



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

A-ALI et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES**

Counsel for Applicant:

Lennox S. Hinds
Claire Gilchrist

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat
Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. On 12 September 2011, the Applicants, a group of staff members in the General Service category, filed an application under art. 2.1 of the Dispute Tribunal's Statute, contesting the decision by the Department of Management to discontinue the payment of monthly salary to General Service staff in two separate disbursements, approximately two weeks apart from each other. In their application filed under art. 2.1 of the Statute, the Applicants request that the decision to eliminate the mid-month salary payments be overturned or, in the alternative, that this decision be applied only to newly-hired staff.

2. On 12 September 2011, the Applicants also filed a motion for interim measures, seeking suspension of the implementation of the contested decision. This motion is considered in the present Order.

3. The Applicants submit that, although the Department of Management's decision took effect on 1 September 2011, the first implementation of the decision will occur on 16 September 2011, the date on which General Service staff would otherwise have received their mid-month payment.

Note on procedure

4. On 12 September 2011, the Dispute Tribunal received 65 emails with applications and motions for interim measures in relation to a number of staff members. By email of 12 September 2011, the Registry requested Counsel for the Applicants to re-file these submissions as one consolidated application under art. 2.1 of the Tribunal's Statute in relation to all Applicants and one consolidated motion for interim measures under art. 10.2 of the Statute. Counsel for the Applicants was informed as follows: "If, and to the extent that the individual situations of each of the [A]pplicants vary, any such relevant differences should be clearly identified in the application on the merits and motion for interim measures". The Registry further

stated that the Tribunal would consider 12 September 2011 as the original filing date of the consolidated application and consolidated motion.

5. The application and the motion were duly filed by the Applicants on 12 September 2011 (after close of business) and, on 14 September 2011, the Registry transmitted them to the Respondent. The Respondent was informed that his reply to the motion for interim measures was due by 4 p.m., 15 September 2011, and his reply to the application filed under art. 2.1 of the Tribunal's Statute was due 14 October 2011. The Respondent's reply to the motion for interim measures was duly filed.

6. Having reviewed the parties' submissions, the Tribunal determined that it had sufficient information before it to decide the present motion on the papers before it, without a hearing.

List of Applicants

7. It appears to be common cause that requests for management evaluation of the contested decision were filed by 39 staff members, there being no indication as to their ratio to the total number of those affected by the decision. However, the list of Applicants, attached to the application filed under art. 2.1 of the Statute, contains names of 40 staff members. It appears that, with respect to one of these staff members, whose name is at the bottom of the list of Applicants, the application lacks relevant information, including in relation to his request for management evaluation, and it may be that his name was included in error. Therefore, for the purposes of the present Order, the Tribunal will refer to 39—not 40—Applicants. In due course, the Tribunal may require clarifications from Counsel for the Applicants as to the final list of his clients.

8. A request for management evaluation is a mandatory first step in the appeal process, with exceptions stipulated under staff rule 11.2(b) (see *Syed* 2010-UNAT-061, *Crichlow* UNDT/2009/028, *Caldarone* UNDT/2009/035, *Planas* UNDT/2009/070, *Parmar* UNDT/2010/006, and *Jaen* UNDT/2010/165). Applications by staff members who have not requested management evaluation,

when required to do so, are not receivable. Where there is more than one applicant in the same matter it would be prudent for applicants to keep an accurate and clear record of each request for management evaluation submitted by them, as well as other related documents and dates, to avoid unnecessary litigation and delays. However, it appears that some Applicants in this case filed their requests in person and failed to retain copies. The Tribunal accepts, and the Respondent has not disputed, that identical management evaluation requests were filed by each Applicant in this case.

9. The present motion for interim measures was filed by 32 of the 39 Applicants whose names appear on the application under art. 2.1 of the Statute. The Respondent submits that the claims of several of the Applicants, including some of those who have submitted the present motion, are time-barred as their requests for management evaluation were filed outside of the prescribed time limits. However, as a result of its findings in relation to the present motion, the Tribunal does not consider it necessary at this stage to determine whether the claims of any of the Applicants are time-barred, particularly since there is conflicting information regarding the exact dates some of the Applicants were notified of the contested decision. This aspect of the case will need to be revisited when the Tribunal considers the application, and appropriate orders will be issued in due course.

Background

10. It is common cause that, for a number of years, General Service staff members in New York have been receiving their monthly salary in two separate disbursements, approximately two weeks apart from each other. The Respondent submits that the mid-month payments have been processed as salary advances that are subsequently deducted from the total salary paid at the end of each month. However, the Organization is currently in the process of replacing the existing payroll and management support systems, and, as part of this process, decided to eliminate the mid-month salary payment to staff in the General Service category.

11. Initially, this decision was scheduled to be implemented effective May 2011, as was announced by the Department of Management through a notice posted on iSeek (the Organization's intranet website) on 25 February 2011. The iSeek notice invited staff in New York to a town hall meeting, stating that it was "intended to inform staff, to allow time to prepare for this change, and to brief staff on the imperatives behind this measure".

12. The town hall meeting was convened on 1 March 2011, and, on 23 March 2011, another announcement was posted on iSeek, stating that the Department of Management decided to defer the implementation of the decision to discontinue mid-month payments until 1 September 2011. The iSeek posting stated:

Following the town hall held on 1 March 2011 in New York and after listening to the concerns expressed by staff, management has further consulted and has decided to defer the implementation date of the cessation of [General Service] mid-month salary to 1 September 2011.

In addition, management also decided on advancing the payroll by five working days—people being paid a week before the end of the month—and allowing the possibility of exceptional salary advances until the end of the year subject to the provision of appropriate justification. This will afford staff additional advance notice before the new measure goes into effect.

13. Although there are some discrepancies in various tables summarising relevant dates, as provided by the Applicants, the Applicants submit that most of them became aware of the contested decision on 13 May 2011, although several Applicants were notified of it in March 2011, around the time of the iSeek posting of 23 March 2011.

14. The Applicants subsequently submitted their requests for management evaluation of the contested decision. Almost all Applicants requested management evaluation on 23 May 2011, although several Applicants submitted their requests for management evaluation on 24 and 27 May 2011, and one Applicant submitted her request on 1 June 2011. The requests for management evaluation, provided to the Tribunal, indicate that the Applicants were aware that the decision would be implemented effective 1 September 2011.

15. On 21 June 2011, the Management Evaluation Unit confirmed that it had received 39 management evaluation requests. The Management Evaluation Unit stated that, after its preliminary review of the requests, it had determined that the requests of five staff members were time-barred as they were submitted after the deadline provided for in staff rule 11.2(c).

16. By letter dated 23 June 2011, signed by the Deputy Secretary-General, the 34 Applicants whose requests were deemed receivable by the Management Evaluation Unit were informed of the Secretary-General's decision to uphold the contested decision. The letter referred to 1 September 2011 as the date of the implementation of the contested decision.

Applicant's submissions

17. The Applicant's principal contentions may be summarised as follows:

Urgency

a. The contested decision will go into effect on 16 September 2011, and will continue to be implemented on the sixteenth day of each month thereafter. While the Administration has provided the Applicant with the exceptional possibility of applying for salary advances until the end of 2011, these requests will have to be renewed every month and there is no guarantee that they will be granted. Furthermore, when requesting exceptional salary advances, the Applicants will be required to comply with the improper requirement of disclosing details of their personal finances to the Administration;

Irreparable damage

b. The elimination of mid-month payments will have a profound effect on the Applicants' fundamental right to just and fair conditions of work. The Applicants will be required to strictly budget their expenditures over a one-

month period with little savings to buffer their financial obligations. The continued stress of less frequent salary payments will result in damage and deterioration of the Applicants' general conditions of life and welfare. The Applicants may default on their financial obligations, which may require the Applicants, and those who rely on them for support, to re-finance their mortgages, re-negotiate child and spousal support payment agreements, and make other adjustments. Missing a financial payment may cause, in addition to pecuniary penalties, damage to an individual's personal credit rating. The proposed transitional measures, in place until the end of the year, do not eliminate the costs or irreparable harm caused by the implementation of the contested decision;

Prima facie unlawfulness

c. The unilateral decision to eliminate the mid-month payment, which has been in place for over 30 years, is unlawful. It violates the Applicants' right to just conditions of work and the right to participate in the setting of the interval of salary payment. The contested decision is also in breach of an implied term of the Applicants' contract of employment or, in the alternative, their acquired right to a mid-month payment. The contested decision also violates the Flemming principle, which requires that conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other employers in the locality. The frequency of salary payments is a basic element of conditions of employment, and New York law requires employers to pay clerical and other similar categories of workers at least once every two weeks. Further, the contested decision is unlawful because it was contrary to the Administration's obligations under staff rule 8.1(f) to allow effective staff participation in resolving issues related to conditions of work. The contested decision was also procedurally defective as no proper administrative issuances have been promulgated on this issue.

Respondent's submissions

18. The Respondent's principal contentions may be summarised as follows:

Urgency

a. This matter is not urgent. The Applicants were first placed on notice of the decision on 25 February 2010, when an announcement was posted on iSeek. Even by their own admissions, the Applicants have been aware of the contested decision since May 2011. The Tribunal has consistently held that, for the requirement of particular urgency to be satisfied, it cannot be self-created. However, the Applicants waited for almost four months—from 23 May to 12 September 2011—to file the present motion;

b. Furthermore, each Applicant has the option of requesting salary advances until the end of the year, and, therefore, the matter cannot be considered urgent. Staff rule 3.15(b) requires that requests for salary advances be supported by “a detailed justification in writing”. Any information the Applicants would be required to provide to the Administration when requesting salary advances would be used solely for the purposes of making a decision on their requests;

Irreparable damage

c. The Applicants have not demonstrated how the implementation of the decision would cause them irreparable harm. Any financial loss would be recompensed should the Tribunal find in favour of the Applicants when considering the application filed under art. 2.1 of the Statute;

d. The Applicants had several months to make appropriate arrangements and, furthermore, the Administration put in place transitional measures until the end of the year, including moving the day of salary disbursement for General Service staff by five working days (i.e., to the end of the third week of each month);

Prima facie unlawfulness

e. The Applicants have failed to demonstrate that the contested decision is *prima facie* unlawful. The decision to remove mid-month payments was made for proper reasons. The monthly payment of salary is used in relation to the overwhelming majority of staff members and is a permissible arrangement. The mid-month payment of salary is not an acquired right;

f. The International Civil Service Commission, whose role it is to coordinate conditions of service of staff, has never considered periodicity of payment to be among the basic elements of compensation under the Flemming principle. This is an administrative matter which is left to the discretion of the Organization;

g. The Administration held appropriate consultations with staff regarding this decision, which included two meetings of the Joint Negotiations Committee, held on 13 December 2010 and 8 February 2011. The process leading to the decision was transparent and had all the hallmarks of sound administration;

h. The contested decision did not require an administrative issuance as it concerned only General Service and related categories of staff in three duty stations. Similarly, when the original arrangement for the mid-month payments was put in place, no bulletins or administrative instructions were promulgated.

Consideration

19. A motion filed under art. 10.2 of the Tribunal's Statute is, by its nature, a request for urgent interim relief pending final resolution of the matter. It is an extraordinary discretionary relief, which is generally not subject to appeal, and which requires consideration by the Judge within five days of the service of the motion on the Respondent (see art. 14.3 of the Tribunal's Rules of Procedure). Such motions

disrupt the normal day-to-day business of the Tribunal. Therefore, parties approaching the Tribunal with motions for interim relief must do so on real urgency basis, with full disclosure of the facts relied on for relief and sufficient information for the Tribunal to decide the matter preferably on the papers before it. The proceedings are not meant to turn into a full hearing. The motion must not be frivolous or an abuse of process, or else the requesting party may well be mulcted in costs.

20. Pursuant to art. 10.2 of its Statute, the Tribunal may order interim relief only if it is satisfied that all three requirements of that article have been met—i.e., that the case is of particular urgency, that the implementation of the contested decision would cause irreparable damage, and that the decision appears *prima facie* to be unlawful.

Urgency

21. The Dispute Tribunal has stated in a number of rulings that the requirement of particular urgency will not be satisfied if the urgency is self-created or caused by the party seeking interim relief (see, e.g., *Villamorán* UNDT/2011/126 and *Dougherty* UNDT/2011/133).

22. The Applicants submit that the announcements posted on iSeek did not amount to a proper notice of the contested decisions. The Respondent appears to disagree. However, at this stage, the Tribunal does not need to determine the precise date on which each Applicant was notified of the contested decision. It is common cause that all requests for management evaluation were filed between 23 May and 1 June 2011. Taking the Applicants' case at its best, it necessarily follows that each of the Applicants was aware of the contested decision prior to the date of her or his request for management evaluation of the decision. The requests for management evaluation indicate that the Applicants were aware that the contested decision would go into effect on 1 September 2011, with the first mid-month payment not being processed on 16 September 2011. Furthermore, the Applicants received the reply to their requests for management evaluation on 23 June 2011, which also referred to

1 September 2011 as the date when the decision would go into effect. Nevertheless, the Applicants waited until 12 September 2011—four days prior to 16 September 2011, the date on which the Applicants would otherwise have received the mid-month payment—to submit their motion for interim relief. The Tribunal is not persuaded that there are any good reasons for the Applicants filing the present motion after 1 September 2011 and only four days prior to 16 September 2011, when they knew of the change months in advance.

23. In the circumstances, the Tribunal finds that the urgency in this matter was created by the Applicants. Consequently, the Applicants have failed to meet the test of particular urgency with regard to his motion.

24. As one of the three conditions required for temporary relief under art. 10.2 of the Statute has not been met, the Tribunal need not determine whether the remaining two conditions—irreparable damage and *prima facie* unlawfulness—have been satisfied. However, considering that, in the circumstances of this case, the issues of urgency and irreparable damage are somewhat related (as explained below), the Tribunal finds it appropriate to include its observations regarding the Applicants' claims that the implementation of the contested decision would cause irreparable damage.

Irreparable damage

25. The Tribunal is not persuaded by the submissions regarding the irreparable nature of the harm that would be caused by the implementation of the contested decision.

26. The Tribunal finds that, considering that the Applicants were aware of the changes in the timing of their salary payments well before September 2011, as explained above in the section regarding the alleged urgency of the present case, they had sufficient time to make appropriate adjustments to avoid at least some of the alleged negative effects of the contested decision.

27. Furthermore, the Tribunal notes the undertaking by the Administration to consider, on individual basis, any requests for salary advances, “subject to the provision of appropriate justification”. The Applicants have provided no reason to conclude that the Administration’s undertaking to consider any such requests was made in bad faith. The Tribunal is also not persuaded by the Applicants’ submission that, because they would have to provide the Administration with “appropriate justification”, their fundamental rights would be breached. There is no indication that the required justification would be beyond what one might reasonably expect under staff rule 3.15 (on salary advances).

28. In any event, the Tribunal finds that the Applicants have failed to persuade the Tribunal on the papers filed that the implementation of the contested decision would cause harm that could not be compensated by an appropriate award of damages.

29. As the Applicants failed to satisfy the conditions of particular urgency and irreparable harm, no determination will be made as to the *prima facie* unlawfulness of the contested decision.

30. The Tribunal notes and appreciates the diligent and professional efforts of both Counsel in complying with its directions and orders in this matter.

Conclusion

31. The Applicants’ motion for interim relief is denied.

(Signed)

Judge Ebrahim-Carstens

Dated this 16th day of September 2011