



**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** René M. Vargas M.

ADLUNG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Shelly Pitterman, UNHCR

## **Introduction**

1. On 10 October 2012 the Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), filed an application for suspension of action, pending management evaluation, on the decision conveyed to her by letter dated 31 August 2012 in which she was identified as a staff member who could be affected by the special measures for reduction in workforce set out in an internal memorandum IOM/079-FOM/80/2012 (Special measures for reduction in international professional workforce as a result of the 2013 Annual Programme Review).

## **Facts**

2. The Applicant joined UNHCR in 1995. In 2000, she was granted an indefinite appointment, and she is currently a staff member in between assignments (“SIBA”).

3. On 29 August 2012, the United Nations High Commissioner for Refugees (“High Commissioner”) promulgated IOM/079-FOM/80/2012 which introduces new measures to reduce costs. The memorandum provides, *inter alia*, that the indefinite appointments of international professional staff members whose posts are slated for discontinuation and who have been on full pay status but without an assignment for nine or more consecutive months will be subject to termination unless these staff members are selected for any vacant post advertised in or before September 2012.

4. By letter dated 31 August 2012 from the Director of the Division of Human Resources Management (“DHRM”), the Applicant was informed that, to the extent that she met the criteria set out in IOM/079-FOM/80/2012, she could be affected by the special measures for reduction in workforce. She was thus notified that her indefinite appointment could be subject to termination in the event she was not selected for any vacant post in the course or before the September 2012 selection exercise.

5. The Applicant filed the application which forms the subject of the present judgment on 10 October 2012.

6. By Order No. 151 (GVA/2012) issued on 11 October 2012, the Applicant was instructed to provide a copy of her request for management evaluation and, on the following day, she submitted the requested document, which was dated 11 October 2012. As directed by the Tribunal, the Respondent filed his reply on 16 October 2012.

### **Parties' contentions**

7. The Applicant's contentions are:

#### *Prima facie unlawfulness*

a. IOM/079-FOM/80/2012 was not submitted to the Joint Advisory Committee for its review and recommendations, as required by inter-office memorandum IOM/FOM No. 014/1990 (Joint Advisory Committee) issued on 15 February 1990;

b. The Secretary-General did not delegate authority to the High Commissioner to take the contested decision. Further, it is unclear whether the High Commissioner sought his comments or consulted him prior to promulgating IOM/079-FOM/80/2012, although the latter relates to basic regulations;

c. To the extent that her indefinite appointment will likely be terminated before other types of appointments, the contested decision contravenes both the Applicant's terms of appointment and staff rule 9.6(e) which provides in particular that staff holding indefinite appointments have a priority for retention in service;

d. The contested decision also infringes her rights under staff regulation 9.3(a) and staff rule 9.6(e). IOM/079-FOM/80/2012 unilaterally defines the terms "available post" and "suitable post" in a sense that is contrary to the overall meaning of staff rule 9.6(e). This provision does not

define these terms. It provides however that, where the necessities of service require that appointments be terminated, staff members shall be retained in an order of preference, subject to the availability of “suitable posts” in which their services can be effectively utilized, and having due regard to relative competence, integrity and length of service. It is the contract status of a staff member which ought to determine whether or not he or she should be retained. The relative competence, integrity and length of service of staff members only becomes relevant where there is an excess number of staff holding the same type of appointment. Thus, a staff member with an indefinite appointment cannot be looked over to retain a staff member on a fixed-term appointment, irrespective of the latter’s fulfilment of the other criteria foreseen in staff rule 9.6(e);

e. The contested decision violates her acquired rights. An indefinite appointment brings with it protection against unilateral separation from service by the Organization. This constitutes a fundamental consideration in a staff member’s decision to join the Organization and the modification of this right entails grave consequences for the staff member;

f. The contested decision also infringes the principle of non-retroactivity as her termination will be based on two selection exercises that occurred in the past;

g. As her status of SIBA is the result of the UNHCR’s failure to assign her to a post commensurate with her grade, skills, experience, education and training, the Respondent is estopped from separating her from service or to otherwise terminate her appointment on the grounds that she was not selected for a post;

#### *Urgency*

h. If the Applicant is not successful in the September 2012 selection exercise, she will likely be separated from service ;

*Irreparable damage*

- i. In view of the blatant irregularities in the decision-making process leading to the contested decision, the damage suffered by the Applicant far exceeds any harm to her future employment, and monetary compensation alone would not do justice to her;
  - j. As the holder of an indefinite appointment, which is akin to a permanent appointment, she had great expectation that she would pursue and finish out her career with UNHCR.
8. The Respondent's primary contentions may be summarized as follows:

*Admissibility*

- a. The letter of 31 August 2012 does not constitute a challengeable administrative decision within the meaning of the Tribunal's case law, as it is not capable of adversely affecting the Applicant's rights. There has not been any decision with regard to the September 2012 selection exercise and the letter of 31 August is only a preparatory step connected with an uncompleted selection process;
- b. Similarly, IOM/079-FOM/80/2012 does not constitute a challengeable administrative decision since it has no individual application and carries no direct legal consequences;
- c. The Applicant's request for management evaluation was not submitted to UNHCR, which only became aware of it in the course of the proceedings before the Tribunal. The submission filed by the Applicant on 12 October 2012 cannot be considered as a valid request for management evaluation, and there is therefore no basis for the Tribunal to suspend the implementation of the contested decision pending management evaluation;

*Prima facie unlawfulness*

d. The letter of 31 August was issued legally pursuant to IOM/079-FOM/80/2012. Further, as per the Appeals Tribunal's case law, neither this Tribunal nor the Appeals Tribunal have the authority to amend the rules of the Organization;

*Urgency*

e. No decision has been taken with respect to the Applicant. The posts advertised in September 2012 are currently under consideration and the letter of 31 August has not modified in any way her contractual status;

*Irreparable damage*

f. No decision has been taken in relation to the September 2012 selection exercise or the Applicant's separation from service. In fact, she will be given priority consideration for available suitable posts she applies for;

g. The suspension of the contested decision is not the only way to ensure that the Applicant's rights are observed.

**Consideration**

9. The Applicant requests suspension of action, pending management evaluation, on the content of the letter of 31 August 2012 from the Director of DHRM informing her that she meets the criteria set out in IOM/079-FOM/80/2012, thereby resulting in her possible termination for reduction of staff.

10. Article 2.1 of the Tribunal's Statute provides :

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ...

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. ...

11. Article 2.2 of the Statute further provides :

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. ...

12. In order for the Tribunal to act upon an application for suspension of action submitted pursuant to article 2.2, an “administrative decision” must be at issue. According to the Tribunal’s case law, a challengeable administrative decision is a decision taken by the Administration which carries direct legal consequences in respect of the applicant’s rights under the terms of his or her appointment or contract of employment (see, *inter alia*, *Elasoud* UNDT/2010/111, *Buscaglia* UNDT/2010/112, *Dudley* Order No. 308 (NY/2010)).

13. In view of the fact that the Applicant’s termination for reduction of staff is only hypothetical at this stage, the content of the letter of 31 August 2012 cannot be considered to directly affect her rights, and the application can only be rejected as irreceivable.

### **Conclusion**

14. In view of the foregoing, the application for suspension of action is rejected.

*(Signed)*

Judge Jean-François Cousin

Dated this 17<sup>th</sup> day of October 2012

Entered in the Register on this 17<sup>th</sup> day of October 2012

*(Signed)*

René M. Vargas M., Registrar, Geneva