



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

NKOYOCK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Jeffrey C. Dahl

Counsel for Respondent:

Jérôme Blanchard, HRLU, UNOG

Introduction

1. On 23 November 2017, the Applicant, Chief of Unit and Officer-in-Charge, Software Products for Member States, Information Technology Service, Division for Management, United Nations Office on Drugs and Crime (“UNODC”), filed an application for suspension of action pending management evaluation of the decision requiring him to attend an interview on 28 November 2017, as part of an investigation.
2. The application was served on the Respondent who filed his reply on 28 November 2017.

Facts

3. On 19 July 2017, the Executive Director, UNODC, received a complaint of prohibited conduct against the Applicant from a former staff member. The complainant sent a similar complaint to the Office of Internal Oversight Services (“OIOS”) on 20 July 2017. The complainant alleges, *inter alia*, that the Applicant used his official capacity to tarnish his reputation, which impacted negatively on the contracts the complainant had with several partners.
4. The matter had been raised in a discussion between the Deputy Director-General of UNOV and the Director, Division for Management, United Nations Office at Vienna (“UNOV”)/UNODC, with a service provider. The latter noted that in light of the seriousness of the accusations levelled against the complainant by the Applicant, the service provider contracting the complainant needed assurance from UNODC that these accusations were unsubstantiated.
5. OIOS referred the matter to UNODC on 15 August 2017.
6. On 9 October 2017, the responsible official decided to appoint a fact-finding Panel under ST/SGB/2008/5 to investigate the allegations.
7. On 27 October 2017, the Panel informed the Applicant of the allegations against him, and requested him to confirm his availability for an interview on 28

November 2017. Numerous exchanges ensued between the Panel members, the Applicant and the Human Resources Management Service, UNOV/UNODC.

8. On 22 November 2017, the Applicant requested management evaluation of “the decision to require [him] to attend and participate in an interview pursuant to an unlawful investigation over [his] objection”.

9. By Order No. 220 (GVA/2017) of 24 November 2017, and following its receipt of the Applicant’s application for suspension of action, the Tribunal ordered the suspension of the implementation of the decision to convoke the Applicant for an interview until 1 December 2017 or until further order. The Tribunal stressed that its order was without prejudice to its ulterior finding on the receivability of the application.

Parties’ contentions

10. The Applicant argues that as a non-staff member, the complainant has no standing to file a complaint under ST/SGB/2008/5, and that, hence, the investigation and his requested interview are unlawful. He also argues that his request is receivable since sec. 5.20 of ST/SGB/2008/5 allows an alleged offender to appeal when he/she believes that the procedure followed is improper. He therefore submits that requiring a staff member to participate in an unlawful investigation, over the staff member’s objections, is an administrative action in contravention of his/her contractual rights.

11. The Respondent argues that the application is not receivable, that the contested decision is not *prima facie* unlawful, and that its implementation would not cause irreparable harm to the Applicant. On the receivability, the Respondent notes that the decision to convoke the Applicant for an interview is not an administrative decision pursuant to art. 2(a) of the Tribunal’s Statute.

Consideration

12. Article 2.2 of the Tribunal’s Statute and art. 13 of its Rules of Procedure provide that the Dispute Tribunal may order the suspension, during the pendency

of management evaluation, of “the implementation of a contested administrative decision that is the subject of an on-going management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage”.

13. It follows from these provisions that an application for suspension of action may only be granted if it concerns an “administrative decision” that has not yet been implemented and is under an on-going management evaluation.

14. Article 2.1(a) of the Tribunal’s Statute reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

15. The Appeals Tribunal has held that “[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision (see *Andati-Amwayi* 2010-UNAT-058).

16. In general terms, administrative decisions subject to judicial review are characterized, *inter alia*, by the fact that they must have direct legal consequences on an individual’s terms of appointment (see *Nguyen-Kropp and Postica*, 2015-UNAT-509).

17. Pursuant to well-established jurisprudence, preparatory decisions are not considered administrative decisions, as they merely constitute one of the steps and/or findings leading to a final or operable administrative decision. Such preliminary steps may only be challenged in the context of an appeal against a final decision of the Administration that has direct legal consequences.

18. The Appeals Tribunal held in *Nguyen-Kropp and Postica* 2015-UNAT-509 that:

31. Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member as required of an administrative decision capable of being appealed before the Dispute Tribunal.

32. This accords with another general principle that tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality.

19. In *Birya* 2015-UNAT-562, the Appeals Tribunal found that the decision "to set up a fact-finding panel is not of itself a decision relating to the contractual rights of a staff member".

20. Further, the Appeals Tribunal held in *Fedorchenko* 2015-UNAT-499 that:

32. Once informed of the outcome of this investigation, Mr. Fedorchenko, who had been subject to it, could of course concur with the closure (without any record on his personnel file). However, that does not preclude him from requesting review of the proceedings for irregularities.

33. The Administration has the duty to conduct investigations into the alleged conduct of staff members in certain cases in compliance with the respective applicable norms. This does not imply, however, that the regularity of the closed proceedings cannot be examined, when challenged by any staff member whose rights were allegedly violated during the proceedings.

21. It is the Tribunal's considered view that any challenge to whether an investigation has been conducted in compliance with the respective applicable norms can only be made once the alleged offender has been informed of the outcome of the investigation, or the staff member has otherwise been notified of a final administrative decision.

22. The Tribunal notes that the decision to convoke the Applicant to an interview in the framework of a complaint filed under ST/SGB/2008/5 is a preparatory decision that does not in itself adversely affect the Applicant's terms of appointment. Since it does not constitute an administrative decision pursuant to art. 2(a) of the Tribunal's Statute, the Tribunal cannot but find that the present application for suspension of action is not receivable *ratione materiae*.

23. In view of the above conclusion, it follows that it is not necessary for the Tribunal to ascertain whether the other prerequisites for the granting of a suspension of action, namely *prima facie* unlawfulness, urgency and irreparable damage, are met in the case at hand.

Conclusion

24. In view of the foregoing, it is ORDERED that:

- a. the application for suspension of action is rejected; and
- b. the suspension of the decision to convoke the Applicant to an interview, pursuant to Order No. 222 (GVA/2017) is lifted.

(Signed)

Judge Rowan Downing

Dated this 30th day of November 2017

Entered in the Register on this 30th day of November 2017

(Signed)

René M. Vargas M., Registrar, Geneva