



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

BROWN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
INTERIM MEASURES**

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**Counsel for Applicant:**

Edward Flaherty

**Counsel for Respondent:**

Stéphanie Cochard, UNOG

Kara Nottingham, UNOG

## **Introduction**

1. On 18 May 2015, the Applicant filed an application on the merits, which was registered under Case No. UNDT/GVA/2015/133, against:

- a. “Her threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave”;
- b. The “Respondent’s refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji”; and
- c. The MEU decision of 15 May 2015.

2. On the same day, the Applicant filed an application for interim measures pursuant to art. 14 of the Tribunal’s Rules of Procedure against the decisions in paras. 1.a and 1.b above.

3. Both applications were served on the Respondent on the same day, and he was requested to file his reply with respect to the application for interim measures on 20 May 2015. In the notification, the Tribunal instructed the Respondent that, to preserve the subject matter of the application for interim measures, he was not to proceed with the implementation of the decisions referred to therein, pending the Tribunal’s decision on said application for interim measures.

4. After filing his reply, the Respondent, on 20 May 2015, filed a motion requesting that the interim measures be ruled upon prior to the exhaustion of the Applicant’s sick leave entitlements.

## **Facts**

5. On 11 July 2012, vacancy announcement 12-HRI-OHCHR-24481-R-Geneva (R) was issued indicating the following: “[t]his position is vacant due to the temporary assignment/secondment of the regular incumbent to another office/organization. The selection and extension of the appointment of the selected candidate will be contingent on the return of the incumbent who maintains a lien against this post”.

6. The Applicant was selected against the position in question (RB post 501057) and recruited at the Office of the High Commissioner for Human Rights (“OHCHR”) on 3 December 2012, under a two-year fixed-term contract expiring on 2 December 2014, as Senior Human Rights Officer (P-5), OHCHR, in Geneva.

7. The Australian Permanent Mission to the United Nations in Geneva advised OHCHR, in a *note verbale* of 16 November 2012, of its agreement that the Applicant, who at the time was in the service of the Australian Government, be placed on secondment to OHCHR as Senior Human Rights Officer, P-5, in Geneva, and that she would keep her right to return to the Government service after the expiration of her secondment to the United Nations.

8. In an email dated 15 September 2014, the Chief, Field Operations and Technical Cooperation Division (“FOTCD”), Africa Branch, informed the unit that upon the return of the incumbent of RB post 501057, the structure of the Branch remained identical with two Sections and that the Applicant “continue[d] to oversee the East and Southern Africa Section”.

9. By email of 29 October 2014, the Applicant was informed by the Chief, Human Resources Management Section, OHCHR, of the decision not to renew her fixed-term appointment. He noted that the decision was taken in view of the fact that she had been appointed against the position during the assignment of the regular incumbent to another department, from which the latter had now returned.

10. The Applicant was placed on certified sick leave as of 14 November 2014. As her certified sick leave continued, her contract has accordingly been renewed on several occasions, for administrative purposes, as reflected in the relevant personnel actions and letters of appointment, as Senior Human Rights Officer, OHCHR, in Geneva.

11. By memorandum of 3 December 2014 from the Director, FOTCD to the Chief, PSMS, the former recommended the extension of the Applicant's fixed-term appointment for a period of two years, stressing that the "recommendation for an extension of the appointment should also go together with a recommendation for a lateral transfer of [the Applicant] to the P5 post of Regional Representative, Pacific Regional Office".

12. By email of 10 December 2014, the Chief, Human Resources Management Section, OHCHR, informed the Applicant that "the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office of OHCHR in Suva, Fiji as the Regional Representative for the Pacific". He also referred to an earlier phone conversation on this matter. On the same day, the High Commissioner conveyed to the Applicant by email that while the incumbent of the post for which she had been hired had returned and resumed his functions, a vacant and suitable position at the P-5 level had been identified and offered to her, and that he hoped that the Applicant would accept this offer and continue to work for OHCHR.

13. By memorandum dated 12 December 2014, the Human Resources Officer, Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG"), informed the Applicant that the High Commissioner had approved her lateral transfer from Geneva to Fiji, within FOTCD, and that the decision would be implemented as soon as possible. Attached thereto was an addendum providing the Applicant with all entitlements applying to her transfer.

14. The Applicant, by email of 16 December 2014 to the Human Resources Officer, HRMS, UNOG, informed the latter that her treating physician and the Medical Services Section ("MSS"), UNOG, had certified that in view of her health situation she could not leave Geneva.

15. By email of 18 December 2014, the Human Resources Officer, HRMS, UNOG, informed the Applicant that in view of her certified sick leave, which had been certified by MSS, UNOG, her appointment, which was due to expire on 31 December 2014, had been extended, for administrative purposes only, until 13 January 2015, to cover the Applicant's sick leave period.

16. By email of 22 December 2014 from the Deputy High Commissioner to the Applicant, the latter was informed that the Office confirmed a two-year extension of her contract, as OHCHR Representative based in Fiji.

17. On the same day, the Applicant filed a request for management evaluation against the decision of 29 October 2014 not to renew her fixed-term appointment, and the decision of 10 December 2014 by which the High Commissioner had agreed to a contract extension of two years and a lateral move to Fiji. She also mentioned that she had been informed on 18 December 2014 that, at that time, her appointment had been extended for administrative reasons to cover her certified sick leave until 13 January 2015.

18. On 16 January 2015, the Human Resources Officer, HRMS, UNOG, reiterated the terms of ST/AI/2005/3 (Sick leave), and noted, *inter alia*, that if the Applicant were to continue on sick leave, she would have exhausted all her sick leave entitlements (full and half pay) on 21 May 2015. She reiterated the same in an email of 11 February 2015.

19. On 10 February 2015, in reply to the Applicant's request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision.

20. By email of 27 February 2015, the Applicant requested the High Commissioner to reconsider her transfer to the post of Head of OHCHR, Fiji, raising, *inter alia*, political considerations in view of her prior position as representative of the Australian Government, and her and her son's medical condition.

21. The Applicant filed a claim for compensation under Appendix D to the Staff Rules on 3 March 2015. This request is still pending.

22. On 13 April 2015, the Applicant wrote a letter to the High Commissioner, requesting her immediate reinstatement to a P-5 position at OHCHR, Geneva. On 27 April 2015, she wrote to the Secretary-General, equally requesting her immediate reinstatement to a P-5 level position at OHCHR, Geneva, or, failing

this, access to external arbitration. In both letters, she raised her concern that she was subjected to retaliation as a “UN whistleblower” with respect to issues she had reported at the World Intellectual Property Organization.

23. By letter dated 30 April 2015, the Director of Office, Office of the Chef de Cabinet, responded to the Applicant’s letter of 27 April 2015, stressing that the only recourse mechanism available to her was within the United Nations internal justice system; with respect to her concern to have been the subject of retaliation, she was informed that she could file a formal request for protection with the United Nations Ethics Office. Finally, he stressed that the offer for the Applicant to take up a P-5 position in Fiji, upon transfer, was still standing.

24. By email of 6 May 2015, the Applicant asked the Human Resources Officer, HRMS, UNOG, “to be provided with [her] contract as soon as possible”.

25. On the same day, the Human Resources Officer, HRMS, UNOG, responded to the Applicant that “to the best of her knowledge, [the Applicant had] so far indicated that [she] did not wish to take [the] position in Fiji”, and that “[she had been] placed on sick leave before the end of [her] contract in December 2014 and [her] appointment ha[d] been since then extended month by month, for administrative purposes, upon receipt of medical certificates ... solely to allow [her] to use [her] sick leave entitlements”. She finished her message stressing that “[a]s already conveyed in several of [their] exchanges, [the Applicant] [would] have exhausted all [her] entitlements to sick leave (with full and half pay) on 21 May 2015” and that “[a]fter that day, [UNOG] [would] initiate [her] separation”.

26. By email of the same day, the Applicant informed the Human Resources Officer, HRMS, UNOG, that if the only option to separation was accepting the assignment to Fiji, she had no choice, so she requested to be forwarded the contract.

27. On 6 May 2015, the Human Resources Officer, HRMS, UNOG, responded to the Applicant in the following terms:

You are currently on certified sick leave until 13 May 2015. In order to take your new functions, you have to contact the ["MSS"] as you need to be medically cleared for your new assignment. Once MSS has given the green light, you will have to book your flight ... and send us your itinerary so that we can issue your travel authorization. You will receive your contract upon assumption of your new functions in Fiji.

28. On 7 May 2015, the Applicant's Counsel sent a letter to the High Commissioner, noting that "[b]y [said] letter, [the Applicant] expressly accepted [the High Commissioner's] offer of an extension of two years of her fixed-term appointment at OHCHR". He further requested the High Commissioner to stay the Applicant's transfer to Fiji on account of her and her son's health condition, and that, in the absence of a response, he would consider that request as having been implicitly denied and he would take necessary action through the internal justice system.

29. On 8 May 2015, the Applicant wrote to the Human Resources Officer, HRMS, UNOG, requesting her to indicate on whose authority she had asserted that she would receive her contract only upon assumption of her new functions in Fiji, and to provide her with a two-year fixed-term contract extension by 11 May 2015.

30. On 12 May 2015, the Chief Medical Doctor, MSS, UNOG, confirmed that in view of the Applicant's health condition, she could not be deployed anywhere outside Geneva, particularly to Fiji.

31. On 13 May 2015, the Applicant informed the Human Resources Officer, HRMS, UNOG, that her treating doctor had certified that she could return to work half-time with OHCHR Geneva as of 18 May 2015, and yet again requested a copy of her two-year fixed-term contract. The Human Resources Officer, HRMS, UNOG, responded by email to the Applicant on the same day, reiterating that her fixed-term appointment had been extended for administrative purposes only to enable her to use her sick leave entitlements, and that it would be extended until

21 May 2015, the date at which the Applicant would have exhausted all her sick leave entitlements.

32. Also on 13 May 2015, the Applicant filed a request for management evaluation of her “threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave” and the Respondent’s “refusal to grant [her] request for a stay (on medical grounds) of [her] lateral transfer to Fiji” and a suspension of action of said decisions with this Tribunal, under art. 13 of its Rules of Procedure.

33. The Officer-in-Charge, Management Evaluation Unit (“MEU”), responded to said request by letter of 15 May 2015, noting that it was not receivable. In view of the foregoing, the Tribunal, by Order No. 105 (GVA/2015) of 18 May 2015 rejected the request for suspension of action, for lack of jurisdiction.

**Parties’ contentions with respect to the Tribunal’s competence to order interim measures**

34. The Respondent notes that both decisions contested in the application for interim measures relate to matters of appointment, namely the non-renewal of the Applicant’s appointment and matters which concern her proposed transfer to Fiji, which he further notes relate to a proposed appointment to new functions. Hence, the Respondent requests that the application be rejected in its entirety, as the Tribunal is not competent to order suspension in cases of appointment, promotion, or termination.

35. The Applicant did not address the matter of the Tribunal’s competence.

**Consideration**

*Preliminary matter*

36. As a preliminary matter, the Tribunal notes that in serving the application, it ordered the Respondent to freeze the relevant contested decisions, to preserve the subject matter of the application for interim measures, as a matter of fairness. Equally, as a matter of fairness, the Tribunal, having made a determination, and



by issuing the order today, grants the Respondent's motion to determine the application for interim measures expeditiously.

*Interim measures*

37. The Appeals Tribunal noted in *Massabni* 2012-UNAT-238 that it is the duty of the presiding Judge to adequately comprehend an application before him/her:

25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

38. In her application on the merits, the Applicant identified the contested decisions as follows:

- a. "Her threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave";
- b. The "Respondent's refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji"; and
- c. The MEU decision of 15 May 2015.

39. In her application for interim measures, the Applicant contests the decisions under paras. 38.a and 38.b above, which she notes are inextricably linked. Under "remedy sought", she notes that she is seeking:

1. “The immediate suspension of the impugned decision to deny her request for a stay regarding her lateral transfer to Fiji on account of her service incurred medical restrictions”;
2. “Assignment to a Geneva-based post commensurate with her skills and experience and in complete conformity with her medically approved work release”;
3. “Suspension of the decision threatening her separation from service with effect from 21 May 2015”;
4. “That such suspension be maintained during the pendency of her new UNDT application proceedings, or until the Respondent has fully complied with its obligations to the Applicant pursuant to ST/AI/1999/16, whichever is later in time”; and
5. “Such other relief as the Tribunal deems is necessary, just and fair”.

40. The Tribunal finds that in fact, the Applicant is seeking the suspension, at least pending a determination of the application on the merits, of her separation from service as a result of the decision not to renew her fixed-term appointment. Any other of the remedies sought in her application for interim measures are subordinate to the suspension of her separation, namely of the non-renewal of her appointment.

41. In light of the foregoing, the Tribunal recalls the scope of its competence to suspend the implementation of an administrative decision beyond the date of completion of management evaluation, i.e. as an interim measure, under the terms of art. 10.2 of its Statute:

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.

42. It is apparent from the unambiguous wording of the above-referenced provision that the Tribunal is not competent to suspend the implementation of a contested administrative decision in cases of appointment, promotion or termination. As the Appeals Tribunal held in *Benchebbak* 2012-UNAT-256:

33. The Statute clearly prohibits the adoption of such suspension in cases of appointment, promotion, or termination. The appeals are receivable because the UNDT exceeded its jurisdiction in ordering the suspension of contested decision beyond the date of completion of management evaluation in a matter concerning an appointment.

43. It is established jurisprudence that a decision not to renew a staff member's appointment is one that is recognized as falling under the notion of "appointment" (cf. *Azzouni* 2010-UNAT-081; *Larkin* UNDT/2010/108; *Rees* UNDT/2011/201; *Gakumba* UNDT/2012/192).

44. It follows that in this matter, under art. 10.2 of its Statute, the Tribunal does not have jurisdiction to order, as an interim measure, the suspension of the decision to separate the Applicant as a result of the non-renewal of her fixed-term appointment.

45. Further, the Applicant contests the Respondent's refusal to grant her request for a stay of her lateral transfer to Fiji, and also requests its suspension. Without prejudice to the question of whether said decision, if any, is a reassignment decision—in which case it would not constitute a matter of appointment for the purpose of art. 10.2 of the Tribunal's Statute (cf. with respect to art. 10.5 of the Tribunal's Statute *Kaddoura* 2011-UNAT-151 and *Rantisi* 2015-UNAT-528)—the Tribunal finds that the matter of the Applicant's transfer to Fiji is intrinsically linked to the renewal of her fixed-term appointment.

46. In other words, if the Applicant's fixed-term appointment is not extended, there is no other decision relating to a potential transfer that the Tribunal could suspend. Thus, and in view of its foregoing conclusion that it is not competent under its Statute to suspend the Applicant's separation from service as a result of the non-renewal of her contract, the application is moot in relation to the request for suspension of an alleged denial of the Applicant's request for a stay of her

transfer to Fiji. Similarly, any of the other relief sought by the Applicant are subordinate to the suspension of the non-renewal and, hence, they cannot be granted by the Tribunal in the framework of the present proceedings.

47. As a result of the above, the Tribunal does not need to examine the cumulative requirements for granting a request for interim measures, namely *prima facie* unlawfulness, urgency and irreparable damage.

### **Conclusion**

48. In view of the foregoing, the application for interim measures is rejected.

*(Signed)*

Judge Rowan Downing

Dated this 21<sup>st</sup> day of May 2015

Entered in the Register on this 21<sup>st</sup> day of May 2015

*(Signed)*

René M. Vargas M., Registrar, Geneva