



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

KITAGAWA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

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

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Alister Cumming, ALS/OHRM

## **Introduction**

1. On 9 October 2018, at 5:07 p.m., the Applicant, a team assistant at the G-4 level on a fixed-term appointment with the Office of Human Resources Management (“DM/OHRM/LDSD/LLODS/LCP”) in New York, 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 not to renew his fixed-term appointment beyond 9 October 2018, which was notified to him on 8 October 2018 and scheduled to be implemented on 9 October 2018, be suspended pending management evaluation.

2. On 9 October 2018, the case was assigned to the undersigned Judge.

3. On 9 October 2017, at 5.53 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 1:00 p.m. on Thursday 11 October 2018.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 9 October 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written order was to follow, which is the present Order.

## **Background**

5. In the application for suspension of action, the Applicant submitted as follows regarding the facts to be relied on (references to annexes omitted):

... It is with understanding that my fixed-term appointments do not carry expectancy of renewal and that the decision was made on the grounds of unsatisfactory performance. However, the entire e-PAS

process was irregular and flawed. I have been unfairly assessed in my e-pas as failing to perform my duties rather than the fundamental issue, which is the communication with the FRO as identified by the Ombudsman's office. This was then led by a Subjective Rebuttal selection process in which the E.O did not comply with ST\_AI\_2010\_5. This followed a Subjective Rebuttal process, collaborated with the fact that the panel rushed the decision as a result due to non-renewal of my contract on 09-10-2018. I believe the panel did not read the further evidence I was requested to provide on Friday 05-10-2018 ...

### **Applicant's submissions**

6. The Applicant's principal contentions are as follows:

1.E-pas related matters: [as per par. 4.1 c of ST/AI/2010/5] lack of discussion during the reporting period. 2.E-pas related matters: [as per par. 5.1 c/d of ST/AI/2010/5] 3.E-pas related matters: [as per par. 5.3 e of ST/AI/2010/5] SRO never intervened and resolved any disputes or miscommunications regarding my performance shortcomings between me and my FRO. 4.E-pas related matters: [as per par. 7.1 of ST/AI/2010/5] shortcoming was not identified. 5.E-pas related matters: [as per par. 9.2 of ST/AI/2010/5] Additional core competencies were added from four to six along with additional goals in my workplan. 6.E-pas related matters: [as per par. 9.8/9 of ST/AI/2010/5] My unsuccessful criteria were not defined and the FRO failed to define the majority of goals/keys I did not meet. 7.E-pas related matters: [as per par. 10.1 of ST/AI/2010/5] FRO/SRO failed to take remedial measures on a regular basis nor did they identify performance shortcoming and provide means of remedy/remedial measures. 8..E.O Rebuttal selection: [as per par. 11-15 & 14.1 & 15.3 of ST/AI/2010/5] I am told by E.O that it was the FRO/SRO who are the subject of this rebuttal representing the Head of Department. I am concerned with the panel selection. 9.E.O Rebuttal selection: [as per par. 14.2 of ST/AI/2010/5] Exclusions of my selection of panel members without replacements and limiting the pool of panel members that I could select from. 10.Rebuttal Process: [as per par. 15.3 of ST/AI/2010/5] No efforts were made by the panel to contact my additional FRO's [Names Redacted] for the rebuttal process. My pertinent files & statement I have provided the EO for HoD was shared with Mr. [Name Redacted], an action which was advised against by OHRM in E.O's e-mail. Mr. [Name Redacted] has used the statement to slander my rebuttal statement and put it forward as the statement represented by HoD to the rebuttal panel. 11.Rebuttal

Process: E.O collaborated the fact that the panel rushed the decision of result due to non-renewal of my contract. The panel did not read the additional evidence I provided requested to provide on Friday.  
12.Rebuttal Process: Final decision from rebuttal panel does not does not refer to any documents on my performance, as per FRO's decision to not extend my contract due to my [Performance Improvement Plan (“PIP”)].

*Urgency and irreparable harm*

7. The Applicant indicated that his contract expires on 9 October 2018 and therefore he will separate from the Organization on 9 October 2018, the date of filing of the application for suspension of action.

**Consideration**

8. 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.

9. 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 5:00 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.

10. 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.

11. 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 Villamoran’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.

12. 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 administration 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.

13. 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 16 October 2018, 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 separation was 9 October 2018, before the deadline provided for the Tribunal to consider the application for suspension of action and therefore the implementation is imminent.

14. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 9 October 2018, which is still ongoing.

15. In the form for the Applicant's request for management evaluation, the Applicant identified the decision subject to management evaluation as "[t]he non renewal of his contract based on the final evaluation of the PIP". In the application for suspension of action, the Applicant requested the suspension of the implementation pending mangment evaluation of the same decision: the decision not to renew his fixed term contract based on the final evaluation of the PIP.

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

17. The Applicant indicated that, if the implementation of the contested administrative decision is not be suspended, his contract expires on 9 October 2018. The Tribunal underlines that this matter is not at the merits stage.

18. The second and third conditions are therefore satisfied.

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

IT IS ORDERED THAT:

20. 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 not to renew the Applicant's fixed-term appointment beyond 9 October 2018 shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

*(Signed)*

Judge Alessandra Greceanu

Dated this 10<sup>th</sup> day of October 2018