



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

GIZAW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Faiza Zouakri, UNDP

Note: For administrative purposes, this order has been given a new number. The order was previously identified with No. 114 (NY/2017). The date and the content of the order remain identical.

Introduction

1. On 10 October 2016, the Applicant, (Amsale Gizaw also referred to as Amsale Admassu), a staff member appointed at the P-3, step 11 level, as a “Change Release and Testing Specialist” with the United Nations Development Programme (“UNDP”), filed an application contesting, “the refusal to address and rectify the inconsistencies and duplication in the job descriptions and duties of Change Release and Testing Specialist [her post] and Quality Assurance Specialist”. As a remedy, the Applicant requests that the contested decision be rescinded and that the Tribunal:

[...] order the elaboration of proper job descriptions reflective of the division of labor presently in effect and to award [the Applicant] compensation for material and moral damages in the amount of two years’ net base pay for the resulting damages to the Applicant’s professional career and reputation, loss of opportunity for proper recognition of her role and for the stress and anxiety resulting from the hostile working environment that has been created.

2. On 5 June 2017, the Applicant filed a motion for interim measures pursuant to art. 10.2 of the Dispute Tribunal’s Statute and art. 14 of its Rules of Procedure, requesting:

[...] the Tribunal to suspend action on the proposal to exclude her name as the official responsible for Project Quality Assurance from the recent Project Initiation Document [“PID”] and subsequent PIDs, by removing attribution for her contribution and the organization’s established project management methodology in accordance with the established PRINCE 2 methodology. Her supervisor, [...] took this measure on the grounds that 1) the Applicant had filed a case with the Tribunal, and 2) to avoid duplication and confusion of tasks. It is thus directly tied to her pending application and prejudices the outcome.

3. The Applicant indicates the contested decision at issue is the “[r]ejection of the Applicant’s request for proper recognition of her project quality assurance responsibilities in present and future [PIDs] contrary to the Organization’s project

management standard [apparently the so-called “Projects IN Controlled Environments” standard, which is also commonly referred to as, “PRINCE 2” or “PRINCE II”]. This decision was communicated to the Applicant by email dated 24 May 2017 and made by her supervisor, Mr. B.F., the Chief of Portfolio Management Office (“PMO”), Office of Information Management Technology (“OIMT”), located in the Bureau of Management Services (“BMS”).

4. On 6 June 2017, the Registry transmitted the motion for interim measures to the Respondent, instructing him to file a response to the motion by 5:00 p.m. on 8 June 2017.

5. On 8 June 2017, the Respondent filed his response arguing that the motion is not receivable on the grounds that the decision is not, *inter alia*, the subject of substantive proceedings before the Tribunal. Furthermore, should the Tribunal find the motion receivable, it is without merit as the Applicant failed to meet all of the conditions required by art. 10.2 of the Dispute Tribunal’s Statute.

Background

6. The following background summary is based on the Applicant’s motion for interim measures and the accompanying annexes (approximately 90 pages).

7. The Respondent has indicated in his reply that he “denies all facts and claims presented by the Applicant in her motion”.

8. The Applicant joined the UNDP on 1 July 1987 and has been performing the functions of Change Release and Testing Specialist (product and process quality assurance) since 1 June 2008.

9. In 2014, the Quality Assurance Specialist position was created and filled.

10. The Applicant explains that the Information Management function that handles product and process quality assurance has two different titles in the Project

Management Plan (“PMP”) and PRINCE 2 project management principles. PMP calls it “Change, Release and Testing Specialist” similar to the Applicant’s title, whereas PRINCE 2 calls it “Quality Assurance” similar to the Quality Assurance Specialist title.

11. The Applicant sets forth in this motion, and in her application of 10 October 2016, that the functions of her position and that of the Quality Assurance Specialist are one and the same with the same job descriptions. In the instant motion, she states that “the refusal to address and rectify this anomaly is the subject of the Applicant’s Case No. UNDT/2016/050, filed on 10 October 2016. The Applicant has continued to carry out her quality assurance functions since filing the application”.

12. The Applicant further states in her motion that:

... for the past eight years, the OIMT change management electronic process (i.e. Phire and Change Management Portal) reflected the fact that [she] is responsible for product and process quality assurance for all OIMT project” The OAI and BOA [unknown abbreviations] auditors in regularly reviewing these processes consistently interviewed the Applicant on the quality assurance processes.

13. The Applicant has further explained in her motion that she has been listed on the project resource list under Project Quality Assurance according to Prince 2 methodology on prior similar projects such as “Compensation Package, PMD [unknown abbreviation], Pension Interface, and LMS projects”.

14. On 15 May 2017, during the Quality Assurance initiation process for the Environmental Reporting Toll project, Ms. A.F., the Environmental Reporting Tool Manager, reviewed the PID. The Applicant’s name was added to the project resource list under the Project Quality Assurance role. The Applicant annexed to her motion the PID reflecting her name therein.

15. During 16 to 22 May 2017, while the project manager, Ms. A.F., was preparing to circulate the PID to the Project Board, the Applicant's supervisor, Mr. B.F., put approval for the PID on hold.

16. On 22 May 2017, the Applicant emailed Mr. B.F., asking for the reason for placing the project on hold:

On Friday 19 May 2017 afternoon, when I ask[ed] you the reason for holding the Environmental Reporting Tool PID; you have mentioned the cause that I put my name as Project Quality Assurance. Also, you mentioned that there is an internal discussion with the Tribunal. May I know further the objective of your discussion with Tribunal?

17. On the same day, Mr. B.F. replied to the Applicant by email, stating:

I told you I was taking time to review the PID internally because you have filed a case at the Tribunal. My discussion is internal to UNDP, not with the Tribunal.

18. On 24 May 2017, the Applicant received an email from Mr. B.F., stating that "to avoid any duplication and confusion [...] we do not accept your request to be mentioned in the project board with the title 'Project Quality Assurance'[...]". The Applicant also received a revised PID with the Applicant's name and role removed.

19. The Applicant sets forth in her motion that:

... this arrangement effectively gives credit for the Applicant's work to the duplicate [the Quality Assurance Specialist position] since her functional title is similar to the one in PRINCE II standard despite the fact that the entire quality assurance task is being handled by the Applicant.

20. On 25 May 2017, the Applicant emailed Mr. N.Y., OIMT Officer-in-Charge, stating as follows:

As you are aware, the Environmental Reporting Tool Project Initiation Document (PID) was on hold as of 16 May 2017 by [Mr. B.F.]. Please

see below his decision based on my filed case at the tribunal, as he mentioned in his email of 22 May 2017 “I told you I was taking the time to review the PID internally because you have filed a case at the tribunal.”

I do not agree at all with his decision for the following reasons.

1. I didn't request Ms. A.F., Environmental Reporting Tool Project Manager (copied) my name to appear as Project Quality Assurance on the (PID). During Quality Assurance initiation process (when Anne and I reviewed the document), I have identified the project resource list without designated Project Quality Assurance. As a result, my name was added because of my responsibilities for the project according to PRINCE II methodology. This is the usual practice and you may see the activities for the last four months: Compensation Package, PMD [unknown abbreviation], Pension Interface, LMS [unknown abbreviation] projects. They all reflected my name with the Project Quality Assurance role.
2. UNDP's formal project management methodology is PRINCE [2]. RACI [apparently a term for a responsibility assignment matrix] is not the PRINCE II standard.
3. Mr. B.F. defended his action as “avoiding potential duplication that would be created”. I have been listed as “project quality assurance” and played its role for several years. So, where does his “would avoid duplication ...” come from now?

Taking into account the Environmental Reporting Tool Project expected launch date and the organization commitment, I would like your agreement and endorsement to continue the quality assurance tasks for this project as before (as was) on your reply to this email.

I am also waiting your response for my email request yesterday (attached).

21. On 25 May 2017, Mr. N.Y. replied to the Applicant acknowledging her email, and stating that he would get back to the issue that she raised in due course. He requested the Applicant to start testing with the parameters laid out in the revised PID for the “Environment Reporting Tool”.

22. The Applicant indicates in her motion that the day before, on 24 May 2017, Mr. D.S., UNDP, UNFPA, UNOPS and UN Women Staff Council chairman, had met with Mr. B.F. to discuss the situation, but there was no resolution.

23. On 26 May 2017, the Applicant replied to Mr. N.Y.'s email and states in her motion that she highlighted to Mr. N.Y. the following (emphasis in the original and reference to annexes omitted):

The Applicant will initiate the Environmental Reporting Tool Project testing as per [Mr. N.Y.'s] instruction as long as she is allowed to perform her duties in a proper working environment.

As seen recently in correspondence on 24 May 2017 with respect to the CPS [unknown abbreviation] project, the [RACI] parameters, deviated from PRINCE II resource definitions, and created confusion when the duplicate Quality Assurance Position incumbent claimed to have initiated the quality assurance process while in actuality contributing **only** to project support tasks as per PRINCE II. The Applicant requested [Mr. N.Y.'s] guidance to avoid future complications on this and upcoming projects.

24. The Applicant further states in her motion (emphasis in original and reference to annexes omitted):

As the Applicant was requested to use the [RACI] parameters instead of PRINCE II roles definition, she reviewed the [RACI] table and identified the following issues that have direct impact on her function:

Activity #7: "Perform quality reviews of projects documentation." The responsibility this activity is assigned to the duplicate Quality Assurance Specialist position incumbent, and it is a duplication since this task is a prerequisite or activity #4 "Assess projects' acceptance criteria and plan for the change control, tests and release" and activity #9 "Prepare/Review Quality Plan, Test Scenarios and Scripts." Therefore, the Applicant is responsible for this activity as part a/activity #4 and activity #9.

Activity #15: "Project Closure (Validity the achievement of BC [unknown abbreviations], Project Objectives, Client Satisfaction, risks and issues log completion, and review of the product.). The

responsibility for this activity is assigned to duplicate Quality Assurance Specialist position incumbent and it is a duplication since the Applicant is confirming the project requirement fulfilment step thru Post Project Implementation Review (PIR). All Change, Release, and Testing deliverables are also a reference to this action. Also, the Applicant executes the “Final Change Review” in Phire and Change Management Portal. As you are aware, the Change, Release and Testing guidelines and online workflow (Phire and Change Management Portal) were approved by the UN Governance Auditors in 2009 and are also being reviewed every year by OIA and BOA [unknown abbreviations]. Assigning this responsibility to the duplicate Quality Assurance Specialist position incumbent while the Applicant owns the actual tasks and deliverables is not appropriate. The Applicant is responsible for this activity.

Activity #19 (add): “Provide Audit Response on Change, Release and Testing process (Project Quality Assurance)” is one activity that is not listed in the RACI table. It should be reflected in the RAC table, and it should reflect that the Applicant is responsible for this activity.

25. On 31 May 2017, a new proposed PID document was circulated to the OIMT managers, reflecting that the assigned Project Quality Assurance role was assigned to the Quality Assurance Specialist and omitting the name of the Applicant.

Applicant’s submissions

26. The Applicant’s principal contentions may be summarized as follows:

Receivability and prima facie unlawfulness

a. The decision to exclude her name as the official responsible for project quality assurance from the PID and subsequent PID’s, and removing attribution for her contribution, is directly tied to her pending application and prejudices the outcome. In other words, the current proposal although a recent

development, is not a new administrative decision which is independently reviewable;

b. The proposed exclusion of the Applicant's name as the official responsible for Project Quality Assurance in the PID is an act of retaliation. The Applicant's supervisor clearly identified the reason for this change in normal reporting procedures as a result of the Applicant having brought a case to the Tribunal challenging the duplication of functions within OIMT/BMS. This latest action is designed to implement and create a permanent record of the Applicant's replacement, which is the purpose of the contested duplication;

c. The denial of proper recognition in the project document violates the Applicant's right to have her job duties properly identified and acknowledged. The present action creates a *fait accompli* that effectively substitutes her role in the project with a duplicate Quality Assurance Specialist position incumbent who is not performing the quality assurance functions and is being credited for the Applicant's work;

d. The replacement of the PRINCE II role definition by the RACI parameters gives the following advantages to the duplicate Quality Assurance Specialist position incumbent: (i) the duplicate Quality Assurance Specialist functional title is similar to PRINCE II role definition; therefore, by implication, she receives credit without performing the quality assurance tasks, and (ii) the RACI parameters are designed to enable the duplicate QAS position incumbent to supervise the Applicant in carrying out her responsibilities without any justification;

Urgency

e. Removing the Applicant's name and role from the present and future PID creates a *fait accompli* and prevents any effective remedy for her claims.

It appears that there is no other avenue open to the Applicant to seek redress for acts of retaliation prompted by her filing a case with the Tribunal. She has attempted informal resolution including the UNDP Ethics Office which said they have no jurisdiction over such claims. There appears to be no established mechanism for bringing a claim as pursuit of formal recourse has precipitated prejudicial actions that are retaliatory in nature;

Irreparable harm

f. If the present practice is adopted for all project documents, the Applicant will effectively be replaced in the official records. This may affect her performance evaluations and career development once the project documents are approved and issued. The damage to the Applicant's professional standing will be irreversible and will become a precedent for her further marginalization, effectively rendering her without a remedy for the substantive application that she has filed;

g. The Applicant raised her concern to Mr. N.Y. that the RACI parameters unfairly prejudices the Applicant in relation to the duplicate Quality Assurance Specialist position incumbent although the Applicant performs the real Project Quality Assurance tasks and is responsible for the process and the incumbent of the duplicate position is performing Project Support tasks according to the PRINCE II standard. This unfortunate situation affects the Applicant's morale;

h. For the past eight years, the OIMT change management electronic process (i.e., Phire and Change Management Portal) reflected the fact that the Applicant is responsible for product and process quality assurance for all OIMT projects. The OAI and BOA auditors in regularly reviewing these processes consistently interviewed the Applicant on the quality assurance processes. The proposed exclusion of the Applicant's name from the present

and future PIDs may trigger the need for adjustments to the OIMT change management electronic process which would create adverse effects on the Applicant's position and jeopardize her job security;

i. Following extended discussions and mediation, Mr. J.W., the Assistant Administrator and Director of the BMS, assured the Applicant last year that there would be a clear separation of functions of the two posts (without revision of the duplicate Quality Assurance Specialist position's job description and title). The latest action, however, contributes to the unfair duplication of functions and retaliates against the Applicant by further marginalizing her and denying her a role, which creates a hostile working environment in which her job security is threatened;

j. Furthermore, if the Respondent is permitted to retaliate against an applicant for challenging a decision using the Administration of Justice, it will have a chilling effect on staff wishing to contest a breach of their rights.

Respondent's submissions

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

Receivability

k. The Tribunal lacks jurisdiction over Mr. B.F.'s decision because it is not a decision already subject to proceedings before the Tribunal as required by art. 10.2 of the Dispute Tribunal's Statute and art. 14.1 of its Rules of Procedure. The decision currently subject to proceedings is "the refusal [by Mr. B.M.] Director of Office of Operations, Legal and Technology Services, BMS, to address and rectify the inconsistencies and duplication in the job description of her post [...] and that of [her colleague]". Thus, the decision currently under judicial review is that of Mr. B.M.'s communicated by letter, dated 28 July 2016;

l. The Applicant now seeks suspension of a new decision made nearly ten months later on 24 May 2017 by Mr. B.F. concerning the use of the “[RACI] standards” and his refusal to have the Applicant listed as “Project Quality Assurance”. The Applicant has not previously requested a management evaluation of Mr. B.F.’s decision as required by staff rule 11.2;

m. The Applicant’s assertion, that Mr. B.F.’s decision is “tied to her pending application and prejudices the outcome”, is an alleged causal link between two decisions (Mr. B.M.’s of 28 July 2016 and Mr. B.F.’s of 24 May 2017). This does not create a right for the Applicant to automatically and directly seek judicial review of a new decision. By doing so, the Applicant arrogates herself a right to a waiver, which the Tribunal is precluded to grant under art. 8.1 (c) of its Statute;

Prima facie unlawfulness

n. The Applicant’s claim that the decision is unlawful because it denies recognition of her duties and gives credit to the incumbent of the Quality Assurance Specialist position and constitutes retaliation is unsupported and misleading. Mr. B.F.’s decision was not on its face unlawful as his refusal to refer to the Applicant as “Project Quality Assurance” in the PID and his request that RACI standards be respected were motivated by legitimate organizational concerns to avoid confusion of duties and duplication of functions;

o. The Applicant was involved in reviewing the creation of the RACI matrix in 2006. Mr. B.F. has since used the RACI matrix to represent responsibilities of individuals involved that are not compatible with PRINCE II. The RACI matrix reflects the Applicant’s functions as Change, Release and Testing Specialist. The actions sought by the Applicant would be to render her a Quality Assurance Specialist, a post currently encumbered by

another individual. The Change, Release and Testing Specialist and Quality Assurance Specialist functions are complementary not duplicative. Quality assurance relates to “how” a project is performed. The role of the Quality Assurance Specialist is to ensure projects meet industry standards and Organizational interests. Quality control, the role of the Change, Release and Testing Specialist, relates to the quality of the product developed. The Applicant is seeking to add the functions of Quality Assurance Specialist to her own;

p. The Applicant, in accordance with *Ullah* UNDT/2012/140, must establish serious and reasonable doubts about the lawfulness of the contested decision. The burden of proof to show improper motive lies with the Applicant, who fails to meet such her burden. She relies solely on Mr. B.F.’s email indicating he was “taking the time to review the PID internally because [the Applicant] [had] filed a case at the Tribunal”. Mr. B.F. is not a native English speaker and consulting with management is a legitimate exercise given the context of the case and facts raised by the Applicant. The Respondent states that, “[o]ne cannot necessarily infer from the meaning of this email any intent to retaliate”;

q. The Applicant’s claim that this “latest action [i.e., Mr. B.F.’s decision] is designed to implement and create a permanent record of the Applicant’s replacement, which is the purpose of the contested duplication” is an assumption unsupported by facts. Perceptions do not constitute evidence. Mr. B.F.’s decision could not be conceived as an intent to retaliate as Mr. B.F. took the exact same decision not to grant her the title of Quality Assurance Specialist on 31 May 2016, nearly a year ago, and five months prior to the existence of the case presently before the Tribunal, and which the Applicant did not challenge;

Urgency

r. There is no urgency. The Applicant's claim that removal of her "name and role from the present and future PID created a *fait accompli* and prevents any effective remedy for her claims" is incorrect and is a misrepresentation of the situation. The Applicant's name and role have not been removed from the PID. The decision rather prevents her from being listed as QAS in addition to her own role. There is no urgency as the decision reiterates the same decision taken on 31 May 2016. The Applicant did not contest the decision in 2016 and "the Respondent does not see how she can now consider the same sort of decision unlawful, much less one that requires urgent interim relief";

Irreparable harm

s. The implementation of Mr. B.F.'s email of 24 May 2017 would not cause irreparable damage. The Applicant is recognized in the project as Change, Release and Testing Specialist. The failure to list the Applicant twice in the PID is not irreparable harm. Indeed, if the absence of a staff member from the RACI matrix could be considered to constitute irreparable harm, then granting of the requested relief by listing the Applicant as "Project Quality Assurance" might result in that harm to the current Quality Assurance Specialist by removing the Quality Assurance Specialist's functions altogether. The Applicant fails to demonstrate that she in fact has been requested to perform any of the Quality Assurance Specialist's duties. The Applicant's refusal to accept the delimitations of the duties and her position is not evidence of harm. The requested relief of her motion is the same relief requested in her application, namely to be considered as the Quality Assurance Specialist. Granting this request as an interim measure would amount to recognizing the right of the Applicant to the position of Quality Assurance Specialist, which is the issue at trial.

Consideration

Legal framework for granting interim measures

28. Article 10.2 of the Statute of the Dispute Tribunal 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.

29. In line therewith, art. 14.1 of the Dispute Tribunal's Rules of Procedure states:

... At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief 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.

30. In terms of art. 10.2 of the Dispute Tribunal's Statute, the Tribunal may, at any time during the proceedings, order an interim measure to provide temporary relief to either party provided the three requirements of *prima facie* unlawfulness, urgency and irreparable harm are met. This relief may include an order to suspend the implementation of the contested administrative decision.

31. A motion filed under art. 10.2 of the Dispute 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 that is generally not subject to appeal and requires consideration by the Judge within five days of the service of the motion on the Respondent (see art. 14.3 of the Dispute Tribunal's Rules of Procedure). An interim measures order is a temporary order made with the purpose of providing

an applicant temporary relief by maintaining the *status quo* between the parties to an application pending the Dispute Tribunal's consideration of the contested decision.

32. Parties approaching the Tribunal for interim measures must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's response to the motion for interim measures should be complete to the extent possible in all relevant respects, and be succinctly and precisely pleaded, bearing in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable.

33. In this particular case, both parties have filed fairly extensive submissions and the Applicant has filed copious documentation in order to advance the respective contentions made. It is clear from the documentation that this is a rather technical case and there is some dispute of fact and interpretation that could possibly only be resolved following a full hearing on the merits, alternatively by the parties by way of amicable resolution.

Receivability

34. The Respondent, in essence, contends that the Tribunal lacks jurisdiction because the Applicant presents a "new" contested decision, which is not tied to the pending Application, which is independently reviewable and for which the Applicant has not previously requested a management evaluation as required.

35. The contested decision under judicial review concerns alleged inconsistencies and duplication in the job descriptions of the Applicant's post (Change, Release and Testing Specialist) and that of a newly created post (Quality Assurance Specialist), which the Applicant argues in her application is a duplication of her role and functions. The Applicant previously requested the Organization to clarify the duplication of these roles and job descriptions, which is at issue in her substantive

case. The Applicant now seeks a suspension of her supervisor's recent decision to preclude her as the listed official responsible for Project Quality Assurance on the PID. The Applicant asserts that this removes her attribution despite her still contributing to the work, which is a departure from the PRINCE 2 methodology and gives credit to the incumbent of the duplicative Quality Assurance Specialist role for the Applicant's contributions.

36. Generally, administrative actions should be appealed separately, even if they pertain to the same ongoing contract, because they remain independently reviewable decisions. In her substantive application, the Applicant contests the failure to address and rectify inconsistencies and duplications in the job descriptions and duties of her post and that of the Quality Assurance Specialist post. In the instant motion, the Applicant requests suspension of the action on the proposal to exclude her name as the official responsible for quality assurance from the recent PID and subsequent PIDs, despite her prior attribution and accreditation in similar projects. In the instant matter, the Tribunal finds that the latter decision is a consequence of the former (see *Roig* 2012-UNAT-368). That the administrative decision in this case has an ongoing legal effect and the "new action" is not an independent administrative action in or of itself, but is part of the overall decision being contested. Mr. B.F.'s action to preclude the Applicant from the PID for the Project Quality Assurance functions and duties is part and parcel of the contested decision in the application of 10 October 2016. Among the issues presented in her application is that the newly created role is a duplication of her own position. Mr. B.F.'s decision to not attribute her to the Project Quality Assurance role in the PID, but to attribute it to the incumbent of the Quality Assurance Specialist role, is an ongoing action that relates to the question of whether the newly created Quality Assurance Specialist role is duplicative to that of the Applicant. This is a matter pending judicial review per the substantive application filed on 10 October 2016.

37. Accordingly, the Tribunal finds that the Applicant does not present a "new" administrative decision in her motion but rather seeks relief on an action tied to and

stemming from a decision which has an ongoing legal effect, and which she contests in her substantive application. The Tribunal therefore has jurisdiction to issue interim relief pursuant to art. 10.2 of the Dispute Tribunal's Statute and art. 14.1 of its Rules of Procedure and the motion is receivable.

Prima facie unlawfulness

38. 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 (see *Jaen* Order No. 29 (NY/2011) and *Villamorán* UNDT/2011/126).

39. The Applicant argues, in essence, that Mr. B.F.'s decision is unlawful because (a) it deprives her of attribution for work she is performing and (b) that it constitutes retaliation for her pending case before the Tribunal.

40. The Respondent submits that Mr. B.F.'s decision was to avoid confusion of duties and duplication of functions. The Respondent argues that the Applicant has failed to prove that she was instructed to do the work of the QAS for which she is losing attribution, and that the quality assurance process had already been initiated by the QAS for the PID in question. The Applicant contends that the initiation discussions were initially between herself and a person called R.H., and that she was not notified of any change in the process. Furthermore, the Applicant submits that the Assistant Administrator and Director of the BMS, Mr. J.W., assured her that there would be a clear separation of functions of the two posts sometime last year; yet there is confusion.

41. The right to a job description that accurately reflects the duties and responsibilities expected of a staff member is an essential element in the process for classification of posts. A properly classified post and personal grade level

commensurate with the duties and responsibilities expected of the staff member is an essential element of fair treatment. The “classification of posts of staff members is part of the conditions of service, and classification of a post is to be done according to its job description, and failure to regularize the discrepancies between the level of classification and an employee’s functions is a breach or violation of the staff member’s rights” (see *Aly et. al.* 2016-UNAT-622).

42. The Tribunal finds that the fact that there is ongoing concern by both parties regarding duplication of functions and lack of clarity regarding functions even at this stage indicates that the decision may be procedurally or substantively defective or contrary to the Administration’s obligation to ensure that its decisions are proper. This is particularly so if indeed there is a deviation from the “usual practice ...and activities for the last four months”, as the Applicant alleges. The Tribunal finds that the Applicant has presented a fairly arguable case of *prima facie* unlawfulness.

43. The Applicant also claims that Mr. B.F.’s decision constitutes retaliation for her having brought an Application to the Tribunal. The burden of proof of retaliation lies with the Applicant (see *Terragnolo* 2014-UNAT-445, *Rahman* 2014-UNAT-453, *Koumain* 2011-UNAT-119, and *Wasserstrom* 2014-UNAT-457).

44. However, in order to prove *prima facie* unlawfulness the Applicant need only show that the contested decision was influenced by some improper considerations, improperly made and not made in good faith, and need not prove retaliation. The Respondent cites *Ullah* UNDT/2012/140, which establishes that an Applicant in order to establish *prima facie* unlawfulness must establish serious and reasonable doubts about the lawfulness of the contested decision.

45. As evidence of Mr. B.F.’s intent to retaliate against her, the Applicant cites Mr. B.F.’s email wherein he states, “I told you I was taking time to review the PID internally because you have filed a case at the Tribunal [...]”. The Respondent urges the Tribunal to consider that English is not Mr. B.F.’s mother tongue and that

discussing the matter internally in light of her pending case, is a legitimate action not to be construed as intent to retaliate. Furthermore, the Respondent asserts that Mr. B.F.'s decision was properly motivated by Organizational and project needs, namely to avoid confusion of duties and duplication of functions as Mr. B.F.'s email of 24 May 2017.

46. An international organization has discretion to organise its services to best suit its needs and requirements, including to restructure its departments or units, to create or abolish posts, to reclassify posts and to make suitable working arrangements; although such decisions may be set aside on limited grounds, including arbitrariness, capriciousness and improper motivation.

47. At first blush, and on the plain reading of this statement, the PID was reviewed and delayed because the Applicant had filed a case with the Tribunal. It appears the Applicant was not consulted or informed that her name would be removed from the proposed PID, and the decision appears to be, at best, arbitrary. In addition, whilst the Tribunal cannot unduly speculate as to exactly what is meant by this email as the matter is not at the stage of a merits review, the Tribunal finds that, on its face, the email casts reasonable doubt as to the lawfulness of the decision. The Tribunal is not assured that this decision was proper and made in good faith.

48. For the foregoing reasons, the Tribunal finds that the contested decision is *prima facie* unlawful.

Urgency

49. According to art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure, an interim measures motion is only to be granted in cases of particular urgency.

50. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks

the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133, and *Jitsamruay* UNDT/2011/206).

51. In the present case, the Applicant was informed of her supervisor's decision on 24 May 2017, and a copy of the proposed PID circulated on 31 May 2017. The decision impacts the Applicant's current and future role and the working environment on an ongoing basis and is a matter that needs to be clarified before the project in issue and any future projects proceed. The urgency is not self-inflicted as the Applicant has sought to clarify her role and that of the Quality Assurance Specialist for some time. In the circumstances, and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

Irreparable damage

52. The Respondent argues that the Applicant, being recognized in the project as a Change, Release and Testing Specialist, which corresponds to her role and not being listed twice also for the Quality Assurance Specialist role, does not constitute harm. The Applicant claims that, as a consequence of the implementation of the decision she will "effectively be replaced in the official records" after being reflected as responsible for product and process quality assurance for the past eight years. This may affect her performance evaluations and career development once the project documents are approved and issued, thus causing irreversible damage to her professional standing and effectively rendering her without remedy in the final cause. That the RACI matrix "unfairly prejudices [her]" given that she performs the "real Project Quality Assurance" and that the exclusion of her name from current and future PIDs would "create adverse effects on the Applicant position and jeopardize

her job security”. It has affected the Applicant’s morale and is creating a hostile work environment.

53. It is generally accepted that mere economic loss alone is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage (*Adundo et al.* UNDT/2012/077; *Gallieny* Order No. 60 (NY/2014)). A loss of a career opportunity with the United Nations may constitute irreparable harm for the affected individual (see, for instance, *Saffir* Order No. 49 (NY/2013) and *Finniss* Order No. 116 (GVA/2016)).

54. A proper job description and functional role is of particular importance to a staff member’s future progression and retention in the workplace. In each case, the Tribunal has to look at the particular factual circumstances. In these particular circumstances, and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

55. As the Applicant has satisfied the conditions of *prima facie* unlawfulness, particular urgency, and irreparable harm, the motion for interim relief is granted

Observations

56. The purpose of an *interdict pendite lite* or interim measure is not to grant final, but only temporary relief, pending the outcome of the substantive proceedings. An interdict or interim measure is granted by the Tribunal with a certain degree of measured caution, on the limited information before it, and on urgent consideration. In granting an interim measure or interdict it is proper to consider the balance of convenience or relative hardship which would result from granting or denying the remedy. The general principles upon which such a remedy is granted include the absence of an adequate alternative remedy, and the balance of interests and convenience favoring the granting of an interdict. An interim interdict is temporary in nature and is usually in place as long as a situation prevails until the final outcome

can be ascertained; the nature and duration of such temporary relief will depend on the facts and circumstances of each particular case. The Tribunal does the best it can on the papers before it. This matter appears to be rather technical, replete with disputes of fact, interpretation, and possible misunderstanding, matters that could only be reconciled at the merits hearing or by the parties following efforts to informally resolve the matter. The Applicant has been in the employ of UNDP for some 30 years since 1987 and appears to be a few years away from retirement. She is naturally concerned about her future career prospects. The Tribunal encourages the parties to explore possibilities to informally resolve the case including by way of the Ombudsman and to inform the Tribunal without delay should they choose to seek suspension of proceedings on the merits pending mediation.

Conclusion

57. In light of the foregoing, the Tribunal ORDERS that the motion for interim measure is granted and the contested decision is suspended pending the Dispute Tribunal's proceedings.

(Signed)

Judge Ebrahim-Carstens

Dated this 13th day of June 2017