
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/047

Order No.: 217 (NY/2018)

Date: 31 October 2018

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

KUMAR

v.

SECRETARY-GE

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.

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,

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 0B41n, 4()-698you4(a)4((ra)-68(6r)-36m)-1TJET@.00

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 8 te2/171.38 585.58 Tm0 g0 G(haTT0 g0 G0056005700440057h)h ribunal

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

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

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

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 r- C b b C r tio

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

(h) General return right: the staff member does not keep a lien against

(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.

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 000even if

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 31th day of October 2018