



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KANDIL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**INTERIM ORDER  
ON AN APPLICATION  
FOR SUSPENSION OF  
ACTION PENDING MANAGEMENT  
EVALUATION UNDER ART. 2.2 OF  
THE DISPUTE TRIBUNAL'S  
STATUTE**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
ALS/OHRM

## **Introduction**

1. The Applicant is an Economic Affairs Officer with the United Nations Economic and Social Commission for Western Asia.

2. On 16 April 2018, he filed an application for suspension of action (SOA) pending management evaluation of the decision communicated to him on 16 April 2018<sup>1</sup> to terminate his appointment effective the same day (16 April 2018). The application was filed in the United Nations Dispute Tribunal's (UNDT) Court Case Management System (CCMS) after the end of the working day in Nairobi and was opened by the Registry on 17 April 2018.

## **Consideration**

3. The Dispute Tribunal has been struggling with practices consisting in ambushing staff members with immediate termination, barring their recourse to suspension of action available under Article 2.2. of the UNDT Statute. Different approaches have been developed.

4. In *Villamoran*, the United Nations Appeals Tribunal (UNAT) confirmed that 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 art. 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under art. 2.2 of the UNDT Statute, that is, 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.<sup>2</sup> According to *Villamoran* an application for an interim SOA order requires the state of increased urgency which has not been created by the applicant. In determining whether to grant

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<sup>1</sup> Termination memorandum -Annex 1 to the application.

<sup>2</sup> *Villamoran* 2011-UNAT-160.

an interim SOA for five days in that case, UNAT held that the UNDT should explicitly address the issue of whether the Applicant acted diligently.

5. 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". The Tribunal held that where notice of non-renewal was provided after close of business, it could not be considered to be implemented, in the sense of art. 2.2 of the UNDT Statute until the end of the following day.

6. In *Harris* Order No. 135 (NBI/2017), this Tribunal considered the issue on a more general level, as involving the matter of right. It recalled *Villamorán* in that applying art. 2.2 must not render it meaningless and held that the Respondent's unilateral determination of the separation date with immediate or even retroactive effect may not act in such way as to *a limine* bar a request for suspension of action.

7. The Tribunal noted that art. 2.2 of the UNDT Statute, which grants the right to seek suspension of the implementation of the contested decision pending management evaluation, differs from article 10.2 specifically in that it does not preclude suspending implementation of the contested decision in cases of appointment, promotion or termination. It further observed that the notion of "implementation" under art. 2.2 of the UNDT Statute is being interpreted in consideration of the facts of the case and practical consequences of the decision. Suspension of implementation would usually mean precluding the decision's taking legal effect and the administration acting upon it. Notably, UNAT jurisprudence accepted that in non-selection and non-promotion disputes it means not just the execution of the dispositive part of the impugned decision, but also imminence of decisions and actions which are legally enabled by the impugned decision and which would have the effect of irreversibly frustrating the Applicant's claim. This way, the suspension of action request serves the more general purpose of securing the main

claim, without, however, leading to satisfying it. Referring these considerations to termination of appointment or contract, suspending the legal effect of a decision must be possible notwithstanding the unilaterally determined date of separation. Conversely, an obstacle against such a suspension could be the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs, obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, *e.g.*, not acting during the appropriate notice period, and then tries to retract. “Implementation” does not follow from a mere announcement of the decision, or, for that matter, from the Respondent having processed the relevant data in *Umoja*.

8. Accordingly, the present application for suspension of action is not irreceivable due to “implementation” because the Respondent chose to terminate his staff member of 18 years on a two-hour notice.

9. The case is complex, involving determination of several material and procedural issues: correctness of reactions to alleged underperformance, especially considering that it occurred only after the arrival of a new supervisor and considering the duties of the Organization toward its staff member on a continuing appointment. The Tribunal cannot make the determination required under art. 2.2 of the UNDT Statute without seeking an explanation from the Respondent on the points of contention.

10. The urgency of the matter in the present case is self-evident. The Applicant acted most diligently by filing his SOA application and management evaluation request on the same day that he received the contested decision. The *Villamorán* test is therefore satisfied.

**IT IS ACCORDINGLY ORDERED:**

11. The decision to terminate the Applicant’s appointment is hereby suspended for five working days, that is, until Monday, 23 April 2018.

12. The Respondent shall file a reply to the SOA application by 5.00 p.m. (Nairobi time) on 19 April 2018.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 17<sup>th</sup> day of April 2018

Entered in the Register on this 17<sup>th</sup> day of April 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi