



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/014

Order No.: 027 (NBI/2016)

Date: 17 February 2016

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 PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Adrien Meubus, ALS/OHRM
Susan Maddox, ALS/OHRM

The Application and Procedural History

1. The Applicant is a Finance Officer on a fixed-term appointment at the P-4 level with the United Nations Mission in Liberia (UNMIL).
2. On 11 February 2016, the Applicant filed an Application for suspension of action with the United Nations Dispute Tribunal (UNDT) in Nairobi seeking the suspension of the following decisions pending management evaluation:
 - a. The decision by the Special Representative of the Secretary-General, UNMIL, (SRSG/UNMIL), to issue a letter of reprimand to another staff member against whom a fact finding Panel (FFP) had substantiated allegations of prohibited conduct instead of referring the matter to the Assistant-Secretary-General of the Office for Human Resources Management (ASG/OHRM) for possible initiation of disciplinary action against the said staff member.
 - b. The decision by the SRSG/UNMIL to request the Applicant to participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).
3. The Respondent filed a Reply to the Application on 13 February 2016.
4. On 13 February 2016, without first seeking leave of the Tribunal, the Applicant filed a “Reply to Respondent’s Reply to Application for Suspension of Action”.
5. On 15 February 2016, the Tribunal issued Order No. 023 (NBI/2016) in which the Respondent was directed to communicate to the Tribunal the FFP’s interview notes for the Applicant and one Mr. Hanno Niidas.

Facts

6. On 7 August 2015, the Applicant filed a complaint against one of his subordinates, Mr. Hanno Niidas, for possible breach of the provisions of ST/SGB/2008/5. An FFP was constituted by UNMIL in accordance with section 5.14 of ST/SGB/2008/5.

7. The FFP issued a report and made several findings with respect to possible prohibited conduct by Mr. Niidas. The FFP also made observations with respect to the apparent dynamics of the section under the Applicant's management and of the working environment under his stewardship that arose from the evidence heard during the course of the investigation and that relate to the obligations of managers under ST/SGB/2008/5.

8. By memorandum dated 4 February 2016 from the SRSG/UNMIL, the Applicant was informed of the outcome of the matter. The Applicant was informed that the SRSG had determined that the most appropriate course of action against Mr. Niidas was a letter of reprimand and that the Applicant, in close collaboration with his supervisors, should take corrective action including complying with the organizational requirements given the observations made by the FFP in relation to his leadership and managerial issues and in light of all circumstances and the underlying evidence gathered in the course of the investigation. The SRSG informed the Applicant that he should participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 at the Applicant's earliest opportunity.

Parties' Submissions

Applicant

Prima facie unlawfulness

9. The SRSG/UNMIL's decision to take the administrative action of issuing a letter of reprimand to Mr. Niidas is contrary to para. 5.18(c) of ST/SGB/2008/5. This

section makes it mandatory for the SRSG as the responsible official to refer the matter to the ASG/OHRM for appropriate disciplinary action against Mr. Niidas.

10. The Applicant submits that he was never interviewed by the FFP regarding any leadership and managerial issues during his stewardship as the Officer-in-Charge (OIC) of the Finance Section or as the Chief of the Finance Unit and that this matter was not raised by his First Reporting Officers (FROs) during previous performance appraisals.

11. The Applicant submits that if left to persist, the contested decisions are the starting point of denying him basic due process rights during a fact finding mission and can be construed as a calculated move by the UNMIL Administration to deny him justice.

12. In *Nwuke* 2010-UNAT-068, the United Nations Appeals Tribunal (UNAT) stated that the UNDT has jurisdiction to examine the administrative activity (act or omission) followed by the Administration after a request for investigation and to decide if it was taken in accordance with the applicable law and that the UNDT can also determine the legality of the conduct of the investigation.

Urgency

13. The Applicant submits that in the face of the gross nature of unlawfulness of the impugned decision and its adverse impact on his reputation, the Tribunal should find that the requirement of urgency has been met. In support of his submission the Applicant cites *Ba* UNDT/2012/025 and *Amar* UNDT/2011/040.

14. Contrary to the Respondent's position that no specific deadline for compliance with the SRSG has been set, the Applicant submits that this position is untenable because para. 8 of the SRSG's memo of 4 February 2016 "... I urge you in close collaboration with your supervisors to take corrective action immediately [...]". The Applicant submits that this categorical statement by the SRSG and especially by

his use of the word “immediately” connotes and emphasizes urgency on the part of the Applicant to comply with the SRSG’s instructions.

Irreparable harm

15. The Applicant submits that the implementation of the contested decision is contrary to para. 5.18(c) of ST/SGB/2008/5 and is a subversion of the internal justice system of the United Nations. He further submits that the request by the SRSG that he should participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 as a result of the fact finding is already having a negative impact on his professional reputation and causing him embarrassment.

16. The Applicant submits that the Respondent did not follow due process as the FFP never questioned him on any matter relating to leadership inadequacies or failures on his part. The SRSG’s request that he undergo training based on the findings of the FFP is contrary to due process and this is impacting negatively on his professional reputation.

Respondent

Prima facie unlawfulness

17. The Applicant has not met his burden of demonstrating a *prima facie* case of unlawfulness of the contested decisions. Paragraph 5.18(b) of ST/SGB/2008/5 specifically provides the responsible official with the discretion, where the allegations are factually established, but are not sufficient to justify the institution of disciplinary proceedings to take managerial actions.

18. The applicable provisions establish that the responsible official has the discretion to take managerial action if so warranted by the findings of the FFP. In this instance, the SRSG considered a number of factors which are consistent with the UNDT’s determination on what constitutes aggravating or mitigating circumstances.

The SRSB considered, in particular, the circumstances of the cases including the already tense work environment that preceded the conflict between Mr. Niidas and the Applicant, the tense relationship between the Applicant and various other personnel in the Finance Section, the ongoing downsizing process, and the frequent turnover of personnel in the Finance Section resulting in fewer personnel managing a workload that has not reduced commensurately.

19. In the case of *Applicant* UNDT/2015/051, the UNDT recognized the discretion afforded to the responsible official in determining the appropriate course of action in the light of the findings of an FFP established under ST/SGB/2008/5. The decision to impose a reprimand on another staff member does not adversely impact the Applicant's terms and conditions of his appointment. The UNDT and UNAT have held in a number of cases that to be reviewable, an administrative decision must have direct legal consequences on a staff member's terms of appointment.

20. The Applicant cannot compel the Administration to institute disciplinary action against another staff member or to refer a matter for consideration of whether to institute disciplinary action. The scope of judicial review of cases under ST/SGB/2008/5 is limited to an assessment of whether the procedure followed in respect of the allegations of prohibited conduct was proper. The Respondent submits that section 5.20 of ST/SGB/2008/5 expressly grants staff members the right to appeal the procedure followed in respect of the allegations of prohibited conduct and in the instant matter the Applicant has not established a failure by the Organization to follow the procedure set out in ST/SGB/2008/5. To the contrary, the Applicant has been provided with the full procedure to which he is entitled under the SGB.

21. With respect to the decision to request the Applicant to participate in training, such a request falls under the scope of the SRSB's prerogative to manage staff within the mission. The request that the Applicant attend training is not a disciplinary sanction but addresses his obligation as a manager to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and

any form of prohibited conduct as foreseen, *inter alia*, by sections 3.2 and 4.1 of ST/SGB/2008/5.

Urgency

22. With regard to the decision to issue a reprimand to Mr. Niidas, the Respondent submits that the Applicant has not established the element of particular urgency required to suspend the implementation of that action.

23. With respect to the decision to request the Applicant to participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5, no specific deadline for compliance with the instruction from the SRSG/UNMIL has been set.

Irreparable harm

24. The Applicant has failed to demonstrate either how his rights are being denied or the negative impact on his reputation and career prospects by the imposition of a reprimand against Mr. Niidas. The complaint filed by the Applicant and the resulting action against Mr. Niidas pursuant to ST/SGB/2008/5 should have no impact on the Applicant's reputation or career prospects as both the complaint and the resulting action are confidential.

25. The Applicant's contention that he would suffer irreparable harm from the decision directing him to attend training aimed at enhancing workplace harmony and augmenting sensitivity to the issues of workplace harassment is without merit. Such harm cannot reasonably be attributed to a decision taken by the Organization in compliance with its obligations enshrined in ST/SGB/2008/5 to take measures aimed at maintaining a workplace free of any form of discrimination, harassment, including sexual harassment and abuse of authority.

26. If grounds for contesting the impugned decisions exist, adequate remedies would be accorded in the course of a substantive determination on the merits of the Applicant's claims.

Considerations

Was the decision to impose corrective measures on the Applicant unlawful?

27. In the course of the investigation the FFP interviewed a number of individuals including Mr. Niidas and the Applicant. In the light of the statements given by the individuals the FFP reached the conclusion that there were leadership and managerial issues in relation the Applicant. The FFP reached this conclusion after hearing the persons who were interviewed on those lines.

28. The FFP reached the above conclusion after hearing one side of the story. The evidence currently before the Tribunal does not indicate that the Applicant was given an opportunity to rebut or comment on these statements. The SRSg, Mr. Farid Zarif, stated in his letter to the Applicant:

At the same time I am concerned about the leadership and managerial issues in the component noted by the FFP during your stewardship that affected performance negatively. I also note the observations of the FFP on communication in the component, particularly in relation to ensuring open communication with colleagues. I urge you, in close collaboration with your supervisors, to take corrective action immediately, including complying with the organizational requirements on same. To assist you in this regard, I have requested that you participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 at your earliest convenience.

29. A close scrutiny of the tenor of the above quoted paragraph from the SRSg to the Applicants reveals that the Applicant was deemed to be responsible for bad performance during his stewardship and was not good in communicating with colleagues. The measure is that he "participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 at [his] earliest convenience".

30. ST/SGB/2008/5 defines prohibited conduct as follows in section 1.5:

For the purposes of the present bulletin, discrimination, harassment, including sexual harassment, and abuse of authority shall collectively be referred to as “prohibited conduct”

31. The Applicant was only a complainant and a witness before the FFP. The available record does not indicate that any allegations of prohibited conduct as defined in ST/SGB/2008/5 were put to him. It should be recalled that “ST/SGB/2008/5 was promulgated to address very specific kinds of conduct, namely discrimination, harassment, including sexual harassment, and abuse of authority, as defined in its sec. 1”¹. The SRSG treated the findings of the FFP on the Applicant as if they amounted to prohibited conduct. This was beyond his powers².

32. The Respondent refers to the performance appraisal of the Applicant to buttress his defence that what the SRSG decided was correct. This is simply surprising. If a staff member is lacking in any of the core values or in performance, measures to address these flaws exist in ST/AI/2010/5 (Performance Management and Development System). Section 10 of ST/AI/2010/5 deals extensively with aspects of a staff member’s performance and it reads:

Identifying and addressing performance shortcomings and unsatisfactory performance

10.1 During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

¹ See *Kostomarova* UNDT/2016/009.

² *Ibid.*

10.2 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as “partially meets performance expectations”, a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

10.3 If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1, a number of administrative actions may ensue, including the withholding of a within-grade salary increment pursuant to section 16.4, the non-renewal of an appointment or the termination of an appointment for unsatisfactory service in accordance with staff regulation 9.3.

10.4 Where at the end of the performance cycle performance is appraised overall as “does not meet performance expectations”, the appointment may be terminated as long as the remedial actions indicated in section 10.1 above included a performance improvement plan, which was initiated not less than three months before the end of the performance cycle.

10.5 Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the performance improvement plan.

33. In his 2014-2015 performance evaluation/cycle for the period 1 April 2014 to 31 March 2015 the Applicant was given a rating C in “Managerial Competencies” and the recommendation was for him to receive training. The comments of the First Reporting Officer on Managerial Competencies are: “Serves as a role model that other people want to follow”. In addition under the managerial competency of “Building Trust” the comments were: “Provides an environment in which others can talk and act without fear of repercussion. Manages in a deliberate and predictable way”. There is nothing to indicate whether there was any concrete action taken to assist the Applicant in improving his managerial competencies if he was found wanting in that respect. A responsible manager does not wait for adverse comments on a staff member to ask that staff member to take measures to improve.

34. Under the Core Values of “Integrity”; “Professionalism” and “Respect for Diversity” he was found to be “Fully Competent”. In the overall comments on Core Values the First Reporting Officer wrote: “In general I consider [the Applicant] to have competently manifested the UN’s core values in the conduct of his daily work”.

35. Allegations that a staff member is not a good leader or manager do impact on the employment terms of that staff member. Due process would have required that he be given at least an opportunity to rebut the allegations before any measure, be it a sanction or a corrective measure is taken against the staff member.

Conclusions on the element of unlawfulness

36. The Tribunal concludes that by taking the observations or conclusions of the FFP at face value without giving the Applicant an opportunity to comment or rebut them and subsequently imposing on him an obligation to take corrective measures, the Administration acted unlawfully. In addition the particulars of prohibited conduct referred to by the SRSG in his letter to the Applicant were never set out. This was essential as the definition of prohibited conduct is a sweeping one in the relevant ST/SGB.

Is the matter urgent?

37. There can be no doubt that the matter is urgent as the Administration would in normal circumstances take action for the Applicant to be subjected to corrective measures.

Would there be irreparable harm if the suspension of action is not granted?

38. The Applicant was a complainant. At the end of the investigation he is being subjected to corrective measures in breach of his due process rights. There is no doubt that this would impact on his reputation and possibly his career prospects. In the case of *Tadonki* UNDT/2009/016 the Tribunal held:

The well-established principle is that where damages can adequately compensate an applicant, if he is successful on the substantive case, an interim measure should not be granted. But a wrong on the face of it should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process. In order to convince the Tribunal that the award of damages would not be an adequate remedy, the Applicant must show that the Respondent's action or activities will lead to irreparable damage. An employer who is circumventing its own procedures ought not to be able to get away with the argument that the payment of damages would be sufficient to cover his own wrongdoing.

39. The facts giving rise to wrong doing in the present matter are the denial of due process before the imposition of corrective measures on the Applicant. In regard to due process the Tribunal endorses what it stated in *Tadonki* UNDT/2009/016:

Due process requires that Management complies with its own rules relating to staff. The Staff Rules embody the principles that should be observed in the application of due process to staff members and they are to be found in Rule 1.1 (c).

The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.

Has the decision been implemented?

40. A suspension of action cannot be granted if the decision being contested has been implemented. The Tribunal considers that the imposition of corrective measures on the Applicant is not a one off event. From the evidence on file it does not appear that the measure has been implemented. Even if there had been corrective measures, they are not completed in one day or one occasion as they are a part of a continuum of events or actions. In the latter alternative, the Tribunal considers that the decision is not fully implemented and can be prohibited at any time.

Ruling

41. A suspension of action of the decision by the SRSG/UNMIL to request the Applicant to participate in training/sensitization on communication, performance management as well as prohibited conduct as defined in ST/SGB/2008/5 is granted until management evaluation is determined.

(Signed)

Judge Vinod Boolell

Dated this 17th day of February 2016

Entered in the Register on this 17th day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi