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UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2018/054  
Order No.: 233 (NY/2018)  
Date: 20 November 2018  
Original: English

## **Introduction**

1. On Tuesday, 13 November 2018, at 2:17 p.m., the Applicant, a Senior Advisor to the Global Partnership to End Violence Against Children, at the P-5 level

relief under

Procedure seeking to suspend, pending management evaluation, the decision by

accept, separate him from service on 14 November 2018. The Applicant submits that the decision is *prima facie* unlawful because UNICEF failed to discharge its obligation under staff rule 9.6(e) to find a suitable post for a staff member on permanent appointment whose post was abolished.

Children, at the P-5 level. The letter of appointment provided that he would retain his permanent contract and the normal tour of duty for New York is 5 years.

5. On 14 May 2018, the Applicant was notified that his post would be abolished on 14 November 2018. The letter provided that in the period between the date of this

expected to apply for all available posts within UNICEF for which he believed he has the required skills and competences, and the Division of Human Resources would assist him in identifying and applying for these posts and make every effort to keep him informed of the posts for which he was being reviewed. It further provided that if he was not selected for another post within UNICEF at the conclusion of the period of notice, his appointment would be terminated, and he would be separated from service with immediate effect.

6. Since receiving this notification, the Applicant applied for several posts at the P-4 and P-5 level. According to the Applicant, he also engaged in discussions with the Division of Human Resources, including its Deputy Director, who assured him that an alternative position would be identified for him.

7. On 9 November 2018, the Applicant received a draft memorandum of understanding regarding being placed on SLWOP until 31 August 2019. The Respondent claims that this was provided to the Applicant as he initiated and requested to be placed on SLWOP. The terms of SLWOP were not agreeable to the Applicant as he understood that he would not be given any priority consideration with respect to any applications for other UNICEF positions. He also understood that if he did not accept the terms of SLWOP as set forth in the memorandum of understanding, his permanent appointment would be terminated and he would be separated on 14 November 2018.

8. On 13 November 2018, the Applicant submitted a management evaluation request challenging this decision.

## **Applicant's Submissions**

9. Principal contentions may be summarized as follows:

### *Prima facie unlawfulness*

a. It is well established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation and renewals (*Obdeijn 2012-UNAT-201*);

b. Pursuant to established jurisprudence and staff rule 9.6(a), (c), (d) and (e), staff members on permanent appointments who are affected by post abolitions must be retained on a priority basis as compared to fixed-term staff members. This requirement mandates the Organization to transfer and assign affected staff members to suitable positions outside the normal selection process;

c. As the Appeals Tribunal stated in *Timothy 2018-UNAT-847* (footnotes omitted),

31. Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff, and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished. As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity.

32. Therefore, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable

consideration, it is incumbent on the Administration to prove that such consideration was given;

- d. As a permanent appointment holder whose post was being abolished, the onus is on the Administration and not simply on him to make good faith efforts to find him a suitable available post;
- e. Whilst the Applicant

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available post. Immediately, the Applicant took steps to file a management evaluation request and suspension of action. This is not a case of self-created urgency in that legitimate steps were taken by him to try to resolve the matter informally;

*Irreparable damage*

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

n. In the present case, the Applicant will be adversely affected by either of the options provided to him. If he is placed on SLWOP, he will be left without an income and will have to bear the burden of the total contributions

contributions for him will cease. If he is terminated, the Applicant will 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**

10.

*Receivability*

a. The Respondent maintains that the application is not receivable since the Applicant fails to identify any contested decision. The

submits that whilst the Applicant c  
special leave without pay, or, if he does not accept, separate him from service  
, there has been no decision or insistence to place him  
on SLWOP. Rather, there were discussions instigated by the Applicant  
regarding his potential placement on SLWOP in order to find a suitable  
solution, whilst he applied for several positions, and that this was all in the  
context of discussions toward a mutually agreed separation package or a  
memorandum of understanding between the parties. Furthermore, the  
Respondent submits that there is no contestable decision regarding the  
allegation that the Applicant would be separated from service if he did not  
accept being placed on leave without pay, as he would have been separated  
anyway due to the abolition of his post;

b. Regarding the A  
to meet its well-established obligations regarding staff members with  
, fort was made to assist him  
in retaining an alternative position after his post was abolished , the  
Respondent states the Applicant has failed to identify a specific contestable  
administrative decision concerning any of the post







*status quo* between the parties to an application pending a management evaluation of the contested decision.

15. 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 i should be complete to the extent possible in all relevant respects, and be succinctly and precisely pleaded on all relevant aspects. Parties should bear in mind that the matter is not at the merits stage at this point of the proceedings, that the relief requested is temporary, and that the luxury of time is unavailable. Urgent applications disrupt the normal day-to-day business of the Tribunal, thus delaying the disposal of other older outstanding cases, and specious pleadings and the taking of untenable positions should be avoided by the parties.

16. In the instant case the Respondent has taken the preliminary point that the matter is not receivable because, *inter alia*, the Applicant has not identified any administrative decision capable of review. The Tribunal will therefore consider this preliminary point first before addressing the requirements for sustaining an application for suspension of action pending management evaluation.



21. It is clear that the Applicant both in his management evaluation request and the application is challenging the decision to place him on special leave without pay or to separate him from service as a result of the abolition of his post, and the

*Prima facie unlawfulness*

24. 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



on the papers before it, the Tribunal finds that the Applicant has made out a fairly arguable case that the contested decision is unlawful and the requirement of *prima facie* unlawfulness to be satisfied.

31. In the matter of the placement of the Applicant on SLWOP, the Tribunal notes that the contested draft memorandum of understanding has not been produced for the conditions of such agreement. There is also dispute as to whether the Applicant requested to be placed on SLWOP, a factual dispute which cannot be reconciled on the papers. Due to limited information provided to this Tribunal, the Tribunal cannot make any ruling on the *prima facie* unlawfulness of such decision, on its conditions, or indeed on the propriety of an exception to grant SLWOP where there is no post encumbered.

#### *Urgency*

32. art. 13 of its Rules of Procedure, a suspension of action application is only to be granted in cases of particular urgency.

33. 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).

34. In the present case, the Tribunal notes that the implementation of the administrative decision is imminent and was to take effect on 14 November 2018, and thus the matter is urgent. In light thereof and on the facts before it, the Tribunal -created as after he was informed about the abolition of his post on 14 May 2018, he discharged his obligations and applied to several other posts both at the P-4 and P-5 levels, and took all such measures to find alternative placement. Furthermore, he was only recently



advised of the finality of the process and states that he had been repeatedly assured that an alternative position would be found for him, but to his surprise on 9 November 2018, he received a draft memorandum of understanding giving him

35. In the circumstances and on the papers before it, the Tribunal finds the requirement of particular urgency to be satisfied.

*Irreparable damage*

36. 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,

39. The Tribunal accepts that the Applicant 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.

**Conclusion**

40. 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 20<sup>th</sup> day of November 2018