



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/100  
Order No.: 231 (NY/2017)  
Date: 13 October

## **Introduction**

1. On 13 October 2017, at 7:24 a.m., the Applicant, a Contigent Owned Equipment Officer with United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the FS-6 level, step 12, on a permanent 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 of reassignment



... To satisfy this, in or around August 18, 2017 I applied to an FS-6 Supply officer post in [UNFICYP]. The post also included the duties of a Transport Officer for which I have 24 years of experience, 19 of which are with the United Nations.

7. Under the heading, “Details of the decision you seek to suspend”, the Applicant further submits that:

I am contesting the decision of reassignment to UNSOS, Mombasa on medical grounds.

For more than one year I have repeatedly requested medical reassignment due to a heart condition. In January 2017, [Medical Services Division, “MSD”] confirmed that I should be deployed to a mission with Level 4 medical facilities.

These well documented facts were explained during my meeting with Career Support Unit verbally on 14th September 2017, and on the evening of to October 2017.

On September 25, 20 17, MINUSTAH [Chief Human Resources Officer] requested that I check out by 15<sup>th</sup> October 2017, on the evening of 10 October I received an email with attachments reassigning me to UNSOS, Momhasa. As the mission does not have

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

*Prima facie unlawfulness*

a. It is evident that the Applicant is a staff member in need of placement within the meaning of staff rule 9.6(e) and ST/AI/2010/3 (Staff selection system), sec. 11. Also, with a medical condition that requires level 4 medical facilities.

b. The Dispute Tribunal has previously determined that the Administration has an obligation to place a staff member in this situation on a suitable post for which he/she is qualified, even though the staff member may not be the best qualified candidate (*Lemonnier* UNDT/2016/186, para. 36). Indeed, the Applicant has a right to be accorded preference and be placed without competing with external candidates or other internal candidates not in need of placement, or with a lower priority of retention as listed in ST/AI/2010/3, sec. 11. The Applicant's medical condition would also contribute to the level of his priority;

c. By the Administration insisting that the Applicant is to deploy to a mission without level 4 medical facilities, and being fully cognizant of his medical condition, he would be placed at significant risk;

d. By advertising a Recruit from Roster vacancy for which the Applicant is obviously qualified, the Administration is in fact disregarding this right and forcing him to accept a post without the required medical facilities, while the post in UNFICYP remains unencumbered and has appropriate medical facilities. In *Lemonnier*, the Dispute Tribunal qualified this practice as a "material irregularity";



must establish that: (i

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.

11. 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.

12. 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.

13. 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



travel on 16 October to UNSOS, Mombasa and therefore before the expiration of the five days deadline provided for under art. 13 of the Rules of Procedure.

18. Regarding the second and the third conditions, the Tribunal notes that, in the present case, the Applicant submitted a request for management evaluation on 13 October 2013 of the decision to reassign him to UNSOS Mombasa, which is currently ongoing and, on the same day, he filed an application for suspension of action requesting the Tribunal to order the suspension, pending management evaluation, of the implementation of the same decision. The Applicant indicated that, if the implementation of contested administrative decision will not be suspended, his contract is to be terminated and he is to be separated from the Organization on Sunday, 15 October 2017. The second and third conditions are therefore satisfied.

19. The Tribunal notes that, as appears from the additional documentation filed by the Applicant, the post in UNSOS, Mombasa to which the Applicant was laterally reassigned is to be moved to UNSOS, Mogadishu before or on 1 July 2018 where there are, apparently, no level 4 medical facilities. The Tribunal further notes that these documents were not available for consultation to the Respondent, who had insufficient time to prepare a complete reply addressing all the substantive elements of the application for suspension of action.

20. The Tribunal considers that the requirements for an interim order pending the Tribunal's determination of a suspension of action as set out in *Villamorán* by the Appeals Tribunal have been satisfied, and that the urgency appears not to be self-created by the Applicant, but underlines that this matter is not at the merits stage.

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

IT IS ORDERED THAT:

22. 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 to reassign the Applicant to UNSOS, Mombasa shall be suspended until the Tribunal has rendered its decision on this application, or until

further order. Accordingly, the Applicant is not to be reassigned from MINUSTAH to UNSOS during the pendency of the Tribunal's consideration of his application for suspension of action of this decision;

23. The Respondent is to file a complete reply to the application on suspension of action by **12:00 p.m, Tuesday, 17 October 2017**, including information and supporting documentation regarding:

- a. The level of medical facilities provided in MINUSTAH;
- b. The level of medical facilities currently existing in UNSOS, Mombasa and in UNSOS, Mogadishu;
- c. The level and title of the UNSOS position to which the Applicant was to be laterally reassigned and if he has clearance for it; and
- d. The list of the available suitable posts at the same level or at a lower level presented to the Applicant.

*(Signed)*

Judge Alessandra Greceanu

Dated this 13<sup>th</sup> day of October 2017