UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2016/070
Order No.:	275 (NY/2016)
Date:	12 December 2016
Original:	English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

CARUSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR SUSPENSION OF ACTION AND

REQUEST FOR ACCOUNTABILITY REFERRAL UNDER ARTICLE 10(8) OF THE STATUTE

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
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Introduction

1. On 7 December 2016, the Applicant, a Director at the D-2 level of the Director of the Middle East and West Asia Division ("MEWAD") in the Department of Political Affairs ("DPA"), filed an application seeking suspension pending management evaluation of the decision not to renew her appoint beyond 31 December 2016 and a request for accountability referral under art. 10.8 of the Dispute Tribunal's Statute.

2. On the same date, the application was transmitted to the Respondent, instructing him to file a reply by 9 December 2016.

3. On 9 December 2016, the Respondent filed his reply whereby he stated that the decision not to renew the Applicant's contract beyond 31 December 2016 will not be implemented pending the completion of the management evaluation and requests that the application be rejected. The Respondent also requests that the Applicant's request for accountability referral be rejected.

Background

4. In her application for suspension of action, the Applicant described the factual background as follows:

> … On 17 May 2016, the Applicant was provided with an e-performance review for the period 2015/2016. The document was completed by the Applicant's First Reporting Officer ["the FRO"] [name redacted] and Second Reporting Officer ["the SRO", name redacted] [reference to annex omitted].
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> … The Applicant was graded as "partially meeting expectation" despite widespread appreciation for the work from external and internal stakeholders [reference to annex omitted].
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> … On 7 March 2016, [the FRO] informed the Applicant that her contract would not be renewed. [The FRO] explained to the Applicant that he would prepare a three-month [Performance Improvement Plan, "PIP"] after which she would be separated from service.

… The Applicant was subsequently given a PIP for the period June 2016 to November 2016 [reference to annex omitted].

… Whilst the Applicant had not been involved in its creation, the PIP was principally designed to rectify supposed performance shortcomings. This despite the myriad of external and internal stakeholders that had worked with the Applicant and had expressed their support and professionalism in her dealings with them over the last year [footnote omitted].

… The PIP foresaw a number of defined tasks that required action by the Applicant. Such defined tasks were to be accompanied by regular reviews and commentary by [the FRO]. No additional measures were imposed with regard to assisting the Applicant to meet these standards or provide any necessary support. Merely that "reviews" were to take place to assess performance.

… The Applicant attended meetings with [the FRO] on 22 July 2016 and 29 September 2016.

… The Applicant would submit that during the first meeting no substantive discussions took place concerning the progress the Applicant had made or advice on better achieving any of the defined goals as laid out in the PIP. Certainly, no shared minutes of this "review" was given to the Applicant after the meeting. The Applicant was left in the dark as to the real progress being made.

… With respect to the subsequent meeting on 29 September 2016, four months after the PIP had commenced, [the FRO] discussed for the first time in brief the PIP without focusing on specific areas where the Applicant should improve her performance.

… Despite the lack of direct involvement by [the FRO], the Applicant continued to perform her functions. As per the previous year, the Applicant gained the trust and confidence of both her team and internal and external stakeholders [reference to annex omitted].

… On 28 October 2016, the Applicant sought permission to attend meetings in Cairo and Jeddah as part of her responsibilities in MEWAD. This request was sent to the Applicant's FRO and SRO. The request was immediately refused on the basis that it coincided with the Applicant's PIP [reference to annex omitted]. The Applicant concluded that this failure to grant the request further reinforced the perception that the Administration had already predetermined the outcome of her PIP.

… On 3 November 2016 and on 14 November 2016, shortly before the PIP was to be concluded, the Applicant attended meetings with [the FRO] when, for the first time, detailed discussions were had with regard to the PIP. The Applicant at this stage heard from [the FRO] about his disapproval at the way she had been conducting her

work and the implicit intention he had that she would be separated from service.

… On 10 November 2016, the Applicant received a review of performance by e-mail from [the FRO]. The document highlighted areas where improvement had been achieved [reference to annex omitted].

a. [The FRO] commended her meticulous preparation of the MEWAD Staff Retreat but criticised supposed lack of communication within MEWAD;

b. [The FRO] also commented on suggested lack of delegation practised by the Applicant and referred to a complaint raised by an individual, [name redaceted], on issues of coordination;

c. [The FRO] took note and appreciated the work of the Applicant in her efforts to discuss with individual staff members their performance and career developments;

d. [The FRO] also raised matters of communication and issues in relation to duty trips criticising the Applicant for wanting to take a necessary duty trip at the same time as her PIP was supposed to be concluded; and finally

e. [The FRO] acknowledged improvements in timely updates provided to him before high level meetings.

… On 1 December 2016, three weeks after the previous e-mail, the Applicant received a second e-mail from [the FRO]. The e-mail titled "Mid-Point Review, PIP" sought to lambast the Applicant concluding that she had not "demonstrated performance at the level of a D2 in the area of managerial competencies, such as the provision of strategic guidance" [reference to annex omitted].

… This e-mail set out, in contradiction to the FRO's earlier communication, a litany of instances of poor performance. In particular:

a. [The FRO] criticised the same MEWAD retreat;

b. [the FRO] criticised the Applicant for having not been well-briefed in relation to the various Special Political Missions (SPM) that fell under her Division;

c. [THE FRO] raised issues of poor communication. At the same time, [the FRO] criticised the Applicant for daring to question the existence of the PIP; and

d. [The FRO] also raised issues of so-called Planning and Organisation relating specifically to travel requests and the quality of mission reports.

> … No reference was made to any specific work output from the Applicant or her Department which raised issues of poor performance.
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> … On the same day and following on from this e-mail, the Applicant received notification that she would be separated from the United Nations [reference to annex omitted].
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> … On 06 December 2016, the Applicant submitted a Management Evaluation Request challenging the decision regarding her non-renewal [reference to annex omitted].

Applicant's submissions

5. The Applicant's main contentions may be summarized as follows:

On the application for suspension of action on the contested decision

Prima facie unlawfulness

a. It is a well-established principle that unsatisfactory performance constitutes a legitimate basis for the non-renewal of a staff member holding a fixed-term appointment (*Ahmed* 2011/UNAT/153). Indeed, it is recognized jurisprudence that a staff member, whose performance was rated as partially meets, has no legitimate expectancy of renewal of his or her contract (*Kotanjyan* 2015/UNDT/181, *Said* 2015/UNAT/175, *Dzintars* 2011/UNAT/184, *Jennings* 2011/UNAT/184);

b. However, pursuant to sec. 10.4 of ST/AI/2010/5 (Performance Management and Development System), a staff member cannot be separated on account of poor performance unless a PIP has been initiated and completed in a fair and transparent manner;

c. In this case there is no dispute that, in line with sec. 10.1 of ST/AI/2010/5, a time-bound PIP (June 2016 to November 2016) was instituted to address supposed performance shortcomings identified during the performance cycle;

d. The Applicant would submit, however, that any fair evaluation of the process by which a PIP was assessed cannot simply rely on e-mail statements of the FRO. Whilst a Tribunal would not seek to replace the FRO's opinion, it would at the very least assess whether the process of the PIP and its subsequent review was undertaken in a fair and impartial manner. It is on this basis that the Applicant challenges the final decision;

e. It becomes apparent, in reviewing the PIP, specifically its implementation and evaluation, that it contained substantive irregularities that suggest that the entire process was simply intended to produce one outcome, that of separation;

f. The Administration contends that the Applicant underwent a number of meetings/"reviews" with regard to the PIP. Whilst the Applicant readily accepts that she attended two meetings with the FRO on 22 July 2016 and 29 September 2016, the substance of what was discussed does not even merit the term "review". These meetings did not produce criticisms or suggested paths for assistance. They did not lead to any particular actions by the FRO to alleviate any concerns that he may have had. It would appear that the meetings were simply part of a tick box exercise and certainly was not a substantive path to assisting the Applicant in achieving any of the suggested performance indicators that had been set as targets by the Applicant's FRO and SRO;

g. Simple reliance on the fact that the meetings took place does not suggest that they were constructive or indeed relevant to the PIP at all. In fact, the Applicant would contend that these meetings were disjointed and not directed at the PIP. The absence of shared minutes of the meetings, for example, speak volumes as to the manner in which such an important and necessary "review" was haphazardly conducted.

h. Ultimately, the evidence upon which the Administration relies on is based on the assessment of the Applicant's FRO. This assessment is contained

in two emails dated 10 November 2016 and 1 December 2016. Had such substantive performance issues apparent, these two email communications would be consistent and contain substantive damning evidence to highlight the Applicant's poor performance. However, a review of these two emails does not in itself suggest such poor performance that would indicate that separation was the only outcome. Rather it reveals substantive contradictions and inconsistencies, including:

i. On 10 November 2016, the FRO's review refers to the Applicant's failure to delegate her responsibilities. However, in the final review on 1 December 2016, no mention is made with respect to such allegations regarding the lack of delegation;

ii. In the final review dated 1 December 2016, the FRO raised his concern that the Applicant has failed to keep herself well-briefed across relations with all Special Political Missions in the Division. As MEDAW Director, this is perhaps the most serious accusation as it alleges her failure to perform a fundamental part of the Division's work. However, this was the first occasion on which the Applicant's FRO had raised this critical concern. No mention of this issue is on record following the 10 November 2016 review, only three weeks earlier; and

iii. The FRO noted in the 10 November 2016 review that MEWAD should continue to increase the number and quality of its mission reports. However, on 1 December 2016, three weeks later, the FRO, whilst noting the improvements, went on to state that they had been inconsistent requiring his guidance and feedback. No specificities were given as to which reports and the numbers that would necessitate such a dramatic decrease in the quality of reports in such a short three-week period.

iv. In the 10 November 2016 review, the FRO commended the Applicant on her very useful, active engagement in the meticulous preparation of the MEWAD staff retreat. However, on 1 December 2016, the Applicant's FRO devalues her involvement in this same retreat and alludes to the notion that the retreat was prepared solely by another individual/entity and that the Applicant merely participated;

v. In addition, the FRO comments on the lack of strategic direction given by the Applicant. A review of the MEWAD staff retreat assessment report prepared by an external facilitator makes no reference to such a fundamental flaw. In fact, the report praises, under the heading of "Facilitator's Observations and Recommendations", the way staff within MEWAD are able to adapt and manage their contribution despite the challenges of the country portfolios which are of a more heated political nature to those of other divisions;

vi. In the 10 November 2016 review, the FRO asked the Applicant to pay attention to the United Nations Regional Centre for Preventative Diplomacy for Central Asia ("UNRCCA"). In the 1 December 2016 review, the FRO indicates that the Applicant fulfilled this activity. However, he then subsequently chastises this activity as an example of her failure to stay abreast of all Special Political Missions in the Division;

vii. The FRO noted in the 10 November 2016 review that the Applicant needed to better communicate MEWAD's goals and strategies to the Department through meetings with the Assistant Secretary-Generals, Under-Secretary-Generals, and Department Directors. On 1 December 2016, the FRO reiterates this requirement but does not indicate the Applicant's

> performance in this regard. Rather, the FRO switches to his obvious disapproval of the Applicant's questioning of the PIP;

i. The only issue that appears consistent in both emails is the manner in which duty trips are booked. The Applicant would submit that this cannot be evidence of poor performance. It certainly would not merit separation as in the case here. Indeed very little reference is even made to the PIP document and the objectives to be obtained in the e-mail dated 1 December;

j. At the same time, reference is made to the substantial and overriding support that the Applicant has received from both internal and external stakeholders regarding the high level of her performance during the currency of the PIP. It is therefore quite surprising that the two supervisors fail to realize such high levels of professionalism, which is apparent to the Applicant's department and external and internal stakeholders. Instead, emphasis appears to be placed on duty trips and the process by which they are booked. Such action does not merit termination;

k. The PIP should not be viewed simply as a vehicle by which the Administration can lawfully separate a staff member. It is a method by which efforts are made to improve performance and assist staff members in achieving his/her goals. Once the Administration had imposed a PIP, it was bound to fully comply with applicable procedures (*Kucherov* 2015/UNDT/106, *Eldam* 2010/UNDT/133). In this instance, the PIP was warped into achieving one outcome, that of separation;

l. In this case the Applicant would submit that the FRO flouted the provisions of the PIP so as to deprive the Applicant from a meaningful opportunity to successfully complete the requirements set for evaluation;

m. In doing so, the FRO abused his position as an evaluator and undermined the purpose of ST/AI/2010/5 to the detriment of the Applicant.

The FRO actions cannot be interpreted as intending to improve performance but rather a reflection of a desire to rid himself of the Applicant;

Urgency

n. The Applicant received the notice of non-renewal on 1 December 2016. Currently, the Applicant's separation from service will take effect on 31 December 2016, just over 3 weeks away;

Irreparable damage

o. The Dispute Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage (*Corcoran* UNDT/2009/071 and *Calvani* UNDT/2009/092). The Dispute Tribunal also found that separation from service will occasion irreparable harm in that the staff member will lose the prospect of applying for positions within the UN as an internal candidate (see *Igunda* UNDT/2011/143);

p. In *Rasul* Order No. 23 (NBI/2010), the Dispute Tribunal held that a non-renewal or failure to extend an appointment will result in damage to career prospects and aspirations, which are not matters that can be compensated for by a monetary reward;

q. In the instant case, if the impugned decision is implemented, the Applicant will be left without a position in the United Nations, which will render her ineligible to apply for other United Nations positions as an internal candidate. Moreover, the sudden separation will result in a loss of her personal integrity and economy, her reputation and her career prospects, which cannot be compensated for by a monetary award. In addition, implementation of the impugned decision will result in a break-in-service, which will disrupt the Applicant's continuous service for the purposes of her eligibility for a permanent/continuing appointment and entitlements such as home leave, which cannot be compensated for by a monetary award.

On the request for an order for accountability referral pursuant to art. 8 of the Dispute Tribunal's Statute

r. The Tribunal retains authority to consider accountability measures against the FROand, pursuant to *Ware* Order No. 231 (NBI/2015), there is no rule preventing the Dispute Tribunal from issuing such an order of accountability under 10.8 of its Statute in the context of an application for suspension of action pending management evaluation;

s. The FRO flouted the provisions of the PIP so as to deprive the Applicant from a meaningful opportunity to successfully complete the requirements set for evaluation. In doing so, the FRO abused his position as an evaluator and undermined the purpose of ST/AI/2010/5 to the detriment of the Applicant. The FRO's actions cannot be interpreted as intending to improve performance but rather a reflection of a desire to rid himself of the Applicant. Such activity must not be tolerated within the United Nations.

Respondent's submissions

6. The Respondent's contentions may be summarized as follows:

a. On 8 December 2016, DPA informed the Applicant that it would not implement the contested decision pending the completion of management evaluation. Since the Applicant has been provided with the relief she sought, there is no matter before the Dispute Tribunal requiring its adjudication. By an email dated 8 December 2016, the DPA Executive Office advised the Applicant that DPA "will extend [her] fixed-term appointment through 7 January 2017, in order to allow for the completion of the Management Evaluation Unit's response";

b. The Applicant's request for an "Order for Accountability", is without merit. First, it is inconsistent with the nature and purpose of injunctive relief under Article 2.2 of the Statue of the Dispute Tribunal. In *Kinglow* Order No. 155 (NY/2016), para. 15 and *Wilson* Order No. 258 (NY/2016), para. 24, the

Dispute Tribunal held that its jurisdiction under art. 2.2 of its Statute is limited to providing an applicant temporary relief by maintaining the status quo between the parties to an application pending a management evaluation. Second, the Applicant establishes no legal or factual basis for the request. Her allegations amount to subjective views of the management of her performance, which are not supported by evidence. They cannot serve as a basis for such an order. Although the Applicant relies on the case of Ware, she fails to note that the Dispute Tribunal stated in that case "that it is not appropriate for parties to make motions for referral [*UNDT/NBI/2015/069,* para. 61.]".

Consideration

The mandatory and cumulative conditions for suspending an administrative decision

7. Article 2.2 of the Dispute Tribunal's Statute states:

> The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

8. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "… [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required;

9. Article 13.1 of the Tribunal's Rules of Procedure states:

> The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision

appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

10. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

a. The application concerns an administrative decision that may properly be suspended by the Tribunal;

b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;

c. The contested decision has not yet been implemented;

d. The impugned administrative decision appears *prima facie* to be unlawful;

e. Its implementation would cause irreparable damage; and

f. The case is of particular urgency.

Whether the application concerns an administrative decision that may properly be suspended by the Tribunal

11. As the Dispute Tribunal stated in *Wilkinson et al.* UNDT/2009/089 (not appealed) and *Ishak* UNDT/2010/085 (affirmed in *Ishak* 2011-UNAT-152), in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision taken by the Administration in a precise individual case and which produces direct legal consequences to the legal order, including the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision.

12. The Tribunal notes that, in the present case, it is uncontested that the administrative decision not to renew the Applicant's contract beyond its expiration on 31 December 2016 is an administrative decision which may be properly suspended by the Tribunal and the first condition is fulfilled.

Ongoing management evaluation

13. An application under art.2.2 of the Dispute Tribunal's Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that she filed a request for management evaluation on 6 December 2016 and this aspect is not contested by the Respondent. Accordingly, the Tribunal notes that the request for management evaluation was initiated within 60 days from the date of notification of the impugned decision on 1 December 2016 and that there is no evidence on the record that the management evaluation was completed. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending and that the second condition is fulfilled.

Implementation of the contested decision and irreparable harm

14. The email sent to the Applicant on 8 December 2016 informed her that DPA had agreed to not implement the decision not to extend her contract pending completion of management evaluation and that "her fixed-term appointment will be extended through 7 January 2017 in order to allow for the completion of the Management Evaluation Unit's response". The Tribunal notes that DPA agreed to suspend implementation on the contested administrative decision pending management evaluation and decided not to implement it "pending completion of management evaluation".

15. Consequently, since the implementation of the decision not to renew the Applicant's contract has already been suspended during the pendency of the management evaluation by DPA and her contract extended until 7 January 2016, as confirmed by the Respondent on 9 December 2016, the Applicant's contractual rights are preserved pending management evaluation. An order of suspension of actions by the Tribunal in this regard is therefore no longer relevant.

16. Furthermore, this also means that there is no risk for this decision to create irreparable harm during this period and the condition of irreparable harm is not fulfilled.

17. Since one of the cumulative conditions is not fulfilled there is no need for the Tribunal to further analyze the remaining ones, notably *prima facie* unlawfulness and urgency, and the application for suspension of action is to be rejected.

Request for an order on accountability referral pursuant to art. 10.8 of the Statute

18. Article 10 of the Dispute Tribunal's Statute provides as follows:

> *(Amended by resolution 69/203)*
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> 1. The Dispute Tribunal may suspend proceedings in a case at the request of the parties for a time to be specified by it in writing.
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> 2. At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.
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> 3. At any time during the deliberations, the Dispute Tribunal may propose to refer the case to mediation. With the consent of the parties, it shall suspend the proceedings for a time to be specified by it. If a mediation agreement is not reached within this period of time, the Dispute Tribunal shall continue with its proceedings unless the parties request otherwise.
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> 4. Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.
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> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:

> *(a)* Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
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> *(b)* Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.
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> 6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.
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> 7. The Dispute Tribunal shall not award exemplary or punitive damages.
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> 8. The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.
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> 9. Cases before the Dispute Tribunal shall normally be considered by a single judge. However, the President of the United Nations Appeals Tribunal may, within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case. Cases referred to a panel of three judges shall be decided by a majority vote.

19. The present Tribunal considers that paras. 1 through 4 of art. 10 of the Statute are related to temporary measures, including an order for suspension of action, while paras. 5 through 9 of art. 10 of the Statute are related to measures that can be ordered as part of a judgment: the rescission of the contested decision (art. 10(5)(a)), compensation for harm supported by evidence (art. 10(5)(b)), costs against a party that abused the proceedings before it (art. 10(6)), and referral for appropriate cases to the Secretary General of the United Nations or the executive boards of separately

administered UN funds and programmes for possible action to enforce accountability (art. 10(8)).

20. It results that a referral for accountability, if any, is not part of the temporary measures which can be requested on an urgent basis prior to an application on the merits being filed. The Tribunal has the discretion to order such a measure only as part of a judgment issued on an application (appeal) on the merits of a case filed before it based on the substantive evidence presented by the parties, and not in the context of an application for suspension of action in which temporary relief pending the Secretary-General's review of the contested decision is sought. An application for suspension of action can be filed only prior to an application on the merits and the only relief that can be requested is suspension of the implementation of the contested decision under review by management. Therefore, the Applicant's request, in this sense, is to be rejected.

Conclusion

21. In the view of the foregoing, the Tribunal hereby ORDERS,

The application for suspension of action and the Applicant's request for an order for referral for accountability are rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 12th day of December 2016