



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

MONTECILLO

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:
Natalie Puchalka, OSLA

Counsel for Respondent:
UNDP

Introduction

1. On Tuesday, 26 March 2019, the Applicant, a Learning Resource Specialist, at the P-4 level, step 12 on permanent appointment with the United Nations Development Programme (“UNDP”) in New York, filed an application requesting urgent relief under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend, pending management evaluation, the decision “to terminate [the Applicant’s] permanent appointment, following abolition of his post, without having made good faith efforts to assist him in finding an alternative position”.

2. Together with his application, referring to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure and the Appeals Tribunal’s judgment in *Villamorán* UNAT/2011/160, the Applicant also filed a motion requesting that the contested decision be suspended pending the Tribunal’s consideration of the suspension of action proceedings, submitting that he will otherwise be effectively separated on Wednesday, 27 March 2019.

3. On the same day, the application was registered and assigned to the undersigned Judge.

Consideration

4. Applications for suspension of action pending management evaluation are governed by art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of the Rules of Procedure which provide that the three statutory requisites of *prima facie* unlawfulness, urgency and irreparable harm must be satisfied before an application can be granted.

5. 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.

6. 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.

7. Article 13.3 (Suspension of action during a management evaluation) of the Tribunal's Rules of Procedure provides that the Tribunal "shall consider an application for interim measures within five working days of the service of the application on the respondent". Accordingly, the Tribunal has until Tuesday, 2 April 2019, to consider the application.

8. In *Villamorán* 2011-UNAT-160, the Appeals Tribunal upheld this Tribunal's *Villamorán* 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.

9. The Tribunal notes that the implementation of the administrative decision is imminent and will take effect on 27 March 2019 (the Deputy Director in the Office of Human Resources, Bureau for Management Services, UNDP, in his email of 21 March 2019 to the Applicant indicates "2018", which obviously must be a typographical error), and thus the matter is urgent. In light thereof and on the facts

before it, the Tribunal accepts the Applicant's submission that the urgency is not self-created as after he was informed about the termination of his permanent appointment on Thursday, 21 March 2019, he filed the request for management evaluation on Monday, 25 March 2019. Furthermore, the Tribunal finds that not only the interests of justice, but the balance of convenience test dictates the grant of urgent relief in this case, pending the consideration of the application for suspension of action pending management evaluation.

10. The Tribunal finds it appropriate to order that no further steps regarding the decision to terminate the Applicant's permanent appointment shall be undertaken until it has made a final determination of the application for suspension of action (*Nunez* Order No. 17 (GVA/2013); *Quesada-Rafaraso* Order No. 20 (GVA/2013); *Charles* Order No. 61 (NY/2013); *Kallon* Order No. 80 NY/2013); *Gandolfo* Order No. 97 (NY/2013)).

IT IS ORDERED THAT:

11. Without prejudice to any final determination of the present application for suspension of action pending management evaluation, the contested decision is suspended during the pendency of the instant proceedings, and the Respondent shall not undertake any further steps regarding the termination of the Applicant's permanent appointment.

12. By **10:00 a.m. on Friday, 29 March 2019**, the Respondent shall file and serve a reply to the application for suspension of action pending management evaluation.

(Signed)

Judge Ebrahim-Carstens

Dated this 26th day of March 2019