



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RIECAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is the Chief of Service, Statistics, working with the United Nations Economic and Social Commission for Western Asia (“ESCWA”), based in Beirut, Lebanon. He serves on a permanent appointment at the D-1, step 11 level.¹
2. On 2 February 2021, the Applicant filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi. He seeks to suspend the decision dated 1 February 2021, which sets guidelines for performance management for the reporting cycle that commenced on 1 April 2020 and ends on 31 March 2021, changes his reporting lines as well as alters his supervisory responsibility.
3. The Respondent filed a reply on 5 February 2021.

Facts

4. On 1 February 2021, Ms. Souad Azar, Senior Human Resource Business Partner, ESCWA, through an email, circulated to the Applicant and other selected staff members a document entitled “Final Version of the ESCWA Performance Management Guidelines, Part 1.”² The Guidelines cover the reporting lines and work planning for all ESCWA staff members for the 2020-2021 performance cycle which is to end on 31 March 2021.³
5. ESCWA reform includes new working modalities within and across clusters that require staff members to work in multiple projects optimally under different clusters. Accordingly, more staff and managers across ESCWA are working in situations where they report to two or more project coordinators across different teams to deliver on projects.⁴

¹ Application, section V.

² Application, annex 1.

³ Ibid.

⁴ Application, annex 2, p.14.

6. As concerns the Applicant, ESCWA places five projects under his coordination, hence increasing his supervisory responsibilities.⁵ As a result, the number of staff for whom the Applicant will be their First Reporting Officer will increase.⁶

7. By the same email, Ms. Azar informed the recipients that she would convene a meeting on Wednesday, 3 February 2021, or Thursday, 4 February 2021, to discuss the “next steps and answer any questions or concerns” from the Applicant and other recipients of the email.

8. On 2 February 2021, the Applicant requested management evaluation of the contested decision. The Management Evaluation Unit is yet to respond.⁷

9. The meeting anticipated by Ms. Azar took place on 3 February 2021.⁸ The outcome of the meeting was not availed to the Tribunal.

Submissions

Applicant's submissions

Unlawfulness

10. The Applicant contends that the contested decision is unlawful because it contradicts ST/AI/2010/5 (Performance Management and Development System). Specifically, the 2020-2021 reporting cycle of the performance management was not initiated until now, the workplans were not established and midpoint reviews did not take place. The 2020-2021 cycle was not entered in e-Performance in *Inspira*. The decision communicated on 1 February 2021 was taken to rectify the shortcomings in performance management only two months before the end of the performance cycle.⁹

⁵ Application, annex 4, p. 28

⁶ Application, section VIII.

⁷ Application, section VI.

⁸ Reply, annex 1.

⁹ Application, section VIII.

11. The Applicant stresses that if the impugned decision is left to stand, the workplans for ESCWA staff members, including himself, will be incorrectly established *ex post facto*. By accepting the decision, the Applicant would *de-facto* cover up for non-compliance with the United Nations performance management system (ST/AI/2010/5) and this is against his conscience. The *ex post facto* workplans and performance evaluation will also be based on different reporting lines than those that staff members worked through most of the reporting cycle 2020-2021. With the new performance management, more middle level staff will be concentrated within his docket, therefore the number of staff for whom he will become a First Reporting Officer will significantly increase.

Urgency

12. The Applicant submits that this matter is urgent because, if the contested decision is implemented, erroneous performance records will be entered in *Inspira e-Performance*. The decision may be implemented within a week.

Irreparable harm

13. The Applicant avers that an improper handling of 2020-2021 performance management will have a negative effect on his career prospects, because the performance reports are required in case of a lateral movement or a promotion. The Applicant also opines that the decision will have a negative impact on the morale of staff.

Respondent's submissions

14. The Respondent primarily contends that the Application is not receivable *ratione materiae*. He advances two grounds. Firstly, the Applicant does not contest an administrative decision within the meaning of art. 2(1)(a) of the Dispute Tribunal's Statute. The 1 February 2021 email inviting the Applicant to a meeting to discuss the Guidelines has produced no direct legal consequences directly affecting his terms of appointment or employment contract. An administrative decision must have a direct

impact and not a future injury to be subject to judicial review. Secondly, the application is not receivable because the 1 February 2021 email has been implemented and is no longer capable of being suspended. The follow-up meeting occurred on 3 February 2021 with no adverse consequences to the Applicant.

15. The Respondent therefore requests the Tribunal to reject the application.

16. Should the Tribunal, however, find the application receivable, the Respondent submits that still the Applicant has not satisfied the three prerequisites for suspension of implementation of the decision.

Prima facie lawfulness

17. The Respondent submits that the email inviting the Applicant to the meeting to share and discuss the Guidelines was lawful. The meeting was called in accordance with sec. 4 of ST/AI/2010/5. In addition to being required as part of performance management, the meeting was also within the Secretary-General's broad discretion to structure and organize the work programme and make management decisions to that end.

18. The Guidelines as such were issued in accordance with ST/AI/2010/5 and the Office of Human Resources ("OHR") guidelines for "Dual Reporting Lines and Working in a Matrix Structure". That guidance states in the preamble that it was "prepared to complement Administrative Instruction ST/AI/2010/5".

Urgency

19. The Applicant has not demonstrated urgency. He acknowledges that he has been aware of the new work programme and has been involved in discussions regarding the matter for over a year. There is no basis for the Applicant's allegation that incorrect information would be entered in *Inspira*. The Applicant has not yet submitted his 2020-21 work plan. If he objects to developing one based on the new reporting lines and work modality, he could have raised that objection in the meeting

or with his managers.

Irreparable harm

20. The Applicant has not demonstrated irreparable harm. He has not received a performance appraisal for the 2020-2021 performance cycle. He has suffered no harm. There is no evidence that merely discussing guidelines for performance management has or will cause the Applicant harm. The alleged negative effect on his career prospects has no basis and is, at best, speculative.

21. Accordingly, the Respondent requests the Tribunal to reject the Application.

Considerations

22. Under art. 2.2 of the Dispute Tribunal's Statute, the Applicant must establish that: (i) the contested decision was *prima facie* unlawful; (ii) there is particular urgency; and (iii) implementation of the decision would cause irreparable harm. All three statutory requirements must be satisfied in order for the implementation of a contested decision to be suspended.

23. On the question of receivability, to the extent the Applicant challenges the guidelines for performance management, the approach based in devolution and the structure and the establishment of "Cluster Leads", the Tribunal cannot proceed to pronounce on whether it would be *prima facie* unlawful, as the decision is not in "a precise individual case" as required to trigger the Tribunal's jurisdiction.¹⁰ However, among the somewhat sweeping grievances of the application, there are clearly decisions of genuinely individual nature, i.e., the ones on the reporting lines, expressed by annexes to the guidelines. For the Applicant, these annexes establish new supervisory responsibilities and also subject him to a new supervisor, all of which presuppose developing individual workplans and assessing their

¹⁰ See former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003) para. V and *Lee* 2014-UNAT-481, para. 49.

implementation. Portraying the application as limited to the fact of sending an email and holding a meeting, is misrepresentation.

24. Regarding the Respondent's claim that the decision would have been already implemented because the online meeting committed to it had already taken place on 3 February 2021, the Tribunal recalls that, generally, attaching the notion of "implementation" to the moment of a mere notification would *de facto* disable the suspension of action as a procedural right in any possible decision, leaving it to the whim of the Respondent whether to grant advance notice to a staff member or not. This is clearly not the legislative intention behind art. 2 of the UNDT Statute. Moreover, the Tribunal considers it to be a matter of basic logic that, where a decision has a continuing effect, it cannot be deemed implemented as of the notification. It is established by jurisprudence of the UNDT across its seats, that a decision having continuous legal effect is only deemed to have been implemented when it has been implemented in its entirety¹¹; in this case this would be if the performance management had been concluded in accordance with the newly enacted reporting lines, at minimum, for the current appraisal cycle.

25. The Tribunal regrets to find that the Respondent's submission on receivability is frivolous.

26. With respect to the question of lawfulness, the Applicant does not aver that the terms of reference of his appointment foresaw him function in any precisely determined hierarchy. The matter is rather argued based on general rules. In this regard, the Respondent opposes in a two-fold approach. On the one hand, it is implied that managers have a blanket authorization to "complement", through issuance of guidelines on their different subordinate levels, the Administrative Instruction ST/AI/2010/5. The Tribunal agrees that complementing more general norms through more specific directions, when issued by a formally competent organ, may be a legitimate exercise. This said, "complementing" presupposes developing existing

¹¹ *Kompass* Order No. 99 (GVA/2015), *Calvani* UNDT/2009/092; *Gallieny* Order No. 060 (NY/2014), *Maina* Order No. 275 (NBI/2014) and *Abdallah* Order No. 080 (NBI/2017).

norms and filling gaps, if any, but not contradicting either the express provision of the superior act, or its overall spirit. The Tribunal fails to see how the creation of a retroactive, i.e., fictitious workplans for numerous staff members and evaluating them accordingly, might fall under a notion of legitimate “complementary” rule-making.

27. On the other hand, the Respondent invokes administrative discretion. Recalling that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”, and therefore, the Tribunal “will not interfere with a genuine organizational restructuring[...]”¹², the Tribunal also recalls that the second prong of the same jurisprudence, which affirms that, administrative discretion notwithstanding, “the administration has the duty to act fairly, justly and transparently in dealing with its staff members”.¹³ On the same note, the general standard of review of discretionary decisions is expressed by the Appeals Tribunal as follows:

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.¹⁴

28. This Tribunal considers that performance management, which bases evaluation of personnel on an entirely *ex post facto* “planning” and reporting lines, is unfair to staff and is absurd in its timing. The impugned decision is thus *prima facie* unlawful.

29. On the prong of urgency, the Tribunal agrees that the time left for the completion of the performance management cycle compared with the time for management evaluation renders the present case urgent. The insertion of data in the *Inspira* platform does not yet constitute implementation of the decision, still, it is

¹² *Hersh* 2014-UNAT-433-Corr.1 paras. 16-17 and references cited therein.

¹³ *Ibid.*

¹⁴ *Sanwidi* 2010-UNAT-084 para. 40.

difficult to reverse and will cause confusion and obfuscation of the system even if the impugned decision were to be ultimately altered by the management evaluation.

30. On the prong of irreparable damage, considering the number of staff put under the Applicant's supervision and also evaluation of his own performance, any further passage of time may disable the remedial action. The Applicant also makes a legitimate point regarding his reputation being at risk through participation in the exercise.

ORDER

31. The application is granted, and the impugned decision is suspended pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 8th day of February 2021

Entered in the Register on this 8th day of February 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi