UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/096
Order No.: 181 (NY/2013)
Date: 30 July 2013
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

WISHART

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON APPLICATION FOR
INTERIM MEASURES UNDER
ART. 10.2 OF THE STATUTE**

Counsel for Applicant:
Janelle Melissa Lewis

Counsel for Respondent:
Lauren Alaie, UNDP
Seth Levine, UNDP

Introduction

1. On 21 July 2013, the Applicant, a permanent staff member of the United Nations Development Programme ("UNDP") filed a motion for interim measures in the context of proceedings on the merits initiated by her on 21 June 2013. The case on the merits concerns, *inter alia*, the decision communicated to the Applicant by letters dated 22 and 23 January 2013 to place her on a "search period" (i.e., a period of time to look for a new position) and subsequent notice of separation. In her application on the merits, the Applicant also contests UNDP's failure to respond to her management evaluation request and the finding of the Ethics Office of UNDP that, although the Applicant had engaged in protected activity, there was no *prima facie* case of retaliation against her. In her application on the merits, the Applicant seeks, as a relief, the rescission of the decision to place her on notice of separation as well as monetary compensation. On 8 July 2013, the application on the merits was transmitted to the Respondent for his reply, to be filed by 7 August 2013.

2. In the context of the present motion for interim measures, the Applicant submits that she will be separated effective 1 August 2013, and seeks the following relief:

> 1. [That] the United Nations Dispute Tribunal exercise its jurisdiction under [arts.] 10.2 and 10.5(a) of [its] Statute to order interim measures to provide temporary relief to the Applicant, while her case, UNDT/NY/2013/096 is pending before the Dispute Tribunal in the following forms:
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> a. To rescind the initial administrative decision made by Ms. [SY], Deputy Director of the Office of Human Resources [("OHR")], Bureau of Management [("BoM")] to place the Applicant on search period, especially in light of the fact that the Applicant requested a management evaluation of the decision and was not provided with a response.
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> b. To suspend the implementation of the administrative decision to place the Applicant on notice of separation following the search period—which concludes on 31 July 2013—until her case, UNDT/NY/2013/096, is adjudicated on the merits.

c. To reinstate the Applicant into her workspace or a comparable workspace until either she is placed in a position and/or her case, UNDT/NY/2013/096, is adjudicated on the merits.

3. The motion for interim measures was transmitted to the Respondent by the New York Registry of the Tribunal on 23 July 2013, with directions to file his response by 25 July 2013. The response to the motion was duly filed.

4. In addition to the present case (Case No. UNDT/NY/2013/096), the Applicant has two other matters pending before the Tribunal. In Case No. UNDT/NY/2012/012, filed on 14 May 2012, the Applicant contests UNDP's alleged failure to protect her from harassment and abuse of authority by her supervisors. In Case No. UNDT/NY/2013/015, filed on 19 March 2013, she contests the decision of 20 December 2012 to issue her a written reprimand. The reprimand was apparently issued based on the finding by UNDP's Office of Audit and Investigations ("OAI") that the Applicant had removed several medical leave forms from her file in September–October 2011, although the investigation had established "no finding of intent on [her] part to cause harm or violate the rules".

Background

5. The Applicant joined UNDP in 1979 and received a permanent appointment in 1981. She is currently 56 years old and four years away from retirement. She submits that she is the sole bread-winner for the family.

Letter of 23 November 2012

6. The Respondent submits that, in October 2012, UNDP's Office of Planning and Budget ("OPB") and Office of Finance and Administration ("OFA") were integrated into the newly established Office of Financial Resources Management ("OFRM"). All the posts in OBP and OFA, including the Applicant's, were reviewed as a result of an "integration transformation plan" (in the words of the Respondent), leading to the creation of OFRM. As a result of the process, the functions of the G-7

post (Associate, Financial Business Support (Development)) encumbered by the Applicant were apparently upgraded to the P-2 level, and the Applicant's functions were not matched with those of the new post.

7. By memorandum dated 23 November 2012, and transmitted to the Applicant on 29 November 2012, the Applicant was informed that, "[a]s part of the current OFRM Change Management Process" and "a Position Matching exercise", the Review Committee "was unable to match [her] functions" with those of the new post. She was "encouraged to apply" for the newly re-classified post or any other suitable position available during the Job Fair Round I (held in December 2012). The Applicant was further informed that, should she be unable to secure a position, she "may become unassigned and the applicable UNDP policies and procedures will apply".

8. The Respondent submits that the Applicant did not avail herself of the opportunity to apply for the upgraded P-2 Post of Business Development Analyst as part of the Job Fair Round I. According to the Respondent, she applied for one other post in Round I (Payroll Specialist at the P-3 level), but declined to be interviewed or to take the test, explaining that she was too nervous, anxious, and ill to participate in the testing and interview. According to the Respondent, in December 2012, when discussing the ongoing process with the external consultant facilitating the process on UNDP's side, the Applicant stated that she had been subjected to constant harassment at work. No information is available in the Respondent's response to the motion whether any action was taken on this report to the external consultant.

Letters of 22 and 23 January 2013

9. By two letters dated 22 and 23 January 2013, the Applicant was informed by Ms. SY, Deputy Director, OHR, BoM, that the Applicant had not secured a post in Round I and that the upgraded post she encumbered had been filled. (The original letter of 22 January 2013 was re-issued on 23 January 2013, apparently to correct

a factual error: the first version incorrectly stated that the Applicant did not apply for any positions during Job Fair Round I. The two versions otherwise appear identical.) The Applicant was informed by Ms. SY that as there was the prospect of her becoming unassigned, her "official job search period [would] start from 1 February 2013 and [would] run through 30 April 2013". The Applicant was informed that during the search period she would be considered an active staff member. The Applicant was further advised that she would be able to participate in the Job Fair Round II (held in January 2013) as well as compete for posts elsewhere in the system during the search period. Finally, the Applicant was informed that, should she be unsuccessful in securing another post within the three-month search period, there were a number of options available to her:

> However, if, in the unfortunate event, you are not placed by 30 April 2013, please be aware that the options listed below are available to extend your search. Alternatively, you may apply for an agreed separation after serving at least two months of the search period, without seeking to extend it further. The application for agreed separation will also remain available if you avail yourself of the options listed below in no particular order:
>
> 1. Identify a fully-funded temporary assignment, if available and based on organizational need.
>
> 2. Avail yourself of accrued annual leave (AL) with UNDP should you wish to do so.
>
> 3. Request to serve the three-month separation notice which would allow you to stay on payroll while continuing to search. During the notice period, you would need to remain available for any assignments that may arise based on organisational need. In some instances the organization may use its discretion and require staff to serve the notice period, for instance, to maintain a staff member's active status while an agreed separation process is finalized.
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> 4. Take Special Leave without Pay (SLWOP) and continue applying for vacancies as an internal candidate.
>
> 5. Request Early Retirement if you are 55 years of age or older.
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> Should you require additional information, please don't hesitate to approach [Career Transition Unit] as they remain ready to discuss the various options that might best meet your particular circumstances

> and kindly keep us informed of your preferences at least two weeks prior to the end of your search period i.e., 15 April 2013. Please note that should you not do so, you will automatically be placed on notice of separation period (option 3 above).

10. The Respondent submits that, on 25 January 2013, the Applicant wrote an email to the external consultant facilitating the process on UNDP's side, expressing her interest in two posts that were subject to recruitment through Round II of the Job Fair and two regular recruitment posts. Furthermore, the Applicant also requested a "waiver to testing and interviews for posts at the G-7 level" because "no other staff in OFRM had to undergo a Finance Test as they were all matched". On the same day, the consultant replied, observing that the Applicant had not met the procedural requirements for applying for Round II posts, but undertaking to revert to her regarding her request for waiver of the testing and interviewing requirement. On 31 January 2013 or 1 February 2013, the consultant informed the Applicant that no exceptions to the testing and interviewing requirement would be allowed in her case. However, it is not explained in the Respondent's response to the present motion how, by whom, and when the Applicant's waiver request was considered.

Request for protection with the Ethics Office

11. On 4 February 2013, the Applicant submitted to the Ethics Office of UNDP a formal request for protection from retaliation by her supervisors for reporting "managerial misconduct involving workplace harassment and abuse of authority".

Management evaluation

12. On 21 February 2013, the Applicant sought management evaluation of the "decision to be one out of 147 staff members not placed during OFRM/BoM Position Matching exercise … resulting in [her] current displacement in the Organization on unassigned status", referring apparently to the letter dated 23 January 2013. The Applicant stated in her request that she had been placed on unassigned status for three months beginning 1 February 2013. The Applicant stated,

inter alia, that the contested decision was a retaliatory act taken against her as a result of her involvement in protected activities, specifically, reporting allegations of managerial misconduct.

UNDP's suspension of response to the Applicant's management evaluation

13. By letter dated 11 March 2013, Mr. JW, the Assistant Administrator and Director, Bureau of Management, "suspend[ed]" UNDP's response to the Applicant's request for management evaluation, stating that until "the claim of retaliation, which you cite as the basis of the decision for which you are seeking a management evaluation, has been appropriately considered by the UNDP Ethics Office and/or OAI, no decision can be made on your request for management evaluation". The Assistant Administrator and Director further stated:

> Accordingly, I have decided to suspend responding to your request until you either file an amended request for management evaluation setting out a different basis of claim, or until the appropriate determination is made by the UNDP Ethics Office following your formal complaint of retaliation to that office. In the event you do not avail yourself of either of the listed options, you may expect a response to your request for management evaluation within 30 days from the date of OAI's assessment.

Ethics Office's review

14. By letter dated 4 April 2013, the Director of the Ethics Office of UNDP informed the Applicant that no *prima facie* case of retaliation was established in her case. The Director further informed the Applicant that "given that [her] request for management evaluation [was] suspended to allow the Ethics Office to review the case", the Ethics Office would notify the Administrator of its findings. It is unclear whether this has been done; however, it is common cause that, as of 26 July 2013, no response to the Applicant's management evaluation had been issued.

Exchanges of April 2013

15. In April and early May 2013 the Applicant and Ms. SY exchanged emails regarding whether the Applicant had properly availed herself of the first option made available to her in the letter of 23 January 2013 (i.e., "[i]dentify a fully-funded temporary assignment, if available and based on organizational need"). The parties appear to be in dispute on this point.

16. Specifically, on 15 April 2013, the Applicant wrote to Ms. SY indicating that she did not expect her notice period to begin at the end of the search period because she was availing herself of one of the options identified, namely "option one, identify a fully-funded temporary assignment, if available and based on organizational need". She stated that she had applied for 12 positions that met the requirements under option one listed in the letter of 23 January 2013. The Applicant stated that, therefore, she did not consider herself to be on notice of separation period.

17. On 29 April 2013, Ms. SY replied to the Applicant stating that in her (Ms. SY's) view the Applicant had not indicated a preference for any of the options identified in the 23 January search letter. Ms. SY explained that, while it was true that a fully-funded temporary assignment was among the options listed in the letter of 23 January 2013, that option would apply only "when an assignment [was] available that meets [her] professional profile and when [she is] selected for it by the requesting office/unit". Ms. SY stated that, "regretfully, [the Applicant] [had] not been selected for any assignment to date". Therefore, Ms. SY stated that "following the end of [her] search period we [would] need to place you on notice of separation".

18. On 30 April 2013, the Applicant replied by email, stating that she "did select one of the five options presented" and therefore Ms. SY's assertions in the email of 29 April 2013 were "factually incorrect".

19. On 2 May 2013, Ms. SY replied by email, stating "you can take the option of a 'fully funded temporary assignment' when a temporary assignment has been

identified and when you have been selected for the assignment by the requesting office/unit" (emphasis in original). Ms. SY further stated that, whilst the Applicant "may have applied for relevant temporary assignments and the [Career Transition Unit] has put forth [her] candidature several times", "to date, no hiring unit has selected or offered [her] such an assignment". Hence, "the option of a temporary assignment [was] not available to [her] at the present time". Ms. SY requested the Applicant to provide her the details of the 12 positions to which the Applicant had applied.

Email of 9 May 2013

20. On 9 May 2013, Ms. EH, Human Resources Specialist, Career Transition Unit, OHR, sent an email to the Applicant stating that she was "writing in connection with the messages sent to [the Applicant] by Ms. [SY] on 29 April and 2 May 2013 indicating that [the Applicant] have been placed on notice of separation as of 1 May until 31 July 2013". She stated, "[w]e hope that during these three-months, you will remain focused on your job search efforts and apply for positions which are relevant to your profile". She further stated that since the Applicant was unassigned "and no longer part of the OFRM unit", she was not required to be in the OFRM offices and was "expected to serve the notice while at home". Ms. EH stated that, should the Applicant wish to avail herself of UNDP resources to assist in her continued search, she could let the Career Transition Unit know and they would "identify an available space" for her. She further stated that a laptop could be made available to her for use on regular basis during the notice period.

21. On 26 June 2013, the Applicant sent an email to the Career Transition Unit, requesting office space with appropriate resources "starting tomorrow, Thursday, 27 June 2013". She added, "I am in need of returning to the office to continue my job search efforts". It appears from the documents submitted to the Tribunal that the Applicant was given access to at least some of the requested resources, although

the Applicant appears to dispute that the assistance provided to her was up to the required standard.

Consideration

22. Article 10.2 of the Tribunal's Statute provides:

> 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.

23. A motion filed under art. 10.2 of the Tribunal's Statute is, by its nature, a request for urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not subject to appeal, and which requires consideration by the Judge within five days of the service of the motion on the Respondent (see art. 14.3 of the Tribunal's Rules of Procedure). Such motions disrupt the normal day-to-day business of the Tribunal. Therefore, parties approaching the Tribunal with motions for interim relief must do so on real urgency basis, with full disclosure of the facts relied on for relief and sufficient information for the Tribunal to decide the matter preferably on the papers before it. The proceedings are not meant to turn into a full hearing.

24. Pursuant to art. 10.2 of its Statute, the Tribunal may order an interim measure to provide temporary relief to either party, only if it is satisfied that all three requirements of that article have been met—i.e., that the case is of particular urgency, that the implementation of the contested decision would cause irreparable damage, and that the decision appears *prima facie* to be unlawful.

Does the case fall under the exclusionary clause of art. 10.2 of the Statute?

25. Article 10.2 of the Statute provides that "temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination". The Respondent submits in his response that the decision "not to align the Applicant was analogous to an abolition of post, which is clearly a termination of contract". The Respondent further submits that the subsequent decision to place the Applicant on notice of separation also concerns termination as it would result in the termination of her permanent contract. The Respondent submits that the Tribunal is therefore precluded from making an interim measure order under art. 10.2 of the Statute.

26. The Tribunal will therefore consider whether the present case falls under the exclusionary provision of art. 10.2 of the Statute. First, it will consider whether this matter is one of "termination".

"Termination" under art. 10.2 of the Statute

27. Staff rule 9.1 explains that "termination" is only one of the six types of separation.

> **Rule 9.1**
>
> **Definition of separation**
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> Any of the following shall constitute separation from service:
>
> (i) Resignation;
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> (ii) Abandonment of post;
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> (iii) Expiration of appointment;
>
> (iv) Retirement;
>
> (v) Termination of appointment;
>
> (vi) Death.

28. Staff rule 9.6 states that "a termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General", with a limited list of permissible reasons (see staff rule 9.6(c)–(d)):

> **Reasons for termination**
>
> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
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> (i) Abolition of posts or reduction of staff;
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> (ii) Unsatisfactory service;
>
> (iii) If the staff member is, for reasons of health, incapacitated for further service;
>
> (iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);
>
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;
>
> (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.
>
> (d) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter.

29. Provisions (e) through (i) of staff rule 9.6 further discuss each of the permissible reasons for termination listed in provisions (c) and (d) above. In particular, staff rule 9.6(e) explains the procedural safeguards afforded to staff members on abolished posts and staff affected by reductions, including the order in which they are to be retained, with "due regard … given in all cases to relative

competence, integrity and length of service" and priority given to "staff members holding continuing [i.e., permanent] appointments".

30. The Respondent submits in his response to the motion on interim measures that "[t]he Respondent's decision not to align the Applicant was *analogous* to an abolition of post, which is clearly a termination of contract" (emphasis added). However, staff rule 9.6 requires "abolition of posts or reduction of staff" as constituting a reason for termination, not something akin to or *analogous* to or otherwise similar to abolition. Therefore, being "analogous" to an abolition is not enough; the language of staff rule 9.6 requires that there *be* an abolition. The reasons for this are clear; as stated above, certain additional safeguards are afforded to staff on abolished posts and staff affected by reductions, particularly with regard to long serving staff members.

31. Furthermore, the Applicant states that no actual formal "abolition" or "reduction of staff" within the meaning of staff rule 9.6 is taking place, and this submission stands unrebutted by the Respondent. None of the documents before the Tribunal refer to "abolition of posts" or "reduction of staff"; notably, in the response of 25 July 2013, the Respondent places no reliance on any of the provisions of staff rule 9.6 nor refers to them. Indeed, the respondent's position on this point is puzzling as it is clear that all the posts in OBP and OFA were reviewed as a result of a transformation plan, not a downsizing or abolition exercise, and that the Applicant's post, which has now been filled, was upgraded or reclassified to the P-2 level.

32. The Tribunal finds that "termination" within the meaning of art. 10.2 of the Statute, must be read to mean termination initiated by the Respondent and premised on one of the permitted reasons under the Staff Rules, for if it were to be read in any other way, it would not be a termination within the meaning of the Staff Rules (see staff rule 9.6). This is not a question of mere semantics as it goes directly to the issue of the Tribunal's power to order interim relief under art. 10.2 of its Statute and could have far reaching consequences for a staff member.

33. If the Respondent labels an administrative decision as "a termination" without any reliance on the provisions of staff rule 9.6, it would not be "a termination" at all—certainly not within the meaning of staff rule 9.6 and, therefore, not within the meaning of art. 10.2 of the Statute—but rather some other form of *separation*, the true nature of which remains to be established.

34. Thus, in the Tribunal's considered view, the present matter does not fall within the exclusionary clause of art. 10.2 of the Statute under the term of "termination". Seeing that the term "promotion" obviously does not apply to the present case, this leaves the term of "appointment" in art. 10.2 to be considered.

"Appointment" under art. 10.2 of the Statute

35. With regard to the term "appointment", the Respondent relies in his response on a judgment of the United Nations Appeals Tribunal in *Benchebbak* 2012-UNAT-256 which appears to suggest that the word "appointment" in art. 10.2 of the Statute should be read as covering not just decisions to appoint or not to appoint a staff member, but also decisions not to renew an existing and expiring appointment. The suggested interpretation of the word "appointment" in the exclusionary clause of art. 10.2 of the Statute as including "non-renewal", is of no relevance to this case. The Applicant is a permanent staff member, and her appointment is not subject to renewal. However, since the Respondent has alluded to this point, the Tribunal finds it appropriate to make the following observations.

36. Although the Appeals Tribunal has yet to apply the interpretation given to the term "appointment" in *Benchebbak* in a variety of factual situations, it is this Tribunal's respectful view that "appointment" should not be read too broadly as if it were meant to cover all decisions somehow related to the staff member's employment relationship with the Organization.

37. This can be demonstrated by examining the wording of the exclusionary clause itself, which refers to "cases of appointment, promotion or termination".

To understand the true meaning of the term "appointment" in art. 10.2 let us turn again to the term "termination" in the same clause. Termination is one of the subcategories of separation, others being resignation, abandonment of post, expiration of appointment (also known as non-renewal) and death (see staff rule 9.1). In other words, the term "separation" consists of several separate subcategories, two of which are "termination" and "expiration of appointment" (i.e., non-renewal). (Thus, termination obviously cannot be an expiration of appointment.)

38. Although "termination" is specifically included in the exclusionary clause of art. 10.2 of the Statute, "expiration of appointment" (non-renewal) is specifically *excluded*. As both the "expiration of appointment" and "termination" are subcategories of separation, why is it that of the two only "termination" is specifically listed in the exclusionary clause? If "expiration of appointment" were to be somehow subsumed under "appointment" in art. 10.2, there would be no purpose in including "termination" in the same clause as it would then also be subsumed under "appointment" just like the "expiration of appointment" (on account of them both being subcategories of separation). Similarly, the word "promotion" in art. 10.2 would also have to be interpreted as falling under the broad understanding of "appointment" and its inclusion in art. 10.2 would serve no purpose.

39. Furthermore, as stated in *Obdeijn* UNDT/2011/032 (affirmed by the Appeals Tribunal in *Obdeijn* 2011-UNAT-201), the International Court of Justice found in its Advisory Opinion of 23 October 1956 concerning *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization* (*ICJ Reports* 1956, p. 93) that "in cases of renewal it is the *initial appointment* which remains in existence and *not a new appointment* independent of its predecessor" (emphasis added).

40. Thus, in cases of non-renewal or extension of an existing appointment no new appointment actually takes place. Notably, it appears that the United Nations, when renewing appointments of current staff members, generally does not issue new

letters of appointment and staff members continue to work under the original appointment terms. See, for example, A/65/373, Report of the Secretary-General on Administration of justice at the United Nations (paras. 227–232), stating that "[i]f the successful candidate is already in the United Nations Secretariat, the appointment may be effected through promotion or reassignment without a new letter of appointment". The Report of the Secretary-General further discussed the term "appointment" in the context of appointing a staff member to a particular position and recommended that the General Assembly amend "the reference to decisions concerning 'appointment, promotion and termination' in [arts. 10.2 and 10.5 of the Statute] to refer to decisions concerning '*appointment*, selection, transfer, secondment, assignment, promotion *and separation*'" (emphasis added). Thus, the Secretary-General recommended replacing the word "termination" with the word "separation", which would thus include both the subcategory of "termination" and the subcategory of "expiration of appointment" (non-renewal). When considering the Secretary-General's proposal, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") noted that "all elements of the new system of administration of justice must work in accordance with the Charter of the United Nations and the legal regulatory framework approved by the Assembly" and expressed its expectation that the Tribunals would be guided accordingly (see para. 57 of A/65/557, Report of the ACABQ on Administration of justice at the United Nations). The General Assembly has not adopted the amendment recommended by the Secretary-General.

41. As indicated above, the Applicant has a permanent contract and even the broad interpretation of the term "appointment" as including matters of non-renewal would not matter in this case; however, the observations above are included in response to the Respondent's reliance on *Benchebbak*.

42. Accordingly, having considered the exclusionary clause of art. 10.2, the Tribunal finds on the papers before it that this case is not one of "appointment, promotion or termination".

Urgency

43. With regard to the requirement of urgency, the Respondent submits in his response to the interim measures motion that all of the Applicant's complaints stem from the initial decision not to align her post with the newly created OFRM post as part of the matching process, which decision was conveyed to her by letter dated 23 November 2012. The Respondent states that the Applicant submitted her request for management evaluation on 21 February 2013, which was outside the established period of 60 days for the filing of a management evaluation request. The Respondent submits that what followed thereafter were not separate administrative decisions, but rather "automatic administrative processes stemming from the time-barred decision not to match the Applicant's functions". The Respondent further submits that, by 23 January 2013, the Applicant was fully informed of the process that would lead to her notice of separation period. According to the Respondent, by filing the motion for interim measures only one week prior to the expiry of the process that lasted six months, any urgency in the present case was caused by the Applicant.

44. The Applicant submits that the implementation of the contested decision would result in her separation from service on 1 August 2013. She relied on the decision of Mr. JW, the Assistant Administrator and Director, Bureau of Management, dated 11 March 2013, to suspend UNDP's response to her request for management evaluation pending the outcome of review of her case by "the UNDP Ethics Office and/or OAI". This resulted in the Applicant waiting for a response to her request for management evaluation before being able to take further action. The Applicant further submits that UNDP's actions in May–July 2013 demonstrated lack of good faith and contributed to the urgency of her case. The Applicant refers, *inter alia*, to her removal from her work station in May 2013 and to the alleged subsequent hindering of access to a suitable cubicle or office for job search purposes.

45. The question as to whether it is the letter dated 23 November 2012 (the Respondent's position) or the letter dated 23 January 2013 (the Applicant's position) that should be used as the starting point for the calculation of the time

limits for the filing of the Applicant's management evaluation request cannot be decisively determined at this stage, and may need to be addressed at a hearing. The Tribunal notes, however, that the letter of 23 November 2012 informed the Applicant that she "*may* become unassigned" (emphasis added), indicating it was a *possibility*, not a certainty, and that the finality was contingent on several factors.

46. The Tribunal further finds that Mr. JW's letter of 11 March 2013 "suspend[ing]" the outcome of management evaluation meant that the finality of the decision to place the Applicant on search period and thereafter notice of separation was contingent upon (i) the review of her complaints by the Ethics Office, (ii) the investigation of her complaints by OAI, (iii) UNDP's objective and reasonable assessment of the findings reached by the Ethics Office and OAI. By not providing any final response to the Applicant's management evaluation request and yet indicating that such response was forthcoming and suggesting that the entire situation could change based on the findings of the Ethics Office and OAI and UNDP management's review, UNDP placed her in a very peculiar and uncertain situation. UNDP's communications to the Applicant following her request for management evaluation undoubtedly misled and confused the Applicant. The Tribunal finds that, as a result of the actions of UNDP following the Applicant's management evaluation request, she acted reasonably and timeously with regard to the filing of her motion, and the urgency is not self-created.

47. Notably, on 17 July 2013, the Respondent filed a submission entitled "Motion to suspend the deadline of the Respondent's reply to the Applicant's application". The Respondent submitted that UNDP's response to the Applicant's request for management evaluation was "suspended pending" the OAI investigation, which has indicated that its review of the allegations would be finalized in July 2013 and, upon receipt of the OAI's findings, the Respondent would "immediately commence" its review of the request for management evaluation. The Respondent requested the Tribunal to suspend the time for his reply to the application on the merits because no final decision regarding the Applicant's situation had yet been

made and the Applicant's application on the merits "ha[d] been filed prematurely". Specifically, the Respondent stated (emphasis added):

> 7. To allow for the above reviews to be carried out, the Respondent suspended replying for the usual period of management evaluation and informed the Applicant in the letter dated 11 March 2013 to expect a response to her request within 30 days from the date of OAI's assessment.
>
> 8. The Respondent respectfully submits that until the claims of retaliation and harassment, which were cited as the basis of the decision for which the Applicant was seeking a management evaluation, have been *appropriately considered* by the UNDP Ethics Office and OAI, *no decision* can be made on the Applicant's request for management evaluation. The Respondent notes that OAI has not yet completed its review of the allegations and, as such, the Respondent submits that the *present appeal to the UNDT has been filed prematurely*.

(The Respondent's motion was denied by Order No. 179 (NY/2013), dated 26 July 2013.)

48. Thus, in the course of the same proceedings the Respondent has submitted both that "the present appeal to the [Dispute Tribunal] has been filed prematurely" (para. 8 of the Respondent's motion of 17 July 2013) and that her claims are barred either because she challenged the contested decisions too late or because she failed to properly contest them in her management evaluation (paras. 19–20 of the response of 25 July 2013). These two contradictory positions are not argued in the alternative but are instead advanced simultaneously. With respect to the issues of receivability and urgency, the Respondent presently seeks to sit on two chairs at once. The Respondent should choose one, but for the purposes of the present motion it will have to forfeit both.

49. The Dispute Tribunal finds that the urgency in this case was not created by the Applicant but rather by the actions of UNDP, particularly its handling of the Applicant's management evaluation request and the uncertainty it created with

regard to the finality of the contested decisions. Accordingly, the Tribunal finds that the present case satisfies the requirement of particular urgency.

Prima facie *unlawfulness*

50. For the *prima facie* unlawfulness test to be satisfied, it is enough for the Applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011), *Villamoran* UNDT/2011/126).

51. The Respondent submits, with respect to the *prima facie* unlawfulness claims, that relevant procedures have been followed and that, "to date, neither OAI nor the Ethics Office have found any support" for her complaints of harassment and retaliation. Further, the Respondent submits that the Applicant's request for management evaluation of 21 February 2013 makes no claims regarding the lawfulness of being placed on a search period or her separation notice period, and, therefore, the Tribunal is not seized of these questions. The Respondent submits that although the Applicant was notified in November 2010 that she was "in jeopardy of being unassigned", she actually did not become unassigned until 1 May 2013, prior to which she continued to encumber her G-7 post, concurrently with the new incumbent of the P-2 post. Further, the Respondent submits that the Applicant failed to avail herself of the opportunities afforded to her: she declined to apply for the re-profiled job she previously encumbered and declined to sit the test and be interviewed for the P-3 post that she did apply for.

52. Although the Respondent submits that the Applicant's request for management evaluation made no claims regarding the lawfulness of her placement on the search period or the notice period, and, therefore, these claims are not properly before the Tribunal, it is apparent from the scope of the Applicant's request for management evaluation that these matters are intrinsically linked with the subject

matter of her management evaluation request and that they are therefore properly before the Tribunal.

53. The Applicant raises a number of issues with regard to the contested decision. In particular, she states that UNDP's actions are in violation of the established rules and procedures and that the contested decision is based on retaliation and harassment against her for reporting allegations of misconduct. She further states that she has not been provided with proper support by UNDP during the search period. She states that, since January 2013, she has applied for 17 positions, to no avail. She further submits that the decisions in her case were taken by persons lacking the proper delegation of authority.

54. On the papers before it, the Tribunal finds that the facts and allegations by the Applicant raise serious concerns with regard to the lawfulness of the contested decision that would need to be examined in full as part of the case on the merits. For example, concerns with regard to the true nature of the exercise in question and whether it falls under any particular provisions of staff rule 9.6. Further, the documents on file indicate that UNDP may not have been aware at the relevant time of the specific positions to which the Applicant was applying, which begs the question of its level of involvement and assistance in her placement. Furthermore, the issues of allegations of retaliation and harassment apparently are still under review. Questions also arise as to whether, in dealing with the Applicant's situation, UNDP took into account proper considerations and disregarded improper ones. All these disputed issues cannot be resolved on the papers. In light of all these concerns, the Tribunal finds that the Applicant has presented a fairly arguable case that the contested decision is *prima facie* unlawful.

55. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

Irreparable damage

56. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013)). As the Tribunal stated in *Kananura* UNDT/2011/176,

> Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money. The Tribunal finds that the requirement of irreparable damage is satisfied.

57. The Applicant has been with the Organization for 34 years, is four years away from retirement, and is the sole bread-winner for her family. The Tribunal finds that the reasons articulated in *Kananura* are applicable to the present case. The Tribunal further notes that the finding of irreparable damage is further exacerbated by the Applicant's medical issues referred to in her papers, which, in all likelihood, would be negatively affected in the event of separation and the resultant loss of medical insurance.

58. The Respondent concedes that the implementation of the contested decision would result in irreparable harm. The Tribunal finds that the requirement of irreparable harm is satisfied.

Appropriate interim relief

59. The Applicant's relief claims are summarized at the beginning of the present Order. Having considered appropriate relief to be ordered in the circumstances of this case, and noting that during the search period the Applicant is "considered an active staff member", as stated in UNDP's letter of 23 January 2013, the Tribunal finds it appropriate to order suspension of the decision to end the Applicant's search

period and to separate her from service, which suspension shall apply from the date of this Order and for a period of 60 calendar days or pending a final determination of the substantive application on the merits, if sooner, or until such further Order as may be deemed appropriate by the Tribunal.

Observations

60. The Tribunal is mindful of the impact on both parties of an interim measures order, especially in cases of this type. The present case raises concern with regard to how the Applicant's particular situation was and is being handled by UNDP. It may well be in the interests of both parties to seek informal resolution of this matter and the two related cases. The Tribunal entreats both parties to attempt such resolution, failing which it may be necessary to consider holding an oral hearing on an expedited basis, which would undoubtedly take up significant resources of the Tribunal as well as significant resources of both parties and of witnesses who may be required to appear before the Tribunal for examination.

61. The present Order is without prejudice to the Tribunal's findings, in the event such will be required, on receivability and merits of the substantive application filed on 21 June 2013.

Order

62. The Respondent shall suspend the implementation of the decision to end the Applicant's search period and to separate her from service, which suspension shall apply from the date of this Order for a period of 60 calendar days or pending a final determination of the substantive application on the merits, if sooner, or until such further Order as may be deemed appropriate by the Tribunal.

63. The Tribunal will determine whether the present case is to be considered on an expedited basis following receipt of the Respondent's reply to the application on the merits and any further submissions.

64. The parties are entreated to explore informal resolution of this matter and the two related cases in the interim. They shall file a joint submission by **Tuesday, 13 August 2013**, informing the Tribunal as to whether they wish to attempt informal resolution of the pending matters.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 30th day of July 2013