



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

BA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Alexandre Tavadian, OSLA
Louis-Philippe Lapicerella, OSLA

Counsel for the Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat
Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Economic Commission for Africa (ECA), based in Niamey, Niger, is applying for suspension of the decision to charge her with misconduct by letter dated 9 March 2012.
2. The Applicant filed an Application on the Merits regarding the same decision, on 26 March 2012. The Respondent's Reply to this is due on 2 May 2012. The Applicant is therefore applying for suspension of action as an interim measure pursuant to Article 10.2 of the Statute of the Dispute Tribunal.
3. On 5 April 2012, the Respondent filed a Reply to the Application for Suspension of Action.

Facts

4. The Applicant joined the ECA on 14 November 2009 as Director of the Niamey Sub-Regional Office for West Africa (SRO-WA).
5. When she took up her duties the Applicant began a restructuring and reform programme in the office. However, within months, a number of staff members lodged complaints against the Applicant with the Executive Secretary of ECA, Mr. Abdoulie Janneh, alleging *inter alia* that the Applicant had repeatedly accused them of dishonesty or incompetence; that she had threatened their contractual status; that she repeatedly shouted at them; that she delayed payment of, or threatened not to pay, entitlements; and that she improperly used office property. These complaints amounted to allegations of harassment, discrimination and abuse of authority, and indeed formal complaints pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) were presented to Mr. Janneh on 28 February and 30 March 2011.

6. On 4 May 2011, the Executive Secretary established a fact-finding panel (“the Panel”) to review the complaints, and the Panel travelled from Addis Ababa, Ethiopia, to Niamey to conduct their investigation from 10-13 May 2011.

7. The Panel met with the Applicant on 12 May 2011. The Panel also conducted interviews with 18 staff members. When the investigation was complete, the Panel sent a report to the Executive Secretary on 11 June 2011 (“the Report”). The Report concluded that some of the complaints were well-founded.

8. On 18 November 2012, Mr. Jannah wrote to Ms. Catherine Pollard, Assistant Secretary-General for Human Resources Management (“ASG/OHRM”), summarising the findings of the Panel and expressing the view that he shared the Panel’s conclusions that the Applicant’s behaviour did constitute harassment and created a hostile environment in the Niamey office. He further agreed with the Panel that in certain areas, the Applicant’s conduct amounted to abuse of authority, and may constitute misconduct. Mr. Jannah indicated that it would be unwise to leave the Applicant in charge of the Niamey office “in which she has created a high degree of hostility and tension, and where the potential for further staff harassment is high.”

9. On 15 December 2011 a letter from the ASG/OHRM to the Applicant informing her that she was to be placed on administrative leave with full pay was prepared (“the Administrative Leave Letter”). It was delivered to ECA on 20 December 2011. Due to absences from the office over the Christmas period, including that of the Applicant, the Administrative Leave Letter was not in fact delivered until 11 January 2012. The Applicant was then placed on administrative leave with full pay. The Applicant contested this decision by filing an application for suspension of action before the Dispute Tribunal and that suspension was granted by issuance of Judgment UNDT/2012/025 of 15 February 2012. The Tribunal ordered the Respondent to return the Applicant to her post as Director of the Niamey Sub-Regional Office, or redeploy her elsewhere. As a result of the decision, the Applicant was redeployed to the position of Director, Yaoundé Sub-Regional Office, Cameroon, from 12 March 2012.

10. On 15 March 2012, the Applicant received a memorandum dated 9 March 2012, from Martha Helena Lopez, Officer-in-Charge of the Office of Human Resources Management in New York, entitled “Allegations of Misconduct”. The memorandum details the investigative process to date and concludes by charging the Applicant with harassing one or more staff members of the Niamey Sub-Regional Office, “by engaging in a pattern of conduct that included: repeatedly shouting at staff, repeatedly accusing staff of dishonesty; and/or repeatedly accusing staff of incompetence.” The Applicant was given three weeks to submit her comments on the allegations, but following her request for extra time, this period was extended to seven weeks, which have not yet elapsed.

The Parties’ submissions

11. The Respondent argues that the Application is not receivable as the Applicant has not filed a Request for Management Evaluation of the contested decision. The Applicant avers that no such request is required as the application involves a “disciplinary measure”.

12. The Respondent also argues that the decision contested is not an administrative decision falling within the jurisdiction of the Dispute Tribunal. The Respondent relies on *Asswad* Order No. 062 (GVA/2010) in which it was stated that “la mise en cause d’un fonctionnaire à des fins disciplinaire ne produit pas, en elle-même, de conséquences juridiques directes.”¹ The Applicant contends that the Application is receivable as an exercise of her rights under section 5.20 of the Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which states that “where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.” The Applicant relies on *Nwuke* 2010-UNAT-099 in support of this contention.

¹ Paragraph 19.

13. The Respondent further argues that the contested decision has already been implemented in that the charges have been made.

14. As to the substance of the Application, the Applicant contends that the decision is *prima facie* unlawful because of three procedural irregularities. The first complaint is that only one member of the Panel had been trained in investigating allegations of prohibited conduct – in breach of the requirement of Section 5.14 of ST/SGB/2008/5 that at least two members of the panel should be trained. The second complaint is that one of the panellists was a former, rather than current, staff member. The third complaint is that due to the position of one of the panellists as Chairperson of the ECA Staff Union Council, there is reasonable apprehension of bias.

15. The Respondent denies the procedural irregularities and alternatively argues that, if they do exist, they do not vitiate the decision because they do not impact the thoroughness or impartiality of the fact-finding report.

16. As to the issue of urgency, the Applicant argues that from 4 May 2012—the date on which her comments on the charges are now due—she risks dismissal for misconduct. She argues that she cannot wait for the outcome of disciplinary proceedings because by then she will have already suffered harm to her career and reputation. The Respondent argues that by claiming urgency the Applicant is attempting to subvert the disciplinary process which is clearly set out in ST/AI/371 (Revised disciplinary measures and procedures) and to shift responsibility for assessing the disciplinary case from the Administration to the Tribunal.

17. On the issue of irreparable harm, the Applicant argues that if the Applicant is dismissed as a result of the charges, her career with the United Nations and her reputation will be irreparably damaged. The Respondent argues that this is a supposition based on a future possibility, rather than the effect of the contested decision—the charging of the Applicant with misconduct. As such, the Applicant has failed to show that she is suffering or is about to suffer any irreparable harm.

Considerations

Receivability

18. Before considering whether the substance of the Application for Suspension of Action has merit, the Tribunal must consider whether or not it is receivable *ratione materiae*.

19. The first issue raised is whether the failure of the Applicant to file a Request for Management Evaluation renders her Application not receivable.

20. Article 8 of the Statute of the Tribunal allows that an application shall be receivable if an “applicant has previously submitted the contested decision for management evaluation, where required” and the application is filed within the appropriate deadlines. The requirement for first submitting a decision to management evaluation is set out in the Staff Rules, not the Statute of the Tribunal.

21. Staff Rule 11.2 states:

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

22. It is very clear from the wording of staff rule 11.2(b) that the exemption from the requirement to request a management evaluation applies only in respect of a decision to

impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process.

23. The Applicant states that she did not file a request for management evaluation because the contested decision is a disciplinary matter. This is not enough. Just because the subject matter of the Application is disciplinary, the Applicant is not exempt from the requirement of staff rule 11.2(a). It is only where the disciplinary process has been completed and a measure set out in staff rule 10.2 has been imposed, that staff may come directly to the Tribunal for relief in disciplinary cases.

24. In light of the above, the present Application is not receivable, and it is not necessary to examine the other issues in the case. However, the Tribunal considers it in the interests of the Parties to make the following finding in relation to the question of whether or not the decision to charge the Applicant in the present case amounts to an administrative decision reviewable by the Tribunal.

25. In *Asswad* it was stated that the decision to charge a staff member with misconduct did not amount to an administrative decision within the definition provided by the jurisprudence of both the former UN Administrative Tribunal and the present Dispute Tribunal and Appeals Tribunal, that is:

a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order...Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.²

26. The Tribunal respectfully disagrees with the learned Judge in *Asswad*. The decision to initiate an investigation which may or may not result in disciplinary proceedings is an administrative action, as is the act of charging a staff member with misconduct. It cannot be disputed that such an act is a decision. It is furthermore taken by the administration. Nothing more is required to qualify such an act as an administrative

² UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003), paragraph V, endorsed in *Tabari*, 2010-UNAT-030, paragraph 18.

action. The decision to charge the Applicant and to initiate the disciplinary process does, therefore, amount to an administrative decision in the view of this Tribunal. In addition, such a decision does impact on the staff member in that it is a decision that would have direct legal consequences for a staff member if it is followed up by disciplinary proceedings.

27. Such a decision cannot be taken on a mere hunch or according to the caprices of a responsible member of the administration. It must obey two strands. First on the substantive level such a decision must be justified by facts and evidence that establish not the veracity of any alleged act of misconduct but raise a *prima facie* case against the staff member. Secondly on the procedural level such a decision must strictly comply with any rules or regulations on the establishment and the conduct of an investigation and the charging process. If the decision is flawed on one or both the substantive and the procedural requirements it is amenable to review by the Tribunal.

28. However it is not sufficient for a staff member to establish that the decision to charge a staff member with misconduct is an administrative one. He or she must go further and establish that the decision will impact on his or her contract of employment. If the decision to charge him or her is flawed it should not be allowed to stand because no employee should be exposed to possible disciplinary proceedings resulting from a flawed initial decision. Why should the administration avail itself of the benefit of the latitude to impose disciplinary proceedings that find their origin in a flawed decision?

29. Thus the Tribunal finds that the decision to charge the Applicant is an administrative decision reviewable by this Tribunal. However, the Tribunal also finds the Application for Suspension of Action is not receivable because no request for management evaluation was made in respect of the contested decision.

Respondent's Application for Costs

30. The Respondent argues that the Tribunal should order the Applicant to pay costs for abuse of proceedings, pursuant to article 10.6 of the Statute of the Tribunal, which provides:

[w]here a party has manifestly abused the proceedings before it, it may award costs against that party.

31. The Respondent argues that the present Application is frivolous since receivability is “squarely determined, *inter alia*, by the principle set out in *Asswad* and by the Applicant’s failure to submit a request for management evaluation”, and that it is an attempt to subvert the disciplinary process.

32. Whilst the Tribunal has some sympathy with the Respondent’s arguments in regard to the Applicant’s failure to submit a request for management evaluation, it does appear that Counsel for the Applicant filed the present application in good faith, even if it is procedurally flawed. A manifest abuse of process necessarily involves some degree of intention to act frivolously or to abuse the proceedings and that is not apparent in the present case. The Respondent’s application for an order for costs against the Applicant is therefore refused.

Conclusion

33. The Application for Suspension of Action is refused. The Respondent’s application for an order for costs against the Applicant is also refused.

(Signed)

Judge Vinod Boolell
Dated this 12th day of February 2012

Entered in the Register on this 12th day of February 2012

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi