



**Before:** Judge Ebrahim-Carstens  
**Registry:** New York  
**Registrar:** Pallavi Sekhri, Officer-in-Charge

MALLICK

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**ORDER**

**ON SUSPENSION OF ACTION**

---

**Counsel for Applicant:**  
Daniel Trup, OSLA

**Counsel for Respondent:**  
Thomas Jacob, UNDP

## **Introduction**

1. On Tuesday, 31 July 2018, the Applicant, the Deputy Resident Representative (“DRR”) for the United Nations Development Programme (“UNDP”) based in Georgetown, Guyana, filed an application 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 by UNDP not to renew the Applicant’s fixed-term appointment beyond the expiration date of 16 August 2018. The Applicant submits that the decision is *prima facie* unlawful because, *inter alia*, the Respondent failed to provide reasons for the non-renewal of her contract and the decision not to renew was based on improper motives.

2. For purposes of judicial efficacy and economy, urgent applications are normally assigned to the judges at the relevant duty station on rotational basis. However, this application, the second urgent suspension of action case filed within 24 hours, together with another urgent application, was assigned to the undersigned Judge being the only judge on duty for the month of July 2018 in New York.

3. The application was served on the Respondent on 31 July 2018 directing, upon the instructions of the assigned Judge, that a reply be filed by 4:00 p.m. on Thursday, 2 August 2018.

4. On 2 August 2018, the Respondent duly filed a reply contending that the Application is without merit as the non-renewal of the Applicant’s appointment is lawful. The Respondent further submitted, *inter alia*, that the Applicant is aware of the reason for the upcoming non-renewal of her appointment as it is the direct result of her asking to leave the DRR post she encumbered, and not for any improper motives, and that there is no evidence that the Applicant at any time requested and was denied the reason for the non-renewal of her appointment.

5. Noting that whilst this matter is not at the merits stage, having considered the parties’ submissions and that the contentions in the Respondent’s reply presented

particular circumstances that needed to be addressed on urgent basis, the Tribunal, on exceptional basis, requested the Applicant to file a response addressing in particular the Respondent's submissions on *prima facie* unlawfulness by 3:00 p.m. on Friday, 3 August 2018 by Order No. 153 (NY/2018).

6. The Applicant timeously by the said deadline filed the response in which she submits that at no stage has she indicated any intention to resign her position from UNDP under the Staff Rules or otherwise, despite her suffering discrimination and abuse in UNDP Guyana. The Applicant further submits that while another candidate was selected in February 2018 for her position as DRR outside the normal cycle of recruitment, the Applicant retained her role and responsibilities on a double incumbency basis and she was not given any fixed deadline when she would be required to relinquish her post, and to date the selected candidate has not yet arrived in Georgetown. The Applicant submitted that the Administration effectively created a legitimate expectation that she would be given a sufficient opportunity to find an alternative position without the threat of separation.

### **Background**

7. Due to time constraints and for the sake of expediency, the Tribunal will set out the facts mostly *verbatim* as presented by the Applicant, and also reflected by the documentation on record (references to annexes omitted):

... [The Applicant] is currently the Deputy Resident Representative for UNDP based in Georgetown, Guyana.

... On 12 July 2018, [the Applicant] received notification that her appointment would not be renewed. No reasons were provided save that a fixed-term appointment does not carry any expectation of renewal [as follows:]

[Further to the previous exchanges with the Director and the Deputy Director of the UNDP Regional Bureau for Latin America and the Caribbean (RBLAC), I would like to confirm that your assignment with UNDP Guyana will reach completion upon expiration of your

fixed-term appointment on 16 August 2018 (close of business).

Clause (c) of our Staff Rule 4.13 states that:

“A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.”]

- ... Between 2015 to 2017, [the Applicant] had endured a difficult period within the office having to face issues regarding discrimination. [The Applicant] was the victim of racist abuse from her colleagues due to her Indian background. Despite seeking assistance from her supervisor, the former Resident Representative, no support was provided.
- ... As a result of these events, a Bureau Mission was sent to Georgetown to investigate the matter. Following the Bureau Mission visit, a Management Consulting Team was recommended to further try to resolve the breakdown in the office environment within Georgetown. At the same time, UNDP [Headquarters (“HQ”)] encouraged [the Applicant] to apply for other positions in order to remove her from the toxic environment and the racist incidents she had endured. However, despite [the Applicant]’s good faith efforts to obtain alternative positions commensurate with her skills and abilities, no position was secured.
- ... On 8 February 2018, [the Applicant] was informed that another staff member had been recruited to her post as Deputy Resident Representative in Georgetown. This appointment [has] taken place outside the normal cycle of recruitment. However, [the Applicant] was notified that she would remain in the post performing her functions as a part of a double incumbency.
- ... To-date the selected candidate has not arrived in Georgetown and assumed the post of Deputy Resident Representative.
- ... Throughout the remainder of 2017 and 2018, [the Applicant] attempted to apply for alternative positions. Despite her applications, [the Applicant] has been met with a wall of silence, in which her candidacy has not been prioritized despite her status and performance. [The Applicant] has received indications that senior management within UNDP HQ did not prioritize her candidacy and in effect have prevented her from being recruited. At the same time, [the Applicant] has received indications that lesser qualified and lower priority staff members have repeatedly been selected to the various positions she applied to.

- ... [The Applicant] is a female from a developing country, with long experience in ‘hardship’ field duty stations, and is the only Indian female Deputy Resident Representative in UNDP. UNDP has a self-declared priority to promote gender and geographic diversity in its workforce. [The Applicant]’s dedication and many sacrifices for UNDP include an incident in North Korea/DPRK, where she utilized her own money to protect the Organization from a potential international scandal, and yet accepted a downgrade in her grade in the interests of the Organization.
- ... On 19 July 2018, [the Applicant] filed a Management Evaluation Request (“MER”), challenging the decision not to renew her appointment. Contained within this MER, [the Applicant] requested that the Administration suspend the decision regarding non-renewal.
- ... No decision has yet been forthcoming from the Administration regarding [the Applicant]’s MER.

8. Similarly, for the sake of expediency the Tribunal will set out the facts *verbatim* as presented by the Respondent in the reply, and as reflected by the documentation on record (references to annexes omitted):

#### Management Consulting Team and HQ Mission

- ... From 30 January 2017 to 10 February 2017, the Office of Audit and Investigations (OAI) conducted an audit of UNDP Guyana which “aimed to assess the adequacy and effectiveness of the governance, risk, management and control processes”.
- ... On 20 April 2017, OAI issued its audit report reflecting, *inter alia*, that UNDP Guyana was in the process of “finalizing a Management Change Team mission to look into optimizing organizational structure and will follow audit and mission recommendations”.
- ... On 1 May 2017, a UNDP Guyana staff member sent an email to all UNDP Guyana staff raising concerns regarding issues within UNDP Guyana.
- ... On 5 May 2017, [name redacted, Ms. MT], Resident Representative/Resident Coordinator (RR/RC), UNDP Guyana sent an email to all staff informing them that the upcoming Management Consulting Team (MCT) was delayed as UNDP would first be conducting a mission to review overall staff issues in UNDP Guyana.

- ... On 8 May 2017, the RR/RC sent a further email to all staff notifying them that the HQ mission would take place from 10 May 2017 to 12 May 2017 to “help [UNDP Guyana] improve our office processes and climate with regards to staff issues and concerns”.
- ... On 7 June 2017, the MCT provided the RR/RC with a Letter of Understanding formalizing the purpose of its review of UNDP Guyana’s strategic positioning and organizational structure for optimal support to the government during the new programmatic cycle whilst ensuring financial sustainability of the office. This letter reflected that the MCT was requested further to “concerns over the findings of a recent audit which highlighted factors that would hinder its ability to deliver on the new programme”.
- ... From 21 June 2017 through 28 June 2017, the MCT team visited UNDP Guyana. On 3 August 2017, the MCT issued its suggested Transformation Plan. The Transformation plan reflects that the basis for this report was to “respond, primarily, to i) the need for a review of its strategic positioning driven by the new programming cycle; ii) the need to improve operational efficiency; and iii) issues of financial sustainability”.

#### Request to leave UNDP Guyana

- ... In October 2011, the Applicant was assessed as “Ready with Development” for Deputy-Resident Representative (DRR) assignments. [According to UNDP Guiding principles for Bureau Managers on the Candidates Pools within UNDP (2013),] “[c]andidates who have been competitively reviewed through a corporate assessment and have been found “ready” or “ready with development” [...] immediately becomes a member of the Pool they have been assessed for.” In addition, “[a]ll pool posts are rotational; as such pool members are expected to rotate according to the country office classification and to apply to posts accordingly.”
- ... On 17 August 2015, the Applicant started her assignment as DRR with UNDP Guyana at the P4-Grade. Georgetown, Guyana is classified as a “B” hardship duty station requiring that incumbents rotate from their assigned post every 4 years.
- ... On 12 May 2017, the Applicant met with [name redacted, Mr. DR] as part of the HQ mission to UNDP Guyana. During their discussions, the Applicant expressed her desire to leave UNDP Guyana.

- ... On 16 May 2017, the Applicant and [name redacted, Ms. JF], then-Assistant Secretary General (ASG) and Director, Regional Bureau Latin America and the Caribbean (RBLAC) had a call to discuss a Programme Specialist, Core Government Functions position with UNDP in the Regional Hub in Amman. Further to that call, the Applicant confirmed that she would be applying to this post.
- ... On 14 July 2017, [name redacted, Ms. CU], Human Resources Analyst (HRA), Office of Human Resources (OHR) sent an email to the Applicant confirming that her lateral move to the P4-Grade position, her current grade, in UNDP's Regional Hub in Amman had been approved.
- ... On 26 July 2017, the Applicant accepted the offer for a lateral move to this P4-grade post. The Applicant however informed the HRA that she was considering opportunities in the private sector and that this information may be relevant to the hiring office. The following day, the HRA informed the Applicant that in view of the need for someone to fully commit to the post in UNDP's Regional Hub in Amman (lateral moves usually require two year commitment), UNDP had to withdraw their offer for a lateral move.
- ... During the last week of August 2017, the Applicant met with the then-ASG and Director, RBLAC at RBLAC's regional meeting held in Panama where she reiterated her desire to leave UNDP Guyana prior to the August 2019 end of her rotation, as well as the fact that she was seeking other professional opportunities both in and out of UNDP.
- ... On 25 August 2017, the then-ASG and Director, RBLAC sent an email to [name redacted, Mr. LM], Deputy Director (DD), RBLAC and the [Human Resources Business Partner] HRBP, RBLAC reflecting that, in response to the Applicant confirming that she wished to leave her post, she had talked to various UNDP bureau who expressed their support for the Applicant's candidacies.
- ... On 15 September 2017, the Applicant requested the then-ASG and Director, RBLAC's responded that same day that she would talk to the hiring managers.
- ... On 2 November 2017, the Applicant emailed the then-ASG and Director, RBLAC for the purpose of informing her that she "need[ed] to move asap [...]" due to family matters.
- ... On 15 November 2017, the then-ASG and Director, RBLAC responded to the Applicant recalling their earlier discussions and the Applicant's requests to leave UNDP Guyana prior to

the August 2019 end of her rotation. The then-ASG and Director, RBLAC further informed the Applicant that considering the Applicant's request as well as the need for UNDP to "consider the implications [of her request] on the CO as well" she would be taking "the DRR Position in Guyana to the next Talent Review Exercise (TRE) before the end of this year". The then-ASG and Director, RBLAC further noted that she would make "efforts to push the EOD of a new incumbent at least until end February 2018 (unless [the Applicant] wish[es] to leave the duty station earlier) – this is a few months from now, as requested by [the Applicant] during our meeting in Panama in August." The Applicant did not contest the decision to place the DRR post in the next TRE.

- ... Further to the receipt of the then-ASG and Director, RBLAC email, the Applicant emailed [name redacted, Ms. MC], Human Resources Business Partner (HRBP), RBLAC requesting to have a skype call. During a call held that same day, the Applicant informed the HRBP, RBLAC of posts she had recently applied to, that she was continuing to actively look for new assignments and that she was particularly interested in positions with UNDP's Regional Bureau for Asia and the Pacific as it was closer to home. The HRBP, RBLAC also inquired about the Applicant's recent application to an HQ position so that she could look into its status.
- ... In December 2017, the Applicant applied to three positions as part of that TRE, including the DRR post in Guyana. The Applicant ranked the DRR position third among the three positions she wished to be considered for. Further to a corporate panel review, the Applicant was not selected for this new rotation.
- ... On 8 February 2018, the HRBP, RBLAC informed the Applicant, via an email titled "Your request and the Guyana DRR post" (emphasis added), of her non-selection for next DRR Guyana rotation. The HRBP specifically noted that, in line with the Director, RBLAC's 15 November 2017 email, that UNDP would postpone the arrival of the new DRR to enable the Applicant to identify new opportunities. The Applicant acknowledged the HRBP's email that same day thanking the HRBP for her support. The Applicant did not contest her non-selection for the DRR Guyana post.
- ... On 21 May 2018, the DD, RBLAC contacted the Applicant requesting that she keep him informed of the positions she was applying to so that he could support her applications.



- ... On 26 June 2018, the Applicant had a call with [name redacted, Mr. DB], Director, Office of Human Resources (OHR) and the DD, RBLAC that included a discussion of her current employment status.
- ... On 29 June 2018, the Applicant sent an email to [name redacted, Mr. TG], Associate Administrator requesting his advice and intervention noting that she only had “weeks left in [her] contract” and that she was “mere weeks away from being displaced and separated”.
- ... On 19 July 2018, the Applicant had a skype call with the Director, OHR. The Applicant discussed her professional background, performance and experiences with UNDP Guyana and indicated that she wanted to be considered as displaced and that she was open to short-term assignments.
- ... On 24 July 2018, the Applicant sent an email to the Director, OHR to keep him abreast of the positions she was applying to.

### **Parties’ Submissions**

9. Due to time constraints, and in the interests of expediting this matter, although endeavoring to summarize them, the Tribunal has incorporated most of the respective contentions and submissions *verbatim*.

### **Applicant’s Submissions**

10. The Applicant’s principal contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. The Administration’s failure to provide reasons for the Applicant’s non-renewal is unlawful. Moreover, this failure gives rise to an adverse inference that the reasons for not renewing the Applicant’s appointment were tainted by improper motives;

b. It is trite law that the duty of procedural fairness requires a written explanation for a decision. In *Obdeijn 2012-UNAT-201*, the Appeals Tribunal held that the Secretary-General has an obligation to state the reasons for an administrative decision:

The obligation of the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Staff Rule, but it is inherent to the Tribunal's power to review the validity of such a Resolution A/RES/63/253 and the principle of accountability of managers that the Resolution advocates for.

c. The Organization's failure to provide reasons in support of a decision not to renew a staff member's contract does not automatically lead to the conclusion that the decision is unlawful. However, the jurisprudence is clear that the failure to provide reasons shifts the burden to the Administration to prove that the impugned decision was not arbitrary or tainted by improper motives;

d. There is a general principle of international civil service law that there must be a valid reason for the non-renewal of any contract and that the staff member must be informed of that reason explicitly in a decision, against which he or she can appeal. This principle, according to the Administrative Tribunal of the International Labour Organization ("ILOAT") *S. v. UNESCO* Judgment No. 3838 (2017), applies to the non-renewal of a fixed-term appointment which, under the staff regulations, ends automatically upon its expiry;

e. In *Assale* UNDT/2014/034, the Dispute Tribunal concluded that "[t]he myth that a fixed-term appointment comes to an end automatically without the Administration having to give any reason must be laid to rest. The Administration keeps relying on that vague defence to justify any situation of non-renewal of a fixed term appointment";

f. As a consequence, the Administration's failure to provide the Applicant with reasons for her non-renewal was unlawful. Moreover, this failure gives rise to an adverse inference that the reasons for not renewing the Applicant's appointment was tainted by improper motives. It should be noted that the need for the position of Deputy Resident Representative in

Georgetown remains and that as such the Applicant's sudden non-renewal is of concern;

g. In *Abosedra* Order No. 10 (NBI/2011), the Tribunal held that a decision by the Administration may be unlawful if "such a decision... was motivated by countervailing circumstances". Examples of such countervailing circumstances are a mistake of law; abuse of authority; the giving of a false reason or considerations; arbitrary or irrational exercise of discretion; improper motives. The decision not to renew the Applicant's contract was based on improper motives;

h. Firstly, consideration must be given to the fact that the Applicant still retains the functions and responsibility for the essential position of Deputy Resident Representative. It seems incredulous to believe that the non-renewal of the Applicant's appointment could have been premised on any rational and objective reasons;

i. Secondly, the Applicant contends that the absence of reasons underlying her non-renewal is premised on the fact that she was a victim of racist abuse by her colleagues in 2015-2017. Throughout her time in the country office, her colleagues subjected her to racist treatment which was intended to undermine her. Despite her frequent complaints, no substantive action was taken by the Resident Coordinator or by the UNDP HQ;

j. According to ILOAT Judgment No. 3172, *In re S.K.* (2013), "[a] decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reason underpinning that decision";

k. The decision not to renew the Applicant's appointment was predicated on improper motives. The Administration's decision was intended to obfuscate its responsibilities and not confront issues of discrimination and

racism within the Organization. The Administration adopted a path of least resistance and elected to rid themselves of a well performing staff member, who dared to raise issues of racism and the manner in which she was being treated;

*Urgency*

l. On 12 July 2018, the Applicant received formal notification of the non-renewal of her appointment. On 16 August 2018, the Applicant will be separated from the Organization;

m. On 19 July 2018, the Applicant filed an MER challenging the decision of the Administration whilst requesting that the Administration suspend the decision pending considering of her application;

n. In conjunction with filing the MER, the Applicant reached out to the Administration to try and obtain a resolution of the matter;

o. However, despite the Applicant's attempt to seek an administrative suspension of the decision or resolution of the matter, none has been forthcoming. Consequently, the Applicant is of the view that the UNDP Bureau for Management Services will not render a decision before the expiration of her contract;

p. Current practice requires that the UNDP Administrator render a decision within 45 days from the date that an application was received. The Applicant's having submitted her MER on 19 July 2018, the Administration needs not file its response until 2 September 2018, 14 days after the expiration of her contract. In email correspondence with the UNDP Bureau for Management Services, the Administration confirmed that a reply to the Applicant's MER could be expected by 2 September 2018. Without the suspension of action, the Applicant will shortly begin the process of check-out;

*Irreparable damage*

q. In *Corcoran* UNDT/2009/071 and *Calvani* UNDT/2009/092, the Dispute Tribunal found that harm to professional reputation and career prospects, or sudden loss of employment may constitute irreparable damage. In *Igunda* UNDT/2011/143, the Dispute Tribunal also found that separation from service will occasion irreparable harm in that the staff member will lose the prospect of applying for positions within the United Nations as an internal candidate;

r. In *Rasul* Order No. 23 (NBI/2010), the Dispute Tribunal held that a non-renewal or failure to extend an appointment will result in damage to career prospects and aspirations, which are not matters that can be compensated for by a monetary reward;

s. In the instant case, if the impugned decision is implemented, the Applicant will be left without a position in the United Nations, which will render her ineligible to apply for other positions as an internal candidate. Moreover, the sudden separation will result in a loss of her personal integrity and economy, her reputation and her career prospects, which cannot be compensated for by a monetary award;

t. In addition, the implementation of the impugned decision will result in a break-in service, which will disrupt the Applicant's continuous service for the purposes of her eligibility for a permanent/continuing appointment and entitlements such as home leave, which cannot be compensated for by a monetary award.

## **Respondent's submissions**

11. The Respondent's principal contentions may be summarized as follows:

### *Prima facie unlawfulness*

a. The non-renewal of the Applicant's appointment is lawful. The Applicant is aware of the reason for the upcoming nonrenewal of her appointment as it is the direct result of her asking to leave the DRR post she encumbered, and not any improper motives. There is no evidence that the Applicant at any time requested and was denied the reason for the non-renewal of her appointment;

b. The Applicant's reference to *Obdeijn* 2012-UNAT-201 for the proposition that "the duty of procedural fairness requires a written explanation for a decision [and...] the failure to provide reasons shifts the burden to the Administration to prove that the impugned decision was not arbitrary or tainted by improper motives" is selective and ignores a key condition of the Appeal Tribunal's consideration in *Obdeijn*. In *Obdeijn*, the Appeals Tribunal went on to state that:

It follows from the above that the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member, such as a decision not to renew an FTA, where the staff member requests it or, a fortiori, the Tribunal orders it.

c. Similarly, in *Nakwafio Kasai* Order No. 401 (NBI/2015), the Dispute Tribunal held:

[...] The cursus laid down by UNAT is that a fixed-term contract dies a natural death on the day of its expiry. There is no general proposition that reasons must as a rule be given in such a situation. On the expiry date the contract is at an end and there is no more that the staff member can do about it. [...]

As regards the alleged absence of reasons as pointed above there is no general rule in the jurisprudential thinking of UNAT that reasons must be given failing which the non-renewal of the fixed term contract is unlawful. In the context of the application, the reason for the non-renewal is subsumed in the contract itself, namely, the expiry date. In the absence of a promise or a legitimate reason for renewal the Applicant is deemed to be aware that his contract is coming to an end [...].

d. A plain reading of *Obdeijn* reflects that the obligation identified by the Appeals Tribunal is that the Organization has to provide a reason – when requested to do so;

e. The Applicant, despite numerous interactions with UNDP senior management regarding her employment status, has provided no evidence that she requested, nor that the Organization refused to state, the reasons for the non-renewal of her fixed-term appointment;

f. Furthermore, the Applicant cannot reasonably submit that she was unaware of the reason for the non-renewal of her appointment, nor state that it was improperly motivated as all of the Organization's actions were consequent to the Applicant's requests;

g. Unlike normal staff positions, staff members on rotational position are aware that prior to the end of their rotation they are to find another position, absent which they will become displaced and their appointment will not be renewed;

h. As notified to the Applicant, the sole reason the DRR Guyana post was presented to the December 2017 TRE “outside of the normal cycle of recruitment” was further to the Applicant's requests to leave the DRR post for family reasons prior to the end of her 4-year rotation. Absent the Applicant's requests, the rotation for this position was not scheduled until August 2019 and her appointment could have been renewed against the DRR post until then;

i. At no time has the Applicant contested the decision to place the DRR post in the December 2017 TRE, nor has the Applicant expressed a desire that this process be reversed and that the DRR post remain within a regular rotational cycle. Similarly, the Applicant has not contested her non-selection for the DRR post. To the contrary, the Applicant reasserted to the Deputy-Director RBLAC in May 2018 that a position she had recently applied to was preferable as it would bring her closer to her family;

j. The Respondent is incredulous as to the Applicant's submission that the fact that the Applicant retains responsibility for the DRR Guyana post or that the selected DRR has not yet arrived in Guyana is reflective of any impropriety. Indeed, the record reflects that the Organization decided to postpone the deployment of the selected DRR to "provide [the Applicant] with more time in [her] search for new opportunities", an action taken for the benefit of the Applicant. While UNDP's HR management system (Atlas) can reflect a position as double encumbered, it is not realistic for the Applicant to suggest that the new DRR should have been deployed sooner or that she could be maintained indefinitely against a position for which the new rotational incumbent has been recruited. As this is a rotational position, the Organization is required to ensure the continuity of the post's functions by initiating the recruitment for the next rotation prior to the end of the prior one;

k. The Applicant does not submit that she had any expectation that her appointment would be renewed. This is supported by the fact that, prior to receiving the 10 July 2018 non-renewal notification, the Applicant wrote to the Associate Administrator that she knew she was "mere weeks away from being displaced and separated", a consequence of the early rotation of her post due to her request to leave UNDP Guyana as well as her earlier decision that she could not fully commit to the post offered to her in UNDP's Regional Hub in Amman;



l. In addition, the record reflects that the Applicant has been met with anything but a wall of silence from senior management. Instead, the HRBP, RBLAC; the Director, OHR; the then-ASG and Director RBLAC; the Deputy-Director RBLAC; and other entities within UNDP have all expended efforts to support the Applicant's candidacies, actions which the Applicant has regularly thanked them for taking. In addition, the Organization identified and offered the Applicant alternate employment at the same grade she was at in UNDP's Regional Hub in Amman, a location closer to her family, but the Applicant was not able to fully commit to it due to private endeavours;

m. Finally, the Applicant has provided no evidence to support her claim that her non-renewal is an attempt by the Organization to obfuscate its responsibilities or a discriminatory action. The Respondent submits that in *Hayashi* UNDT/2014/030, the Dispute Tribunal specifically found that "it is not possible for a Tribunal to base its judgment on mere assertions not supported by any other evidence";

n. The record reflects that UNDP conducted an HQ mission to UNDP Guyana to review ongoing issues of work atmosphere and employee relations within the country office as a whole. Similarly, a Management Consulting Team was recommended prior to the HQ mission taking place for the purpose of addressing UNDP Guyana efficiency concerns. As the DRR of UNDP Guyana, the Applicant was well aware of the scope of these missions;

o. Further, the record reflects that not only did the Organization not take steps to "rid themselves" of the Applicant but they actually took continued steps to retain the Applicant by offering her a new position and keeping her against the DRR post for several months to support the Applicant's search for alternate employment both within and outside of UNDP;

p. Throughout her application the Applicant makes a range of selective claims without identifying any evidence to support her assertions,

documentary or other. As held in *Balinge* UNDT/2012/180, “[t]his Application fails for the simple fact that it is entirely based on unsubstantiated allegations. There is absolutely no showing of any unlawfulness on the part of the Respondent beyond the mere assertions and allegations of the Applicant”;

q. The Applicant cannot request that the Organization take specific actions to support her, professionally and personally, in response to her requests to leave UNDP Guyana early and then claim that the actions of the Organization in response thereto are ill-motivated. The Applicant has at all time been aware of the reason for the non-renewal of her fixed-term appointment upon its natural expiry, a reason onto itself, that is that the Applicant has not been retained against another position further to the end of her rotation against the DRR post in UNDP Guyana.

**Applicant’s further submissions pursuant to Order No. 153 (NY/2018)**

12. In response to the Tribunal’s order requesting a response to the reply, the Applicant made the following further submissions. The Tribunal must commend both counsel for complying with the time limits in this matter which at first blush appeared to be a straightforward matter.

a. It is common cause that the Applicant was not happy with the environment within UNDP Guyana. Indeed, the discrimination and abuse suffered by the Applicant forced her to look elsewhere to find alternative positions. In the interest of transparency, the Applicant shared her professional development and requirements with senior management;

b. However, this cannot be equated with an intention to resign from UNDP; under Rule 9.2(a) and (b) of the Staff Regulations and Rules, a resignation is a separation initiated by a staff member through the provision of a written notice. Nothing in the Respondent’s submissions suggests that a

written notice of any kind was ever submitted. Certainly, no discussions were had with the Applicant regarding actual resignation or separation;

c. The Applicant legitimately raised her concerns and frustrations regarding UNDP Guyana. This is evidenced in her email correspondence. There was never any form of written notice which permitted UNDP to simply consider that the Applicant sought to separate from the Organization. The notification of separation dated 10 July 2018 does not state any reason for her separation, and does not state that the decision was predicated on her desire to leave UNDP;

d. The Applicant was aware that her position with UNDP Guyana was re-advertised. Whilst the Applicant applied for the post, she was not selected. Subsequently, an alternate candidate was given the post. However, instead of the Applicant being separated, she retained her position and functional responsibilities. The Applicant continued to perform the role of DRR. At the same time, the Administration undertook to assist the Applicant in finding alternative positions;

e. It was on this basis that the Applicant did not challenge the non-selection. The Applicant did approach the Administration in relation to her non-selection, and did seek the intervention of the Ombudsman. However, whilst the post of DRR took on a double incumbency, the Applicant retained her role and responsibilities. The Applicant was assured she would be provided with assistance in finding a new position. Effectively, there was no change in the Applicant's terms and conditions of appointment, and no fixed deadline was provided within which the Applicant would be required to relinquish her post;

f. The Applicant therefore understood that she would have the opportunity to find an alternative position without any need for her to be separated. The Administration effectively created a legitimate expectation that

she would be given sufficient opportunity to find an alternative position without the threat of separation. It should be noted that no reference is made in the notice of separation regarding the Applicant occupying a double incumbency post and the fact that as a result, she is now required to vacate the position. The Administration cannot simply provide an opportunity for the Applicant to stay on her post and then decide unilaterally to remove this option subsequently without giving warning;

g. It is settled law that fixed-term appointments do not carry any automatic right of renewal, and expire automatically on the date indicated in the contract. Therefore, cases where a staff member has a legitimate expectation of renewal of a fixed-term appointment are an exception to this rule. In judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization (UNESCO), Advisory Opinion, ICJ Reports 1956, pp. 77, 91, the International Court of Justice has ruled that the practice of an international organization may entitle staff members to rights not expressly granted or create a legitimate expectation;

h. The Tribunals have repeatedly accepted that staff members may have rights beyond those set out in their Letters of Appointments or the Staff Regulations and Rules. It is accepted that employment rights can stem from general principles, for example principles of fairness and good faith. In *Sina* UNDT/2010/060 (overruled on different grounds in *Sina* 2010-UNAT-094), the Dispute Tribunal defined legitimate expectation as follows:

A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so.

i. In this case, the Applicant had retained her position as DRR, despite the fact that an alternate staff member had been selected. The Administration could have notified the Applicant that her appointment was to be terminated. Instead UNDP retained the Applicant's services based on the issues and difficulties she had previously experienced. At no point did UNDP indicate to the Applicant that she would be separated from service were she not able to find an alternative position. The Administration committed itself to a course of conduct that the Applicant relied upon;

j. It is accepted that, whilst valid reasons must be given for the non-extension of a contract, the case law does not specifically require that the reasons be stated in the text that gives notice of the non-extension. However, such reasons should not be provided simply after a lawful challenge by the Applicant's counsel and a thoughtful and well-prepared reply by counsel for the Respondent;

k. As indicated in the Respondent's reply, the Applicant had written to the Administration regarding the status of her contract renewal and seeking a response as to why she had not received a notification of renewal. No reply was forthcoming. The Administration was obligated to have communicated its reasoning at the earliest possible stage so that the Applicant would have been aware as to *casus belli* of the non-renewal. The Respondent's failure to provide this reasoning permitted it the time to develop a more legalistic and defensible position to rely on;

l. The Applicant retains the position that the Administration failed to provide the true reason for her non-renewal, the basis of which related to acts of discrimination and harassment which she suffered in UNDP Guyana.

## Consideration

### *Legal framework*

13. 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.

14. 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.

15. 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.

16. Under art. 2.2 of the Statute, a suspension of action order 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 the contested decision.

17. 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. 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, and be succinctly and precisely pleaded, bearing in mind that the matter is not at the merits stage at this point of the proceedings, and that the luxury of time is unavailable. In this instance the parties made detailed submissions and the Respondent filed a fully reasoned reply together with annexes resulting in a bundle of some 80 pages.

18. As the Respondent has not contested the urgency and irreparable harm aspects of the application, the Tribunal will deal with those first.

*Urgency*

19. 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.

20. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (see, for instance, *Villamorán* UNDT/2011/126, *Dougherty* UNDT/2011/133 and *Jitsamruay* UNDT/2011/206).

21. In the present case, the Applicant submits that she received the formal notification of the non-renewal of her appointment on 12 July 2018. On 19 July 2018, the Applicant filed a management evaluation request challenging the contested decision and requesting the suspension of the decision pending management evaluation. On 23 July 2018, the Applicant received an acknowledgment email advising that pursuant to Staff Rule 11.2(d), the Administrator had 45 calendar days to respond, accordingly she may expect a reply to her request by Sunday, 2 September 2018. The email also explained that Ms. SM, the Assistant Administrator

and Director, Bureau for Management Services, had been delegated the authority by the Administrator to answer the request. On 24 July 2018, Ms. SM informed the Applicant by email “that UNDP management does not believe that the facts of the case merit suspension of action on the management decision taken”.

22. The decision on the Applicant’s management evaluation request is not due until 2 September 2018, after the expiration of the Applicant’s contract on 16 August 2018. The Applicant’s submission on this issue has commendably not been challenged by the Respondent.

23. In the circumstances and on the papers before it, the Tribunal finds that the matter is urgent as the contested decision is impending and will be implemented before the management evaluation is rendered, and the Tribunal finds the requirement of particular urgency to be satisfied.

*Irreparable damage*

24. 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 (see, for instance, *Adundo et al.* UNDT/2012/077 and *Gallieny* Order No. 60 (NY/2014)). In each case, the Tribunal has to look at the particular factual circumstances.

25. 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) and *Finniss* Order No. 116 (GVA/2016)).

26. The Applicant submits that if the impugned decision is implemented, she will be ineligible to apply for other positions in the United Nations as an internal candidate. The Applicant also submits that the sudden separation will result in a loss of her personal integrity and economy, her reputation and her career prospects, which cannot be compensated for by a monetary award. The Applicant further submits that



the impugned decision will result in a break in service, which will disrupt her continuous service for the purposes of her eligibility for a permanent/continuing appointment and entitlements such as home leave, which cannot be compensated for by a monetary award. The Applicant's submission on this issue also has not been challenged by the Respondent.

27. It appears the Applicant has been with the Organization for some 14 years, seemingly with a good track record. She has served in several hardship duty stations for 12 consecutive years. The Tribunal accepts that she would suffer much more than mere economic loss as pleaded. In the circumstances and on the papers before it, the Tribunal finds the requirement of irreparable damage to be satisfied.

*Prima facie unlawfulness*

28. 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 procedurally or substantively defective, was influenced by some improper considerations, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (see, for instance, *Jaen* Order No. 29 (NY/2011) and *Villamorán* UNDT/2011/126).

29. The Applicant submits that other than to specify that a fixed-term appointment does not carry any expectation of renewal, the letter dated 10 July 2018 provides no reasons for the non-renewal of her contract. The Applicant, relying on, amongst others, the case of *Obdeijn* UNDT/2011/032 (affirmed in *Obdeijn* 2012-UNAT-201), submits, *inter alia*, that not only is there a duty of procedural fairness, but the general principle of international civil service law requires a valid reason for the non-renewal of any contract of which the staff member must be informed explicitly in a decision against which he or she can appeal. Therefore, the Administration's failure to provide reasons for the non-renewal of her contract is unlawful, giving rise to the adverse inference that the decision was tainted by

improper motives. The Appeals Tribunal in *Obdeijn* also reiterated that the Secretary-General has an obligation to state the reasons for an administrative decision as a consequence of the inherent power of the Tribunal to review the validity of such.

30. The Respondent on the other hand argues that *Obdeijn* only requires the Organization to provide a reason when requested and that the Applicant failed to show that she requested, and that the Organization refused, to state the reasons for the non-renewal. Furthermore, the Respondent argues that the Applicant was well aware of the reasons for the non-renewal of her fixed-term contract.

31. In *Ncube* 2017-UNAT-721, the Appeals Tribunal stated that “our case law requires the Secretary-General to provide a reasonable explanation when a staff member’s fixed-term appointment is not renewed”. Also in *He* 2018-UNAT-825, the Appeals Tribunal confirmed that “the Administration has an obligation to state the reasons for an administrative decision not to renew an appointment to assure the Tribunals’ ability to judicially review the validity of the Administration’s decision”.

32. In *Assale* 2015-UNAT-534, the Appeals Tribunal stated that it is undisputed that a fixed-term appointment carries no expectancy of renewal or conversion, and citing *Said* 2015-UNAT-500, stated that “[n]evertheless an administrative decision not to renew a fixed-term appointment can be challenged on the grounds the Agency has not acted fairly, justly and transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving such factors played a role in the administrative decision”.

33. In *S. v. UNESCO* ILOAT Judgment No. 3838 (2017), it was held that “an official who holds a fixed-term contract that automatically ends upon expiry must be informed of the true reasons for not renewing that contract and must receive reasonable notice thereof”. In ILOAT Judgment No. 1154, *In re Bluske* (1992), ILOAT did not accept the reasons for non-renewal provided orally as the substantive reasons for non-renewal, but only accepted the reasons provided in writing for the purpose of judicial review.

34. In the present case, while the non-renewal letter referred to “the previous exchanges with the Director and the Deputy Director of the UNDP [...] RBLAC”, it does not specify the true or exact reasons for not renewing the contract but simply relies on Staff Rule 4.13, which provides that “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”. Similarly, whilst the letter states that the writer “would like to *confirm* that your assignment with UNDP Guyana will reach completion on expiration of your fixed term appointment”, there are no “previous exchanges” before the Tribunal that indicate this.

35. While the Respondent argues that the Applicant is aware of the reason for the upcoming non-renewal of her appointment as it is the direct result of her asking to leave the DRR post she encumbered, the Applicant disputes such contention and submits that she has never indicated that she wished to separate from the Organization. In particular, she emphasizes that she never resigned from her post, that she has retained her role and responsibilities as DRR, that she was retained on her post on an indeterminate double incumbency basis with no fixed deadline for relinquishment even after the selection of another for her post, and the selected candidate has still not arrived in Georgetown. The Applicant states that all these circumstances created a legitimate expectation that she would be allowed to continue her search for an alternative position without the threat of separation.

36. The Tribunal notes that the Applicant expressed in an email to the Associate Administrator that she was “mere weeks away from being displaced and separated” prior to receiving the non-renewal notification. The Respondent acknowledges however that this was a consequence of the early rotation of her post due to her request to leave Guyana as well as her earlier decision that she could not commit to the post offered to her in UNDP’s regional hub in Amman. It appears there followed further communications and discussions of which the Tribunal has no further information and of which there arises some dispute of fact which cannot be reconciled on the papers.

37. The Tribunal finds that in this particular case, in all these circumstances, the dispute and lack of clarity between the parties as to the Applicant's continued double post incumbency and the reason for non-renewal further highlights the necessity of having sufficiently detailed reasons for the non-renewal of the Applicant's contract, in order to also assess whether the Administration has acted fairly justly and transparently with a staff member.

38. On the second matter of legitimate expectation, as was stated in *Adundo* UNDT/2012/118, "it is trite law that although appointments do not carry an automatic expectation of renewal, such legitimate expectation may be created". Although the Tribunal does not have the full facts of the case on hand and there seems to be substantial dispute between the parties, it is clear that the Organization's intention was to retain the Applicant until she secured another post, hence the double incumbency arrangement (as recorded in email exchanges with the Applicant). Although it seems unusual that UNDP would fund two staff members to perform a position with the aim of retaining one in service until she finds alternative employment, this appears to have been the arrangement between the parties. There appear to have been efforts by the Respondent to place the Applicant elsewhere considering what seems to be a very hostile environment on, as the Respondent put it, "ongoing issues of work atmosphere and employee relations within the country office", and as exemplified by the email from an unidentified staff member threatening a hunger strike in protest.

39. A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or by words that it is intended, or is reasonably likely, to induce the other party to act in some way in reliance upon that representation, and the other party does so (*Checa-Meedan* UNDT/2012/009). The Applicant states that all the circumstances herein before mentioned created a legitimate expectation that she would be allowed to continue her search for an alternative position without the threat of separation. Not only must the expectation be legitimate and on some reasonable basis, but the fulfillment of the

expectation must lie within the powers of the person or body creating the expectation (*Candusso* UNDT/2013/090). In this instance one wonders for how long the Applicant would be allowed to search for an alternative job all during the double incumbency. The Tribunal notes that the Respondent acknowledged that the Applicant's rotation period in Guyana would only expire August 2019 and she was expected to remain in Guyana had she not requested to move from the hostile environment. In all the circumstances the Applicant may well have had an expectation that she was secured from separation even if she would be displaced from the Guyana office.

40. Accordingly, on the papers currently before it, the Tribunal finds that the Applicant has made out a fairly arguable case that the contested decision is unlawful.

41. In the circumstances and on the papers before it, the Tribunal finds the requirement of *prima facie* unlawfulness to be satisfied.

### **Conclusion**

42. 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 7<sup>th</sup> day of August 2018