



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/034

Order No.: 86 (NY/2019)

Date: 17 May 2019

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Nerea Suero Fontecha

MONTECILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Natalie Puchalka, OSLA

Counsel for Respondent:

UNDP

Introduction

1. On 16 May 2019, the Applicant, a Learning Resource Specialist at the P-4 level with the United Nations Development Programme (“UNDP”), submitted an application for suspension of action pending management evaluation of the decision to terminate his permanent appointment at close of business that very day. There was therefore particular urgency and to ensure that his rights were protected he filed a motion for suspension of this decision under the principles in *Villamorán* 2011-UNAT-160 pending the determination of his application for a suspension of action.

2. The Tribunal granted the motion for interim suspension pending its final determination and ordered the Respondent not to undertake any further steps regarding the termination of the Applicant’s permanent appointment.

Consideration

3. This application is made under art. 2.2 of the Statute and art. 13 of the Rules of Procedure of the Tribunal.

4. Article 13 of the Rules of Procedure provides as follows:

1. 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 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.

2. The Registrar shall transmit the application to the Respondent.

3. The Dispute Tribunal shall consider an application for interim measures within five working days of the service of the application on the respondent.

5. It is clear that the Tribunal is under a duty to transmit a copy of the suspension of action application to the Respondent and to issue a decision within five days thereof. There is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to await the Respondent's response before the Applicant's request is considered.

6. The Applicant is required to satisfy the Tribunal that the impugned decision appears *prima facie* to be unlawful, is urgent and will cause him/her irreparable harm if implemented. All three elements of the test must be satisfied before the impugned decision can be stayed.

Prima facie unlawfulness

7. It is clear that the Dispute Tribunal's Statute does not require the Tribunal to make a definitive finding that the decision is in fact unlawful. The test is not particularly onerous since all the Tribunal is required to do at this stage is to examine the material in the application and to form an opinion as to whether it appears that, if not rebutted, the claim will stand proven. This means that the onus is on the Applicant to provide a sufficiency of material in order to satisfy the statutory test. Any such opinion is not a finding by the Tribunal and is certainly not binding should the matter go to trial on the merits. It is merely an indication as to what appears to be the case at the suspension of action stage. Whether or not this initial impression is well-founded or not is a matter for determination after a full examination of the evidence in the event that a substantive claim is filed.

8. The Applicant stated that after an unblemished record of service of 20 years, he experienced workplace difficulties which appeared to him to be a direct consequence of the testimony he provided to the Office of Audit and Investigations regarding an illegal recruitment implicating a senior manager. Within the following year during the period that the particular senior manager was the officer-in-charge,

the Applicant's post was abolished. Since then the Applicant had been on temporary assignments with no future prospects. The search periods within which the Applicant would have been eligible for consideration and appointment to a more secure post were extended several times and although he expressed an interest in and applied to several posts, the Administration did not make genuine and good faith efforts to assist him in securing alternative employment.

9. In *El-Kholy* 2017-UNAT-730, affirming Judgment No. UNDT/2016/102, which was subsequently reaffirmed in *Timothy* 2018-UNAT-847, the Appeals Tribunal held that it is for the Administration to prove that a staff member holding a permanent appointment, whose post was abolished, was afforded due and fair consideration under staff rule 9.6(e) which creates an obligation on the Administration to find a suitable and vacant post for an affected staff member. Based on the material presented to the Tribunal, it appears that the Administration did not discharge its obligation to find a suitable alternative post for the Applicant.

10. Whether there is a connection between the Applicant's testimony to the Office of Audit and Investigation and the failure to make good faith efforts to find him a suitable alternative post is not a matter for determination at this stage. However, the Tribunal is surprised by the indications that notwithstanding the long line of affirmative jurisprudence since the Appeals Tribunal's ruling in *El-Kholy*, the Respondent appears not to have taken proactive steps to retain the services of the Applicant. Moreover, to leave the final decision on termination within an hour to spare on the last day notwithstanding his long service is a matter of concern.

11. In all the circumstances and particularly what appears at this stage to be a failure on the part of UNDP to discharge its obligations under staff rules 9.6(e), 9.6(g) and 13.1(d) the Tribunal finds that the requirement of *prima facie* unlawfulness is satisfied.

Urgency

12. At or about 4:00 p.m. on 16 May 2019, the Applicant was informed verbally that his permanent appointment would be terminated on that day and subsequently received a written notice of termination of his permanent appointment that would take effect within an hour. Almost at the same time, the Applicant filed the present application for suspension of action. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of particular urgency is satisfied.

Irreparable harm

13. The Tribunal recalls that in *Khalouta* Order No. 138 (NY/2014), para. 21, it said:

... Loss of employment is to be seen not merely in terms of financial loss, for which compensation may be awarded, but also in terms of loss of career opportunities. This is particularly the case in employment within the United Nations which is highly valued. Once out of the system the prospect of returning to a comparable post within the United Nations is significantly reduced. The damage to career opportunities and the consequential effect on one's life chances cannot adequately be compensated by money...

14. The Applicant states that he has worked at the UNDP for almost 20 years and has been on permanent appointment since 2009. In the circumstances presented by the Applicant in this case, the Tribunal finds that the requirement of irreparable damage is satisfied.

15. All three elements for the grant of an order for Suspension of Action are satisfied.

Order

16. The application for suspension of action is **GRANTED**.

(Signed)

Judge Goolam Meeran

Dated this 17th day of May 2019