



Case No.: UNDT/NY/2012/054

Judgment No.: UNDT/2012/093

Date: 22 June 2012

## **Introduction**

1. The Applicant joined the United Nations Children’s Fund (“UNICEF”) in January 1992, where he has held the post of Senior Health Adviser at the P-5 level

suggested changes would affect its entire staff. At a meeting on 1 September 2010, a new organigramme was shared with the staff that indicated the changes in funding sources.

6. On 31 May 2011, the Applicant wrote to the Director of the Programme Division, stating that “I just learned today that the funding source of my post ... has been converted from [Support Budget] to [Other Resources] in the proposed 2012-2013 OMP”. The Director confirmed this by email of 11 June 2011, noting that the Section is “only proposing a change in the source of funding ... NOT abolishing the post”. In reply, on 12 June 2011, the Applicant replied, “I have no doubt that [the Chief of Health Section, UNICEF]’s intention is to terminate my contract using the excuse of unavailability of funding”.

7. Since December 2011, the Applicant’s post has been funded from a donor program funded by the Programme Budget Allotment.

8. On 5 April 2012, the Applicant was notified via letter dated 4 April 2012 that due to a lack of funding his contract would not be renewed beyond 30 June 2012. In the letter, it was indicated that:

This is to share with you that for the past several months, we have been seeking funding for the position you encumber. Nonetheless, to date we have not been successful in securing sufficient funding to extend your contract beyond its expiration date, 30 June 2012.

9. Since being notified of hi



current post is a direct result of the conflict between himself and the Chief of the Health Section;

*Urgency*

c. The urgency of the Applicant's request for a suspension of action is due to the fact that, despite engaging in efforts to find another suitable position within either UNICEF or in another UN organization, his appointment is scheduled to end on 30 June 2012;

d. A suspension of action until 31 July 2012 is urgently needed so that he can improve his chances for selection for one of the vacancies to which he applied as well as to enable UNICEF to fulfill its obligation under the operative Administrative Instruction to duly assist him to be appointed to another post;

*Irreparable damage*

e. The decision to separate him from service will result in him losing the opportunity to benefit from his recently earned permanent contract status and such a loss cannot be compensated by the financial remedies currently available in the United Nations' justice system;

f. The Applicant has served with UNICEF for over two decades and his minor children are both currently enrolled in school in the United States. Consequently, abolishing his post would result in the psychological, emotional and financial trauma of having his family relocate back to his country of origin, Morocco, where his children would have to undertake their secondary studies in languages (French and Arabic) which they have not studied in school.

**Respondent's submissions**

16. The Respondent's principal contentions may be summarised as follows:

*The timing of the requested suspension of actions*

a. Upon filing his request for management evaluation on 1 June 2012, the Applicant was informed that a response would be provided to him no later than 2 July 2012. The Applicant was subsequently verbally informed that the requested management evaluation would actually be issued prior to the

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e. All of the current staff members of the Health Section, UNICEF, including the Applicant, were not only fully appraised of the declining funding as well as the measures that were being implemented to deal with the funding reductions, but they were also invited to participate in the budgetary discussions;

f. If the decision to change the source of funding for the post encumbered by the Applicant could somehow be construed as breaching his contractual rights, he would be time-barred from requesting a management evaluation of this decision, since he was actually aware of the budget changes as of 31 May 2011;

g. Contrary to the Applicant's submission that there was some animosity between himself and the Associate Director, the evidence shows the Associate Director not only continued to support the Applicant, but also retained him over other high performers;

h. While the Applicant avers that the funding changes were made by the Associate Director, they were actually made by the Director of Programmes who the Applicant praises as fully supporting his claims. The Respondent also contends that the sole criteria for selecting which posts would be funded by the Support Budget versus Other Resources was solely based on a question of necessity;

i. The Applicant was fully aware that the funding of his post was contingent upon receiving new funds. Consequently, his rights were not affected by the reduction in funding seeing that, per the terms of his contract, his post was fully funded until the expiry of its two-year fixed-term;

*Urgency*

j. The Applicant was informed as early as 4 April 2012 that despite all of its attempts, UNICEF had not managed to obtain new funding for the renewal

of his fixed-term contract. More importantly, the Applicant was fully aware since 2010 that any renewal of his fixed-term contract would be contingent on UNICEF securing new funding;

k. Since the Administration committed to provide the Applicant with the findings of the management evaluation prior to the expiration of his contract on 30 June 2012, any reversal of the contested decision would be implemented prior to the separation actually taking effect. Therefore, there is no actual urgency in the Applicant's claim;

*Irreparable damage*

l. As a result of the Applicant's conversion to a permanent appointment, he becomes eligible for financial benefits such as a separation indemnity which he would not otherwise qualify for. Furthermore, the Applicant benefits from priority status for the posts to which he applied. Should the Applicant obtain a new post within twelve months of his separation, he would be reinstated with all the benefits he accrued during his tenure;

m. Should there have been any breach of the Applicant's contractual rights "any losses incurred could, in this case, be adequately compensated by a monetary award" (*Stephens* UNDT/2011/167). The Appeals Tribunal has held that if a loss can be adequately compensated by a monetary award, it cannot then qualify as an irreparable harm which would warrant a suspension of action (*Tadonki* 2010-UNAT-005, *Ballestrieri* 2010-UNAT-041).

**Consideration**

*The nature of an application for suspension of action and the conditions*

17. This is an application for suspension of action pending management evaluation, although the Applicant has requested for its implementation beyond the time required for management evaluation. Article 2.2 of the Statute of the Dispute



Tribunal provides that 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 cases of particular urgency, and where its implementation would cause irreparable damage. The Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

*The extension of the requested suspension of action—during management evaluation*

18. Article 2.2 of the Statute of the Dispute Tribunal (and art. 13 of its Rules of Procedures) provides that the Tribunal may suspend the implementation of a contested administrative decision pending management evaluation of that decision.

19. In the present case, the Applicant contests the decision not to renew his contract beyond 30 June 2012 and requests that the reparation date be postponed until 4





days. Furthermore, the Applicant has been given a vague verbal undertaking that he can expect an outcome to the management evaluation prior to the expiration of his contract on 30 June 2012. This means he may be informed imminently or on Friday, 29 June 2012, in which event the decision will have been implemented before the Applicant has had opportunity to approach the Tribunal to preserve his alleged rights. As a result, the Respondent can hardly be seen to be dealing in good faith, and the time spent in defending this application could well have been used in expediting management evaluation or finding a resolution to this matter, particularly in view of the Applicant's length of service. The Respondent is encouraged to ensure a timely outcome of the management evaluation.

### *Urgency*

30. The Respondent contends that there is no actual urgency in the Applicant's claim as any reversal of the contested decision would be implemented prior to the separation actually taking effect, but does not address what would happen if the contested decision was not set aside.

31. It is undisputed that the Applicant's contract expires on 30 June 2012, i.e., eight days from the date of the present Judgment, and that the Applicant has actively, but without success, been seeking alternative employment with the Organization ever since he was notified of his possible separation.

32. Considering the imminent risk of the Applicant being separated from UNICEF, the Tribunal finds that his case is one of particular urgency and that this is not the result of the Applicant's own actions.

### *Irreparable damage*

33. The Respondent does not challenge the circumstances and harm to which the Applicant refers concerning him and his family. Rather, the Respondent contends that any possible damage to the Applicant may be compensated by financial means.

34. The harm that the Applicant contends that he and his family will suffer from the non-renewal of his contract, and thereby also his separation from the Organization, is of a nature that is generally non-pecuniary, including the harm related to his family's potential relocation to Morocco.

35. The Applicant also contends he will suffer harm from losing the opportunity to benefit from his recently earned permanent contract status and that such a loss cannot be compensated by the financial remedies currently available within the system. The Respondent contends that the Applicant benefits from priority status for the posts to which he has applied and s

**Order**

39. The Tribunal orders a suspension of action of the impugned decision not to renew the Applicant's fixed term contract pending management evaluation.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 22<sup>nd</sup> day of June 2012

Entered in the Register on this 22<sup>nd</sup> day of June 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York