



## ***Introduction***

1. On 28 October 2010, the Applicant, a staff member of the United Nations Environment Programme (UNEP), received a memorandum from one Paul Akiwumi, Chief of Staff, Office of the Executive Director UNEP, in which she was informed that she had been placed on special leave with full pay pending an initial investigation of allegations of misconduct made against her in accordance with staff rules 102 and 10.4 (“the Impugned Decision”).

2. The Applicant filed a request for management evaluation of the Impugned Decision on 14 January 2011 arguing that the decision was unlawful.

3. On 21 January 2011, the Applicant filed an Application pursuant to staff rule 11.3(b)(i) and article 2.2 of the Statute of the Dispute Tribunal requesting the Tribunal to order the suspension of the continuing implementation of the Impugned Decision. The Respondent’s Reply was filed on 25 January 2011. The hearing of suspension of action Application took place on 27 January 2011.

4. The Tribunal issued Order No. 009 (NBI/2011) on 27 January 2011 in which the Impugned Decision was suspended until such a time as the Assistant Secretary-General, Office for Human Resources Management (“ASG/OHRM”) on behalf of the Secretary-General, or his delegated representative, decides to pursue the matter and presents the Applicant with formal charges. In the said Order, the Tribunal advised the Parties that the written reasons for the decision would be issued at a subsequent date.

a. For a request for a suspension of action to be granted, three elements need to be satisfied, that is, the decision must be prima facie unlawful, the matter must be urgent and implementation or in this case, continued implementation will result in irreparable harm.

b. In his 28 October 2010 memorandum, the UNEP Chief of Staff erred when he referred to the Impugned Decision as “special leave with full pay”

when in fact the Applicant had been placed on administrative leave pursuant to provisional staff rule 10.4. The question for determination in this case is whether the decision to place the Applicant on administrative leave with full pay was unlawful or prima facie unlawful.

c. According to the terms and structure of ST/AI/371/Amend. 1 (Revised Disciplinary Measures and Procedures) (consolidated text) (“ST/AI/371”), administrative leave cannot be imposed pending resolution of a preliminary fact-finding investigation and administrative leave may only be recommended once the head of office or responsible official has reported the findings of a preliminary investigation to the ASG/OHRM. Section 5 of ST/AI/371 confirms that it is only the ASG/OHRM, on behalf of the Secretary-General, who may decide whether administrative leave is warranted.

d. Whilst the Executive Director of UNEP (“ED/UNEP”) may have had the authority under the former Staff Rules to place a staff member on suspension during an investigation, there is no evidence that this authority has been expressly delegated to the ED/UNEP under the new provisional Staff Rules promulgated on 2 September 2010, ST/SGB/2010/6 (Staff Regulations of the United Nations and provisional Staff Rules) and this renders the impugned decision *ultra vires*. There is no document promulgated by the Secretary-General or the ASG/OHRM that indicates that the particular authority to use provisional staff rule 10.4 to place a staff member under administrative leave has been delegated to the ED/UNEP.

e. Should the Tribunal find that the ED/UNEP had the delegated authority to place a staff member under administrative leave, it is evident from the structure of ST/AI/371, that administrative leave may be contemplated only after the initial investigation has established that the staff member engaged in wrongdoing that could amount to misconduct and that this conduct appears to be of such a nature that administrative leave may be

warranted. As required by section 3 of ST/AI/371, at this particular stage administrative leave was not an option.

f. The purpose and rationale of administrative leave comes closest to what under the former Staff Rules was referred to as “suspension during an investigation”. Former staff rule 110.2(a) stated that if a charge of misconduct was made against a staff member and the Secretary-General so decided, the staff member may be suspended from duty during the investigation and pending completion of disciplinary proceedings for a period which should not normally exceed three months. The Applicant submits that the resemblance of former staff rule 110.2(a) with the provisional staff rule 10.4 is striking and whereas no charge of misconduct has been made, even if the ED/UNEP had the delegated authority, at this stage of the process, administrative leave could not be imposed.

g. On the element of irreparable harm, the Applicant submits that the loss of opportunity to continue to gain professional experience during her forced absence from work cannot be quantified and that damages cannot compensate her for the frustration, unhappiness and dissatisfaction that will be caused to her for the loss of the chance to acquire more experience and improve so as to increase the likelihood that she may exceed to a better position in her career.

h. Loss of professional reputation or harm to career prospects constitutes irreparable harm if that is accompanied by adverse comments made. Since she has been placed on administrative leave as a result of pending investigation into potential misconduct, this creates such an adverse context that will continue to cause irreparable harm to her professional reputation and career prospects if the decision is not suspended.

i. In respect to the final criteria, the element of urgency, the Applicant submits that in reviewing the element of urgency, the issue for consideration is whether or not implementation or continuing implementation of the

Impugned Decision is imminent or would result in irreparable harm if not suspended. In this case the matter is urgent, the implementation is of a continuous nature and that the Applicant is forced to be absent from work.

6. Based on the foregoing, the Applicant requests the Tribunal to order the suspension of the continued implementation of the Impugned Decision.

***Respondent's Case***

7. The Respondent submissions are:
  - a. The Applicant has failed to meet each and every one of the elements that she is required to show in this proceeding.
  - b. As to prima facie unlawfulness, the Applicant has not shown that the ED/UNEP lacked the express, delegated authority to place her on leave pending a fact-finding investigation pursuant to ST/AI/371. Staff rule 10.4 does not indicate the type of investigation. The initial fact-finding investigation in this case was launched by the ED/UNEP as the head of UNEP. As the head of UNEP, he has the specific, delegated authority pursuant to ST/AI/234 revision 1 (Administration of the Staff Regulations and Staff Rules), which delegates to the heads of office in Annex V, the right and duty to place staff on suspension pending an investigation. This, according to the Respondent, is the source of the ED/UNEP's express authority.
  - c. In former staff rule 110.4, the reason the word "suspension" is used is because ST/AI/371 was passed in 1989 before the passage of the provisional staff rule that provides the authority under staff rule 10.4, therefore it uses the now outdated terminology because staff rule 10.4 now brings in the advent of administrative leave leaving behind the old language which would have given the power to suspend to the heads of office.

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h. The cases are rife in which the various Tribunals including the Dispute Tribunal, its predecessor the former UN Administrative Tribunal and the International Labor Organization Administrative Tribunal, have awarded monetary damages to staff members who have been able to prove that reputational damage resulted from the unlawful use of administrative power. In this case, the Tribunal has power to award similar damages as has been awarded in hundreds of cases before for reputational damage.

i. In respect to urgency, which is the last element that the Applicant must show, the Tribunal in *Calvani*<sup>1</sup> stated that in a case where staff members are being investigated for possible misconduct, there can be no urgency to return that staff member to their post if doing so would jeopardize the integrity of the fact-finding process or in this case expose the Organization and its staff to possible continued harm or damage. The Respondent argues that this was precisely why it was decided to place the Applicant on administrative leave, that is, it was felt that her continued presence within her office would possibly

ED/UNEP possessed the express delegated authority to make the under ST/AI/234.

*Considerations*

***Is the Impugned Decision unlawful? Does the UNEP Executive Director have the authority to place the Applicant on Administrative leave with pay? Was the Impugned Decision premature?***

8. In dealing with the first requirement of the conditions precedent to establishing the grounds for the grant of a suspension of action under the Statute of the Dispute Tribunal, the Applicant's counsel submitted that the Impugned Decision is unlawful. The said decision, he argued, was done *ultra vires* and was not within the competence of the ED/UNEP.

9. In arguing the issue of unlawfulness, the learned Counsel divides this into two limbs. The first is that the ED/UNEP had no authority to place the Applicant on administrative leave as such authority lay only with the ASG/OHRM who could exercise it on behalf of the Secretary-General. The second limb is that even if it can be shown that the ED/UNEP had such authority, he had sped in time and exercised the said authority prematurely thereby rendering the impugned decision unlawful.

10. Arguing the first limb, Counsel has submitted that there is nothing to show that the ASG/OHRM had expressly delegated this power to the ED/UNEP. Under ST/AI/371 of 2 August 1991 which authorised the suspension of a staff member and its amended version of 11 May 2010 which replaces suspension with administrative leave, the authority of the ASG/OHRM to act is clearly spelt out and this power was and remains his and his alone.

11. The learned Counsel for the Respondent disagreed. In her written submissions, she referred the Tribunal to section 8 of ST/AI/234 which provides for heads of offices away from headquarters to exercise authority in certain matters regarding their staff. She added that under Annex V of that administrative instruction,



the ED/UNEP enjoyed express delegated authority to place the Applicant on suspension pending investigation pursuant to former staff rule 110.4. She also referred to a memorandum dated 19 June 2006 from the then ASG/OHRM to the Director, Division of Administrative Services, United Nations Office in Nairobi. She submitted further that in the said memorandum, the ASG/OHRM was of the opinion that the ED/UNEP enjoyed delegated authority to suspend staff. Respondent's Counsel then reproduced the second paragraph of the five-paragraph memorandum in support of her position.

12. It is not in contention that the ASG/OHRM is invested under ST/AI/371 with the authority to act on behalf of the Secretary-General, on the basis of evidence presented to him, to place a staff member on administrative leave if such is warranted during an investigation. As to whether this authority has been expressly delegated to the ED/UNEP, the Tribunal refers to section 8 of ST/AI/234 and its Annex V as urged upon it by the Respondent. In this regard, the Tribunal takes judicial notice of the fact that on 2 September 2010, the Secretary-General promulgated the provisional texts of the Staff Rules and made these effective on the dates of their issuance.

13. ST/AI/371 which came into effect on 11 May 2010 provides the framework for the application of staff rule 10.4 on which the Respondent claims to rely.

14. In invoking section 8 of ST/AI/234 and its Annex V which delegates authority to the ED/UNEP to suspend staff members pending investigation, the Respondent Counsel loses sight of the fact that the portion of Annex V which she refers to is former staff rule 110.4 now clearly superseded by staff rule 10.4. The current language and position in view of the 2010 amendment of ST/AI/371 is that staff may be sent on administrative leave and not on suspension.

15. Has the ASG/OHRM expressly delegated his authority to place staff on administrative leave to the ED/UNEP under staff rule 10.4? Is the delegation of authority under the former staff rule 110.4 automatically carried over into staff rule 10.4?

16. To these questions, the answer is No! If the intention of the ASG/OHRM was to delegate his authority to place staff on administrative leave pending investigation to heads of offices away from headquarters, such delegation must not be guessed at or presumed. Considering the far-reaching implications of placing staff on such leave both for the staff member whose professional development is thereby arrested and the Organisation which has to, for a period of time, pay an able-bodied staff member for not doing any work, the ASG/OHRM is required to expressly delegate his authority under staff rule.10.4.

17. With regard to the second limb as to when the authority of the ASG/OHRM to place staff on administrative leave pending investigation comes alive or becomes operational, the Respondent has argued that the Secretary-General or his agent can exercise this authority even at the fact-finding stage. Learned Counsel for the Respondent in her oral submission told the Tribunal that the Applicant had only been placed on what Counsel described as “administrative, special leave that is warranted under staff rule 10.4” at the start of an initial fact-finding pro

and fact-finding is over and sufficient evidence indicating that the staff member engaged in wrongdoing that could amount to misconduct is established, a report is then sent to the ASG/OHRM giving a full account of the facts and attaching documentary evidence or record relevant to the alleged misconduct.

20. Section 4 of ST/AI/371 provides that, if the conduct appears to be of such a nature and of such gravity that administrative leave is warranted, the head of office shall make a recommendation to that effect, giving reasons. The same section makes it clear that administrative leave may be considered if the conduct in question might pose a danger to other staff members or to the Organisation or if there is a risk of evidence being destroyed or concealed and “if redeployment is not feasible”.

21. Under section 5 of ST/AI/371, the ASG/OHRM on behalf of the Secretary-General, shall decide on the basis of the evidence presented, whether the matter should be pursued and if so, whether administrative leave is warranted. Section 6 makes it clear that if the case is to be pursued, the affected staff member among other things is informed in writing of the allegations and his or her right to respond. If administrative leave is authorized, the staff member is also informed of the reason and its probable duration and shall surrender his or her ground pass. A staff member on administrative leave may not enter UN premises without permission and when granted or reasons for the leave are stated in writing to the staff member.









37. Counsel for the Respondent in this regard cited the decision in *Calvani* where it was held that a staff member who was on suspension without pay had failed to show urgency in restoring him to his duties. It is important to distinguish that in *Calvani* the applicant in that case was placed on administrative leave following what



41. In the written submissions of the Respondent and specifically at paragraphs 25, 26, 29 and 30, it is asserted variously that:

“...the authority to interpret the Staff Rules is exclusively vested in OHRM.”

And then:

“...in her capacity as the sole interpreter of the staff rules and staff regulations, the ASG/OHRM has opined that UNEP enjoys the delegated authority to place staff on suspension pursuant to ST/AI/371.”

Also that:

“...both the Applicant and Respondent informed OHRM, which in ST/AI/234 is designated as the exclusive domain for interpretation of the staff rules, of the fact that the Executive Director of UNEP had placed the Applicant on leave...”

And finally that:

“...the UNDT lacks the requisite power to substitute its judgment for that of the Secretary-General and thereby vitiate or suspend it.”

42. During the oral hearing, the Tribunal asked for the address of the Respondent’s Counsel on the purport and meaning of the foregoing assertions. Her response was that she was merely reiterating the provisions of section 13 of ST/AI/234. For ease of reference the said section of the administrative instruction is reproduced below.

“Interpretation of the staff rules lies within the responsibility of the Office of Human Resources Management. Staff members with inquiries with regard to the application of staff regulations or rules in their own cases should address them, in the first instance, to their executive or administrative officer. Departments or offices should address their inquiries with regard to the interpretation of staff rules and their application to individual cases to the Staff Administration and Training Division, Office of Human Resources Management.”

43. It must be borne in mind that this revised administrative instruction which is titled: “Administration of the Staff Regulations and Staff Rules,” was made in March 1989 for the guidance of staff members and departments within the Organisation on occasions when they seek the meaning of Staff Regulations or Staff Rules. It is a document which points the staff member or the department, as the case may be, to a location where they can, in the first instance, seek help to fathom the meaning and proper application of any rules or regulations that present them with any difficulty of understanding. The Administrative Instruction in question places squarely on the Office of Human Resources Management, the responsibility of helping and guiding staff and departments alike to ascertain the meaning and application of Staff Rules and Regulations. The said ST/AI/234 does not relate to conflict resolution processes nor does it contemplate that the ASG/OHRM becomes the organ for legal interpretation.

44. In the case of *Hastings*,<sup>2</sup> Shaw J had occasion to refer to the hierarchy of the UN’s internal legislation. According to the Judge, this is headed by the Charter of the UN followed by Resolutions of the General Assembly, Staff Regulations and Rules, Secretary-General’s Bulletins and then Administrative Instructions.

45. The General Assembly of the United Nations at its 74<sup>th</sup> plenary meeting on 24 December 2008 adopted a Resolution under which it enacted the Statute of the United Nations Dispute Tribunal which set up this Tribunal. Article 2 of that Statute grants the Tribunal the power to hear and pass judgment on any application brought by staff members, former staff members or their representatives against the Secretary-General as the Chief Administrative O

47. It does not bear restating that the Tribunal is the first tier of the new internal

50. When Counsel communicates with the Tribunal whether by way of written pleadings and submissions or by appearance

combative posture towards the Tribunal. It is as unprofessional as it is contemptuous and does not reflect the “highest standards of efficiency, competence and integrity” required of staff members and of Counsel appearing before the Tribunal.

57. To institute any kind of proceedings before the Tribunal, there are prescribed forms in the Tribunal's Registries which an intending litigant may fill and file. In this way, the Registries at a glance are able to categorize an application. It is thus easier for an Applicant, even if he has no legal representation, to bring his or her case before the UNDT. This procedure also addresses the matter of access to justice.

58. The instant Application was filed befo

61. The Application that gave rise to the proceedings and deliberations in this case clearly was brought under a wrong heading when it was filed as a suspension of action application. The Tribunal, in the present circumstances and in the interest of justice places this matter on the cause list of applications on the merit and accordingly disposes of it fully and on the merits. The only other issue which the Tribunal needs to avert its mind to in the course of doing this is the question whether the Parties' cases were fully presented, heard and considered and whether any party in the case is likely to suffer any prejudice by reason that this matter is disposed of as one heard on the merits. The Tribunal finds that no prejudice results to any party as a result as this case was fully canvassed by both parties and fully considered by the Tribunal.

62. Indeed article 36 of the Tribunal's Rules of Procedure confers the Tribunal with the power to deal with situations not expressly provided for in the said Rules and thereby fill in the gaps encountered in its daily operations. In invoking this power, the Tribunal has at all times the need to meet the ends of justice as its object.

### ***Findings***

63. The following are the Tribunal's findings in the present Application:

a. The Impugned Decision is grossly, patently, incurably and incontrovertibly unlawful. The ED/UNEP wrongfully and arbitrarily placed the Applicant on administrative leave in this case.

b. In the face of the gross unlawfulness of the Impugned Decision and its adverse impact on the Applicant's career, the requirement of urgency is met.

c. The deprivation of continuing professional experience especially where the administrative decision on which it is based is not only unlawful but patently so cannot be adequately compensated in monetary terms.

d. An order suspending the Impugned Decision pending management evaluation is bound to work injustice in the circumstances.

e. It is impossible to suspend the Impugned Decision pending proceedings since there are none and the filing of new proceedings on the same matter would only require that the Tribunal repeats what it has done here under a new heading.

f. The Tribunal, in the present circumstances and in the interest of justice places this matter on the cause list of applications on the merit and accordingly disposes of it fully and on the merits.

***Judgment***

64. In light of the foregoing the Tribunal hereby rescinds, voids and nullifies the Impugned Decision.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 25<sup>th</sup> day of February 2011

Entered in the Register on this 25<sup>th</sup> day of February 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi