



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

KUMAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON AN APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Mariam Munang, OSLA

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

## **Introduction**

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



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

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

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

13. On 16 August 2016, the Applicant contacted the Director of the Information and Communications Technology Division (“ICTD”) to seek



19. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

20. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

21. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it.

#### *Receivability*

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

23. The Tribunal finds that regardless of which one of the two options go into effect—termination or SLWOP—the Applicant will be deprived of his earnings in the near future and will either cut his ties with the Organization or remain

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

*Prima facie unlawfulness*

24. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for her or him to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper





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 Appli

34. Urgency is relative and each case will turn on its own facts, given the exceptional and extraordinary nature of such relief. If an applicant seeks the Tribunal's assistance on an urgent basis, she or he must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account (*Evangelista* UNDT/2011/212). The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions. The requirement of particular urgency will not be satisfied if the urgency was created or caused by the applicant (*Villamorán* UNDT/2011/126; *Dougherty* UNDT/2011/133; *Jitsamruay* UNDT/2011/206).

35. The Respondent submits that, to the extent the Applicant wishes to challenge the terms of his secondmTribyTD.0005 Applic2



**Conclusion**

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

**Orders**

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

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

*(Signed)*

Judge Ebrahim-Carstens

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