



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

A ALI

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:
Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:
ALS/OHRM, UN Secretariat

Introduction

1. On 26 October 2018, at 5:27 p.m., the Applicant, a Publishing Assistant at the G-4 level on a fixed-term appointment with the Department for General Assembly and Conference Management (“DGACM”) in New York, 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 not to renew his fixed-term appointment beyond 31 October 2018, which was notified to him on 8 October 2018 and scheduled to be implemented on 31 October 2018, be suspended pending management evaluation.

2. On 26 October 2018, the case was assigned to the undersigned Judge.

3. On 26 October 2017, at 6.33 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 4:00 p.m. on Tuesday, 30 October 2018.

4. The Tribunal further informed the parties that, due to the urgency of the matter (the deadline for the implementation of the contested decision being 31 October 2018) and pursuant to arts. 19 and 36 of the Dispute Tribunal’s Rules of Procedure, the suspension of the implementation of the contested decision pending the consideration of the application for suspension of action under art. 2.2 of the Dispute Tribunal’s Statute was granted and that a reasoned written order was to follow, which is the present Order.

Background

5. In the application for suspension of action, the Applicant submitted as follows regarding the facts to be relied on (references to annexes omitted):

... Mr. A Ali joined the DGACM Publishing team in May 2013, when the 1st Phase of “Project for digitalisation with DGACM” was launched with the funding provided by the State of Qatar.

The digitalisation programme was conceived in order to preserve important older United Nations documents, facilitate future availability and usability of valued documents, reduce the carbon print, and contribute to environmental improvement.

On 26 September 2018, Mr. A Ali received a notification that his contract was not to be extended beyond its expiry date, effective 31 October 2018.

The reasons given in the e-mail were that “the digitalization project will come to closure on 31 October 2018”.

Mr. A Ali immediately contacted staff representatives in order to assess his rights.

On 4 October 2018, Mr. A Ali filed a Management Evaluation Request seeking rescission of the decision of non-renewal or placement on an alternative suitable post outside of the competitive recruitment process ...

However, on 23 October 2018, during a meeting held with [...], the Under-Secretary-General for General Assembly and Conference Management, Mr. A Ali understood the following:

- First, that there is still remaining funding from the 1st phase of the digitalisation project;
- Second, that DGACM has obtained further funding from the State of Qatar for the 2nd phase of the digitalisation project; and
- Third, that DGACM intends to hire independent contractors for the 2nd phase of the project.

On or about the same day, Mr. A Ali discovered two documents pertaining to the 2nd phase of the project for digitalisation with DGACM ...

In particular, the “Project Initiation Document” specified as follows:

... As with the 1st phase, DGACM once again have obtained the funding from Qatar to digitize United Nations documents in pursuit of the objective set by the General Assembly. For 2nd phase, DCAGM will utilize five general service staff members and five general service WAE (when as employed) staff members with language and technical skills. The project is a cooperative one between DGACM and DPI. The remaining staff will be provided with a contract for one-year from July 2018 which would mark the beginning of the 2nd phase of the project” ...

In light of the above, Mr. A Ali wishes to amend his Management Evaluation Request specifying that the non-renewal of his contract

was not based on a genuine reason but rather a strategy designed to remove him from post, prohibited by ST/AI/2013/4.

Mr. A Ali also reiterates his request for Suspension of Action pending management evaluation.

Applicant's submissions

6. The Applicant's principal contentions are as follows:

(a) Administration failed to act fairly, justly and transparently by providing inaccurate reasons to Mr. A Ali's non-renewal

... The Administration failed to act fairly, justly and transparently when, on 26 September 2018, it provided inaccurate reasons for his non-renewal. The notification that the Applicant received referred to the closure of the digitalisation project. However, on 23 October 2018, the Applicant discovered that: (i) there is remaining funding from the 1st phase of the digitalisation project; that (ii) DGACM has obtained further funding from the State of Qatar for the 2nd phase of the digitalisation project; and that (iii) DGACM intended to hire independent contractors for the 2nd phase of the project.

This information not only directly contradicted the notification the Applicant received on 26 September 2018 that the digitalisation project was closing but it also contradicted the "Project Initiation Document" that specified that DGACM would "utilize five general service staff members" for the 2nd phase of the digitalisation project ...

The Administration's reliance on project closing was intentionally misleading and was aimed to deprive him of an opportunity to challenge the Administration[s] failure to comply with its obligations Section 3.3(b) of ST/AI/2013/4.

Further, there appears to be no lawful explanation for removing the Applicant while there was still funding from the 1st phase of the project and there was still need for his services in order to complete the task of uploading all important UN documents according to A/RES/67/237.

The Applicant's performance was consistently rated as "successfully meets performance expectations" or "exceeds performance expectations" for the last 12 years.

As no issues were raised with the Applicant's performance, it would seem suspect at best to withdraw the services of a staff member with five years of experience on the post before launching the 2nd phase of the digitalisation project. Any reasonable managerial approach would find such a resource invaluable and would, under normal legitimate circumstances, take all and any necessary steps to maintain it.

(b) Alternatively, the Administration should place Mr. A Ali on any available vacant post without proceeding through a competitive selection process

Even if the Administration were to establish that his G-4 post was lawfully being abolished then, pursuant to Staff Rules 9.6(e) and 9.6(f), if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post, staff members holding fixed-term appointments shall be retained by preference to staff members with a lower level of protection (such as temporary appointments).

In the case of *Evans* Order No. 281 (NY/2017), the Tribunal observed the following:

The Tribunal underlines that a staff member's post may only be abolished by his/her employer when all the functions of that post are no longer needed or the post is no longer funded, and it consists in the annulment/disappearance of the post. The abolition of a post may not be considered effective genuine, and therefore lawful, if the post is only renamed or/and moved in a different unit or if other post(s) with identical or similar functions are created in the same unit or in different units after the abolition.

The Tribunal underlines that according to the mandatory provisions of staff regulation 9.3(a)(i) and staff rules 9.6(c)(i) and 9.6(e)(iii), regarding the right of a staff member, including the Applicant, with a fixed-term contract in case of abolition of his/her post to express his/her interest and to be retained in any available suitable post(s), without having to go through a competitive selection process.

The Applicant applied to a number of vacancies within the UN Secretariat. Nine of these applications are still pending, four with the DGACM. It cannot therefore be said that there are no suitable alternative position onto which he could be placed pursuant to Staff Rule 9.6.

In light of the above, the Administration is requested to comply with its obligations and place the Applicant on any available post with similar functions without requiring him to participate in a competitive selection process.

Urgency and irreparable harm

7. The Applicant indicated that his contract expires on 31 October 2018 and therefore he will separate from the Organization on that date.

Consideration

8. 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.

9. 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 5:00 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.

10. 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.

11. 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.

12. 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 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.

13. 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 2 November 2018, to consider the request for suspension of action pending management evaluation of the contested decision. In the present case, the effective date of the Applicant's separation is 31 October 2018, before the deadline provided for the Tribunal to consider the application for suspension of action and therefore the implementation is imminent.

14. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 4 October 2018, which is still ongoing. On 23 October 2018, the Applicant became aware of new and previously unknown information to the effect that additional funding had been received for the digitalization project. The Applicant submitted the amendment to the request for management evaluation together with the present application for suspension of action.

15. In the form for the Applicant's request for management evaluation, the Applicant identified the decision subject to management evaluation as "[n]on renewal of fixed term appointment and separation from service". In the application for suspension of action, the Applicant requested the suspension of the implementation pending management evaluation of the same decision.

16. It results that the contested administrative decision subject to management evaluation is the same administrative decision as the one that is subject of the present application for suspension of action.

17. The Applicant indicated that, if the implementation of the contested administrative decision is not suspended, his contract expires on 31 October 2018, before the deadline provided for the Tribunal to consider the application for suspension of action. The Tribunal underlines that this matter is not at the merits stage.

18. The second and third conditions are therefore satisfied.

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

IT IS ORDERED THAT:

20. 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 not to renew the Applicant's fixed-term appointment

beyond 31 October 2018 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 October 2018