



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

KUMAR

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:**  
Mariam Munang, OSLA

**Counsel for Respondent:**  
Miles Hastie, UNICEF

## **Introduction**

1. On 19 October 2016, the Tribunal received an application from a permanent staff member of the United Nations Children’s Fund (“UNICEF”) contesting the decision communicated to him on 11 and 13 October 2016 that, upon his return from secondment with the United Nations Secretariat, he would either have to go on special leave without pay (“SLWOP”) for one year starting 1 November 2016, or his permanent appointment would be terminated on 31 October 2016. The Applicant submits that both options amount to unlawful separation in breach of the Administration’s obligations to him as a staff member holding a permanent appointment and returning from secondment.

2. On 19 October 2016, the New York Registry transmitted the application for suspension of action to the Respondent, stating that the Respondent’s reply was due 10:00 a.m., 21 October 2016.

3. On 21 October 2016, the Respondent duly filed his reply to the application.

4. The parties’ submissions on *prima facie* unlawfulness, particular urgency, and irreparable harm are summarized under relevant sections below.

## **Background**

5. The material facts in this matter are common cause; more particularly, the Respondent admits the facts contained in paras. 4 to 13 of the application, which are incorporated, with minor changes, below at paras. 6 to 16.

6. The Applicant joined UNICEF on 3 March 2003 as a Programmer at the P-4 level. Since 1 July 2009, he held a permanent contract with UNICEF.

7. In November 2012, he was seconded from UNICEF to the United Nations Secretariat to serve as a Senior Information Officer at the P-5 level. In June 2012, prior to his secondment, the Applicant was notified in an email from the Mobility and Staffing Section, Division of Human Resources, UNICEF, that his release on secondment was on the basis that he “will not retain a lien against any post in UNICEF”, that his “return to UNICEF is not automatic, [and that he] will need to apply and compete with other candidates and get appointed to a post”. It is unclear from the documents placed before the Tribunal whether those conditions were formally accepted by the Applicant and incorporated into his terms of appointment.

8. On 1 November 2015, UNICEF approved the extension of the Applicant’s secondment up to 31 October 2016.

9. Prior to the end of his secondment, the Applicant applied for seven posts within UNICEF, at the P-4, P-5, and D-1 levels. The selection exercises for these positions are ongoing.

10. The Respondent submits that, in May 2016, approximately six months before the expiry of his secondment, the Applicant was flagged as a returning secondee. However, due to an administrative error, the Applicant was not automatically added to lists or shortlists of vacancies in his area of specialization and at his grade. In addition to the posts to which the Applicant applied, two additional vacancies at the P-4 level arose during the six months before the conclusion of his secondment. The Respondent submits that, given that the Applicant identified and applied for seven other posts, it may be inferred that he was equally able to identify the vacancies against which UNICEF might have listed him, and that he would not have pursued them or did not consider himself a strong candidate. UNICEF has not finalized its own assessment of this question,

which the Respondent says will be conducted in the context of management evaluation.

11. On 1 August 2016, the Applicant was informed that his secondment would not be extended. He was told that in the event that he was not successful with his applications and did not wish to separate from the Organization, he could request to be placed on SLWOP for one year. Alternatively, if he chose to separate, he would be paid termination indemnity.

12. The Administration informed the Applicant that it “will follow-up with offices to ensure [his] name is added to shortlists of positions for which [he] meet[s] the minimum requirements at the P-4 level”, but not for positions at the higher level. The Administration also further advised the Applicant that to increase his chances in getting appointed to a post before the conclusion of his secondment, aside from continuing to apply for positions for which he deemed himself qualified within UNICEF, including those at the P-4 level, he should also apply to positions at other UN agencies.

13. On 16 August 2016, the Applicant contacted the Director of the Information and Communications Technology Division (“ICTD”) to seek assistance with his placement on a suitable position in UNICEF. The Applicant did not receive a response.

14. On 11 October 2016, the Applicant was informed that as he had not been offered a position within UNICEF, he would be required to confirm whether he wished to be placed on SLWOP as of 1 November 2016.

15. On 13 October 2016, the Applicant was again advised by the Administration that as he had not been successful in obtaining another position, he would have to choose either SLWOP or separate from service.

The Applicant again contacted the Director of ICTD who recommended that he apply to job openings as published in the UNICEF recruitment portal.

16. On 19 October 2016, the Applicant sought management evaluation of the decision to make his ongoing employment on permanent contract contingent upon his success in securing a vacant position in UNICEF and the failure of UNICEF to make good faith efforts to place the Applicant, a permanent contract holder, on a suitable post.

### **Consideration**

#### *Legal framework*

17. Article 2.2 of the Statute of the Dispute Tribunal 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. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

18. 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.

19. 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.

20. 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.

21. 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 before it.

#### *Receivability*

22. The Respondent submits that UNICEF has not made a unilateral decision to terminate him, but has rather given him the option of remaining a staff member, albeit on SLWOP. Accordingly, the Tribunal "cannot order UNICEF to suspend implementation of a decision taken by [the Applicant]". The Respondent also submits that the Applicant is time-barred from challenging the terms of his secondment, which were agreed upon in 2012.

23. The Tribunal finds that regardless of which one of the two options go into effect—termination or SLWOP—the Applicant will be deprived of his earnings in the near future and will either cut his ties with the Organization or remain attached to it through SLWOP, but without earnings or any work assignments. The Tribunal does not accept the Respondent's argument that, by giving

the Applicant the choice between these two options, the decision is with the Applicant and is no longer attributable to the Respondent. He has been placed in this position by the Administration, and the contested decision clearly affects his rights. The present application is therefore receivable.

*Prima facie unlawfulness*

24. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for her or him 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); *Villamoran* UNDT/2011/126).

25. Although in some parts of his application the Applicant refers to the "implied decision not to renew his contract", he contests, in effect, the decision to terminate his permanent contract or, in the alternative, to place him on SLWOP and discontinue payment of his salary.

26. The Applicant submits that he has retained a right of employment with UNICEF upon the expiration of his secondment and he is entitled to be reabsorbed into UNICEF. He submits that UNICEF has failed to make good faith efforts to identify a suitable position for him. He refers the Tribunal to sec. 5.3 of CF/AI/2015-001 (Inter-organization staff mobility), which provides that, as a staff member returning from secondment, the Applicant has the same status as staff members on abolished posts, and shall be afforded priority consideration for available suitable posts.

27. The Respondent submits that the Applicant was informed that he had no specific lien and would not be automatically reabsorbed. The Respondent submits

that the Applicant's "old role no longer exists". Pursuant to sec. 1.2(h) of CF/AI/2015-001, staff members returning from secondment do not keep a lien against a specific post and are required to be selected for a suitable post in order to be reabsorbed after the loan, secondment or outside employment. The Respondent admits that, on review, UNICEF has determined that the Applicant could have been automatically listed against two additional posts to which he did not apply. The Respondent admits that this constitutes arguable or *prima facie* legal error and may warrant compensation, but submits that the implementation of these errors cannot be suspended by this application.

28. Section 5.3 of CF/AI/2015-001 on Inter-organization staff mobility states:

In order to reabsorb loaned or seconded staff members with general return rights at the end of the agreed release period, they will be granted the same status as staff members on abolished posts.

29. The Applicant has a permanent appointment. Pursuant to sec. 5.3 of CF/AI/2015-001, UNICEF is required to treat him as a staff member who has been affected by the abolition of his post. This means that the Applicant is covered by the protections afforded to him by staff rule 13.1, which states in relevant parts (emphasis added):

### **Rule 13.1**

#### **Permanent appointment**

...

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments *shall be retained in preference to those on all other types of appointments*, provided that due regard shall be given in all cases to relative competence, integrity and length of service. ...

30. Pursuant to staff rule 13.1(d) and sec. 5.3 of CF/AI/2015-001, UNICEF is required to make good faith efforts to find suitable and available posts against



which the Applicant can be placed (*El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; *Tiefenbacher* UNDT/2016/183). Staff regulation 1.2(c) allows UNICEF to reassign staff laterally (it states: “Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”). The Applicant submits that he “has not been notified of any posts for which he has been reviewed or of any steps taken by UNICEF, at all, to identify such posts”. It appears from the Respondent’s reply that there are suitable and available posts against which the Applicant could have been placed on a preferential basis, although this has not been done. In this regard, the Tribunal notes that, as stated at para. 122 of *Hassanin*,

Staff rule 13.1 is clear that permanent staff on abolished posts, if they are suitable for vacant posts, should only be compared against other permanent staff—it would be a material irregularity to place them in the same pool as continuing, fixed-term, or temporary staff members.

31. Accordingly, there are serious doubts as to whether UNICEF has discharged its obligations towards the Applicant under staff rule 13.1(d) and sec. 5.3 of CF/AI/2015-001.

32. Accordingly, on the papers before the Tribunal, there are serious and reasonable concerns as to whether the contested decision was lawful. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

#### *Urgency*

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

34. 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).

35. The Respondent submits that, to the extent the Applicant wishes to challenge the terms of his secondment, which started in 2012, such a challenge is not receivable and any urgency associated with it is self-created. Likewise, any urgency associated with the Applicant's separation could only be created by him if he elected to separate, rather than be placed on SLWOP.

36. The Applicant was notified of the contested decision on 11 and 13 October 2016. He filed a request for management evaluation on 19 October 2016. The contested decision will be implemented on 1 November 2016, either in the form of termination of appointment or placement on SLWOP. The Tribunal finds that this matter is of particular urgency, and the urgency in this case is not self-created.

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

#### *Irreparable damage*

38. 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; *Galliény* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

39. The Applicant submits that if the impugned decision is implemented, the Applicant would lose his status as a permanent contract holder. He would be left without a position in the UN, which will render him ineligible to apply for other UN positions as an internal candidate. Moreover, the sudden separation will result in a loss of his personal integrity and economy, his reputation and his career prospects, which cannot be compensated for by a monetary award.

40. The Respondent submits that, if the Applicant elects SLWOP, he will not face a sudden loss of employment, permanent contract, or eligibility to apply for UNICEF posts. The Respondent states that there is no evidence that the Applicant will suffer harm to his professional reputation, personal integrity and career prospects, regardless of what election he makes.

41. It is established law that loss of a career opportunity or termination of an ongoing employment relationship 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 Tribunal finds that the implementation of the contested decision would cause the Applicant irreparable harm in the form of sudden loss of earnings, loss of preferential consideration and retention, and loss of a prospect of placement against a suitable post within the framework of staff rule 13.1.

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

**Conclusion**

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

**Orders**

44. In light of the foregoing, the Tribunal ORDERS:

The application for suspension of action is granted and the contested decision is suspended pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 21<sup>st</sup> day of October 2016