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UNDER-SECRETARY GENERAL MEMORANDUM ON ADDITIONAL DELEGATION OF AUTHORITY AND SUBDELEGATION THEREOF

PRELIMINARY REMARKS

1. It is important to bear in mind that this consultation is based exclusively on the available texts and documents and should be used cautiously and make sure that there is no missing document that could be relevant for the Memorandum legal analysis.

2. Furthermore, for lack of time, this consultation is not exhaustive. It only gives some indications which might help in drawing up a strategy and perhaps an action plan with a view to dealing with the issues raised in the Memorandum in a responsible and effective way, and in taking an informed decision.

3. Finally, it should be noted that this consultation is made on legal basis but bearing the fingerprints of a former UN Official, trade unionist, specialized in the International Civil Service Law. That is why this consultation contains, in its last page and in Molière language, one observation and some suggestion which have nothing to do with the Memorandum or the New Wood request.

INTRODUCTION

4. The Under-Secretary-General issued a Memorandum on "*Additional delegation of authority in the administration of the staff regulations and*

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rules" dated 26 March 2020. This Memorandum relates to the delegation and sub-delegation of authority, in one hand, and to terminate the appointment of a staff member in case of reduction of staff and to decide to offer and approve agreed separation packages, in the other hand. The Memorandum fixed the terms in which this authority should be exercised.

5. Considering the great impact which the Memorandum could have on the working conditions of staff members and their future in the Organization, the consultation of Staff Representatives should be made on it before its issuing. The available information is not clear on that issue which makes necessary to try to give more explanation on the consultation.

6. This paper is an attempt at providing New Wood with some legal guidelines on the critical issues which the Memorandum could raise including those that could be raised when it is translated into practice. However, this consultation does not give any legal advice on the action to take in case the New Wood decides to bring its grievance to the informal or formal legal process and if it has the legal capacity to do so.

7. This consultation refers to Fundamental Rights at Work and Human Rights including the freedom of Association since they are considered as general principles of international law that should be respected by the United Nations Organisation in relation with its employees and the United Nations and ILO administrative tribunals have pronounced in this way. The reference also is made to the Sustainable Development Goals (SDGs) as far as it incorporates a wide range of human rights principles and standards throughout its targets. In addition, the United Nations

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Organization considers that the SDGs "*can be much more effective if guided by a Human Rights Based Approach*".

8. It is from this perspective that the SDGs and Decent wok are referred to in this consultation. It is true that no reference is made to them in the international administrative Tribunals (to our knowledge). But it is also true that, in a litigation before international tribunals, the parties could bring a contribution in establishing new case law and strengthening those which already established. The Lawyers outside of United Nations are not, generally, aware about these principles and it is up to the United Nations Trade Unions or Associations and the Staff members to defend these principles before the UN and ILO administrative tribunals. The discussion of the contested Memorandum could be, today, a good opportunity for New Wood to do so.

ON DELEGATION OF AUTHORITY

9. The Charter of the United Nations assigns to the Secretary-General the powers and responsibilities in matter of staff management (Arts 100 and 101 of the Charter).

10. For an effective mandate delivery, it is within the Secretary General's competence to delegate to managers the necessary managerial authority over human, financial and physical resources.

11. It should be recalled that two regional workshops were held on new delegation of authority with heads of entity co-chaired by Under-Secretary -General for Management Strategy, Policy and Compliance (DMSPC) and for Operational Support (DOS) in late January 2020.

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12. During the said workshops, most heads of entity had accepted their delegation of authority via an online portal. According to the various Bulletins issued by him, the Secretary-General may revoke a prior delegation of authority at any time.

ON STAFF CONSULTATION

13. The context within which this important decision of delegation of authority to terminate staff contracts was made raises the issue of effectiveness of the consultation namely between the General-Secretary and the Staff Representatives. The provisions of Staff Rules and Regulation are not respected in this regard.

14. It should be recalled that the Staff Rules and Regulation provide for an effective consultation between the General-Secretary and the Staff Representatives. According to Article 8.1 paragraph (a) of Staff Regulation, *[T]he Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies.*

15. To give effect in practice to the consultation, the staff has the right to establish representative bodies according to the Staff Rules and Regulation. The main provisions in this respect are the following:

Rule 8.1. Staff representative bodies and staff representatives

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(a) The term “staff representative bodies”, as used in the present chapter of the Staff Rules, shall be deemed to include staff associations, unions or other corresponding staff representative bodies established in accordance with staff regulation 8.1 (b).

(b) Staff representative bodies may be established for a duty station or for a group of duty stations. Staff members serving in duty stations where no staff representative body exists may seek representation through a staff representative body at another duty station.

16. The New Wood Trade Union is established according to the Staff Rules and Regulation and its main objective is to represent staff interests in their relations with the Administration. As a such, the Secretary-General should consult the New Wood Committee in an effective way and in good faith before issuing the Memorandum so far as the latter may affect the staff welfare, their conditions of work and the general conditions of their life.

17. By failing to consult with the New Wood Trade Union, the Secretary-General has failed to apply the provisions of the Staff Rules and Regulation namely provision 8.1. (f) which provides for the following:

(f) The staff representative bodies shall be entitled to effective participation, through their duly elected executive committees, in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies, and shall be entitled to make proposals to the Secretary-General on behalf of the staff.

18. The provision 8.1 paragraph h, of the Staff Regulation determines the administration decisions that should be subject of consultation and the manner in which the latter should take place. This provision provides for the following:

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> (h) General administrative instructions or directives on questions within the scope of paragraph (f) above shall be transmitted in advance, unless emergency situations make it impracticable, to the executive committees of the staff representative bodies concerned for consideration and comment before being placed in effect.

19. The Memorandum of 26 March 2020 is a general administrative instruction on question within the scope of paragraph 8.1 (f), on the one hand, and there is no emergency situation which could have prevented the Secretary-General form ensuring this consultation, on the other hand. In these circumstances, , the Memorandum is clearly not issued in conformity with the Staff Rules and Regulation and should be withdrawn accordingly.

20. In one of its earlier reports, the Joint Inspection Unit evoked the lack of effectiveness of consultation of Staff Representatives:

> *"Grievances on the substance of measures decided were worsened by the chronic lack of communication, early consultation and sometimes good faith in negotiations between Staff and Management. While the principles and frameworks for mutual information, consultation and negotiation were available via joint bodies, the failure to effectively apply them creates a confrontational atmosphere*"[1].

21. In its Recommendations, the JIU invited the staff and management representatives as members of the SMC "*to consider, discuss and improve […] the institutional changes proposed in chapter VIII to make this Committee, hence the SMR, more effective*".

[1] Staff-management relations within the United Nations, Joint Inspection Unit JIU/REP/2011/10

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22. It would be interesting to know what has been done since then and what was achieved in terms of effectiveness of SMC and SMR or equivalent bodies and, in case of need, what strategy should be adopted to achieve this objective.

ON ABOLITION OF POSTS

23. The international organisations have the right to restructure their departments and units, abolish posts, if necessary, and consequently terminate the appointment of their staff members who are affected by the planned restructuring. However, prior to terminating appointments, they have to take suitable steps to find alternative employment for the affected staff, at least for those holding an appointment of indeterminate duration.

24. The applicable law regarding the abolition of posts is mainly the Staff Rules and Regulations. There are several provisions governing this issue provided for under Chapter IX on Separation from Service.

25. However, it is not the Staff Rules and Regulations only that apply. In fact, the relationship between international civil servants and their employer organizations is governed not only by the terms of their respective employment contracts and the individual organization's Staff Rules and Regulations. They are also governed by a large body of legal principles, often referred to as the general principles of international civil service law.

26. These principles have been developed and are continually applied by international administrative tribunals including those of the United Nations,

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and it is generally recognised that these general principles must be respected by the Organisation in the adoption and application of its Staff Rules and Regulations.

27. Among these general principles are those relating to non-discrimination, obligation to motivate decision, proportionality as well as non-retroactivity, act in good faith, honour legitimate expectations, provide stability and foreseeability of rules, and the principle *tu patere legem quam ipse fecisti*.

28. In General, it was decided by the Tribunals (UNDT and UNAT) that the downsizing process was effective, real, genuine and the applicants were not personally targeted by the process.

29. In the context of any reduction of staff, it is important to refer to the United Nations Sustainable Development Goals (UNSDGs) particularly the Targets 8.5 and 8.8 related to inclusive economic growth, and to the UN support to the ILO standards on decent work. The ILO considers decent work more than just a source of income and social protection. According to the ILO, decent work "*provides people with social identity, dignity and self-respect*". It added that target 8.5 recognizes "*full and productive employment and decent work as an objective and, moreover, extends this objective to all women and men and target 8.8 (upholding labour rights and promoting safe and secure working environments) are concerned with guaranteeing fundamental rights and protections that all people ought to enjoy in the world of work"*[2].

[2] ILO, Time to Act for SDG 8 Integrating Decent Work, Sustained Grouth and Environmental Integrity, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_712685.pdf

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30. These Fundamental Rights are part of Human Rights. They are considered as peremptory norms of international law on human rights. They are of "an absolutely binding nature from which no exception is permitted" as outlined by the ILO Committee of Experts in its analysis on the Forced Labour Convention (No 29) which is one of the eight ILO fundamental Conventions. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) considered that the principles embodied in the Forced Labour Convention "have found universal acceptance and endorsement and have become an inalienable part of the core fundamental rights of human beings".

31. The freedom of Association and social dialogue are among the fundamental rights at work which are part of Human Rights. The reasoning applied to the Forced Labour Convention should be applied, *mutatis mutandis,* to it since it is considered by the International Community as Fundamental Right and part of Human Rights accordingly[3].

32. The United Nations SDGs as well as the ILO Decent Work Agenda cover all human beings, men, and women, in the world and do not exclude the Staff of the United Nations Organisations. Second, the United Nations Organizations, like the States, are subject of the International Law. They should apply Decent Work and the Fundamental rights and Human rights, first of all, for themselves.

[3] See ILO Declaration on Fundamental Principles and Rights at Work, ILO, June 1998; International Covenant on Economic, Social and Cultural Rights, UN, December 1966

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33. Based on this reasoning, we could legally support that the Secretary-General is bound by the fundamental Principles of freedom of association and social dialogue.

34. The ILO CEACR underlined that "*social dialogue is both a key contributing process to the implementation of the fundamental Conventions, and a positive outcome when these Conventions are effectively applied*". It added that where there is an absence of genuine social dialogue, "*the application of the fundamental Conventions is seriously hindered"*.

CONCLUSIONS

35. In view of the above, and given the urgency and importance of the issue and what it represents for the future of staff within the UN, it would be advisable to set up a working group to be supported by affirmed legal counsel, specialised in the international civil service law, to analyse in-depth the issue of the legal point, in particular.

36. It would also be advisable to ask the Secretary-General to reconsider his decision on downsizing and open an effective dialogue, in good faith, with Staff Representatives. This dialogue should take place particularly in light of the Targets 8.5 and 8.8 of the SDGs on decent work jointly with the Fundamental Principles and Rights at Work and Human Rights in addition to the Staff Rules and Regulations as well as the general principles of international civil service law.

PERSONAL OPINION AND RECOMMENDATION ON PROVISION 9.3 d) of Staff Rules

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Article 9.3 d) du Statut du Personnel : une indemnité extra juste, à la tête du client ou l'achat du silence du fonctionnaire ?

1. A la lecture du Chapitre IX du Statut du personnel lors de la préparation de cette consultation, l'Article 9.3 d) a attiré mon attention.

2. Conformément à cette disposition, le Secrétaire général « *peut, lorsque les circonstances le justifient et lorsqu'il juge qu'il y a lieu de le faire, verser au fonctionnaire licencié qui ne conteste pas la mesure de licenciement* (c'est nous qui soulignons) *une indemnité de licenciement supérieure de 50 %, au plus, à celle normalement prévue par le Statut du personnel »*.

3. Cette disposition peut être interprétée comme ayant pour objectif essentiel de dissuader psychologiquement un fonctionnaire dont le licenciement est abusif à engager les procédures contentieuses pour obtenir justice. Il est légitime de se demander si l'Administration accorderait les 50% dans le cas où elle a la certitude absolue que sa décision de licenciement n'est entachée d'aucune irrégularité et quels sont les critères sur lesquels elle se baserait pour l'octroi d'un tel pourcentage supplémentaire.

4. Le licenciement relève du pouvoir d'appréciation de l'Administration, certes, mais elle peut être annulé par le Tribunal si elle viole une règle de forme ou de procédure ou si elle repose sur une erreur de fait ou de droit ou encore si des éléments essentiels n'ont pas été pris en

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considération, si des conclusions manifestement erronées ont été tirées des pièces du dossier ou enfin si elle émane d'un organe incompétent.

5. Cette disposition pourrait être très préjudiciable au fonctionnaire si la décision du licenciement est susceptible d'être censurée pour les considérations rappelées ci-dessus. Il pourrait l'être aussi lorsque la décision de licenciement est disproportionnée par rapport à la faute qui l'aurait motivée ou entachée d'irrégularité et qu'une action en justice devant le Tribunal conduirait à son annulation voire à la réintégration du fonctionnaire dans l'Organisation.

6. Dans le souci de protéger les droits des fonctionnaires qui pourraient faire l'objet d'un licenciement abusif, et d'empêcher l'Administration à abuser de son pouvoir sans aucune censure en réduisant le fonctionnaire au silence par un montant d'argent qui pourrait être considéré, dans un autre contexte, comme de la corruption visant à acheter le silence de la victime, il est impératif d'amender le statut du personnel par la suppression de la partie de la disposition portant sur le renoncement du fonctionnaire à contester la décision du licenciement et permettre en conséquence aux fonctionnaires qui font recours contre le licenciement d'en bénéficier eux-aussi.

7. L'amendement du Statut du personnel sur ce point s'impose d'autant plus que l'accès à la justice est un droit fondamental et que, de surcroît, l'Organisation jouit de l'immunité de juridiction et d'exécution qui empêchent le fonctionnaire de l'assigner devant une juridiction externe.

8. En effet, le droit au recours juridictionnel implique la capacité juridique et effective pour un fonctionnaire d'ester en justice pour faire juger ses

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prétentions dans le cadre du contentieux prévu par le système onusien. Ce droit est reconnu par la Déclaration universelle des droits de l'homme. C'est un droit fondamental qui relève des normes considérées comme impératives et il ne peut pas y déroger, à ce titre, sous aucun prétexte. Son caractère impératif interdit même au fonctionnaire à y renoncer.

9. Dans son Article 1.2 relatif aux droits et obligations essentiels du fonctionnaire et les valeurs fondamentales, le Statut du personnel prévoit l'obligation du fonctionnaire de « *respecter et appliquer les principes énoncés dans la Charte, ce qui suppose notamment qu'il ait foi dans les droits fondamentaux de l'homme, dans la dignité et la valeur de la personne humaine et dans l'égalité des droits des hommes et des femmes*. ».

10. L'Administration n'est pas exemptée du respect de ces droits et principes et il est de son obligation de les respecter et les promouvoir. Le droit au recours fait partie de ces droits fondamentaux et elle est tenu, à ce titre, de le respecter et pour ce faire elle doit amender le statut en supprimant la partie de la disposition 1.2 qui porte sur le renoncement au droit d'ester en justice contre le licenciement.

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