UNITED NATIONS DISPUTE TRIBUNAL

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| Case No.: | UNDT/NY/2010/061 |
| Order No.: | 186 (NY/2010) |
| Date: | 28 July 2010 |
| Original: | English |

**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

FERNANDEZ DE CORDOBA BRIZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# REASONED RULING ON

# APPLICATION FOR INTERIM MEASURE

**Counsel for applicant:**
Bart Willemsen, OSLA

**Counsel for respondent:**
Bettina Gerber, HRMS/UNOG

**Notice:** The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

## Introduction

1. On 20 January 2010, the Secretary-General of the United Nations Conference of Trade and Development (UNCTAD) formally reassigned the applicant, an economist working at the P-3 level for UNCTAD in New York, to Geneva on a lateral transfer. The applicant appealed this decision, which was upheld at the level of management evaluation. Subsequently the implementation of the impugned decision was suspended until 1 August 2010, but subject to future medical clearance since the applicant is recovering from surgery to his wrist. The applicant then moved an application requesting that the decision be suspended under art. 10.2 of the Statute until his case on the merits is determined.

2. Following the hearing of the application for interim relief, I made a brief order dismissing the application with reasons to follow. These are my reasons for denying the relief.

## Facts

3. In 2000, the applicant joined UNCTAD in Geneva at the P-2 level. In February 2005, he was promoted to the P-3 level and transferred to New York to the position which he currently holds. On 1 July 2009, the applicant was placed on a roster for pre-approved candidates for all available P-4 vacancies of Economic Affairs Officer.

4. On 9 November 2009, the applicant wrote to the Officer-in-Charge of the Human Resources Management Section in UNCTAD (the OIC) complaining that his job application concerning a P-4 post in Geneva had not been properly registered on the online UN job-site, Galaxy.

5. In an email of 27 November 2009, the Special Assistant to the Secretary-General of UNCTAD (the Special Assistant) wrote to the applicant’s would-be supervisor in the UNCTAD Geneva office as follows:

> As already agreed with you, the P3 trickle-down vacancy will be earmarked for the lateral assignment to DITC of [first name of the applicant] with target EOD date 1 March 2010. The OSG is in the process of identifying a suitably-qualified replacement for NYO [the New York Office].
>
> Meantime, you may use the P3 post temporarily for 3 months (1 Dec 2009 - 28 Feb 2010).
>
> In order not to undermine the objectivity of the lateral assignments (mentioned above), knowing that this mad house thrives on false and self-serving gossips worse than infantile chatting fish vendors, pls do not make the proposed lateral arrangements public. This is to allow us to do proper notification to staff members concerned and to initiate the related administrative actions.

6. On 4 January 2010, the OIC called the applicant by telephone informing him that he was being considered for reassignment to Geneva. The applicant advised the OIC of the medical condition of his mother who required imminent surgery. Furthermore, he explained that he would also need surgery in early 2010. Thereafter, on the same day, the OIC wrote an email to the applicant in which the OIC stated that:

> … I would like to let you know that you are considered for the lateral move as P3, Economic Affairs Officer in Trade and Analysis Branch in DITC under the supervision of, [name]. Your qualifications and experience were taken into account when considering this move. The targeted date for this lateral move would be 1 April 2010. The post is a regular vacant position.

7. By email of 12 January 2010, the applicant reiterated that he was regrettably “unable to accept the offer of a lateral move from New York to Geneva” due to his mother’s medical situation since “both the operation and ensuing period of recovery will take several months” and a move to Geneva would adversely affect the well-being of his mother. He added that he had “never made any application for such or any other lateral move”.

8. By email of 15 January 2010, the OIC wrote the applicant:

> Dear [first name of the applicant],

> I am very sorry about the health situation of your mother. I hope that everything will go well and she will recover quickly.
>
> As promised, I will convey your message to the senior management and will get back to you.

9. In a memorandum of 20 January 2010 to the applicant, the OIC stated that:

> 1. On behalf of the Secretary-General of UNCTAD, I would like to convey officially the decision on your forthcoming lateral move within UNCTAD and re-assignement from New York Office to the position of Economic Affairs Officer, P3 in Trade Analysis Branch, Division on International Trade in Goods and Services, and Commodities, Geneva. This decision had been taken within the Secretary-General's authority as Head of department per section 2.4 of ST/AI/2006/3 on "Staff Selection System".
>
> 2. Please be informed that the Secretary-General has been apprised of your personal situation and it has been carefully considered. As mentioned earlier, your qualifications and experience were primary factors in reaching this decision.
>
> 3. The effective date of your lateral transfer to Geneva will be 1 April 2010 …

10. On 24 February 2010, the applicant wrote to the OIC that:

> I write to inform you that it has been confirmed that I will need to undergo surgery on my wrist. As you are aware, I broke my wrist in September of 2009 but unfortunately it did not heal as hoped and therefore the treating doctor, [name] (one of the most renowned hand surgeons in the world), has now scheduled surgery for 11 March 2010 (see attached Medical Report). Doctor [name] has also confirmed that in addition to post-operative visits I am expected to be casted for a period of 6 weeks after which I will require occupational therapy for a further period of 6 - 8 weeks.
>
> As a result of the above I will not be able to move to Geneva on 1 April 2010 and I would be grateful if you could confirm that the reassignment will therefore be suspended at your earliest convenience.

11. Also on 24 February 2010, the applicant's supervisor in the UNCTAD New York office wrote to the OIC complaining about not being consulted on the applicant's transfer to Geneva and stating that it was "in the best interest of both Geneva and the NYO to keep [the applicant] here in New York".

12. By email dated 1 March 2010, the OIC enquired from the UN Medical Services Section whether it was advisable to postpone the applicant's move to Geneva. This email was forwarded to the applicant later the same day.

13. On 4 March 2010, the applicant filed a request for management evaluation contesting the decision to transfer him. On the same day, he submitted an application for suspension of action.

14. By memorandum of 5 March 2010, the OIC wrote to the applicant as follows:

> 1. I refer to your correspondence of 25 February 2010 informing me of your wrist surgery and my reply to you on 1 March 2010 informing you that the matter was referred to the UN Medical Service for their opinion.
>
> 2. Please be informed that I have obtained such opinion from Dr. [name], stating that "it seems to be prudent that [name of the applicant] should be considered for a lateral transfer upon he would completely finish his treatment, which has already been started in New York". He further mentioned that the expected time for the move would be around the end of May 2010.
>
> 3. Given the above medical opinion, the effective date of your lateral transfer to Geneva is postponed until end of May 2010. We will request medical clearance for your travel to Geneva on lateral transfer as appropriate.

15. Subsequently on 5 March 2010, the applicant withdrew his application for suspension of action, since the respondent "has indicated to suspend the implementation of the Impugned Decision until after expiration of the time limit for management evaluation".

16. On 16 March 2010, the Head of the Trade Analysis Branch (the TAB Head, not the would-be supervisor in para. 5), where the applicant was assumedly to be transferred to, wrote to another UNCTAD staff member in Geneva as follows:

> Dear [first name of the UNCTAD staff member],
>
> Do you know if anyone in the Trade Analysis Branch was consulted by the UNCTAD management on the decision to place [first name of the applicant] in the branch?

> As Head of TAB, I was not aware of the decision, and the concerned memo was not even copied to me. I came to know about it through words of mouth.

17. On 6 April 2010, the P-3 post of liaison officer, UNCTAD, in New York, was advertised on Galaxy, but the applicant did not apply for it. This is the post that the applicant currently holds, but which, according to the OIC, UNCTAD's senior management has decided to redefine to cover work relating to intergovernmental processes of the Fifth Committee of the General Assembly and Advisory Committee on Administrative and Budgetary Questions (ACABQ), and the liaison work with the Programme Planning and Budget Division in the Committee for Programme Coordination, in order to support the Budget and Project Finance Section and the Evaluation and Planning Unit of UNCTAD in Geneva.

18. On 7 April 2010, the applicant received the management evaluation decision upholding the decision of UNCTAD to laterally transfer him to Geneva as it was found that "the contested decision constituted a proper exercise of discretion"; the legal basis for the determination being provisional staff rule 1.2(c) (assumedly referring to staff regulation 1.2(c) and/or provisional staff rule 1.2(a)) and sec. 2.4 of ST/AI/2006/3/Rev.1), and the case of *Allen* UNDT/2010/009 which stated as follows:

> It is widely recognized that the Organization enjoys broad discretion in assigning its employees to different functions as deemed appropriate ... There is no requirement to obtain the consent of the concerned staff member or his direct supervisor. The obligation of staff to accept such assignments in the interest of the Organization has been consistently upheld by UNAT, provided the decision was not improperly motivated. In general, it is for the Organization to determine whether a measure of this nature is in its interest or is not.

It was also found that "meaningful consultation" had taken place for which reason it was not necessary to comment on the applicability of ST/SGB/172.

19. In an interoffice memorandum of 19 May 2010, the UN Medical Services Division advised the UNCTAD Executive Office as follows concerning the applicant's health:

> 1. For medical reasons it is recommended that [name of the applicant] should be allowed to work light duties effective 01 June 2010 until 01 August 2010.
>
> 2. During this time, [name of the applicant] … should also refrain from travel until further notice.
>
> 3. At that time, he will be re-evaluated by his treating physician.

20. In a memorandum of 26 May 2010, the OIC informed the applicant that the transfer would be postponed until 1 August 2010 subject to his medical clearance.

**Relevant legal provisions**

21. The following provisions are applicable and/or have been relied on by the parties:

Article 10.2 of the Statute

> 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.

ST/SGB/2009/9 (Staff Regulations of the United Nations and provisional Staff Rules)

> Provisional staff rule 1.2(a)
>
> Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors.
>
> Staff regulation 1.2(c)
>
> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

ST/AI/2006/3/Rev.1 (Staff Selection System)

> 2.4. Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level.

ST/AI/2010/3 (Staff Selection System)

> [Section 1] (p). *Job opening*: vacancy announcement issued for one particular position or for a set of job openings;
>
> 2.5. Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.
>
> 13.1. The present administrative instruction shall enter into force on 22 April 2010.

ST/SGB/172 (Staff Management Relations: Decentralization of Consultation Procedure)

> 2. Under staff regulation 8.1, the Staff Council is established as the staff representative body with which the Secretary-General shall consult on questions relating to staff welfare and administration ... [T]he staff management consultation procedure will be decentralized so that issues of particular concern to the staff of an organizational unit may be resolved expeditiously at the departmental level, without necessarily being referred to the Joint Advisory Committee.
>
> 3. To this end, the heads of departments or offices at Headquarters, or their designated officials, will hold consultations with the appropriate unit representative regarding matters that affect the conditions of work or interests of the particular unit. The unit representatives, on their part, may initiate consultations by taking up such matters with the head of the department or office concerned or his/her designated officials and may be assisted, if necessary, by a member of the Staff Committee. Consultation at the departmental level may include such questions as the administrative arrangements in implementation of decisions involving major organizational changes or relocation of groups of staff. If issues involve matters of Secretariat-wide policy, or for any other reason cannot be resolved at the departmental level, they should be brought forward to the Joint Advisory Committee for further consideration.

**Applicant's submissions**

22. Some of the submissions made by the applicant at the hearing are incorporated directly in my considerations and therefore are not set out in the summary of his submissions below. At the hearing, the applicant submitted that one of his claims was that the currently ongoing selection process for his (now redefined) position in New York be halted until the final determination of his case.

*A prima facie unlawful decision*

23. Concerning the meaning of "prima facie", the applicant refers to *Omondi* Order No. 17 (NBI/2010) in which the Tribunal, albeit in the context of art. 13.1 of the Tribunal's Rules of Procedure, held that:

> [a] suspension of action will only succeed where the Applicant is able to establish a prima facie case on a claim of right, or where he can show that prima facie, the case he has made out is one which the opposing party would be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene, and that unless it so intervenes at that stage, the Respondent's action or decision would irreparably alter the status quo. Of course, the onus of establishing a case for suspension of action order lies on the Applicant.

In *Omondi*, the Tribunal also stated that "[all] that is required is for a prima facie case to be made out by the Applicant or in other words that there is a triable issue here". The applicant also refers to *Rasul* Order No. 23 (NBI/2010) in which the Tribunal clarified that the test to be applied is whether the contested decision "appears to be unlawful" to the Tribunal.

24. The applicant places reliance on ST/SGB/172 and submits that it is applicable on an individual basis, and that the Administration failed to have prior meaningful consultations, as required by the Bulletin. In *Allen* the Tribunal held that:

> … [b]y notifying the Applicant of his redeployment by the memorandum dated 19 September 2008, addressed and sent by e-mail to all UNCTAD staff without prior personal consultation, the

> Respondent failed to treat the Applicant in a manner befitting his status as an international civil servant.

25. The applicant contends that such "personal consultation[s]" are also required when a reassignment concerns an individual staff member. Even though in United Nations Administrative Tribunal Judgment No. 518 *Brewster* (1991) considered that "an essential element of [such consultations] is that each party to the consultation must have the opportunity to make the other party aware of its views", it follows that these consultations must be meaningful or, put in different terms, conducted in good faith and be given their appropriate weight. However, the applicant conceded that this does not mean that the Administration must endorse the other party's views and alter its position. Such good faith requirement is particularly important if the reassignment requires a transfer to another duty station and the Organisation by alternative ways can accommodate the interests of the staff member without prejudice to its own interests.

26. The applicant argues that the Administration did not demonstrate good faith, since it did not enquire further into the applicant's need to remain within traveling distance of his mother; the "careful consideration" that the Administration claimed it had given to the applicant's humanitarian circumstances was no more than "a hollow phrase". Furthermore, the email of the Special Assistant of 27 November 2009 shows that the question of reassignment had already been decided upon before any consultation with the applicant, making the latter merely a sham. Furthermore, there was originally no intention to advertise the applicant's present position on Galaxy; this was only decided as a result of the applicant's legal and factual arguments during the management evaluation. Finally, the applicant says he was not allowed to speak directly to the UNCTAD Secretary-General to explain his case.

27. The applicant contends that the redefinition of his post in New York was no more than an attempt to mislead the UN Secretary-General at management evaluation, and that there was no operational need for his reassignment. The OIC did not explain how the applicant is not qualified for the redefined New York position or

why his skills and experience are so unique that the vacant post in Geneva could not be otherwise advertised; rather the applicant is over-qualified for this position. The applicant's current supervisor was never consulted about the redefinition and was left out of the recruitment process, whilst he would normally be the Programme Case Officer (PCO) for the process. Furthermore, against common procedure and practice under ST/AI/1998/9 (System for the Classification of Posts) the New York post was reclassified without this supervisor having been consulted.

28. The applicant contends that his reassignment is not to the ultimate benefit of UNCTAD and refers to the UN Administrative Tribunal Judgment No. 1313 (2006) in which it was held that:

> The benefit which would ordinarily be seen from such a transfer would be that the staff member's skills or experience would be improved or enhanced to the ultimate benefit of the Organization or that it was done to provide similar beneficial experience for the staff member selected to be moved into the position vacated by reason of the said transfer.

29. The applicant submits that he has established his case on a preponderance of evidence as set out in *Sefraoui* UNDT/2009/95, illustrated by the Special Assistant's email of 27 November 2009, as well as by the failure to consult his present supervisor and the TAB Head about his transfer and his replacement. The applicant alleges that the true reason for the proposed transfer is that the UNCTAD senior management wants to replace the applicant with a staff member who is willing to report to the Special Assistant concerning the conduct and contacts of the applicant's present supervisor with Member States, which the applicant had refused to do in 2007 after the Special Assistant had requested him to do so. Subsequently the applicant reported this to his supervisor and the UN Ombudsman's Office, and the applicant was now being retaliated against for this. He alleges that this is also why he has not been selected for a P-4 position or even invited for an interview. In addition, he was never provided with a job description for the Geneva post (at the hearing the applicant explained that he had requested it "informally" to which the respondent answered that it would forward it as soon as possible).

*Particular urgency*

30. I must point out from the outset, that there appears to be an overlap between the applicant's contentions regarding urgency and irreparable harm.

31. Firstly, the applicant refers to *Tadonki* Order No. 16 (NBI/2009), in which the Tribunal held:

> … if the decision contested [i.e., the non-renewal of the applicant's appointment] is implemented before consideration of the substantive appeal on the merits, the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled.

32. Secondly, the applicant refers to *Calvani* Order No. 92 (NY//2009), in which the Tribunal concluded that the decision to place the applicant on administrative leave without pay would deprive the applicant "of his salaries in such a sudden and unexpected way [that would] obviously [place] him and his family in a situation of particular urgency, which the respondent cannot seriously contest". In Omondi the Tribunal found that the requirement of irreparable harm is satisfied if the applicant can establish that "unless [the Tribunal] intervenes … the Respondent's action or decision would irreparably alter the status quo". The applicant argues that a transfer from New York to Geneva would, without prejudice to staff regulation 1.2(c), have significant and protracted impact on his personal and professional life, which cannot be compensated by monetary means. Although the communication from UN Medical Services of 20 July 2010 appears to defer the implementation of the applicant's physical transfer "until further notice", at present undetermined, it cannot be excluded that the applicant will be cleared to travel at any time. Considering *Tadonki*, if the applicant prevails in the substantive case, the position he presently encumbers in New York will be filled with another staff member, precluding specific performance and arguably resulting in irreparable harm.

*Irreparable damage*

33. The applicant contends that irreparable harm is established if it can be shown that a suspension of action is the only way to ensure that the applicant's rights are observed – see *Fradin de Bellabre* UNDT/2009/004; an approach confirmed in *Utkina* UNDT/2009/096.

34. The applicant says that if the decision to transfer him to Geneva is implemented, he will have to abandon a personal life he has built in New York over the last six years and will be required to start up a new personal life in Geneva. This damage that is the value of his social life (well-being, friends, etc), cannot be compensated by monetary means. Implementation would also entail that another staff member poised for the applicant's present position will be appointed to it, thus precluding his return to New York should he succeed on the merits.

**Respondent's submissions**

*Prima facie unlawfulness*

35. The decision is not prima facie unlawful and it is the applicant who must demonstrate this. He must establish a sufficient likelihood of ultimate success (see *Modeste* Order No. 62 (NY/2010)). The applicant must establish a serious and reasonable doubt about the lawfulness of the contested decision (see *Corcoran* UNDT/2009/071).

36. The Organisation enjoys a broad discretion in assigning its employees to different functions as deemed appropriate. According to staff regulation 1.2(c) and provisional staff rule 1.2(a) it falls within the Administration's discretionary power to assign every staff member where he or she is more needed, provided that the functions attributed are not at odds with his skills and qualifications, not being bound by the preferences of the employee. Otherwise, the effective functioning of the Organisation could not possibly be ensured (see *Bye* UNDT/2009/083 and *Allen*).

37. The respondent points out that when assigning a staff member to a different function, there is no provision that requires obtaining the consent of a staff member or of his direct supervisor. Provided that the decision was not improperly motivated, there is an obligation on the staff member to accept a reassignment in the interests of the Organisation. Furthermore, it is for the Organisation to determine whether a decision to transfer a staff member is in its interest or not, provided that there is no abuse of this broad discretionary power, or a violation of procedures (see *Allen*).

38. With reference to sec. 3 of ST/SGB/172 the case at hand only concerns the reassignment of one staff member. Furthermore, there is no provision in the staff regulations and rules that require that a staff member is consulted before a decision such as this is taken or which defines the term "consultation". However, in *Brewster* the UN Administrative Tribunal stated that:

> … an essential element of consultation is that each party to the consultation must have the opportunity to make the other party aware of its views so they can be taken into account in good faith.

39. Consultation with the staff member *before* the decision is officially communicated can therefore be considered as good managerial practice, but not essential. If a staff member disagrees with the decision to transfer him or her, the decision can nevertheless be implemented as there is no requirement to obtain the consent of the staff member or his supervisor.

40. In the present case, the applicant had several opportunities to share his views with UNCTAD senior management and he had in fact been consulted prior to the official communication of the decision to him. The applicant and the OIC had several telephone conversations and email exchanges before 20 January 2010 (the date the decision was officially communicated to the applicant) and the applicant was encouraged to submit his views and concerns in writing and he did so by e-mail dated 12 January 2010. The OIC had no reason to enquire further as the applicant had had the opportunity to put forth his concerns, and the OIC communicated these concerns to the senior management who duly took them into account. However, senior management decided that the interests of the Organisation should prevail over the

applicant's concerns. The UNCTAD management has subsequently taken into consideration the health constraints of the applicant with regard to the transfer date which has already been postponed twice.

41. UNCTAD would satisfy its obligations when a staff member is laterally transferred by providing the staff member with work at the same level and ensuring that the newly attributed functions match the qualifications and skills of the staff member concerned. The position in Geneva is a P-3 post, Economic Affairs Officer in the TAB, Division of International Trade in Goods and Services and Commodities, and the applicant's current level is P-3 and he works as an Economic Affairs Officer. The applicant is not overqualified for the post.

42. Furthermore, the respondent contends that the transfer would be in the interests of UNCTAD, and the decision was properly motivated. The Administration has a wide discretion in organising its departments and in assigning staff, on condition that this is done in the interests of the service. In general, it is for the Organisation to determine whether a measure like a transfer of a staff member is in its interests or not. In UN Administrative Tribunal Judgment No. 701 *Khubchandani* (1995) the former Administrative Tribunal reinforced the requirement that managers must pay due regard to the interests of the individual staff member; however, the best interests of the Organisation must ultimately prevail when reassignments are determined.

43. In this case, the respondent submits, the decision to reassign the applicant was based on objective considerations. The position in New York had been redefined, a decision UNCTAD management had every authority to take, to cover new areas on account of concerns expressed by Member States. In addition, the P-3 post of Economic Affairs Officer in Geneva in the TAB, which became vacant in December 2009, needed to be filled.

44. The respondent contends that the UNCTAD management has the discretion to decide whether to advertise a regular budget post or whether to assign a staff member, whose qualifications and skills match the requirements, to the post. The

decision to reassign the applicant to Geneva was based on his qualifications and experience, which TAB in the past had regularly requested and utilised during his current assignment in New York. The UNCTAD management considered that assigning the applicant to the post in Geneva would be an excellent use of his skills and qualifications and would be in the best interest of the Organisation.

45. Concerning the allegation that the applicant had been approached by the Special Assistant to report on the conduct and contacts of his supervisor, the respondent refutes this contention and notes that the applicant does not provide any evidence for it. UNAT has consistently held that that where the appellant avers illegal motives, the burden of proof in such matters rests upon him (see UN Administrative Judgments No. 312 *Roberts* (1983) and No. 1118 *Khuzam* (2003), as endorsed by the UNDT in *Bye*).

46. As to the applicant's supervisor not being consulted before the decision was taken, the respondent explains that the OIC had unsuccessfully tried to reach the supervisor at beginning of January 2010 as he was on home leave until mid-February 2010. Furthermore, the decision not to involve the applicant's supervisor in the process of redefining the functions and the recruitment process do not form part of the present appeal as these decisions do not concern the applicant. Finally, the UNCTAD office in New York is under the direct supervision of the Office of the Secretary-General, which has the discretionary power to assign the role of the PCO to a staff member of its office. There is no legal obligation to assign the role of the PCO to the manager supervising the staff member to be recruited.

*Particular urgency*

47. The respondent argues that this requirement is not fulfilled as it was decided on 26 May 2010 to postpone the reassignment of the applicant to Geneva to 1 August 2010.

*Irreparable damage*

48. With reference to *Fradin de Bellabre*, the respondent submits that harm is irreparable if only it can be shown that there are no other ways to ensure that the applicant's rights are observed. The respondent contends that there is no cogent evidence of this in the present case, even though the "status quo" of the applicant would change as he would be working in Geneva (although at the same level) and executing different functions, which, however, would match his skills and qualifications. The applicant's abandonment of his social life in New York cannot be considered as irreparable as there is no acquired right to continuously work in one duty station. As an international civil servant, the applicant is obliged to carry out his duties in any duty station the Secretary-General assigns him to, bearing in mind, that the Organisation puts a strong emphasis on the mobility of its staff. The alleged immaterial damage could be compensated financially if the applicant should win the case on the merits.

## Considerations

*The jurisdiction of the Tribunal*

49. The applicant contends that the contested decision is that of 20 January 2010, which was encompassed by the management evaluation of 7 April 2010 and that the decisions following thereafter regarding postponement of his reassignment were merely implementations of this underlying decision. I agree with this submission and find that this application is receivable.

50. To grant the interim relief sought, the Tribunal must be satisfied that all three conditions specified in art. 10.2 of the Statute, echoed by art. 14 of the Rules of Procedure, are met. Furthermore, parties approaching the Tribunal in matters of this nature must do so urgently and with sufficiency of information for the Tribunal to preferably decide on the papers before it. The proceedings are not meant to turn into a

full hearing. The application must not be frivolous or an abuse of process or else an applicant may well be mulcted in costs (see *Applicant* Order No. 164 (NY/2010)).

*Prima facie unlawfulness*

51. The first of the three criteria is that the contested decision "appears prima facie to be unlawful". If indeed the applicant has an arguable case of unlawfulness a legal rule must therefore have been broken or not followed. I find that none of the three arguments the applicant outlines in his submissions render the decision to transfer him prima facie unlawful under the relevant legal instruments, namely staff regulation 1.2(c), provisional staff rule 1.2(c) and art. 2.4 of ST/AI/2006/3/Rev.1 (the applicable Administrative Instruction in this case as the contested decision was taken on 20 January 2010).

51. The applicant's contention that the Administration has an obligation to undertake personal consultations with a staff member affected by a decision to transfer has no specific legal basis in the legal instruments of the UN, and I find that the applicant's reliance on ST/SGB/172 is misguided as this provision clearly is for collective bargaining purposes and applies to bargaining units. However, such obligation may be inferred from general legal notions such as the principles of equity and natural justice, good faith and fair dealing, and from international best practice and international labour standards. Article 20 of the ILO Workers with Family Responsibilities Recommendation No. 165 of 1981 provides that family responsibilities and considerations should be taken into account when transferring workers from one locality to another and art. 2 of the Workers with Family Responsibilities Convention (No. 156) provides that the Convention (as supplemented by Recommendation No. 165), applies to all branches of economic activity and to all categories of workers, both in public and private sectors and regardless of whether the activity is for profit.

52. As an international civil servant, a UN staff member must also expect to be relocated to different places in the world during her/his career. Furthermore, some

matters are entirely within the realm of management prerogative provided the dictates of fairness and due process are met. In an instance such as this, once the respondent has made an operational decision, he only has an obligation to consult in good faith and not to negotiate. Consultation is a process by which the views of the party consulted are merely sought or ascertained, this must not mean that the views of this party must necessarily prevail or that the consulting party must change its position.

53. In ILO Tribunal Judgment No. 380 *Bénard and Coffino* (1979), the Tribunal made a distinction between consultation and negotiation as follows:

> [T]he Tribunal does not share the view of both parties that there is no difference between consultation and negotiation. While in practice the two often overlap there is a clear distinction between them. The distinction lies in the situation. If the end product of the discussions (to use a wide and neutral term) is a unilateral decision, 'consultation' is the appropriate word. If it is a bilateral decision, i.e. an agreement, 'negotiation' is appropriate. Decisions are reached after consultation; agreements after negotiation. Negotiation starts from an equality of bargaining power (i.e. legal equality, economic strength may be unequal); consultation supposes legal power to be in the hands of the decision maker, diminished only by the duty to consult. Where there is simply only an obligation to consult, the decision maker's duty is to listen or at most to exchange views. The object of the consultation is that he will make the best decision and the assumption is that he will not succeed in doing that unless he has the benefit of the views of the person consulted. The object of negotiation on the other hand is a compromise. This object would be frustrated if either party began with a determination not to make any concession in any circumstances, just as the object of consultation would be frustrated if the decision maker began with a determination not to be influenced by anything that might be said to him. On both these hypotheses there would be lack of good faith.

54. From art. 2.4 of ST/AI/2006/3/Rev.1, which implements the general rules about the Administration's managerial prerogatives as stipulated in staff regulation 1.2(c) and provisional staff rule 1.2(a), it clearly follows that the Administration decides whether a staff member is to be transferred within its department or office and to vacant posts at the same level. There are no limitations stipulated concerning duty stations, which is also explicitly confirmed in art 2.5 of ST/AI/2010/3 (see also

staff regulation 1.2(c)). Even though the staff member may therefore be entitled to make representations to the Administration, the latter is not bound by these and needs, at most, to take them into meaningful consideration, conducting the consultation in good faith and taking the interests of the staff member into account without prejudice to its own interests.

55. In this case, the Administration considered the applicant's representations, but the applicant alleges there was no meaningful consultation. Having indicated the ill-health of his mother and his expressed need and desire to be as geographically close to her as possible, he argues that the respondent made no further enquiries as to the further particulars of same. He alleges that any reasonable official would have made further enquiries as to the particulars e.g. the period of time the applicant would need to remain within traveling distance of his mother, the direct assistance his mother required from applicant, and alleges that this begs inference that the purported "careful consideration" of humanitarian circumstances was no more than a hollow phrase.

56. In an appropriate case, with the appropriate information, an applicant may succeed in challenging management's decision to reassign him or her. In UN Administrative Tribunal Judgment No. 943 *Yung* (1999) the applicant (an international career staff member with 20 years of service, close to retirement and who was subject to rotation), refused to accept a post in Geneva, following the abolishment of two of her posts (the last within 6 weeks of her placement there) after the Medical Services Division had urged UNICEF to find a suitable post for her in New York. The applicant claimed that the respondent was aware that because of medical and family reasons, she could not accept the Geneva post, alleging that the respondent's treatment of her medical condition underscored two years of bad faith and failure to respect basic notions of fairness. The record in that case contained medical evidence of the fragile health situation of the applicant and her immediate family, and the applicant was able to show that the respondent failed to act with good faith and to abide by the letter and intent of the relevant provisions of the UNICEF

manual and the United Nations staff regulations and rules regarding permanent staff on abolished positions. The Administrative Tribunal held that:

> The Tribunal has noted that for international professional staff being considered for a post to replace the abolished post, there are no geographical limitations. Paragraph 18.2.21 of the UNICEF Manual states: "In the event that a suitable post is found the staff member will be offered the post ..."
>
> The Tribunal finds that the post offered was not suitable. Consequently, the refusal by the applicant was not capricious and was justified under the circumstances.
>
> Whether a post is suitable must be decided on a case-by-case basis in view of all the circumstances presented. In this case the employee had been in service in New York for many years. She was not a young professional but was closer to retirement age. Her family was in New York. Of equal importance is that she had finally found medical care that addressed her health problems. Finally the applicant had been passed over for at least one apparently suitable post in New York.
>
> For all the reasons stated above the Tribunal finds the Respondent failed to act with good faith, failed to abide by the letter and intent of the relevant provisions of the UNICEF Manual and United Nations Staff Regulations and Rules regarding permanent staff whose positions have been abolished, and that he discriminated against the Applicant.

57. In the instant case, the applicant presented his personal circumstances (his mother's health) to the Administration both by telephone and in an email before the final decision on 20 January 2010 was taken. In the decision of 20 January 2010 it was stated that the Secretary-General was apprised of the applicant's personal situation and that his representations had "been carefully considered" and his "qualifications and experience were primary factors in reaching this decision". There is nothing before me to indicate that the respondent began with a determination not to be influenced by anything that might be said to him. Rather, I find that the ball lay in the applicant's court to fully explain his personal circumstances and not for the respondent to embark on an investigation on his behalf.

58. As regards the applicant's other submissions, I find that the applicant has failed to point to any illegality arising from the failure to consult or involve his

current supervisor and the Head of the TAB in the selection processes for the New York and Geneva post, although this may have been useful. Similarly with the applicant not being provided with the job description for the job in Geneva to which has was to be reassigned, he should in any case be familiar with the tasks of the office since he worked there from 2000 to 2005.

59. It is also not clear that the respondent has any obligation to demonstrate that the applicant's transfer is to the ultimate benefit of UNCTAD as contended by the applicant, if the Administration otherwise did not act outside the scope of its discretion and without ill motivation. With reference to *Allen* it is generally for the Organisation to determine its own interests when assigning certain tasks and responsibilities to staff members. To this end, the applicant concedes that the Administration has a wide discretion in selection of staff insofar as this does not amount to an abuse of authority. In other words, if the decision is not motivated by extraneous factors or ulterior motives it is not for this Tribunal to replace the lawful judgment of the Administration. In this regard, the applicant has not placed any factors or motive other than the alleged retaliation arising from his alleged refusal to furnish information he alleges was requested by the Special Assistant as far back as 2007, which retaliation he apparently has failed to follow up on. There is at this stage insufficient evidence to conclude that the decision was motivated by anything other than organisational considerations.

60. As regards UN Administrative Tribunal Judgment No. 1313 (2006), it is not necessary for me to consider it, since its factual background differs materially from the present case. While the interests of mobility prompted the transfer in this judgment, here it was related to the tasks to be performed in the positions in question in New York and Geneva and it was found that the applicant's skills and experience matched the Geneva post better.

61. The circumstances which the applicant refers to do not constitute a conspiracy to remove him from New York on account of his alleged failure to provide the information on his supervisor.

62. Accordingly, the applicant has not established a prima facie case for unlawfulness.

*Particular urgency*

63. The applicant's submissions in this regard appear to address the notion of irreparable damage rather than that of urgency. The only relevant contention under this heading is that if another individual is appointed to his post in New York before the conclusion of the case on the merits, this would deny the applicant his rights to the position.

64. To my mind, the alleged urgency of this postulation is self-inflicted and unsustainable as the applicant did not apply for the New York position when it was advertised. Had the applicant applied for the position and if the applicant is qualified as he submits, his candidacy for the position would appear very strong, and if selected, the main issue of the case on the merits, namely his transfer, would become immaterial.

65. The applicant has not argued that if the decision were finally to be implemented on 1 August 2010, the urgency requirement would be satisfied. Nor has he appraised the respondent, and indeed the Tribunal, of his mother's medical condition since 12 January 2010. On the contrary, in his letter dated 24 February 2010, the applicant simply states, "As a result of the above I will not be able to move to Geneva on 1 April 2010 and I would be grateful if you could confirm that the reassignment will therefore be suspended at your earliest convenience". Thus, he clearly states that he cannot move to Geneva on 1 April as a result of his upcoming surgery and recuperation. He does not object to his reassignment but merely requests its suspension, and he does not allude to any other reason or inability to move. To all

intents and purposes, it seems that he has accepted the inevitable in this communication.

*Irreparable harm*

66. The applicant submits that the respondent misunderstood the concept of art. 10.2 of the Statute, since it is a *non-sequitur* to state that the applicant has no acquired right to continue to work in New York. Having said that the transfer to Geneva may likely affect the applicant's personal life, the applicant has not demonstrated why this should amount to "irreparable harm". What is the harm that cannot be compensated? The applicant must – as a necessary minimum – be able to refer to some specific, albeit non-pecuniary, damage; a generalised reference to the value of his social life, if such is at all compensable, does not suffice. Also on a professional level, the applicant has failed to refer to any specific harm he may suffer from the reassignment.

67. In sum, in my view there are three factors that defeat the applicant's case for irreparable damage. In his letter dated 24th February 2010 the applicant states "as a result of the above I will not be able to move to Geneva on 1 April 2010 and I would be grateful if you could confirm that the reassignment will therefore be suspended at your earliest convenience". In this letter the applicant does not dispute moving to Geneva but simply advances the reason why he could not move by 1 April 2010 and merely requests a suspension of the decision. Indeed, his ballpark point at this stage appears to be the loss of his social life in New York. Secondly, the applicant did not apply for the position which has now been redesignated and advertised. Thirdly, and perhaps most significantly, is that the applicant himself previously applied for a position in Geneva in November 2009 and even complained about such an application not being appropriately registered on Galaxy. This indicates that the applicant, only two months before the decision to transfer him, apparently had no problems with moving, thus not only giving the respondent a reasonable indication that he had no objection to transfer to Geneva, but totally belying his insistence that

he would be suffering a loss of social life which he alleges he built up over six years in New York.

68. Since the prerequisites for granting an interim measures under art. 10.2 of the Statute are not satisfied, I need not decide the applicant's contention that the Tribunal is competent to order the respondent not to make the appointment of a third party under art. 10.2.

**Conclusion**

69. In light of the above findings, the application was dismissed.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 28th day of July 2010