



**Before:** Judge Nkemdilim Izuako  
**Registry:** Nairobi  
**Registrar:** Abena Kwakye-Berko, Officer in Charge

GEBREMARIAM

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON APPLICATION FOR  
SUSPENSION OF ACTION**

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**Counsel for the Applicant:**  
Alexandre Tavadian, OSLA

**Counsel for the Respondent:**  
Katya Melliush, Legal Officer, UNON

## **Introduction**

1. The Applicant began his career with the United Nations with the Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia in 1990. Currently, he is working at ECA as a Library clerk at the G4 level under a permanent appointment.

2. On 18 April 2013, the Applicant filed an application with the Dispute Tribunal contesting a decision taken by Ms. Hazel Scott, Director, Division of Administrative Services, ECA, to issue him with a written reprimand on 6 February 2013 because he had failed to attend a meeting in relation to his formal challenge of an administrative decision.

3. On 16 April 2013, the Applicant received a letter from Ms. Scott rescinding the reprimand letter issued on 6 February 2013 and requesting the Applicant to respond to the same allegations.

4. On 26 April 2013, the Applicant filed the present Application for Suspension of Action requesting the Tribunal to suspend what he describes as an “unlawful disciplinary process that is likely to result in another unlawful reprimand”.

5. The Respondent filed a Reply to the Application on 30 April 2013 in which it is argued that:

- a. the Application is not receivable;
- b. no decision to initiate a disciplinary process has been taken;
- c. if it has been, it has been implemented and cannot be suspended;
- d. the decision is lawful and appropriate;
- e. the case lacks any urgency; and
- f. the Applicant has not shown how he will suffer irreparable harm.

## **Facts**

6. On 4 February 2013, the Applicant filed a management evaluation request concerning delays in granting his annual within-grade increment for the year 2013. He copied Ms. Scott on his complaint.

7. In the afternoon of the same day, 4 February 2013, Ms. Scott informed the Applicant that she intended to schedule a meeting between them and a Human Resources Officer to discuss his complaint.

8. In the late afternoon on 4 February 2013, Ms. Deborah Abebe, Ms. Scott's Assistant, informed the Applicant that Ms. Scott would like to meet with him on 5 February 2013.

9. The Applicant asked to reschedule the meeting because his colleague was on leave and he could not leave his desk unattended.

10. On 5 February 2013, Ms. Scott held a meeting expecting the Applicant to attend. When the Applicant did not appear at the meeting, his supervisors instructed him to attend.

11. On 5 February 2013, during a phone conversation with Ms. Scott's Assistant, the Applicant explained that he was not feeling sufficiently composed to discuss the matter with the Administration in a rational manner. He did not attend the meeting.

12. On 6 February 2013, Ms. Scott issued an interoffice memorandum entitled "Reprimand for Misconduct". In the memorandum, Ms. Scott informed the Applicant, *inter alia*, as follows,

[Applicant's] behavior of gross insubordination and disrespect to constituted authority amounts to misconduct for which you are hereby issued this letter of reprimand in line with Staff Rules 10.2 (b)(i). The Chief, HRSS is hereby advised to keep a copy of this letter of

reprimand in your file. Please be informed that a repeat of this or similar behavior shall result in sterner actions against you.

13. In an email dated 7 February 2013, the Applicant protested against Ms. Scott's actions and, on 22 February 2013, he filed a management evaluation request of the decision to issue a reprimand.

14. On 16 April 2013, the Applicant received a letter from Ms. Scott in which she informed him that she had decided to rescind the reprimand and stated that she had decided to give him the opportunity to respond or comment on the circumstances surrounding his refusal to attend the meeting to which she had invited him on 5 February 2013. Some parts of this letter are reproduced below and will be discussed further:

7. The manner in which you refuse to attend the meeting: hanging up on Ms. Abebe, avoiding the calls altogether, ignoring your supervisors' instructions, without attempting to contact my office to explain your reasons for wanting the reschedule for the meeting, is unacceptable. You were informed twice the day before, by myself by email and by my secretary by phone and you had enough time to be ready knowing clearly the subject to be discussed, particularly as I advised you in my email that the purpose of the meeting was to address your concerns. I would like to remind that as a staff member you have obligations based on the Staff Rules, one of which is the obligation for you to follow the instruction and directions of supervisors:

*(Rule 1.2(a) "Staff members shall follow the direction and instruction properly issued by the Secretary-General and by supervisors."*

8. In the absence of circumstances you might be able to shed some light on, your refusal to attend the meeting despite the instruction of your supervisors would amount to the failure to follow a direct instruction, as provided in Rule 1.2 (a).

9. I would like to underline the seriousness of your behavior which may amount to misconduct as (sic) Staff Rule 10.1 and ST/SGB/2011/1.

*a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and the Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may*

*amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.*

10. On 8 February 2013, you wrote to me an email with the title “personality and attitude”. Could you please explain the meaning of sending this message to me? It is my view that the message is a direct threat to my own person (See Annex 3).

11. You are therefore requested to comment or respond to all these allegations.

15. On 23 April 2013, the Management Evaluation Unit issued a letter informing the Applicant that his request was moot because the reprimand had been rescinded.

16. On 24 April 2013, the Applicant filed a management evaluation request of what he described as the decision to initiate a disciplinary process on the basis of allegations that had already given rise to a reprimand which was ultimately rescinded. On 26 April 2013, the Applicant filed the present Application for Suspension of Action.

17. The Respondent filed a Reply to the Application on 30 April 2013.

18. The Tribunal heard the Suspension of Action Application on 2 May 2013.

### **Applicant’s submissions**

19. The Applicant submitted that this is an Application for a Suspension of Action pursuant to art. 14 of the Rules of Procedure of the UN Dispute Tribunal. The underlying application is that challenging the decision to issue a reprimand against the Applicant. He further submitted that this Suspension of Action is appended to the UNDT application on the merits which carries case number UNDT/NBI/2013/16 and that he filed, as a procedural precaution, a second management evaluation request in case the Respondent attempts to argue that the impugned decision is a new and unrelated administrative action.

20. The Applicant submitted that if the Tribunal determines that the impugned decision is a new administrative decision, then this Suspension of Action would fall for determination under art. 13 of the Tribunal's Rules of Procedure.

21. The Applicant's primary contentions may be summarized as follows:

*Prima facie unlawfulness – Violation of due process*

a. The letter issued by Ms. Scott on 16 April 2013 explicitly stated that he is facing allegations of misconduct. At paragraph 9 of the letter, relying on staff rule 10.1 that deals with disciplinary measures and procedures, Ms. Scott underlined the seriousness of the Applicant's behavior which may amount to misconduct.

b. The Applicant submitted that this demonstrates that Ms. Scott envisages the possibility of imposing a disciplinary sanction on him. In the initial letter of reprimand, which was subsequently withdrawn, the Administration had used the word "misconduct" at least twice. The interoffice memorandum itself was entitled "Reprimand for misconduct". Consequently, the Administration cannot credibly argue that it does not consider the Applicant's behavior as misconduct.

c. Since the Administration wanted to sanction an alleged misconduct, this process must be viewed as an attempt to impose a disguised disciplinary measure. An administrative measure can be imposed only in circumstances where the staff member's action did not amount to misconduct. Otherwise, the Administration would be able to sanction misconduct without complying with the procedural requirements set out in the Staff Regulations and Rules as well as in ST/AI/371 (Revised disciplinary measures and procedures) as amended.

d. The Administration cannot be allowed to sanction staff members for alleged misconduct by imposing non-disciplinary measures in order to circumvent the procedural guarantees. Imposing an administrative measure in

order to sanction misconduct is disingenuous and runs contrary to the Staff Regulations and Rules.

e. As soon as the Administration identifies a behavior as possible misconduct, the staff member is entitled to the procedural safeguards of disciplinary proceedings.

f. In the present case, Ms. Scott had skipped a few procedural steps in pursuing the disciplinary process. More specifically, she failed to report the matter to the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”). Similarly, the Assistant Secretary-General did not determine that “the case is to be pursued” as stipulated at para. 5 of ST/AI/371. Therefore, Ms. Scott, usurped the powers of the ASG/OHRM by determining herself that the case was to be pursued.

g. This violation has a significant impact on the Applicant’s rights. Ms. Scott appears to entertain a personal animosity towards the Applicant. It is obvious that the reprimand issued by Ms. Scott was rescinded as a result of the Management Evaluation Unit’s intervention. Instead of rescinding the reprimand and not pursuing the matter any further, Ms. Scott reinitiated the disciplinary process against the Applicant. Ms. Scott’s conduct leads to an apprehension of bias and strongly suggests that she harbors animus towards the Applicant.

h. Not only had Ms. Scott no authority to determine that the case is to be pursued, she also lacks the required impartiality to make such a determination. The ASG/OHRM would have been in a better position to make such a determination.

i. The Applicant’s behavior does not constitute misconduct. His refusal to attend the meeting was justified and reasoned. First, his colleague was on leave for the week and he was unable to leave his desk unattended. There was

no urgency and the Administration could have rescheduled the meeting. Second, the Applicant did not want to discuss his complaint addressed to the Management Evaluation Unit in a meeting attended by the Chief of Human Resources and other top mission officials which was imposed on him, especially without the presence of his legal counsel. Third, the Applicant was not psychologically prepared to have this discussion at that particular time.

*Prima facie unlawfulness – Double Jeopardy*

j. On 16 April 2013, after the expiration of the deadline for the issuance of the Management Evaluation Unit's decision, the Applicant received a letter from Ms. Scott rescinding the reprimand. It is obvious that Ms. Scott sent out this letter after the Management Evaluation Unit had informed her that she had exceeded her authority and power.

k. Ms. Scott was not entitled to withdraw the reprimand especially when the Applicant was in the midst of formally challenging the decision. The Administration was *functus officio* as soon as it placed the reprimand on the Applicant's personnel file. She ought to have allowed the formal process to take its course and to determine whether her actions were lawful.

l. Since Ms. Scott rescinded the reprimand letter after the expiration of the deadline for the Management Evaluation Unit's decision, there is no longer any doubt that she was complying with MEU's instructions. Therefore, to all intents and purposes, the Applicant successfully challenged the reprimand letter issued against him in February 2013. The Administration cannot pursue a case that the Applicant had already successfully challenged.

m. Ms. Scott now directs the Applicant to respond to the very same allegations that led to the rescinded reprimand. This constitutes an abuse of authority.



n. In her letter dated 16 April 2013, Ms. Scott failed to acknowledge that she unlawfully instructed that the reprimand be placed on the Applicant's file. Ms. Scott requested an explanation for the Applicant's refusal to attend a meeting that he had no duty to attend. However, this time around, Ms. Scott wants to ensure that the reprimand is issued in compliance with the procedural guarantees. She wants to punish the Applicant at the expense of violating a well-established legal principle against double jeopardy

o. The Administration cannot charge the Applicant twice for the same alleged offence. A staff member cannot be sanctioned twice on the basis of the same allegations. The reason for rescinding the initial reprimand is irrelevant; once a staff member has been sanctioned, the same allegations cannot constitute the basis for a second disciplinary process or an adverse measure.

*Prima facie unlawfulness –Lack of authority to issue a reprimand*

p. The Applicant submits that it appears, from the email exchange between one Mr. Nouhou Diallo, of ECA (acting on behalf of Ms. Scott) and the Applicant as well as from the history of this case, that Ms. Scott has the intention of issuing another reprimand on the basis of the same allegations.

q. Ms. Scott does not appear to have the required authority to issue such a reprimand as stipulated in the Administrative Instruction on Delegation of Powers ST/AI/234 (Administration of Staff Regulations-Staff Rules).

*Urgency*

r. The Applicant submits that it is clear from Ms. Scott's letter and from Mr. Diallo's email dated 23 April 2013 that the issuance of a reprimand is imminent.

s. Ms. Scott had requested the Applicant to provide comments but did not specify a deadline. Despite the Applicant's repetitive inquiries, the Administration refused to inform him when the reprimand is likely to be issued. Thus, a reprimand may be issued at any time.

t. Irrespective of whether the Applicant responds to the allegations of misconduct, Ms. Scott may issue a reprimand at any time. She had already issued a reprimand without giving any notice to the Applicant. Although this reprimand was subsequently rescinded, the moral and reputational damage had already been done. The Applicant harbours a well-founded fear that the Administration might act in a similar manner again. It was submitted on his behalf that the Administration's previous conduct demonstrates that there is urgency.

u. Only a few days before the hearing of this Application, the Administration gave him two weeks to send his written response to the demands made in the letter of 16 April 2013. It is now obvious that in less than two weeks from the date of the hearing, the Respondent will take action on this issue which may have adverse consequences for the Applicant. This matter is therefore urgent.

*Irreparable damage*

v. The Applicant, in reliance upon the Tribunal's holdings in *Corna* Order No. 80 (GVA/2010) of 16 December 2010 and *Utkina* UNDT/2009/096, submitted that the harm is irreparable if it can be shown that suspension of action is the only way to ensure that his rights are observed.

w. The Applicant relied upon the Dispute Tribunal's holding in *Tadonki* UNDT/2009/016 where it was held, *inter alia*, that monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

x. The Applicant also relied on the Tribunal's ruling in *Ba* Order No. 057 (NBI/2012) where it was held that the decision to initiate an investigation which may or may not result in disciplinary proceedings 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.

y. The Applicant submitted that the irreparable damage also stems from undue stress and harm to his professional reputation. The Suspension of Action is the only remedy available to him to prevent a serious reputational damage.

22. For these reasons, the Applicant prayed that this Application for Suspension of Action be granted pending the disposition of the underlying Application on the merits in case UNDT/NBI/2013/16. Alternatively, he prayed that this Application for Suspension of Action be granted pending the second Management Evaluation Request filed on 24 April 2013.

### **Respondent's submissions**

23. The Respondent's primary contentions may be summarized as follows:

#### *Prima facie unlawfulness*

a. In the Application on the Merits, UNDT/NBI/2013/16, in which the Applicant contested the decision to issue a reprimand, he protested, *inter alia*, that he was not afforded due process in what was essentially a disciplinary process. The Respondent, having accepted that, rescinded the reprimand and requested the Applicant's comments on the underlying allegations of misconduct. This does not in itself amount to the initiation of a disciplinary process. Under ST/AI/371, a disciplinary process is not initiated until OHRM charges a staff member with misconduct. This has not occurred in the present case and the Application for Suspension of Action is therefore misconceived.

- b. The Applicant's argument that he is facing double-jeopardy is erroneous.
- c. The contested decision –to initiate another disciplinary process – if such a decision is found to have been made, has by its very nature, been implemented. Therefore, there is nothing to suspend.

*Urgency*

- d. The Applicant had not shown any urgency, or hint of urgency, whatsoever in his Application. No disciplinary process had been initiated. There is no impending, critical outcome which requires the involvement of the Tribunal. The Respondent submitted that the Applicant's speculation that "[i]t is clear from Ms. Scott's letter and from Mr. Diallo's email dated 23 April 2013 that the issuance of a reprimand is imminent" is of no merit.

*Irreparable damage*

- e. The Respondent submitted that, assuming for the purpose of argument that the contested decision had not been implemented, and is indeed a decision to initiate "another disciplinary process", the Applicant had failed to show how – if it were shown to be unlawful – allowing the decision to be implemented could possibly cause irreparable harm.
- f. Chapter X of the Staff Rules allows for a challenge to the imposition of both disciplinary and non-disciplinary measures to the UNDT. Thus the test in *Corna* cited by the Applicant does not apply in the present case.

24. The Respondent submitted that the Application is not receivable as an art. 14 application filed as part of UNDT/NBI/2013/16, as the contested decisions are different.

25. The Respondent further submitted that the Application should also fail on the following grounds:

- a. no decision to initiate “another” disciplinary process had been taken;
- b. if such a decision had been taken, it had already been implemented and cannot be suspended;
- c. the decision is lawful and appropriate;
- d. the case lacks any urgency; and
- e. the Applicant has not shown how he would suffer irreparable harm.

## **Considerations**

### *Receivability*

26. The facts in this case show that there are two decisions which the Applicant had complained about, that is, the issuance of the reprimand on 6 February 2013 and the initiation of what he submitted is a disciplinary process on 16 April 2013.

27. Counsel for the Respondent submitted that the arguments in respect of the first decision are now moot. The Tribunal agrees that the first decision had been overtaken by events as it had since been rescinded or withdrawn.

28. With respect to the second decision, the initiation of a disciplinary process, the Tribunal finds this to be a live matter. The Applicant requested management evaluation of the decision in time and approached the Tribunal in time. The Respondent’s argument that the decision to initiate a disciplinary process had already been implemented and cannot therefore be suspended is untenable. The disciplinary process initiated by the memorandum of 16 April is still an ongoing process. It is not completed by its mere initiation. The Tribunal can suspend the said disciplinary process. The Application is therefore receivable. The Application can, however, only be considered under art. 13 of the Tribunal’s Rules of Procedure since there is no substantive application or merits application which would entitle the Applicant to a determination under art. 14.

*Prima facie unlawfulness*

29. In the circumstances of this case, Ms. Scott cannot reopen or initiate a disciplinary process as it would amount to double jeopardy to withdraw the reprimand and replace it with a disciplinary process.

30. By her actions and her demands in the memorandum of 16 April 2013 in which she withdrew the reprimand, Ms. Scott proceeded to usurp the functions of the ASG/OHRM. She cannot under the guise of initiating a fact-finding under para. 2 of ST/AI/371, purport to give the Applicant a given time to provide a written response. This is because the demand for response or comments on allegations of misconduct from the affected staff member with witness statements annexed is the exclusive preserve of the ASG/OHRM. Having issued an unlawful reprimand and later withdrawn it, she became *functus officio* regarding any disciplinary action against the Applicant as it pertains to the issue of his refusal to attend a meeting to which she had invited him on 5 February 2013.

31. The language of the memorandum of 6 February 2013 in which Ms. Scott made thinly-veiled threats of taking even “sterner actions” against the Applicant clearly reveals an animus on her part. Also, the language and tone of the subsequent letter of 16 April 2013 which not only stated allegations of misconduct but even went further to set out the legal framework on which the allegations were based constitute evidence of bad faith on her part.

32. Any disciplinary action initiated by Ms. Scott against the Applicant on the same matter is heavily tainted, totally compromised and speaks to a lack of integrity in such a process. Ms. Scott, having by her unlawful reprimand shown that she believes the Applicant to be deserving of punishment, the Tribunal has a duty to uphold the Suspension of Action Application and to suspend the pretence at due process, which if allowed, would amount to an egregious violation of the procedural safeguards enshrined in ST/AI/371.

33. It must be emphasized that disciplinary action against an erring staff member is not aimed at assuaging the bruised egos and feelings of managers but at upholding the highest standards of conduct expected of international civil servants for the greater good of the Organization. Where, as in this case, a Manager had unlawfully and unprocedurally hastened to impose what Counsel for the Respondent characterized as an administrative measure on a staff member and later withdrew such a measure, it is only proper and fair that the said Manager is estopped from revisiting, reopening or re-initiating action on the same issue, as allowing such, would tilt towards the appearance of retaliation against the said staff member than of anything else.

*Urgency*

34. The Tribunal is convinced that in view of Ms. Scott's previous conduct and her letter of 23 April 2013, including the two week time frame given the Applicant to respond, the issuance of at least another reprimand is imminent and accordingly finds that the Applicant has satisfied the test for urgency.

*Irreparable damage*

35. The Tribunal adopts the reasoning in *Tadonki* UNDT/2009/016 and *Ba* Order No. 057 (NBI/2012) as submitted by the Applicant. In addition, the Tribunal finds that the Applicant will continue to suffer undue stress and harm to his psychological well-being and professional reputation arising from the earlier reprimand if the tainted process is allowed to continue.

**Conclusion**

36. Based on the foregoing, the Tribunal grants this Application for Suspension of Action under art. 13 of the Tribunal's Rules of Procedure pending the second Management Evaluation Request filed by the Applicant on 24 April 2013.

Case No. UNDT/NBI/2013/016

Order No. 099 (NBI/2013)

*(Signed)*

Judge Nkemdilim Izuako

Dated this 6<sup>th</sup> day of May 2013

Entered in the Register on this 6<sup>th</sup> day of May 2013

*(Signed)*

Abena Kwakye-Berko, Officer in Charge, Nairobi Registry