
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/026
Order No.: 104 (NY/2018)
Date: 25 May 2018
Original: English

Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

PENA CORREA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION PENDING THE
CONSIDERATION OF AN
APPLICATION FOR SUSPENSION OF
ACTION UNDER ART. 2.2 OF THE
DISPUTE TRIBUNAL'S STATUTE**

Counsel for Applicant:
Marissa Maclennan, OSLA

Counsel for Respondent:
Elizabeth Gall, Administrative Law Section, OHRM

Introduction

1. On 24 May 2018, at 4:21 p.m., the Applicant, a Field Security Assistant at the GS-5 level, step 7, on a fixed-term appointment permanent appointment with United Nations Verification Mission (“UNVMC”) in Barrancabermeja, Colombia, 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 that the administrative decision consisting in the Administration’s “[n]on-renewal, contract expiring 27 May 2018”.
2. On the same date (24 May 2017), the case was assigned to the undersigned Judge. By email to the parties, forwarded at 6:25 p.m. on the same date, the Registry acknowledged receipt of the application for suspension of action and requested the Respondent to file a reply by Tuesday, 29 May 2018, at 4:00 p.m.

Background

3. In the application for suspension of action, the Applicant presents the fact as follows (references to annexes omitted):

... [The Applicant] joined the [UNVMC] in Columbia on 28 February 2017. He currently holds a fixed term appointment at the GS5 level as Field Security Assistant. His duty station is Barrancabermeja.

... On 27 October 2017, [the Applicant] received notification that he was the subject of an investigation into an allegation of providing false information in response to Question 32 on his P11 form [...].

... On 1 November 2017, he provided a statement to investigators about why he answered “no” to the question on his 16 October 2016 dated P11 form, which asked whether he had been arrested, summoned or cited as a criminal defendant before a court of law [...]. [The Applicant] explained that one is not formally accused until there is a hearing with the prosecutor. As such, at the time of his P11, he was only under investigation and not formally accused.

... On 3 November 2017, UNVMC sent a letter to the prosecutor’s office asking specifically whether [the Applicant] was under any criminal process as a defendant as of 16 October 2016 [...].

... On 14 November 2017, the prosecutor's office responded stating that [the Applicant] was "imputado" on 27 April 2015 and cited a case number [...]. There was no mention of what the allegation was or what the facts of the investigation were. The letter went on to say that after a delay in the process, the investigation was assigned a different number, and the hearing where he was accused did not actually happen until 8 and 9 August 2017. No further information was provided.

... On 16 November 2017, [the Applicant] was asked to give a second written statement, which he provided [...]. He maintained, as put forth in his earlier statement, that because he was only under investigation as of 16 October 2016, and the "accusation" hearing only happened in August 2017, he answered "no" to question 32 on his P11 form.

... On 16 May 2018, [the Applicant] received an email with a memo, dated 26 April 2018 [...]. The email appeared to have been sent on 2 May, but [the Applicant] was on annual leave until 16 May, and also due to migration of email systems, he did not open the email until 16 May.

... The memo from the [Chief Mission Support] informed him of the non-renewal of his contract, which expires on 27 May 2018. It stated that pursuant to Staff Rule 9.6(c)(v) and in accordance with an investigation conducted by the Mission, [the Applicant] had not provided information relevant to the suitability during the selection process – that, had the Mission known at that time of his appointment, "should have precluded" his appointment. It also noted that [the Applicant] "should have answered 'yes'" to question 32 on his P11.

Consideration

4. Articles 13.3, 19 and 36.1 of the Dispute Tribunal's Rules of Procedure state as follows:

Article 13 Suspension of action during a management evaluation

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

...

Article 19 Case management

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

...

Article 36 Procedural matters not covered in the rules of procedure

1. All matters that are not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

5. In *Villamorán* Order No. 171 (NY/2011) dated 7 July 2011, the Dispute Tribunal suspended the implementation of two decisions pending its consideration of an application for suspension of action concerning those decisions filed before the Tribunal on 5 July 2011. The Tribunal stated:

7. In view of the fact that 7 July 2011 is the last working day before the Applicant's separation, I directed at the hearing, before 5 p.m. (close of business in New York), that the implementation of the contested decisions be suspended until further order.

8. Having considered the facts before it and the submissions made by both parties, the Tribunal determines that, in view of the complex issues in the present case, further submissions are required for the fair and expeditious disposal of the application and to do justice to the parties.

9. The Tribunal further considers that, given that the contested administrative decisions are due to be implemented today, it is appropriate, in the special circumstances of the present case, to order the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action.

6. The Tribunal ordered that the implementation of the contested decisions be suspended until 5:00 p.m. on 12 July 2011, the deadline for the Tribunal to consider and decide on the application for suspension of action in accordance with art. 13 of the Rules of Procedure. The Respondent appealed the order.

7. In *Villamorán* 2011-UNAT-160, the Appeals Tribunal stated:

36. The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence [footnote omitted].

...

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

44. The Secretary-General contends that “[t]he last minute submission of an application for a suspension of action does not provide a legally sustainable basis to grant such a suspension, as was the approach of the Dispute Tribunal in the present case”. While we agree that the UNDT should have explicitly addressed this matter, a review of the record reveals that the decision to impose a break in service following the expiration of Villamorán’s fixed-term appointment was notified to her only on 23 June 2011. She made her request for management evaluation the same day and filed her request for suspension one week later, on 1 July 2011. The UNDT Registry informed her that she had used the wrong form and Villamorán refiled her submission, using the correct form, on 5 July 2011, two days prior to the date the decision would be implemented. In light of the foregoing, we do not find that the urgency was self-created.

...

46. It follows from the above that the UNDT’s decision to order a preliminary suspension of five days pending its consideration of the suspension request under Article 13 of the UNDT Rules was properly based on Articles 19 and 36 of the UNDT Rules. We find that the UNDT did not exceed its jurisdiction in rendering the impugned Order. The interlocutory appeal is therefore not receivable.

8. The Tribunal is of the view that, in accordance with the Appeals Tribunal's jurisprudence in *Villamorán* 2011-UNAT-160, the Dispute Tribunal has the competence to order a preliminary suspension of a contested administrative decision for up to five days pending its consideration of a suspension request under art. 13 of the Rules of Procedure in cases where the following cumulative conditions are fulfilled:

a. The implementation of the contested administrative decision is imminent, that is, it will take place before the five days provided for under art. 13 of the Rules of Procedure have elapsed;

b. The contested administrative decision is subject to the management evaluation review, which is ongoing; and

c. The contested administrative decision subject to a preliminary suspension is the same administrative decision that is the subject of the application for suspension of action pending management evaluation.

9. Regarding the first condition, the Tribunal notes that, in accordance with art. 13 of the Rules of Procedure, the Tribunal has five working days from the date of service of the application for suspension of action on the Respondent, namely on 24 May 2018, to consider the request for suspension of action pending management evaluation of the contested decision. In the present case, the Applicant's fixed-term appointment expires on 27 May 2018 and, therefore, the implementation of the non-renewal is imminent, and is to take place before the expiration of the five days provided for the Tribunal to consider the application for suspension of action, namely 1 June 2018.

10. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted, on 24 May 2018, a request for management evaluation of "the non-renewal of his contract". The Tribunal notes that in the application the contested decision was identified by the Applicant as the "[n]on-renewal, contract expiring 27 May 2018".

11. It results that the contested administration decision is subject to an ongoing management evaluation process and is the same administrative decision as the one that is subject of the present application for suspension of action.

12. The second and third conditions are therefore satisfied.

13. Pursuant to arts. 19 and 36.1 of the Dispute Tribunal's Rules of Procedure,

IT IS ORDERED THAT:

14. Without prejudice to the Tribunal's determination of the application for suspension of action under art. 2.2 of the Dispute Tribunal's Statute, the implementation of contested decision, namely the non-renewal of the Applicant's fixed-term appointment, which is due to expire on 27 May 2018, shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

(Signed)

Judge Alessandra Greceanu

Dated this 25th day of May 2018