



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

MONGA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**

Self-Represented

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM

Elizabeth Gall, ALS/ OHRM

## **Introduction**

1. The Applicant is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”/Mission”) and contests the decision to separate him from the Organization.

2. The present Application was filed on 20 December 2012.

## **Factual Background**

3. The Applicant joined MONUSCO on 20 September 2005 as an Individual Contractor. Effective from 28 May 2006, he was offered an appointment of limited duration to serve as an Interpreter.

4. On 15 April 2008, the Applicant and three other passengers in a United Nations vehicle (registration number UN-23162) were involved in an accident in Kamina, within the Democratic Republic of Congo. The Applicant sustained injuries as a result of the accident.

5. The medical facilities at the hospital in Kamina to which he was taken after the accident did not detect injuries that he was later discovered to have incurred.

6. The Applicant’s appointment was later converted to a fixed-term appointment effective from 1 July 2009 and in January 2011; he was transferred from the duty station in Kamina to Kanyabayonga within the Goma region.

7. On 15 August 2011, the Applicant was diagnosed as suffering from a jaw bone fracture in addition to diabetes by the attending physician at a Level I hospital in Goma and was referred to a Level III hospital in Goma to undergo a surgical procedure. The Applicant received outpatient treatment at the Level III hospital from 16 to 26 September 2011.

8. Effective 1 October 2011, the Applicant took up the position of Community Liaison Assistant with the Civil Affairs Section of the Mission at GL-

5 level and was then posted to Walikale duty station, at which he reported in November 2011.

9. On 15 February 2012, the Applicant filed an incident report in connection with the vehicle accident which occurred on 15 April 2008.

10. On 24 March 2012, the Applicant wrote to the attending doctor at MONUSCO requesting assistance in respect of the Applicant's request for a transfer to the Kamina duty station. On the same date, the physician advised the Applicant that no medical reasons necessitated the Applicant's transfer from Goma to Kamina as medical treatment was readily available to him in Goma.

11. According to the Applicant, he sent an email dated 27 April 2012 to the Human Resources section in Goma tendering his resignation and was advised to write an official letter giving notice of his resignation.

12. On 2 May 2012, the Applicant tendered his resignation by a letter of the same date and cited deteriorating health conditions as a result of the trauma caused by the accident on 15 April 2008. The Applicant stated in that letter that the said resignation would be effective from 28 May 2012.

13. According to the Applicant, he then wrote an email on 3 May 2012 requesting the Chief Civilian Personnel Officer ("CCPO") to disregard the signed letter of resignation and asked that his resignation take effect from 1 May 2012 as was stated in his first email on resignation dated 27 April 2012.

14. Further, according to the Applicant, he received verbal communication from a Mr. Arinos Maria Cardoso that the CCPO had rejected the Applicant's resignation and had instead issued an instruction to a Ms. Eileen Lim, a National Staff Unit Officer at MONUSCO to transfer the Applicant to Kamina.

15. According to the Respondent, the Applicant completed the relevant check-out procedures from the Mission in the period between 8-14 May 2012.

16. On 25 June 2012, the Applicant wrote to MONUSCO concerning a request made by him in April 2012 for a transfer from Walikale to Kamina for health

reasons and requested a transient posting to Goma. On the same date, the Civil Affairs Division of MONUSCO advised the Applicant that his resignation was considered effective from 28 May 2012.

### **Procedural Background**

17. The Applicant filed the instant Application on 20 December 2012, to which the Respondent filed a Reply challenging receivability on 11 January 2013 and further filed a Motion requesting for receivability to be considered as a Preliminary Issue on 11 January 2013.

18. On 23 January 2013, the Applicant filed a Request for invalidation of documents submitted [presumably by the Respondent] on his resignation and a reply to the challenge to receivability. The Respondent then filed a Consolidated Reply on 24 January 2013 to which the Applicant filed a Consolidated response on 28 January 2013 comprising an omnibus request for invalidation of documents submitted by the Respondent, a reply to the challenge to receivability and a request for the payment of compensation.

19. On 13 February 2013, the Applicant filed a Motion for Interim Measures dated 12 February 2013 for the payment of his leave days into salary and contribution to the pension fund to facilitate payment for his ongoing medical treatment.

### **Applicant's Submissions**

20. The primary thrust of the Applicant's case is that because the CCPO failed to indicate his acceptance of the Applicant's resignation by way of a letter dated 2 May 2012, his purported resignation is a nullity. He contends that his resignation was superseded by the CCPO's subsequent rejection of the Applicant's resignation and decision to instead transfer the Applicant to the Kamina duty station.

21. The Applicant further repudiates the validity of the letter of resignation he sent to the CCPO dated 2 May 2012 on account of the fact that he sent an email

dated 3 May 2012 seeking to nullify the effect of the letter dated 2 May 2012 and requesting the CCPO to disregard the letter of resignation.

22. The Applicant adopts the position that the instruction given by the CCPO for the Applicant's transfer to Kamina was thwarted by a Ms. Eileen Lim, the National Staff Unit Officer at MONUSCO who refused to implement the CCPO's instruction to transfer him.

23. He further maintains that he only knew of the decision to separate him on 31 July 2012 vide an email of that date written to relevant Security Officers at MONUSCO to retrieve his United Nations ID.

24. The Applicant states that he was not notified in writing of the administrative decision to separate him from the Organization and that by virtue of the fact that he has not received a separation letter to date, the decision to separate him was an implied and not an express decision.

25. The Applicant argues that in the absence of a written notice of separation directly addressed to him by the lawful authority, he was not constrained to seek a request for management evaluation before filing this Application with the Tribunal as a request for management evaluation of a contested decision is only a prerequisite for decisions that are notified to staff members in writing. His position is that without a written decision to separate him, he could not proceed with a request for management evaluation.

26. He further submits that in his case, he solicited the assistance of the Ombudsman's Office from February 2012 until October 2012 and that in light of the failure of mediation efforts undertaken by Ms. Maria Montiel as the Deputy Ombudsman, he filed the present Application with a mind to the stipulated deadlines for filing an application with the Tribunal where mediation of a dispute fails.

27. The Applicant states that he has submitted a claim for compensation for injuries attributable to his official service under Appendix D to the Staff Rules

and that his claim is presently under consideration by the Advisory Board on Compensation Claims (ABCC).

### **Respondent's submissions**

28. The Respondent submits that the Application is not receivable for the reason that the Applicant failed to request management evaluation of the administrative decision he is contesting and avers that the submission of a management evaluation request is a legal imperative that precedes the filing of an application with the Dispute Tribunal.

29. The Respondent's position is that pursuant to the Application filed by the Applicant dated 20 December 2012, the Applicant became aware of the contested decision to separate him on 30 July 2012 and that under the relevant provisions of staff rules [11.2(a) and (c)] the deadline for the Applicant to request management evaluation or for the Secretary-General to extend the deadline pending informal settlement efforts conducted by the Office of the Ombudsman expired on 28 September 2012.

30. The Respondent states that the Applicant filed his Application without having submitted the contested decision for management evaluation and avers that the Management Evaluation Unit has confirmed that the Applicant failed to make any such submission and the Respondent as a consequence requests the Tribunal to dismiss the Application on the grounds of receivability.

31. Without prejudice to his submissions on receivability, the Respondent contends that the contested decision is lawful and that the Secretary-General lawfully exercised his discretion to accept the Applicant's voluntary resignation under staff rule 9.2 and further maintains that the contested decision was not actuated by improper motive or purpose.

## Consideration

### *Receivability as a Preliminary Issue*

32. The Tribunal must first address the Respondent's principal contention that the Application is not receivable due to the fact that the Applicant did not submit the contested decision for management evaluation before filing the Application or at all.

33. Staff rule 11.2(a) pertinently provides that:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), *shall, as a first step*, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

34. The only exception to the legal prerequisite for submission of a contested decision for management evaluation is to be found in staff rule 11.2(b) rendered thus:

A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

35. The Statute of the Dispute Tribunal provides in part at Article 8(1) (c) that an application shall be receivable if "the Applicant has previously submitted the contested administrative decision for management evaluation, *where required*." (Emphasis added)

36. It therefore follows from article 8.1 of the Statute of the Dispute Tribunal and the cited provisions of the Staff Rules that this was not an instance where the Applicant was exempted from the requirement to submit the contested decision for administrative review under the management evaluation process.

37. The Applicant however seeks to qualify the requirement for administrative review of the contested decision on the following grounds, *viz.*,

- i) The decision to separate him was never notified to him in writing and was thus an implied decision that could not be subjected to the administrative review process;
- ii) He subsequently withdrew his letter of resignation dated 2 May 2012 by way of an email dated 3 May 2012;
- iii) Purported mediation efforts by the Office of the Ombudsman and Mediation Services sufficed in the present instance.

38. Separation from service by way of resignation is a matter of law and is governed by the Staff Regulations and Staff Rules, which renders it is necessary to have recourse to staff rule 9.2 which provides that:

- a) A resignation, within the meaning of the Staff Regulations and Staff Rules, is a separation initiated by a staff member.
- b) Unless otherwise specified in their letters of appointment, three months' written notice of resignation shall be given by staff members holding continuing appointments, thirty calendar days' written notice by those holding fixed-term appointments and fifteen calendar days' written notice by those holding temporary appointment.
- c) The Secretary-General may require the resignation to be submitted in person in order to be acceptable.

39. In accordance with directions in the United Nations Human Resources Handbook on Separation from Service [by way] of Resignation, a local staff member in a field mission should submit his resignation in writing to the Chief Administrative Officer copied to the Supervisor and the Chief Personnel and further states that the letter of resignation should indicate the date of the staff member's resignation.]

40. The Tribunal is not persuaded by the Applicant's submissions that the alleged defect in the acceptance of his resignation effectively negated his letter of resignation dated 2 May 2012. Contrary to the rationale underlying the Applicant's assertions, which are, with respect, flawed, an employer does not



have an unqualified right to refuse to accept a resignation. If that proposition were true, it would render it impossible for an employee to voluntarily terminate the employer-employee relationship by way of resignation because the employer could choose to repeatedly refuse to accept the resignation extant in the notice of resignation. Save for exceptions that must be expressed either in the applicable rules and guidelines or in the contract of employment itself, the valid resignation of a staff member takes effect from the date specified in the notification of resignation within the parameters set by the Staff Rules.

41. The Tribunal has noted that the Applicant's letter of resignation did not conform to the stipulated 30 day requirement for written notice of resignation for staff members on fixed-term contracts but considers that this does not of itself revoke the validity of his resignation. The Applicant expressed a clear and unequivocal intention to resign in his letter dated 2 May 2012 and has adduced no evidence to support his assertion that he sought to withdraw his resignation vide an email dated 3 May 2012.

42. There is evidence available on record that on 25 June 2012, the Civil Affairs Division of MONUSCO communicated to the Applicant the fact that his resignation was complete as from 28 May 2012 as stipulated in the notice of resignation. There is therefore no basis either in law or in fact to support his contention that the effect of his notice of resignation was altered by the non-acceptance thereof by the CCPO.

43. Pursuant to rule 9.1(a) of the Staff Rules, resignation constitutes separation from service. Having established that the resignation leading to the Applicant's separation from service was effective, the Tribunal must now address the question of whether the Applicant was constrained to seek management evaluation in respect of the decision to separate him in the absence of a written decision informing him of his separation.

44. In *Schook* 2010-UNAT-013, the United Nations Appeals reversed a judgment by the Dispute Tribunal which had rejected an application based on grounds that the applicant had failed to abide by the sixty-day time limit to request a management evaluation.

45. The Appeals Tribunal stated:

Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. *Therefore, a written decision is necessary if the time-limits are to be correctly calculated*, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a notification of the decision in writing, required by Rule 111.2(a).

46. The Appeals Tribunal in the *Schook* case concluded that the Appeal was receivable because the administration had been remiss in failing to issue a written decision notifying the Appellant that he would not continue in service after the relevant date.

47. Likewise, in *Thiam* UNDT/2010/131, the Dispute Tribunal found that the Administration is obligated to send a written notification of the administrative decision to a staff member in order to determine when the sixty-day time limit stipulated for submission of a request for management evaluation starts to run.

48. In his Application dated 20 December 2012, the Applicant submitted that he did not receive a formal letter of separation. In a subsequent submission dated and filed on 28 January 2013, the Applicant stated that the Human Resources Section sent him the 'separation documents' after he filed the present Application with the Dispute Tribunal. The Applicant has however not challenged the Respondent's assertion that he completed check-out procedures from the Mission in May. In the absence of express submissions from the Applicant to the contrary, the Tribunal draws an inference from the Applicant's latter submission that among the separation documents sent to him was a formal notice of separation from service which was sent after he had filed this Application in December 2012.

49. In its judgment in *Abassa*, UNDT/2012/086, the Dispute Tribunal found that the applicant in that case had not been formally notified of the contested administrative decision but had nevertheless submitted a request for management evaluation and it was only thereafter that the applicant was officially notified of the administrative decision. In construing the provisions of staff rule 11.2(a) on

the 60-day time limit for submission of a decision for administrative review, the Dispute Tribunal held that time started running for purposes of the management evaluation from the date on which he was officially notified of the contested administrative decision.

50. In the present instance, the Applicant had an opportunity to submit a request for management evaluation either after allegedly gaining knowledge of the contested decision on 31 July 2012 or after receiving the separation documents in the period between 20 December 2012 and 28 January 2013. He chose to do neither and instead referred this Tribunal to its judgment in *Khisa*, UNDT/2013/001 and quoted the Tribunal thus:

The Tribunal does not consider it to be good managerial practice for a dignified Organization such as the United Nations, to sweep allegations that border on human rights violations against a staff member under the rug by merely covering itself in the cloak of non-receivability.

51. The receivability of any application before the Tribunal is subject to the statutory requirement of art. 8.1(c) of the Statute of the Dispute Tribunal, which is categorical that where required, an Applicant must submit a request for management evaluation of a contested decision.

52. Where, as in this case, the Applicant deliberately fails to make such submission, then the Application is not receivable and the Tribunal has no jurisdiction over the matter.

53. In light of the Applicant's submissions on the receivability of the Application, the Tribunal considers it fitting to conclude by quoting the words of the Kenyan Court of Appeal in *Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Limited* [1989] KLR 1 on the question of jurisdiction:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a Court takes upon itself to exercise a

jurisdiction which it does not possess, its decision amounts to nothing...”

**Conclusion**

54. This Application is not receivable and is dismissed in its entirety.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 28th day of February 2013

Entered in the Register on this 28th day of February 2013

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi