



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON

**SUSPENSION PENDING THE
DISPUTE TRIBUNAL'S
CONSIDERATION OF AN
APPLICATION FOR SUSPENSION OF
ACTION UNDER ART. 10.2 OF THE
DISPUTE TRIBUNAL'S STATUTE
AND ART. 14 OF ITS RULES OF
PROCEDURE**

AND

CHANGE OF VENUE

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
ALS/OHRM

Introduction

1. On Friday, 14 September 2018, at 3:22 p.m., the Applicant, a Director of Management and Operations Division at the D-2 level working with UN Habitat in Nairobi, filed an application under art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure seeking to suspend, pending the Dispute Tribunal's proceedings, the decision to reassign him to another position in Nairobi. The Applicant further requested that the decision be suspended during the Dispute Tribunal's consideration of this application for suspension of action (a so-called *Villamorán* type request).

2. Noting that the Applicant is currently based in Nairobi and that the application would therefore "fall under the Nairobi Tribunal", the Applicant seeks that the request for suspension of action during the Dispute Tribunal's proceedings be considered in New York "due to the urgency of his case" and that art. 6 of the Dispute Tribunal's Rules of Procedure on filing of cases with the appropriate Registry "relate solely the filing of cases and not for requests for suspension of action", submitting further that:

- [4] Such a distinction is critical in this case as the matter at hand relates to [the Applicant] receiving the decision of the Management Evaluation Unit at 12:21 p.m. today. Mr. Cox understands that the decision, which had already received a suspension of action pursuant to Article 13, will be implemented next week. Taking into account the current time in Nairobi and that the Tribunal Registry is now closed [the Applicant] would be prevented from seeking a right to an effective remedy at short notice.
- [5] [The Applicant] cannot help but notice the late and sudden arrival of the Management Evaluation Unit decision considering that the matter had been in mediation.
- [6] In the alternative, should the Tribunal consider that Article 6 of the UNDT Rules of Procedure apply to requests for suspension

of action, [the Applicant] seeks a change of venue, taking into account the fact that the decision subject to challenge will be implemented shortly. [The Applicant] submits that this is in the interests of justice, as currently New York remains the only viable option for this matter to be heard at such short notice.

Consideration

3. The Tribunal notes that, in the present case, the Applicant has apparently not filed any application on the merits under art. 2.1(a) of the Statute of the Dispute Tribunal but only an “application for suspension pursuant to art. 14 of the Rules of Procedure”, meaning a request for an interim measure under art. 10.2 of the Statute and art. 14 of the Rules of Procedure. The Tribunal further notes that, when the Applicant received the decision of the Chef de Cabinet at 12:21 p.m. today, the Nairobi Registry was already closed and that it was therefore impossible for him to file an application with that Registry and that the only option available was to do so with the New York Registry. Finally, the Tribunal notes that if a judicial decision is not made on his request for suspension of action pending the Dispute Tribunal’s consideration of his request for an interim measure during its proceedings, the contested decision might be implemented before the Dispute Tribunal in Nairobi will have an opportunity to review the matter and that the purpose of the request would therefore be lost under art. 10.2 of the Statute and art. 14 of the Rules of Procedure.

4. Under these very exceptional circumstances, due to the urgency and as a matter of access to justice, this Tribunal will therefore consider the Applicant’s request to ensure that the Applicant is accorded proper access to justice in accordance with arts. 19 and 36 of its Rules of Procedure, noting that a situation as the one in the present case is not covered, or as much as contemplated, in any of its founding documents. At the same time, the Tribunal will order the case to be immediately transferred to Nairobi for further consideration as this is the correct venue for considering the matter.

5. Requests for interim measures pending the Dispute Tribunal's consideration are governed by art. 10.2 of the Dispute Tribunal's Statute and art. 14 of the Rules of Procedure. The three statutory requisites of *prima facie* unlawfulness, urgency and irreparable harm must be satisfied for an application for suspension of action to be granted. Where an administrative decision has been implemented, a suspension of action may not be granted (see, for instance, *Gandolfo* Order No. 101 (NY/2013)), save where the implementation of the decision is of an ongoing nature (see, for example, *Calvani* UNDT/2009/092; *Hassanin* Order No. 83 (NY/2011); *Adundo et al* Order No. 8 (NY/2013); *Galliény* Order No. 60 (NY/2014)).

6. Pursuant to art. 19 of the Rules of Procedure of the Dispute Tribunal,

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.

7. Article 36.1 of the Rules of Procedure provides that:

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.

8. Pursuant to art. 13.3 of the Rules of Procedure,

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

9. In *Villamoran* 2011-UNAT-160, the Appeals Tribunal upheld this Tribunal's *Villamoran* Order No. 171 (NY/2011) finding that the Dispute Tribunal was within its competence to order a suspension of the contested decision pending a determination of the application for suspension of action on the basis of the aforesaid Rules of Procedure and without having to make a finding as to whether the requirements of a suspension of action under art 2.2 of the Dispute Tribunal's Statute

and art. 13 of its Rules of Procedure had been met. The Appeals Tribunal, *inter alia*, found that:

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 Dispute Tribunal's, "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.

10. The Tribunal notes that the Applicant states that today, on Friday, 14 September 2018, at 12:21 p.m., he was notified of the Chef de Cabinet's decision to endorse the recommendation of the Management Evaluation Unit to uphold the contested decision to reassign him to another position. The Tribunal notes that the Respondent has not had an opportunity to reply and that it does not have all the information before it. The Tribunal is satisfied that the urgency was not self-created and, and the fact that once the decision is implemented, the Applicant will have no recourse. According to the information before the Tribunal, the contested decision has not been implemented. Accordingly, the Tribunal is satisfied that the requirements for an interim order pending the Tribunal's determination of the suspension of action as set out in *Villamorán* by the Appeals Tribunal have been satisfied. Furthermore, that not only the interests of justice, but the balance of convenience test also dictate the grant of urgent relief in this case.

11. In accordance with arts. 19 and 36.1 of the Dispute Tribunal's Rules of Procedure,

IT IS ORDERED THAT:

12. A case is opened in the Dispute Tribunal's eFiling portal and provided with a Case Number;

13. Without prejudice to the Dispute Tribunal's determination of the application for suspension of action under art. 10.2 of its Statute and art. 14 of its Rules of Procedure, the implementation of the contested decision shall be suspended until the Dispute Tribunal has rendered its decision on this application, or until further order;

14. The venue of the case is hereafter changed to Nairobi whereat all further processes and pleadings shall be filed.

(Signed)

Judge Ebrahim-Carstens

Dated this 14th day of September 2018