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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/047  
Order No.: 217 (NY/2018)  
Date: 31 October 2018  
Original: English

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**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

KUMAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Mohamed Abdou, OSLA

**Counsel for Respondent:**  
Esther Uwazie, UNICEF

## **Introduction**

1. On Thursday, 25 October 2018, the Applicant, a Senior Information Officer at the P-5 level, on a permanent appointment with the United Nations International Children's Emergency Fund ("UNICEF"), filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, requesting suspension of the termination of the Applicant's permanent contract effective 31 October 2018.

2. On the same day, the case was assigned to the undersigned Judge, and the Registry transmitted the application for suspension of action to the Respondent, requesting the Respondent to file a reply by Friday, 26 October 2018.

3. On 26 October 2018, the Tribunal invited the parties to a case management discussion ("CMD") on 10:30 a.m. on Monday, 29 October 2018, and directed the Applicant to submit information on his current location and the Respondent to file the following additional information by 9:30 a.m. on Monday, 29 October 2018:

a. All relevant documents related to the Applicant's permanent appointment at UNICEF;

b. All documents related to the Applicant's secondment to the United Nations Secretariat in November 2012;

c. A list of all the posts that the Applicant applied at UNICEF from October 2016 to 31 June 2018 and 1 July 2018 to the present, separately;

d. A history of the P-4 post that the Applicant occupied before his secondment to the United Nations Secretariat, together with all relevant documents, including the job description(s);

e. A list of all available posts at UNICEF at P-4 and lower level, with identical or similar job descriptions with the P-4 post occupied by the Applicant before his secondment;

f. The Applicant's two last performance evaluations.

4. On Monday, 29 October 2018, the Respondent filed the additional submission directed by the Tribunal, and the parties attended the CMD in the New York courtroom.

5. At the CMD, the Applicant and his Counsel, Mr. Mohamed Abdou, participated via telephone and the Respondent was represented by Ms. Esther Uwazie, who was present in person.

6. Following the discussions related to the factual aspects of the case, including the existence of the Applicant's post in UNICEF, the circumstances of his secondment to the United Nations Secretariat between 2012-2016, the rights of a staff member with permanent contract whose post is abolished, in the light of the latest jurisprudence of the Appeals Tribunal (*Timothy* 2018-UNAT-847), the date of the latest notification of 2 October 2018 and the reasons for filing the application for suspension of action on 25 October 2018, the Tribunal instructed both parties to file additional submissions together with the relevant documentation by 30 October 2018.

7. On Tuesday, 30 October 2018, the Applicant and the Respondent duly filed additional submissions as directed by the Tribunal. Specifically, the Respondent filed a copy of the Administrative Instruction CF/AI/2015/001 issued on 30 October 2015.

### **Factual background**

8. 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.

9. On 20 June 2012, the Chief, Section 1 Human Resources Services Learning Development and HR Services Division, requested the release of the Applicant for a period of one year to the United Nations Secretariat. In accordance with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and

Allowances (“Inter-Organization Agreement”), UNICEF agreed to the release and the Applicant was seconded from UNICEF to the United Nations Secretariat for one year to serve as a Senior Information Officer at the P-5 level from 1 November 2012 to 31 October 2013.

10. On 23 September 2013, the Executive Office of the Department of Management requested a further extension of the Applicant’s secondment under the same terms and conditions for an additional year through 31 October 2014. In the letter from the Department of Management requesting the extension of the secondment, the following mention was included: “[...] and that the staff member will retain his rights of employment with UNICEF upon completion of secondment”.

11. On 30 September 2013, UNICEF approved an extension of the Applicant’s secondment from 1 November 2013 to 31 October 2014. No reference was included if UNICEF agreed for the Applicant to retain his rights of employment with UNICEF upon completion of secondment.

12. The Applicant’s secondment was further extended upon request from 1 November 2014 to 31 October 2015 and from 1 November 2015 to 31 October 2015. In the response issued on 14 August 2015, in relation to the request for the extension of 11 August 2015, UNICEF agreed to the extension up to 31 October 2016 and indicated that since the Applicant would complete four years of secondment at the end of October 2016, any further requests for extension of his services would need to be on inter-agency transfer basis.

13. On 1 July 2016, UNICEF was informed by Ms. VCO, Human Resources Officer at the United Nations Secretariat, that the Applicant’s secondment would end on 31 October 2016 and he would return to UNICEF on 1 November 2016. On the same day, Ms. MJ, on behalf of UNICEF, acknowledged the message, stating in the response that “we look forward for the [Applicant’s] return to UNICEF on 1 November 2016”.

14. On 1 August 2016, UNICEF wrote the Applicant that they were informed that the United Nations Secretariat would not request a further extension and that the Applicant would return to UNICEF. In the email, UNICEF wrote that “in the event you are not successful with your applications on the conclusion of your secondment and do not wish to separate from the organization, you can request Special Leave without Pay (“SLWOP”) for an initial period of one year from 1 November 2016 to 31 October 2017” and advised the Applicant to refer to the Inter-Organization Mobility Administrative Instructions on the Return to Service (secs. 5.3, 5.4, 5.7 and 5.8).

15. On 16 August 2016, upon his return from annual leave, the Applicant confirmed his interest to come back to UNICEF, as previously indicated the same to the United Nations Secretariat. He further indicated that he applied for several jobs at P-5 and D-1 level mentioning his secondment condition and his general lien status in the cover letter, but he did not receive any answer. The Applicant requested advice on what he should do as a person coming back to UNICEF after a successful secondment. In the follow-up email dated 16 August 2016, UNICEF advised the Applicant that they would follow up with offices to ensure that his name was added to shortlists of positions for which he met the minimum requirements at the P-4 level and but that they could not do the same for higher-level positions, and that in order to increase his chances of getting appointed to a post before the conclusion of his secondment, he should continue to apply for positions which he deemed himself qualified, including those at P-4 level within UNICEF and with other United Nations agencies.

16. On 18 October 2016, the Applicant was informed by the Mobility and Staffing Section, Division of Human Resources, UNICEF, that since his secondment to the United Nations Secretariat would expire on 31 October 2016 and no information was provided to the office that he was offered a position within UNICEF, he should advise whether he would like to be placed on SLWOP for one year as of 1 November 2016.

17. On 19 October 2016, the Applicant submitted a management evaluation request challenging the decision to make his ongoing employment on permanent contract contingent on his success in securing a vacant position within UNICEF and the failure of UNICEF to make good faith efforts to place the Applicant on a suitable post. On the same day, the Applicant filed a request for suspension of action seeking suspension of the decision to terminate his permanent appointment.

18. On 21 October 2016, by Order No. 247 (NY/2016), the Tribunal suspended the decision to terminate the Applicant's permanent appointment pending management evaluation.

19. On 25 October 2016, a management evaluation was issued, which found that UNICEF made administrative errors concerning the assistance provided to the Applicant upon his return from secondment by failing to list or shortlist the Applicant for posts within his area and awarded compensation of two months' net base salary.

20. The message sent on 18 October 2016 was resent to the Applicant on 28 October 2016.

21. In November 2016, the Applicant was placed on SLWOP, which was extended for a second year from November 2017 to October 2018.

22. On 24 August 2018, the Applicant received an email from UNICEF advising him that "in the event you are not successful with your applications on the conclusion of the SLWOP, you will be separated from service at the end of October 2018".

23. On 2 October 2018, the Applicant received the notice that he would be separated from service upon the completion of his twenty-four months on SLWOP, namely on 31 October 2018, since he was not selected for any other posts in UNICEF and that a further extension of SLWOP is not possible.

24. On the same day, the Applicant sent an email reminding UNICEF of its obligation to exercise reasonable efforts in finding suitable positions to which he could be laterally reassigned. The Applicant also informed UNICEF that he was not

able to access UNICEF online platform for internal applicants due to the expiration of his user account. Between 2-18 October 2018, the Applicant corresponded with several officials in this regard seeking to resolve the issue.

25. On 24 October 2018, the Applicant requested a management evaluation of the contested decision to terminate his appointment effective 31 October 2018.

### **Applicant's submissions**

26. The Applicant's principal contentions as completed in the additional submission filed on 30 October 2018 are as follows:

#### *Prima facie unlawfulness*

a. The contested decision is *prima facie* unlawful as it is vitiated by the same errors leading to Order No. 247 (NY/2016), in which the Tribunal noted the following:

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;

b. The same considerations discussed above apply with equal force to the new decision to terminate the Applicant’s appointment. The Administration has not made any genuine effort to laterally transfer the Applicant to any available suitable position within UNICEF. Nor has the Applicant been given any priority consideration in any competitive selection process or for any UNICEF position to which he has applied. Since his return from secondment in August 2016, no assistance was provided by Human Resources, not even in the form of seeking to identify suitable positions to which the Applicant may apply;

c. The Applicant has made sufficient efforts to find suitable positions within UNICEF. The Applicant has applied to 26 positions for which he is



qualified since the end of his secondment but did not receive any feedback or any invitation to go through a competitive process. Of particular importance are the applications submitted following the issuance of *Timothy* 2018-UNAT-847. While the Applicant submitted one application for the position at the P-4 level in September 2018 and the recruitment process is still ongoing and the applications are under review, there is no indication that UNICEF would have given the Applicant any preferential treatment, but to the contrary, UNICEF's position seems to be that the Applicant should not be given any priority because he agreed to be placed on SLWOP in 2016;

d. During the CMD, it transpired that the facts that the Applicant was seconded to the United Nations Secretariat until 31 October 2016 with the right to be reabsorbed within UNICEF at the expiry of his secondment and that the Applicant is a permanent appointment holder are not in contention;

e. Moreover, it appeared that UNICEF does not take issue with the fact that it failed to exercise reasonable efforts to find suitable positions for the Applicant upon his return. Instead, UNICEF claims that any grievances that the Applicant may have should have been addressed in the 2016 management evaluation decision;

f. These assertions are entirely incorrect. The 2016 management evaluation decision only addressed the errors preceding its issuance and covered a very limited number of positions for which the Applicant had applied. There is no indication in that decision that the Applicant would not benefit from UNICEF's assistance in the future. To the contrary, the decision reflects a clear acknowledgment that such assistance ought to be given;

g. Upon his returned from secondment, the Applicant remained in employment for 2 years on SLWOP without receiving any support from the Organization notwithstanding the availability of suitable positions. The

decision to terminate the Applicant's appointment is therefore *prima facie* unlawful;

*Urgency*

a. In *Tadonki* UNDT/2009/016, the Tribunal concluded that there is urgency where the decision contested may be implemented before the consideration of the substantive appeal on the merits, and as a result the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled;

b. At the outset, the Applicant notes that all UNICEF communications since 2016 regarding the possible termination of his permanent appointment have been made conditional upon his inability to secure another position prior to the end of the special leave without pay. These various notifications do not constitute final administrative decisions affecting the Applicant's rights;

c. Currently, the Applicant's separation from service will take effect on 31 October 2018. As a consequence of the imminent deadline, the Applicant seeks an urgent suspension of the separation decision;

d. After the Applicant received the notification on 2 October 2018 that he would be separated by 31 October 2018 if he was not selected for a post within the Organization, he started seeking feedback regarding his pending job applications, and yet he received no feedback and thus filed the present application on 25 October 2018;

*Irreparable damage*

e. This Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage. This 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;

f. In the instant case, 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 United Nations, which will render him ineligible to apply for other United Nations 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.

### **Respondent's submissions**

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

#### *Prima facie unlawfulness*

a. On 1 August 2016, the Applicant was advised that he would be separated from service upon conclusion of his secondment, unless he opted to be placed on SLWOP. Based upon his election, the Applicant was placed on SLWOP until to 31 October 2017, and thereafter, upon his request, until 31 October 2018;

b. The Applicant also challenged "the implied decision to terminate [his] appointment". Although the Applicant received the outcome of his request for management evaluation, through the Office of Staff Legal Assistance ("OSLA"), on 28 October 2016, wherein he was awarded compensation (2 months' net base salary) concerning the administrative error in the assistance he received upon return from secondment, the Applicant did not challenge the decision;

c. The decision which placed the Applicant on SLWOP and its subsequent extension were communicated to the Applicant on 1 August 2016 and 26 September 2017, respectively;

d. The Applicant was merely sent a reminder on 24 August 2018, which was confirmed on 2 October 2018, that, should the Applicant not be selected for a post by 31 October 2018, he would be separated from service.

e. Under staff rule 11.2(c), request for a management evaluation should be sent within 60 calendar days from the date on which the staff member received notification of the administrative decision he/she wishes to appeal. In *Kazizi 2015-UNAT-557*, the Appeals Tribunal confirmed that “time starts to run from the date on which the original decision was made”;

f. The Applicant’s reference to the 2 October 2018 communication regarding his separation is inapposite as he was informed on 1 August 2016 that his secondment from UNICEF to the United Nations Secretariat would not be extended in the event he would not be successful with his applications with UNICEF and he could request SLWOP if he did not wish to separate from UNICEF. The Applicant requested SLWOP, which was granted for an initial period of three months and further extended until 31 October 2018. In the email communication dated 26 September 2016, in which he was granted an extension of SLWOP until 31 October 2018, he was notified that this extension was final and he would be separated from service on 31 October 2018, should he not be successful with his applications;

g. As such, the Applicant’s time-limit started to run on 1 August 2016 or in the alternative, at the latest, on 26 September 2017. The 2 October 2018 communication is merely a confirmatory decision, which does not reset the time limit;

h. Furthermore, the present application is a mere repetition of the claims covered in the Applicant’s request for management evaluation filed on 19

October 2016, and he received the outcome of his request for management evaluation on 28 October 2016, which he did not challenge at the time;

i. With respect to the Applicant's argument that the Administration made no genuine effort to assign him to a post, the Applicant was compensated for the administrative error in the assistance he received upon his return from secondment from the United Nations Secretariat. If he considered that the compensation he received was inadequate or that the decision to terminate his appointment was unlawful, he should have challenged the outcome of his request for management evaluation at the time. Having failed to challenge the outcome of his said request for management evaluation within the time stipulated under art. 8 of the Statute of this Tribunal, the present application should be dismissed;

*Urgency*

j. There was nothing sudden about the Applicant's impending separation from service on 31 October 2018 on termination of appointment. The fact that the Applicant's appointment was not terminated on 31 October 2016 was due only to the Applicant's request to be placed on SLWOP, and he was well-aware at least since 26 September 2017 that his SLWOP would not be extended after 31 October 2018;

k. In the alternative, assuming *arguendo* that the 2 October 2018 communication was a challengeable administrative decision, the Respondent respectfully submits that the Applicant himself would be responsible for any 'urgency' in that he did not submit a request for management evaluation, which the Respondent would have been able to address as a matter of priority, until 24 October 2018, allowing the Respondent no time to conduct a management evaluation;

*Irreparable damage*

- a. In view of the fact that the Applicant has been on SLWOP since 2016, should the Applicant be separated pending conclusion of management evaluation, he would not suffer any irreparable harm.

**Considerations**

28. Article 2.2 of the Dispute Tribunal's Statute states:

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.

29. Article 8.1(c) of the Dispute Tribunal's Statute states that an application shall be receivable if "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

30. Article 13.1 of the Dispute Tribunal's Rules of Procedure provides:

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.

31. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;

- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

*Whether the application concerns an administrative decision that may be properly suspended by the Tribunal*

32. The Tribunal notes that in the present case, the contested decision is the termination of the Applicant's permanent contract due to the expiration of the maximum period of SWLOP on 31 October 2018.

33. The Tribunal concludes that the application concerns an administrative decision that is reviewable by the Tribunal and which may properly be suspended by the Tribunal, and the first condition is fulfilled.

*Ongoing management evaluation*

34. An application under art. 2.2 of the Dispute Tribunal's Statute is predicated upon an ongoing management evaluation of the contested decision. The Applicant submits that he filed his request for management evaluation on 24 October 2018, which is not contested by the Respondent. Accordingly, the Tribunal finds that the request for management evaluation was initiated prior to the filing of the suspension of action. The Tribunal notes that there is no evidence on record that the management evaluation is completed. The Tribunal therefore finds that the Applicant's request for such evaluation is still pending and that the contested decision is the subject of an ongoing management evaluation for which reason the second condition is fulfilled.

*Whether the contested administrative decision was implemented*

35. The Tribunal notes that it is uncontested that on 1 August 2016, the Applicant was informed that Applicant's permanent contract is to be terminated on 31 October 2018. While the Respondent argues that the contested decision was notified on 1 August 2016 when the Applicant was informed that his contract would not be extended in the event he would not be successful with his applications with UNICEF before the end of his secondment with the United Nations Secretariat on 31 October 2016 and any subsequent communications only confirmed such decision, the Tribunal notes that it is uncontested that the Applicant remained a staff member with permanent contract with UNICEF during the two years period of the SWLOP. The Tribunal considers that the implementation of the decision to separate the Applicant on 31 October 2018 was affected by a suspensive condition, namely he was to be separated if he was not successful with his applications for a position with UNICEF until the expiration of the first year of SWLOP. The duration of the Applicant's SWLOP was extended for another year on the same conditions, until 31 October 2018. Consequently, the implementation of the decision to terminate his contract was postponed until the end of October 2018. Therefore, the termination of the Applicant's contract remained under the same suspensive condition. The effective date of separation, 31 October 2018, was notified to the Applicant on 2 October 2018. The Applicant is currently considered for several posts with UNICEF. Therefore, the Tribunal concludes that the contested decision is not yet implemented.

36. Consequently, the first three cumulative and mandatory conditions presented above have been fulfilled.

*Whether the impugned administrative decision appears prima facie unlawful*

37. The preamble of the Staff Regulations and Rules provides that "[u]nder the Charter of the United Nations, the General Assembly provides staff regulations which set out the broad principles of human resources policy for the staffing and administration of the Secretariat and the separately administered funds and



programmes". Since UNICEF is one of the separately administered funds and programmes, the Staff Regulations and Rules are applicable in the present case.

38. Staff rule 4.9 (Inter-organization movements) provides as follows:

(a) Inter-organization movements are defined in and shall be governed by an inter-organization agreement among the organizations applying the United Nations common system of salaries and allowances.

(b) The Secretary-General may allow a staff member to serve in a specialized agency or other intergovernmental organization, provided that such movement in no way diminishes the rights or entitlements of the staff member under his or her letter of appointment with the United Nations.

39. Inter-Organization Agreement dated 1 January 2012 provides in relevant part:

2. For the purposes of this Agreement:

... (d) "Secondment" is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which the staff member will normally be paid by and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his or her rights of employment in the releasing organization. The period of secondment may be extended for a further fixed period by agreement among all the parties concerned.

40. CF/AI/2015-001 (UNICEF's Administrative Instruction on Inter-organization staff mobility) dated 30 October 2015 provides in relevant part:

1.1 For the purpose of this instruction the following definitions apply:

... (d) Secondment: the movement of a staff member from one organization to another for a fixed period during which the staff member will normally be paid by and, be subject to the staff regulations and rules of the receiving organization, but will retain his or her rights of employment in the releasing organization.

... (g) Specific return right: the staff member keeps a lien against a specific post, which should be the one encumbered prior to being released to a receiving organization/prior to commencing outside employment, and may return to his/her specific post at the end of the agreed period.

(h) General return right: the staff member does not keep a lien against a specific post and will be required to be selected for a suitable post in order to be reabsorbed after the loan, secondment or outside employment. This right is limited to the original duty station for locally recruited staff.

...

#### Secondment

4.6 A staff member on secondment is administered by and subject to the staff regulations and rules of the receiving organization, but retains his or her rights of employment with the releasing organization.

4.7 The initial period of secondment shall be at least one year and should not exceed two consecutive years. It may be extended up to a total period of maximum four consecutive years, subject to agreement of the releasing (see paragraph 3.2) and receiving organizations as well as the staff member. Should the service of a seconded staff member still be required by the receiving organization beyond the four years' period, the staff member should be transferred to the receiving organization.

4.8 An outgoing secondment is granted with general return rights to UNICEF (see section 5).

...

#### Section 5 – Return to service

##### UNICEF staff members with specific return rights

5.1 Staff members with specific return rights shall return to their specific post and resume duties on the first working day following the end of the agreed period of release or outside employment.

5.2 The provisions of CF/AI/2010-001 Amend. 1 on Separation from Service that apply to staff on abolished posts are also applicable to staff who have been granted a lien against a specific post if the latter post is abolished during the period of release to the receiving organization/outside employment.

##### UNICEF staff members with general return rights on loan or secondment

5.3 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 (see CF/AI/2010-001 Amend. 1 on Separation from Service). In this regard, six months prior to the end of the loan or secondment period:

(a) The staff member shall apply for all available posts for which he/she deems him/herself qualified;

(b) HR managers will include the name of such a staff member on lists of applicants and/or shortlists, even if the staff member did not submit an application. Every effort will be made to keep the staff member informed of the posts for which he or she is being reviewed;

(c) Staff members in the IP category may be included in applicable rotation exercises from six months prior to the end of secondment or loan, as per CF/EXD/2015-003 on Staff Mobility and Rotation.

41. In the present case, the Tribunal notes that, even if the Applicant's letter of permanent appointment was not produced by the Respondent, it is uncontested that the Applicant is a staff member on permanent contract since 1 July 2009 and he was seconded to the United Nations Secretariat in November 2012.

42. The Tribunal notes that in the first request for an extension of the secondment dated 21 September 2013, the United Nations Secretariat requested UNICEF to confirm that the Applicant would "retain his rights of employment with UNICEF upon completion of secondment". The extension was granted without any objection to this aspect and the Tribunal observes that there is no evidence on the record to confirm that before he started his secondment, he was informed by UNICEF that he would have to apply and compete for a post upon his return to UNICEF. Also there is no evidence on the record that after the adoption of the new policy on 30 October 2015, after UNICEF agreed with his last extension, he was expressly informed in writing of the terms and conditions of his last secondment, namely if he was granted a lien against a specific post (i.e. the post that he occupied prior to his secondment), or if he had general return rights at the end of the agreed release period.

43. After serving with the United Nations Secretariat for four years on secondment, the Applicant returned to UNICEF in November 2016, when he was left with only two options, namely, separation or placement on SLWOP. To avoid separation, the Applicant requested and was granted SLWOP, which was extended until 31 October 2018. The Tribunal further notes that the Applicant applied for several positions in the past two years and he is still under consideration for a few positions.

44. The Tribunal notes that under staff rule 4.9(b), inter-organization movement “in no way diminishes the rights or entitlements of the staff member under his or her letter of appointment”. Further, under the Inter-Organization Agreement and CF/AI/2015-001, the Applicant retains his rights of employment in the releasing organization, which is UNICEF in this case. Under CF/AI/2015-001, the Applicant is entitled to general return rights as a seconded staff member, which means, among other things, that human resources managers are obligated to include the Applicant’s name on lists of applicants and/or shortlists, even if a staff member did not submit an application and every effort should be made to keep the staff member informed of the posts for which he or she is being reviewed. It appears that the Applicant continues to be entitled to this right since he is still a staff member on permanent appointment with UNICEF, albeit on SLWOP.

45. The Tribunal notes that, while the Applicant submitted that UNICEF has not made any genuine effort to find him a suitable position even though he applied for several positions in the past two years, the Respondent failed to present any evidence that UNICEF continued to include the Applicant’s name on lists of applicants and/or shortlists to the suitable posts, including posts for which the Applicant did not even submit an application.

46. The Tribunal further notes that the Respondent confirmed that the post the Applicant occupied before secondment still exists while the title of the post was changed from Programmer (P-4) to Information Communication Technology Manager (P-4) in November 2016. No evidence was presented to the Tribunal that this post was occupied by other staff member on or before 1 November 2016 or that it is currently encumbered and why the Applicant could not be returned to his post if not encumbered.

47. The Tribunal notes that it appears that starting from August 2016 until now, the Applicant was subjected to the procedures applicable to a staff member whose post was abolished while being on secondment, even though his post was never abolished. The Tribunal considers that in the absence of any evidence that the

Applicant's post is encumbered or the roles of the post have changed to the extent that the Applicant is no longer suitable for the post, it appears that the Respondent failed to fulfil its duty to reabsorb the Applicant upon his return from secondment.

48. Even if the Applicant's post was no longer available as stated by the Respondent, the Applicant is entitled to general return rights as defined in CF/AI/2015-001. In particular, the Tribunal notes that pursuant to sec. 5.3(b), the Applicant is entitled to be considered for suitable available posts even if he did not submit an application. There is no evidence before the Tribunal that the Applicant was provided with such consideration before or after 1 November 2016 and until now. In this respect, the Tribunal also underlines the relevance of paras. 45, 47, 55-58, 61-63 of *Timothy* 2018-UNAT-847 issued by the Appeals Tribunal on 29 June 2018, which is binding the Organisation.

49. In light of the above, the Tribunal finds that the requirement of *prima facie* unlawfulness is satisfied.

*Is there an urgency?*

50. The Tribunal considers that the condition of urgency is fulfilled, since the Applicant's appointment is due to expire on 31 October 2018. The Tribunal notes that the separation decision notified to the Applicant on 2 October 2018 included the condition that he would be separated on 31 October 2018 if he was not selected for a post with UNICEF. As such, the Applicant started seeking feedback regarding his pending job applications and he filed the present application on 25 October 2018 when he received no feedback.

51. Pursuant to 5.3(b) of CF/AI/2015-001, UNICEF has an obligation to make every effort to keep the staff member informed of the posts for which he is being reviewed, and yet despite the Applicant's inquiries, it appears that UNICEF failed to provide any feedback. The Tribunal considers that in light of this obligation, the Applicant filed the present application for suspension of action within a reasonable time and concludes that the urgency was not self-created.

*Is there an irreparable harm to be caused by the implementation of the contested decision?*

52. In the instant case, the Applicant submits that the Applicant would lose his status as a permanent contract holder, and he would be left without a position in the United Nations, which will render him ineligible to apply for other United Nations positions as an internal candidate. The Applicant further submits that 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.

53. The Tribunal considers that the contested decision, if implemented, has the potential to cause the Applicant irreparable harm since he would lose status as a permanent contract holder and as an internal candidate. In the circumstances, the Tribunal is satisfied that the condition of irreparable harm is fulfilled.

54. In light of the above,

IT IS ORDERED THAT:

55. The application for suspension of action is granted in relation to the decision to terminate the Applicant's permanent appointment and to separate him from the Organization on 31 October 2018, and the implementation of this decision is suspended pending management evaluation.

*(Signed)*

Judge Alessandra Greceanu

Dated this 31<sup>th</sup> day of October 2018