
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/083
Order No.: 246 (NBI/2015)
Date: 28 July 2015
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

AZAGLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

decision within five days thereof, there is no requirement, either under art. 2.2 of the Statute or art. 13 of the Rules of Procedure, for the Tribunal to defer consideration of the request until receipt of the Respondent's response. In fact, service to the Respondent is all that is required under the Rules. The request for suspension of action stands or falls on its merits as presented at the time.

A request under art. 2.2 of the Statute is also predicated upon an ongoing and pending management evaluation of an administrative decision that may properly be suspended by the Tribunal and any order to suspend a contested administrative decision ends on the date on which the management evaluation is completed. Further, the Tribunal must proceed on the basis of an impression regarding whether the Applicant satisfies the three cumulative requirements in art. 2.2 of the Statute and art. 13 of the Tribunal's Rules of Procedure, namely that the decision appears to be prima facie unlawful, that the matter appears of particular urgency, and that the implementation of the decision would appear to cause irreparable damage. The Tribunal is not expressing a conclusive finding but merely applying the statutory test and expressing an opinion based on the material presented in support of this urgent request. Whether this preliminary indication is upheld when the substantive issues of fact and law are subsequently considered will depend on the evidence, arguments and submissions of the parties. However, the benefit afforded by the suspension of action procedure is to indicate a preliminary view which may assist either party to consider its position.

10. This Tribunal endorses the views expressed by Meeran J. and based on the circumstances of this present matter, decides that there is no need for the Tribunal to defer consideration of the Application until receipt of the Respondent's response, if any.

Receivability

11. The issue to be determined here is whether or not the impugned decision has been implemented. In Ba UNDT/2012/025, the Tribunal canvassed the issue of whether or not the Applicant's placement on administrative leave had been implemented. The Tribunal held that:

The continuing legal effect is carried forward by the suspension from duties, regardless of whether or not a staff member is being paid. Thus it is firmly the view of this Tribunal that a decision to place a staff

member on administrative leave—with or without pay—is a decision with continuing effect which may be suspended by the Tribunal at any time as long as the administrative leave endures.

12. In Hassanin Order No. 83 (NY/2011), Ebrahim-Carstens J. stated the following:

To allow the Respondent's interpretation would be to render the Tribunal impotent. It cannot have been the intention of the drafters of the Statute that the Tribunal should have no power to dispense justice (in this context, by granting urgent and limited interlocutory relief) where the Respondent notifies a staff member of a decision at the time of, or at the eleventh hour before the "implementation" of a decision. This would allow even the most tainted and unlawful decision to stand, so long as it has been implemented hastily.

13. In light of the foregoing, the Tribunal finds the application receivable.

Prima facie unlawfulness

14. The Applicant submits that the Contested Decision is unlawful because: (a) there is no legal basis for its issuance; it is a veiled decision to place him on Administrative Leave, (c) it breaches his basic due process rights; and (d) it casts a cloud of doubt as to his innocence during the fact-finding process. The Applicant submits that the Contested Decision presumes his guilt and further taints the fact-finding process even before he has had the opportunity to respond to the allegations levied against him. He submits that there is no evidence that he has or will tamper with any evidence or intimidate anyone as a result of the fact-finding thus the decision is unlawful.

15. The Applicant further submits that the Contested Decision is unlawful because the Fact-Finding Panel gave him only one day within which to respond to the serious allegations against him even though he has been denied access to his office where all of his official documents are located.

16. In El-Khalek 2014-UNAT-44, the United Nations Appeals Tribunal (UNAT) held that:

of the staff of the Secretariat”. The SGB further states that flexible working arrangements **require** a specific agreement and are purely **voluntary** for all concerned (emphasis added). Flexible working arrangements are not meant to be a catch-all which extends to Chapter X of the Staff Regulations and Rules of the United Nations. Staff rule 10.4 provides for a procedure that is to be used during the pendency of an investigation and until the completion of the disciplinary process.

21. The decision for the Applicant to work from his apartment was made pending an investigation by a fact-finding panel into grave allegations against him. The Applicant has been, in effect, placed on administrative leave during an investigation as contemplated by staff rule 10.4. The Administration is using a flexible working arrangement as a convenient avenue by which to circumvent judicial review in matters pertaining to administrative leave and thereby gives the imprimatur of legitimacy to what is actually an unlawful administrative decision. The Tribunal also finds that the Applicant being ordered to work from his apartment is in the nature of a “veiled disciplinary measure” or “de facto disciplinary suspension” without his due process rights being respected. The Tribunal finds therefore that the use of a flexible working arrangement for the purpose outlined in Mr. Price’s IOM is a breach of the Staff Rules.

22. This Tribunal finds that the non-adherence to proper procedures in this case means that the Applicant has met the threshold of *prima facie*unlawfulness which is one of the three conditions for the grant of this Application.

Urgency

29. The decisions for the Applicant to work from his apartment and to provide a response to the Fact-Finding Panel by 2355 hours today, 28 July, are suspended pending management evaluation.

(Signed)

Judge Vinod Boolell

Dated this 28th day of July 2015

Entered in the Register on this 28th day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi