



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2014/070  
Order No.: 339 (NY/2014)  
Date: 12 December 2014  
Original: English

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**Before:** Judge Alessandra Greceanu  
**Registry:** New York  
**Registrar:** Morten Albert Michelsen, Officer-in-Charge

OMWANDA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF ACTION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Stephen Margetts, ALS/OHRM, UN Secretariat

Notice: This Order has been corrected in accordance with the Rules of Procedure of the Dispute Tribunal.

## **Introduction**

1. On 5 December 2014, the Applicant, a Security Officer at the S-2/6 level in the Security and Safety Service (“SSS”), Department of Safety and Security (“DSS”), filed an application for suspension of action pending management evaluation, pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13 of its Rules of Procedure. The Applicant seeks the suspension of the decision of 21 November 2014 made by the Under-Secretary-General (“USG”), DSS, to initiate a preliminary investigation against the Applicant by appointing a fact-finding panel to investigate the Applicant’s possible unsatisfactory conduct.

2. On 5 December 2014, the Registry acknowledged receipt of the application and, on behalf of the Tribunal, ordered the Respondent to submit his reply by 5:00 p.m., 9 December 2014.

3. On 9 December 2014, the Respondent filed his reply.

4. On 11 December 2014, the Applicant filed, without leave from the Tribunal, a submission in response to the Respondent’s reply. Considering the urgent nature of the application and the particular circumstances of the case, the Tribunal will allow this submission.

## **Submissions of the parties**

5. In support of his claim, the Applicant contends that the contested decision is *prima facie* unlawful on the grounds that a parallel investigation is being conducted on some of the issues that are currently pending before the Tribunal in another case (UNDT/NY/2014/057). The Applicant submits that the investigation panel will require confidential information which can only be shared with the Dispute Tribunal. The Applicant also submits that “the decision [of the USG/DSS] to get more facts from [the Applicant] through the panel is *sub judice*”. Further, the Chief of SSS, “has recorded statements from alleged witnesses and submitted a full investigation report

to [the USG/DSS] without informing the Applicant that a parallel investigation was being conducted”. This decision “will deny the Applicant the right to an impartial hearing” and is in violation to his due process rights.

6. The Applicant considers this matter to be urgent and causing irreparable harm on the grounds that, in the absence of the suspension of the decision, the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) will follow the investigation panel’s findings and/or recommendation, will place the Applicant on administrative leave and will terminate his contract of employment. The Applicant contends that the investigation panel cannot be trusted to be impartial. Further, the Applicant submits that the contested decision is motivated by ill will and his supervisor is aware of the medical conditions of his children who require frequent medical attention which can best be provided in the United States and not Kenya, where he would have to return if terminated. The Applicant considers that he has suffered humiliation, distress and unnecessary pressure caused by the continuous adverse decisions taken against him.

7. The Respondent contends that the application should be dismissed. As a matter of receivability, the Respondent submits that, in the absence of a request for management evaluation prior to the filing of the application, it is not susceptible of being suspended under art. 2.2 of the Statute of the Dispute Tribunal. The Respondent also submits that, in any event, no final administrative decision has been taken since the decision to conduct an investigation is a preparatory and preliminary process that may only be challenged in the context of an appeal against a final decision to impose a disciplinary measure.

8. On the merits, the Respondent submits that the decision to appoint a fact-finding panel and to conduct an investigation is lawful. The Respondent further contends that the Applicant has failed to demonstrate that any of the two other statutory requirements for granting a suspension of action have been met, namely irreparable harm and urgency, as no action has been taken that would have an impact upon the Applicant’s rights. There has been no determination by the Under-Secretary-

General, Department of Management (“USG/DM”) as to whether to report this matter to the ASG/OHRM. Further, no determination or recommendation has been made by the ASG/OHRM as to the imposition of disciplinary measures. The Applicant’s assertions regarding the irreparable harm that may be caused should the Tribunal refuse to suspend the contested decision pending management evaluation amount to mere speculation.

9. In his response to the Respondent’s reply, the Applicant submits that the application is receivable given that a request for management evaluation was duly filed and that management evaluation is still ongoing. The Applicant also submitted that the contested decision is an administrative decision that may be suspended by the Tribunal since it is based on improper motives and, as such, impacts the Applicant’s terms of employment.

10. On the merits, the Applicant contends that the contested decision is unlawful on the following grounds:

[The USG/DSS] decision has been made on the recommendation of a parallel investigation [the Chief, SSS] has been conducting, while aware the subject issues under such investigations, are clearly matters before the Dispute Tribunal.

The decision of [the Chief, SSS] to conduct an investigation and submit his recommendation to [the USG/DSS], on matters he clearly knew are before the Dispute Tribunal, was improper and unlawful.

The decision of [the Chief, SSS] to conclude his recommendation without [the] applicant’s input or access to such investigation/review or fact-findings violated [the] applicant’s due process rights. The issue is whether it is proper, reasonable and lawful for any staff member or administrator to review matters before the Tribunal without leave of the Tribunal.

...

[The USG/DSS] action of referring the matter back to [the Chief, SSS], whom the applicant had allegedly accused of unfair treatment and discrimination, was the reason [the] applicant requested [management evaluation] and further appealed the decision before the Tribunal.

...

[The USG/DSS] and [the Chief, SSS], did not have [the] authority to freshly review, change or make new recommendations and decisions on matters, which had passed them. [...]

...

[...] There would be no finality of justice to the applicant, if any administrator can, at will, bring back or re-open and review the same issues, regardless of the justice process.

...

The [contested decision is] a further punishment on the applicant, beyond the withdrawal of his weapon and the re-training which he has already endured.

11. The Applicant also submits that the allegations relating to his access to restricted area without authorization are unfounded. The Applicant contests the alleged breach of security on the grounds that the said area was not restricted as he was in the Security Office, which is not a restricted area for security officers, not in the Consultation room, where the President of the United States was.

12. The Applicant requests the Tribunal to “receive and grant a fair and just termination of the matter”.

### **Relevant background facts**

13. The background facts are set out in the parties’ submissions and the written documentation on the record. The relevant facts to the present application for suspension of action are those set out below.

14. On 27 February 2014, the Applicant was posted at an entrance to the United Nations Secretariat building in New York. While he was operating the gate controls, the gate closed on a car, causing minor damages. Following an investigation, it was determined that the incident occurred due to the Applicant’s negligence. A performance notice was issued to the Applicant.

15. On 12 September 2014, the Applicant notified his superior of his refusal to abide by his order to attend a re-training program on how to operate the gate.

16. On 24 September 2014, allegedly with no authorization or official reason, the Applicant entered an area in the immediate vicinity of the offices of the dignitaries who were attending a high-level session of the Security Council, under the Chairmanship of the President of the United States.

17. On 7 October 2014, the Applicant followed the re-training session on how to operate the gate controls.

18. On 21 November 2014, the USG/DSS notified the Applicant of his decision, pursuant to para. 2 of ST/AI/371 (Revised disciplinary measures and procedures) to appoint a fact-finding panel to investigate the following allegations of misconduct of the Applicant:

- a) Insubordination, for refusing to carry out a lawful order, in violation of staff rule 1.2(a).
- b) Violation of SSS Standard Operating Procedure OPS-46, section 46.03.05 which led to the damage of a Mission vehicle.
- c) Violation of SSS Standard Operating Procedure OPS-20, sections 20.05 and 20.06, in positioning yourself in a highly restricted area while off duty, without permission or reasonable cause.
- d) Violation of the standards of conduct expected of an international civil servant.

19. On 3 December 2014, the Applicant forwarded to the Management Evaluation Unit (“MEU”), the email whereby he received notification of the USG/DSS decision of 21 November 2014. In his email, entitled “Harassment”, the Applicant requested the MEU to “assist [him] settle at [his] work by amicably solving the perennial subject that has been done against [him] by [the USG/DSS] and [the Chief SSS]”.

20. On 5 December 2014, the MEU informed the Applicant that his email of 3 December did not constitute a request for management evaluation and invited him to submit the appropriate form, duly completed.

21. On the same date, the Applicant filed his application for suspension of action.

22. On 8 December 2014, the Applicant indicated to the MEU that the contested decision was attached to his previous email but nevertheless attached the requested form, duly filled.

### **Consideration**

#### *The competence of the Dispute Tribunal*

23. The United Nations Appeals Tribunal ruled in *O'Neill* 2011-UNAT-182 (affirming UNDT/2010/203) that “the UNDT is competent to review its own jurisdiction, whether or not it has been raised by the parties”. The Tribunal is therefore mandated to review its competence.

24. Pursuant to art. 2.2 of its Statute, the Dispute Tribunal:

... shall be competent to hear and pass judgment 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 ...

25. Article 8.1 (c) of the Tribunal’s Statute states that an application shall be receivable if

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

26. Staff rule 11.2 (Management evaluation) of ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations) provides that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

27. Article 13.1 of the Tribunal’s Rules of Procedure states that:

The Dispute Tribunal shall order a suspension of action 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, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

28. The Tribunal considers that, for an application for suspension of action to be successful, it must satisfy the following cumulative conditions:

- a. The Applicant requested management evaluation of the contested decision, which evaluation is ongoing;
- b. The contested decision has not yet been implemented;
- c. The application concerns an administrative decision that may properly be suspended by the Tribunal;
- d. The impugned administrative decision appears *prima facie* to be unlawful;
- e. The case is of particular urgency; and
- f. Its implementation would cause irreparable damage.

*Procedural requirements*

Ongoing management evaluation

29. An application under art. 2.2 of the Statute is predicated upon an ongoing and pending management evaluation of the contested decision.

30. The Applicant forwarded the contested decision to the MEU on Wednesday, 3 December 2014.

31. On Friday, 5 December 2014, at 10:20 a.m., the MEU acknowledged receipt of the Applicant's email. On the same date, the Applicant filed his application for



suspension of action before the Tribunal. The Registry of the Dispute Tribunal in New York acknowledged receipt of the application and transmitted the application to the Respondent on that day, at 12:36 p.m. The Applicant was later informed, at 4:36 p.m., that the MEU did not consider his initial email as constituting a request for management evaluation and suggested that the Applicant duly filled the appropriate form. The Applicant complied on Monday, 8 December 2014.

32. In view of the foregoing, the Tribunal considers that the request for management evaluation has been initiated by the Applicant prior to the filing of the application for suspension of action. There being no evidence on the record that the MEU responded to the Applicant's request for management evaluation, the contested decision is to be considered by the Tribunal as being the subject of an ongoing management evaluation. The first condition is fulfilled.

Implementation of the contested decision

33. There is no evidence on the record as to whether the contested decision has been implemented, namely whether the members of the panel have been appointed and whether an investigation is being carried out. The Tribunal therefore accepts that the decision has not yet been implemented. The second condition is fulfilled.

The application concerns an administrative decision that may be properly suspended by the Tribunal

34. As the Dispute Tribunal stated in *Hocking & al* UNDT/2009/077, *Wilkinson et.al* UNDT/2009/089 and *Ishak* UNDT/2010/085, in order for the Tribunal to suspend an administrative decision, the contested decision must be a unilateral decision that is taken by the Administration in a precise individual case and which produces direct legal consequences to the legal order, including the Applicant's rights. The Tribunal has the competence to determine whether the contested decision is an administrative decision and whether it was made in compliance with or contrary to a staff member's terms of appointment (see *Slade* UNDT/2011/136).

35. In *Hashimi* (Order No. 93 (NY/2011)), the Tribunal found that:

23. Generally, appeals against decisions to initiate an investigation are not receivable as they are preliminary in nature and do not at that stage affect the legal rights of a staff member as required of administrative decisions capable of being appealed before the Tribunal (see *Dudley* Order No. 308 (NY/2010)). For instance, a decision to interview a staff member will, ordinarily, not be viewed as a final administrative decision affecting the staff member's legal rights. Interviews are carried out to collect information and, in any case, they are secondary to the decisions to conduct an investigation, to bring charges and to impose disciplinary measures. An interview may be one of many investigative steps and the Tribunal will not ordinarily substitute its view for that of the investigators examining the matter as to whether an interview should take place. This accords with the general principle that the Tribunal should not interfere with matters that fall within the Administration's prerogative, including lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality; otherwise, there is a danger that the Organization's internal mechanisms would come to a grinding halt.

...

25. There may be cases when the decision to launch an investigation and the manner in which it is carried out may be so plainly unlawful and in actual or imminent breach of the staff member's legal rights so as to render such decision capable of being reviewed by the Tribunal.

36. ST/AI/371/Amend.1 (Revised disciplinary measures and procedures), dated 11 May 2010, states:

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake an investigation. Staff rule 10.1 provides that 'Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and 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 the disciplinary process and the imposition of disciplinary measures for misconduct.

...

3. If the investigation results in sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to

misconduct, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known and attaching documentary evidence, such as cheques, invoices, administrative forms, signed written statements by witnesses and any other document or record relevant to the alleged misconduct.

37. Paragraphs 4 to 8 of ST/AI/371, as amended by ST/AI/371/Amend.1, read as follows:

4. If the conduct appears to be of such a nature and of such gravity that administrative leave may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons. As a general principle, administrative leave may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed and if redeployment is not feasible.

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether administrative leave is warranted. Administrative leave under staff rule 10.4 is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant administrative leave without pay, in both cases without prejudice to the staff member's rights.

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

- (a) Inform the staff member in writing of the allegations and his or her right to respond;
- (b) Provide him or her with a copy of the documentary evidence of the alleged misconduct;
- (c) Notify the staff member of his or her right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense, and offer information on how to obtain such assistance.

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request for an extension, giving

cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

8. The entire dossier is then submitted to the Assistant Secretary-General, Office of Human Resources Management. It shall consist of the documentation listed under subparagraphs 6 (a), (b) and (c) above, the staff member's reply and the evidence, if any, that he or she has produced. In cases arising away from New York, the responsible official shall promptly forward the dossier to the Assistant Secretary-General, Office of Human Resources Management

38. The decision to launch an investigation, and the manner in which it is carried out is not, in view of the record, plainly unlawful in light of ST/AI/371 and ST/AI/371.Amend.1. The Tribunal considers that, in this particular case, there is no reason warranting departing from the general principle that the contested decision to initiate an investigation by appointing a fact-finding panel is a preliminary decision which does not have an immediate and adverse effect on Applicant's terms of appointment. The third condition is not fulfilled. Therefore, the application is not receivable.

39. In view of the findings above, it is not necessary to make any determinative conclusions with respect to whether the contested decision appears to be *prima facie* unlawful, whether it is urgent or would cause irreparable harm.

### **Conclusion**

1. The application for suspension of action is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 12<sup>th</sup> day of December 2014