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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/016

Order No.: 099 (NBI/2013)

Date: 6 May 2013

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-

## **Introduction**

1. The Applicant began his career with the United Nations with the Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia in 1990. Currently, he is working at ECA as a Library clerk at the G4 level under a permanent appointment.

2. On 18 April 2013, the Applicant filed an application with the Dispute Tribunal contesting a decision taken by Ms. Hazel Scott, Director, Division of Administrative Services, ECA, to issue him with a written reprimand on 6 February 2013 because he had failed to attend a meeting in relation to his formal challenge of an administrative decision.

3. On 16 April 2013, the Applicant received a letter from Ms. Scott rescinding the reprimand letter issued on 6 February 2013 and requesting the Applicant to respond to the same allegations.

4. On 26 April 2013, the Applicant filed the present Application for Suspension of Action requesting the Tribunal to suspend what he describes as an “unlawful disciplinary process that is likely to result in another unlawful reprimand”.

5. The Respondent filed a Reply to the Application on 30 April 2013 in which it is argued that:

a. the Application is not receivable;

b. no6(a)-16acei7(p)-23(i)37(o)-41(n)19(.)] TJ h6(a)-16ac h wfealdecioi7(p)-23(i)-2(i)17(na).

## **Facts**

6. On 4 February 2013, the Applicant filed a management evaluation request concerning delays in granting his annual within-grade increment for the year 2013. He copied Ms. Scott on his complaint.

7. In the afternoon of the same day, 4 February 2013, Ms. Scott informed the Applicant that she intended to schedule a meeting between them and a Human Resources Officer to discuss his complaint.

8. In the late afternoon on 4 February 2013, Ms. Deborah Abebe, Ms. Scott's Assistant, informed the Applicant that Ms. Scott would like to meet with him on 5 February 2013.

9. The Applicant asked to reschedule the meeting because his colleague was on leave and he could not leave his desk unattended.

10. On 5 February 2013, Ms. Scott held a meeting expecting the Applicant to attend. When the Applicant did not appear at the meeting, his supervisors instructed him to attend.

11. On 5 February 2013, during a phone conversation with Ms. Scott's Assistant, the Applicant explained that he was not feeling sufficiently composed to discuss the matter with the Administration in a rational manner.

reprimand in your file. Please be informed that a repeat of this or similar behavior shall result in sterner actions against you.

13. In an email dated 7 February 2013, the Applicant protested against Ms. Scott's actions and, on 22 February 2013, he filed a management evaluation request of the decision to issue a reprimand.

14. On 16 April 2013, the Applicant received a letter from Ms. Scott in which she informed him that she had decided to rescind the reprimand and stated that she had decided to give him the opportunity to respond or comment on the circumstances surrounding his refusal to attend the meeting to which she had invited him on 5 February 2013. Some parts of this letter are reproduced below and will be discussed further:

7. The manner in which you refuse to attend the meeting: hanging up on Ms. Abebe, avoiding the calls altogether, ignoring your supervisors' instructions, without attempting to contact my office to explain your reasons for wanting the reschedule for the meeting, is unacceptable. You were informed twice the day before, by myself by email and by my secretary by phone and you had enough time to be ready knowing clearly the subject to be discussed, particularly as I advised you in my email that the purpose of the meeting was to address your concerns. I would like to remind that as a staff member you have obligations based on the Staff Rules, one of which is the obligation for you to follow the instruction and directions of supervisors:

*(Rule 1.2(a) "Staff members shall follow the direction and instruction properly issued by the Secretary-General and by supervisors."*

8. In the absence of circumstances you might be able to shed some light on, your refusal to attend the meeting despite the instruction of your supervisors would amount to the failure to follow a direct instruction, as provided in Rule 1.2 (a).

9. I would like to underline the seriousness of your behavior which may amount to misconduct as (sic) Staff Rule 10.1 and ST/SGB/2011/1.

*a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and the 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 a disciplinary process and the imposition of disciplinary measures for misconduct.*

10. On 8 February 2013, you wrote to

20. The Applicant submitted that if the Tribunal determines that the impugned decision is a new administrative decision, then this Suspension of Action would fall for determination under art. 13 of the Tribunal's Rules of Procedure.

21. The Applicant's primary contentions may be summarized as follows:

*Prima facie unlawfulness – Violation of due process*

a. The letter issued by Ms. Scott on 16 April 2013 explicitly stated that he is facing allegations of misconduct. At paragraph 9 of the letter, relying on staff rule 10.1 that deals with disciplinary measures and procedures, Ms. Scott underlined the seriousness of the Applicant's behavior which may amount to misconduct.

b. The Applicant submitted that this demonstrates that Ms. Scott envisages the possibility of imposing a disciplinary sanction on him. In the initial letter of reprimand, which was subsequently withdrawn, the Administration had used the word "misconduct" at least twice. The interoffice memorandum itself was entitled "Reprimand for misconduct". Consequently, the Administration cannot credibly argue that it does not consider the Applicant's behavior as misconduct.

c. Since the Administration wanted to sanction an alleged misconduct, this process must be viewed as an attempt to impose a disguised disciplinary measure. An administrative measure can be imposed only in circumstances where the staff member's action did not amount to misconduct. Otherwise, the Administration would be able to sanction misconduct without complying with the procedural requirements set out in the Staff Regulations and Rules as well as in ST/AI/371 (Revised disciplinary measures and procedures) as amended.

d. The Administration cannot be allowed to sanction staff members for alleged misconduct by imposing non-disciplinary measures in order to circumvent the procedural guarantees. Imposing an administrative measure in



no urgency and the Administration could have rescheduled the meeting.



n. In her letter dated 16 April 2013, Ms. Scott failed to acknowledge that she unlawfully instructed that the reprimand be placed on the Applicant's file. Ms. Scott requested an explanation for the Applicant's refusal to attend a meeting that he had no duty to attend. However, this time around, Ms. Scott wants to ensure that the reprimand is issued in compliance with the procedural guarantees. She wants to punish the Applicant at the expense of violating a well-established legal principle against double jeopardy

o. The Admin(A)20(pp)-20( T 536.64 Tm [(T)-10(h)19(e)3( )-190(A)20(d)-2dS)-5(h)19(e).



x. The Applicant also relied on the Tribunal's ruling in *Ba* Order No. 057 (NBI/2012) where it was held that the decision to initiate an investigation which may or may not result in disciplinary proceedings does impact on the staff member in that it is a decision that would have direct legal consequences for a staff member if it is followed up by disciplinary proceedings.

y. The Applicant submitted that the irreparable damage also stems from undue stress and harm to his professional reputation. The Suspension of Action is the only remedy available to him to prevent a serious reputational damage.

22. For these reasons, the Applicant prayed that this Application for Suspension of Action be granted pending the disposition of the underlying Application on the merits in case UNDT/NBI/2013/16. Alternatively, he prayed that

- b. The Applicant's argument that he is facing double-jeopardy is erroneous.
- c. The contested decision –to initiate another disciplinary process – if such a decision is found to have been made, has by its very nature, been implemented. Therefore, there is nothing to suspend.

*Urgency*

- d. The Applicant had not shown any urgency, or hint of urgency, whatsoever in his Application. No disciplinary process had been initiated. There is no impending, critical outcome which requires the involvement of the Tribunal. The Respondent submitted that the Applicant's speculation that “[i]t is clear from Ms. Scott's letter and from Mr. Diallo's email dated 23 April 2013 that the issuance of a reprimand is imminent” is of no merit.

*Irreparable damage*

- e. The Respondent submitted that, assuming for the purpose of argument that the contested decision had not been implemented, and is indeed a decision to initiate “another disciplinary process”, the Applicant had failed to show how – if it were shown to be unlawful – allowing the decision to be

- a. no decision to initiate “another” disciplinary process had been taken;
- b. if such a decision had been taken, it had already been implemented and cannot be suspended;
- c. the decision is lawful and appropriate;
- d. the case lacks any urgency; and
- e. the Applicant has not shown how he would suffer irreparable harm.

### **Considerations**

#### *Receivability*

26. The facts in this case show that there are two decisions which the Applicant had complained

*Prima facie unlawfulness*

29. In the circumstances of this case, Ms. Scott cannot reopen or initiate a disciplinary process as it would amount to double jeopardy to withdraw the reprimand and replace it with a disciplinary process.

30. By her actions and her demands in the memorandum of 16 April 2013 in which she withdrew the reprimand, Ms. Scott proceeded to usurp the functions of the ASG/OHRM. She cannot under the guise of initiating a fact-finding under para. 2 of ST/AI/371, purport to give the Applicant a given time to provide a written response. This is because the demand for response or comments on allegations of misconduct from the affected staff member with witness statements annexed is the exclusive preserve of the ASG/OHRM. Having issued an unlawful reprimand and later withdrawn it, she became *functus officio* regarding any disciplinary action against the Applicant as it pertains to the issue of his refusal to attend a meeting to which she had invited him on 5 February 2013.

31. The language of the memorandum of 6 February 2013 in which Ms. Scott made thinly-veiled threats of taking even “sterner actions” against the Applicant clearly reveals an animus on her part. Also, the language and tone of the subsequent letter of 16 April 2013 which not only stated allegations of misconduct but even went further to set out the legal framework on which the allegations were based constitute evidence of bad faith on her part.

32. Any disciplinary action initiated by Ms. Scott against the Applicant on the same matter is heavily tainted, totally compromised and speaks to a lack of integrity in such a process. Ms. Scott, having by her unlawful reprimand shown that she believes the Applicant to be deserving of punishment, the Tribunal has a duty to uphold the Suspension of Action Application and to suspend the pretence at due process, which if allowed, would amount to an egregious violation of the procedural safeguards enshrined in ST/AI/371.

33.

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*(Signed)*

Judge Nkemdilim Izuako

Dated this 6<sup>th</sup> day of May 2013

Entered in the Register on this 6<sup>th</sup> day of May 2013

*(Signed)*

Abena Kwakye-