**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**
Daniel Trup, OSLA

**Counsel for the Respondent:**
UN-Habitat

**The Application and Procedural History**

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

2.

critical role of the Management and Operations Division, the management and operations functions would be transferred to the United Nations Office at

working relation with the Department of Management. It was decided that the UNON/DOA would be tasked with supporting the Executive Director with the design and implementation of immediate austerity measures whereas the Applicant was to be reassigned to another role within the organization, commensurate with his skills, qualifications and professional experience.[4] A memorandum from the Under-Secretary-General for Management, dated 26 June

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

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

19.

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

22.

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

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

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

f. The absence of thought and suggestion of a rushed determination driven by ulterior motive can further be demonstrated by the communication to him on 30 June 2018 that he was to be assigned to Geneva, on 2 July 2018 by the withdrawal of that decision and a statement that he was to be deployed to New Delhi, to a nonexistent role and budget. This suggestion was withdrawn formally on 6 July, with a promise to make a new proposal early in the following week. The Administration onlgest2ther7(omi)-3()6(eo )-(9≈u)-10(m0( )-649)-209(to)-11( )] TJETBT19n make lsuggestv92

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

34.

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

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

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

b.
reassignment;

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

d. The Respondent has since the decision put in place several measures which if reversed or suspended would adversely affect the organizations operations. These include the establishment of a team comprised of both UN-Habitat and UNON staff members to implement the relevant m

f. There was no requirement for the Respondent to issue a new letter of appointment and personnel action since this was not a new appointment. There was no opportunity to issue a letter to the Applicant calling upon

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

42.

resented with the duly approved and signed

assigned to his new post.

43.

quickly without prior planning is incorrect and unsupported by the evidence. The decision was made in close consultations with the respective stakeholders.

44.

such a radical decision, the Applicant knew about the discussions with the Department of Management regarding the precarious financial situation and the much-needed reforms. There was no need for his consent. With specific reference to his reassignment, the evidence shows that he was duly informed and consulted about his new role and responsibilities.

45.

given an explanation for his sudden removal and that the Executive Director informed him that the reasons for reassignment related to the closure of the Habitat III Conference and the necessary related audit is incorrect and is not

restructuring of the organization. It was therefore imperative in the Executive hat the Applicant be reassigned and it was in the best

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

*Irreparable harm*

52. reassignment to a temporarily funded position will unduly damage his career and standing within the United Nations is

performance but purely on grounds of organizational necessity. This was emphasized to him during his meeting with the Executive Director and the Deputy Executive Director.

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

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

55.
is based on his erroneous assumption that he was assigned to a temporary post despite the fact that this was repeatedly clarified to him during his meetings with the respective officials.

*Urgency*

56. There is no urgency to justify the grant of an art. 14 suspension of action. On this score the Respondent reiterates his arguments that there is nothing on the part of the Administration to implement as all the necessary steps for the

for the Applicant to agree to the reassignment and take up his assigned duties.

57. regarding his

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

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

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

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

or which are materially reversible without prejudicing the positions

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

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

69. This interpretation, in turn, has been rejected by jurisprudence which accepted widely that in non-selection and non-promotion disputes

impugned decision, but, due to the contractual nature of the relation that they purpose to create, require also that an offer of appointment be accepted by the successful candidate.[21]

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

even retroactive effect may not act in such way as to *a limine* bar a request for suspension of action. In a termination of appointment or contract, suspending the legal effect of a decision must be possible notwithstanding the unilaterally determined date of separation. It further observed that the notion of

consideration of the facts of the case including emergence of decisions and actions which are legally enabled by the impugned decision and which would have the

suspension could be the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs, obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, *e.g.*, not acting during the appropriate notice period, and then tries to retract. In any

decision, or, for that matter, from the Respondent having processed the relevant data in *Umoja.*

73. This Tribunal considers that the same reasoning remains valid for the question of the implementation of a decision on reassignment , *i.e.*, a decision does not become implemented simply because the Administration notifies it; it is necessary to look into particular facts which are legally relevant consequences of the impugned decision. The Tribunal notes that while the Respondent does not cite the above-mentioned Orders, it nevertheless avers along their line of argumen

bar is the attendant investiture in the new function or position. In this respect, Mr. Cox relies upon that fact that at no stage was he issued with a decision transferring him to the new post, no revised letter of appointment was issued, no personnel action was sent to him

arguments advanced it appears that, if not rebutted, the claim will stand proven on the examination of the application. As the interim measure under art. 10.2 of the

82. Rationalization of the impugned decision rests at the crux of the matter

and assurances of good faith without, however, a showing of the particular premises on which the impugned decision was based and in not responding in a matter-of-

of the Respondent that reveals that the transfer of the responsibilities of the Applicant to UNON has been required at the United Nation Headquarters level in rejection of the request by the Executive Director for a bridge funding for UN-Habitat. It further sets out the necessity of the audit of the entire UN-Habitat and not just its specific Conference III. Finally, it sets out the mark of 1 January 2019 for balancing the finances of UN-Habitat in the implementation of austerity measures. It thus becomes apparent to the Tribunal that, in the face of audit and austerity measures which implies staff reduction/reassignment it is more appropriate to have UNON temporarily perform the functions of operation and management for UN-Habitat, which brings to the table the necessary experience

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



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