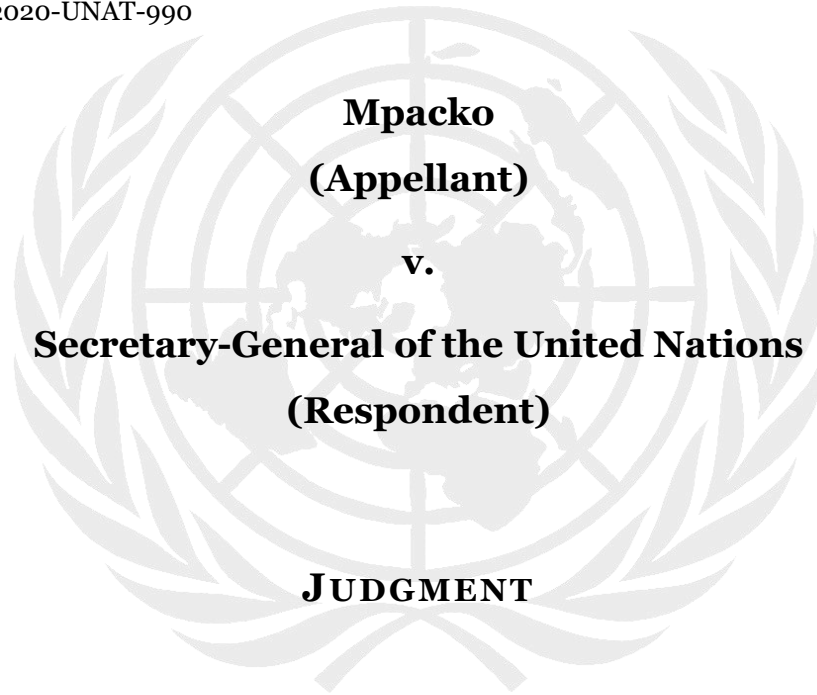




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-990



**Mpacko
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2019-1294
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Mrs. Mpacko:	Ludwig Leblanc
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. The present case arose in April 2012 when the United Nations Stabilization Mission in Haiti (MINUSTAH) decided to redeploy Mrs. Adele Denise Maloka Mpacko from Santo Domingo, the Dominican Republic, back to Port-au-Prince, Haiti. She contested that decision, but her application for suspension of the redeployment decision was not successful. Starting from the end of June 2012, Mrs. Mpacko was absent from work, and she did not respond to any attempts by MINUSTAH to contact her including sending her messages via her personal e-mail address and delivering documents to her residence in Santo Domingo. Mrs. Mpacko was subsequently separated from service for abandonment of post, in December 2012. Six years later, she launched the appeal process to contest the separation decision. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York rejected her application as not receivable. For reasons set out below, we affirm the Dispute Tribunal's decision. We also reject the applications for intervention filed by Mrs. Mpacko's two daughters.

Facts and Procedure

2. Mrs. Mpacko joined MINUSTAH in 2008 as an Associate Civil Affairs Officer at the P-2 level with the Civil Affairs Section in Port-au-Prince, Haiti. Effective 1 September 2010, she moved to the Contracts Management Unit, and effective 10 May 2011, she was assigned to the Procurement Section, both within MINUSTAH, but in Santo Domingo, the Dominican Republic. The post in the Procurement Section which she was encumbering was loaned from MINUSTAH's Port-au-Prince duty station.

3. On 13 April 2012, Mrs. Mpacko received an e-mail, informing her that her post was to be returned from Santo Domingo to Port-au-Prince, and that she was to be redeployed from the Procurement Section, Santo Domingo, to the Civil Affairs Section, Port-au-Prince, effective 1 June 2012.

4. On 7 May 2012, Mrs. Mpacko requested a management evaluation of the decision to redeploy her back to Haiti.¹ On 29 May 2012, Mrs. Mpacko filed with the Dispute Tribunal an application for suspension of action of the contested decision, pending the management evaluation.²

5. In June 2012, Mrs. Mpacko's fixed-term appointment was extended for one year from 1 July 2012 to 30 June 2013. From 28 June 2012, she was absent from work. She requested certification of sick leave for her absence.

6. In an e-mail dated 11 July 2012 sent to Mrs. Mpacko's work e-mail address, a human resources officer from MINUSTAH asked Mrs. Mpacko to get in touch with him in relation to her request for sick leave certification, because the Medical Services Division at Headquarters (MSD) was "not able to certify any [of her] sick leave at present ... [and it] require[ed] a detailed medical report with exact diagnosis, treatment provided and prognosis". Mrs. Mpacko did not respond to the e-mail.

7. In a memorandum dated 10 August 2012, the Officer-in-Charge (OIC) of the Personnel Section, MINUSTAH, advised Mrs. Mpacko that since her sick leave had yet to be certified by the MSD, her absence from 28 June 2012 onwards would be charged to annual leave, and that after her annual leave days would be exhausted as of 31 August 2012 she would be placed on Special Leave without Pay (SLWOP) from 1 September 2012. There was no response from Mrs. Mpacko.

8. However, Mrs. Mpacko continued to provide her medical reports to the MSD via her personal e-mail address. In a response e-mail dated 27 September 2012 sent to Mrs. Mpacko's personal e-mail address, the MSD advised Mrs. Mpacko that based on the medical certificate submitted, the MSD was "not able to certify any sick leave at present".

¹ On 22 June 2012, the Under-Secretary-General for Management upheld the contested decision.

² The UNDT rejected Mrs. Mpacko's application, finding that there was no particular urgency to the application. The Dispute Tribunal determined that Mrs. Mpacko had known of the reassignment decision at least six weeks before she had brought her suspension of action application, and that any urgency was of Mrs. Mpacko's own making. Mrs. Mpacko appealed Judgment No. UNDT/2012/081 to the Appeals Tribunal. In Judgment No. 2013-UNAT-314, the Appeals Tribunal dismissed Mrs. Mpacko's appeal as not receivable, finding that the Dispute Tribunal had not exceeded its competence or jurisdiction in denying her application for suspension of action.

9. In a memorandum dated 28 September 2012 to Mrs. Mpacko, the OIC of the Personnel Section, MINUSTAH, referred to her 10 August 2012 memorandum and the e-mail of 27 September 2012 from the MSD and asked Mrs. Mpacko to “resume [her] duty in Port au Prince on 01 October 2012. Failure to report to work will force MINUSTAH to pursue abandonment of post procedures.” Again, Mrs. Mpacko did not respond.

10. On 1 October 2012, Mrs. Mpacko resubmitted her medical reports to the MSD, copying the Personnel Section of MINUSTAH. The Personnel Section of MINUSTAH responded the following day, using the personal e-mail address that Mrs. Mpacko had used the previous day to communicate with the MSD and forwarding all correspondence related to Mrs. Mpacko’s unauthorized absence. The Personnel Section of MINUSTAH stated that the office had attempted to contact her “many time[s] without success”. It thus requested Mrs. Mpacko’s “prompt response” and her immediate presence at work in Port-au-Prince.

11. After MINUSTAH’s attempts to enlist the help of Mrs. Mpacko’s colleague and her sister-in-law that Mrs. Mpacko had designated as her emergency contact had failed, on 14 November 2012, the Director of Mission Support, MINUSTAH, requested the approval of Mrs. Mpacko’s separation for abandonment of post on the ground that her sick leave was not certified, and that she had failed to return to duty and had not responded to efforts to contact her by phone, e-mail and her next of kin, after she had exhausted her annual leave and the SLWOP.

12. On 4 December 2012, the then Assistant Secretary-General for Human Resources Management approved Mrs. Mpacko’s separation from service for abandonment of post in accordance with administrative instruction ST/AI/400 on the ground that the required procedures under ST/AI/400 had been followed.³

13. In a memorandum dated 4 January 2013, the Director of Mission Support, MINUSTAH, informed Mrs. Mpacko that she had been separated from service for abandonment of post effective 4 December 2012. This memorandum was sent first to Mrs. Mpacko’s work e-mail address and subsequently to her personal e-mail address.

³ Administrative instruction ST/AI/400 titled “Abandonment of post” issued by the Assistant Secretary-General for Human Resources Management, dated 22 December 1994.

14. On 10-11 January 2013, a security officer of MINUSTAH in Santo Domingo attempted to hand deliver paperwork relating to Mrs. Mpacko's separation at her residence, but he was not successful.

15. According to Mrs. Mpacko, in 2013, she did not receive any communication from MINUSTAH, except for "a letter of employment issued to [her] upon [her] request by MINUSTAH HR". Mrs. Mpacko here refers to a reference letter addressed "to whom it may concern" dated 14 June 2013. The letter was issued to Mrs. Mpacko by a human resources officer of MINUSTAH "for certifying her employment with the United Nations and visas [sic] purpose". It stated that Mrs. Mpacko had worked for MINUSTAH since 13 January 2008 and provided information about her annual income and the medical insurance coverage for her and her two daughters. The letter concluded that "[i]t [did] not, in any way, commit the United Nations to any financial, legal or other obligation".⁴

16. In a letter dated 24 July 2013, the Chief, Payroll and Disbursement Section, Accounts Division, Office of Programme Planning, Budget and Accounts, stated to Mrs. Mpacko that it had been determined, upon processing her final pay on separation with effect from 4 December 2012, that she had been overpaid by USD 1,153.85 and asked Mrs. Mpacko to pay back USD 1,153.85 by money order, bank draft, or cheque. She warned Mrs. Mpacko that "failure to settle this overpayment will prevent us from completing the processing of [her] other separation entitlements".

17. This letter was sent as an attachment via an e-mail to Mrs. Mpacko's personal e-mail address at 5:17 pm, 24 July 2013. Mrs. Mpacko responded at 5:52 pm, 24 July 2013, by stating that the recovery of overpayment was "an error", because she had been on sick leave and had never separated from MINUSTAH.

18. E-mail exchanges ensued between Mrs. Mpacko on the one hand and the MSD, MINUSTAH and, later the Department of Field Support, on the other, with each side essentially maintaining and reiterating the original position.

⁴ In an e-mail dated 7 August 2013 to Mrs. Mpacko, the Officer-in-Charge, Personnel Section, MINUSTAH, stated that this letter of 14 June 2013 "should not have been issued" because Mrs. Mpacko had already been separated from service effective 4 December 2012.

19. On 30 November 2018, Mrs. Mpacko requested a management evaluation of the contested decision to separate her from service for abandonment of post, claiming that she had not received any “prior and formal notice” of the separation decision. She asserted that she first saw the separation letter only on 5 November 2018 and that nobody from MINUSTAH had contacted her or sent a registered mail to her contact details.

20. In a letter dated 13 December 2018, the Chief of the Management Evaluation Unit (MEU) informed Mrs. Mpacko that her request for a management evaluation was out of time and was therefore not receivable.

21. On 31 December 2018, Mrs. Mpacko filed an application with the Dispute Tribunal contesting the decision to separate her from service for abandonment of post.

22. In Judgment on Receivability No. UNDT/2019/096 issued on 29 May 2019, the Dispute Tribunal rejected Mrs. Mpacko’s application as not receivable. The UNDT noted that Mrs. Mpacko had filed an application contesting a decision that had become effective more than three years before, and concluded that it was therefore not receivable pursuant to paragraph 4 of Article 8 of the UNDT Statute.⁵ The Dispute Tribunal recalled the detailed procedures set forth in Administrative Instruction ST/AI/400 that must be followed to separate a staff member for abandonment of post, particularly when Mrs. Mpacko claimed that her absence was the result of incapacity due to health reasons. The UNDT found that the Administration had properly followed the procedures. Noting that ST/AI/400 listed a few examples of appropriate communication methods, such as registered mail, personal delivery, or telephone, the UNDT determined that the said administrative instruction also allowed the utilization of any other appropriate means. It found that sending communications to Mrs. Mpacko’s personal e-mail address was appropriate under ST/AI/400, since she had responded to e-mails that had been previously sent to her personal e-mail address.

23. On 27 July 2019, Mrs. Mpacko appealed the Judgment before the United Nations Appeals Tribunal (Appeals Tribunal).

⁵ Article 8(4) of the UNDT Statute reads: “an application shall not be receivable if it is filed more than three years after the applicant’s receipt of the contested administrative decision”.

24. On 20 September 2019, Ms. Paule Audrey Mpacko Ntoubas, Mrs. Mpacko's elder daughter, filed an application for intervention by a person not party to a case "in order to guarantee [her] fundamental right to an education" "so that [she] can complete the Baccalaureate studies that [she] was forced to suspend four years ago" allegedly caused by the withholding of the education grant for the 2010-2011 school year and the refusal to reimburse her school fees for the school year 2011-2012.

25. On 30 September 2019, the Secretary-General filed an answer to Mrs. Mpacko's appeal as well as comments, wherein he objected to Paule Audrey's application for intervention. On the same date, Mrs. Mpacko filed comments in support of Paule Audrey's application for intervention.

26. On 21 October 2019, Mrs. Mpacko filed a motion for additional pleadings, to which the Secretary-General filed his response on 31 October 2019.

27. On 10 March 2020, Ms. Ann Steffi Mpacko, Mrs. Mpacko's younger daughter, filed an application for intervention by a person not party to a case "in order to guarantee her 'inalienable right to education'". On 17 March 2020, the Secretary-General filed his response objecting to Ann Steffi's application for intervention. On the same date, Mrs. Mpacko filed comments in support of Ann Steffi's application for intervention.

Submissions

Mrs. Mpacko's Appeal

28. The Dispute Tribunal erred in fact and in law by declaring Mrs. Mpacko's application was not receivable. Mrs. Mpacko never received any official information or notification of her separation from service in any form. The Administration must prove that it provided the notification in one of the forms stipulated in section 16 of ST/AI/400, including the dispatch of a registered letter with a return receipt or communication via her emergency contact. It was unjust to invoke a statute of limitations against her application since the Administration did not provide her with notice of her separation.

29. The Dispute Tribunal committed a procedural error by failing to hold a hearing for the parties to face each other in person or by videoconference, in violation of the principle of adversarial court proceedings.

30. The Dispute Tribunal erred by examining the substance of the case after it had found Mrs. Mpacko's application was not receivable. The Judge's analysis of the facts was riddled with prevarications, doubts and assumptions. As the appeal is a re-adjudication, Mrs. Mpacko is submitting the facts anew to the Appeals Tribunal and presenting her arguments to counter the UNDT Judge's factual findings, in order to prove her position that she has not received the notice of separation from service for abandonment of post in accordance with sections 11 and 16 of ST/AI/400 and consequently she still considers herself to be a serving staff member of the United Nations.

31. Mrs. Mpacko requests that the Appeals Tribunal find her case receivable, vacate the UNDT Judgement, re-adjudicate the case and conclude that the Administration has caused her and her two daughters moral, financial, and emotional harm. As remedies, Mrs. Mpacko requests that the Appeals Tribunal order her reinstatement, payment of her salaries since October 2012 and an unspecified amount of reparation and compensation for the moral and emotional harm sustained. She further requests that in the unlikely event of rejection, the Appeals Tribunal order the production of the evidence of the notification of separation from service in accordance with section 16 of ST/AI/400.

The Secretary-General's Answer

32. The Dispute Tribunal correctly concluded that Mrs. Mpacko's application was not receivable, as it was filed more than three years after her receipt of the contested decision, in July 2013 at the latest. In such circumstances, the UNDT had no authority to exercise any discretion to suspend or waive the deadlines. Mrs. Mpacko was informed on several occasions that she had been separated from service for abandonment of post effective 4 December 2012. She acknowledged the contested decision when she sent a protest e-mail on 8 August 2013 calling the decision a "substantial error". However, she waited until 30 November 2018 to request a management evaluation of the separation decision, which was more than five years after she had been informed of the contested decision. Mrs. Mpacko has failed to establish any error warranting the reversal of the impugned Judgment. She simply reiterates her arguments on the merits and clearly disagrees with the Dispute Tribunal on its receivability finding, but she does not show how the Dispute Tribunal erred in dismissing her application as not receivable. Her appeal should therefore be rejected for this reason alone.

33. Mrs. Mpacko's appeal should also be rejected on the ground that she has failed to establish that the Dispute Tribunal erred in finding that she had been appropriately informed of the separation decision. Mrs. Mpacko makes an erroneous reference to paragraph 16 of ST/AI/400. There is no reference to an obligation to use registered mail to notify staff members of separation for abandonment of post. ST/AI/400 also provides for other means of communication throughout the procedure of abandonment of post, including telephone communication or written communication, by registered mail, personal delivery, or other appropriate means.

34. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the impugned Judgment.

Mrs. Mpacko's Motion for Additional Pleadings and the Secretary-General's Response

35. Mrs. Mpacko requests leave to adduce a template of an acknowledgement of receipt into evidence, because this is required to be signed by the staff member for a decision to become officially notified, and it is the necessary part of the elaborate official process of the taking of a decision to separate a staff member from service, and she was never asked to sign such acknowledgement of receipt.

36. The Secretary-General requests that the Appeals Tribunal deny Mrs. Mpacko's motion, because she has failed to explain the exceptional circumstances warranting the receipt of the template of acknowledgement of receipt. The template was readily available when she presented her case before the Dispute Tribunal. She should have presented it to the Dispute Tribunal.

Applications for Intervention by Ms. Paule Audrey Mpacko Ntouba and Ms. Ann Steffi Mpacko

37. Paule Audrey and Ann Steffi, the daughters of the Appellant, filed applications for intervention in order to seek justice and guarantee their right to an education. They state that, due to their mother's arbitrary separation from service with the United Nations, their mother lost the only main source of income including the education grant and could not support their education. Paule Audrey alleges that she cannot enroll in any other educational institution unless her debt is cleared, that she has already missed four years of education, and

that her inability to complete her schooling at the Lycée Français in Santo Domingo and to sit for the Baccalauréat examination will jeopardize her university education. Ann Steffi alleges that she has been deprived of kindergarten and primary education, and she has developed psychological and physiological problems as a result of the deprivation of education.

38. Paule Audrey and Ann Steffi request that, as their mother has proven her contentions, the Appeals Tribunal order the restoration of the rights to Mrs. Mpacko including her right to an education grant, and that the Appeals Tribunal accept their applications for intervention.

Considerations

Applications for Intervention by Ms. Paule Audrey Mpakou Ntomba and Ms. Ann Steffi Mpakou

39. Paule Audrey and Ann Steffi, the daughters of the Appellant, filed applications for intervention in the present case. They maintain that they have standing to intervene before the Appeals Tribunal in view of their relationship with the Appellant, as her dependents. They state that the Organization's denial to pay to their mother an education grant has had an impact on Paule Audrey's ability to pass the Baccalauréat and Ann Steffi's ability to complete her primary education. They request this Tribunal to grant their mother's appeal.

40. Article 6(2) of the Statute of the Appeals Tribunal states:

The rules of procedure of the Appeals Tribunal shall include provisions concerning:

...

f) Intervention by persons not party to the case whose rights may have been affected by the judgement of the Dispute Tribunal and whose rights might therefore also be affected by the judgement of the Appeals Tribunal.

Article 16 of our Rules of Procedure states:

Intervention by persons not party to the case

1. Any person for whom recourse to the Appeals Tribunal is available under article 6.2 (f) of the statute may apply to intervene in a case at any stage thereof on the grounds that his or her rights may have been affected by the judgement of the Dispute Tribunal and might, therefore, be affected by the judgement of the Appeals Tribunal.

41. To determine who may be recognized as having rights affected by a UNDT Judgment, reference must be made to the scope of persons who have a standing before the UNDT.

42. Article 3(1) of the UNDT Statute recognizes the standing of three categories of individuals: (a) any staff member of the United Nations; (b) any former staff member of the United Nations; and (c) any person making claims in the name of an incapacitated or deceased staff member of the United Nations.

43. Paule Audrey and Ann Steffi fall within none of these categories. They are not staff members of the Organization nor were they ever staff members, and as such, have no standing to intervene before the UNDT or the Appeals Tribunal.

44. The applications for intervention are denied.

Motion for Additional Pleadings

45. On 21 October 2019, the Appellant filed a motion requesting leave to adduce “a template of an acknowledgement of receipt”. She claims that this document must be signed by a staff member for a decision to become officially notified. Apart from the fact that there is no provision in our Statute to justify the filing of additional pleadings, our jurisprudence has established that this could only occur in exceptional circumstances: “There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer. Under Article 31(1) of its Rules of Procedure, the Appeals Tribunal may allow additional pleadings in exceptional circumstances.”⁶

46. Regarding the possibility to adduce evidence, Article 2(5) of the Appeals Tribunal Statute provides:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken

⁶ *Chrichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 27; see also *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, paras. 12 and 13; *Khisa v. Secretary-General of the United Nations*, Order No. 329 (2018); *He v. Secretary-General of the United Nations*, Order No. 312 (2018); *Koumoin v. Secretary-General of the United Nations*, Order No. 305 (2017).

without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

47. In the present case, the Appellant does not identify any exceptional circumstances justifying the need to adduce documents. The “template of an acknowledgement of receipt” was readily available when the Appellant filed her application with the UNDT and could have been presented at the level of the Dispute Tribunal.

48. The motion for additional pleadings is denied and the document adduced by the Appellant in her motion is rejected.

Merits

49. The Appellant does not establish that the UNDT erred in finding that she had been informed of her separation for abandonment of post and that her claim was time-barred.

50. Article 8 of the UNDT Statute provides:⁷

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed *more than three years after the applicant’s receipt* of the contested administrative decision.

The Appeals Tribunal has consistently held:⁸

Article 8(4) is an “absolute restriction on [the UNDT’s] judicial discretion”. Put differently, “under Article 8(4) of the UNDT Statute, the UNDT cannot waive the time limit to file an appeal, more than three years after the applicant’s receipt of the contested administrative decision.

⁷ Emphasis added.

⁸ *Khan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-727, para. 23, citing *Reid v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-389, para. 14, and *Bangoura v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-268, para. 30.

51. On appeal, the Appellant claims that she was not properly informed of the separation from service due to abandonment of post, because the separation was not sent by “registered mail” at her most recent address “with an acknowledgement of receipt”.

52. This means of communication is, however, not required by the regulations the Appellant refers to. Paragraph 16 of ST/AI/400 states:

Upon approval of separation for abandonment of post, the personnel officer concerned will process the separation action and will notify the staff member at the address most recently provided by him or her, advising of the Secretary-General's decision and the effective date in accordance with paragraph 12 above. Separation for abandonment of post is not termination and therefore the staff member will not be entitled to any notice of termination or the payment of termination indemnity, and no repatriation grant is payable ...

53. This provision does not provide an obligation to use registered mail to notify a staff member of separation from service for abandonment of post. The French version of this provision does not refer to registered mail either.

54. Paragraphs 9 and 10 of ST/AI/400 allow different means of communication throughout the procedure of abandonment of post, including telephone communication or written communication, by registered mail, personal delivery, or other appropriate means:

... The executive or administrative officer should then endeavour to contact the staff member concerned by telephone or by any appropriate means, failing which a written communication should be addressed to the staff member at his or her last known address...

... the executive or administrative officer ... shall refer the matter to the appropriate personnel officer, who should address a further written communication, by registered mail, personal delivery, or other appropriate means ...

55. While generally considered a safe and efficient means of communication, registered mail is not legally required for notification of separation for abandonment of post. In the present case, the Administration was entitled to decide that notification sent to the personal e-mail address, as reiterated by MINUSTAH in January, July, and August 2013, was the most appropriate means of communication.

56. The UNDT did not err in fact in deciding that “the contested decision, namely the separation for abandonment of post, was sent to the Applicant’s personal e-mail address on 7 January 2013” and that “[e]ven if the [Dispute] Tribunal were to accept the Applicant’s claim that she did not receive the separation memorandum sent to her personal e-mail address on 7 January 2013, her responses to the July and August 2013 communications from the Administration show that she was clearly informed that she was separated for abandonment of post with effect from 4 December 2012”.⁹

57. The UNDT thus correctly concluded that the application was not receivable.

⁹ Impugned Judgment, paras. 21-22.

Judgment

58. The appeal is dismissed and Judgment No. UNDT/2019/096 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Neven, Presiding
New York, United States

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
Bournemouth, United Kingdom

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar