



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/083

Order No.: 246 (NBI/2015)

Date: 28 July 2015

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

AZAGLO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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

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**Counsel for the Applicant:**

Amboko Wameyo

**Counsel for the Respondent:**

ALS/OHRM

## **Introduction**

1. The Applicant is a staff member of the United Nations Mission in Liberia (UNMIL). He filed the current application on 28 July 2015 seeking suspension of the decision instructing him to work from home during the pendency of an investigation by a fact finding mission into allegations of prohibited conduct that have been made against him (Contested Decision). The Contested Decision denies him access to his work station and UNMIL premises.

## **Facts**

2. On 16 July 2015<sup>1</sup>, the Applicant received an interoffice memorandum (IOM) from Mr. Mark Kroeker, Officer-in-Charge (OiC) of UNMIL, informing him of the allegations against him and that a panel had been formed pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) to conduct an investigation.

3. On 21 July 2015, the Applicant received an IOM from Mr. Hubert Price, UNMIL's Director of Mission Support (DMS), informing him that the fact-finding panel would be in UNMIL during the week of 27-31 July 2015 to investigate the allegations of prohibited conduct. Mr. Price further informed the Applicant that "it has been determined that you will work out of your apartment for a period of time that coincides with their visit/investigation, in lieu of coming onto UNMIL premises. This determination was made in line with the recommendation of the OIC, Conduct and Discipline, as a best practice employed in situations of this nature". The Applicant was then informed that the period during which he would work out of his apartment would be from 22 July to approximately 5 August 2015. Lastly, Mr. Price informed him that an OiC of Finance would be named to lead the Team through the period remaining to the closing of accounts.

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<sup>1</sup> The IOM is dated 15 July 2015.

4. On 22 July, the Fact-Finding Panel emailed the Applicant requesting his performance appraisal documents for 2013/2014 and 2014/2015, the names of his first and second reporting officers and an organigram of the Finance Unit. The Applicant responded the same day and apologized for his inability to provide all the requested information as a result of the instruction for him to work from his apartment, which limited his access to the relevant tools.

5. At 0821 and 1605 hours on 27 July 2015, the Chair of the Fact-Finding Panel, Mr. Anees Ahmed, provided the Applicant with excerpts of the complaints and requested a list of persons the Applicant wished to call as witnesses in support of his case. He was informed that the Panel would interview them during 29 and 31 July. Mr. Ahmed further directed him to provide his written response to the complaints, documents and witness list, no later than 2355 hours on 28 July 2015. The Applicant was also advised that he would be invited to provide an oral statement to the Panel “at a time to be fixed between 29 and 31 July 2015 in Monrovia”.

6. The Applicant wrote to Mr. Ahmed at 1746 hours on 27 July 2015 to request: (a) additional documentation relating to the complaints; and (b) an extension of time of three weeks to file his response.

7. The Applicant submitted a request for management evaluation on 28 July and subsequently filed this application for suspension of action with the Tribunal.

### **Considerations**

8. Applications for suspension of action pending management evaluation are to be decided in accordance with art. 2.2 of the UNDT Statute of the Dispute Tribunal and art. 14 of the UNDT Rules of Procedure.

9. In *Agha* Order No. 158 (NY/2015), Meeran J. observed that:

While it is clear that the Tribunal is under a duty to transmit a copy of the request for suspension of action to the Respondent and to issue a

decision within five days thereof, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to defer consideration of the request until receipt of the Respondent's response. In fact, service to the Respondent is all that is required under the Rules. The request for suspension of action stands or falls on its merits as presented at the time.

A request under art. 2.2 of the Statute is also predicated upon an ongoing and pending management evaluation of an administrative decision that may properly be suspended by the Tribunal and any order to suspend a contested administrative decision ends on the date on which the management evaluation is completed. Further, the Tribunal must proceed on the basis of an impression regarding whether the Applicant satisfies the three cumulative requirements in art. 2.2 of the Statute and art. 13 of the Tribunal's Rules of Procedure, namely that the decision *appears* to be *prima facie* unlawful, that the matter *appears* of particular urgency, and that the implementation of the decision would *appear* to cause irreparable damage. The Tribunal is not expressing a conclusive finding but merely applying the statutory test and expressing an opinion based on the material presented in support of this urgent request. Whether this preliminary indication is upheld when the substantive issues of fact and law are subsequently considered will depend on the evidence, arguments and submissions of the parties. However, the benefit afforded by the suspension of action procedure is to indicate a preliminary view which may assist either party to consider its position.

10. This Tribunal endorses the views expressed by Meeran J. and based on the circumstances of this present matter, decides that there is no need for the Tribunal to defer consideration of the Application until receipt of the Respondent's response, if any.

#### *Receivability*

11. The issue to be determined here is whether or not the impugned decision has been implemented. In *Ba* UNDT/2012/025, the Tribunal canvassed the issue of whether or not the Applicant's placement on administrative leave had been implemented. The Tribunal held that:

The continuing legal effect is carried forward by the suspension from duties, regardless of whether or not a staff member is being paid. Thus it is firmly the view of this Tribunal that a decision to place a staff

member on administrative leave—with or without pay—is a decision with continuing effect which may be suspended by the Tribunal at any time as long as the administrative leave endures.

12. In *Hassanin* Order No. 83 (NY/2011), Ebrahim-Carstens J. stated the following:

To allow the Respondent's interpretation would be to render the Tribunal impotent. It cannot have been the intention of the drafters of the Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the "implementation" of a decision. This would allow even the most tainted and unlawful decision to stand, so long as it has been implemented hastily.

13. In light of the foregoing, the Tribunal finds the application receivable.

*Prima facie unlawfulness*

14. The Applicant submits that the Contested Decision is unlawful because: (a) there is no legal basis for its issuance; it is a veiled decision to place him on Administrative Leave, (c) it breaches his basic due process rights; and (d) it casts a cloud of doubt as to his innocence during the fact-finding process. The Applicant submits that the Contested Decision presumes his guilt and further taints the fact-finding process even before he has had the opportunity to respond to the allegations levied against him. He submits that there is no evidence that he has or will tamper with any evidence or intimidate anyone as a result of the fact-finding thus the decision is unlawful.

15. The Applicant further submits that the Contested Decision is unlawful because the Fact-Finding Panel gave him only one day within which to respond to the serious allegations against him even though he has been denied access to his office where all of his official documents are located.

16. In *El-Khalek* 2014-UNAT-44, the United Nations Appeals Tribunal (UNAT) held that:

When a staff member is offered only 24 hours to defend himself against a very serious accusation and not even provided with details of the charges and the supporting evidence, the procedure becomes a parody of due process, and cannot be considered lawful.

17. UNAT has also held in several cases that “it is imperative that the Administration adheres to the rule of law and standards of due process in its decision making”.<sup>2</sup>

18. Additionally, in *Cabrera* 2012-UNAT-215, UNAT held that:

Placing a staff member on SLWFP denies him all the rights which he may otherwise be entitled to and the circumstances of the case indicated that the staff member was placed on SLWFP which was in the nature of a “veiled disciplinary measure” or “de facto disciplinary suspension”.

19. In the present matter, the documents the Applicant has placed before the Tribunal clearly indicate that his due process rights have been trampled on. The Tribunal has carefully examined the matter and cannot find even an ounce of legality in a decision by a panel, that has been established under ST/SGB/2008/5, to afford a staff member approximately 24 hours within which to provide a written response to serious allegations of prohibited conduct, particularly when the staff member is provided with only excerpts from the complaints against him and none of the supporting documentation submitted with the complaints. The Tribunal wishes to echo UNAT by stating that the procedure the Applicant is being subjected to is “a parody of due process, and cannot be considered lawful”.

20. ST/SGB/2004/4 (Flexible working arrangements) governs the process of “working from home”. The purpose of this SGB is to offer “more flexible working arrangements leading to a better balance between the professional and personal lives

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<sup>2</sup> Rees 2012-UNAT-65; Tadonki 2014-UNAT-400; and Hersch 2014-UNAT-433.

of the staff of the Secretariat”. The SGB further states that flexible working arrangements **require** a specific agreement and are purely **voluntary** for all concerned (emphasis added). Flexible working arrangements are not meant to be a catch-all which extends to Chapter X of the Staff Regulations and Rules of the United Nations. Staff rule 10.4 provides for a procedure that is to be used during the pendency of an investigation and until the completion of the disciplinary process.

21. The decision for the Applicant to work from his apartment was made pending an investigation by a fact-finding panel into grave allegations against him. The Applicant has been, in effect, placed on administrative leave during an investigation as contemplated by staff rule 10.4. The Administration is using a flexible working arrangement as a convenient avenue by which to circumvent judicial review in matters pertaining to administrative leave and thereby gives the imprimatur of legitimacy to what is actually an unlawful administrative decision. The Tribunal also finds that the Applicant being ordered to work from his apartment is in the nature of a “veiled disciplinary measure” or “de facto disciplinary suspension” without his due process rights being respected. The Tribunal finds therefore that the use of a flexible working arrangement for the purpose outlined in Mr. Price’s IOM is a breach of the Staff Rules.

22. This Tribunal finds that the non-adherence to proper procedures in this case means that the Applicant has met the threshold of *prima facie* unlawfulness which is one of the three conditions for the grant of this Application.

### *Urgency*

23. The Applicant has been directed to provide his response to the allegations of prohibited conduct by 2355 hours today although he has been barred from the UNMIL premises, and therefore effectively blocked from accessing important documents he may possibly need for his response. Based on the circumstances presented, the Tribunal finds this Application to be urgent.

*Irreparable damage*

24. The Applicant submits that even though he is still employed and drawing a salary, he is psychologically and negatively affected by the situation and is suffering undue stress, mental anguish and embarrassment. He submits that the decision to have him work from his apartment is already having an impact on his professional reputation because there are negative rumours spreading in the mission area about him.

25. In *Tadonki* UNDT/2009/016, this Tribunal held that unlawfulness should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. The Tribunal further held 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”.

26. Further, in *Calvani* UNDT/2009/092, the Tribunal held that damage to reputation and family distress is irreparable.<sup>3</sup>

27. This Tribunal does not doubt that the Applicant suddenly being ordered to work from his apartment and an OiC being appointed while he is in the mission area may have a profoundly negative impact on his professional reputation. The Tribunal also does not doubt that negative rumours have already started spreading about him as a result of the Contested Decision. The Tribunal finds that if this Application is refused, the Applicant will suffer irreparable damage that no amount of money can compensate him for.

**Decision**

28. The Application for suspension of action is granted.

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<sup>3</sup> See also *Villamorán* UNDT/2011/126



29. The decisions for the Applicant to work from his apartment and to provide a response to the Fact-Finding Panel by 2355 hours today, 28 July, are suspended pending management evaluation.

*(Signed)*

Judge Vinod Boolell

Dated this 28<sup>th</sup> day of July 2015

Entered in the Register on this 28<sup>th</sup> day of July 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi