



**Introduction**

1. On Tuesday, 26 March 2019, the Applicant, a Learning Resource Specialist, at the P-4 level, step 12 on permanent appointment with the United Nations Development Programme DP in New York, filed an application requesting urgent relief under [redacted] to suspend, pending management evaluation, the decision [redacted]. Due to the complexity of the case, and the detailed facts and submissions in the papers, for the sake of completeness and judicial economy, the very lengthy application has been summarized almost in full below.

2. Together with his application, referring to arts. 19 and 36 of the Dispute [redacted] UNAT/2011/160, the Applicant also filed a motion requesting that the contested [redacted] the suspension of action application, submitting that he will otherwise be effectively separated on Wednesday,

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9.                   □ □ □       □ □                   □ □ □ Learning Resource Specialist in Copenhagen, Denmark was abolished. He was therefore granted a temporary assignment in New York as a Learning Resource Specialist (eRecruit). The temporary assignment ran from 24 July 2017 through to 31 December 2017. Following an application for suspension of action on 19 December 2017, his appointment was extended and the application was withdrawn. Thereafter,



The 30 day period has lapsed and another position has not been secured. We note you expressed interest in the position of Management Specialist, BMS Directorate, regrettably after a careful review of your professional skills and experience you were not found to meet the minimum criteria for consideration for this role.

I would like to take this opportunity to reiterate that you remain eligible for an Agreed Separation. Application is attached. Please advise us within 3 working days (ie no later than COB Tuesday 26 March 2019) of your intention. In this context we can consider allowing you to serve

If we do not hear from you by this aforementioned date we will proceed with the termination of your appointment effective Wednesday 27

payment of termination indemnities as applicable and in accordance with Annex III of the Staff Regulations, as well as the normal end of service entitlements, less any amounts owed. Additionally, and further to Staff Rule 9.7(d) you will be paid compensation equivalent to salary, applicable post adjustment and allowances in lieu of 3

If you have any questions please feel free to reach out to me.

**Consideration**

*Legal framework*

14. Article 2.2 of the Statute of the Dispute Tribunal provides:

2. 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.

15. Article 13.1 of the Tribunal

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











list of all available vacancies and encouraged to apply to suitable positions and, once a staff member applies to positions that they are interested in, his or her candidacy is considered on a priority and non-competitive basis.

b. The Applicant has failed to establish that the decision to terminate his permanent appointment is *prima facie* illegal because UNDP complied with its obligations to make good faith and reasonable efforts to identify and place the Applicant on a position that was both available and suitable before taking the decision to terminate his permanent appointment.

c. During the nearly two years when the Applicant has been displaced, UNDP has made efforts to identify an alternate post for him. This has included holding multiple meetings between him and two different Directors, Office of Human Resources and Mr. DR sending him lists of available positions, as well as identifying and sending him on temporary assignment. By sending the Applicant on temporary assignment, UNDP was assisting the Applicant to expand his skill set and potentially be suitable for a greater number of available positions. Further, UNDP adhered to its Standard Operating Procedures by affording the Applicant with a one-month search period in addition to the time he had since his position had been abolished two years prior in which UNDP proactively encouraged him to apply to vacancies, and considered him for any vacancy he expressed interest in on a non-competitive priority basis. In particular, Mr. DR followed-up with the Applicant and provided the list of available vacancies on two separate occasions, as well as encouraged him to express his interest in available positions.

d. Despite these efforts, UNDP has not been able to identify an available suitable position for the Applicant. The Applicant(e)4(re)7(st i)-4(n a)4(va)4(il)-3(a)4(ble positi).



shortly after returning from leave on 15 March 2019, the Applicant requested to take further leave between 22 March and 29 March 2019.

g. A [redacted] [redacted] [redacted] [redacted] [redacted] he applied to only eight positions in the two years that he did not have a position and, for the positions that he applied to outside of the OHR function, he did not inform OHR colleagues of during the one-month search period. The Applicant identified only one UNDP position that he was interested in and failed to do so in a timely manner, expressing his interest only after the deadline for that vacancy had passed and after being prodded to do so. The Applicant was expected and obligated under the jurisprudence (although the Respondent does not state any specific case-law) to prioritize his placement on a position, particularly in view of the length of time that he had been without a position, but his actions demonstrate that he did not. The Applicant has accordingly failed in his mutual obligation to make effort to be placed, and UNDP cannot therefore be held accountable for his lack of placement under *Timothy*, para. 35.

h. While the Applicant suggests that the termination decision is the result of ulterior motives, given that the decision was taken after he was nominated to be part of the Staff Council and shortly before he was to go on home leave, this submission has no merit. Rather, the termination decision is based on that, in

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not deemed suitable for any of them. There are therefore serious and reasonable doubts as to whether these efforts were genuine and in good faith.

32. On a *prima facie* basis, under *Timothy*, para. 32, it would therefore appear to the Tribunal that the Respondent has not demonstrate[d] that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. In this regard, the Tribunal also notes that apparently almost two years elapsed before the Respondent took any active or reasonable initiative to find the Applicant a more secure post other than just a temporary assignment and that this only occurred when his termination was imminent. The Respondent has therefore not shown that any mechanism and procedures [redacted] intended to protect the rights of a staff member holding a continuing [or permanent] post [redacted] by *Timothy*, para. 31, when his post was abolished in August 2017 [redacted] proposed list of available posts, of which it is uncertain whether the Applicant was suitable for any of them, by immediately expressing his interest for two posts, the Applicant would [redacted] stated in para. 45 of *Timothy*. Insofar as there is any dispute of fact regarding any of these matters, this can only be reconciled at a substantive hearing on the merits.

33. In conclusion, it appears to the Tribunal that UNDP has not fulfilled its obligation to make proper, reasonable and good faith efforts to find an alternative post for the displaced staff member at his or her grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest [redacted] *Timothy*, para. 57.

### Conclusion

34. In light of the above, upon a *prima facie* review, the contested decision is unlawful.



40. 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); *Finniss* Order No. 116 (GVA/2016)). The Respondent also concedes to this point in his reply.

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

### **Conclusion**

42. The Tribunal finds that the conditions for suspension of action under art. 2.2 of its Statute have been satisfied for granting the application for suspension of action. Accordingly, the decision to terminate the Applicant   t shall be suspended pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 1<sup>st</sup> day of April 2019