissions and a final determination on the application.

3. The Respondent submitted his response on 14 January 2011 and on 20 and 24 January 2011, the Tribunal held hearings on the application for suspension of action.

Relevant facts

4. The Applicant was appointed to the post of Regional Advisor at the L-5 level at ESCWA on 16 February 2009. On 23 December 2009, he was offered a fixed-term appointment at the P-5 level with an expiry date of 31 December 2010.

[1] Pursuant to staff rule 11.3(b)(ii), in cases involving separation from service, a staff member may opt to first request the Secretary-General to suspend the implementation of the decision until the management evaluation has been completed and the staff member has been notified of the outcome. If the Secretary-General rejects the request, the staff member may then submit a request for suspension of action to the Dispute Tribunal.
[2] The application was filed at 2328 hours on Thursday, 23 December 2010. Close of business in Nairobi is 1700 hours and 24 December 2010 was an official holiday in Nairobi.

5. As a Regional Adviser, the Applicant worked with two managers: the then Director of the Economic Development and Globalization Division ("EDGD"), Mr. Nabil Safwat, and the Director of the Programme Planning and Technical Cooperation Division ("PPTCD"), Mr. Roberto Laurenti. However, with respect to his performance appraisal Mr. Safwat served as his first reporting officer (FRO) and the then ESCWA Executive Secretary served as his second reporting officer (SRO). Mr. Laurenti served as an additional reporting officer.

6. On 17 June 2010, the Applicant signed off on his 2009-2010 ePAS, which had an overall rating of "partially meets performance expectations". He did not rebut his overall performance rating but it was subsequently changed to "fully successful performance". Further, Mr. Laurenti indicated in his comments, dated 20 May 2010, that it was difficult to evaluate the Applicant's performance as he had undertaken only four missions during the reporting period.

7. By an email dated 6 July 2010, the Applicant informed Mr. Laurenti that he had actually undertaken eight missions to member countries and that he had made substantial contributions by way of a paper on the impact of the global financial crisis on the economies of the ESCWA region. He requested that Mr. Laurenti make the necessary changes in his comments to reflect this information in the 2009-2010 ePAS. When asked to explain why he noted four instead of eight missions, Mr. Laurenti stated that four of the missions were merely technical advisory missions and therefore were not considered as proper missions. In this connection the Fact-Finding Investigation Panel found as follows:

> "However the panel considers that there was an absence of communication. In particular
>
> *(a) The PAS evaluation by Mr. Laurenti, in his quality of the Additional Supervisor, missed a discussion on performance of Mr. Abosedra. This is a managerial mistake. While it usually happens that managers minimize the*

discussion due to the time shortage, there had to be a discussion with Mr. Abosedra, if there was a concern about his performance".

8. By an email dated 21 July 2010, the Chief, Human Resources Management Service ("HRMS"), ESCWA, informed Mr. Safwat that the Applicant had brought to their attention that there was an error in the evaluation by Mr. Laurenti regarding the number of missions he had completed. HRMS further informed Mr. Safwat that he would have to request that the ePAS be "rolled back" to the "Start end of cycle – SM" phase in order to correct the error. By an email dated 18 August 2010, Mr. Safwat requested that the ePAS Helpdesk roll back the Applicant's ePAS.

9. On 18 October 2010, the Applicant lodged a harassment and discrimination complaint with the Director of Administrative Services Division ("D/ASD"), ESCWA, against Mr. Laurenti. Thereafter, the Executive Secretary, ESCWA, appointed a panel to investigate and report to her on the Applicant's complaint.

10. By a memorandum dated 2 December 2010, the D/ASD informed the Applicant of the outcome of the investigation into his complaint. The Applicant was informed that the Fact-Finding Investigation Panel had concluded that there was no improper conduct of harassment and discrimination as defined by ST/SGB/2008/5 but there was an absence of communication and inaccessibility of Mr. Laurenti to the Applicant. The D/ASD further informed the Applicant that the Executive Secretary had endorsed the findings of the Panel and had decided to close the matter. Consequently, no further action would be taken on the matter.

11. By an email dated 3 December 2010, Mr. Laurenti informed the D/ASD that the Applicant's post would be re-advertised in the near future and that this was linked to the proposed restructuring of the EDGD. He informed the D/ASD that "[t]he new TORs will be forwarded to you as soon as the orientation of the dicto [*sic*] restructuring gets clearer", and that the Applicant should be advised that his contract would be allowed to expire on 31 December 2010.

12. On 6 December 2010, the D/ASD informed the Applicant that EDGD/PPTCD had requested that his appointment be allowed to expire on 31 December 2010.

Applicant's submissions

13. The Applicant submits that the decision not to extend his contract was retaliatory in that the proximity of the fact-finding panel's conclusion and the decision of non-extension are "suspiciously close". He also submits that contrary to the communication of 6 December 2010, Mr. Laurenti made a unilateral decision not to extend his contract on the day after the fact-finding panel concluded its investigation about his alleged harassment of the Applicant. The Applicant submits that this raises a *prima facie* case of retaliation. The Applicant further asserts that even though the fact-finding panel concluded that no harassment had occurred, this does not detract from the fact that he had, in good faith, lodged a formal complaint according to ST/SGB/2008/5, and that retaliation against him on this basis is prohibited.

14. The Applicant also submits that the decision not to renew his contract was retaliatory in that: his performance was beyond reproach and funding still exists for his post.

15. At the time of his filing of this request for suspension of action on 23 December 2010, the Applicant considered that the matter was urgent because his contract was due to expire on 31 December 2010. He submits that once he is separated, he will no longer be able to pursue his case effectively and his future employment prospects within the Organization will be affected adversely.

16. The Applicant submits that he will suffer irreparable harm if the contested decision is implemented because he will be forced to separate from service. Consequently, he will not be able to pursue his case effectively and this will impact on his future chances of continuing his work for the United Nations.

Respondent's submissions

17. The Respondent submits in his reply that the application for suspension of action should be dismissed on the grounds that the Applicant failed to satisfy the requirements of Article 13 of the Tribunal's Rules of Procedure for the grant of a suspension of action. In this respect, the Respondent submits that Applicant has made no *prima facie* showing that the contested decision is unlawful in that he has not proffered any evidence to support his claim of retaliation. The Respondent submits that there is no basis upon which an inference can be made that the impugned decision and the fact-finding panel's conclusions are intrinsically linked.

18. The Respondent submits that the primary basis for the decision to allow the Applicant's appointment to expire was the re-structuring of the division, which was being contemplated, to meet the new operational demands of Regional Advisers, as requested by Member States.

19. The Respondent also submits that the matter is not of "particular urgency" given that the Tribunal granted his application for suspension of action until 28 January 2011, which effectively extended the Applicant's contract beyond 31 December 2010. Further, the Respondent asserts that as the terms of reference under the Applicant's appointment are no longer required, the Applicant would not have any duties to perform even if his application for suspension of action is granted.

20. Lastly, the Respondent submits that the Applicant would not suffer irreparable harm by virtue of the non-renewal of his contract in that while he had not asserted that there would be any harm to his career prospects or reputation, "there are many instances when the Tribunal will be able to fully compensate for any harm to professional reputation and career prospects should the applicant pursue a substantive appeal and should the Tribunal decide in [his] favour".[3] Further, the Respondent submits that the Applicant would not suffer irreparable harm as he has the right to pursue his case under the applicable provisions of the Statute of the Dispute Tribunal.

[3] *Utkina* UNDT/2009/86.

Considerations

21. Applications for suspension of action are governed by Article 2 of the Statute of the Tribunal and Article 13 of the Tribunal's Rules of Procedure. Article 13.1 provides as follows:

> "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".

22. The current application must therefore be reviewed against the three essential prerequisites to a suspension of action application as outlined in Article 13(1) of the Tribunal's Rules of Procedure and Article 2(2) of the Statute.

a) Prima facie unlawfulness

23. The first requirement is that the administrative decision must be unlawful. What is unlawful depends obviously on the specific circumstances of each case. A decision would be unlawful if it is in breach of the United Nations Charter and/or the Rules and Regulations made under the Charter and approved by the General Assembly. In a number of cases[4] it has been held that a decision would also be unlawful if it was motivated by countervailing circumstances. Examples of such circumstances are a mistake of law or fact; bias; overlooking of facts; wrong inferences or conclusions from facts; abuse of authority; improper motives or considerations; arbitrary or irrational exercise of discretion; the giving of a false reason. Further an absence of a reasoned decision may amount to the unlawfulness of

[4] See for example *Utkina* UNDT/2009/096; Administrative Tribunal of the International Labour Organization (ILOAT) Judgment No. 2116, *Giordimaina* (2002); ILOAT Judgment No. 495, *Olivares Silva* (1982); ILOAT Judgment No. 1750, *Peroni* (1998).

a decision[5]. In the same case it was held that the obligation to give a reasoned decision to justify the non renewal of a contract derives from *an implication or principle of law*.

24. The Tribunal considers that the contested decision is *prima facie* unlawful for two reasons: the provision of a false reason and retaliation.

Providing a false reason

25. The Respondent stated that the reason for allowing the contract to expire was justified by the need to restructure the department where the Applicant was posted. The idea of restructuring was first mooted in October 2010 by the Acting Director of EDGD, Mr. Tarik Alami[6], when the new Executive Secretary of ESCWA came on board. During the hearing, the Tribunal posed the following question to the Acting Director of EDGD, Mr. Tarik Alami:

> "So, if I have understood you correctly Mr. Alami, you are telling this Tribunal that in regard to such an important issue about the restructure of a division that deals with economic issues in the Arab world and that motivated the termination of the contract of a staff member, or somebody who was occupying a position, all that took place with regard to vision, restructure, etc., was never recorded in writing. There are absolutely no minutes, nothing to reflect what took place? Is this what you are telling the Tribunal?"

26. In response, Mr. Alami told the Tribunal that, "[…] regarding the restructure itself, other than the [terms of reference] of all the recruitment in my division, no". He also informed the Tribunal that:

[5] ILOAT Judgment No. 675, In re *Perez de Castillo* (1985).
[6] Mr. Alami became Acting Director of EDGD in October 2010.

> "Well, I don't have anything in writing to the new Executive Secretary but I have discussed with her during our first meeting as well as during several meetings about my vision regarding, the restructure of the division and she is very much aware of this but in writing, no. I do not have anything in writing prior to my meeting with her."

27. Subsequent to the hearings, the Respondent submitted to the Tribunal, on a confidential basis, three power-point presentations and draft vacancy announcements (terms of reference for posts in EDGD) that were supposed to substantiate the restructuring claim. The Tribunal found all three documents to be of no value to the discussion at hand as they merely provided information on the structure, work plan/program, major outputs and achievements, administrative issues and programme budget for 2012-2013. While there was a section on EDGD's way forward, this merely explained a new three-track strategy that EDGD planned to adopt in relation to monitoring and assessment of the structural and development issues within its portfolio. The Tribunal finds it truly disturbing that apart from a handful of draft vacancy announcements for positions in EDGD, such a crucial matter as the restructuring of a division in such an important organization like ESCWA would merely be discussed verbally without anything being recorded.

28. Further, Mr. Alami had a meeting with the Applicant in mid-November 2010 regarding his contract "as per the Executive Secretary's request to **think over** (*emphasis added*) the existing structure and the focus of the division and **propose to her during ESCWA's retreat in early December a new vision for the division** (*emphasis added*)". During the meeting, Mr. Alami told the Applicant that due to the region's developmental challenges and the type of requests that had been received from member countries, new terms of reference for a regional adviser "**will be** (*emphasis added*) developed in the area of Trade and transport facilitation and **probably** (*emphasis added*) macroeconomic forecasting". Mr. Alami then told the Applicant that he would be welcome to apply once a new vacancy announcement is issued.

29. During cross-examination, Mr. Laurenti told the Tribunal that the restructuring was "in the process". He confirmed, however, that before any restructuring took place, the Executive Secretary would have to approve it. When asked if such an approval would be in writing, he told the Tribunal that he did not know. When asked whether a decision had been made on restructuring, he told the Tribunal that he did not know. When asked if the restructuring of EDGD was still in the "realm of a proposed change" i.e. that it had not yet been decided on as of 3 December 2010 when he communicated to the D/ASD the decision to allow the Applicant's contract to expire, he responded that he "did not know if it was under the process". The Tribunal finds it disturbing and very strange that a person in the position of Mr. Laurenti who was in charge amongst other matters of the budget could afford to remain content with answers amounting to "I don't know" on material issues. A classic example of his "I don't know" answer is when he invoked a situation akin to selective amnesia to the question as to whether the restructuring had been decided yet.

30. Based on the evidence adduced during the hearing, it is apparent that when the Applicant was informed of the non-renewal of his fixed-term appointment on 6 December 2010, the restructuring of EDGD was nothing more than an embryo with months to go before it could be deemed as a fully developed and viable option upon which critical decisions, such as the non-renewal of a staff member's contract, could be based. Thus, it is highly questionable that while EDGD/PPTCD was merely supposed to "**think over**" and provide proposals to the Executive Secretary on a "new vision" for the division during ESCWA's retreat, which took place on 8 & 9 December 2010, the decision not to renew the Applicant's contract based on a proposed restructuring of EDGD was taken on or before 3 December 2010, **before** any such proposal was even presented to the Executive Director at the ESCWA retreat for her approval or disapproval.

31. Mr. Alami also stated that when he took over as Acting Director of EDGD in October 2010 the division was lagging behind and that about 60% of the posts were vacant. Yet in the face of this, ESCWA deemed it proper to allow the contract of the Applicant to expire. This, in the view of the Tribunal, is a classic example of shoddy management.

32. Further it is a matter of grave concern that, in the absence of new TOR, both Mr. Laurenti and Mr. Alami hastily concluded that the Applicant would not be in a position to carry on with his functions because the new responsibilities would encompass trade. Yet the same Mr. Laurenti when asked whether the Applicant knows something about trade came up with his classic "I don't know" answer. Mr. Alami in his bid to justify the expiration of the contract of the Applicant tried very hard to explain that the new TOR for the new position was lying on his desk and had not yet been made public.

33. Mr. Alami was asked to clarify an email he sent to the D/ASD on 24 December 2010 that reads:

> "Dear David, as per our discussion during today's meeting, kindly note that in mid November, I had a meeting with Mr. Abosedra regarding his contract, after the executive secretary's request to think over the existing structure and the focus of the division and proposed to her during ESCWA's retreat in early December a new vision for the division".

34. He was asked the following question: *"So you were supposed to propose to the Executive Secretary the new vision during the retreat which took place on the 8 and 9 of December, correct?"* Mr. Alami answered in the affirmative and when asked whether he in fact proposed the new vision to the Executive Secretary in December he struggled hard to justify the unjustifiable by trying to explain that the vision had been presented to the Executive Secretary well before and the whole matter was an ongoing process. Mr. Alami did concede that under the existing TOR the Applicant

would be in a position to carry on with his duties. The Tribunal reiterates its conclusion that the so called restructure was either an embryo, or was a figment of the imagination of Mr. Alami and Mr. Laurenti or a convenient way for them, but foul in the view of the Tribunal to get rid of the Applicant. It should be emphasised that the only example of foul being fair is to be found in the witches' philosophy in Shakespeare's Macbeth, an example not to be emulated by management.

35. The Tribunal notes that the Applicant was the only Regional Adviser, out of a total of seven, whose contract was not renewed. The Respondent asserts that this occurred because the Applicant was the only Regional Adviser working for EDGD, which, according to Mr. Laurenti, was the only division "dysfunctional" enough to require restructuring. The Tribunal considers that this argument is specious and immaterial as the evidence clearly shows that the restructuring, which had not been approved as of 3 December 2010 and has still not been implemented, was not the reason for the non-renewal for the Applicant's fixed-term appointment. It is abundantly clear that the contested decision was motivated not by a dire need to restructure but by extraneous factors. Thus, the Tribunal concludes that a false reason was given for the non-renewal of the Applicant's appointment, which is *prima facie* unlawful.

Retaliation

36. Pursuant to section 1.4 of ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), retaliation is any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in a protected activity, such as reporting misconduct on the part of one or more United Nations officials.

37. The Applicant lodged a formal complaint of harassment and discrimination against Mr. Laurenti on 18 October 2010 and on 12 November 2010, the Executive Secretary, ESCWA, established a Fact-Finding Investigation Panel ("the Panel") to

investigate his complaint. On 25 November 2010, Mr. Laurenti sent the following email to the various division heads, including Mr. Alami:

> "Grateful if you could provide PPTCD with a brief assessment on the performance of the [Regional Adviser] in your respective Division by COB 26 November 2010. We shall then proceed with HR regarding their contracts, all due to expire on 31 December 2010".

38. 26 November 2010, the Panel finalized its report and transmitted it to the Executive Secretary for action. On 2 December 2010, the Applicant and Mr. Laurenti were informed of the conclusions of the Panel that there was no improper conduct of harassment and discrimination as defined by ST/SGB/2008/5 but there was an absence of communication and accessibility of Mr. Laurenti to the Applicant. In regard to the lack of communication the Panel on Investigation observed:

> "Mr. Laurenti was not available to Mr. Abosedra between June and Mid-October 2010. This may demonstrate elements of discrimination. However, it is more likely an absence of communication than the discrimination proper according to ST/SGB/2008/5, Section 1.1".

39. By an email dated 3 December 2010, which was a Friday, Mr. Laurenti informed the D/ASD that:

> "[T]he post of [Regional Adviser] on Macro-economic is going to be re-advertised in the near future. This is also linked to the proposed restructuring of EDGD. The new TORs will be forwarded to you as soon as the orientation of the dicto restructuring gets clearer. Please advise the staff [the Applicant] that his contract will be allowed to expire on 31st December 2010".

40. On Monday, 6 December 2010, D/ASD informed the Applicant that:

> "We have been requested by the concerned Divisions (EDGD/PPTCD) to allow your current appointment to expire on 31 December 2010 in accordance with Staff Rule 9.4…"

41. The Tribunal considers that pursuant to ST/SGB/2005/21, the Applicant engaged in a protected activity by submitting his complaint of 18 October 2010. The question now is whether he was retaliated against as a result of this complaint against Mr. Laurenti. Based on the chronology of the events that took place after he lodged his complaint against Mr. Laurenti on 18 October 2010, a reasonable inference can be made that the contested decision was retaliatory in nature and therefore, *prima facie* unlawful.

42. Based on Mr. Laurenti's email of 25 November 2010, which predated the Panel's report of 26 November 2010, it is evident that any decision to renew or not renew the contracts of the regional advisers, including the Applicant, was to be based on performance. During cross-examination, Mr. Alami confirmed that he told Mr. Laurenti that he could not assess the Applicant's performance as he had not worked with him long enough. The record shows, however, that for the performance appraisal period of 2009-2010, the Applicant's overall performance rating was "successfully meets performance expectations". With such a rating, the Applicant's performance was definitely not the issue.

43. There appears, however, to have been a rather sudden epiphany on the part of Mr. Laurenti between 25 November 2010 and 2 December 2010 when he was informed of the findings of the Panel. As noted in paragraph 35 above, the non-renewal of the Applicant's contract obviously had nothing to do with restructuring but on 3 December 2010, a day after Mr. Laurenti received the findings of the Panel, the non-renewal of his contract was as a result of restructuring. While Mr. Laurenti claims that he had no animus towards the Applicant, the Tribunal is of the view that

due to skirmishes with the Applicant over substantive comments he made in the Applicant's ePAS, there was a certain amount of animus existing even prior to the issuance of the Panel's report. The Tribunal notes that on 25 June 2010, the Applicant tried to meet with the D/PPTCD regarding the ePAS but this meeting did not take place until 14 October 2010. While Mr. Laurenti was unavailable to the Applicant during this long period, he was available to other regional advisers.

44. It is also rather dubious that Mr. Alami, as head of EDGD, was not the one to write to the D/ASD regarding the Applicant's contract. When he was asked if he had instructed Mr. Laurenti or the D/ASD in writing not to extend the Applicant's contract, he responded that they had "discussed it verbally" and that there was nothing in writing from him. He did not, however, confirm that he had instructed Mr. Laurenti to act. Once again, the Tribunal cannot help but question why Mr. Alami, as head of the division, would not put an important discussion, such as the non-renewal of the contract of the **only** staff member working in his division, in writing? Mr. Alami, who was still relatively new in his position, was obviously complacent and allowed himself to be steamrolled by Mr. Laurenti.

45. Instead, one day after the Panel's findings were notified to him, Mr. Laurenti, who was only an additional supervisor for the Applicant, was the one who wrote to the D/ASD regarding the non-renewal of the Applicant's contract due to the restructuring of EDGD. However, during cross-examination, he told the Tribunal that EDGD is not his division and that he neither controls the restructuring process nor the division. He explained that his role was to co-ordinate matters, such as the budget. When asked by the Tribunal what role he would have if restructuring ever takes place, he answered, "absolutely close to zero".

46. The Tribunal is of the view that Mr. Laurenti was already nursing a grudge against the Applicant due to the ePAS skirmishes and that this rancour boiled over once the Applicant had the audacity to file a complaint against him and the Panel, while not finding a breach of ST/SGB/2008/5 on the part of the D/PPTCD, found that

there was an absence of communication and inaccessibility on his part. There is no doubt that Mr. Laurenti's strategic use of Mr. Alami's hazy restructuring plan to attain the non-renewal of the Applicant's appointment was retaliatory in nature.

47. The Tribunal agrees with the Applicant that even though the fact-finding panel concluded that no harassment had occurred, this does not detract from the fact that he had, in good faith, lodged a formal complaint according to ST/SGB/2008/5, and that he had a right to be protected against retaliation. It is appropriate to note here that Article 6.5 of ST/SGB/2008/5 enjoins the head of department to take appropriate monitoring measures following the outcome of an investigation to ensure that retaliation does not take place. In blatant disregard of this important rule Mr. Laurenti assisted by Mr. Alami, decided to get rid of the Applicant by using a non-existent restructuring exercise. It is to be wondered whether Mr. Laurenti and Mr. Alami were acting as rational managers or were exercising their power not to the benefit of the unit where they belonged but rather to satisfy their own personal goals and egos.

48. Based on the available evidence, the Tribunal finds, in accordance with Article 2 of the Statute of the United Nations Dispute Tribunal and Article 13 of the Tribunal's Rules of Procedure, that the Respondent's decision not to renew the Applicant's fixed-term appointment is *prima facie* unlawful having been motivated by false representation in regard to a non-existent restructure and retaliatory measures. Thus, the Applicant has met his burden of proof in this respect.

b) Particular urgency

49. The Respondent submits that the matter is not of "particular urgency" given that the Tribunal granted the application for suspension of action until 28 January 2011, which effectively extended the Applicant's contract beyond 31 December 2010. This is a rather myopic argument since the Tribunal did not grant the suspension of action indefinitely. The underlying issue, non-renewal of the Applicant's fixed-term appointment, remains the same. In light of the fact that the application for suspension of action was granted until 28 January 2011 and there are

just a few hours left before the contested decision is implemented, the Tribunal considers that this is a matter of "particular urgency".

c) Irreparable damage

50. Generally, an interim measure should not be granted in a case where damages can adequately compensate an Applicant, if he is successful on the substantive case. As noted by the Respondent, in *Utkina* the Tribunal held that:

> "there are many instances when the Tribunal will be able to fully compensate for any harm to professional reputation and career prospects should the applicant pursue a substantive appeal and should the Tribunal decide in [his] favour".[7]

51. However, *Utkina* is distinguishable in that the Tribunal found that the Applicant failed to demonstrate that the contested decision was influenced by improper considerations and was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith. In the present case, the Tribunal has held in paragraph 25 above that the contested decision is *prima facie* unlawful as the Respondent failed to follow any proper procedure and the contested decision is based on extraneous factors. Thus, the irreparable damage that would be suffered by the Applicant far exceeds any harm to his future employment prospects.

52. In this connection, the International Labour Organization Administrative Tribunal (ILOAT) made the following observations in relation to fixed-term appointments[8]:

> "Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home

[7] *Utkina* UNDT/2009/86.
[8] ILOAT Judgment No. 675, In re *Perez de Castillo* (1985).

country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for -- and in practice invariably receives -- a decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an Organization that caused the Tribunal to adopt the principle that a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the Organization the obligation to consider whether or not it is in the interests of the Organization that that expectation should be fulfilled and to make a decision accordingly".

53. 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".[9]

54. Consequently, monetary compensation alone in the face of the blatantly unlawful decision-making process used by ESCWA would not begin to do justice to the Applicant. Under the circumstances of this case, the Tribunal finds therefore that implementation of the contested decision would cause the Applicant irreparable damage.

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

Conclusion

55. The Applicant has satisfied all three elements under Article 13 of the Tribunal's Rules of Procedure for a suspension of action.

Decision

56. Rule 11.2 of the new Staff Rules[10] 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 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".

57. Article 2.2 of the Statute of the United Nations Dispute Tribunal provides that:

> "The Dispute Tribunal shall be competent to hear and pass judgment 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".

58. Article 13(1) of the Rules of Procedure of the United Nations Dispute Tribunal provides that:

> "The Dispute Tribunal shall make an order 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

[10] ST/SGB/2009/6, 27 May 2009

> 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".

59. It would appear that under Article 2.2 of the Statute adopted by the Member States and the Rules of Procedure the duration of the management evaluation is subject to the outcome of the management evaluation. In other words if the Tribunal, as an independent judicial body, has found an administrative decision to be unlawful and capable of causing irreparable damage the suspension order which is in the nature of a judicial interim order, the purpose of which is to maintain the status quo between parties until the case is determined on its merits, ceases to have effect once the Management Evaluation Unit (MEU) files its conclusions irrespective of the nature of the outcome of its decision. Admittedly if the MEU confirms the decision of the Tribunal there will be an issue pending between the staff member and management. But if the MEU finds that there was no flaw in the administrative decision it means that the staff member is out of his/her job notwithstanding a judicial order for suspension. In other words by a stroke of the pen the MEU, an administrative body, is empowered to nullify a judicial order in regard to its duration.

60. It is true that in the case of *Kasmani v the Secretary General*[11] the United Nations Appeals Tribunal ("the Appeals Tribunal") has held that the Dispute Tribunal is limited by the powers conferred upon it by the Statute and that the Dispute Tribunal has no power to order the suspension of action beyond the pendency of a management evaluation. With due deference to the Appeals Tribunal, the Tribunal considers that notwithstanding of a rule it is its duty to consider whether that rule is in conformity with general principles of law. The Redesign Panel established by the General Assembly[12] was fully alive to the weaknesses of the internal justice prevailing before the new system came into operation on 1 July 2009 and strongly criticized it in its report presented to the General Assembly[13],

[11] Kasmani 2010-UNAT-011.
[12] General Assembly Resolution A/Res/59/283.
[13] Redesign Panel Report, A/RES/61/205, 28 July 2006.

> "…the 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".

61. 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 considered that these rules were not in conformity with basic fundamental principles of the rule of law[14].

62. Consequently, the suspension will remain in force until the case is finally determined on its merits if the Applicant is minded to pursue the matter further. The Applicant will, however, have to file an application on the substantive issue of the expiry of his contract within the delay provided for by law. If he fails to do so within the prescribed delay, the order for suspension will lapse automatically.

[14] See generally the discussion on general principles of law by C.F. Amerasinghe, in *Principles of the Institutional Law of International Organizations* (Cambridge, 2007), Second Edition, pages 288-299.

(Signed)
Judge Vinod Boolell

Dated this 28th day of January 2011

Entered in the Register on this 28th day of January 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi