



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/004
Order No.: 010 (NBI/2023)
Date: 12 January 2023
Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

EL-SHEIKH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Jason Biafore, OSLA

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

Introduction and procedural history

1. The Applicant, a Resident Coordinator/Resident Representative at the United Nations Development Programme (“UNDP”) Kuwait Central Office, filed an application on 5 January 2023 seeking suspension of what he describes as the “[d]ecision to separate by non-renewal.”
2. The application was transmitted to the Respondent on 5 January 2023 with a deadline to file a reply by 4:00 p.m. (Nairobi time) on Monday, 9 January 2023.
3. On 10 January 2023, the Respondent filed a motion seeking an extension of time to file a reply to the application on the ground that the UN-Habitat officials that would provide the pertinent information to enable the Respondent to review and respond effectively to this case were still on leave.
4. The Tribunal granted an extension of time until 5.00 p.m. (Nairobi time) on 11 January 2023.
5. The Respondent filed the reply to the application on 11 January 2023 at 11.58 p.m.

Background

6. The Applicant joined the United Nations in 2004. He worked as a Chief Technical Advisor/Principal Coordination Officer - D-1 level at the Country Program in Saudi Arabia since 2015. On 9 September 2015, UN-Habitat proposed the Applicant for the assessment training for a position as a Resident Coordinator.¹
7. On 31 March 2017, the Applicant was reassigned back to head the UN-Habitat office in Kuwait as D-1 Principal Coordination Officer. On 29 September 2017, UN-Habitat proposed him for the Resident Coordinator positions in Kuwait and

¹ Application, section VII (1-3) and annex 1.

Saudi Arabia.²

8. On 27 January 2018, the Applicant signed a letter of appointment as Resident Coordinator/Resident Representative in Kuwait. While on that assignment the Applicant's fixed term appointment with UN-Habitat was extended against his Kuwait D-1 position.³

9. On 20 October 2022, the Applicant sent an email to the Special Assistant to the Executive Director of UN-Habitat stating that he wanted to return to UN-Habitat at the end of his assignment in Kuwait, that is, in January 2023.⁴ He followed up on the issue with email exchanges with the UN-Habitat Director of Programme Management on 2 and 4 December 2022.⁵

10. On 4 and 5 December 2022, the acting Chief of Staff, Office of the Executive Director UN-Habitat, sent the Applicant an email informing him that there are currently no vacant D-1 posts and offered him a P-5 position in Yemen with financial compensation at the same level of D-1 that he currently receives.⁶

11. On 13 and 16 December 2022, the Applicant held meetings with the UN-Habitat Director, Office of Management and with the UN-Habitat Chief of Human Resources and Learning Unit to discuss possibilities and options available for his return to UN-Habitat following completion of the Resident Coordinator Assignment.⁷ At the 16 December 2022 meeting, the Applicant was presented with three options:

- a. to consider a P-5 position in Yemen;
- b. termination with indemnity; or

² *Ibid.*, at section VII (3-4) and annex 2; reply, annex 1.

³ *Ibid.*, at section VII (6) and annexes 3 and 4; reply, annex 2.

⁴ *Ibid.*, at annex 5.

⁵ *Ibid.*, at annexes 6 and 7.

⁶ Reply, annexes 5(b), 6(a) and 6(b).

⁷ *Ibid.*, at annexes 9 and 10.

c. expiration of his contract at its expiry date as his contract had been extended to coincide with the duration of his temporary assignment with the Resident Coordinator system.

12. On 20 December 2022, the Applicant requested for management evaluation of what he described as the decision “not to respect [his] right of return at the D-1 level as required under ST/AI/2022/1 paras. 5.2 & 5.3 and the consequential decision to separate by non-renewal.”⁸

13. On 21 December 2022, the Management Evaluation Unit (“MEU”) granted UN-Habitat an extension of time until 12 January 2023 to provide its comments to the Applicant’s management evaluation request.⁹

14. On 24 December 2022, the UN-Habitat Chief of Human Resources and Learning Unit sent the Applicant an email (following up on the 16 December 2022 meeting) presenting him several options and requiring his response. The pertinent parts of the email are reproduced below:

Per our last meeting, we have prepared two options for your consideration: volunteer downgrade to P-5 and the draft agreement on the agreed separation prepared upon your request.

The third attachment reflects provisional financial compensation without fifty percent of the discretionary raise, subject to confirmation from the UNON HRMS.

Please confirm the receipt and let us know your decision.¹⁰

Parties’ submissions

The Applicant

15. The Applicant case is summarized below.

a. Paragraph 5.3 of ST/AI/2022/1 (Resident coordinator

⁸ Application, annex 12; reply, annex 8.

⁹ Reply, annex 9(c).

¹⁰ Reply, annex 10.

selection) creates an obligation to return the Applicant at his D-1 level. The Administration cannot argue the unavailability of a suitable vacant post. They were obliged, following the release of the Applicant on temporary assignment within the Secretariat to act as a Resident Coordinator, to ensure a suitable post was retained against which he could return.

b. The Administration have been fully informed as to the period of the Applicant's release as a Resident Coordinator thus they had a clear opportunity to plan for his return and respect his contractual rights upon return.

c. It is the Respondent who chose to bring an end to the Applicant's assignment as a Resident Coordinator and who also failed to maintain a position against which he might be re-absorbed according to the Respondent's own rules.

d. The return right at para. 5.3 of ST/AI/2022/1 was created specifically to encourage senior staff to take a risk with their career to fill this important role. The maintaining of a pool of senior staff available to act as Resident Coordinators is contingent on this return right which encourages candidates to take what otherwise might appear a risky career move.

e. The right of return is less an entitlement granted to the staff member but instead the mechanism which permits the Organization to maintain a roster of candidates capable of acting as Resident Coordinators. The decision not to respect the Applicant's return right is, therefore, not just a breach of his contractual rights but represents a risk for the Resident Coordinators program as a whole.

f. Had UN-Habitat harboured any concerns they might be unable to reabsorb the Applicant according to the rules, they should not have proposed him as a candidate for such a role.

g. His post has not been abolished. Thus, the justification for not respecting the Applicant's return right does not correspond with the facts. Responding to this fact the Director, Office of Management, claims funding is an issue. The Applicant notes that while funding was not provided by the Kuwait Government in 2021 it was in 2022 and recovery is available. Where the Organization claims a lack of funding for a post as the justification for separation, they are required to evidence such which is plainly not possible in the instant case.

h. That the Applicant's functions are now covered by a National Officer appears on the face of it unlikely given the international nature of those functions and the enormous difference between the grades of the two posts. Further, the explanation of changing priorities for UN-Habitat was provided only after the Applicant had countered the preliminary assertions that the post was abolished and then that it was without funding. An inference can be drawn for late provided or faulty reasons for a contested decision.

i. A recent Joint Inspection Unit ("JIU") report into UN-Habitat indicated several vacant D-1 positions including the heads of the Strategic Planning and Monitoring Branch and Knowledge and Innovation Branch. The same report indicates regional representative positions are covered by "ad interim" or "acting" officers, that is, the posts are vacant with staff performing functions on a temporary or *ad hoc* basis. An Office of Internal Oversight Services ("OIOS") Audit found austerity measures had not been strictly followed, that regular budgeted posts were 84% vacant and that only one of 10 posts above the professional level was occupied as at 31 December 2021 and that a

lack of experienced staff at professional and above level represented a risk to UN-Habitat. The Applicant seeks lateral transfer to these vacant positions.

j. The offer of a P-5 post does not correspond to the Applicant's right. The Applicant's right is to a D-1 position. There is no obligation for the Applicant to accept placement on a lower position, particularly in circumstances where the Administration have been on notice of his return and the legal provisions for such from the outset. This is not a situation where the Administration have been confronted with a set of circumstances they must respond to, instead they have failed to comply with an obligation they have been aware of from the outset.

k. While the Organization has offered remuneration at the D-1 level, placement at a lower level does significant damage to the Applicant's career prospects. Further, the Administration make no indication that efforts would continue to identify a D-1 position if he were transferred to a P-5 post.

l. The offer of only one post worldwide does not represent good faith dealings. The Applicant has worked for a significant period in family duty stations and has corresponding family commitments. The suggestion that the only post available is in a category E duty station appears to suggest an attempt to demotivate the Applicant from returning.

m. The Applicant submits that this matter is urgent because the management evaluation response is not due until 3 February 2023 but without an order for suspension he will be separated on 20 January 2023. The Applicant submits that he was first alerted to the fact that there might be an issue with his return to a D-1 position only on 4 December 2022, however, the communication did not indicate a final

administrative decision regarding the Applicant's non-reabsorption and corresponding separation by non-renewal. The first unequivocal communication of the Applicant's non-reabsorption and corresponding separation by non-renewal was communicated during the meeting of 16 December 2022. Taking either of these dates as the date of communication of the decision, the Applicant submits no self-created urgency can be alleged for a delay of two weeks or four days from communication of the decision to filing of a management evaluation request.

n. In respect of irreparable harm, the Applicant submits that monetary compensation is insufficient to compensate the frustration, unhappiness, and loss of chance of career development associated with the non-renewal of a fixed-term contract. Loss of United Nations employment is not merely viewed in terms of financial loss but also in terms of the loss of career opportunities.

The Respondent

16. The Respondent's case is summarized below.

a. At no time did the Respondent decide or make the decision to separate the Applicant from the Organization. Therefore, the Applicant's application must fail because his application concerns an administrative decision that has not been made and, as such, may not be suspended by the Tribunal.

b. The Applicant's assertions that the Respondent has not accorded him the right to return is unfounded and unsupported by the evidence. Moreover, funding received for the D-1 position he previously occupied in Kuwait, is not disputed. However, the contribution for the year 2021 was not received and this necessitated a restructuring of the personnel in the UN-Habitat office in Kuwait and the reduction of its scope of work.

c. A decision was made to nationalise the team in Kuwait to cover two national officers at the “NOB” and “NOA” levels in addition to one general service staff. This was strongly encouraged by the Government of Kuwait and agreed upon between the Government and the Respondent. Consequently, the D-1 position in Kuwait remained unfunded and, was subsequently abolished. Annex 13 of the Applicant’s application showing the availability of the D-1 position in Kuwait is a screenshot from Inspira. However, under Umoja, the United Nations official platform that provides efficient and transparent management of the financial, human and physical resources of the Organisation, the D-1 position in Kuwait does not exist as it was abolished. Moreover, it should be noted that screenshot used by the Applicant from Inspira is not connected to Umoja.

d. Contrary to the Applicant’s assertion, at no time did the Respondent make any decision to terminate the Applicant’s contract. Instead, it was the Applicant who proposed an agreed separation with termination indemnity should he not take up the available position as suggested.

e. The Respondent has made reasonable and good faith efforts to reabsorb the Applicant. However, this must be subject to availability of funding in which the Applicant can be effectively utilised, and in line with staff rule 13.1. In the present case, the Applicant has been offered positions at the P-5 level, as there are currently no D-1 positions available due to lack of funding. As such, the Respondent has thus discharged its obligations to the Applicant.

f. The Applicant’s assertion in his para. 31 of his application that he was offered the post in a category E duty station in an effort to demotivate him is unjustified and unsupported by the exchanges that took place with the Applicant, the UN-Habitat Director, Office of Management, the UN-Habitat Chief of Human Resources and Learning Unit and the acting Chief of Staff, Office of the Executive Director UN-Habitat. Throughout, the Respondent

considered all the relevant factors including the financial constraints faced by the Organization and what the Respondent considered is in the best interest of the Organization. The lawfulness of the offer of the P-5 post in Yemen to the Applicant is strengthened by the fact that several consultations between the Applicant and the Respondent were held with respect to his reabsorption to UN-Habitat. Furthermore, the P-5 post in Yemen was offered to the Applicant by the Respondent in good faith efforts as it was the only available post with funding to reabsorb the Applicant by the date of his return to UN-Habitat and in no way was it intended to demotivate him

g. With regards to the Applicant's expressed interest to be assigned to either the P-5 positions in Bilbao, Spain or Iraq, the Applicant was informed that both posts would not be available by the date of his return to UN-Habitat.

h. The Applicant has been already offered the P-5 position following the expiration of his current contract. Additionally, efforts have continuously been made by the Respondent to find the Applicant a suitable position. The offers provided would have immediate effect, as such, there is no urgency as the Applicant would continue his employment with the Organisation immediately after the end of his temporary assignment on 20 January 2023.

i. In respect to irreparable harm, the Respondent submits that the Applicant has been offered a P-5 position in Yemen and, therefore, shall not suffer loss of career development as the Respondent had no intention of separating the Applicant.

Considerations

Suspension of action pending management evaluation

17. Article 2.2 of the United Nations Dispute Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the

decision appears to be *prima facie* unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative; in other words, they must all be met for a suspension of action to be granted.¹¹

18. The burden of proof rests on the Applicant to show that the three requirements are met to the satisfaction of the Dispute Tribunal.¹² The three elements are summarised below as argued by the Applicant and contested by the Respondent.

Prima facie unlawful decision

19. ST/AI/2022/1 stipulates as follows at paras. 5.2 and 5.3:

5.2 Staff members holding a permanent, continuing or fixed-term appointment when they take up the functions of the resident coordinator position will retain their contractual status.

5.3 Staff members of the Secretariat who are selected for resident coordinator positions will retain the right to return to their parent entity at the end of their assignments as resident coordinator at the level they held with the parent entity prior to their resident coordinator service.

20. In his application, the Applicant has shown that there is a *prima facie* case to warrant a suspension of action pending management valuation.

21. The Applicant has alleged, and the Respondent has not disputed that the parent entity will not absorb him into his former contractual position at the D-1 level. Instead, the Respondent has offered the Applicant a junior position at the P-5 level. This is *prima facie* a violation of the Applicant's right to return under para. 5.3 of ST/AI/2022/1 which guarantees him the right to return at his D-1 level.

¹¹ See for example, *Hepworth* UNDT/2009/003, para. 8. UNAT has acknowledged the cumulative nature of the test in its review of submissions in *Nwuke* 2013-UNAT-330, para. 7 and *Barud* 2020-UNAT-998, para. 12 amongst many others.

¹² See for example, *Danza*, Order No.: 45 (GVA/2022), para. 14.

Particular urgency

22. The Applicant has shown, and the Respondent has not disputed that the Applicant's temporary contract as Resident Coordinator expires on 20 January 2023 which is only eight days from the date of this Order. Therefore, the matter is urgent for purposes of this application. The Applicant took all necessary steps to give notice to the Respondent and engaged him in discussions pertaining to his impending return to his position, but the Respondent took no action to honour his obligation prompting the Applicant to file this application. The Tribunal finds that the urgency is not self-created.

Irreparable damage

23. The Applicant has argued that implementation of the decision to refuse to absorb him into his contractual position and instead offer him a junior position would cause irreparable damage. The Respondent is of the contrary opinion. The Tribunal finds that Applicant is entitled to his contractual right to return to his position at the D-1 level and that failure by the Respondent to receive the Applicant at that level would indeed cause the Applicant irreparable harm.

Conclusion

24. The Applicant has satisfied the three conditions to be granted the application to suspend the Respondent's decision not to absorb him into a D-1 level position at the expiry of his temporary contract with UNDP on 20 January 2023. The application is granted as prayed.

25. The Respondent seems to suggest that they are willing to enter negotiations with the Applicant to resolve the matter amicably. The Tribunal encourages this proposal. The parties are at liberty to engage in negotiations toward settling this dispute amicably.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 12th day of January 2023

Entered in the Register on this 12th day of January 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi