



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/019  
Order No.: 54 (NY/2019)  
Date: 1 April 2019  
Original: English

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**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

MONTECILLO

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:**  
Natalie Puchalka, OSLA

**Counsel for Respondent:**  
Angela Arroyo, UNDP

## **Introduction**

1. On Tuesday, 26 March 2019, the Applicant, a Learning Resource Specialist, at the P-4 level, step 12 on permanent appointment with the United Nations Development Programme (“UNDP”) in New York, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision “to terminate [the Applicant’s] permanent appointment, following abolition of his post, without having made good faith efforts to assist him in finding an alternative position”. Due to the complexity of the case, and the detailed facts and submissions in the papers, for the sake of completeness and judicial economy, the very lengthy application has been summarized almost in full below.

2. Together with his application, referring to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure and the Appeals Tribunal’s judgment in *Villamorán* UNAT/2011/160, the Applicant also filed a motion requesting that the contested decision be suspended pending the Tribunal’s consideration of the suspension of action application, submitting that he will otherwise be effectively separated on Wednesday, 27 March 2019.

3. By Order No. 49 dated 26 March 2019, the Tribunal ordered that the contested decision be suspended during the pendency of the present case and that the Respondent file a reply to the suspension of action application by 29 March 2019.

4. In the reply filed on 28 March 2019, the Respondent stated that some of the claims included in the application for suspension of action are not receivable *ratione temporis* and that, in any event, the contested decision is not *prima facie* unlawful. The Respondent also erroneously indicated that the Respondent is UNDP and not the Secretary-General. The Respondent before the Dispute Tribunal is and has always been, since the inception of the new system of justice, the Secretary-General (see art. 2.1 of the Dispute Tribunal’s Statute). As in the case of the application, the very long reply has also been summarized almost in full below.

5. On 29 March 2019, without prior leave of the Tribunal, Counsel for the Applicant filed comments on the Respondent's reply. In response, later the same date after close of business, the Respondent filed a motion for leave to respond to the Applicant's comments. These further unsolicited filings added to the already long pleadings before the Tribunal which has only 5 days to consider this interim measures application on a *prima facie* basis, without a firm conclusion on the merits. Counsel for the parties are reminded that a suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It 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 a management evaluation of its impugned decision, or a full determination of the case on the merits.

6. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers instantly filed before it. An application may well stand or fall on its founding papers. Likewise, a Respondent's reply should be complete to the extent possible in all relevant respects. Whilst pleadings should contain all relevant material to support a party's case, they should not be unwieldy and burdensome, nor frivolous nor an abuse of process. Parties should bear in mind that the matter is not at the merits stage at this point of the proceedings, no hearing is contemplated, nor are further pleadings envisaged, unless the Tribunal orders otherwise. As the Applicant's additional submissions filed on 29 March 2019 were filed without leave and do not shed any particular light on the case, they are rejected, and the Respondent's 29 March 2019 motion to respond to these submissions is therefore redundant.

### **Relevant background**

7. The following outline of facts is based on the documentation on record and the parties' written submissions.

8. On 25 May 2011, the Applicant was granted a permanent appointment with retroactive effect from 30 June 2009.

9. Effective 31 July 2017, the Applicant's post as Learning Resource Specialist in Copenhagen, Denmark was abolished. He was therefore granted a temporary assignment in New York as a Learning Resource Specialist (eRecruit). The temporary assignment ran from 24 July 2017 through to 31 December 2017. Following an application for suspension of action on 19 December 2017, his appointment was extended and the application was withdrawn. Thereafter, the Applicant was given several notices of termination, including a verbal one, but he remained in service.

10. In an email of 13 February 2019 from Mr. DR, the Deputy Director of OHR, the Applicant was provided the following information and instructions as a consequence of the abolishment of his post regarding the possible termination of his appointment and other options:

...

The purpose of this message is to provide you with information, as well as to inform you of the available options regarding your next steps. Should you have any queries or require further information, please address them directly to me at [email address redacted].

Please be informed that the abolishment of your position does not necessarily mean that your appointment with UNDP will be terminated. There are two options available to you:

1) Seek further employment within the Organization. As a Permanent Appointment (PA) holder whose position has been abolished, given your length of service with UNDP, you will be given priority consideration over equally qualified candidates who do not hold a permanent appointment. If it is your intention to seek another position within the Organization, you can review all currently available vacancies at <http://jobsintra.undp.org>. Kindly note that you must formally apply to any position for which you wish to be considered, as well as notify me of any application you submit, so that I can ensure your candidacy is given all due consideration, as well as advocate on your behalf.

As discussed, I understand that you have no restrictions in terms of function or geographic location, however, please let me know whether you will consider accepting a post at a lower grade. If you are regrettably not successful in finding employment within the Organization, you are eligible to apply for an Agreed Separation.

2) If you do not wish to seek further employment opportunities within the Organization you are eligible to apply immediately for an Agreed Separation. An Agreed Separation, subject to approval, would pay you additional indemnities beyond those mandated under Annex III of the UN Staff Regulations and Rules, even if you opt not to pursue continued employment. A copy of the application for Agreed Separation is attached. Please notify me if you would like to serve your statutory three-month notice period or receive compensation in lieu of notice, as this will inform your separation date, and any submission for Agreed Separation.

Thank you for notifying me of your decision regarding the options mentioned above at the earliest opportunity, but no later than three working days from communication of this message i.e. by Monday 18 February 2019 COB.

As discussed, if in thirty days after transmission of this communication you have not secured alternative employment, or you have not communicated your intention as requested in the preceding paragraphs, the Organization will proceed with issuing you a Notice of Termination of Appointment.

I remain available should you like to discuss further and look forward to supporting your search efforts.

11. By email of 18 February 2019 to Mr. DR and Mr. DB, the Applicant informed that he “would like to continue [his] employment with the [O]rganization”.

12. By emails of 26 February and 15 March 2019, Mr. DR forwarded the Applicant a list of vacancies that he indicated might be of the Applicant’s interest. The Applicant responded by email of 17 March 2019 that he was interested in two specific positions and also in some positions that had previously been “frozen”.

13. By email of 21 March 2019 to the Applicant, Mr. DR appears to notify the Applicant of his imminent termination on 27 March 2019, stating that:

Reference is made to your meeting with [Mr. DB], Director of Office of Human Resources, on 13 February 2019. In that meeting and also as you confirmed in writing on 18 February 2019, you advised UNDP that you would like to seek continued employment with the Organization. As such, OHR proceeded to regularly inform you of the positions being advertised over the last 30 days.

The 30 day period has lapsed and another position has not been secured. We note you expressed interest in the position of Management Specialist, BMS Directorate, regrettably after a careful review of your professional skills and experience you were not found to meet the minimum criteria for consideration for this role.

I would like to take this opportunity to reiterate that you remain eligible for an Agreed Separation. Application is attached. Please advise us within 3 working days (ie no later than COB Tuesday 26 March 2019) of your intention. In this context we can consider allowing you to serve your 3 months' notice rather than receiving payment in lieu of notice.

If we do not hear from you by this aforementioned date we will proceed with the termination of your appointment effective Wednesday 27 March 2018 [this must clearly be a typo and should state "2019"], with payment of termination indemnities as applicable and in accordance with Annex III of the Staff Regulations, as well as the normal end of service entitlements, less any amounts owed. Additionally, and further to Staff Rule 9.7(d) you will be paid compensation equivalent to salary, applicable post adjustment and allowances in lieu of 3 months' notice.

If you have any questions please feel free to reach out to me.

## **Consideration**

### *Legal framework*

14. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

15. Article 13.1 of the Tribunal's Rules of Procedure states:

The Dispute Tribunal shall order a suspension of action 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.

16. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

17. It also follows from the language of art. 2.2 of the Tribunal's Statute and art. 13.1 of the Rules of Procedure that the suspension of action of a challenged decision may only be ordered when management evaluation of that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159; *Benchebbak* 2012-UNAT-256). As stated in *Onana* 2010-UNAT-008 (affirmed in *Kasmani* 2010--UNAT-011; *Benchebbak* 2012-UNAT-256), the Dispute Tribunal may under no circumstances order the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed. An order for a suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented (*Gandolfo* Order No. 101 (NY/2013)).

#### *Receivability*

18. The Respondent submits in his reply that the Applicant refers to a number of decisions taken by UNDP during 2016, 2017 and 2018. Specifically, the Respondent contends that the Applicant refers to the decision to abolish his post and his decision not to apply to two P-4 level positions available at that time; UNDP's consideration of his candidacy for positions that he applied to between August 2017 and July 2018; and his performance management and development in 2016 and 2017-2018. The Respondent contends that the Applicant raises similar arguments to support his request for management evaluation. To the extent that the Applicant is seeking to contest those decisions, the Respondent submits that they are not receivable as they are time-barred.

In this regard, the Respondent contends that the Applicant has not formally challenged any of those decisions, all of which were taken more than 60 days prior to the Applicant's submission of his request for management evaluation of 26 March 2019. Referring to staff rule 11.2(a), the Respondent submits that the Applicant is, accordingly, time-barred from challenging those decisions in the context of his current request for management evaluation or this application.

19. The Tribunal finds the Respondent's submission untenable since the Applicant clearly states in the application that he is contesting the decision "to terminate [his] permanent appointment, following abolition of his post, without having made good faith efforts to assist him in finding an alternative position". It is apparent from the current papers that the Applicant's supporting iterations simply give context and historical background to the circumstances he alleges led to the termination of his permanent appointment rather than his placement in an alternative position.

20. Accordingly, the Tribunal finds the Respondent's submission of irreceivability unsustainable if not bordering on the vexatious, and it is rejected.

*Prima facie unlawfulness*

21. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an 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 (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

22. The Applicant's principal submissions may be summarized as follows:

- a. It is well-established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation and renewals. The Applicant, referring to art. 101.3



of the Charter of the United Nations, General Assembly resolution 51/226 (Human resources management), the legal principle of *lex specialis*, staff rules 9.6(e) and 13.1(d), the UNDP policy on “Termination of Appointment”, the Appeals Tribunal’s judgments in *Fasanella* 2017-UNAT-765 and *Timothy* 2018-UNAT-847, asserts that preference is to be given to retaining staff holding permanent appointments faced with the abolition of a post or reduction of staff to all other types of appointments including those on continuing appointments.

b. As a permanent appointment holder whose contract was being abolished, the onus is on the Administration, and not simply on him, to make good faith efforts to find him a suitable available post, and the Administration made no real effort to find him a suitable available post as is evident from the email sent by Mr. DR to the Applicant on 13 February 2019 and their subsequent exchange of emails. The first option that Mr. DR presented to him, namely that the Applicant could seek further employment within the Organization, was not genuine because the Applicant was only given 30 days to do so to avoid termination, which is an unrealistic time-frame to secure alternative employment and the Administration was aware that the Applicant was due to go on home leave from 23 February 2019 to 16 March 2019. Apart from being presented with two lists of available positions on 26 February 2019 and 15 March 2019, the Applicant was not given any further assistance and several positions in the two lists referred to above were not appropriate for him. Also, despite the Applicant having applied for several posts, he was never given any information about the pending status of those applications or provided with any genuine assistance regarding locating a suitable post. Ultimately, the Applicant was not considered and retained for any of the available suitable posts on a preferred or non-competitive basis, and he was also not considered for any secondment/transfer opportunities outside UNDP. As part of the current UNDP Review (restructuring) process that began in 2017, a number of vacant positions were apparently frozen or not advertised, which impeded upon the Applicant’s efforts to find another suitable position, but the Administration was

able to fill those frozen posts internally, including approximately eleven positions in information technology and the Administration did not consider reassigning him to one of those posts. Placing the Applicant on temporary assignments since 24 July 2017 does not amount to a good faith effort to finding him an alternative suitable position.

c. Notwithstanding the Applicant's 20 years with an exemplary work record for the Organization, the Administration was adamant in terminating his appointment particularly because: (a) the Applicant was the only staff member holding a permanent appointment at the P-4 level that was initially affected by the restructuring process; (b) the Applicant was given five notifications that his post would be abolished in a five-year period; (c) the Administration ignored his request for a review of his 2016 performance evaluation and a workplan for his 2018-2019 performance period had not been initiated; (d) Mr. DR, his direct supervisor, made an intentional attempt to underutilize the Applicant and sourced work from others, and Mr. DR also hid the Applicant's recent work contributions from management; and (e) the Applicant's position is still needed. The Applicant's nomination for the Staff Council and participation in an investigation into alleged misconduct involving the Chief of his department in 2014 could be reasons.

23. The Respondent's principal submissions may be summarized as follows:

a. With reference to staff rule 9.6(e) and *Timothy*, although the Organization has an obligation to make reasonable efforts to identify a suitable position for a staff whose post has been abolished, it does not create an absolute right for permanent appointment holders to remain in employment with the Organization for the entire tenure of their appointment, if no such position exists. UNDP's Standard Operating Procedures establish specific steps for supporting displaced permanent appointment holders to identify an alternate post before any termination decision is taken. These procedures indicate, amongst other guidelines, that the displaced staff member be provided with a

list of all available vacancies and encouraged to apply to suitable positions and, once a staff member applies to positions that they are interested in, his or her candidacy is considered on a priority and non-competitive basis.

b. The Applicant has failed to establish that the decision to terminate his permanent appointment is *prima facie* illegal because UNDP complied with its obligations to make good faith and reasonable efforts to identify and place the Applicant on a position that was both available and suitable before taking the decision to terminate his permanent appointment.

c. During the nearly two years when the Applicant has been “displaced”, UNDP has made efforts to identify an alternate post for him. This has included holding multiple meetings between him and two different Directors, Office of Human Resources (“OHR”) and Mr. DR sending him lists of available positions, as well as identifying and sending him on temporary assignment. By sending the Applicant on temporary assignment, UNDP was assisting the Applicant to expand his skill set and potentially be suitable for a greater number of available positions. Further, UNDP adhered to its Standard Operating Procedures by affording the Applicant with a one-month search period—in addition to the time he had since his position had been abolished two years prior—in which UNDP proactively encouraged him to apply to vacancies, and considered him for any vacancy he expressed interest in on a non-competitive priority basis. In particular, Mr. DR followed-up with the Applicant and provided the list of available vacancies on two separate occasions, as well as encouraged him to express his interest in available positions.

d. Despite these efforts, UNDP has not been able to identify an available suitable position for the Applicant. The Applicant, himself, recognized that there were no available positions that were suitable for his profile, stating to Mr. DR that “that there are not many Management Services positions available when I visited the job site”. The Applicant has not pointed to one single available position that he is suitable for and for which UNDP has failed to

consider him. The fact that an assignment for the Applicant has not been identified does not in and of itself support that UNDP did not make good faith and reasonable efforts to attempt to find him one.

e. Further, UNDP is not obligated to retain the Applicant in its employment to serve on a position to which he was not fully competent to fulfill pursuant to *Timothy*, para. 38. The Applicant argues that UNDP has failed to consider him for “vacant positions which were frozen or not advertised”. A position that is frozen cannot be filled by a staff member and, accordingly, are not “available” for consideration in this context, meaning that a position may be frozen due to no budget being available for that position or being affected by a structural reorganization. Given UNDP’s reliance on voluntary funding for its activities, the Administration cannot fund positions or functions without the budget in place. Available positions were accessible to the Applicant and UNDP also identified such positions to him on several occasions.

f. While the Applicant submits that the one-month search period was during a time when he had planned to take home leave and that period is “unrealistic” as a search period, the Applicant has been without a position for almost two years and has had that entire period to identify, with UNDP’s assistance, an alternate position. Since the Applicant was notified of the abolition of his post in April 2017, he has been on notice that UNDP considered it of primary importance that his situation be resolved—either through identification of an alternate assignment or separation—as it is untenable for UNDP to maintain a staff member in its workforce who does not have an assignment. Further, the one-month search period was exceptionally extended beyond the 30-day period in consideration of the Applicant’s decision to take annual leave. The search time period is therefore not unreasonable on its face. Even though the Applicant has the right to take leave, he cannot hold his decision to proceed with his leave plans during this critical period against UNDP and that despite being on notice that his appointment may be terminated,

shortly after returning from leave on 15 March 2019, the Applicant requested to take further leave between 22 March and 29 March 2019.

g. According to the Applicant's own submissions, he applied to only eight positions in the two years that he did not have a position and, for the positions that he applied to outside of the OHR function, he did not inform OHR colleagues of during the one-month search period. The Applicant identified only one UNDP position that he was interested in and failed to do so in a timely manner, expressing his interest only after the deadline for that vacancy had passed and after being prodded to do so. The Applicant was expected—and obligated under the jurisprudence (although the Respondent does not state any specific case-law) to prioritize his placement on a position, particularly in view of the length of time that he had been without a position, but his actions demonstrate that he did not. The Applicant has accordingly failed in his mutual obligation to make effort to be placed, and UNDP cannot therefore be held accountable for his lack of placement under *Timothy*, para. 35.

h. While the Applicant suggests that the termination decision is the result of ulterior motives, given that the decision was taken after he was nominated to be part of the Staff Council and shortly before he was to go on home leave, this submission has no merit. Rather, the termination decision is based on that, in the almost two years since the abolition of his position in July 2017, no alternate position has been identified and the Applicant was informed that his position was to be abolished in April 2017. Since that time, he has been repeatedly informed of his need to find an assignment and that, if no position was identified, his appointment could be terminated. Further, UNDP is proceeding with the termination of the Applicant's post at this time because it has now issued its Standard Operating Procedures. Accordingly, the timeline of this issue—the long duration of the matter and the UNDP's recent issuance of Standard Operating Procedures—support that the termination decision is unrelated to any recent developments in the Applicant's nomination for Staff Council or his decision to take home leave.

The notification of the termination of the Applicant's permanent appointment

24. As a further issue, the Tribunal will consider whether the termination of the Applicant's permanent appointment with UNDP is lawful as being properly notified to the Applicant.

25. By email of 21 March 2019 to the Applicant, Mr. DR notified the Applicant of his imminent termination on 27 March 2019 stating that: "the 30 day period has lapsed"; the Applicant has not secured "another position"; and UNDP will "proceed with the termination of your appointment effective Wednesday 27 March 2018" which [must clearly be a typo and should state "2019"]". Quite confusingly, Mr. DR, however, also refers to different circumstances relating to a possible three-month notice period, which makes no sense if the termination was to be "effective" on 27 March 2019. It appears from both the application and reply that, on 21 March 2019, the Applicant was informed that as the 30 day search period had lapsed, and no alternative position had been secured, he could either accept an agreed separation, possibly serve three-month notice, or, if he did not respond, his permanent appointment would be terminated effective 27 March 2019, effectively giving the Applicant less than a week's notice. If this indeed so, it calls into question whether the termination notice is lawful.

26. Staff Regulations have direct effect for UNDP staff members (see ST/SGB/2018/1, the current Staff Regulations and Rules, which provides that: "Under the Charter of the United Nations, the General Assembly provides staff regulations which set out the broad principles of human resources policy for the staffing and administration of the Secretariat and the separately administered funds and programmes. The Secretary-General is required by the staff regulations to provide and enforce such staff rules, consistent with these principles, as he considers necessary").

27. Regarding the relevant legal framework for notification of a termination decision, the Tribunal further observes that under staff regulation 9.3, a staff member's appointment may be terminated due to abolition of post, requiring that the staff member shall be given "such notice ... as may be applicable under the Staff Regulations and

Rules”. Staff rule 9.6(c) further provides that if a staff member’s appointment is terminated, “reasons” must be provided therefor. Staff rule 9.7(a) provides that, “A staff member whose continuing appointment is to be terminated shall be given not less than three months’ written notice of such termination”, which applies *mutatis mutandis* to permanent appointments. The Tribunal notes that the Respondent filed the UNDP Standard Operating Procedures (SOP’s) for termination of permanent appointment in UNDP dated February 2019, a general “policy reference.” In the recent decision of *Younis* UNDT/2019/004, the Dispute Tribunal reiterated the law on the hierarchy of the Organizations internal legislation and, in particular, the legal status of internal guidelines, such as Standard Operating Procedures. In particular, the Tribunal highlighted that circulars, guidelines, manuals, and other similar documents may set standards and procedures for guidance of management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Tolstopiatov* UNDT/2010/147, *Ibrahim* UNDT/2011/115, *Morsy* UNDT/2012/043). In any event, the Tribunal notes that on previous occasions in the instant case, the Applicant was given three months’ notice of termination, which notices were either withdrawn or rendered ineffective.

28. In the present case, the Applicant was notified of his imminent termination on 27 March 2019 by Mr. DR’s 21 March 2019 email and the reason therefor, namely, the abolishment of his post, but no proper written notice of termination appears to have been issued providing him with a three-months written notice as required by staff rule 9.7(a). It therefore follows that while UNDP appears to have decided to terminate the Applicant’s appointment, he is yet to receive the lawful notification. Consequently, on the facts as they appear, the purported termination appears *prima facie* unlawful as well.

#### UNDP’s obligations under staff rule 9.6(e)

29. Both parties refer to staff rule 9.6(e) as the relevant legal provision outlining the statutory requirements for terminating a staff member’s permanent appointment due to abolishment of a post. The relevant part of the provision reads as follows:

(e) ... [I]f the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

...

30. The content of staff rule 9.6(e) has been the subject of extensive litigation, and the Appeals Tribunal has in several judgments pronounced upon the interpretation thereof (see, for instance, *Timothy*, to which both parties refer, but also *El-Kholy* 2017-UNAT-730, *Hassanin* 2017-UNAT-759, *Lemonnier* 2017-UNAT-762, *Zachariah* 2017-UNAT-764 and *Fasanella* 2017-UNAT-765). Of particular relevance in the present case, the Appeals Tribunal in *Timothy*, *inter alia*, held that:

31. Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff, [reference to footnote omitted] and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished. [reference to footnote omitted] As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity.

32. Therefore, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given. [reference to footnote omitted]



...

45. We agree with the Secretary-General that it is lawful and reasonable for the Administration to expect affected indefinite appointment holders to cooperate fully in the process. As already mentioned, a staff member holding a continuing or indefinite appointment facing termination due to abolition of his or her post must show an interest in a new position by timely and completely applying for the position. So, if the Administration informs the affected staff members that they are expected to apply for suitable available positions, they are obliged to fully cooperate and make a good faith effort in order for their applications to succeed. This includes a duty to apply within the deadlines and to respect the formal requirements.<sup>22</sup>

...

57. However, with the exception of said mandatory requirements established by Staff Rule 9.6(e) and (f) and the jurisprudence of the Appeals Tribunal, i.e. that “suitable posts” be available within their parent organization at their duty station and belong in the same category to that encumbered by the redundant staff member, nothing in the language of Staff Rule 9.6(e) and (f) indicates that the (right and at the same time) obligation of the Administration to consider the redundant staff member for suitable posts, vacant or likely to be vacant in the future, is limited to the staff member’s grade level. On the contrary, by applying the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the Administration is under an obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest.

31. On the current papers before the Tribunal, albeit the Applicant’s position was made redundant following its abolishment effective 31 July 2017, the only actual and specific steps the Respondent has proved to have undertaken in compliance with the above principles, in an effort to consider the Applicant for an alternative post, is that, on 26 February and 15 March 2019, the Deputy Director of OHR, Mr. DR, sent the Applicant two separate lists of some vacancies at the P-3 and P-4 levels in UNDP. The Applicant was given an unrealistic 30 days to consider these vacancies, at a time when he was known to be proceeding on official home leave for some days. It is also unclear whether the Applicant was actually suitable for any of the relevant posts—when he thereafter expressed interest for two of the positions, he was then informed that he was

not deemed suitable for any of them. There are therefore serious and reasonable doubts as to whether these efforts were genuine and in good faith.

32. On a *prima facie* basis, under *Timothy*, para. 32, it would therefore appear to the Tribunal that the Respondent has not “demonstrate[d] that all reasonable efforts have been made to consider the staff member concerned for available suitable posts”. In this regard, the Tribunal also notes that apparently almost two years elapsed before the Respondent took any active or reasonable initiative to find the Applicant a more secure post other than just a temporary assignment and that this only occurred when his termination was imminent. The Respondent has therefore not shown that any “mechanism and procedures” were “triggered” as “intended to protect the rights of a staff member holding a continuing [or permanent] post” as envisioned by *Timothy*, para. 31, when his post was abolished in August 2017. Also, in response to Mr. DR’s proposed list of available posts, of which it is uncertain whether the Applicant was suitable for any of them, by immediately expressing his interest for two posts, the Applicant would appear to have “fully” cooperated “in the process” as stated in para. 45 of *Timothy*. Insofar as there is any dispute of fact regarding any of these matters, this can only be reconciled at a substantive hearing on the merits.

33. In conclusion, it appears to the Tribunal that UNDP has not fulfilled its “obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest” as per *Timothy*, para. 57.

### Conclusion

34. In light of the above, upon a *prima facie* review, the contested decision is unlawful.

*Urgency*

35. According to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

36. 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; *Jitsamruay* UNDT/2011/206).

37. The Applicant filed the present application, and an application for urgent immediate relief pending the current matter, on 26 March 2019, shortly after learning of the contested decision on 21 March 2019 that his appointment would be terminated effective 27 March 2019. The Tribunal finds that there is no self-created urgency in this case, and this is clearly a pressing matter requiring urgent intervention.

38. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

*Irreparable damage*

39. It is generally accepted that mere economic loss only 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)). In each case, the Tribunal has to look at the particular factual circumstances.

40. It is established law that 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); *Finniss* Order No. 116 (GVA/2016)). The Respondent also concedes to this point in his reply.

41. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

### **Conclusion**

42. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied for granting the application for suspension of action. Accordingly, the decision to terminate the Applicant's permanent appointment shall be suspended pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 1<sup>st</sup> day of April 2019