



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

VULETA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Katya Melliush, OSLA

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

## **Introduction**

1. On 20 October 2017, at 5:00 p.m., the Applicant, a Human Resources Assistant with United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-5 level on a continuing 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 to terminate his continuing contract with MINUSTAH, which was notified to him on 19 October 2017 and scheduled to be implemented on 20 October 2017, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant arts. 19 and 36 of Rules of Procedure requesting the Tribunal to suspend the implementation of the contested decision pending the consideration of the application for suspension of action under article 2.2 of the Dispute Tribunal’s Statute.

2. On 20 October 2017, the case was assigned to the undersigned Judge.

3. On 20 October 2017, at 5:49 p.m., the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 5:00 p.m. on 24 October 2017.

4. The Tribunal further informed the parties that, due to the urgency of the matter and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the Applicant’s motion on suspension pending the consideration of the application for suspension of action under article 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written order would follow.

5. By Order No. 234 (NY/2017) dated 20 October 2017, the Tribunal granted, 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 suspension of the implementation of the decision to terminate the Applicant’s continuing appointment until the Tribunal rendered its decision on the application for suspension of action, or until further order.

6. On 23 October 2017, the Applicant filed an additional submission and supporting documentation.

7. On 24 October 2017, the Respondent filed his reply contending that the application is moot because the contested decision will not be implemented pending management evaluation and the Applicant has been provided with the relief he is seeking.

## **Background**

8. Appended to the application for suspension of action, the Applicant filed his termination letter from the Chief of Mission Support (a staff member from Department of Field Support was also copied) dated 19 October 2017 in which is stated as follows (emphasis in the original):

### **Notice of termination of continuing/permanent appointment**

**[Name of the Applicant and his index no.]**

Dear [name of the Applicant],

Reference is made to my earlier letter to you on the subject **Advance information letter. Termination of appointment with MINUSTAH**. This letter serves to inform you that efforts by Field Personnel Division for your lateral re-assignment under the delegation of [the Under-Secretary-General for Department of Field Support] has not been successful and therefore the Under-Secretary-General for Management has approved the termination of your appointment with the United Nations in accordance with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i) subsequent to your decision to decline the offer of placement in [the United Nations Support Office in Somalia] made by the Field Personnel Division for your lateral re-assignment under the delegation of [the Under-Secretary-General for Field Support].

This is an official notice that your appointment will be terminated in line with Staff Rule 9.7, and your separation will be effective **20 October 2017**.

The Under-Secretary General for Management also approved payment of termination indemnity pursuant to Staff Regulation 9.3 (c), Staff Rule 9.8 and in accordance with the rates set out in Annex III of the Staff Regulations. In addition a compensation in lieu of notice will be paid in line with Staff Rule 9.7(d).

The Human Resources Section of MINUSTAH will follow up with you on the necessary arrangements.

I take this opportunity to express the mission's sincere appreciation for your dedication and contribution to the work of the United Nations and wish you the best in your future endeavours.

### **Parties's submissions**

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

#### *Prima facie unlawfulness*

a. Staff rule 9.6(e) creates an obligation for the Administration to retain the services of staff members facing post abolition against suitable posts. Continuing appointment holders, such as the Applicant, are to be retained in preference to staff members on any other contractual modality. The requirement to retain staff on continuing appointment is "subject to availability of suitable posts". It makes no indication as to where such posts might be;

b. The recent decision of the Tribunal in *Timothy* UNDT/2017/080 highlights the obligation of the Respondent to do more than simply invite staff to apply for alternative positions. The Tribunal in *Timothy* considered that continuing appointees have a right to be retained and that they should not only be given precedence over fixed-term appointees and others, but that the Organization has a duty to reassign those of less secure tenure in order to make suitable positions available for continuing appointees;

c. In the present case, it is clear that:

i. The Applicant was not properly considered in any comparative review process, or at all, for transfer to the United Nations Mission for Justice Support in Haiti ("MINUJUSTH") or elsewhere within the Organization;

- ii. The Applicant was unlawfully not given precedence over a fixed-term appointee, namely a Human Resources Assistant in the Liquidation Team of MINUSTAH;
  - iii. A suitable post (a post of Human Resources Assistant) with Job Opening No. 85169, was available, but the Applicant was not subjected to any comparative review process for this position;
- d. Even if the Applicant had been fully and fairly and properly considered for suitable posts within the Organization, which is disputed, the Applicant was not given sufficient (or any) notice of termination;

*Urgency*

- e. Termination is said to take effect on 20 October 2017. 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";
- f. In *Applicant* UNDT/2012/091, it was found that where notice of non-renewal was provided after close of business, it could not be considered to be implemented until the end of the following day;
- g. In the instant case, the notice requirements for termination are codified in the Rules and a period of three months months is required under staff rule 9.7(a);
- h. The fact that no notice has been provided means that the matter is of the utmost urgency as implementation is imminent;

*Irreparable damage*

i. Referring to *Kasmani* 2009-UNDT-017, *Diop* 2012-UNDT-029 and *Villamorán* 2011-UNDT-126, it is well-established that monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with non-renewal of a fixed-term contract. How much more so the unexpected and unlawful termination of a continuing appointment?

10. In the Applicant's additional submissions dated 23 October 2017, the Applicant requested that the Tribunal accept additional submissions in support of his Application, stating that the additional submissions serve only to "flesh out" some of the detail supplied previously and should not unduly prejudice the Respondent in preparing his reply which is due to be filed by close of business on 24 October. The Applicant's additional submissions may be summarized as follows:

a. The Administration appears to be encouraging the lateral reassignment to other missions of staff on continuing and permanent appointments in the Code Cable regarding lateral reassignments, which was sent to the Mission in July 2017. It is in light of this that the Applicant's email, annexed to the Application for Suspension of Action, should be viewed;

b. In support of his contention that the exercise was not conducted in accordance with the Staff Rules or relevant jurisprudence, reference is made to the lateral reassignment of fixed-term appointees from MINUSTAH to other missions. One such example is the position of Administrative Assistant (at the FS-5 level) within the office of the Chief of Mission Support of MINUJUSTH, to which a fixed-term appointee was recently laterally reassigned. Another example is the case of a Finance Assistant in MINUSTAH, also a fixed-term appointee, who was recently laterally reassigned to the United Nations Verification Mission in Columbia;

c. The Applicant's appointment was converted from fixed-term to a continuing appointment on 30 September 2014.

11. On 24 October 2017, the Respondent filed his reply submitting that the contested decision will not be implemented pending management evaluation. Based thereon, the Respondent contended that the application is moot because the Applicant has been provided with the relief he is seeking and that there is no matter for the Dispute Tribunal to adjudicate.

### **Consideration**

#### *The mandatory and cumulative conditions for suspending an administrative decision*

12. Article 2.2 of the Dispute Tribunal's Statute states:

... 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.

13. Article 8.1(c) of the Tribunal's Statute states that an application shall be receivable if: "... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required".

14. Article 13.1 of the Tribunal's Rules of Procedure states:

... 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.

15. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following mandatory and cumulative conditions:

- a. The application concerns an administrative decision that may properly be suspended by the Tribunal;

- b. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- c. The contested decision has not yet been implemented;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. Its implementation would cause irreparable damage; and
- f. The case is of particular urgency.

*Whether application concerns an administrative decision that may properly be suspended by the Tribunal*

16. The Tribunal notes that it is uncontested that the contested decision in the present case, namely the decision to terminate the Applicant's continuous contract with MINUSTAH, is an administrative decision subject to review by the Tribunal, including its implementation being suspended pending management evaluation. Consequently, the first cumulative and mandatory condition presented above is fulfilled.

*Whether the Applicant requested management evaluation of the contested decision and whether the evaluation is ongoing*

17. The Tribunal notes that it is uncontested that the Applicant filed a management evaluation request of the contested decision on 20 October 2017, within 60 days from the day of notification, and that the evaluation is currently pending. Consequently, the second cumulative and mandatory condition presented above is fulfilled.

*Whether the contested decision has not yet been implemented*

18. The Tribunal notes that pursuant to Order No. 234 (NY/2017) issued on 20 October 2017, the Tribunal suspended the contested decision until the Tribunal has rendered its decision on this application, or until further order. Further, the Tribunal



notes that the Respondent, on behalf of the Secretary-General, has informed the Tribunal that the Administration has decided—and, consequently, obliged itself—not to implement the contested administrative decision during the pendency of the management evaluation.

19. It results that the relief the Applicant has requested, namely that the decision to terminate his continuous appointment be suspended during the pendency of management evaluation, has already been granted by the Administration.

20. Consequently, the Tribunal considers that, since the implementation of the contested decision was suspended by the Administration pending management evaluation, there is no further determination to be made by the Tribunal in the present case.

21. The Tribunal commends the Administration for its swift and appropriate response in line with the position it had adopted in previous and similar cases, which prevented further litigation before the Tribunal.

### **Conclusion**

22. Taking act that the Administration has already granted the requested relief, and that the implementation of the contested decision is already suspended pending management evaluation, the Tribunal ORDERS:

The application for suspension of action is moot.

*(Signed)*

Judge Alessandra Greceanu

Dated this 25<sup>th</sup> day of October 2017