



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

LAMOTHE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON SUSPENSION PENDING THE
DISPUTE TRIBUNAL'S
CONSIDERATION OF AN
APPLICATION FOR SUSPENSION OF
ACTION
AND
CHANGE OF VENUE

Counsel for Applicant:

Natalie Dyjakon, OSLA

Counsel for Respondent:

UNICEF

Introduction

1. By application filed electronically with the Tribunal's New York Registry on 28 December 2019 (p.m. New York time), the Applicant, an Emergency Officer (P-2), at the Office of Emergency Programmes ("EMOPS"), Operations Centre ("OPSCEN"), United Nations International Children's Emergency Fund ("UNICEF"), requests suspension of action pending management evaluation of the decisions to:

- a. Abolish the post he currently encumbers and not to renew his fixed-term appointment beyond close of business on 31 December 2018;
- b. Not to make good faith efforts to assist him in finding an alternative position following the abolition of his Current Post; and
- c. Recruit for the post of OPSCEN Emergency Officer (P-2), EMOPS, OPSCEN, UNICEF, NYHQ #103033.

2. The Applicant also included in his above application a motion pursuant to arts. 19 and 36 of the Tribunal's Rules of Procedure seeking an order suspending the contested decisions pending the Tribunal's adjudication of the suspension of action proceedings in this case (also known as a "Villamorán type motion/request").

Facts

3. On 12 June 2017, the Applicant was informed that the post he currently encumbers was proposed for abolition.

4. By email of 26 January 2018, Human Resources, UNICEF, asked the Applicant to confirm whether he would be interested in being considered for the post of Emergency Officer, OPSCEN, P-2, NHHQ, #103033.

5. On 17 May 2018, the Applicant was informed that Human Resources, UNICEF, needed to check his academic credentials as he had been selected for the above-mentioned post.

6. By email of 11 June 2018, the Chief, Human Resources Partner for Emergencies Section (“HRPES”), UNICEF, informed the Applicant that, without a completed University degree he could not be appointed to the Emergency Officer post for which he had been selected, and that his application to this post would be reviewed by the end of 2018, i.e., at the time the Applicant was expected to complete his Advanced University degree.

7. By email of 6 December 2018, following-up on the above 11 June 2018 email, Human Resources, UNICEF, advised the Applicant that as he would not be completing his degree by the end of 2018, he could not be appointed to the Emergency Officer post and that, as a result, that recruitment would be cancelled.

8. On 14 December 2018, UNICEF re-advertised the Emergency Officer post. The Applicant re-applied on 23 December 2018.

9. Between 7 December 2018 and 19 December 2018, the Applicant corresponded with Human Resources, UNICEF, regarding his academic credentials.

10. On 20 December 2018, the Applicant requested management evaluation “of the recruitment for the position ‘Emergency Officer (OPSCEN), P-2, NYHQ #103033’”. UNICEF replied to this request for management evaluation on 28 December 2018 interpreting that it was directed against the decision to find the Applicant ineligible for the first advertisement of the Emergency Officer post due to the Applicant not having the requisite academic degree(s).

11. On 24 December 2018, the Applicant met with the Chief, HRPES, UNICEF, and *inter alia* explained to her that although he had completed his Master’s degree, he would be receiving the result of his final research project in February 2019. The Applicant argues that the Chief, HRPES, UNICEF, advised him that she would explore finding an interim solution in light of that information.

12. By email of 26 December 2018, the Chief, HRPES, UNICEF, informed the Applicant that without any University degree he could not be appointed to the Emergency Officer position.

13. On 28 December 2018, the Applicant requested management evaluation of the decisions referred to in paragraph 1 above.

Consideration

14. The Applicant is currently based in New York and, therefore, the appropriate venue for the consideration of his application is the Tribunal's seat in New York.

15. However, at the date of filing of the application, one New York Judge was on prearranged annual leave and the other New York Judge was on sick leave. As a result, the Tribunal's New York Registry redirected the application to the Geneva Registry at 9 p.m. Geneva time on Friday, 28 December 2019, for consideration by the judge on duty in Geneva.

16. In *Villamorán* 2011-UNAT-160, the Appeals Tribunal confirmed the Dispute Tribunal's competence to suspend a contested decision pending a determination of a related application for suspension of action without having to make a finding as to whether the statutory requirements for granting a suspension of action 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.

17. If this application is served on the Respondent on Monday, 31 December 2018, the statutory five working days to consider it will expire on Monday, 7 January 2019. It follows that at least one of the *prima facie* receivable contested decisions (non-renewal of the Applicant's appointment) would, clearly, be implemented before the Dispute Tribunal has an opportunity to review the matter. Therefore, to ensure the Applicant's proper access to justice, it is warranted

to expeditiously decide on his motion for suspension pending finalization of the suspension of action proceedings.

18. Having considered the chronology of the facts in this case, the Tribunal is satisfied that the requirements for an interim order pending the Tribunal's determination of the application for suspension of action pending management evaluation, as set out in *Villamorán*, are met.

19. Noting that one New York Judge will return from leave on Monday, 31 December 2018, the undersigned Geneva Judge will limit her ruling to the Applicant's motion. This is without prejudice to any receivability consideration that the Tribunal may raise and examine when adjudicating the application for suspension of action pending management evaluation. Furthermore, the undersigned Judge will order that the case be immediately transferred to New York, for further processing and adjudication of said application, since, as stated above, that is the appropriate venue.

Conclusion

20. In view of the foregoing, it is ORDERED that:

- a. Pursuant to arts. 19 and 36 of the Tribunal's Rules of Procedure, the implementation of the contested decisions set forth in para. 1 above shall be suspended until the Dispute Tribunal has rendered its decision on the Applicant's application for suspension of action pending management evaluation. This is without prejudice to the Dispute Tribunal's determination on said application under art. 10.2 of its Statute and art. 13 of its Rules of Procedure;
- b. The venue of the case be changed to New York for further processing and adjudication of the Applicant's application for suspension of action pending management evaluation; and

c. The Geneva Registry effect the necessary arrangements for the transfer of the respective electronic case file to the Tribunal's New York Registry.

(Signed)

Judge Teresa Bravo

Dated this 31st day of December 2018

Entered in the Register on this 31st day of December 2018

(Signed)

René M. Vargas M., Registrar, Geneva