UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/095
Order No.: 150 (NBI/2018)
Date: 25 September 2018
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON AN APPLICATION FOR SUSPENSION OF ACTION PURSUANT TO ARTICLE 14 OF THE UNDT RULES OF PROCEDURE AND ON A MOTION FILED PURSUANT TO ARTICLES 19 AND 36 OF THE UNDT RULES OF PROCEDURE

Counsel for the Applicant:
Daniel Trup, OSLA

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

The Application and Procedural History

1. The Applicant is the Director of the Management and Operations Division of the United Nations Human Settlements Programme (UN-Habitat). He serves at the D2 level and is based in Nairobi. On 20 July 2018, the Applicant filed a Management Evaluation Request, challenging the decision to unilaterally reassign him within Nairobi Habitat office. [1]

2. On the same day he submitted a request for suspension of action to the Tribunal seeking an injunction to the implementation of any decision regarding the transfer. On 23 July 2018, the request was granted by the order of this Tribunal No. 110 (NBI/2018). On 12 September 2018, the Management Evaluation Unit upheld the decision of the Administration.[2]

3. Having received the management evaluation response, on Friday, 14 September 2018, after hours at the United Nations Dispute Tribunal in Nairobi, the Applicant filed an application under art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure seeking to suspend the impugned decision pending the Dispute Tribunal's proceedings. Because of the lateness, the Applicant sought that his request for suspension of action be considered at UNDT in New York.

4. On the same date, the UNDT sitting in New York issued Order No. 177 (NY/2018) in which it held, having noted that the Applicant had not filed any application on the merits under art. 2.1(a) of the UNDT Statute but only an application for suspension of action pursuant to art. 14 of the UNDT Rules of Procedure, that it was satisfied that the requirements for an interim order pending the Tribunal's determination of the suspension of action as set out in *Villamoran* 2011-UNAT-160 by the Appeals Tribunal had been satisfied. The Tribunal also ordered the change of venue of the case to UNDT Nairobi.

5. On 17 September 2018, the Applicant filed an application on the merits.

[1] Annex F to the application.
[2] Annex H to the application.

6. The application for an interim order was served on the Respondent on 18 September 2018 and a reply was filed on 20 September 2018. The Applicant filed his comments on the same on 21 September 2018.

7. On 21 September 2018, by Order No. 144 (NBI/2018), the Tribunal requested additional information from the Respondent, which was supplied on 24 September 2018. The Respondent also commented on the Applicant comments.

Facts

8. Unless otherwise indicated, the facts described below are undisputed and/or result from documents.

9. The Applicant joined UN-Habitat on 23 January 2013 as Chief of the Office of the Executive Director at the D-1 Level, on a two-year fixed term appointment. On 1 December 2015, he was promoted to the position of Director of the Management and Operations Division (Director/MOD) at the D-2 level. This fixed-term appointment was renewed through 22 January 2019. The post is funded from the non-earmarked funds of the United Nations Habitat and Human Settlements Foundation.

10. On 22 December 2017, the United Nations General Assembly elected Ms. Maimunah Molid Sharif as Executive Director of UN-Habitat. She took up her duties at UN-Habitat on 18 January 2018. According to the Respondent, Ms. Sharif, upon extensive consultations with the relevant stakeholders (member states, partners and staff) who expressed concerns regarding the organization's finances, undertook to revitalize the organization and address the precarious financial situation which recorded a projected financial deficit of USD5 – 8 million by December 2018.[3]

11. Between May 2018 and July 2018, upon discussions held among the Executive Director, her Deputy, officials of the Executive Office of the Secretary-General, the Department of Management, the Office of the Controller and the Office of Human Resources Management (OHRM), it was decided that, given the

[3] Reply- annex 2.

critical role of the Management and Operations Division, the management and operations functions would be transferred to the United Nations Office at Nairobi's Director of Administration (UNON/DOA) and there would be a closer working relation with the Department of Management. It was decided that the UNON/DOA would be tasked with supporting the Executive Director with the design and implementation of immediate austerity measures whereas the Applicant was to be reassigned to another role within the organization, commensurate with his skills, qualifications and professional experience.[4] A memorandum from the Under-Secretary-General for Management, dated 26 June 2018, filed by the Respondent on 24 September 2018, discloses that the initiative of transferring the management and operations functions to UNON came from the Secretary-General's office, together with a recommendation for unspecified austerity measures, an audit of the management and finances of UN-Habitat as well as authorization to use UN-Habitat Program Support Cost fund to cover the cost of the austerity measures, in the expectation that expenditures on both the fund and the un-earmarked Foundation be aligned with the revenue as of 1 January 2019.[5]

12. On 29 June 2018, the Applicant was informed by Ms. Aisa Kacyira, Deputy Executive Director, UN-Habitat, that all responsibilities of the Management and Operations Division, UN-Habitat, were being transferred to the Department of Management, United Nations Secretariat. In addition, he was notified that his post of D-2 Director was to be taken over by Mr. Chris Kirkcaldy, UNON/DOA.[6]

13. The Applicant avers that Ms. Kacyira assured him that there was no question of performance, nor were there any ulterior motives for reassignment, moreover, that Ms. Kacyira stated that effective immediately, he was to be assigned to be head of the Geneva liaison office, with responsibility also for the Brussels office.[7]

[4] Reply, paras. 7 and 8.
[5] Respondent's clarification pursuant to Order No. 144 (NBI/2018), Annex A1.
[6] Paragraph 9 of the application.
[7] Paragraph 5 of the application.

14. According to the Applicant, on 2 July 2018, following the conversation with Ms. Kacyira, a phone conversation took place with Martha Helena Lopez, Assistant Secretary-General for Human Resources Management (ASG/OHRM). Ms. Lopez stated that the decision to deploy him to Geneva no longer stood and that the Organization wished to deploy him to New Delhi. The Applicant told her that there was no role in New Delhi, with the role currently encumbered only by a National Officer Category staff member and with USD150,000 funding. Ms. Lopez agreed that this may not be appropriate, and agreed to discuss further with the Administration.[8]

15. Also on 2 July 2018, the Applicant received a memorandum dated 28 June 2018 from the Executive Director of UN-Habitat, titled "Change of Functions" which stated that with immediate effect, he would be "redeployed within UN-Habitat". The notification also stated that the functions of Director/MOD of UN-Habitat would be performed by the Director of Administration (DOA) of the United Nations Office at Nairobi (UNON). [9]

16. On the same day, Ms. Kacyira sent out on behalf of Ms. Sharif a memorandum to all staff titled "UN-Habitat Reform – the financial situation". In this memorandum, Ms. Kacyira referred to the requirement of UN-Habitat to undertake a "strategic alignment" including the implementation of "objective and fact-based austerity measures." This will require the temporary transfer of the authority for the leadership of the Management and Operations Division to the UNON/DOA. The final paragraph of the Memorandum stated "…please note that [Applicant] has been reassigned from the Management and Operations Division and will be assuming a new role with UN-Habitat, reporting directly to the Deputy Executive Director.[10]

17. On 5 July 2018, the UN-Habitat Administration issued a decision that Mr. Kirkcaldy would pass on the day to-day running of the position of Director/MOD to Ms. Jane Nyakairu.[11] According to the Applicant, the reasoning given for this

[8] Paragraph 10 of the application.
[9] Annex A to the application.
[10] Annex B to the application.
[11] Annex D to the application.

decision was the impossibility faced by Mr. Kirkcaldy in combining the responsibilities for managing the post of Director/MOD with his continuing obligations within UNON.

18. On 6 July 2018, a telephone discussion took place between Ms. Lopez and the Applicant. During the discussion, Ms. Lopez informed him that the intention was now to reassign him to a role in Nairobi to be determined commensurate with his level as n D-2 and his experience.[12]

19. On 13 July 2018, a "Request for Classification Action" was signed by the UN-Habitat Deputy Executive Director. It described the Applicant's new role as an Advisor at D-2 level within the Office of the Executive Director in Nairobi. It specified the Applicant's proposed duties and responsibilities under the same post and conditions as his previous D-2 fixed term appointment.[13]

20. According to the Respondent, between 17 and 20 July 2018, further discussions took place between the Applicant and Ms. Kacyira where she presented to the Applicant the "Request for Classification Action" for his new role and requested him to sign it. The Applicant declined to sign stating that he wanted to be assured that his contract would be extended upon its expiry on 22 January 2019. The DED clarified to him that any extension would be contingent on the availability of funds and that she could not give any undertaking to him that his fixed term would be renewed in January 2019 given the current financial situation as any extension would be contingent on availability of funds and that this would apply to all staff funded under the Foundation. The meetings concluded without the Applicant signing the document.[14]

21. The post at which the Applicant served, Director/MOD, has been formally reclassified as Director (Adviser D-2) on 17 July 2018. It is maintained under the same post number. It continues to be funded from UN-Habitat's General Purpose Foundation. UNON/DOA assumed the functions of Director/MOD, but has not assumed the post as such, he remains on UNON payroll and is not being paid by

[12] Reply, para. 18 and para. 18 of the application.
[13] Reply - annex 6.
[14] Reply, para. 26 and paras. 21 to 23 of the application

UN-Habitat. [15] This arrangement is expected to continue pending the organizational review and restructuring of UN-Habitat with the relevant strategic plan, proposed budget and organizational structure are to be submitted for approval in April 2019; consequently, the Respondent does not have immediate plans for restoring the position of the Director/MOD.[16]

Applicant's submissions

22. The Applicant requests this Tribunal to "order the suspension of the contested decision pending the art. 14 suspension of action proceedings". In support of this request the Applicant makes the following submissions:

(i) The administrative decision is prima facie *unlawful*

23. The decision to reassign him was not based on a genuine reorganization nor by any proven operational considerations. Such a surprise reorganization had less to do with the efficiency of the office but rather appears to be aimed at simply removing him from post and sidelining him.

a. No explanation was provided as to why it was required to permanently remove him. The role and functions of Director/MOD in UN-Habitat still exists and functions as a core part of management, split between Mr. Kirkcaldy and Ms. Nyakairu, acting as "Operational Coordinator".

b. Despite the financial crisis that has been emphasized by the Management Evaluation Unit, the post that he occupied still exists and has not been abolished. To remove him and transfer responsibility to someone else does not remedy or deal with UN-Habitat's financial position.

c. As identified in the memorandum dated 2 July 2018, the transfer of Mr. Kirkcaldy to the position was temporary in nature and designed primarily to implement fact-based austerity measures. Nothing in the

[15] Respondent's clarification pursuant to Order No. 144 (NBI/2018), paras. 7-8.
[16] *Ibid.*, at para 10.

evidence suggests why it was necessary to remove him from his post permanently.

d. The meeting on 20 July 2018 with the Executive Director presented a new reason for his removal from his role, namely the need for an audit of Habitat III. This reason cannot be considered either consistent with the previous reasons given, nor is it a valid reason for the removal of a Director from his post, particularly if there is no suspicion of wrongdoing on the part of said Director.

e. The speed at which the Administration decided to remove him from his post without even considering an alternative position for such a reassignment suggests a process undertaken in haste. He was never consulted about such a radical decision. Whilst the absence of consultation is not in of itself grounds to conclude the decision to reassign him was unlawful, it is indicative of an absence of thought and suggestive of a rushed determination driven by an ulterior motive.

f. The absence of thought and suggestion of a rushed determination driven by ulterior motive can further be demonstrated by the communication to him on 30 June 2018 that he was to be assigned to Geneva, on 2 July 2018 by the withdrawal of that decision and a statement that he was to be deployed to New Delhi, to a nonexistent role and budget. This suggestion was withdrawn formally on 6 July, with a promise to make a new proposal early in the following week. The Administration only provided a new suggestion after 11 days on 17 July 2018, to the ill-defined and previously non-existent post of "Advisor". It is very clear from this timeline that the decision of the Administration was rushed in removing him from his role as Director, but there was no prior organizational need or requirement for his reassignment elsewhere.

24. The imminent decision to reassign him to the post of "Advisor" should be regarded as a *de facto* demotion as held by the UNDT in *Bye* UNDT/2009/083. The post of "Advisor" is not commensurate with his previous position having managed an entire division. He is being relegated to advising the Executive

Director with the assistance of only one P-3 Program Officer. The Management Evaluation Unit's position in which it concludes that a D-2 does not expect to have management authority is contrary to the D-2 Generic Job Profile announced at the United Nations portal *iSeek* which indicates a requirement for having a senior role in both managing and directing.

25. He will be reassigned away from a core post to a temporary fill-in post that does not in any way reflect his previous responsibilities in any anyway. As in the case of *Chemingui* UNDT/NBI/2015/079 (Order No. 245 (NB/2015)), since he is not being provided a lien to his current established post, which would have addressed the job security concerns, such a transfer should be regarded *prima facie* unlawful as the new position is temporary in nature.

26. Despite the previous suspension of action, the Administration simply ignored the order and did not place him back to the position he had previously enjoyed. In *El-Awar* UNDT/2017/023, the Tribunal determined that an art. 13 suspension of action was not enforceable and therefore he did not seek additional orders from the Tribunal. However, in this case, he seeks a full suspension of action pursuant to art. 14 of the UNDT statute so as to prevent the implementation of this unlawful decision.

(ii) Implementation of the impugned decision will cause him irreparable harm.

27. Being forced to transfer from his post of Director/MOD to a newly established temporary post of "Advisor" will inevitably have a detrimental impact on his career and reputation, as did the announcement of reassignment without any assignment of responsibility and role on 2 July 2018.

28. Once the transfer has taken place, the damage is done as his reputation would be permanently undermined and, at the minimum, it would be reflected in his Personal History Profile. Any future job applications he may choose to make would not allow him to take full advantage of his work as Director/MOD in UN-Habitat but rather relate to the ill-defined post of "Advisor". Such reputational

harm would be substantial and could not be remedied through financial compensation.

29. At the same time, he will be reassigned to a post that is less secure than his position as Director/MOD. The post of "Advisor" will be funded through extra-budgetary funding for a role not considered to be core, and as a result would be less secure going forward. Indeed, the Applicant has only been able to obtain certainty of funding for the suggested new post for five and a half months.

(iii) Urgency

30. The decision regarding his reassignment is imminent following the decision of the Management Evaluation Unit and will be carried out shortly.

Receivability

31. Although he is no longer performing the role of Director/MOD, the decision regarding his reassignment has not been fully implemented. Specifically, he has not yet been reassigned to the post of "Advisor". He has simply been removed from his role, with no assignment of work or responsibility.

32. His reassignment should be viewed in the same light as recruitment in that until the staff member has been reassigned to the new post, the decision to remove and transfer has not been completed. At no stage was he issued with a decision transferring him to the new post. No revised letter of appointment was issued, no personnel action, or indeed any notification, was sent to him that with immediate affect he would be transferred to the new post. As such, without such notification, no decision to transfer him had been made or implemented. As such, the scope and the ability of the Tribunal to suspend the decision exists.

Motion Pursuant to arts. 19 and 36 of the UNDT Rules of Procedure

33. Article 19 of the UNDT Rules provides that the Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties. Article 36(1)

of the UNDT Rules of Procedure provides that all matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by art. 7 of its statute.

34. In this case, he is aware that UN-Habitat intends to issue the decision to reassign him from his post as D-2 Director/MOD shortly. If the Administration is allowed to proceed, he will be moved off his post and suffer harm.

35. In *Villamoran*, the Appeals Tribunal held that where the implementation of an administrative decision was imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under art. 13 of the UNDT Rules of Procedure have elapsed, and where the UNDT is not in a position to take a decision under art. 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render art. 2(2) of the UNDT Statute and art. 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision was imminent.

36. Based on the foregoing, the Applicant requests that this Tribunal suspend the implementation of the impugned decision until completion of the UNDT procedure.

Respondent's submissions

The application is not receivable

37. The Respondent submits that this application for suspension of action is not receivable as it has already been implemented. As stated in the various communications shared with the Applicant and UN-Habitat staff members, the functions of the Director/MOD of UN-Habitat have fully been transferred to the UNON/DOA and the Applicant has been deployed with UN-Habitat. This was immediately followed by several irreversible actions and measures taken by the

Administration which clearly demonstrates that the decision has already been implemented.

38. In view of the chronology of events in this case, the decision was already implemented before the Applicant filed his applications for suspension of action on 20 July 2018 and 14 September 2018 respectively and well before he filed the present application for the following reasons:

a. The Applicant had duly been notified of the decision by memorandum dated 28 June 2018;

b. There have been several meetings confirming the Applicant's reassignment;

c. The Applicant's post had already gone through the classification process and approved. This was signed off and discussed with the Applicant. The fact that the Applicant refuses to sign the classified job description does not mean that the decision has not been implemented;

d. The Respondent has since the decision put in place several measures which if reversed or suspended would adversely affect the organizations operations. These include the establishment of a team comprised of both UN-Habitat and UNON staff members to implement the relevant measures. An intervention by the Tribunal in this regard would not maintain but disrupt the *status quo* and would instead seek to reverse the actions already taken by the Administration.

e. The Applicant has effectively ceased to carry out the said functions immediately following notification of the decision, which was confirmed during his meeting of 4 July 2018 with UN-Habitat's Management and Operations staff, the Applicant confirmed that he no longer serves as the Director/MOD as well as is borne out by the first paragraph of the application, where he acknowledged that he is "a serving staff member at the D-2 level, previously working as Director of the Management and Operations Division".

f. There was no requirement for the Respondent to issue a new letter of appointment and personnel action since this was not a new appointment. There was no opportunity to issue a letter to the Applicant calling upon him to take up his new duties, given that the Applicant obtained a suspension of action.

The Dispute Tribunal lacks jurisdiction to order the Applicant's reinstatement

39. The Dispute Tribunal has no authority to execute orders for suspension of action. As stated in *El-Awar* UNDT/2017/023, such orders do not make any award that may be the subject of execution nor do they require any specific action to be carried out within a certain time limit. A suspension of action order merely maintains the *status quo* pending adjudication of the merits. An order for suspension of action cannot restore a situation or reverse an allegedly unlawful act, which has already been implemented. Such orders are of a temporary nature and do not vest in the Dispute Tribunal the powers to intervene in the Applicant's relationship with the Organization. The Dispute Tribunal may order reinstatement only as relief upon adjudication of the merits of the case but not in the context of an order for suspension of action.

Unlawfulness

40. The decision to reassign the Applicant is a lawful exercise of the Executive Director's discretion, made in good faith and in accordance with the relevant rules and procedures of the organization, such as staff regulation 1.2(c), and was not based on any improper or ulterior motives but purely on grounds of organizational necessity.

41. The Applicant's assertions that he was reassigned from an established core funded D-2 post to a temporary funded post is incorrect. The Applicant was reassigned different functions, but he remained on the same D-2 post with identical contractual terms (a fixed-term appointment with expiration date of 22 January 2019).

In all the remaining part on this score the Respondent mainly engages in a polemics with the Applicant:

42. Contrary to the Applicant's assertion that he was handed a draft "Request for Classification", he was in fact presented with the duly approved and signed "Request for Classification" request which informed him that he had been assigned to his new post.

43. The Applicant's assertion that the decision to reassign him was done quickly without prior planning is incorrect and unsupported by the evidence. The decision was made in close consultations with the respective stakeholders.

44. Contrary to the Applicant's assertion that he was never consulted about such a radical decision, the Applicant knew about the discussions with the Department of Management regarding the precarious financial situation and the much-needed reforms. There was no need for his consent. With specific reference to his reassignment, the evidence shows that he was duly informed and consulted about his new role and responsibilities.

45. The Applicant's assertion that during the Executive Director and Deputy Executive Director's meeting with him on 20 July 2018 he was for the first time given an explanation for his sudden removal and that the Executive Director informed him that the reasons for reassignment related to the closure of the Habitat III Conference and the necessary related audit is incorrect and is not supported by the evidence. The Applicant was fully informed of the reasons for his reassignment by the Deputy Executive Director when they met on 29 June 2018. The Executive Director reiterated to him that the decision was made in the context of the re-organization, which include the audit of UN-Habitat, Habitat III and the World Urban Forum (WUF9).

46. The organizational need for the restructuring of the organization was well informed and justified by feedback received from the respective stakeholders and the concerns raised regarding the precarious financial situation of the agency. The decision was buttressed by the fact that the Management and Operations Division, which was headed by the Applicant, is a key player in the reorganization and

restructuring of the organization. It was therefore imperative in the Executive Director's judgement that the Applicant be reassigned and it was in the best interest of the organization. It is not for the Applicant to determine whether the decision was in the interest of the organization. The Applicant's opinion regarding the timing, planning and need for the reassignment is not relevant and cannot be more authoritative than that of the Administration.

47. From the functions described in the "Request for Classification", the Applicant's new role as an Advisor is commensurate with his professional skills and experience.

48. The request for classification underwent comprehensive reviews and consultations with the Office of Human Resources Management (OHRM) and was duly approved in accordance with the established rules and procedures for the classification of a D-2 level post. His skills, qualifications and professional experience as stated in his Personal History Profile are commensurate with the skills, qualifications and professional experience required for this post. The Applicant should, therefore, be able to exercise the said functions when the decision is implemented.

49. The fact that the Applicant was reassigned to a lateral position rebuts his assertion of the reassignment being a *de facto* demotion. The Applicant continues to have the same fixed-term appointment. The position is of strategic importance to the organization. There is no requirement under the relevant Staff Rules and jurisprudence that a staff member at the D-2 level should be supervising a certain number of staff. There is no rule preventing a staff member in a permanent position from being required to undertake tasks that are of provisional character, particularly in the context of a restructuring.

50. Whether the designation of the UNON/DOA is temporary or not, or that another Director/MOD will be appointed, is a matter of conjecture on the part of the Applicant. The decision on what happens to the post of Director/MOD is a discretionary matter for the Administration and cannot be used to argue that the decision was tainted by improper or other motive.

51. The Applicant has not satisfactorily explained or provided evidence of how his reassignment was tainted by the alleged improper and ulterior motivation of the decision makers. He objects to the decision by relying on his own judgement of the organizational necessity and timing for his reassignment. As such, the Applicant has not discharged the requisite burden of proof.

Irreparable harm

52. The Applicant's inference that his reassignment to a temporarily funded position will unduly damage his career and standing within the United Nations is unsubstantiated and unjustified. The decision was not based on the Applicant's performance but purely on grounds of organizational necessity. This was emphasized to him during his meeting with the Executive Director and the Deputy Executive Director.

53. The fact that the Applicant will be reassigned to a position with less staff to supervise than his previous assignment does not necessarily mean that his reputation would be permanently undermined or that he would suffer irreparable harm.

54. The Applicant continues to encumber the same position that he encumbered prior to the decision and therefore the post was not temporary in nature nor a less secure position.

55. lt is clear from the Applicant's submissions that the crux of his arguments is based on his erroneous assumption that he was assigned to a temporary post despite the fact that this was repeatedly clarified to him during his meetings with the respective officials.

Urgency

56. There is no urgency to justify the grant of an art. 14 suspension of action. On this score the Respondent reiterates his arguments that there is nothing on the part of the Administration to implement as all the necessary steps for the Applicant's reassignment have already been fully executed. The only thing left is for the Applicant to agree to the reassignment and take up his assigned duties.

57. Contrary to the Applicant's assertion that the decision regarding his reassignment is imminent, He cannot argue that the decision has not been implemented because he has not agreed to take up his new duties.

Considerations

Receivability

58. The Tribunal notes that, at the time of the filing of the request for suspension of action, the Applicant had not yet filed an application on the merits under art. 2.1(a) of the Statute of the Dispute Tribunal but only an "application for suspension pursuant to art. 14 of the Rules of Procedure", meaning a request for an interim measure under art. 10.2 of the Statute and art. 14 of the Rules of Procedure.

> Article 10
>
> 2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, 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.

59. The Tribunal recalls that it is clear from both the above instruments that the suspension pursuant to them may only be granted "during the proceedings", i.e., where the Tribunal is seized of an application.[17] The only situation where the Tribunal may suspend a decision outside the pendency of an application is in the regime of art. 2.2 of the UNDT Statute, *i.e.*, a suspension of action pending management evaluation, the regime already exhausted by the Applicant. Article 19 of the UNDT Rules of Procedure, invoked by the Applicant, also concerns the Tribunal's powers during the pendency of a dispute; it is, moreover, of a general character whereas interim measures are regulated specifically in art. 10.2 of the Statute and art. 14 of the Rules of Procedures. As such, art.19 of the Rules of

[17] See e.g., Order No 115 (GVA/2018).

Procedure may not be used to broaden the authority of the Tribunal in contradiction of the specific, clear and higher ranking provision of the Statute.

60. Regarding the *Villamoran* construct, the Tribunal has one reservation as to extending it to requests made under art. 10.2 of the UNDT Statute. The contexts of art. 2.2 and 10.2 of the Statute are not analogous. In case of an application under art. 2.2, the *Villamoran* construct prevents an implementation of a decision which has not yet been examined in the administrative course of review where the Tribunal, who is properly seised of a request, would not be practically able to determine the relevant issues; thus, implementation of the impugned decision, would happen without any control. At the same time, the protection is afforded to the litigant for a short period only, given the phase of the administrative review, *i.e.*, management evaluation, is inherently swift. In addition, the UNAT in *Villamoran* stressed that in determining whether to grant an interim suspension of action for five days in that case, the UNDT should explicitly address the issue of whether the Applicant acted diligently.

61. Conversely, in situations falling under art. 10.2 of the UNDT Statute, the impugned decision has already been reviewed by the MEU and upheld, as such, at least in theory, the presumption of regularity has been strengthened. Interim measure in the form of suspension of the implementation of the impugned decision is thus available to protect a litigant who is likely to succeed in the application on the merits, where there is real likelihood that without receiving the temporary relief justice will in effect be denied even if the litigant succeeds in his application.[18] Granting a suspension of the implementation of the decision in favour of a claimant who is not filing an application on the merits would undermine legal certainty and would be an entirely undue advantage for someone who is not acting diligently. Rather, this Tribunal concedes that in the circumstances where even a short delay would debar an applicant an affective relief it would be acceptable to apply the *Villamoran* to grant an interim measure but under the condition that the claimant would file an application on the merits as soon as possible, failing which the measure would automatically be lifted. The

[18] See, *mutatis mutandis*, *Rangel* 2015-UNAT-531.

present request for interim measure did not offer an expeditious filing of the application proper while the demand went as far as to have the implementation of the impugned decision suspended until the completion of the proceedings. As such, the request was initially irreceivable.

62. By the time, however, the UNDT in Nairobi had an opportunity to respond to the request – which had reached it in a roundabout way as described in para. 4 above – the Applicant has filed his application on the merits. Considered that the dispute is pending now there is no legal interest to be served by rejecting the request and forcing the Applicant to file his submission afresh would be merely officious. Therefore, the Tribunal finds that reasons of economy of proceedings speak for accepting that the application for an interim measure has now been validated in the aspect of completeness.

63. The thrust of the receivability argument is whether the decision has been implemented. Whereas it is indeed trite law that once a decision has been implemented it cannot be suspended, the issue, however, of what is "implementation" in the context of interim measures has been problematic since the onset of the UNDT. The Tribunal reviewed jurisprudence relied upon by the Respondent[19] and found that it does not lend support to the Respondent's contention. The *El-Awar* Judgment is not relevant for the issue as it does not concern the question of "implementation" of a decision but a request to execute an order already issued, a matter outside the scope of either art. 2.2 or art. 10.2 of the Statute. As concerns the remaining ones, the Tribunal's observations are summarized below:

64. By Order No. 087 (NBI/2014) the UNDT refused a suspension of placement of an applicant on administrative leave which had been announced and was being applied pending investigation. The Tribunal, however noted:

> 27. The preliminary question for the Tribunal, therefore, is whether there are exceptions to the principle that decisions which have been implemented cannot be stayed. In other words, are there situations/circumstances in which the Parties can in fact be restored

[19] Paragraphs 42 and 43 of the reply.

> or which are materially reversible without prejudicing the positions of the parties and/or others. […]
>
> 29. The facts of the present case suggest that this may one of those situations which can be properly construed as such an exception.

65. Eventually, though, the Tribunal refused the request, not because of the "implementation", but because of the way it has been framed:

> 30. Be that as it may, the Tribunal notes that although the Applicant has framed his Application to ask for a stay of the impugned decision, he is in fact asking that the decision either be reversed or varied so that he is at least paid for the duration of the investigation.

66. By Order No. 167 (NBI/2014) the UNDT similarly refused the suspension of action of placement of the applicant on administrative leave, it however mused:

> 44. An application for a suspension of action cannot be granted if the impugned administrative action has been implemented. Neither a staff member nor the Tribunal has any control on the timing for the implementation of an administrative decision. But should implementation of a decision debar an applicant from an injunctive relief in all cases indiscriminately to the point of rendering the powers granted to the Tribunal in matters of injunctive relief impotent? This appears to be the legal situation today.

67. In relation to the above Orders, it must be stressed that it has been otherwise established in jurisprudence of the UNDT across its seats[20] that a decision having continuous legal effect, such as to place a staff member on administrative leave, is only deemed to have been implemented when it has been implemented in its entirety. Otherwise, such decision may be stayed; not as a matter of exception, but because they are not considered implemented in the context of art 2.2 of the statute. The above Orders cited by the Respondent, therefore, are relevant only as to their *dicta* which clearly demonstrate the Tribunal's discomfort with the notion of "implementation" understood as equal with the announcement of the dispositive part of the decision.

[20] *Calvani* UNDT/2009/092; *Gallieny* Order No. 060 (NY/2014), *Maina* Order No. 275 (NBI/2014); *Fahngon* Order No. 199 (NBI/2014); and *Abdallah* Order No. 080 (NBI/2017)/Corr.1.

68. In another order relied upon by the Respondent, Order No. 297 (NY/2014), the UNDT interpreted what constituted implementation in a dispute over non-selection and concluded that:

> 20. … [T]he selection of a successful candidate and the non-selection of other recommended candidate(s) produce legal effects simultaneously. Therefore, the non-selection decision of a recommended candidate is to be considered implemented at the same time as the selection of the successful candidate.

69. This interpretation, in turn, has been rejected by jurisprudence which accepted widely that in non-selection and non-promotion disputes "implementation" means not just the notification of the dispositive part of the impugned decision, but, due to the contractual nature of the relation that they purpose to create, require also that an offer of appointment be accepted by the successful candidate.[21]

70. In the last order cited by the Respondent, Order No. 043 (GVA/2015), the Tribunal rejected a request for suspension of a non-renewal of his appointment, having found it implemented. Whereas the Order does not discuss the meaning of implementation in this case, it is obvious from the decision that the request had been filed three weeks after the applicant was separated from the Organization. Clearly, it transpires that that applicant in that case had implicitly accepted the consequences of the decision and later tried to retract it. This is not the question at bar.

71. The Tribunal notes, moreover, that while all of the Orders cited by the Respondent were made under art. 8 of the Statute and not under art. 10.2 of the Statute, the authority under art 10.2 of the statute is different, among other, the Tribunal may act "at any time during the proceedings" which implicitly acknowledges that implementation of certain decisions is a process and not just a stroke of pen.

72. In this connection, it must be recalled that in Order No. 135 (NBI/2017) this Tribunal held and later reiterated in Order No. 060 (NBI/2018), that the

[21] Including from the same UNDT Judge, *see Tiwathia* UNDT/2012/109; *see also* Order No. 20 (GVA/2013), Order No. 116 (GVA/2016), Order No. 147 (NY/2016), *Wang* UNDT/2012/080; contrariwise *Nwuke* UNDT/2012/116.

Respondent's unilateral determination of the separation date with immediate or even retroactive effect may not act in such way as to *a limine* bar a request for suspension of action. In a termination of appointment or contract, suspending the legal effect of a decision must be possible notwithstanding the unilaterally determined date of separation. It further observed that the notion of "implementation" under art. 2.2 of the UNDT Statute is being interpreted in consideration of the facts of the case including emergence of decisions and actions which are legally enabled by the impugned decision and which would have the effect of irreversibly frustrating the Applicant's claim. An obstacle against such a suspension could be the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs, obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, *e.g.*, not acting during the appropriate notice period, and then tries to retract. In any event, implementation" does not follow from a mere announcement of the decision, or, for that matter, from the Respondent having processed the relevant data in *Umoja.*

73. This Tribunal considers that the same reasoning remains valid for the question of the implementation of a decision on reassignment , *i.e.*, a decision does not become implemented simply because the Administration notifies it; it is necessary to look into particular facts which are legally relevant consequences of the impugned decision. The Tribunal notes that while the Respondent does not cite the above-mentioned Orders, it nevertheless avers along their line of argument, repeatedly asserting that "several irreversible consequences " have already occurred in the form of exchange of memoranda and a creation of a team comprising UNON and UN Habitat personnel. It is this Tribunal's opinion that these are neither irreversible - as facts of this case demonstrate, several announcements and assignments have been done and subsequently varied through oral or email communication or a stroke of pen– nor primarily relevant for the issue at bar.

74. Whereas it is undisputed that presently Mr. Cox has essentially been removed from his functions of D-2 Director/MOD, more relevant for the issue at

bar is the attendant investiture in the new function or position. In this respect, Mr. Cox relies upon that fact that at no stage was he issued with a decision transferring him to the new post, no revised letter of appointment was issued, no personnel action was sent to him or notification that with immediate affect he would be transferred to the new post. Mr. Cox has not been assigned any tasks and he has not undertaken any. He has not consented to his new job description.

75. Whereas the Respondent argues that a new letter of appointment or personnel action was not necessary, the fact of the matter remains that a decision on lateral transfer, just as it is with appointment and promotion, has a contractual element which for the implementation necessarily requires collaboration from the staff member. As such, notwithstanding the authority of the Secretary-General to reassign staff with a wide discretion, the staff member must explicitly or implicitly consent to a major change in the terms of the contractual relation between him/her and the United Nations. It is impossible to unilaterally implement a reassignment of a staff member who refuses it, with the ultimate sanction on the part of the Administration being to escalate the conflict of positions to termination.[22] The impugned decision, therefore, has not been implemented and is capable of being reviewed on the merits.

Merits

76. The Applicant is required to satisfy the Tribunal that the impugned decision appears *prima facie* to be unlawful, is urgent and will cause him/her irreparable harm if implemented. All three elements of the test must be satisfied before the impugned decision can be stayed.

Unlawfulness

77. It is clear that the UNDT Statute does not require the Tribunal to make a definitive finding that the decision is in fact unlawful. In comparison, however, with requests filed under art 2.2 of the Statute, the test is more demanding in that at this stage the Applicant is required to convince the Tribunal that notwithstanding a negative management evaluation outcome and any other

[22] E.g., *Hepworth* 2015 UNAT-503.

arguments advanced it appears that, if not rebutted, the claim will stand proven on the examination of the application. As the interim measure under art. 10.2 of the Statute may be granted "at any time during the proceedings", what suffices as a *prima facie* proof will depend on the state of pleadings and evidence adduced at any given stage when the application is being decided. This, in any event, does not mean a conclusive determination by the Tribunal and is certainly not binding for the outcome of the trial on the merits.

78. In so far as the unlawfulness of the decision is argued based on attribution of an ulterior motive, it is for the Applicant who raises such allegations of ulterior motives to prove them.[23] This said, the proof of ulterior motive is hardly ever direct, rather, as a rule inferences must be drawn from the circumstances. The Applicant appears to base his allegations of the ulterior motive on the following factual circumstances a) lack of consultation; b) a haste in removing his functions of management and operations from him, c) lack of rationalization why the purported goals of the reorganization could not be implemented with him staying on his post or through a temporary transfer only. The Tribunal will address these in turn.

79. There was no consultation before the decision to transfer the Applicant and he was simply told that some kind of reassignment would happen. As a matter of rationality and courtesy, it would be usual for a manager to discuss the possibility of reassignment with a staff member before making the final decision, especially where the matter concerns senior management; however, there is no requirement in the relevant legal instruments for the Respondent to consult a staff member about a proposed reassignment.[24] In this case, the Respondent indeed appears to have had formed a firm decision on the necessity to remove the management leadership functions from the Applicant without having a clear vision of where to reassign him. This does not suffice as proof of irrationality or ulterior motive, given that an applicant's career development is not the primary objective of a reassignment exercise. The Applicant's objections were indeed

[23] *E.g., Parker* 2010-UNAT-012 and *Azzouni* 2010-UNAT-081.
[24] *See* Perez-Soto UNDT/2012/078; *Rees* UNDT/2011/156, and Order No. 186 (NY/2010) dated in Case No. UNDT/NY/2010/061.

heard to the extent concerning his prospective functions, for example, regarding his transfer to Delhi and the new job description.

80. The alleged haste in moving to implement the impugned decision is a value-judgment. Usually, the Administration is expected to act quickly and the undisputed circumstance of dire financial situation of UN-Habitat is an objective reason to act with an accelerated speed. At results from the documents submitted, discussions on the subject at the highest level of the UN-Habitat and OHRM leadership took place throughout June 2018 before the decision concerning the Applicant was taken. As such the decision to remove from him his managerial functions did not happen overnight. The difficult process of arriving at a decision on what would be the Applicant's new role is reflective of a shortage of appropriate assignments, especially in the face of the financial crisis, which is common knowledge.

81. Regarding the rationale for the permanent removal of the functions from the Applicant, the Tribunal recalls that whereas there is no dispute that the Respondent manages the posts and reassigns staff with a wide discretion[25], this discretion is not unfettered and is subject to examination pursuant to the *Sanwidi* test, *i.e.*, "the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse."[26] The Tribunal does not agree with the Respondent's reading of the Tribunal's *Pierre* order[27], suggesting that because the Respondent exercises wide discretion in reassignment of staff, the Tribunal would be relieved of its role in examining rationality of the impugned decision for the purpose of the interim relief. Rather, this Tribunal holds that, once challenged, the Respondent has the obligation of showing, albeit minimally, that the decision is rational and not capricious.

[25] E.g., *Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015-UNAT-501, *Rees op. cit.*
[26] 2010-UNAT-084.
[27] Order No 006 (NBI/2018) cited by the Respondent in the Respondent's clarification pursuant to Order 144 (NBI/2018), para 32.

82. Rationalization of the impugned decision rests at the crux of the matter before us because of the Respondent's position having been to invoke discretion and assurances of good faith without, however, a showing of the particular premises on which the impugned decision was based and in not responding in a matter-of-fact fashion to the Applicant's arguments. It was only the recent filing of the Respondent that reveals that the transfer of the responsibilities of the Applicant to UNON has been required at the United Nation Headquarters level in rejection of the request by the Executive Director for a bridge funding for UN-Habitat. It further sets out the necessity of the audit of the entire UN-Habitat and not just its specific Conference III. Finally, it sets out the mark of 1 January 2019 for balancing the finances of UN-Habitat in the implementation of austerity measures. It thus becomes apparent to the Tribunal that, in the face of audit and austerity measures which implies staff reduction/reassignment it is more appropriate to have UNON temporarily perform the functions of operation and management for UN-Habitat, which brings to the table the necessary experience and impartiality. At the same time, the Applicant may be perceived as having a conflict of interest. The decision, therefore, is not *prima facie* irrational.

83. The Applicant's last argument about the unlawfulness of the impugned decision is based on the contention that the new position is a *de facto* demotion. He does not argue that it is incompatible with his qualifications. Here, for the purpose of *prima facie* determination the Tribunal is persuaded by the arguments of the Respondent, summarized *supra*.

84. Having found that the requirement of showing *prima facie* unlawfulness of the decision has not been sustained, the Tribunal will not discuss the remaining prongs of the test under art 10. 2 of the Statute.

Conclusion

The application is rejected.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 25th day of September 2018

Entered in the Register on this 25th day of September 2018

(Signed)
Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi