



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

SAMUEL THAMBIAH, O.

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:**  
Self-represented

**Counsel for Respondent:**  
Jorge Ballesterro, UNICEF

## **Introduction**

1. On 29 May 2011, the Applicant sent an application for suspension of action on the “[d]ecision ... o[f] 21 May 2011 ... unilaterally separating Applicant’s services on 31 May 2011”.

## **Facts**

2. The Applicant joined the United Nations in 2001.

3. With effect from 1 September 2010, she was given a fixed-term appointment until 31 May 2012, as a Publicity and Promotion Officer in the Private and Fundraising and Partnership Division (“PFP”), within the Central and Eastern Europe, Commonwealth of Independent States Regional Office of the United Nations Children’s Fund (“UNICEF”), which is based in Geneva.

4. By a letter of 1 December 2010, the Director of PFP informed the Applicant that her post had been slated for abolition with effect on 31 May 2011. In line with the procedures applicable to staff on abolished posts, she was invited to apply for available posts and advised that her name would be included on lists of applicants and/or shortlists. In the event that her applications were not successful, she would be separated from service on 31 May 2011.

5. At the end of 2010 and in the first half of 2011, the Applicant applied for several posts within and outside the Regional Office of UNICEF.

6. In March, April and May 2011, she enquired several times about the outcome of the selection procedures in relation to the posts for which she had applied, highlighting her qualifications and experience.

7. On 8 April 2011, the Applicant received a letter of separation.

8. By an email of 21 May 2011 to the Applicant, the Director of PFP explained *inter alia* that recommendations to fill posts within PFP were being sent to the Division of Human Resources at the UNICEF headquarters in New York and that the process and timeline for review of post recommendations was outside

the remit of PFP. She also identified specific steps, such as providing counseling and training budget, which the Administration had taken in order to support staff on abolished posts. She recalled her commitment that the Administration “would do [its] utmost to support staff and request exceptional consideration from [h]eadquarters as and when the situation arise[d] and where there [wa]s a case that c[ould] be made. This include[d] requests for deferrals of abolishment of posts”. However, she stated, in the Applicant’s case the abolishment date could not be deferred.

9. On Sunday, 29 May 2011, at 23.51 p.m. (Geneva time), the Applicant sent an email to the Registry of the Tribunal and to the Management Evaluation Unit, United Nations Secretariat, requesting management evaluation of the “[d]ecision by [the] Director [of] PFP (Geneva) on 21 May 2011 that Applicant should look outside UNICEF and thereby unilaterally separating Applicant’s services on 31 May 2011”.

10. Also on 29 May 2011, at 23.59 p.m., the Applicant sent her application for suspension of that decision.

11. On 30 May 2011, the Tribunal transmitted to the Respondent a copy of the Applicant’s request for management evaluation. It also transmitted a copy of her application for suspension of action and instructed him to file his reply, if any, by 31 May 2011, at 10.00 a.m.

12. On 31 May 2011, at 8.52 a.m., the Respondent filed an interim reply to the application and requested an extension of time to file a complete reply, explaining that 30 May 2011 was a holiday at headquarters in New York.

### **Parties’ contentions**

13. The Applicant’s primary contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. The contested decision was taken before completion of the restructuring exercise. Recruitment procedures to fill posts in the new

structure are still on-going and the Applicant, who applied for two vacant posts within PFP and was interviewed for both positions, is still awaiting the outcome of these procedures. The statement, contained in the email of 21 May 2011, that she should submit applications outside of UNICEF suggests that it has already been decided to select another candidate to fill the positions. The decision not to select her is therefore inconsistent with the normal recruitment procedures and contrary to the feedback she received after her interview. Further, this decision fails to duly take into consideration her qualifications and experience;

b. One of her colleagues who also held a post which was subject to abolition was shortlisted and interviewed for the only position he had applied for;

c. The Applicant's separation from service unfairly deprives her of an opportunity to be considered as an internal candidate;

d. The staff was repeatedly ensured that, should the restructuring be delayed and appointments not finalised by 1 May 2011, staff affected by the abolition of their posts would have their appointments extended;

e. As a woman from a developing country with ten years of uninterrupted service with UNICEF, relevant skills and very good performance evaluations, due consideration should have been given to her applications;

f. The UNICEF Regional Office in Geneva does not have authority to abolish a post. The Applicant's contract, which stipulates that her appointment expires on 31 May 2012, is legally binding for the Administration and cannot be overruled by the Director of PFP;

g. The implementation of the contested decision is in breach of the applicable Staff Rules which provide that staff members whose posts are abolished are given every possible consideration and assistance in finding alternative positions;

*Urgency*

h. If the Applicant is separated from service, she will be deprived of an opportunity to be considered as an internal candidate for positions for which she has applied;

*Irreparable damage*

i. Even if the Administration determines, at a later stage, that the decision was unlawful, it will be too late to reverse the decision;

j. The Applicant's family is entirely dependent on her income and her separation from service will bring unnecessary suffering upon it;

k. The Applicant's separation from service will be detrimental to her career and harmful to her dignity.

14. The Respondent's primary contentions may be summarized as follows:

a. The application for suspension of action is irreceivable given that the Applicant has not filed a request for management evaluation as required by article 2.2 of the Statute of the Tribunal. Therefore, there is no "pending" management evaluation;

b. The application is irreceivable *ratione materiae*. The email of 21 May 2011 does not contain any "administrative decision" as it does not affect the rights of the Applicant. It communicated a simple suggestion made by the Director of PFP, following several meetings which had been held with a view to assisting the Applicant and in light of her unsuccessful applications;

c. As per article 10.2 of its Statute, the Tribunal is not empowered to suspend decisions relating to termination of employment and cannot therefore suspend the contested decision;

*Prima facie unlawfulness*

d. There is no *prima facie* unlawfulness. Due to a previous decision, several posts were abolished, including that of the Applicant, and her attempts to find an alternative position have been unsuccessful in spite of the fact that the selection panels were aware of her status and the relevant provisions. The recommendation to apply to posts outside of UNICEF is lawful;

*Urgency*

e. The Applicant's case is not urgent. Should the Applicant be selected for a post in UNICEF within one year of separating the Organization, she would have the right to be reinstated, with retroactive effect from the date of her separation;

*Irreparable damage*

f. The Applicant would not suffer irreparable damage because, in the event that one of her applications for a post in UNICEF is successful within one year of separating the Organization, she would be reinstated retroactively without any break in service;

g. If the Applicant files an application on the merits at a later stage, the Tribunal may well order compensation.

**Consideration**

15. The Applicant requests the Tribunal to suspend, during the pendency of management evaluation, what she characterizes as the "decision" of 21 May 2011 to "separate her from service" following the abolition of her post.

16. In accordance with article 2.2 of its Statute, the Dispute Tribunal may order a suspension of action on an application filed by an individual requesting

the 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.

17. The email of 21 May 2011 does not contain any administrative decision that could be reviewed by this Tribunal. It simply reiterates some of the commitments made by the Administration to support staff on abolished posts. It further gives advice to the Applicant and clarifies some issues without having any impact on her rights with respect to her terms of appointment or contract of employment (see article 2.1(a) of the Statute). Therefore, no suspension of action can be ordered with respect to this email.

18. Additionally, as far as the abolition of her post is concerned, it is clear that the Applicant was notified thereof by the letter of 1 December 2010, in which the Director of PFP stated:

I regret to inform you that due to the necessities of service the post you currently encumber is among the posts slated for abolition with effect on 31 May 2011.

... during the period of notice served to you by this letter, you are expected to apply for all available posts for which you believe you have the required competencies ... the Division of Human resources ... will assist you in identifying and applying for available posts at the duty station for which you have the core and functional competencies required... Every effort will be made to keep you informed of the posts for which you are being reviewed.

Nevertheless, as appropriate openings in our office may not be available, we would encourage you to explore all your options and to seek alternative opportunities in other United Nations agencies, as well as outside the United Nations system.

Should you not be selected for a post, I regret to have to inform you that you will be separated from service, upon expiration of an exceptional 6 month notice period, on 31 May 2011.

19. The time limit to formally contest the decision of 1 December 2010 was 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested, in accordance with provisional staff rule 11.2(c).

20. Article 8.3 of its Statute provides that the Dispute Tribunal may not suspend or waive the deadlines for management evaluation. Time and again, the Appeals Tribunal has emphasized that the Dispute Tribunal has no authority to suspend or waive the deadlines for management evaluation or administrative review (see, for instance, *Trajanovska* 2010-UNAT-074 and *Ajdini et al.* 2011-UNAT-108).

21. It results from the above provisions and case law that, where an applicant fails to request management evaluation within 60 days from the date on which he or she was notified of the contested decision, he or she is barred from requesting a suspension of action pending management evaluation before the Dispute Tribunal.

22. Since the Applicant received notification of the abolition of her post on 1 December 2010, this time limit has long expired and she is now barred from challenging this measure.

23. As far as her separation from service is concerned, she has failed to demonstrate that it is *prima facie* unlawful. She has not identified any procedure or particular rule which the contested measure might have contravened, nor has she substantiated her allegations. Instead, she makes a general reference to the Staff Rules and submits that her skills and experience were not duly taken into consideration. Overall, she has not adduced any evidence showing that her separation from service might be contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

24. The Tribunal notes in passing that, from the receipt of the impugned email, it took more than a week to the Applicant to file her application for suspension of action. She sent it on Sunday, 29 May 2011, and the Tribunal received it on the following morning. The fact that Monday, 30 May 2011 was a holiday at headquarters in New York prevented the Respondent from filing a complete reply in due time. This notwithstanding, the Tribunal considers that, in view of the outcome of the matter, the Respondent's inability to submit a complete reply did not affect his rights.



**Conclusion**

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

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*(Signed)*

Judge Thomas Laker

Dated this 31<sup>st</sup> day of May 2011

Entered in the Register on this 31<sup>st</sup> day of May 2011

*(Signed)*

Víctor Rodríguez, Registrar, Geneva