



**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

NADEAU

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 21 April 2016, the Applicant, an Investigator in the Investigations Division, Office of Internal Oversight Services (“ID/OIOS”), filed an application for suspension of action pending management evaluation.
2. The Applicant seeks suspension of the following two decisions made by Mr. BS, Officer-in-Charge, ID/OIOS (“OIC/ID/OIOS”), on 18 April 2016:
  - a. the decision to suspend the activities of the Proactive Risk Unit (“PRU”); and
  - b. the decision to designate Mr. VD as his first reporting officer (“FRO”) and Mr. MD as his second reporting officer (“SRO”).
3. On 22 April 2016, the Registry of the Dispute Tribunal transmitted the application for suspension of action to the Respondent, directing that a reply be filed by 12:00 p.m. on Tuesday, 26 April 2016.
4. On 26 April 2016, the Respondent filed a reply to the application for suspension of action, submitting that it is not receivable and that, should the Tribunal find that it is receivable, the Applicant’s claims are without merit.

## **Background**

5. By email to the Under-Secretary-General, OIOS (“USG/OIOS”) dated 18 March 2016, the Applicant stated:

Unfortunately, the toxicity of my working environment continues to impact on my health, and the recent return of staff members who were on assignments or leave has worsened the situation.

In addition, my immediate supervisor, [Mr. DW], is now on extended sick leave and it was reported that he may not return to the office in May, but instead be redeployed to our office in Entebbe. This adds to an already stressful situation because [Mr. DW] is my first reporting

officer, while the director of our division is my second reporting officer.

For the reasons outlined in an application that is sub judice before the United Nations Dispute Tribunal, a series of events and decisions exacerbated the toxicity of my working environment, and the fact that there was no official announcement about the future of [Mr. DW] as Chief of Section, Proactive Risk Unit, adds to that toxicity.

It goes without saying that I cannot be part of Unit V or have [Mr. MD] in my reporting lines, as both elements will seriously impact on my health.

Therefore, I would appreciate if you could spare one hour in the near future to discuss my options.

6. The Applicant states that he met with the USG/OIOS on 1 April 2016 and that the Executive Officer, OIOS, also attended

“because of his serious misconduct” including “retaliation against staff members who filed complaints against him” (official translation). He also could not work with Mr. VD because of his “serious misconduct ... lack of integrity and professionalism ... [and] incompetence” (official translation). The Applicant requested the reversal of the contested decisions and assignment toof id .725 TD. assignm

13. On the same day, Mr. VD responded to the Applicant, stating that he trusted the Applicant regarding his attendance at the office, and did not need further details or confirmation regarding his attendance and medical appointments. Mr. VD asked the Applicant to proceed with work on his assigned cases.

**Applicant's submissions**

14. The Applicant's principal contentions may be summarized as follows:

*Prima facie unlawfulness*

a. The decision to direct the Applicant to report to Mr. VD and Mr. MD offends the values and principles of the United Nations Charter, thus constituting a violation of the Staff Regulations, bec2ds the 279tN.nstim0u325 TTD0alum.0

- f. The Secretary-General has insisted that the Organization has zero tolerance for misconduct, but this is dependent on the integrity of OIOS staff;
- g. Mr. BS knew that the Applicant has legal matters pending before the Dispute Tribunal;
- h. In making his decision, Mr. BS failed to take into consideration all of the relevant information before him, thus violating due process;

*Urgency*

- i. The written instructions that Mr. VD has sent to the Applicant are offensive in nature and contain indirect threats to him;
- j. Since 18 April 2016, the Applicant's health is worsening;
- k. Information on public record suggests tD0 Tc0 Twg; ;

*Irreparable damage*

- o. The decision has triggered a chain of events that are taking a toll on the Applicant's health that may result in irreparable damages;
- p. Unless the impugned administrative action is suspended, the threat of

**Prima facie *unlawfulness***

- c. The decisions were lawfully taken in response to staffing shortages and increased workload;



The designation of the Applicant's FRO and SRO

h. The reporting lines are the only ones available to the OIC/ID/OIOS within the current operational structure. The Applicant has not identified any legal basis that would disqualify the reporting officers from carrying out their functions as managers within the ID/OIOS. He has previously worked with his SRO and received positive evaluations for his work;

i. The Applicant's references to the toxicity of the current atmosphere are unfounded. The USG/OIOS and the OIC/ID/OIOS have devoted significant time and energy to informally resolving complaints and improving the atmosphere in the New York office;

j. The Applicant's references to overturned judgments of the Dispute Tribunal are irrelevant to the application. They have no factual or legal effect;

*Urgency*

k. The Applicant puts forward no valid argument to demonstrate that the matter is urgent;

l. His contentions regarding the offensive nature of the written instructions of the FRO in his email to the Applicant of 20 April 2016 are without merit. The email is entirely factual in nature and mer0 TD2149 Tw[(k. tr3(e)-.7(riT





or how it will be implemented, other than noting that the Applicant will be “redeployed” as a result. It is not clear to the Tribunal how the fact that the Applicant reported to his new reporting officers resulted in the implementation of a decision to suspend the functions of an entire operational unit, as submitted by the Respondent. Was the Applicant the only staff member assigned to the PRU? This information has not been provided to the Tribunal in this case. Based on the evidence before it, the Tribunal is unable to conclude with certainty that this decision has been implemented.

22. With regard to the second decision, to designate certain staff members as the Applicant’s FRO and SRO, the Tribunal considers this decision to be one of ongoing implementation and effect. In *Calvani* UNDT/2009/092, the Tribunal held that a decision to place a staff member on administrative leave without pay during a certain period of time had continuous legal effect during that period and could only be deemed to have been implemented in its entirety at the end of the administrative leave (rather than when the decision was first notified).

23. The decision to designate an individual as a supervisor is not implemented through one discreet or precise act but rather over a period of time through the ongoing actions of both the staff member and his or her designated supervisor. Therefore, the Tribunal does not consider that the decision has been implemented. The question whether the decision to designate a FRO and SRO has direct legal consequences on the Applicant was not addressed by the Respondent. The Applicant has submitted that the decision is unlawful for a number of reasons, which are addressed below in the section on *prima facie* unlawfulness.

Is the decision to suspend the activities of the PRU an administrative decision subject to judicial review?

24. The Respondent submits that the decision to suspend the activities of the PRU is not reviewable by the Tribunal, because it is an operational decision of OIOS, which is operationally independent from the Secretary-General. Since decisions of

OIOS are not administrative decisions of the Secretary-General, the Respondent submits that they are not subject to review by the Dispute Tribunal, citing *Koda* 2011-UNAT-130, paras. 40 and 41.

25. In *Koda*, the Appeals Tribunal stated:

40. The Administration claims that OIOS' decisions are not administrative decisions of the Secretary-General, and thus not subject to review by this, or necessarily any other, Court. But

[t]he Office of Internal Oversight Services shall exercise operational independence under the authority of the Secretary-General in the conduct of its duties and, in accordance with Article 97 of the Charter, have the authority to initiate, carry out and report on any action which it considers necessary to fulfill its responsibilities with regard to monitoring, internal audit, inspection and evaluation and investigations as set forth in the present resolution ... [footnote: General Assembly resolution 48/218 B (12 August 1994), para. 5(a)]

41. Thus OIOS operates under the "authority" of the Secretary-General, but has "operational independence". As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General's involvement. Further, the Secretary-General is charged with ensuring that "procedures are also in place" to protect fairness and due-process rights of staff members. It seems that the drafters of this legislation sought to both establish the "operational independence" of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General's administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.

42. To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration's taking disciplinary action based thereon must be set aside.

43. Though the UNDT judge found flaws in the OIOS' report, no disciplinary action was based upon it—its recommendation for reassignment was disregarded by the administration, which renewed Koda's contract ...

44. Again, we see no reason to intervene. All claims of error are denied.

26. The Tribunal considers that the *ratio decidendi* of *Koda* 2011-UNAT-130 should be interpreted narrowly, based on the facts of that case. The Appeals Tribunal did not state that decisions of OIOS are not administrative decisions of the Secretary-General, and thus not subject to review by the Dispute Tribunal, as submitted by the Respondent. The Appeals Tribunal's ruling in *Koda* related to the content of a report produced by OIOS. The Appeals Tribunal found that the Dispute Tribunal has no jurisdiction to interfere with "the contents and procedures of an individual report" of OIOS. However, "[t]o the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned." In *Koda*, the Administration rejected a recommendation in an OIOS report to reassign the staff member in that case, so the Appeals Tribunal found no reason to intervene, and affirmed the Dispute Tribunal's judgment, which dismissed the staff member's application.

27. In Judge Faherty's separate and dissenting opinion in *Wasserstrom* 2014-UNAT-457, she stated:

The principle underlying our ruling in *Koda* is that notwithstanding an entity's operational independence, once it is part of the Secretariat, any decision capable of affecting an employee's terms of employment and conditions of service "may be impugned".

The majority opinion in *Wasserstrom* did not provide any other interpretation of the *Koda* judgment.

28. The Tribunal is cognizant of references to the operational independence of OIOS in ST/SGB/273 (Establishment of the Office of Internal Oversight Services) and ST/SGB/2002/7 (Organization of the Office of Internal Oversight Services).

However, since the facts of the present case are distinguishable from *Koda*, and since the Appeals Tribunal did not in that case state that OIOS decisions in general, or even OIOS operational decisions specifically, are immune from judicial scrutiny, the Tribunal rejects the Respondent's submission that the decision to suspend the functions of the PRU is not reviewable by the Tribunal. The operational independence of OIOS does not necessarily mean that the Organization cannot be held liable for OIOS decisions. As stated by the Appeals Tribunal in *Koda*: "Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System".

*Prima facie unlawfulness*

The decision to suspend the functions of the PRU

29. The submissions in the Applicant's application for suspension of action focus primarily on the second of the contested decisions, to designate certain staff members as his FRO and SRO. It appears that he contests the first decision primarily because it

31. The Applicant has not explained exactly how the decision to suspend the activities of the PRU contravenes para. 14 of A/RES/70/111, which does not mention any particular unit of OIOS. However, the Tribunal notes that sec. 7 of ST/SGB/2002/7 (Organization of the Office of Internal Oversight Services) states that one of the core functions of the Investigations Division is:

(d) Assessing the potential within programme areas for fraud and other violations through the analysis of systems of control in high-risk operations, as well as offices away from Headquarters, and making recommendations for corrective action to minimize the risk of commission of such violations;

32. To the extent that sec. 7(d) of ST/SGB/2002/7 and sec. 14 of A/RES/70/111 describe some or all of the functions of the PRU, the Tribunal notes that, while the General Assembly stressed the need to increase an emphasis on these functions, the temporary suspension of the work of the PRU is not *prima facie* unlawful *per se*, as para. 14 of A/RES/70/111 does not create any legal obligation on OIOS, but rather highlights an area of particular importance and concern to the General Assembly. The Applicant has not referred the Tribunal to any other instrument or case law to support his submission that this decision is *prima facie* unlawful; or indeed that the decision produces legal consequences for the Applicants terms and conditions of employment.

33. The Tribunal is not satisfied, based on the submissions of the parties and evidence before it in this case, that the decision to suspend the functions of the PRU is *prima facie* unlawful. It follows that the decision in question does not meet one of the cumulative and mandatory conditions for granting a suspension of action. Having reached this finding, the Tribunal does not need to examine the remaining cumulative requirements for granting a suspension of action of this decision, namely urgency, and irreparable harm.

34. The request to suspend the implementation of the first contested decision regarding the functions of the PRU is rejected.



The designation of the Applicant's first and second reporting officers

35. The designation of first and second reporting officers is provided for in ST/AI/2010/5 (Performance Management and Development System), which states:

**Section 5**

**Reporting officers and additional supervisors**

5.1 A first reporting officer shall be designated for each staff member at the beginning of the performance cycle. The first reporting officer is responsible for:

- (a) Developing the workplan with the staff member;
- (b) Conducting the midpoint review and final evaluation;
- (c) Providing ongoing feedback on the overall work of the staff member throughout the performance cycle;
- (d) Advising, supporting and coaching the staff member on professional development and in the development of a personal development plan;
- (e) Developing a performance improvement plan in consultation with the staff member in the case of performance shortcomings or underperformance, if applicable;
- (f) Ensuring that all e-PAS and/or e-performance documents of staff supervised are completed in accordance with the prescribed procedures.

36. The second reporting officer is responsible for holding the FRO accountable in the performance of the above tasks, resolving disagreements between the staff member and the FRO, and overseeing the implementation of a performance improvement plan in case of performance shortcomings or underperformance (sec. 5.3 of ST/AI/2010/5). In addition, the SRO "has the broader responsibility of ensuring that the Performance Management and Development System is consistently and fairly applied across work units by all first reporting officers who report to him or her. The second reporting officer shall ensure fairness and consistency throughout the cycle, especially when defining performance expectations and communicating performance standards" (sec. 5.4 of ST/AI/2010/5).

37. The Applicant submits, *inter alia*

41. In his application for suspension of action, the Applicant states that he has a “reasonable expectation of immediate retaliation” and describes written instructions that he has received from Mr. VD as “offensive” and containing “indirect threats”.

42. In para. 51 of A/RES/62/228 (Administration of justice at the United Nations), adopted on 22 December 2007, the General Assembly reaffirmed the importance of the general principle of exhausting administrative remedies before formal proceedings are initiated. The Tribunal cannot circumvent the complaint procedures provided for in ST/SGB/2008/5 ~~trati217of just2(ction)6rit3(te reo)ru~~ ~~te reo~~ ~~cs~~ that he o/1(n.1(2.7

45. The request to suspend the implementation of the second contested decision regarding the designation of the Applicant's FRO and SRO is rejected.

### **Observation**

46. The Tribunal is aware that many applications have been filed by diverse applicants regarding OIOS, alleging conditions not conducive to a harmonious and productive working environment. As the office charged with onerous general oversight duties and responsibilities, it would be in the interests of all concerned to have any outstanding matters resolved amicably, and the Tribunal encourages the parties to attempt informal resolution through either *inter partes* discussions or the Office of the United Nations Ombudsman and Mediation Services.

### **Conclusion**

47. The application for suspension of action pending management evaluation does not meet all of the cumulative and mandatory conditions for granting such relief as set out in art. 2.2 of the Tribunal's Statute.

48. The application is therefore rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 29<sup>th</sup> day of April 2016