



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Hafida Lahiouel

CABAL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON MOTION PURSUANT TO  
ARTICLE 19 AND 36 OF RULES OF  
PROCEDURE**

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**Counsel for Applicant:**

Mariam Munang, OSLA  
Daniel Trup, OSLA

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. At 4:31 p.m. on 3 June 2016, the Applicant, a Human Resources Assistant at the United Nations Economic Commission for Latin America and the Caribbean (“ECLAC”), Santiago, Chile, filed a document titled “Application for suspension of action pursuant to article 13 of the Rules of Procedure of the United Nations Dispute Tribunal and Motion pursuant to articles 19 and 36 of the UNDT Rules of Procedure (Villamorán)”. The Applicant requests the Tribunal to order the suspension, pending management evaluation, of the implementation of the administrative decision not to renew her contract upon its expiration on 30 June 2016. The application for suspension of action includes a motion requesting the Tribunal to “order the suspension of the contested decision pending the Article 13 suspension of action proceedings”.

2. On the same day, the case was assigned to the undersigned Judge.

3. At 6:25 p.m. on 3 June 2016, the New York Registry of the Dispute Tribunal transmitted the Applicant’s 3 June 2016 filing to the Respondent, stating:

Further to Judge Greceanu’s instructions, the Respondent shall submit his response to the Applicant’s motion pursuant to arts. 19 and 36 of the Rules of Procedure by **1:00 p.m. on Monday, 6 June 2016**, and his reply to the application for suspension of action by **5:00 p.m. on Wednesday, 8 June 2016**.

4. At 11:34 a.m. on 6 June 2016, the Respondent filed his response to the Applicant’s motion.

## **Factual and procedural background**

5. On 30 August 2013, the Applicant signed a Letter of Appointment offering her a two year fixed-term appointment as a Human Resources Assistant at the G-5, Step 4 level, ECLAC, in Santiago, Chile. The effective date of appointment was 1 January 2014.

6. For the 2013–2014 performance evaluation cycle, the Applicant received an overall end-of-cycle rating of “Partially meets expectations”.

7. The Applicant rebutted her performance evaluation for 2013–2014. A Rebuttal Panel was convened and issued a report dated 1 October 2014. The panel stated that it was of the opinion that the rating of “Partially meets expectations” should be maintained and recommended the implementation of a Performance Improvement Plan (“PIP”).

8. The Applicant was placed on a PIP from 11 November 2014 until 8 May 2015. In May 2015, upon completion of the first PIP, the Applicant was informed that the Administration had decided to extend the PIP for another six months, from May 2015 until October 2015.

9. On 4 January 2016, the Applicant signed a Letter of Appointment offering her a six month extension to her appointment. The Letter of Appointment stated that it expired “without prior notice on 30 June 2016” and further stated: “A Fixed-Term Appointment, irrespective of the length of service, does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations”.

10. On 17 May 2016, the Applicant was informed by her new first reporting officer and second reporting officer that her contract, which was due to expire on 30 June 2016, would not be renewed.

11. On 23 May 2016, the Organization advertised two Human Resources Assistant positions at the G-5 level, ECLAC, Santiago, Chile, through Job Opening number 16-HRE-ECLAC-61172-J-SANTIAGO (O). The announced deadline for applications was 29 May 2016.

12. By memorandum dated 30 May 2016, the Applicant was informed that, in accordance with the information conveyed to her in person on 17 May 2016, her appointment would not be extended beyond its date of expiry on 30 June 2016.

13. On 3 June 2016, the Applicant submitted a request for management evaluation of the decision not to renew her fixed-term appointment.

14. On the same day, 3 June 2016, the Applicant filed an application for suspension of action before the Tribunal, requesting the suspension, until the completion of the management evaluation, of the implementation of the contested decision, notified to her on 17 May 2016, not to renew her fixed-term appointment beyond its date of expiration on 30 June 2016. Furthermore, the Applicant included in the application for suspension a motion, pursuant to arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure, requesting that the Tribunal "order the suspension of the contested decision pending the Article 13 suspension of action proceedings".

15. This order addresses the Applicant's motion to order the preliminary suspension of the implementation of the contested decision pending the determination of the Applicant's application for suspension of action of the non-renewal decision.

**Applicant's motion pursuant to articles 19 and 36 of the UNDT Rules of Procedure (Villamoran)**

16. The Applicant states that the Administration has advertised "the Applicant's post" as a temporary job opening with the deadline closing on 29 May 2016. She submits that if the Administration is allowed to proceed with the recruitment process, she will lose the possibility of being "reinstated". The finalization of the recruitment process, she says, "would frustrate any order issued by the Tribunal".

17. The Applicant submits that she will suffer irreparable harm if the recruitment process is finalized because she will be left without a position at the United Nations, which will render her ineligible to apply for other United Nations positions as an internal candidate. Moreover, the sudden separation will result in a loss of her personal integrity and economy, as well as her reputation and career prospects.

18. The Applicant cites arts. 19 and 36.1 of the Dispute Tribunal's Rules of Procedure, and the Appeals Tribunal's jurisprudence in *Villamoran* 2011-UNAT-160

(quoting para. 43 of the judgment), in support of her request that the Tribunal “order the suspension of the contested decision pending the Article 13 suspension of action proceedings”.

**Respondent’s response to the Applicant’s motion**

19. The Respondent submits that the criteria for ordering a preliminary suspension of action have not been met. He submits that the Tribunal has the discretion to order a preliminary suspension of action pursuant to arts. 19 and 36 of the Rules of Procedure during the five day period if the following criteria are satisfied:

- a. The implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member;
- b. The implementation of an administrative decision takes place before the five days provided for under art. 13 of the Rules of Procedure have elapsed; and
- c. The Dispute Tribunal is not in a position to take a decision under art. 2.2 of the Statute because it requires further information or time to reflect on the matter.

20. The Respondent submits that the implementation of an administrative decision is not imminent. The Applicant’s term of appointment will expire on 30 June 2016, after the five day period provided to the Dispute Tribunal under art. 13 of the Rules of Procedure has lapsed. Second, the Respondent states that although the recruitment process for the Applicant’s position is under way, it will not be completed within the five day period.

**Relevant law**

21. Article 2.2 of the Dispute Tribunal’s Statute provides:

## **Article 2**

...

2. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

22. Articles 13, 19 and 36.1 of the Dispute Tribunal's Rules of Procedure provide:

### **Article 13 Suspension of action during a management evaluation**

1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

2. The Registrar shall transmit the application to the respondent.

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

### **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.

23. Staff rule 11.2 on management evaluation states:

**Rule 11.2**

**Management evaluation**

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(d) The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General.

**Consideration**

24. 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.

25. 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.

26. 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.

27. 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 only 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.

28. 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 to consider the request for suspension of action pending management evaluation. In the present case, the effective date of service of the application for suspension of action on the Respondent is Monday, 6 June 2016, since the application was transmitted to the Respondent via email after close of business on Friday, 3 June 2016. The Tribunal therefore has until Monday, 13 June 2016 inclusive to consider and rule on the Applicant's application for suspension of action.

29. As confirmed by both parties, the contested decision will not be implemented until 30 June 2016, by which time the Tribunal will have ruled on the application for suspension of action. Therefore, the first condition is not fulfilled.

30. Regarding the second and the third conditions, the Tribunal notes that in the present case, the Applicant submitted a request for management evaluation on 3 June 2016 of the decision not to renew her contract beyond 30 June 2016 and on the same day filed an application for suspension of action requesting the Tribunal to order the suspension, pending management evaluation, of the implementation of the decision not to renew her contract. The Applicant indicated that the contested administrative decision not to renew her contract is to be implemented on 30 June 2016 when she is to be separated and the management evaluation review of the non-renewal decision is currently ongoing.

31. In the motion, the Applicant stated that the Administration advertised her post and the deadline for the applications closed on 29 May 2016, indicating that if the process is allowed to continue she will lose the possibility of being reinstated and suffer the same irreparable harm as that which will result from the non-renewal decision (she will be left without a position at the United Nations, which will render her ineligible to apply for other United Nations positions as an internal candidate; the sudden separation will result in a loss of her personal integrity and economy). In addition the Applicant stated that the finalization of the recruitment process would frustrate any order issued by the Tribunal.

32. The Tribunal considers that in the motion, the Applicant requested the suspension of the recruitment process initiated through Job Opening number 16-HRE-ECLAC-61172-J-SANTIAGO (O), which is a different administrative decision than the decision not to renew the Applicant's contract.

33. While the Applicant's motion makes reference to the recruitment process for two Human Resources Assistant positions at the G-5 level, ECLAC, Santiago, Chile, initiated through Job Opening number 16-HRE-ECLAC-61172-J-SANTIAGO (O), the decision to initiate this recruitment process is a separate decision to the decision not to renew the Applicant's appointment and is not the decision for which the Applicant filed the request for management evaluation dated 3 June 2016. In *Villamorán*, and other cases in which the Tribunal has ordered preliminary suspension of action pending consideration of an application for suspension of action, the decision suspended by the Tribunal on a preliminary basis was the same decision as the decision contested in the application for suspension of action (*Gebre* Order No. 20 (NBI/2016); *Chama* Order No. 347 (NBI/2015); *Gatti et al* Order No. 119 (NY/2013); *Gandolfo* Order No. 97 (NY/2013); *Charles* Order No. 61 (NY/2013)). The present case is therefore distinguishable.

34. The Tribunal concludes that the administrative decision indicated in the motion is different from the contested administrative decision for which the Applicant requested management evaluation review and respectively filed a suspension of action pursuant to art. 13 of the Rules of Procedure. Moreover, the Applicant did not file a management evaluation request to contest the recruitment process for the job opening indicated above, which advertised two positions for Human Resources Assistant, including the one occupied currently by the Applicant. The Applicant's motion refers to the irreparable harm that she would suffer if the recruitment process is finalized pending the Tribunal's consideration of the suspension of action related to the non-renewal of her contract.

35. Therefore, the Tribunal concludes that since, in the present case, the only administrative decision that can be subject of a preliminary suspension for five days

pending its consideration of an application for suspension of action is the contested administrative decision not to renew the Applicant's contract beyond its expiration on 30 June 2016, which is subject to an ongoing management evaluation review, the second and third conditions are also not fulfilled.

36. In light of the foregoing,

IT IS ORDERED THAT:

37. The Applicant's motion pursuant to arts. 19 and 36 of the Rules of Procedure is rejected.

38. The Tribunal will rule on the application for suspension of action in a separate order in due course.

*(Signed)*

Judge Alessandra Greceanu

Dated this 7<sup>th</sup> day of June 2016