



11. The Applicant stresses that if the impugned decision is left to stand, the workplans for ESCWA staff members, including himself, will be incorrectly established *ex post facto*. By accepting the decision, the Applicant would *de facto* cover up for non-compliance with the United Nations performance management

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implementation. Portraying the application as limited to the fact of sending an email and holding a meeting, is misrepresentation.

24. Regarding the Respondent's claim that the decision would have been already implemented because the online meeting committed to it had already taken place on 3 February 2021, the Tribunal recalls that, generally, attaching the notion of "implementation" to the moment of a mere notification would *de facto* disable the

norms and filling gaps, if any, but not contradicting either the express provision of the superior act, or its overall spirit. The Tribunal fails to see how the creation of a retroactive, i.e., fictitious workplans for numerous staff members and evaluating them accordingly, might fall under a notion of legitimate “complementary” rule-making.

27. On the other hand, the Respondent invokes administrative discretion. Recalling that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”, and therefore, the Tribunal “will not interfere with a genuine organizational restructuring[...]¹², the Tribunal also recalls that the second prong of the same jurisprudence, which affirms that, administrative discretion notwithstanding, “the administration has the duty to act fairly, justly and transparently in dealing with its staff members”.¹³ On the same note, the general standard of review of discretionary decisions is expressed by the Appeals Tribunal as follows:

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.¹⁴

28. This Tribunal considers that performance management, which bases evaluation of personnel on an entirely *ex post facto* “planning” and reporting lines, is unfair to staff and is absurd in its timing. The impugned decision is thus *prima facie* unlawful.

29. On the prong of urgency, the Tribunal agrees that the time left for the completion of the performance management cycle compared with the time for management evaluation renders the present case urgent. The insertion of data in the *Inspira* platform does not yet constitute implementation of the decision, still, it is

¹² Hersh2014-UNAT-433-Corr.1 paras. 16-17 and references cited therein.

¹³ *Ibid.*

¹⁴ Sanwidi2010-UNAT-084 para. 40.

difficult to reverse and will cause confusion and obfuscation of the system even if the impugned decision were to be ultimately altered by the management evaluation.

30. On the prong of irreparable damage, considering the number of staff put under the Applicant's supervision and also evaluation of his own performance, any further passage of time may disable the remedial action. The Applicant also makes a legitimate point regarding his reputation being at risk through participation in the exercise.

ORDER

31. The application is granted, and the impugned decision is suspended pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 8th day of February 2021

Entered in the Register on this 8th day of February 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi