UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2011/003
Judgment No.:	UNDT/2011/040
Date:	25 February 2011
Original:	English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

AMAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA
John Becht, OSLA
Joy Maina, OSLA

Counsel for Respondent:
Miouly Pongnon, UNON

Introduction

1. On 28 October 2010, the Applicant, a staff member of the United Nations Environment Programme (UNEP), received a memorandum from one Paul Akiwumi, Chief of Staff, Office of the Executive Director UNEP, in which she was informed that she had been placed on special leave with full pay pending an initial investigation of allegations of misconduct made against her in accordance with staff rules 102 and 10.4 ("the Impugned Decision").

2. The Applicant filed a request for management evaluation of the Impugned Decision on 14 January 2011 arguing that the decision was unlawful.

3. On 21 January 2011, the Applicant filed an Application pursuant to staff rule 11.3(b)(i) and article 2.2 of the Statute of the Dispute Tribunal requesting the Tribunal to order the suspension of the continuing implementation of the Impugned Decision. The Respondent's Reply was filed on 25 January 2011. The hearing of suspension of action Application took place on 27 January 2011.

4. The Tribunal issued Order No. 009 (NBI/2011) on 27 January 2011 in which the Impugned Decision was suspended until such a time as the Assistant Secretary-General, Office for Human Resources Management ("ASG/OHRM") on behalf of the Secretary-General, or his delegated representative, decides to pursue the matter and presents the Applicant with formal charges. In the said Order, the Tribunal advised the Parties that the written reasons for the decision would be issued at a subsequent date.

a. For a request for a suspension of action to be granted, three elements need to be satisfied, that is, the decision must be prima facie unlawful, the matter must be urgent and implementation or in this case, continued implementation will result in irreparable harm.

b. In his 28 October 2010 memorandum, the UNEP Chief of Staff erred when he referred to the Impugned Decision as "special leave with full pay"

when in fact the Applicant had been placed on administrative leave pursuant to provisional staff rule 10.4. The question for determination in this case is whether the decision to place the Applicant on administrative leave with full pay was unlawful or prima facie unlawful.

c. According to the terms and structure of ST/A1/371/Amend. 1 (Revised Disciplinary Measures and Procedures) (consolidated text) ("ST/AI/371"), administrative leave cannot be imposed pending resolution of a preliminary fact-finding investigation and administrative leave may only be recommended once the head of office or responsible official has reported the findings of a preliminary investigation to the ASG/OHRM. Section 5 of ST/AI/371 confirms that it is only the ASG/OHRM, on behalf of the Secretary-General, who may decide whether administrative leave is warranted.

d. Whilst the Executive Director of UNEP ("ED/UNEP") may have had the authority under the former Staff Rules to place a staff member on suspension during an investigation, there is no evidence that this authority has been expressly delegated to the ED/UNEP under the new provisional Staff Rules promulgated on 2 September 2010, ST/SGB/2010/6 (Staff Regulations of the United Nations and provisional Staff Rules) and this renders the impugned decision *ultra vires*. There is no document promulgated by the Secretary-General or the ASG/OHRM that indicates that the particular authority to use provisional staff rule 10.4 to place a staff member under administrative leave has been delegated to the ED/UNEP.

e. Should the Tribunal find that the ED/UNEP had the delegated authority to place a staff member under administrative leave, it is evident from the structure of ST/AI/371, that administrative leave may be contemplated only after the initial investigation has established that the staff member engaged in wrongdoing that could amount to misconduct and that this conduct appears to be of such a nature that administrative leave may be

warranted. As required by section 3 of ST/AI/371, at this particular stage administrative leave was not an option.

f. The purpose and rationale of administrative leave comes closest to what under the former Staff Rules was referred to as "suspension during an investigation". Former staff rule 110.2(a) stated that if a charge of misconduct was made against a staff member and the Secretary-General so decided, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should not normally exceed three months. The Applicant submits that the resemblance of former staff rule 110.2(a) with the provisional staff rule 10.4 is striking and whereas no charge of misconduct has been made, even if the ED/UNEP had the delegated authority, at this stage of the process, administrative leave could not be imposed.

g. On the element of irreparable harm, the Applicant submits that the loss of opportunity to continue to gain professional experience during her forced absence from work cannot be quantified and that damages cannot compensate her for the frustration, unhappiness and dissatisfaction that will be caused to her for the loss of the chance to acquire more experience and improve so as to increase the likelihood that she may exceed to a better position in her career.

h. Loss of professional reputation or harm to career prospects constitutes irreparable harm if that is accompanied by adverse comments made. Since she has been placed on administrative leave as a result of pending investigation into potential misconduct, this creates such an adverse context that will continue to cause irreparable harm to her professional reputation and career prospects if the decision is not suspended.

i. In respect to the final criteria, the element of urgency, the Applicant submits that in reviewing the element of urgency, the issue for consideration is whether or not implementation or continuing implementation of the

Impugned Decision is imminent or would result in irreparable harm if not suspended. In this case the matter is urgent, the implementation is of a continuous nature and that the Applicant is forced to be absent from work.

6. Based on the foregoing, the Applicant requests the Tribunal to order the suspension of the continued implementation of the Impugned Decision.

Respondent's Case

7. The Respondent submissions are:

a. The Applicant has failed to meet each and every one of the elements that she is required to show in this proceeding.

b. As to prima facie unlawfulness, the Applicant has not shown that the ED/UNEP lacked the express, delegated authority to place her on leave pending a fact-finding investigation pursuant to ST/AI/371. Staff rule 10.4 does not indicate the type of investigation. The initial fact-finding investigation in this case was launched by the ED/UNEP as the head of UNEP. As the head of UNEP, he has the specific, delegated authority pursuant to ST/AI/234 revision 1 (Administration of the Staff Regulations and Staff Rules), which delegates to the heads of office in Annex V, the right and duty to place staff on suspension pending an investigation. This, according to the Respondent, is the source of the ED/UNEP's express authority.

c. In former staff rule 110.4, the reason the word "suspension" is used is because ST/AI/371 was passed in 1989 before the passage of the provisional staff rule that provides the authority under staff rule 10.4, therefore it uses the now outdated terminology because staff rule 10.4 now brings in the advent of administrative leave leaving behind the old language which would have given the power to suspend to the heads of office.

d. Based on the provisions of ST/AI/234 and based on the express provisions of staff rule 10.4, the Applicant has not cleared the first hurdle, which is to show prima facie unlawfulness of the decision because contrary to the submissions of the Applicant, the ED/UNEP did indeed have the authority to place her on administrative leave pending the completion of the initial fact-finding investigation.

e. The Respondent submits that if there was any doubt that the ED/UNEP possessed the requisite delegated authority to place the Applicant on administrative leave pending a disciplinary investigation,

> "such doubt is vanquished by the clear and unequivocal opinion of the ASG/OHRM. In her capacity as the sole interpreter of the staff rules and staff regulations, the ASG/OHRM has opined that UNEP enjoys the delegated authority to place staff on suspension pursuant to ST/AI/371."

f. The Impugned Decision must be left to stand because,

> "…although OHRM was notified of it OHRM did not direct UNEP to correct or revoke it pursuant to ST/AI/234 Rev. 1."

g. In respect of the requirement to show that irreparable damages will be visited upon her rights as a staff member if the decision is allowed to continue and take its course, the Applicant has not met that requirement. To the extent that the Applicant is claiming that she has an unfettered and unqualified right to return to work and that right will be damaged by her non-return to work, any damage to her reputation may be cured and compensated as it has been in hundreds of cases, if any, by the award of monetary damages. In addition, the Respondent further submits that a decision on irreparable harm or irreparable damages must be made on a balance of consideration of the equities.

h. The cases are rife in which the various Tribunals including the Dispute Tribunal, its predecessor the former UN Administrative Tribunal and the International Labor Organization Administrative Tribunal, have awarded monetary damages to staff members who have been able to prove that reputational damage resulted from the unlawful use of administrative power. In this case, the Tribunal has power to award similar damages as has been awarded in hundreds of cases before for reputational damage.

i. In respect to urgency, which is the last element that the Applicant must show, the Tribunal in *Calvani*[1] stated that in a case where staff members are being investigated for possible misconduct, there can be no urgency to return that staff member to their post if doing so would jeopardize the integrity of the fact-finding process or in this case expose the Organization and its staff to possible continued harm or damage. The Respondent argues that this was precisely why it was decided to place the Applicant on administrative leave, that is, it was felt that her continued presence within her office would possibly invite additional damage to the staff who had brought the allegations and would hinder an expedited resolution of this case by enabling a full and un-impeded investigation of the facts. In this case,

> "there cannot be any showing of urgency as the judgment in *Calvani* has not been appealed, negated, modified, amended in any way so therefore the holding in *Calvani* as to urgency, is binding on this Tribunal until it is removed by the Appeals Chamber which has not done so."

j. Each and every one of the elements of article 2.2 of the Statute of the Dispute Tribunal must be shown and failure to show any one of the elements necessarily must result in a denial of a suspension of action which is an extraordinary measure and therefore carries an extraordinary burden which the Applicant has failed to carry in this case. Accordingly, the Respondent submits that the Impugned Decision should be left to stand because the

[1] UNDT/2009/092.

ED/UNEP possessed the express delegated authority to make the under ST/AI/234.

Considerations

Is the Impugned Decision unlawful? Does the UNEP Executive Director have the authority to place the Applicant on Administrative leave with pay? Was the Impugned Decision premature?

8. In dealing with the first requirement of the conditions precedent to establishing the grounds for the grant of a suspension of action under the Statute of the Dispute Tribunal, the Applicant's counsel submitted that the Impugned Decision is unlawful. The said decision, he argued, was done *ultra vires* and was not within the competence of the ED/UNEP.

9. In arguing the issue of unlawfulness, the learned Counsel divides this into two limbs. The first is that the ED/UNEP had no authority to place the Applicant on administrative leave as such authority lay only with the ASG/OHRM who could exercise it on behalf of the Secretary-General. The second limb is that even if it can be shown that the ED/UNEP had such authority, he had sped in time and exercised the said authority prematurely thereby rendering the impugned decision unlawful.

10. Arguing the first limb, Counsel has submitted that there is nothing to show that the ASG/OHRM had expressly delegated this power to the ED/UNEP. Under ST/AI/371 of 2 August 1991 which authorised the suspension of a staff member and its amended version of 11 May 2010 which replaces suspension with administrative leave, the authority of the ASG/OHRM to act is clearly spelt out and this power was and remains his and his alone.

11. The learned Counsel for the Respondent disagreed. In her written submissions, she referred the Tribunal to section 8 of ST/AI/234 which provides for heads of offices away from headquarters to exercise authority in certain matters regarding their staff. She added that under Annex V of that administrative instruction,

the ED/UNEP enjoyed express delegated authority to place the Applicant on suspension pending investigation pursuant to former staff rule 110.4. She also referred to a memorandum dated 19 June 2006 from the then ASG/OHRM to the Director, Division of Administrative Services, United Nations Office in Nairobi. She submitted further that in the said memorandum, the ASG/OHRM was of the opinion that the ED/UNEP enjoyed delegated authority to suspend staff. Respondent's Counsel then reproduced the second paragraph of the five-paragraph memorandum in support of her position.

12. It is not in contention that the ASG/OHRM is invested under ST/AI/371 with the authority to act on behalf of the Secretary-General, on the basis of evidence presented to him, to place a staff member on administrative leave if such is warranted during an investigation. As to whether this authority has been expressly delegated to the ED/UNEP, the Tribunal refers to section 8 of ST/AI/234 and its Annex V as urged upon it by the Respondent. In this regard, the Tribunal takes judicial notice of the fact that on 2 September 2010, the Secretary-General promulgated the provisional texts of the Staff Rules and made these effective on the dates of their issuance.

13. ST/AI/371 which came into effect on 11 May 2010 provides the framework for the application of staff rule 10.4 on which the Respondent claims to rely.

14. In invoking section 8 of ST/AI/234 and its Annex V which delegates authority to the ED/UNEP to suspend staff members pending investigation, the Respondent Counsel loses sight of the fact that the portion of Annex V which she refers to is former staff rule 110.4 now clearly superseded by staff rule 10.4. The current language and position in view of the 2010 amendment of ST/AI/371 is that staff may be sent on administrative leave and not on suspension.

15. Has the ASG/OHRM expressly delegated his authority to place staff on administrative leave to the ED/UNEP under staff rule 10.4? Is the delegation of authority under the former staff rule 110.4 automatically carried over into staff rule 10.4?

16. To these questions, the answer is No! If the intention of the ASG/OHRM was to delegate his authority to place staff on administrative leave pending investigation to heads of offices away from headquarters, such delegation must not be guessed at or presumed. Considering the far-reaching implications of placing staff on such leave both for the staff member whose professional development is thereby arrested and the Organisation which has to, for a period of time, pay an able-bodied staff member for not doing any work, the ASG/OHRM is required to expressly delegate his authority under staff rule.10.4.

17. With regard to the second limb as to when the authority of the ASG/OHRM to place staff on administrative leave pending investigation comes alive or becomes operational, the Respondent has argued that the Secretary-General or his agent can exercise this authority even at the fact-finding stage. Learned Counsel for the Respondent in her oral submission told the Tribunal that the Applicant had only been placed on what Counsel described as "administrative, special leave that is warranted under staff rule 10.4" at the start of an initial fact-finding process at UNEP offices. According to her, time was yet to come in the process when the ASG/OHRM would possibly exercise his power to place the Applicant on suspension.

18. The Applicant has referred to the memorandum of 28 October 2010 by means of which the author purported to send her on administrative leave on the basis of an initial fact-finding investigation and submits that the said leave is premature. According to the Applicant's Counsel, administrative leave under ST/AI/371 cannot be imposed pending the resolution of a preliminary fact-finding investigation. Administrative leave may only be recommended once the head of office or responsible official has reported the findings of the preliminary investigation to the ASG/OHRM.

19. Section 2 of ST/AI/371 deals with initial investigation and fact-finding which may be undertaken by the head of office or responsible officer where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed. Under section 3, when this initial investigation

and fact-finding is over and sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct is established, a report is then sent to the ASG/OHRM giving a full account of the facts and attaching documentary evidence or record relevant to the alleged misconduct.

20. Section 4 of ST/AI/371 provides that, if the conduct appears to be of such a nature and of such gravity that administrative leave is warranted, the head of office shall make a recommendation to that effect, giving reasons. The same section makes it clear that administrative leave may be considered if the conduct in question might pose a danger to other staff members or to the Organisation or if there is a risk of evidence being destroyed or concealed and "if redeployment is not feasible".

21. Under section 5 of ST/AI/371, the ASG/OHRM on behalf of the Secretary-General, shall decide on the basis of the evidence presented, whether the matter should be pursued and if so, whether administrative leave is warranted. Section 6 makes it clear that if the case is to be pursued, the affected staff member among other things is informed in writing of the allegations and his or her right to respond. If administrative leave is authorized, the staff member is also informed of the reason and its probable duration and shall surrender his or her ground pass. A staff member on administrative leave may not enter UN premises without permission and when granted such permission shall enter under escort.

22. The correct position in applying the relevant staff rules and regulations here is that the ED/UNEP cannot in purporting to exercise powers he claims were properly delegated to him by the ASG/OHRM, exercise even powers that the said ASG/OHRM does not have. Notwithstanding the confused submissions of the Respondent's Counsel as to which officials may place staff members on administrative leave and which have power to place staff members on suspension, there is under the applicable rules only the ASG/OHRM's authority to place staff on administrative leave. The matter of suspension under the old Staff Rules has been superseded as stated earlier.

23. Clearly, in acting for the Secretary-General, the authority of the ASG/OHRM under ST/AI/371 and staff rule 10.4 to place staff on administrative leave pending investigation and the disciplinary process can only come alive when, on the basis of evidence presented to him, he decides that the matter should be pursued and that administrative leave is warranted. At the stage where, as in this case, the head of office has merely started an initial investigation and fact-finding, the matter has neither undergone nor survived the required processes that would make for the placement of the affected staff member on administrative leave by the Secretary-General or anyone acting on his behalf.

24. The Tribunal agrees with the Applicant that the ED/UNEP had jumped the gun and raced ahead to wrongfully and arbitrarily place the Applicant on administrative leave in this case.

Feasibility of Redeployment

25. It has been pointed out earlier that under section 4 of ST/AI/371, administrative leave may be considered if the conduct in question might pose a danger to other staff members or to the Organisation or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

26. The Respondent has in oral submissions stated that the Applicant was placed on administrative leave in order for the ED/UNEP to find out the truth of the allegations made against her and to decide whether there was need to report to the ASG/OHRM for disciplinary action to follow. The Respondent in sending the Applicant on administrative leave, stated in the memorandum of 28 October 2010 that he decided to do so in order to maintain the status quo and prevent possible harassment of UNEP/DCPI staff members. During the oral proceedings in this case, the Tribunal wanted to be satisfied that the feasibility of redeployment had been considered as provided for by section 4 of ST/AI/371.

27. Respondent’s Counsel on the one hand submitted that the matter of redeployment was not properly before the Tribunal in a suspension of action

application. She however added that the ED/UNEP had considered redeployment but Counsel did not know the details. She continued that "it was thought that the nature of those allegations would not allow a redeployment because the very harm that was posed within the division might replicate itself if those allegations are proven to be true." The Tribunal was not told who had given thought to redeployment or how the mere thinking of it had satisfied section 4 of ST/AI/371.

28. The Tribunal finds that the requirement for considering the feasibility of redeployment in this case was never addressed at any stage before the Applicant was placed on administrative leave. The Staff Rules and Administrative Instructions are promulgated to guide Managers and staff members alike. It must be borne in mind that any administrative decision adversely affecting the status of staff must substantially comply with the applicable rules. The Tribunal finds that such compliance has been lacking in this case serving to render the Impugned Decision irredeemably unlawful.

Nature of leave on which the Applicant was placed

29. This Application arose on account of a memorandum from the Chief, Executive Office of UNEP, to the Applicant conveying to her the decision of the ED/UNEP who purportedly acting under staff rules 102 and 10.4 had placed her on what was described as "special leave with full pay." By the said memorandum, she was informed that while on the said special leave, she retained her right to enter the UN Complex and access her UN email account including other matters as her personal needs dictated.

30. Counsel for the Applicant in his written submissions raised as an issue the fact that the 28 October 2010 memorandum informed his client that she had been placed on special leave with full pay. He went on to point out that special leave with pay is governed by provisional staff rule 5.3 and that it is granted at the request of a staff member for research purposes, in cases of extended illness, for child care or for other important reasons. He was of the view that a special leave with pay could only be

granted within a context quite different from that pending investigations as had been done in this case. He added that even if the Respondent actually meant to place the Applicant on administrative leave under staff rule 10.4 as claimed, such placement on administrative leave as done here did not comport with the procedures of ST/AI/371 as she was informed for instance that she could enter the UN Complex.

31. In written submissions before the Tribunal, the Respondent's Counsel described the leave on which the Applicant was placed as administrative leave pursuant to staff rule 10.4. She additionally submitted that the ED/UNEP could impose suspension pending investigations. According to the Respondent's Counsel, staff rule 10.4 contains no requirement that a staff member be relieved of her ground pass and may be tailored to meet specific needs. In this connection, according to Counsel, the Applicant upon her request was granted access to the Library with a computer designated for her use.

32. During the oral hearing, the Tribunal had ruled that in order to avoid bogging the hearing down with arguments as to what kind of leave the author of the 28 October 2010 memorandum really intended for the Applicant, the Respondent's Counsel's explanations that it was administrative leave pursuant to staff rule 10.4 would be accepted all around. The matter of the description in the memorandum that it was special leave with full pay was treated as a misnomer and as an error.

33. In spite of adopting this position of the Respondent, it is difficult still to determine the precise nature of the leave upon which the ED/UNEP and the officer who wrote the memorandum intended to place the Applicant. While staff rule 10.4 under which they purport to act can only be applied within the framework of ST/AI/371, the Respondent's Counsel has striven to read the said rule as capable of standing alone. Section 1 of ST/AI/371 clearly defines the purpose of the document as follows:

> "The purpose of the present instruction is to provide guidelines and instructions on the application of chapter X of the Staff Rules, Disciplinary

> Measures and Procedures, and to outline the basic requirements of due process to be afforded a staff member against whom misconduct is alleged..."

34. From the foregoing, it is manifestly clear that ST/AI/371 provides guidelines and instructions on the application of chapter X of the Staff Rules. Additionally, staff rule 10.4 is one of the Staff Rules under chapter X. The simple reality is that all Staff Rules which fall under chapter X deal with disciplinary measures and procedures and must be guided by ST/AI/371. In other words, staff rule 10.4, which the Respondent's Counsel has continued to cite as the authority for the Impugned Decision in this case cannot stand alone. For its efficacy, it must take support from ST/AI/371. No manager, however highly placed, can place a staff member on administrative leave and then proceed to tailor it to any needs outside the provisions of ST/AI/371!

35. The granting of access to the UN Gigiri Complex and the Library within it, including a designated computer for the Applicant's use, is contrary to the conditions governing placement on administrative leave. On the whole, the ED/UNEP not only exercised powers beyond his reach, he also acted prematurely in purporting to place the Applicant on administrative leave during an initial fact-finding process and subverted the provisions of the relevant administrative instruction in attempting to design the said leave on his own terms.

The element of urgency

36. The second condition precedent for the grant of a suspension of action is urgency. The Applicant's Counsel submitted that the matter is of an urgent nature because of the fact of the Applicant being prevented from performing her duties due to the continuing implementation of the Impugned Decision. Counsel for the Respondent argued that the matter is not urgent because the decision to place the Applicant on administrative leave during the fact-finding process was aimed at expediting the process by removing any obstruction potentially posed by the Applicant's continued presence at work.

37. Counsel for the Respondent in this regard cited the decision in *Calvani* where it was held that a staff member who was on suspension without pay had failed to show urgency in restoring him to his duties. It is important to distinguish that in *Calvani* the applicant in that case was placed on administrative leave following what the Tribunal described as a "thorough audit" in which the irregularities the applicant was suspected of had been identified. In other words, the administrative leave option was adopted at the appropriate time when the applicant had been charged with misconduct. While *Calvani* is not relevant to this case, it is necessary to point out that the Respondent's Counsel was wrong in law when she submitted that the decision in *Calvani* binds this Tribunal.

38. The Tribunal finds that in the face of the gross nature of unlawfulness of the Impugned Decision and its adverse impact on the Applicant's career, the requirement of urgency is met.

Irreparable damage

39. It is the case of the Applicant that in depriving her of the opportunity to continue to gain meaningful professional experience in her work, she is exposed to hardship for which she cannot be compensated monetarily. The Respondent submitted orally that any harm including reputational damage can be cured by the award of compensation.

40. The Tribunal finds no merit in the argument that any harm suffered by the Applicant may be cured by damages. The deprivation of continuing professional experience especially where the administrative decision on which it is based is not only unlawful but patently so cannot be adequately compensated in monetary terms.

The legal interpretation of Staff Rules and official issuances

41. In the written submissions of the Respondent and specifically at paragraphs 25, 26, 29 and 30, it is asserted variously that:

> "…the authority to interpret the Staff Rules is exclusively vested in OHRM."

And then:

> "…in her capacity as the sole interpreter of the staff rules and staff regulations, the ASG/OHRM has opined that UNEP enjoys the delegated authority to place staff on suspension pursuant to ST/AI/371."

Also that:

> "…both the Applicant and Respondent informed OHRM, which in ST/AI/234 is designated as the exclusive domain for interpretation of the staff rules, of the fact that the Executive Director of UNEP had placed the Applicant on leave…"

And finally that:

> "…the UNDT lacks the requisite power to substitute its judgment for that of the Secretary-General and thereby vitiate or suspend it."

42. During the oral hearing, the Tribunal asked for the address of the Respondent's Counsel on the purport and meaning of the foregoing assertions. Her response was that she was merely reiterating the provisions of section 13 of ST/AI/234. For ease of reference the said section of the administrative instruction is reproduced below.

> "Interpretation of the staff rules lies within the responsibility of the Office of Human Resources Management. Staff members with inquiries with regard to the application of staff regulations or rules in their own cases should address them, in the first instance, to their executive or administrative officer. Departments or offices should address their inquiries with regard to the interpretation of staff rules and their application to individual cases to the Staff Administration and Training Division, Office of Human Resources Management."

43. It must be borne in mind that this revised administrative instruction which is titled: "Administration of the Staff Regulations and Staff Rules," was made in March 1989 for the guidance of staff members and departments within the Organisation on occasions when they seek the meaning of Staff Regulations or Staff Rules. It is a document which points the staff member or the department, as the case may be, to a location where they can, in the first instance, seek help to fathom the meaning and proper application of any rules or regulations that present them with any difficulty of understanding. The Administrative Instruction in question places squarely on the Office of Human Resources Management, the responsibility of helping and guiding staff and departments alike to ascertain the meaning and application of Staff Rules and Regulations. The said ST/AI/234 does not relate to conflict resolution processes nor does it contemplate that the ASG/OHRM becomes the organ for legal interpretation.

44. In the case of *Hastings,*[2] Shaw J had occasion to refer to the hierarchy of the UN's internal legislation. According to the Judge, this is headed by the Charter of the UN followed by Resolutions of the General Assembly, Staff Regulations and Rules, Secretary-General's Bulletins and then Administrative Instructions.

45. The General Assembly of the United Nations at its 74th plenary meeting on 24 December 2008 adopted a Resolution under which it enacted the Statute of the United Nations Dispute Tribunal which set up this Tribunal. Article 2 of that Statute grants the Tribunal the power to hear and pass judgment on any application brought by staff members, former staff members or their representatives against the Secretary-General as the Chief Administrative Officer of the United Nations.

46. Applications which may be brought before the Tribunal include administrative decisions alleged to be in non-compliance with the Applicants' terms of appointment or contracts of employment. The Tribunal shall, in entertaining such applications, have regard to all pertinent regulations, rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

[2] UNDT/2009/030.

47. It does not bear restating that the Tribunal is the first tier of the new internal justice system within the United Nations set up to resolve disputes between staff members and Management. In the process of doing so, the Tribunal upholds the rights of individuals, strengthens accountability and ensures responsible decision-making. As with any legitimate Court, the Tribunal affirms the rule of law and is not a respecter of persons.

48. It goes without saying that the legal interpretation and application of all Staff Rules, Regulations and administrative issuances falls wholly and squarely within the province of this Tribunal. Appeals from this Tribunal lie and terminate at the United Nations Appeals Tribunal. The Tribunals which make up the formal system of internal justice in this Organisation, by their nature and power, hand down binding decisions in cases between staff members and the Administration.

Conduct of Counsel appearing before the Tribunal

49. Staff regulation 1.2 (b) requires that staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. In the context of the present case, the submissions made by Ms. Miouly Pongnon, the Respondent's Counsel, that the ASG/OHRM is the sole interpreter of UN Staff Rules and that since OHRM was notified of the Impugned Decision and did not direct UNEP to correct or revoke it then the decision must be left to stand, is not only reckless but is also misleading and mischievous. It is especially mired in mischief, coming as it does, from a senior legal counsel representing the Secretary-General. There is ample authority for the view that an administrative instruction such as ST/AI/234 ranks lowest in the hierarchy of internal legislation within the Organisation. It is of particular concern to this Tribunal that the Counsel prefers to give such misleading advice to her clients rather than guide them to a proper application of the rules and administrative issuances and the role of the Tribunal.

50. When Counsel communicates with the Tribunal whether by way of written pleadings and submissions or by appearance in oral proceedings, he or she is bound by ethical rules and the Staff Regulations and Staff Rules including the professional ethics that govern legal practitioners in the jurisdiction where he or she was licensed to practice law. The proper place of Counsel appearing before this Tribunal is that of an officer of the court whose first duty is to guide the court and to honestly advice his or her clients with a view to achieving the just determination of the case. On the part of the Tribunal, its role is that of an impartial arbiter and it must dispense even-handed justice. Where there are mistakes of law, it would be up to the Appeals Tribunal to correct them.

51. During the hearing of this Application, the Tribunal was minded to rule on and expunge paragraph 26 of the Respondent's written submissions for its unnecessary challenge of the Tribunal's jurisdiction. The same was the fate of paragraphs 10 to 16 of the said document, revealing as they did, certain privileged information about mediation efforts contrary to article 15(7) of the Tribunal's Rules of Procedure which states that all documents prepared for and oral statements made during any informal conflict resolution process or mediation are absolutely privileged and confidential, shall never be disclosed to the Tribunal and that no mention shall be made of any such mediation efforts in documents or written pleadings submitted to Tribunal or in any oral arguments before it. (Subject, off course, to the exception in article 2(c) of the Statute of the Tribunal).

52. Following this, the Respondent's Counsel reacted with an inappropriate and sarcastic retort,

> "If I may ask for a clarification your Honour, does that mean that your Honour is also expunging from the record the existence and the fact of the provisions of ST/AI/234?"

The same Counsel's habit of constantly attempting to reopen and reargue an issue after the Tribunal has ruled on it is disrespectful in the extreme. No Counsel does him or herself a favour, not to mention the disservice to his or her client, by engaging in a

combative posture towards the Tribunal. It is as unprofessional as it is contemptuous and does not reflect the "highest standards of efficiency, competence and integrity" required of staff members and of Counsel appearing before the Tribunal.

The just disposal of cases in the light of the formal procedures for institution of proceedings before the UNDT

53. As earlier mentioned, under articles 2 and 3 of the Statute of the Dispute Tribunal, the Tribunal is empowered to hear and pass judgment on applications filed by (a) staff members of the United Nations, including the United Nations Secretariat or separately administered funds and programmes, (b) former staff members and (c) others who make claims in the name of incapacitated or deceased staff members.

54. Apart from a claim or application on the merits, the Tribunal is also competent to adjudicate on an application for the suspension of the implementation of a contested administrative decision pending an on-going management evaluation when certain conditions are met. A suspension of action application is usually urgent and seeks an interim relief.

55. The UNDT may grant or deny leave in an application to file a friend-of-the-court brief by a staff association. It may also grant or deny leave to an intervener to join in a matter before it.

56. In considering an application on the merits, the Tribunal is invited to fully entertain the Applicant's claim or cause of action and if upheld to grant the reliefs sought and in this way fully and finally dispose of the case. On the other hand, the applications of an intervener or that of a staff union that seeks to file a friend-of-court brief would generally not stand on their own and would rest or depend on a full application on the merits. In cases of suspension of action, an interim measure is sought to relieve the Applicant while he waits for management evaluation or for the conclusion of proceedings that would determine the case on the merits.

57. To institute any kind of proceedings before the Tribunal, there are prescribed forms in the Tribunal's Registries which an intending litigant may fill and file. In this way, the Registries at a glance are able to categorize an application. It is thus easier for an Applicant, even if he has no legal representation, to bring his or her case before the UNDT. This procedure also addresses the matter of access to justice.

58. The instant Application was filed before the Tribunal by way of a suspension of action application. Before an oral hearing was held, parties exchanged pleadings, submissions on facts and law and relevant documents. The facts not being in contention, Counsels for both parties did not call witnesses but addressed the Tribunal on the issues in the case as they saw fit. Among the issues on which submissions were made were those of (1) unlawfulness, (2) urgency and (3) irreparable damage.

59. The Tribunal found that the three conditions were met for a suspension of action order. In deliberating on the issue of prima facie unlawfulness, it was the finding of the Tribunal that the matter of unlawfulness as established in this case had crossed the threshold of prima facie unlawfulness required to grant a suspension of action order. The degree of unlawfulness established was not just prima facie, obvious or adequate at first sight. The Impugned Decision was found to be grossly, patently, incurably and incontrovertibly unlawful.

60. An order suspending the Impugned Decision pending management evaluation is bound to work injustice in the circumstances because it would mean that if the Respondent's agents decided at the end of their management evaluation that the decision was right, it would be reinstated in spite of this Tribunal's finding that its degree of unlawfulness is enough to dispose of this case on the merits. On the other hand, it is impossible to suspend the Impugned Decision pending proceedings since there are none and the filing of new proceedings on the same matter would only require that the Tribunal repeats what it has done here under a new heading.

61. The Application that gave rise to the proceedings and deliberations in this case clearly was brought under a wrong heading when it was filed as a suspension of action application. The Tribunal, in the present circumstances and in the interest of justice places this matter on the cause list of applications on the merit and accordingly disposes of it fully and on the merits. The only other issue which the Tribunal needs to avert its mind to in the course of doing this is the question whether the Parties' cases were fully presented, heard and considered and whether any party in the case is likely to suffer any prejudice by reason that this matter is disposed of as one heard on the merits. The Tribunal finds that no prejudice results to any party as a result as this case was fully canvassed by both parties and fully considered by the Tribunal.

62. Indeed article 36 of the Tribunal's Rules of Procedure confers the Tribunal with the power to deal with situations not expressly provided for in the said Rules and thereby fill in the gaps encountered in its daily operations. In invoking this power, the Tribunal has at all times the need to meet the ends of justice as its object.

Findings

63. The following are the Tribunal's findings in the present Application:

a. The Impugned Decision is grossly, patently, incurably and incontrovertibly unlawful. The ED/UNEP wrongfully and arbitrarily placed the Applicant on administrative leave in this case.

b. In the face of the gross unlawfulness of the Impugned Decision and its adverse impact on the Applicant's career, the requirement of urgency is met.

c. The deprivation of continuing professional experience especially where the administrative decision on which it is based is not only unlawful but patently so cannot be adequately compensated in monetary terms.

d. An order suspending the Impugned Decision pending management evaluation is bound to work injustice in the circumstances.

e. It is impossible to suspend the Impugned Decision pending proceedings since there are none and the filing of new proceedings on the same matter would only require that the Tribunal repeats what it has done here under a new heading.

f. The Tribunal, in the present circumstances and in the interest of justice places this matter on the cause list of applications on the merit and accordingly disposes of it fully and on the merits.

Judgment

64. In light of the foregoing the Tribunal hereby rescinds, voids and nullifies the Impugned Decision.

(Signed)

Judge Nkemdilim Izuako

Dated this 25th day of February 2011

Entered in the Register on this 25th day of February 2011

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi