



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

VULETA

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:
Katya Melliush, OSLA

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 20 October 2017, at 5:00 p.m., the Applicant, a Human Resources Assistant with United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-5 level, on a continuing appointment, filed an application for suspension of action during management evaluation pursuant to art. 13 of the Dispute Tribunal’s Rules of Procedure, requesting that the decision to terminate his continuing contract with MINUSTAH, which was notified to him on 19 October 2017 and scheduled to be implemented today, on 20 October 2017, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant art.19 and 36 of Rules of Procedure requesting the Tribunal to suspend the implementation of the contested decision pending the consideration of the application for suspension of action under article 2.2 of the Dispute Tribunal’s Statute.

2. On 20 October 2017, the case was assigned to the undersigned Judge.

3. On 20 October 2017, at 5:49 p.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 5:00 p.m. on 24 October 2017.

4. The Tribunal further informed the parties that, due to the urgency of the matter and pursuant to articles 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the Applicant’s motion on suspension pending the consideration of the application for suspension of action under article 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written Order is to follow, which is the present Order.

Background

5. Appended to the application for suspension of action, the Applicant filed his termination letter from the Chief of Mission Support (a staff member from

Department of Field Support was also copied) dated 19 October 2017 in which is stated as follows (emphasis in the original):

Notice of termination of continuing/permanent appointment

[Name of the Applicant and his index no.]

Dear [name of the Applicant],

Reference is made to my earlier letter to you on the subject **Advance information letter. Termination of appointment with MINUSTAH**. This letter serves to inform you that efforts by Field Personnel Division for your lateral re-assignment under the delegation of [the Under-Secretary-General for Department of Field Support] has not been successful and therefore the Under-Secretary-General for Management has approved the termination of your appointment with the United Nations in accordance with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i) subsequent to your decision to decline the offer of placement in [the United Nations Support Office in Somalia] made by the Field Personnel Division for your lateral re-assignment under the delegation of [the Under-Secretary-General for Field Support].

This is an official notice that your appointment will be terminated in line with Staff Rule 9.7, and your separation will be effective **20 October 2017**.

The Under-Secretary General for Management also approved payment of termination indemnity pursuant to Staff Regulation 9.3 (c), Staff Rule 9.8 and in accordance with the rates set out in Annex III of the Staff Regulations. In addition a compensation in lieu of notice will be paid in line with Staff Rule 9.7(d).

The Human Resources Section of MINUSTAH will follow up with you on the necessary arrangements.

I take this opportunity to express the mission's sincere appreciation for your dedication and contribution to the work of the United Nations and wish you the best in your future endeavours.

Applicant's submissions

6. The Applicant's principal contentions may be summarized as follows:

Prima facie unlawfulness

a. Staff Rule 9.6 (e) creates an obligation for the Administration to retain the services of staff members facing post abolition against suitable posts. Continuing appointment holders, such as the Applicant, are to be retained in preference to staff members on any other contractual modality. The requirement to retain staff on continuing appointment is "subject to availability of suitable posts". It makes no indication as to where such posts might be;

b. The recent decision of the Tribunal in the case of *Timothy* UNDT/2017/080 highlights the obligation of the Respondent to do more than simply invite staff to apply for alternative positions. The Tribunal in *Timothy* considered that continuing appointees have a right to be retained and that they should not only be given precedence over fixed-term appointees and others, but that the organisation has a duty to reassign those of less secure tenure in order to make suitable positions available for continuing appointees;

c. In the present case it is clear that:

- i. The Applicant was not properly considered in any comparative review process, or at all, for transfer to the United Nations Mission for Justice Support in Haiti ("MINUJUSTH") or elsewhere within the Organisation;
- ii. The Applicant was unlawfully not given precedence over a fixed-term appointee, namely Human Resources Assistant in the Liquidation Team of MINUSTAH;

iii. A suitable post (post of Human Resources Assistant) with Job Opening 85169, was available, but the Applicant was not subjected to any comparative review process for this position;

d. Even if the Applicant had been fully and fairly and properly considered for suitable posts within the Organisation, which is disputed, the Applicant was not given sufficient (or any) notice of termination;

Urgency

e. Termination is said to take effect on 20 October 2017. In *Applicant* UNDT/2012/091, it was held that the purported provision of 30 minutes' notice for non-renewal for a contract of employment that had lasted two years was "nonsensical". The Tribunal commented that it "amounts to a petty and disgraceful game and portrays irresponsible managerial practice";

f. In *Applicant* UNDT/2012/091, it was found that where notice of non-renewal was provided after close of business, it could not be considered to be implemented until the end of the following day;

g. In the instant case, the notice requirements for termination are codified in the Rules and a period of three months months is required under staff rule 9.7(a);

h. The fact that no notice has been provided means that the matter is of the utmost urgency as implementation is imminent;

Irreparable damage

i. Referring to *Kasmani* 2009-UNDT-017, *Diop* 2012-UNDT-029 (Diop) and *Villamorán* 2011-UNDT-126, it is well-established that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with non-renewal of a fixed-

term contract. How much more so the unexpected and unlawful termination of a continuing appointment?

Consideration

7. 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.

8. 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.

9. 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.

10. 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 Villamoran 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.

11. The Tribunal is of the view that, in accordance with the Appeals Tribunal's jurisprudence in *Villamoran* 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.

12. 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 27 October 2017, to consider the request for suspension of action pending management

evaluation of the contested decision. In the present case, the effective date of the Applicant's termination is 20 October 2017, which is the date of the present Order and therefore the implementation is imminent.

13. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 20 October 2013, which is still ongoing. In the form for the Applicant's request for management evaluation, he identified the decision subject to management evaluation as "[t]he failure of the MINUSTAH Administration to make necessary efforts to find a suitable post for [the Applicant] when [his] was abolished", but in the document titled, "Additional written submissions in support of the management evaluation request", the Applicant clearly identified the contested decision as the termination notice dated 19 October 2017. Consequently, the Tribunal concludes that the Applicant has requested management evaluation of the termination decision in its entirety.

14. The Tribunal notes that, in the application for suspension of action, even though that no stipulations were made under the headings, "Details of the decision you seek to suspend" and "Briefly describe what the decision was about", the contested decision was identified by the Applicant as the termination decision made on 19 October 2017 with the implementation date on 20 October 2017 in his other submissions.

15. It results that the contested administration decision subject to management evaluation is the same administrative decision as the one that is subject of the present application for suspension of action.

16. The Applicant indicated that, if the implementation of contested administrative decision will not be suspended, his contract is to be terminated and he is to be separated from the Organization on 20 October 2017 and it appears not be self-created. The Tribunal underlines that this matter is not at the merits stage.

17. The second and third conditions are therefore satisfied.

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

IT IS ORDERED THAT:

19. 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 the decision to terminate the Applicant's continuing appointment shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

(Signed)

Judge Alessandra Greceanu

Dated this 20th day of October 2017