



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/117
Order No.: 282 (NY/2017)
Date: 29 December 2017
Original: English

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

MARQUEZ-MORRIS

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:
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Counsel for Respondent:
Chinonyelum Esther Uwazie, UNICEF

Notice: This order has been corrected.

Introduction

1. On 28 December 2018, at 5:15 p.m., the Applicant, a Programme Officer at the P-2 level, step 9, on a permanent appointment with the United Nations Children's Fund ("UNICEF"), filed an application for suspension of action during management evaluation pursuant to art. 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure, requesting that the administrative decision consisting in the Administration's "[f]ailure [...] to make good faith efforts to find an alternative suitable position for [the Applicant] following abolition of her post" resulting in her separation from the Organization on 31 December 2017 be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant art. 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.

2. On the same date (28 December 2017), the case was assigned to the undersigned Judge. By email to the parties, forwarded at 6:25 p.m. on the same date, the Registry acknowledged receipt of the application for suspension of action and notified the parties that, "Upon the instructions of Judge Greceanu, please be informed, as the implementation of the contested decision is to take place on Sunday, 31 December 2017: that [the Applicant's motion to suspend the contested decision during the Tribunal's consideration of the application for suspension of action] is granted, that the implementation of the contested decision is suspended pending the Tribunal's consideration of the application for suspension of action, and that a written order is to follow confirming this decision". Upon the assigned Judge's instructions, the Respondent was instructed to submit his reply to the application for suspension of action by 12:00 p.m. on Wednesday, 3 January 2018.

3. By email of 29 December 2017, the Respondent informed the Tribunal that "action has been taken to suspend the implementation of the contested decision in compliance with the Tribunal's instructions".

Background

4. In the application for suspension of action, the Applicant presents the fact as follows (references to annexes omitted):

... [The Applicant] is currently serving as P-2 Programme Officer in the United Nations Children’s Fund (“UNICEF”) HIV/AIDS Section. She has worked at the UNICEF for fifteen years.

.... On 16 May 2012, [the Applicant] was granted a permanent appointment [...].

... On 10 October 2016, [the Applicant] was notified that her post was to be abolished effective 30 June 2017 [...].

.... On 12 April 2017, upon insistence of [the Applicant’s] first and second reporting officers, the abolition was postponed until 31 December 2017 [...]. [The Applicant’s] first and second reporting officers fully support the extension of her contract throughout 2018 substantiated by the section’s needs and the available budget to support it [...]. As [the Applicant’s] second reporting officer stated: “the position is pivotal to the section’s efficient implementation of the new HIV strategy” [...] and “the section[.] still needs the staff member to continue with her functions” [...].

... On 27 November 2017, [the Applicant] was notified that the abolition of her post would not be further postponed and that the Administration would start the off-boarding process for 31 December 2017 [...].

... On 4 December 2017, [the Applicant] received a “separation letter” with the effect on 31 December 2017 [...].

... From 4 December 2017 to 26 December 2017, [the Applicant] was on a certified sick leave [...].

. On 28 December 2017, [the Applicant] filed a management evaluation request [...].

Applicant’s submissions

5. The Applicant’s principal contentions may be summarized as follows:

Prima facie unlawfulness

a. It is well-established that administrative decisions must be made on proper reasons and the Administration has a duty to act fairly, justly and

transparently in dealing with its staff members, including in matters of appointments, separation and renewals;

b. In determining whether an administrative decision is *prima facie* unlawful, the Tribunal has found that this condition does not require more than serious and reasonable doubts about its illegality;

c. Article 101(3) of the Charter of the United Nations provides that: “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity”. In its Resolution 51/226 (part II, paragraph 5), the General Assembly requested the Secretary-General “to announce all vacancies so as to give equal opportunity to all qualified staff and to encourage mobility”;

d. However, under staff rules 9.6(e) and 13.1, as well as under sec. 9.10 of the CF/AI/2010-001, Am. 2, staff on permanent appointments affected by abolition should be retained on a priority basis as compared to fixed-term staff or staff holding continuing appointments. Such an obligation mandates the Organization to transfer and assign staff members affected by the abolition of posts to suitable positions outside the normal selection process;

e. Furthermore, under sec. 9.5 of the CF/AI/2010-001, Am. 2: “During the period of notice, a staff member is expected to apply for all available posts for which he or she believes he or she has the required competencies. HR managers will assist staff in identifying and applying for available and potentially suitable posts (see paragraphs 9.7 and 9.8). They will include the name of such a staff member on lists of applicants and/or shortlists, even if the staff member did not submit an application. Every effort will be made to keep the staff member informed of the posts for which he or she is being reviewed”;

f. The Dispute Tribunal stated in *Timothy* UNDT/2017/080, paras. 63-64, that:

... The Tribunal underlines in order for the Administration to fully respect its obligation pursuant to staff rule 9.6(e), it firstly has the duty to timely provide staff member(s) affected by the abolition of posts or reduction of staff with a list of: (a) all posts, at the staff member's duty station, occupied at the date of abolition by staff members with a lower level of protection than the one of the staff member(s) affected, if any; and (b) all the vacant suitable positions at the same level or at the lower level, if any. Secondly, the Administration has to provide a formal offer, together with the list or as soon as possible period after the notification of the list in order for the staff member(s) to be able to evaluate all the options and to timely express his/her interest accordingly after consultations between the parties and the staff union, if necessary (in accordance with the mandatory provisions of art. 13.1 of the International Labour Organization ("ILO") Convention on Termination).

... Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff has the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or noncompetitive basis in the mandatory order established by staff rule 9.6(e). Therefore, the staff member(s) is entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and where required to the his/her nationality and gender.

g. As a permanent appointment holder whose contract was to be abolished, the onus is on the Administration, and not simply on her to make good faith efforts to find a suitable available post;

h. The Administration made no real effort to find her a suitable available post and failed to discharge its onus for the reasons outlined below;

i. Firstly, instead of taking any active steps to assist the Applicant in locating a suitable post, the Administration placed the entire burden of finding a suitable post on her. This may be exemplified in the emails below, where the Administration stated:

i. "... there will not be any further postponing of the abolishment date of the post ... you are encumbering, and as such we will notify GSSC to start the off-boarding process, and advise you soonest on your entitlements and benefits. We understand that you have been applying to posts in UNICEF, and in the event you receive an offer from UNICEF before end of December 2017, we will inform GSSC to stop the off boarding process. For posts that you have applied to, or have been added to, at the time of the abolishment of your post, and before the end of your notice period, you will continue to have the status of staff on abolished post for those particular post[s]";

ii. "In the event you are not successfully appointed to a regular post at the end of your notice period, I am writing to provide you with the detailed administrative procedures and information concerning your entitlements upon separation from UNICEF on termination of your permanent appointment on abolition of post on close of business (c.o.b) 31 December 2017".

j. The Applicant applied for several vacancies. She was, however, never given any information about the pending status of those applications or provided with any other assistance locating a suitable post. Ultimately, the Applicant was not considered and retained for any of the available suitable posts on a non-competitive basis, even though she had to apply for such posts;

k. Secondly, instead of the Administration assisting the Applicant to find suitable alternative posts, it actually took steps to discourage and impede upon the Applicant's efforts to find a suitable alternative post. In particular:

i. As early as in April 2017, the Administration decided to preclude the Applicant from attending the "HR [assumedly, human resources] Local Focal" Points training under the pretext that her "post [would] be abolished after 31 Dec 2017". By consequence, the Applicant was not able to fully perform her duties as early as eight months before the anticipated abolition of the post and she was not given a chance to acquire additional knowledge and skills that might have been useful in searching for an alternative position within UNICEF;

ii. As early as in October 2016, the Applicant was informed that she had been identified by the Operations Chief as "close to retirement" and recommended to do so. Labelled as such, the Applicant Morris realized that she was not seriously considered for any alternative position leaving her with no other choice but to retire;

l. Finally, the Administration failed to perform any of the steps outlined by the Tribunal in the case of *Timothy*, which are required in order to comply with its obligation under staff rule 9.6(e). In particular:

i. The Administration did not provide a list of:

1. All posts at the Applicant's duty station occupied at the date of abolition by staff members with a lower level of protection than the applicant's post;
2. All vacant suitable positions at the same level or at a lower level; and

ii. The Administration did not provide a formal offer, together with the list or as soon as possible after the notification of the list in order for the Applicant to be able to evaluate all the options and to timely express her interest accordingly after consultations between the parties and the staff union if necessary;

m. Therefore, there is no evidence that the Administration made a *bona fide* effort to review all possibly suitable available posts, which were vacant or are likely to be vacant in the future. As such, the Administration failed to meet the requirement to reassign her as a matter of priority to another post matching her abilities and grade and if this was impossible, then to at least offer her duties at a lower grade and/or other posts they could have discovered if the Administration would have widened its search accordingly;

n. In light of the above, there are serious and reasonable doubts about the lawfulness of the decision and that such a decision is *prima facie* unlawful;

Urgency

o. On 27 November 2017, the Applicant was notified that the abolition of her post would not be further postponed and that the Administration would start the off-boarding process for 31 December 2017;

p. On 4 December 2017, the Applicant received a “separation letter” with the effect on 31 December 2017;

q. From 4 December 2017 to 26 December 2017, the Applicant was on a certified sick leave;

r. During her sick leave, the Applicant became aware of the fact that no genuine efforts were being made to assist her in finding an alternative suitable position following the abolition of her post and immediately took steps to file a management evaluation request and suspension of action;

s. On 28 December 2017, the Applicant filed a management evaluation request;

t. The matter is therefore urgent and this is not a case of self-created urgency as her health was affected immediately following the final notification that no efforts had been made to place her on an alternative position;

Irreparable damage

u. It is trite law that loss which can be adequately compensated through a monetary award will not constitute irreparable damage justifying a suspension of action1;

v. Nonetheless, this Tribunal has found that harm to professional reputation and career prospects, or harm, or sudden loss of employment may constitute irreparable damage;

w. In the instant case, if the impugned decision is implemented, the Applicant will suffer harm due to the loss of employment and in relation to her career prospects. Specifically, she will lose the opportunity to advance her career as a Programme Officer in the HIV/AIDS section at UNICEF. Such harm cannot be compensated for by a monetary award.

Consideration

6. 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.

7. 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.

8. 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.

9. 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 Villamorán’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 Villamorán 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.

10. The Tribunal is of the view that, in accordance with the Appeals Tribunal's jurisprudence in *Villamorán* 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 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.

11. 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 28 December 2017, to consider the request for suspension of action pending management evaluation of the contested decision. In the present case, the effective date of the abolition of the Applicant's post is Sunday, 31 December 2017 and, therefore, the implementation is imminent, and is to take place before the expiration of the five days provided for the Tribunal to consider the application for suspension of action, namely 5 January 2018.

12. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted, on 28 December 2017, a request for management evaluation of "the decision by the Administration to not make good faith efforts to absorb her on to a new post after it decided to abolish her post".

13. The Tribunal notes that in the application the contested decision was identified by the Applicant as the “[f]ailure by the Administration to make good faith efforts to find an alternative suitable position for [the Applicant] following abolition of her post”.

14. It results that the contested administration decision is subject to an ongoing management evaluation process and is the same administrative decision as the one that is subject of the present application for suspension of action.

15. The second and third conditions are therefore satisfied.

16. Pursuant to arts. 19 and 36.1 of the Dispute Tribunal’s Rules of Procedure,

IT IS ORDERED THAT:

17. 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 contested decision consisting in the Administration’s “[f]ailure [...] to make good faith efforts to find an alternative suitable position for [the Applicant] following abolition of her post” resulting in her separation from the Organization on 31 December 2017 shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

(Signed)

Judge Alessandra Greceanu

Dated this 29th day of December 2017