Introduction

1. The Applicant has filed an application for a suspension of action against a decision by the Department for General Assembly and Conference Management ("DGACM") that, according to the Applicant, "forces [the Applicant] to use the electronic 'Flex Time' system for time and attendance recording, specifically to 'scan in and scan out', in order to record the time of entry and exit" from his workplace.

2. As described to the Tribunal at the hearing on the application for suspension of action on 13 January 2011, the Flex Time electronic time and attendance recording system ("Flex Time System") was formally placed into effect within DGACM as of 1 January 2011; instead of manually filling out daily time sheets, DGACM staff members now record their time and attendance by swiping their pass across an electronic sensor both upon entry and exit from their workplace. It was explained that the Flex Time System is only installed presently in some sub-divisions within DGACM, but that it would be implemented on a department-wide basis.

3. At the same hearing, the Applicant clarified that he is only objecting to two aspects of the Flex Time System: (a) the recording of the exact time of the Applicant's entry into the workplace; and (b) the requirement that the Applicant 'swipe' his pass at the end of the day in order to reflect that his workday has ended. This end-of-the-day 'swipe' of the pass would have the effect of recording the exact time that a staff member left the workplace premises.

4. It was explained at the hearing that under the former time and attendance system, staff members would manually record their entry time and exit time simultaneously on a master time sheet. This would occur either when the staff member arrived at the workplace or sometime later in the day.

5. The Applicant also clarified at the hearing that he currently is voluntarily using the system upon entry to the workplace in

the United Nations Office at Vienna ("UNOV") since 2003 and is known as the Flex Time System.

10. Beginning in 2009, DGACM began holding town hall meetings and briefings with its different units to explain the Flex Time System and its benefits, presented as "improved technological infrastructure that would allow staff members to work anytime from anywhere in the world". Specifically referenced were the flexible working arrangements of staggered working hours, compressed work schedule (ten working days in nine) and telecommuting, which the Applicant claims have been in place since 2003.

11. The Applicant stated that, later in the discussions regarding the Flex Time System, additional proposals were added: counting half an hour for lunch instead of one hour (UNOV practice) and the managing of compensatory time (at UNOV, professional service staff members can accrue compensatory time, but under the DGACM Flex Time System, only general service staff members can accrue compensatory time). One of the Applicant's contentions herein is that these added features entailed a change in conditions of work and personnel policies, which were required to be the subject of negotiations with staff representatives.

12. The Applicant states that the first communication he received from DGACM management regarding the Flex Time System was in a 26 November 2010 email from the Chief of the Spanish Translation Section. The email explained that as of 1 January 2011, the Flex Time System would be the only system in effect for recording attendance and for approving leave requests; thus, the attendance sheet to be signed upon arriving at the workplace would be discontinued. The email further explained that certain "fundamental issues" such as the policy of accumulation of compensatory hours and core hours still ha

> order how the night shift and the Journal shift are managed). As for lunch, for the time being one hour is "discounted" automatically, independently of the real time (I say discount quote unquote, because until the rules of the game are established, the numbers that may come out from the system are not taken into account. If you forget to log in or out at the ground floor scanners, you can do it from your computer that very day or later, in a retroactive way. Those of you who have Mobile Office may do it from home).

13. Part of the Applicant's contentions is that, while some informal discussions with staff representatives occurred, as required under ST/SGB/274, para. 6, such discussions have led "nowhere" and that as of the date of his application to the Tribunal, no flexible arrangement proposal has been formally put on the table for negotiation with staff.

14. The Respondent counters that, prior to the introduction of the Flex Time System, DGACM management engaged in extensive consultations with staff, particularly on whether all aspects of the UNOV system should be implemented or modified (namely, one-half hour for lunch, whether only general service staff members may accrue compensatory time, and what work options are available to the staff member—full time, half time, or 80% time). The Respondent recognises that not all of these issues have been discussed fully. Counsel for the Respondent further stated that with the Flex Time System DGACM only has introduced a new "manner" of recording time and attendance under ST/AI/1999/13, sec. 1, and that working hours, compensatory time off or overtime arrangements have not been changed.

15. The Applicant reported to the workplace on 4 January 2011 and found that the usual attendance sheet had been discontinued. On the same day, by email to the Under-Secretary-General ("USG") of DGACM, the Applicant requested proper directions or instructions on the use of the Flex Time System.

16. On 5 January 2011, the Executive Officer, DGACM (in the absence of the USG/DGACM), emailed an answer to the Applicant's query, stating in part:

> You may not have been around for the numerous informational sessions (Town Halls, staff meetings, section-by-section meetings) we

> have had regarding the Flex Time System, nor does it seem you have spoken with any of the staff reps with whom we have also had numerous meetings. Please see the answer to your questions [contained in the 4 January 2011 email to the USG/DGACM] below in blue.

17. On 6 January 2011, the Executive Officer emailed all DGACM staff a message titled "Implementation of Flex Time System as of 1 January 2011" which

We will have some lunch briefings in the coming days for anyone who may have questions about the use of Flex Time and will advise you of dates once scheduled. In the meantime, staff in the Executive Office ... or the [Information Communica

1.4 The executive or administrative officer shall ensure that the requisite mechanisms are in place throughout the department or office for effective internal control of attendance and recording of night-time work, compensatory time off and overtime, travel time and administration of leave entitlements. The executive officer or other appropriate official shall certify the hours of night differential and overtime for which payment is to be made in accordance with Appendix B to the Staff Rules. He or she shall also issue appropriate personnel actions to record periods of unauthorized absence or periods of special leave without pay, on the basis of which the corresponding amount of salary and entitlements may be withheld.

20. Staff Regulation 1.3(b), on Performance of Staff, provides:

The whole time of staff members shall be at the disposal of the Secretary-General for the performance of official functions. The Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. Exceptions may be made by the Secretary-General as the needs of the service may require, and staff members shall be required to work beyond the normal tour of duty when requested to do so.

21. Staff Rule 1.4 provides, *inter alia*:

Hours of work and official holidays

(a) The Secretary-General shall set the normal number of working hours per week for each duty station. Exceptions may be made by the Secretary-General as the needs of service may require. A staff member may be required to work beyond the normal number of working hours whenever requested to do so.

22. ST/AI/408 ("Introduction of Staggered Working Hours at Headquarters"), sec. 2, provides:

The normal working week in New York shall remain five days of eight and one-half hours (eight hours when the General Assembly is not in session), with a break of one hour for lunch. Except for staff on authorized absences or sick leave, all staff must be present during a "core period" from 10 a.m. to 4 p.m., the lunch hour beginning not earlier that 11:30 a.m. and ending not later than 3 p.m. The remaining two and one half hours of work (two hours when the General

> identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies, and shall be entitled to make proposals to the Secretary-General on behalf of the staff.

Applicant's contentions

26. The Applicant addresses the three required criteria for a suspension of action

i. the Flex Time System "with its intrusive practice of recording the actual entry and exit times, entails a significant change in conditions of work and personnel policies, which requires negotiations with staff", citing Staff Rule 108.1(d), ST/SGB/2007/9 and ST/SGB/274;

ii. the use of the Flex Time System was connected with the introduction of "Flexible working arrangements" (ST/SGB/2003/4) such as staggered working hours, compressed work schedule, telecommuting, and eventually, with working extra hours to gain compensatory time, which have been in place since 1984, without the need for a computerised Flex Time System;

iii. the "intrusive requirement of logging in and logging out with exact times, which conceptually is no different from controlling staff with electronic bracelets, biometric devices, [global positioning system] trackers or [television] cameras in offices or cubicles. All of these technologies are 'a 21st century tool' that could also be used to take or control attendance, and which also would entail a significant change in conditions of work and personnel policies."

Particular urgency

28. The Applicant contends that, following Corna Order No. 90 (UNDT/2010), implementation of the contested decision would deprive the Applicant of a right, since every working day the Applicant is being deprived of his right "not to be bound to follow directions and instructions improperly issued". At the hearing on the application for suspension of action, the Applicant added that he had been warned that if he does not "swipe out" as required by the Flex Time System, he "could be" subject to disciplinary action.

Tribunal in Abdallah2010-UNAT-091: "To report to work on time regularly, and without break is a basic duty of any one who is employed". In support of his position, the Respondent cites staff regulation 1.3(b), staff rule 1.4(a) and ST/AI/408 (Introduction of staggered working hours at headquarters).

32. The Respondent addresses the three required criteria for a suspension of action application, as set out below.

Prima facie unlawfulness

33. The Respondent contends that the Applicant has failed to present any evidence that raises any "serious" or "reasonable" doubt as to the lawfulness of the contested conduct (citing Corna Order No. 90 (UNDT/2010)). The decision to implement the Flex Time System was taken by the Administration to improve efficiency and minimise costs in the maintenance of time and attendance records, which in turn provides a greater benefit to the Applicant through greater efficiency in management of his affairs, minimising error in recording and payment of entitlements.

Particular urgency

34. According to the Respondent, the Flex Time System was introduced following careful consideration of views of staff members and following an introductory period from September 2010 to December 2010; since 1 January 2011, the FlexTime System has been introduced without any adverse impact on the Administration or on staff members. Thus, no need exists for an order suspending the implementation of the Flex Time System.

Irreparable harm

35. The Respondent states that irreparable harm as to the Applicant does not exist, as the Applicant offers to "voluntarily scan in at arrival . . . while the issue is being solved". Since the Applicant consents to complying with the new Flex Time System

39.

43. The Applicant appears to misunderstand the limited role of the Tribunal in suspension of action cases when he states that "[t]he only way to ensure that my right of not having to scan in and out in the Flex Time system (an improper direction or instruction) is observed is to order DGACM Administration to stop the practice until the merits of the case are finally decided in management evaluation, the UNDT or eventually the UNAT". While the Tribunal, upon the required showing, may order a suspension of action pending management evaluation, the Tribunal may not (on the procedural posture presented to the Tribunal) suspend implementation of the Flex Time System until the UNDT or the UNAT has "decided the case on the merits."

44. The inquiry required of the Tribunal in a suspension of action is very narrow and the threshold of proof that the Applicant must meet is high.

45. The Tribunal will consider whether the Applicant has demonstrated *prima facie* unlawfulness of the contested administrative decision, particular urgency and irreparable harm to him by the implementation of that decision. In the event that all of these requirements have been met, the Tribunal shall suspend the contested decision. Each of these requirements will be examined below. Stated another way, if only one of these criteria has not been met, then the suspension of action may not be granted.

46. At this juncture, the Tribunal notes that the Respondent has raised the issue of whether contested decision is an administrative decision, and considers it prudent to reference the useful discussion *LeBoeuf* UNDT/2010/206, paras. 18-20, on this matter. Accepting, *arguendo*, that the decision is an administrative decision subject to appeal before the Dispute Tribunal, the Tribunal will consider whether the three necessary conditions are met.

Prima facie *unlawfulness*

47. In *Hepworth* UNDT/2009/003, the Dispute Tribunal engaged in a useful discussion of what constitutes *prima facie* unlawfulness in the suspension of action context:

> 10. Further explanation is needed for the criteria that the contested decision "appears *prima facie* to be unlawful". The Latin expression "*prima facie*" might be translated as "at first sight" and can have as such at least two meanings: it seems arguable that 'at first sight' means that the unlawfulness of the decision is that clear and far beyond every doubt that it can be discovered already at first sight. On the other hand —with accentuation of the word *first*—it implies that one can have *second* thoughts about it upon closer inspection which can lead to a different result from the first sight. It seems clear that these different approaches may lead to different results. Since the suspension of action is only an interim measure and not the final decision of a case it may be more appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable doubts about the lawfulness of the contested decision. This understanding can also rely on the fact, that Art. 2.2 of the UNDT Statute only requires that the contested decision "appears" *prima facie* to be unlawful.

48. Similarly, in *Corna* Order No. 90 (UNDT/2010), the Tribunal there discussed what is required for a showing of *prima facie* unlawfulness:

> 28. As the Tribunal held in *Buckley* UNDT/2009/064 and *Miyazaki*

under ST/AI/1999/13 ("Recording of attendance and leave"), the executive or administrative officer shall ensure that accurate time and attendance records are kept for effective internal control of attendance and recording of night-time work, compensatory time off and overtime, travel time, and administration of leave entitlements. With the introduction under ST/AI/408 of staggered working hours at Headquarters and under ST/SGB/2003/4 of flexible working arrangements, the requirement to keep accurate time and attendance records is all the more imperative.

51. Given the requirements of staff members to work a normal work week and given the requirements imposed on the Administration to ensure that accurate time and attendance records are kept, the Tribunal cannot say that the contested decision (implementation of the Flex Time System within DGACM as of 1 January 2011) appears to be prima facie unlawful, based on the relevant rules and regulations in effect.

52. The question nevertheless remains: did an obligation of consultation exist upon DGACM before the Flex Time System was implemented in full and, if so, would this make the contested decision prima facie unlawful?

53. The Applicant argues, in essence, that as of the date of his Applicant to the Tribunal, no flexible arrangement proposal has been formally put on the table for negotiation with staff, ostensibly in violation of ST/SGB/274, para. 6.

54. Upon review of ST/SGB/274, the importance of "staff-management consultation procedures" is emphasised, but it is not entirely clear from the bulletin that the Flex Time System is a required subject of consultation or, more importantly, what the consequences of a failure to consult are.

55. ST/SGB/274, para. 6, does require a brief report of items discussed to be forwarded to supervisors concerned for implementation and to chairpersons of the Joint Advisory Committee, with copies to relevant assistant secretaries-general. Under para. 8, any differences arising over interpretation of the provisions of ST/SGB/274 should be "brought to the attention" of the USG for Administration and

Management through the Joint Advisory Committee, but the Bulletin does not suggest that, due to an arguable failure to consult by DGACM in this case over the Flex Time System, that System itself thereby is rendered unlawful.

56. In other words, the purported failure to consult under ST/SGB/274, para. 6 does not change the Tribunal's conclusion that implementation of the Flex Time System within DGACM as of 1 January 2011 does not appear to be prima facie unlawful, under UNDT Statute, art. 2.2.

Particular urgency and irreparable harm

57. The Applicant cites as particular urgency and irreparable harm in his case that he "might" be subjected to disciplinary action for failure to comply with the Flex Time System in effect.

58. The Tribunal finds that what hypothetically may, or may not, happen in the future cannot form the basis for a current finding of particular urgency and irreparable harm as to the Applicant. The Applicant would be afforded his right to appeal any future disciplinary action as per the relevant staff rules and regulations.

Abuse of Process

59. In his response to the application for suspension of action, the Respondent submitted that the application was frivolous and that costs should be awarded against the Applicant. After some clarification at the beginning of the hearing as to the scope of the Applicant's application, Counsel for the Respondent recognised that para. 29 of the response relating to abuse of process could be struck out from the record. The Respondent went on to explain that it did not comprehend why the Applicant would prefer a less accurate record of time and attendance than that produced in the electronic system and that staff members should not be obstructive to changes that improve efficiency. On this issue the Tribunal reiterates, as it did at the hearing, that a lack of understanding of one party as to the respective position of the other does not

render an application to the Tribunal to be an abuse of process. For this reason, the application for costs shall be denied.

Conclusion

60. For failure to meet all three criteria as required under art. 2.2 of the Dispute Tribunal's Statute, the application for a su