



**Before:** Judge Goolam Meeran

**Registry:** Geneva

**Registrar:** René M. Vargas M.

EL-AWAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Marisa MacLennan, OSLA

**Counsel for Respondent:**

Saidou N'Dow, UN-Habitat

## **Introduction**

1. By application filed on 24 February 2017 with the New York Registry and rerouted to the Geneva Registry, the Applicant, a Senior Coordination Officer (P-5) of the United Nations Human Settlements Programme (“UN-Habitat”), requests suspension of action pending management evaluation of the decisions by UN-Habitat “to 1) withdraw his delegation of authority and 2) remove the majority of his functions”.

## **Facts**

2. The Applicant joined the Global Water Operators Partnerships Alliance (“GWOPA”), an alliance of partners promoting the Water Operators Partnership established by UN-Habitat, in 2008, as a Programme Manager. It would appear that since then, he has been the head of the GWOPA Secretariat in Barcelona.

3. By a memorandum dated 16 February 2017, Dr Joan Clos, Under-Secretary-General and Executive Director, UN-Habitat, informed the Applicant as follows:

[T]he Delegation of Authority to sign UN-Habitat Agreements and Legal Instruments, the Delegation of Procurement Authority and the Delegation of Authority to Recruit Consultants and Individual Contractors granted to you through my memoranda dated 16 December 2014 are hereby temporarily withdrawn with immediate effect, pending further notice.

4. By a second memorandum that day, Mr. Rafael Tuts, the Director, Programme Division, UN-Habitat, informed the Applicant that UN-Habitat had decided to “conduct a management review of GWOPA”. Consequently, he instructed the Applicant as follows:

You are instructed to desist from entering into any financial commitments for GWOPA without my explicit approval. Disbursements against current commitments and obligations must be cleared through the Director, Management and Operations. You may not initiate any new procurements, hire of consultants, or travel without my authorization, until further notice.

Until explicitly authorized by me, you are instructed not to engage with member states, UN agencies, the Steering Committee and the wider membership of GWOPA, media, other governments, or other partners on any topic, and if asked, simply inform inquiring parties that a management review has started with a view to strengthening GWOPA, and that you are awaiting further instructions from me or the Executive Director.

5. These memoranda followed discussions initiated in September 2016 whereby UN-Habitat senior managers informed the Applicant that GWOPA's hosting agreement with the Spanish Government may not be extended beyond its expiry in 2017, that part of the funding earmarked for the 2017 budget of GWOPA's Secretariat Office in Barcelona may be reallocated to UN-Habitat's core funding, and that GWOPA would transition to "a new business model".

6. From 12 January 2017, the Applicant expressed his reservations with the developments concerning the financial status of GWOPA. By letter of 2 February 2017, the Steering Committee of GWOPA also requested the support of the Executive Director, UN-Habitat, for GWOPA's institutional transition from UN-Habitat to another UN entity.

7. On 24 February 2017, the Applicant requested management evaluation of the decisions contained in the two memoranda referenced in paras. 3 and 4 above.

### **Parties' contentions**

8. The Applicant's primary contentions may be summarized as follows:

#### *Receivability*

a. The decisions being challenged "strip him of all his meaningful functions", have ongoing legal effects and, as such, may be suspended pending management evaluation;

b. The contested decisions have direct legal consequences for the Applicant and, as such, are reviewable;

*Prima facie unlawfulness*

- c. The Organisation failed to provide any meaningful or legitimate reason for the contested decisions. The suggestion in the second memorandum that the management review that was being undertaken necessarily requires the immediate removal of the Applicant's core functions is not, without more, a legitimate basis for taking a decision which appears to be a punitive measure and a cover for retaliation against the Applicant;
- d. The Applicant has been unlawfully deprived of any meaningful work;
- e. The contested decisions are the result of retaliation against the Applicant for expressing disagreement with attempted budget cuts and programme alterations;

*Urgency*

- f. The indefinite removal of the Applicant's core functions creates a legitimate fear that unless the impugned decisions are rescinded, his future performance evaluations will be adversely affected and, consequently, his prospects of continued employment within the Organisation will be adversely affected;

*Irreparable damage*

- g. The continued implementation of the contested decisions would compromise the Applicant's ability to work and puts at risk his job security, his career prospect and reputation.

**Consideration**

9. Pursuant to art. 2.2 of the Tribunal's Statute and art. 13.1 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of a management evaluation where the decision appears prima facie to be unlawful, in case of particular urgency, and where its

implementation would cause irreparable damage to the concerned staff member. It is clear that all three conditions have to be satisfied before an application for suspension of action is granted. Alternatively, if the Applicant fails to satisfy one of the conditions, the Tribunal is unable to grant the urgent temporary relief that is being requested.

### *Receivability*

10. As this Tribunal consistently held, an application for suspension of action may only be granted if the contested decision has not yet been implemented (see, e.g., *Applicant* Order No. 167 (NBI/2014); *Elkeiy* Order No. 43 (GVA/2015); *Kawas* Order No. 297 (NY/2014)). However, when a decision produces continuous legal effects, it can only be deemed to be implemented in its entirety when these effects cease (see, e.g., *Calvani* UNDT/2009/092; *Kompass* Order No. 99 (GVA/2015)).

11. In this case, the contested decisions remove what appear to be core functions from the Applicant's duties and responsibilities for an indefinite period. As such, they produce continuous legal effects for the Applicant. The application for suspension of action is receivable.

### *Prima facie unlawfulness*

12. It is clear from the plain words of art. 2.2 of the Tribunal's Statute and art. 13 of its Rules of Procedure, that the Tribunal is not required to make a conclusive finding that the contested decisions were taken in violation of the applicable rules or procedures, or otherwise in breach of the staff member's contractual rights. In deciding on an application for suspension of action, the threshold is much lower and the Tribunal shall only determine if the decision appears prima facie to be unlawful. Whether it is in fact unlawful can only be considered and determined at a proper examination of the documentary and oral evidence following the filing of a substantive application. Though attempts have been made to define the meaning of the phrase "appears prima facie to be

unlawful”, this Tribunal declines to enter that debate since the concept of a prima facie case is well known and it is unhelpful to attempt to define it.

13. Moreover, under the scheme of internal justice, which places an emphasis on dispute resolution, the stage of management evaluation affords the Administration the opportunity to review and reconsider the decision and, in doing so, it may well be of assistance to the Administration to consider whether the Tribunal has expressed an opinion, not a decision, as to the possible legality of the impugned decision.

14. At this stage, the Tribunal will decide on the application for suspension of action on the basis of the material presented by the Applicant. Whilst the Tribunal is required to transmit the application to the Respondent pursuant to art. 13.2 of its Rules of Procedure, it is not required to request a response or to seek any additional information, particulars or argument. The application for suspension of action stands or falls on the basis of the application itself and the documents attached to it.

15. Based on the information contained in the application and the attached documents, the Tribunal finds that the contested decisions appear to be prima facie unlawful.

16. Whilst the Tribunal has not been fully appraised at this preliminary stage of the full breath of the Applicant’s functions, notably by being provided his job description, it appears that important leadership and managerial responsibilities have been taken away from the Applicant through the memoranda dated 16 February 2017. Significantly, the Applicant is no longer entitled to communicate with any internal or external stakeholder, including GWOPA Steering Committee. This appears prima facia to have a significant impact on the Applicant’s work, as the GWOPA Steering Committee provides “the overall strategic direction of GWOPA” and shall work in close collaboration with the GWOPA Secretariat, which is headed by the Applicant. Furthermore, the Applicant is no longer entitled to enter into any commitment that has a financial implication, including in the field of procurement, travel and human resources,

without the explicit authorisation of the Director, Programme Division, UN-Habitat, nor to sign any agreement or legal instrument on behalf of UN-Habitat.

17. The Tribunal is not aware of the remaining functions that the Applicant may still be able to exercise besides continuing his supervisory role of the few staff members of the GWOPA Secretariat. However, it finds the evidence sufficient at this stage to conclude that important functions attached to the Applicant's role as Programme Manager of GWOPA have been removed from his portfolio and that his authority has been significantly curtailed, for an indefinite period.

18. It appears from the documents submitted by the Applicant that no explicit reasons were given to him to remove the above-mentioned functions besides the fact that GWOPA was undergoing a restructuring process. It is unclear why a forthcoming restructuring of GWOPA would require a formal removal of core functions from the head of its Secretariat. This may be a matter for further examination should the Applicant file a substantive claim on the merits.

19. The sequence of events displayed by the documents may tend to suggest that the contested decisions were motivated not by the impact of the restructuring process on the operational needs of GWOPA, but rather as a reprisal for the Applicant's expressed disagreement with the budget cut for GWOPA, and/or the request from the Steering Committee to move away from UN-Habitat, or to avoid the risk that the Applicant may jeopardize the restructuring process by his dissenting attitude.

20. According to the documents on file, the Applicant wrote to the Executive Director, UN-Habitat, on 12 January 2017, to raise his concerns about the "abrupt reduction" of GWOPA Secretariat budget for 2017, suggesting that "this drastic and abrupt decision could be interpreted as an intentional move by UN-Habitat to close down GWOPA". The Steering Committee also wrote to the Executive Director, UN-Habitat, on 2 February 2017, to request "the support of UN-Habitat in a smooth transition of the Global WOPs Alliance to another UN entity".

21. At this stage, it would appear that the sudden unilateral withdrawal of core functions and authority from a senior staff member without proper justification does not appear to be a lawful exercise of managerial discretion. As the Tribunal previously held in *Applicant* UNDT/2011/187, the Applicant not only has a duty to perform his work, but this is also a right. The withdrawal of the Applicant's core functions, without a legitimate reason, may constitute a breach of his contract of employment. That having been said, the Tribunal is merely expressing a view on the available material. If and/or when the matter is fully examined and the Respondent is accorded the right to be heard, the Tribunal could then make the appropriate findings of fact and law.

*Urgency*

22. The test of particular urgency is satisfied given the fact that with every day that passes, the position of the Applicant as the Programme Manager for GWOPA becomes increasingly untenable, and also carries with it the serious risk of reputational damage as more amply discussed below.

*Irreparable damage*

23. It would appear that the sudden and apparently inexplicable withdrawal of delegated authority to sign agreements and legal instruments on behalf of UN-Habitat, and preventing the Applicant from engaging with a wide range of stakeholders are of such a fundamental nature that they not only deprive him from carrying out his duties but impinge directly on the Applicant's standing amongst those individuals and entities with whom he has been interacting professionally, leaving ample room for speculation as to the reason why he has suddenly been deprived of significant duties and responsibilities. This open-ended situation risks undermining the Applicant's professional relationship with the various stakeholders involved with GWOPA as well as his reputation. Such damage cannot be compensated by money. The Tribunal finds that this condition is satisfied.



**Conclusion**

24. The Tribunal is satisfied that the contested decisions are prima facie unlawful and that there is a particular urgency in this case to avoid irreparable damage to the Applicant.

25. It is ORDERED that:

- a. The application for suspension of action is granted; and
- b. The decisions to withdraw the Applicant's delegation of authority as well as the decision to withdraw the functions stipulated in the memorandum of 16 February 2017 from the Director, Programme Division, UN-Habitat be suspended pending the outcome of management evaluation.

*(Signed)*

Judge Goolam Meeran

Dated this 28<sup>th</sup> day of February 2017

Entered in the Register on this 28<sup>th</sup> day of February 2017

*(Signed)*

René M. Vargas M., Registrar, Geneva