



**Before:** Judge Alessandra Greceanu

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

MAHON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION PENDING THE  
CONSIDERATION OF AN  
APPLICATION FOR SUSPENSION OF  
ACTION UNDER ART. 2.2 OF THE  
DISPUTE TRIBUNAL'S STATUTE**

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**Counsel for Applicant:**

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**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 7 December 2018, the Applicant, a G-6 Senior Legal Assistant working for the Office of Legal Affairs 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 of the Administration to exclude her from the second stage of the 2018 Young Professional Programme ("YPP") written examination in Social Affairs, which is scheduled to take place on 13 December 2018, be suspended pending management evaluation. With the application, the Applicant filed a motion pursuant art. 19 and 36 of the Dispute Tribunal's 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 art. 2.2 of the Dispute Tribunal's Statute.

2. On 7 December 2018, the case was assigned to the undersigned Judge.

3. On the same day, the Registry acknowledged receipt of the application and transmitted it to the Respondent. The Tribunal instructed the Respondent to submit his reply by 12:00 p.m. on 11 December 2018, together with all documentation related to the written test, including the job opening, the content of the written test, the marking guide for each element of the written test and the matrix with the results (containing total points for each part of the written test) for each candidate.

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 13 December 2018) 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 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 the following facts.

6. On 11 July 2018, the Applicant applied for the YPP examination in Social Affairs as a “G to P” candidate.

7. On 17 September 2018, the Applicant was informed that her application was rejected because she had not met the education criteria specified in the job opening. On 18 September 2018, the Applicant contested this decision demonstrating that she does meet the education criteria.

8. On 2 October 2018, the Applicant received a confirmation that the previous decision was reversed and that she was now invited to sit the first part of the YPP written examination in Social Affairs. The first stage of the YPP examination was to be administered on-line on Thursday, 25 October 2018. The Applicant was further informed that, “[o]nly those who meet the cut-off set from this stage will be invited to the second stage (to take place online on 13 December 2018)”.

9. On 25 October 2018, the Applicant undertook the first stage of the on-line written test.

10. The test itself comprised of two sections. The first part consisted of two written papers and the second was a multiple-choice exercise.

11. However, immediately upon commencing the test at 7:00 a.m. New York time, the IT system failed. As a consequence, the Applicant was not able to respond to any question. The communications the Applicant saw on the screen mentioned as follows: “A required parameter (attempt) was missing”, “Network connection lost”, and “504 Gateway Time-out” to “Error loading site config. Error: Database connection failed. It is possible that the database is overloaded or otherwise not running properly”.

12. When finally allowed to log back into the system, the Applicant answered all remaining multiple-choice questions in a hurry since she understood from the YPP Manual that candidates would not be penalized for wrong answers.

13. Immediately after encountering the first technical issues, the Applicant contacted YPP Tech Support. However, only automatic replies were received from an email account of the Office of Human Resources Management (“OHRM”) in the Department of Management (“DM”).

14. Finally, on 3 December 2018, the Applicant received a notification that she had not reached the passing threshold of the written part required for convocation to the second stage of the exam.

15. The OHRM further informed the Applicant of the following:

We recognize that you were completing a portion of the exam during the time period when the testing site experienced some load difficulties. As such, your scores were compensated based on a number of factors that were examined. These include, whether there were any missing responses, the amount of time that you were in the testing site during this period, and your responses to questions completed outside of the time period in question. Through detailed analysis of this information and the score compensation, we were able to mitigate any potential impact of the website incident. ... Due to the heavy volume of applicants, we are unfortunately not able to provide further feedback on an individual basis.

16. On 7 December 2018, the Applicant, submitted a request for Management Evaluation challenging the OHRM’s decision to exclude her from the second stage of the YPP written examination.

## **Applicant's submissions**

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

### *Prima facie unlawfulness*

a. It is trite law that a selection exercise is an ongoing process until a selection decision is made. The written test is normally the first step in the process. Success at the written test determines whether a candidate can proceed to the next stage in the selection exercise. An improperly or unfairly conducted written test can be challenged as an administrative decision that may impact a candidate's career if the unfairness of the initial step is established.

b. In this instance, the Applicant seeks to challenge the conduct of the written assessment. As enunciated by Appeals Tribunal in the case of *Riecan* 2017-UNAT-802, there is a presumption of regularity in which any staff member challenging a non-selection must establish at the *prima facie* level that there were serious and reasonable doubts regarding the process of recruitment.

c. In this case, the Applicant contends that the technical failures in the online test as well as subsequent treatment of this matter by the OHRM serve to challenge the presumption of regularity. Consideration needs to be given to the following:

i. First, numerous server failures that occurred during the on-line examination prevented the Applicant from being able to be in a position to meaningfully respond to the questions;

ii. Second, it transpires from the notification sent to the Applicant on 3 December 2018, that, contrary to the information provided in the YPP Manual, it would have been less prejudicial for the Applicant to

leave some questions unanswered rather than trying to quickly finalize as many multiple-choice questions as she could have.

d. Finally, it further transpires from the notification sent to the Applicant on 3 December 2018, that in order to assess their eligibility, the candidates were rated not only based on their performance on the test day but also on “the amount of time [they] were in the testing site during this period, and [on their] responses to questions completed outside of the time period in question”. It therefore appears that in assessing candidates’ eligibility, OHRM took into consideration extraneous and irrelevant factors such as how many times a candidate took a training test.

e. When reviewing these irregularities, the Tribunal must address whether the Applicant had a likelihood of promotion had the Organization adhered to the applicable Rules and Regulations and/or treated all the candidates equally. In the cases of *Vangelova* 2011-UNAT-172 and *Bofill* 2011-UNAT-174, the Appeals Tribunal held that:

“An irregularity in promotion procedures will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation”.

f. In this case, the Applicant submits that she would have had a significant chance of being selected for the professional post were it not for the irregularities in the written examination exercise as highlighted above. The Applicant did not take this exercise lightly provided that such an opportunity for General Staff members to access the Professional category comes only once every two or four years. With seventeen years of experience and months of studying for the examination, the Applicant would have been shortlisted for the second phase of the test but for the technical failures in

conducting a fair recruitment process, for which the Administration should take the full responsibility.

*Urgency*

g. On 3 December 2018, the Applicant received a notification that she had not reached the passing threshold of the first stage of the written assessment. The second stage of the written assessment is to be held on 13 December 2018.

h. On 7 December 2018, the Applicant filed a Management Evaluation Request challenging the OHRM's decision to exclude her from the second stage of the YPP written examination.

i. If the implementation of the examination process is not suspended, the Applicant will stand no chance of being properly considered for the position. This gives rise to urgency and justifies the granting of an order staying the implementation of the administrative decision.

*Request for suspension pending proceedings on suspension of action*

j. The circumstances of the case are of such urgency that the Applicant respectfully requests an order be made as in *Villamorán* 2011-UNAT- 160. In this case, the Applicant is aware that the next stage of the YPP examination is scheduled for 13 December 2018. If the Administration does not rescind its decision or find an alternative solution to allow the Applicant to compete for a Professional grade by 13 December 2018, the Applicant will suffer the harm described above.

*Irreparable damage*

k. It is established law that a loss of a career opportunity with the United Nations is considered irreparable harm for the affected individual. It is

submitted that the implementation of the selection decision at this stage would damage the Applicant's career prospects in a way that could not be compensated through financial means.

### **Consideration**

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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

December 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 second stage of the written assessment is 13 December 2018, on the deadline provided for the Tribunal to consider the application for suspension of action and therefore the implementation is imminent.

24. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 7 December 2018, which is still ongoing.

25. In the form for the Applicant's request for management evaluation, she identified the decision subject to management evaluation as "decision of the Administration to exclude her from the second stage of the 2018 Young Professional Programme ("YPP") written examination in Social Affairs, which is scheduled to take place on 13 December 2018".

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

27. The Applicant indicated that, if the implementation of contested administrative decision is not suspended and the second stage of the written assessment is held on 13 December 2018, the Applicant will stand no chance of being properly considered for the position and the urgency appears not to be self-created. The Tribunal underlines that this matter is not at the merits stage.

28. The second and third conditions are therefore satisfied.

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

IT IS ORDERED THAT:

30. 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 contested decision shall be suspended until the Tribunal has rendered its decision on this application, or until further order.

*(Signed)*

Judge Alessandra Greceanu

Dated this 10<sup>th</sup> day of December 2018