



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Santiago Villalpando

KISAMBIRA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**

Vinita Ullal

**Counsel for Respondent:**

Sarahi Lim Baro, ALS/OHRM, UN Secretariat  
Christine Graham, ALS/OHRM, UN Secretariat

## **Introduction**

1. By way of application filed on 1 February 2011, the Applicant, who is the President of the United Nations Staff Union (New York) (“UNSU”), sought a suspension of action of the Administration’s decision to suspend the collection and remittance of the staff union dues to UNSU’s bank account. According to the application, the decision was conveyed to him by letter dated 26 January 2011 from the Assistant Secretary-General, Office of Programme Planning, Budget and Accounts (“the Controller”, “OPPBA”), which he received on 28 January 2011.

2. Due to the urgent nature of the application and the time frame imposed by the Dispute Tribunal’s Rules of Procedure, the Respondent was directed to file a response by 4 February 2011, which was done. A hearing was held on 7 February 2011, at which both parties attended, represented by their Counsel.

## **Facts**

3. On 29 October 2010 the Controller sent a memorandum to the Applicant, as President of UNSU, stating that, in accordance with the President’s request of 28 June 2010, staff members’ dues that are deducted through payroll had been remitted since June 2010 into the new account of UNSU. However, the Controller’s memorandum stated that, as a result of a separate conflicting request regarding where to deposit these funds, made by the Secretary of UNSU, the Controller had “decided to suspend, with immediate effect, the payments to the United Nations Staff Union of the dues collected from staff members through payroll, until the issue is resolved internally by the United Nations Staff Union”.

4. The President of UNSU met with the Controller in early November 2010 in relation to the suspension of the payment of the staff dues and on 8 November 2010 the President wrote to the Controller requesting the suspension to be lifted, stating that:

[T]he ultimate authority to implement all policies and decisions of the United Nations Staff Union, including financial governance and correspondence and certifying authority, is vested in the President of the United Nations Staff Union; in the latter's absence, it is vested in the First Vice-President. The Secretary or any other member of the United Nations Staff Union does not have any such authority.

5. The Applicant, as President of UNSU, subsequently followed the matter up with the Controller and the Under-Secretary-General, Department of Management ("USG/DM"), but no resolution was reached.

6. On 23 December 2010 the First Vice-President of UNSU (i.e., not the Applicant) filed a request for management evaluation of the decision not to remit the payments to UNSU of dues collected from staff members through payroll. On 13 January 2011 the Management Evaluation Unit responded that the request was not receivable as it was not submitted by the First Vice-President in his capacity as a staff member alleging non-compliance with his contract of employment or terms and conditions of appointment.

7. On 28 January 2011 the Director, Accounts Division of OPPBA, sent an email to members of UNSU, informing them that since October 2010 the Accounts Division had stopped remitting UNSU dues because of "conflicting instructions received from the President of the Staff Union and the Secretary, on behalf of the Executive Board", and that such dues were being held in trust. The email further stated that, from January 2011, the Accounts Division would suspend further collection of dues, pending the resolution of UNSU's internal dispute.

8. On 28 January 2011 the Applicant, as President of UNSU, received a letter dated 26 January 2011 from the Controller. This letter informed the Applicant:

[That the Controller had] decided to temporarily suspend, from the month of January 2011, the deduction of staff union dues from the salaries of staff members, to avoid any legal liability for the UN arising from such continued collection ... [T]he suspension of this voluntary service is temporary and can be lifted once we get a clear instruction for

the remittance of the funds in a manner that satisfies us that such collection and remittance will not entail any legal liability for the UN.

...

In order to avoid the recurrence of a similar situation in future, we would also require that an agreement between the Staff Union and OPPBA be memorialized in a written document that will, inter alia, clearly identify the staff union officials with signatory authority for providing instructions to OPPBA.

...

We are informing the concerned staff members that we will hold the amounts collected for an additional three months in anticipation of an early resolution of the issue and that, should the issue remain unresolved beyond this three month period, we will refund the amounts collected to the concerned staff members.

...

9. The Applicant filed his application with the Dispute Tribunal on 1 February 2011.

### **Applicant's submissions**

10. The Applicant's primary contentions may be summarised as follows.

#### *Prima facie unlawfulness*

a. The decisions to suspend the remittance of UNSU dues to its bank accounts and to suspend the deductions of the dues through payroll interfere with:

- i. the principle of freedom of association and the right to association of staff;
- ii. the eligibility of staff members for election to the staff representative body, the Staff Union; and
- iii. the effective participation of the Staff Union in identifying, examining and resolving issues relating to staff welfare, including

conditions of work, general conditions of life and other human resources policies.

b. The decisions are at odds with the established principle of non-interference by management in the internal affairs of the Staff Union (see: staff regulation 8.1 and staff rule 8.1; UNSU Statute and Regulations, secs. 10, 12, and 13).

*Urgency*

c. The contested decisions have interfered with the election process for the 44<sup>th</sup> Staff Council, as sec. 13.3 of the UNSU Statute and Regulations requires that “all candidates for election to office must be dues paying members in good standing of the Union”. Further, the UNSU cash flow and activities are impeded and the decisions also suggest that the management of UNSU, and especially its finances, is in turmoil. The decisions may prompt the voluntary contributors to stop contributing altogether.

*Irreparable damage*

d. The decisions will allow the Respondent to interfere in UNSU affairs and will undermine the right to freedom of association.

e. The decisions undermine and violate the Statute and Regulations of UNSU, which are clear on the responsibilities of its officers with regard to financial governance and correspondence (notably, the President is the certifying officer, is responsible for finances and is responsible for communications on UNSU’s behalf). By acceding to the correspondence and instructions from another party other than the Staff Union President, the Controller has questioned his authority, repute and responsibilities.

## **Respondent's submissions**

11. The Respondent's primary contentions may be summarised as follows.

### *Receivability*

a. A request for suspension of action may be granted in situations where the impugned decision has not yet been implemented. The decisions that the Applicant is seeking to suspend have already been implemented. Consequently, the application is moot.

b. The application is not receivable as no request for management evaluation has been filed by the Applicant. A staff member applying for a suspension of action must file a request for management evaluation prior to seeking a suspension of action before the Tribunal.

c. The application is equally not receivable because the Applicant's request was not submitted in his capacity as a staff member alleging non-compliance with his terms of appointment or employment contract. Rather, the Applicant submitted his application in his capacity as the President of UNSU. Staff associations have no standing before the Tribunal.

### *Prima facie unlawfulness*

d. The Applicant has not identified how the contested decisions violate his contract of employment or his terms of appointment. Moreover, the contested decisions were entirely reasonable given the circumstances. The Administration acted in good faith and in conformity with its procedures for dealing with payment instructions of third parties.

e. Staff members who wish to contribute to the Staff Union provide written authorization that UNSU then forwards to OPPBA. There is no statutory basis for this service. The Administration is not obligated to assist UNSU in its collection of membership dues.

*Urgency*

f. The Applicant has only put forth claims involving UNSU. He has not shown how the contested decisions are of particular urgency in respect of his rights as staff member.

g. There is no particular urgency.

*Irreparable damage*

h. There has been no showing that the impugned decisions would cause irreparable damage to the Applicant's rights as a staff member.

**Considerations**

12. The Respondent contends that the Applicant has submitted his request not in his capacity as a staff member alleging non-compliance with his terms of appointment or employment contract, but in a representative capacity as the President of UNSU. The Respondent contends that staff associations, having no standing before the Tribunal, the application is not receivable.

13. Article 3.1 of the Tribunal's Statute, read in conjunction with art. 3.2, provides that an application, including an application for suspension of action pending management evaluation, may be filed by:

- a. Any staff member of the United Nations;
- b. Any former staff member of the United Nations;
- c. Any person making claims in the name of an incapacitated or deceased staff member of the United Nations.

14. Article 2.1 of the Tribunal's Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... against the Secretary- General as the Chief Administrative Officer of the United Nations:

(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. Article 2.2 of the Tribunal's Statute states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation [...].

16. The nature of the dispute can be distilled from the background and history of the dispute as reflected by the communications between the parties, the issues raised, and the communications between the parties and the Management Evaluation Unit, if any, as well as the subject matter of the referral to the Management Evaluation Unit. It is clear from the record, including the correspondence between the parties, that the Applicant, at least initially, sought to challenge the decisions in his capacity as President of UNSU, and on its behalf. This is evident from his description of how the impugned decisions would affect UNSU and the membership at large. It is also evident from the fact that the Applicant did not file for management evaluation of an administrative decision affecting his rights, but that the First Vice-President challenged the decisions and filed for management evaluation.

17. However, when asked at the hearing as to the nature of the dispute and the capacity of the Applicant, Counsel for the Applicant, as well as the Applicant himself, submitted that the Applicant came before the Tribunal as an individual and not in a representative capacity. Despite this, the Applicant did not provide an explanation as to



how his individual terms of appointment were affected by the decisions he sought to impugn. From the clear wording of its Statute, this Tribunal does not have jurisdiction *ratione personae* in relation to applications filed by or on behalf of UNSU. The application therefore fails on this ground alone, however the Tribunal also wishes to point out another fundamental flaw with the application as it currently stands.

18. Article 8.1 of the Tribunal's Statute states:

An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.

...

19. The Appeals Tribunal has held that requesting management evaluation is a mandatory first step in seeking the review of an administrative decision—see, e.g., *Planas* 2010-UNAT-049. Despite the fact that *Planas* dealt with an application under art. 2.1 of the Statute (rather than art. 2.2, as in the instant case), the procedural requirements are analogous. Additionally, the phrases “during the pendency of the management evaluation” and “[an application] that is the subject of an ongoing management evaluation” in art. 2.2 confirm further that the filing of a request for management evaluation is also a mandatory requirement for an application under art. 2.2.

20. At the hearing of the matter the Applicant conceded that he had not submitted a request for management evaluation of the contested decisions *qua* his capacity as a staff member, or at all. He argued that this was justifiable, because he only found out about the implementation of the impugned decisions on the same day that the latter of them occurred, being 28 January 2011.

21. An applicant has 60 days from notification of an impugned decision to request management evaluation, in accordance with staff rule 11.2. There is nothing in the legal instruments to suggest an exception whereby an applicant may circumvent the

requirement to submit a request to management evaluation of an administrative decision of this type, even if the notification of the decision occurs on the same day as its implementation. The application is therefore not receivable for the additional reason that the Applicant has failed to adhere to the strict requirements of art. 2.2 of the Tribunal's Statute, as no request for management evaluation has been submitted.

22. It is of course open to any staff member (including the Applicant) as an interested party who has been affected by the decisions taken by the Respondent to make an appropriate application before the Tribunal. Such application must be in compliance with the requirements for an application for suspension of action under art. 2.2 of the Statute and art. 13 of the Rules of Procedure. In this regard I may add that the present Order may, in effect, simply be postponing the inevitable.

23. The Respondent contends that the collection and transmission of membership dues is done entirely voluntarily. However, in accordance with general principles and international labour norms (including as expressed in international instruments on the right to freedom of association and collective bargaining), the Respondent has an obligation to facilitate organisational rights of staff members. The Respondent contends that, in view of the conflicting present UNSU instructions, he has acted in the best possible way in such facilitation without interfering in the internal affairs of UNSU, even providing the Union with a three-month grace period to resolve the internal dispute. It is regrettable that because of a dispute within UNSU which has caused the conflicting instructions to be given to OPPBA as to the banking arrangements, it is the rank and file members that are primarily affected. The Tribunal hopes that this matter will be resolved without further recourse to proceedings.

IT IS ORDERED THAT:

24. The application for suspension of action is not receivable and is rejected.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 7<sup>th</sup> day of February 2011