



Before: Judge Alessandra Greceanu
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

MULLAN

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:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 13 October 2017, at 7:24 a.m., the Applicant, a Contingent Owned Equipment Officer with United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-6 level, step 12, on a permanent appointment, 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 of reassignment to [United Nations Support Office in Somalia, “UNSOS”], Mombasa, on medical grounds” be suspended.

2. On 13 October 2017, the case was assigned to the undersigned Judge.

3. On 13 October 2017, at 10:45 a.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed, by 12:00 p.m. on 13 October 2017, the Applicant to file his request for management evaluation and the Respondent to submit his reply by 12:00 p.m. (noon) on 13 October 2017, including information and supporting documentation, if any, on (a) if travel arrangement for the Applicant have already organized, (b) the level for medical facilities in UNSOS, Mombasa, and (c) if the alleged post with Job Opening No. 83236 in the United Nations Peacekeeping Force in Cyprus (“UNFICYP”), Cyprus, for FS-6 level Supply Officer is still vacant and if any offer for this post have been made to the Applicant.

4. On 13 October 2017, at 11:52 p.m., the Applicant filed the management evaluation request and also additional documentation consisting in an email correspondence regarding the level and location of the position to which he was to be laterally reassigned in UNSOS, Mombasa and the level of medical service provided in Mogadishu to where the relevant position is to be moved on or before 1 July 2018.

5. Also, on 13 October 2017, at 11:52 p.m., Counsel for the Respondent filed the reply in which he states that, due to the short deadline for the Respondent, it has not been possible to take full instructions and that he therefore was unable to provide full

submissions on the three conditions for granting an order under art. 2.2 of the Dispute Tribunal's Statute. Against this background, Counsel submits that the contested decision is lawful and requests the Tribunal to dismiss the application for suspension of action. In response to the Tribunal's other orders, Counsel submits as follows:

Travel Arrangements for the Applicant

... The Applicant does not have to travel until Monday 16 October 2017.

Level of medical facilities in UNSOS, Mombasa

... A Level III hospital is available in Mombasa, which is able to deal with the Applicant's immediate medical needs. There is no Level IV medical facility in Mombasa. However, there is one in Nairobi, Kenya. This medical arrangement is similar to that available to the Applicant in MINUSTAH, where he had access to a Level IV medical facility in Miami, USA.

Status of Job Opening 83236

... The selection process for this job opening is ongoing. No final selection decision has been made.

Background

6. In his application for suspension of action, the Applicant presents the facts as follows (emphasis omitted):

... I am a Field Service Officer, at the FS-6 level Chief COE in MINUSTAH on a permanent appointment with the United Nations on assignment to MINUSTAH.

... I have been requesting medical reassignment for more than one year, as per [General Assembly resolution 68/265 (Mobility framework), A/RES/68/265], Article 13; which states "..... with the exception of special circumstances in which the movement of staff members earlier than the minimum post occupancy limit is necessary for their health and safety or prompt delivery of mandates" which to date has not been in general ignored.

... While MINUSTAH staff have repeatedly been informed in Town Hall meetings and through Broadcasts that they will not be retained past 15 October 2017 unless they find other employment in the System.

... To satisfy this, in or around August 18, 2017 I applied to an FS-6 Supply officer post in [UNFICYP]. The post also included the duties of a Transport Officer for which I have 24 years of experience, 19 of which are with the United Nations.

7. Under the heading, “Details of the decision you seek to suspend”, the Applicant further submits that:

I am contesting the decision of reassignment to UNSOS, Mombasa on medical grounds.

For more than one year I have repeatedly requested medical reassignment due to a heart condition. In January 2017, [Medical Services Division, “MSD”] confirmed that I should be deployed to a mission with Level 4 medical facilities.

These well documented facts were explained during my meeting with Career Support Unit verbally on 14th September 2017, and on the evening of to October 2017.

On September 25, 20 17, MINUSTAH [Chief Human Resources Officer] requested that I check out by 15th October 2017, on the evening of 10 October I received an email with attachments reassigning me to UNSOS, Momhasa. As the mission does not have level four medical facilities I was obliged turn down the offer, which I did that evening. Additionally, Mombasa it is out of reach for my family to come to convalesce me should I suffer either another heart attack or an attack of ACS.

On the evening of 11th October 2017, I received a repeat e-mail from [name redacted, “CK”] insisting that I go to Mombasa and that travel arrangements would be initiated and that MSD said the medical facilities were sufficient. I once again reminded [CK], that my request for medical reassignment remained pending after one year. I emphasized that send me there would only place me in jeopardy.

Given that [CK] is fully cognizant [of my] medical condition, I consider [CK’s] decision may be prejudiced by my dogged pursuit of reassignment on medical grounds since 2016 and that I have been dogmatic in the petitioning of staff rights related to the MINUSTAH Drawdown as Chairman of the MINUSTAH [Field Service Union, “FSU”].

Applicant's submissions

8. The Applicant's principal contentions may be summarized as follows:

Prima facie unlawfulness

a. It is evident that the Applicant is a staff member in need of placement within the meaning of staff rule 9.6(e) and ST/AI/2010/3 (Staff selection system), sec. 11. Also, with a medical condition that requires level 4 medical facilities.

b. The Dispute Tribunal has previously determined that the Administration has an obligation to place a staff member in this situation on a suitable post for which he/she is qualified, even though the staff member may not be the best qualified candidate (*Lemonnier* UNDT/2016/186, para. 36). Indeed, the Applicant has a right to be accorded preference and be placed without competing with external candidates or other internal candidates not in need of placement, or with a lower priority of retention as listed in ST/AI/2010/3, sec. 11. The Applicant's medical condition would also contribute to the level of his priority;

c. By the Administration insisting that the Applicant is to deploy to a mission without level 4 medical facilities, and being fully cognizant of his medical condition, he would be placed at significant risk;

d. By advertising a Recruit from Roster vacancy for which the Applicant is obviously qualified, the Administration is in fact disregarding this right and forcing him to accept a post without the required medical facilities, while the post in UNFICYP remains unencumbered and has appropriate medical facilities. In *Lemonnier*, the Dispute Tribunal qualified this practice as a "material irregularity";

Urgency

e. The Administration can at any moment decide to fill the Recruit from Roster vacancy with a rostered applicant, which would result in the position not being available for placing the Applicant, it would also place him in jeopardy not to have appropriate medical facilities as his condition requires, thereby obliging his separation on 15 October 2017. The Tribunal is requested to suspend all action on filling the post pending management evaluation;

f. As a candidate may be selected at any moment, the Applicant further requests the Tribunal to suspend recruitment pending the deliberation on this suspension of action request;

Irreparable damage

g. It is established law that loss of a career opportunity with the United Nations may constitute irreparable harm. If the Applicant is not placed, he will be obliged to separate from service effective 15 October 2017;

h. Additionally, being aware of the Applicant's medical condition, and, as the Organization has placed sufficient emphasis on the health and safety of staff, as per art. 13 of General Assembly resolution 68/265, placing him in a mission without appropriate medical facilities would knowingly endanger his life and wellbeing and put him at unnecessary risk;

i. The Applicant also seek immunity from further retaliation against him for his activities as Chairperson of the MINUSTAH FSU.

Respondent's submissions

9. The Respondent's submissions are as follows

a. All the Applicant's allegations are denied, except where expressly admitted Under art. 2.2.2 of the Dispute Tribunal's Statute, the Applicant

must establish that: (i) the contested decision was prima facie unlawful; (ii) there is a particular urgency; and (iii) implementation of the decision would cause irreparable harm. All three statutory requirements have to be satisfied in order for the implementation of a contested decision to be suspended. The onus is on the Applicant to prove all three elements;

b. The contested decision is lawful, and the Applicant has not provided any evidence that the contested decision is unlawful;

c. On 13 April 2017, the Security Council decided that MINUSTAH would close on 15 October 2017. A new mission, the United Nations Mission for Justice Support in Haiti (or MINUJUSTH), will be established from 16 October 2017. As the Applicant holds a permanent appointment, the Organization has decided to laterally reassign him under sec. 11.2 of ST/AI/2010/3 to UNSOS, Mombasa. In taking this decision, the Organization took the Applicant's medical situation into account. Based on an assessment done recently by the medical officers in Nairobi, as per the last medical report on file the Applicant's urgent medical needs can be met in a Level III hospital in Mombasa. The Applicant will also have access to the Level IV hospital in Nairobi to meet any medical needs that arise.

Consideration

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 administrative 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.

15. 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 13 October 2017, to consider the request for suspension of action pending management evaluation of the decision to laterally reassign the Applicant to UNSOS Mombasa.

16. In the present case, the effective date of his reassignment is “immediate” according to facsimile of 10 October 2017 from the Director of the Field Personnel Division, Department Field Services (“DFS”) to the Director of Mission Support, UNSOS, and the Chief of Mission Support, MINUSTAH, in which he states that:

- ... Under the authority of the USG/DFS provided for in Section 11.2 of ST/AI/2010/3, [the Applicant] will be laterally reassigned with immediate effect from MINUSTAH to UNSOS as FS-6, Contingent Owned Equipment Officer. His duty station will be Mombasa.
- ... Please make all necessary selection, on boarding and travel arrangements to ensure the immediate reassignment and travel of the staff member. Please confirm the travel details to DFS and MINUSTAH.

17. In accordance with the Respondent’s reply the Applicant does not have to travel until Monday 16 October 2017. It results that the Applicant is expected to

travel on 16 October to UNSOS, Mombasa and therefore before the expiration of the five days deadline provided for under art. 13 of the Rules of Procedure.

18. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 13 October 2013 of the decision to reassign him to UNSOS Mombasa, which is currently ongoing and, on the same day, he filed an application for suspension of action requesting the Tribunal to order the suspension, pending management evaluation, of the implementation of the same decision. The Applicant indicated that, if the implementation of contested administrative decision will not be suspended, his contract is to be terminated and he is to be separated from the Organization on Sunday, 15 October 2017. The second and third conditions are therefore satisfied.

19. The Tribunal notes that, as appears from the additional documentation filed by the Applicant, the post in UNSOS, Mombasa to which the Applicant was laterally reassigned is to be moved to UNSOS, Mogadishu before or on 1 July 2018 where there are, apparently, no level 4 medical facilities. The Tribunal further notes that these documents were not available for consultation to the Respondent, who had insufficient time to prepare a complete reply addressing all the substantive elements of the application for suspension of action.

20. The Tribunal considers that the requirements for an interim order pending the Tribunal's determination of a suspension of action as set out in *Villamorán* by the Appeals Tribunal have been satisfied, and that the urgency appears not to be self-created by the Applicant, but underlines that this matter is not at the merits stage.

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

IT IS ORDERED THAT:

22. 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 to reassign the Applicant to UNSOS, Mombasa shall be suspended until the Tribunal has rendered its decision on this application, or until

further order. Accordingly, the Applicant is not to be reassigned from MINUSTAH to UNSOS during the pendency of the Tribunal's consideration of his application for suspension of action of this decision;

23. The Respondent is to file a complete reply to the application on suspension of action by **12:00 p.m, Tuesday, 17 October 2017**, including information and supporting documentation regarding:

- a. The level of medical facilities provided in MINUSTAH;
- b. The level of medical facilities currently existing in UNSOS, Mombasa and in UNSOS, Mogadishu;
- c. The level and title of the UNSOS position to which the Applicant was to be laterally reassigned and if he has clearance for it; and
- d. The list of the available suitable posts at the same level or at a lower level presented to the Applicant.

(Signed)

Judge Alessandra Greceanu

Dated this 13th day of October 2017