UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/012
Judgment No.: UNDT/2013/156
Date: 4 December 2013
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

PORTER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Monica Ona Bileris, Esq.

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a Security Awareness Induction Training (SAIT) Liaison Officer at the P-3 level with the United Nations Mission for Iraq (UNAMI) based in Amman, Jordan. He filed an Application on 21 February 2012 contesting the following:

> a. A decision taken by UNAMI administration to keep him on medical leave for more than two years after his doctors had recommended that he was fit to return to work.
>
> b. Inaction and/or refusal by UNAMI Administration to take him back into service for over two years.
>
> c. Failure by the Administration to reimburse financial claims that accrued to him as a result of the forced medical leave.

2. The Respondent filed a Reply to the Application on 26 March 2012 in which it was contended that the Application was not receivable *rationae temporis* as the Applicant had not requested management evaluation of the contested decisions within the requisite time limit.

3. This Judgment will focus on the preliminary issue of receivability as raised by the Respondent.

Facts

4. The Applicant worked as a Security Officer at the FS-5 level with the United Nations Mission in Kosovo from June 2001 until November 2003. Prior to that he had served the United Nations under the flagship of the Canadian Government forces in the United Nations Protection Force ("UNPROFOR") in Croatia between 1994-1995, with the United Nations Mission in Kosovo (UNMIK) and with UNAMI in Iraq between 1999 and 2001 after which he formally joined the Organization as a staff member.

5. From January 2005 he worked as a Training Officer and later as a Security Officer at the P-3 level with UNAMI, rotating regularly between duty stations in Baghdad, Iraq and Amman, Jordan.

6. During the course of his duty with UNAMI in Baghdad, sometime in February 2009, the Applicant took ill and was admitted at the infirmary suffering from back-problems, pain, anxiety, and sleep deprivation among other complications.

7. The UNAMI Chief Medical Officer (CMO/UNAMI), Dr. Bernhard Lennartz, diagnosed him as suffering from extreme stress. Dr. Lennartz recommended that the Applicant should take some time off work to see his doctor in Amman, Jordan.

8. Around the first week of May of 2011, the Applicant saw Dr. Adnan Takriti, a psychiatrist in Amman, Jordan. Dr. Takriti advised him to take some time off work to recuperate and cleared the Applicant to return to work after one month. Dr. Takriti's medical report was sent to Dr. Lennartz on 11 May 2009 who forwarded it to the mission and the Medical Services Division (MSD) in New York.

9. Having been advised to take time off work, the Applicant applied for two weeks certified sick leave from 11 May 2009 which his doctor agreed to. For his sick leave, he was authorized by MSD and UNAMI to be away from the mission area and to travel back to his home country, Canada. He paid for his ticket and travelled to Canada on 21 May 2009.

10. The Applicant was advised by Dr. Lennartz that before he could return to work, he needed to obtain medical clearance from Dr. Ardash Tiwathia of MSD at Headquarters. He was asked to provide a medical report to Dr. Tiwathia prior to returning from leave.

11. On 3 June 2009, MSD advised the Applicant to remain on leave until he received medical clearance and that he needed to get a psychiatric report. The

Applicant then proceeded to arrange a doctor's appointment for purposes of obtaining the needed report.

12. The doctors that the Applicant first saw in Canada referred him to Dr. Maurice Boulay who was a psychologist. Therapy sessions were scheduled and conducted on a continuous basis starting 7 June 2009 and went on for a period of about four months.

13. Dr. Boulay then sent his medical Report to Dr. Lennartz and Dr. Tiwathia advising that the Applicant was anxious to return to work as quickly as possible but that he should be posted to a "non-conflict" area as he had had "more than his fair share of being exposed to situations which were life threatening".

14. On 30 August 2009, Dr. Boulay advised Dr. Lennartz that the Applicant was anxious to return to work, and could return though he reiterated his recommendation that the Applicant return to a non-conflict zone.

15. On 15 September 2009, Dr. Lennartz wrote an email to Dr. Boulay informing him to advise the Applicant to see a psychiatrist to obtain a psychiatric report.

16. On 30 September, Dr. Lennartz wrote to the Applicant informing him that Dr. Boulay, being a psychologist was not considered a medical practitioner or doctor and that MSD would require, other than Dr. Boulay's report, a medical report from a psychiatrist.

17. On 1 October 2009 the Applicant wrote the following email to various senior officials in UNAMI and MSD:

> Dear UN Staff members,
>
> Can someone please advise some guidance on this issue or is it late or am I terminated? I was advised a week ago 'to relax', 'get better', 'take time to heal', the UN would take care of me, and now I find that UNAMI wants to terminate my contract as of yesterday, the 30th of September, the same day the advised me.
>
> I am pushing forward with the request to see the psychiatrist as directed by the UNAMI doctor, I do not understand the difference,

> as in Canada I have been led to believe the both are professional and interchangeable.
>
> Irregadless I have followed the direction from the mission doctor, I have not returned to the mission prior to any clearance and am now awaiting an appointment with a psychiatrist.
>
> Also, as I advised earlier, I will return today if I am provided clearance or allowed to return.

18. On the same day, the Applicant also wrote to Dr. Lennartz expressing his surprise on realizing that he had been terminated given that he had been following instructions given to him. He explained that he only saw Dr. Boulay because he was asked to do so by his Canadian doctor and that if he had been advised that as a psychologist Dr. Boulay was not considered a medical doctor, he would have made other arrangements and saved himself considerable expenses. He also expressed confusion because Dr. Lennartz had earlier advised him to continue seeing Dr. Boulay.

19. On 17 October 2009, Ms. Jacinta Muhoho, Chief, Human Resources Section at UNAMI wrote to the Applicant informing him among other things, that his contract had not been terminated but that his salary had only been placed on hold temporarily pending clearance of his medical leave by MSD.

20. The Applicant then booked an initial appointment with a psychiatrist, Dr. Adelman on 19 October 2009 and the results of his appointments were forwarded to Dr. Tiwathia, Dr. Lennartz and other relevant personnel as was required.

21. Dr. Adelman found that the Applicant had a mild version of Post-Traumatic Stress Disorder (PTSD), which he said was a normal reaction for a person who had been working in conflict zones. The doctor cleared him for work but not in a conflict zone.

22. After the submission of the Applicant's psychiatric report on 20 November 2009, Dr. Tiwathia wrote to Mr. Robin Sellers on 30 November 2009, Chief of Mission Support, UNAMI, informing him that the Applicant was medically cleared to return to the mission but that he may only be assigned to Jordan and Kuwait and not Iraq.

23. On 13 January 2010, Dr. Lennartz wrote to the Applicant informing him that he had been cleared to return to mission as of 30 November 2009, and stated that he was surprised that the Applicant had not yet been informed by MSD about his clearance.

24. By a fax dated 1 April 2010, Dr. Tiwathia informed Mr. Sellers that all medical reports from the Applicant's attending doctors had been reviewed by MSD and that based on the medical information provided, the Applicant was "NOT medically fit to return to UNAMI."

25. By a memorandum dated 7 April 2010 from Ms. Muhoho, the Applicant was informed that effective 17 February 2010, he had exhausted his sick leave entitlements. She informed him further that UNAMI would make a request to the United Nations Joint Staff Pension Fund (UNJSPF) for him to be awarded a disability benefit.

26. On 9 April 2010, the Applicant wrote to Dr. Tiwathia expressing his displeasure and discomfort over the fact that he was still not cleared to return to work as per his doctors' recommendations. Dr. Tiwathia responded by informing him to file a compensation claim with the Advisory Board on Compensation Claims (ABCC).

27. On 7 June 2010, Dr. Boulay wrote to Dr. Tiwathia again informing her that it was his professional opinion that the Applicant was cleared to return to work and that "even a short return to duty would have been therapeutic in itself." He wrote:

> As requested I am sending you a follow up report on Mr. Porter's condition. I saw Mr. Porter on Tuesday, June 1, 2010, after he came back from a trip to Jordan and Amman. Although he appeared to have continued to maintain gains since I last saw him, he was somewhat upset at finding out that he will no longer be working with the UN at the end of this month. As you know, Dr. Adelman and I had come to the conclusion that [the Applicant] was fit to return to duty in a non-conflict area where he would have been able to benefit from ongoing psychological support. What might not have been made clear was that even a short return to duty would have been therapeutic in itself….

28. On 29 June 2010, the Applicant filed a compensation claim with the ABCC detailing his perspective of what had led to his ailment and contending that his ailments were service-incurred. He explained in detail the kind of work environment he had been exposed to over the years working in United Nations missions in conflict zones and which he and his doctors concluded were largely responsible for his illnesses. He also noted in the compensation claim that he had never been advised when his sick leave was exhausted and that his pay had been stopped.

29. By letter dated 6 August 2010 from Mr. Masaki Sato, Chief, Asia and Middle East Section, Field Personnel Division, Department of Field Support, the Applicant was informed that as of 14 February 2010 he had exhausted his sick leave at full pay and that consequently, starting 15 February 2010, had been placed on sick leave at half pay. He was also informed that he did not receive any salary in June 2010 since he had been paid his regular salary until May 2010 while it ought to have been at half pay rate.

30. By memorandum dated 12 January 2011, from the Medical Director of MSD in New York to the Administrative Officer at UNAMI, it was indicated that the Applicant's sick leave certification had been approved through to 31 January 2011.

31. On 21 February 2011, the Applicant received a Letter of Appointment (LoA) that had been signed by Mr. Sato on 21 January 2011. The LoA indicated the term of appointment as 1 October 2010 to 23 November 2010, a period of 1 month and 23 days. This showed that his appointment had ended on 23 November 2010.

32. On 23 February 2011, the Applicant wrote to Ms. Muhoho and Mr. Sato requesting for an explanation regarding a letter that he had received indicating that his contract had been terminated. Among other things, he made inquiries as to why he was notified of his termination towards the end of February 2011 when the notice of termination showed that his contract had expired in November 2010. He also asked to know why the reason indicated for his termination was that he was "disabled" when his doctors had advised that he was healthy and fit for work.

33. On 29 March 2011, Mr. Sato sent the Applicant a letter stating:

> …I would like to inform you that we have given full consideration to your situation and have explored current and potential vacancies to place you in another field mission. Regrettably, we have exhausted all available options….in order to keep you on actual contractual status we will place you on Special Leave Without Pay (SLWOP) upon the expiration of your sick leave entitlement from 24 November 2010 until the ABCC finalizes [the] review of your case and issues its decision.

34. On different dates between May and July 2011, the Applicant wrote to Mr. Sato essentially protesting that he was receiving conflicting information from the Administration regarding his contractual status with UNAMI. He arranged to meet with Mr. Sato on 16 July 2011 and travelled from Ontario to New York although according to the Applicant, the meeting was cancelled by Mr. Sato at the last minute.

35. On 21 July 2011, the Applicant was medically cleared to return to UNAMI in either Jordan or Kuwait. The Applicant was informed that he was being sent on mission to Kuwait.

36. The Applicant requested that UNAMI pay the airfare for his return to the mission as he had no money and for an advance of USD 10,000 to secure living quarters for his family but he was told to "just return to mission and figure things out from there."

37. He eventually returned to UNAMI in Kuwait on 1 August 2011. On arrival in Kuwait, he was told to return to and remain in Amman, Jordan where he still serves as the SAIT Liaison Officer at the P-3 level.

38. On 11 August 2011, the Applicant through his legal counsel addressed a letter to the Secretary-General and the Special Representative of the Secretary-General for UNAMI (SRSG/UNAMI) titled "Request for Final Administrative decision".

39. No response to the above mentioned letter was received by the Applicant who then filed a request for management evaluation on 28 November 2011. The

Management Evaluation Unit (MEU) responded the next day, 29 November 2011 informing him that his claims were not receivable.

40. The Applicant filed the present Application on 21 February 2012.

41. On 26 March 2012, along with the Reply to the Application, the Respondent also filed a motion requesting to have the issue of receivability in this case decided prior to moving onto the merits.

Respondent's case

42. The Respondent contends that the Application is not receivable *rationae temporis* since the Applicant failed to request for management evaluation of the contested decisions within the 60-day time limit under staff rule 11.2 (c).

43. The Applicant was required to submit his request for management evaluation within 60 calendar days from the date on which he received notification of the contested decisions.

44. The main administrative action in this case is the decision of 1 April 2010 that the Applicant was not medically fit to return to UNAMI and the Applicant was informed of this in writing on 9 April 2010. He, however, did not seek management evaluation of this decision until 28 November 2011, more than one year and five months after he had been notified of it. He therefore did not meet the 60-day time limit under staff rule 11.2 since he was required to submit his management evaluation request by 8 June 2010.

45. It is also the Respondent's case that the Applicant's requests for the Administration to reconsider the decision of 9 April 2010 and his letter of 11 August 2011 to the Secretary-General and the SRSG/UNAMI seeking a "final administrative decision" do not revive the applicable time limits. His efforts to engage the Administration in informal settlements did not absolve him of the obligation to comply with the time limit to seek management evaluation.

46. The other decisions contested by the Applicant are inextricably linked to the decision of 9 April 2010 and are also similarly time-barred.

47. The Respondent prays that the Application is dismissed.

Applicant's case

48. The Applicant asserts that all his claims are receivable.

49. He submits that he is contesting a series of decisions and, in essence, non-decisions over the course of almost two years, which prompted him to finally make a request for a final administrative decision to the Secretary-General on 11 August 2011.

50. On the Secretary-General's failure to respond to the request for a "final administrative action", the Applicant requested a management evaluation on 28 November 2011 contesting this inaction and the facts surrounding his case. As such his claim was submitted for management evaluation within the requisite time and is receivable.

51. Although the Applicant was informed in April 2010 that he was not medically fit to return to UNAMI, no formal decision of the matter was taken at the time. He also argues that no clear administrative decision was taken in April 2010 which could be considered a final decision; neither can any clear decision be identified that could be understood or believed.

52. The Applicant had on numerous occasions desperately tried to elicit an actual administrative decision from the Organization to no avail and this is evidenced by his long chain of correspondence with the Administration.

53. The Respondent in this case stood idly and silently as the Applicant was asking questions concerning his contract and pay and now seeks to blame him for not taking requisite action.

54. The Applicant, at a complete loss on what to do after having all his previous enquiries go unanswered, made a request for a final administrative decision as a last-ditch effort to get the Administration's attention but this also went unanswered. It was after this last effort that he promptly filed a request for management evaluation.

55. He contends that it was only after realizing that he had exhausted every other avenue to settle his claims, including by speaking with MSD officials, Human Resource personnel, Dr. Lennartz and even the Ombudswoman, that he realized he had no other choice than to appeal his claims. As at this point he had finally realized the extent of his injury after becoming aware with finality that the Administration was not going to return him to work after two years.

56. It was due to the Administration's inaction that the Applicant was forced finally to request the Organization to take action. The facts in this case make it clear that his actions were not those of someone who has "slept on his rights" and consequently failed to comply with time limits.

57. Based on these pleadings, facts and circumstances of the case, the Applicant requests the Tribunal to find his claims fully admissible and receivable.

Issues

58. The Tribunal, for now, only restricts itself to the question of whether the Applicant's claims are receivable which will be tackled under the following headings:

a. Whether the Tribunal, while precluded from waiving or suspending deadlines for management evaluation is bound by the MEU finding on the receivability of a case.

b. Whether the contested actions form part of the same continuum.

Consideration

Whether the Tribunal, while precluded from waiving or suspending deadlines for management evaluation is bound by the MEU finding of the receivability of a case

59. The Respondent contends that the Application is not receivable and argues that the Applicant did not request management evaluation of the contested decision within the 60 day time limit required under Staff Rule 11.2(c). The

Applicant on the other hand maintains that all his claims are receivable as he is contesting a series of decisions and non-decisions spanning a period of over two years.

60. Staff Rule 11.2(c) invoked by the Respondent provides thus:

> A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested…

61. Article 8.3 of the Statute of the Dispute Tribunal, also invoked by the Respondent, provides that the Dispute Tribunal shall not suspend or waive the deadlines for management evaluation and this has been decided in numerous cases by the Appeals Tribunal.

62. In *Costa*[1] the learned Judge Shaw stated that art. 8.3 contains an express prohibition in relation to management evaluation deadlines and the Tribunal had no jurisdiction to extend the deadlines for either administrative review or management evaluation. In *Ajdini et al*[2] the Appeals Tribunal held that

> This issue should now be considered as settled because the Appeals Tribunal in *Costa* and other judgments such as *Mezoui*,[3] *Samardzic*[4] and *Trajanovska*,[5] has consistently held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review.

63. It is therefore settled law that the Dispute Tribunal can neither suspend nor waive the timelines applicable for management evaluation. Requests for management evaluation must under all circumstances be sent to the Secretary-General within 60 days.

64. From the parties' pleadings in the instant case, the Tribunal notes a sharp disparity between what the Applicant and Respondent consider to be the contested administrative decision in this case.

[1] Judgment No. UNDT/2009/051.
[2] Judgment No. 2011-UNAT-108.
[3] Judgment No. 2010-UNAT-043.
[4] Judgment No. 2010-UNAT-072.
[5] Judgment No. 2010-UNAT-074.

65. The Respondent argues that the main contested decision is that of 1 April 2010 which the Applicant was informed of on 9 April 2010 regarding the decision to keep him on sick leave. The Respondent's case is that the Applicant, having been informed of this decision on 9 April 2010, had 60 days from that date within which to seek management evaluation by contacting MEU.

66. The Applicant, on the other hand, maintains that what he is contesting are not stand-alone decisions *per se* but rather a series of decisions and non-decisions spanning over the course of more than two years, the final of which were his clearance to return to mission on 21 July 2011 and the non-response to his letter of 11 August 2011 addressed to the Secretary-General. Regarding the decision of 1 April 2010, the Applicant submitted that it was his understanding that despite the non-clearance, the Administration was still working towards returning him to work and that this was not a final decision, particularly so because the letter did not give any sufficient details as to its finality.

67. The Applicant filed his request to MEU on 28 November 2011 to which MEU responded that any administrative decision taken earlier than 29 September 2013, which was exactly 60 days prior to the Applicant's request to the MEU constituted a late submission.

68. In *Igbinedion*[6], pronouncing on the question of whether or not the Tribunal was bound by the findings of the MEU regarding the receivability of a case, Boolell J stated that

> Staff rule 11.2(a) and (c) require a staff member to first approach the Secretary-General for the resolution of a dispute within sixty (60) days of being notified of the impugned decision. That is the threshold of receivability before the Management Evaluation Unit. The threshold for receivability before this Tribunal is governed by Articles 7 and 35 of the Rules of Procedure.
>
> …The submission by the Respondent that [the] finding by the MEU [on receivability] binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word 'deadline.'

[6] Judgment No. UNDT/2013/023.

> ...Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation...Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation *after* the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to consider a request by a staff member outside of the time-limits prescribed for such a request.
>
> …The MEU made a *finding* that the request before it was time-barred for the purposes of being reviewed by the Unit. To suggest that that finding is a 'deadline' for the purposes of litigation before the Tribunal is both misconceived and erroneous
>
> ….The UNDT and Management Evaluation Unit operate on different receivability thresholds. A litigant *must* seek management evaluation before looking to have his or her dispute litigated and, for the purposes of litigation, time begins to run either from receipt of a response from the MEU or the expiry of the time-limit set for such a response.

69. In an earlier Judgment of the case, *Igbinedion* UNDT/2011/110, the Tribunal ascertained that essentially MEU in deciding that the Applicant's request for management evaluation was not receivable had deemed for its purposes an earlier action taken by management to be the contested decision when in fact, the real impugned decision in his case had come much later.

70. MEU had considered that the extension of the Applicant's contract by four months in 1 December 2010 to be the contested decision and counted 60 days from that date to find his request for management evaluation time-barred. The Tribunal however ruled that the impugned decision was taken on 18 March 2011, when the Applicant was given notification of the non-renewal of his contract and thus found the application receivable. The Tribunal arrived at its decision based on the fact that the Applicant had found himself in a situation comprising a continuum of events in which the final action which formed the contested decision in his case was that of 18 March 2011.

71. In the instant case, to determine whether or not the Application is receivable, it is necessary to determine which administrative decisions the Applicant is contesting as well as the exact dates on which he received notification of said decisions and in doing this several questions surrounding the

circumstances of this case must be answered. For instance, were there any administrative decisions to be challenged? When exactly did the claims raised in the Application become ripe to be contested? Or when did it become too late for the Applicant to complain?

72. The former Administrative Tribunal held in *Andronov*[7] that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. This definition of what constitutes an administrative decision has been cited with approval in many cases by the Dispute and Appeals Tribunals.[8] The former Administrative Tribunal further stated in *Andronov*:

> [An] administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

73. In the present case, a series of decisions were set in motion the moment the Applicant took ill and proceeded on sick leave as from 11 May 2009. Were those decisions 'administrative decisions' as per the definition in *Andronov*?

74. As he was readying himself to return to work after the initially scheduled two weeks, on 3 June 2009, the Applicant was advised to remain on sick leave until he obtained a psychiatric report. At these early stages of the series of events that were to later transpire, nothing seemed irregular with this directive and the Applicant could not reasonably foretell that he would remain on sick leave for 26 months. He thus proceeded to see the doctors necessary for him to obtain the required medical report in order to be cleared for duty as per the instructions given to him.

75. The first of the doctors that attended to him in Canada was Dr. Boulay, who cleared the Applicant as fit to return to work but recommended that he return

[7] Former UN Administrative Tribunal Judgment No. 1157 (2003).
[8] For instance in *Al-Surkhi* 2013-UNAT-304.

to a non-conflict zone. The medical report issued by Dr. Boulay clearing the Applicant was deemed inadequate by UNAMI and MSD who informed the Applicant that the said doctor was a psychologist and not a psychiatrist. Consequently, he was advised to obtain a medical report from a psychiatrist.

76. To his dismay, however, on the same date, the Applicant received information that his contract had been terminated and he proceeded to write to various senior officials in UNAMI and MSD seeking guidance on whether and why he had been terminated. He was later advised that he had not been terminated except that his "salary had been placed on hold pending clearance by MSD of his medical leave."

77. As at this point, one might ask whether there was any administrative decision against which the Applicant could have contested. The Tribunal finds that there was none since the Applicant had instructions to comply with in order to obtain his clearance and there was no finality on the issue as everything seemed geared towards preparing him to resume duty.

78. As instructed, the Applicant saw a psychiatrist, Dr. Adelman on 19 October 2009 who also cleared him as fit for duty but recommended that he return to a non-conflict zone just as Dr. Boulay had recommended.

79. The psychiatric report was forwarded to MSD and UNAMI on 20 November. As that was the one requirement being awaited for the Applicant to be cleared, the record indicates that on 30 November 2009, Dr. Tiwathia of MSD wrote to Mr. Sellers who was the CMS/UNAMI informing him that the Applicant had been medically cleared to return to UNAMI but that he may only be assigned to Jordan and Kuwait.

80. Curiously however, the Applicant who was still in Canada was not copied in this correspondence and no one from either UNAMI or MSD informed him of this development until two months later on 13 January 2010 when Dr. Lennartz wrote telling him that he had already been cleared. From the record, no other information was given to him and therefore the Applicant still did not know which duty station he was to be posted to.

81. As at this time, the Applicant was in limbo regarding his employment although laboring under the belief that the mission was still working towards returning him to duty. As such he could not contest any decision as there was in fact no clear administrative decision that he could have contested.

82. In between the clearance from MSD of 30 November 2013 which he had not been informed about until after two months and 1 April 2010, something curious happened. On the latter date, Dr. Tiwathia again wrote to Mr. Sellers informing him that after MSD reviewed the Applicant's medical reports, it was decided that the Applicant was NOT medically fit to return to UNAMI, a sharp contradiction with the clearance she had given five months earlier. No further information or reasons were given for this decision.

83. The Respondent submits that it is this latter decision not to clear the Applicant on 1 April 2010 that forms the core subject of the Applicant's claims in this case. The Applicant's own account on this is that he contests not exclusively the decision of 9 April 2010 but the entire sequence of events starting the time he went on sick leave.

84. On 7 April 2010, the Applicant was informed that he had exhausted his medical leave entitlements three months earlier. He was also informed on the same date that UNAMI would proceed to make a disability grant request on his behalf to the UNJSPF, insinuating that UNAMI was not going to take him back to service. The Applicant wrote to Dr. Tiwathia on 9 April 2010 protesting the ensuing state of affairs and expressing his anxiety and displeasure at the fact that he still was still not cleared to work despite his doctors recommendations. Dr. Tiwathia responded only by informing the Applicant to file a claim with the ABCC.

85. In the intervening periods, the Applicant continued to seek treatment and his doctors continued to inform MSD repeatedly that the Applicant was fit for work and that given his anxiety; even a short return to duty would have been therapeutic.

86. Four months later, on 6 August 2010, the Applicant was informed that he had exhausted his sick leave with pay seven months earlier and that starting 16 February 2010 had been placed on sick leave at half pay. He was also informed that he did not receive a salary in June 2010 because he had been erroneously paid at full rate in May.

87. On 21 February 2011, seven months after the previous communication, the Applicant was informed that his appointment with UNAMI had come to an end on 23 November of the previous year. The Applicant wrote back in protest asking to know among other things why the reason for his termination had been indicated as "disabled" when three doctors that he had seen at the instruction of the Organization had advised that he was healthy and fit for duty and why he was being informed of this nearly half a year later. As a response he was informed on 29 March 2011 that the mission had placed him on SLWOP starting 23 November 2010 until the ABCC finalized his case.

88. From the record, in between the months of May and July 2011 the Applicant continued to push for information to understand exactly what was happening in his case. He travelled to New York to speak with Mr. Sato but his trip was unfruitful as Mr. Sato cancelled the scheduled meeting at the last minute.

89. Finally, the efforts of his travels, chains of emails, phone call enquiries came to fruition on 21 July 2011 when he was cleared by MSD to return to mission. This however was not without a tinge of the now familiar state of reigning confusion as he was initially instructed to report to the duty station in Kuwait only to get there and be told to return and to remain in Amman, Jordan.

90. It is concluded therefore that in light of the facts of this case as discussed above, the contested decision cannot be said to have arisen on any singular date, indeed the Applicant is contesting a series of decisions whose nature was not considered nor appreciated by MEU. This Tribunal therefore cannot be bound by the findings of MEU regarding the receivability of the claims.

Whether the contested actions form part of the same continuum

91. The Respondent's case is that the main contested decision in this case is that of 1 April 2010 while the Applicant contends that he contests a series of decisions over the course of almost two years.

92. From these facts and chronology of this case, at no point was the Applicant informed that the Administration would keep him on sick leave for 26 months. There was never a clear final decision given to him on this matter until he found out when he resumed duty in August 2011. The entire period was gravely marred by contradicting decisions, counter-decisions, non-decisions, mis-communications and non-communications all perpetuating the Applicant's confusion as regards his standing in the Organization.

93. Thus, the entire 26 month period of the Applicant's estrangement from the Organization clearly formed a continuum during which the Applicant was kept in limbo; unaware, unsure and in a lingering state of confusion regarding his employment.

94. Until the Applicant was brought back to service, he was not in a position to determine the finality of the set of reckless pronouncements and actions on the part of MSD and UNAMI which he now contends constituted apparent abuse. The recklessness of the impugned set of actions did not become immediately evident until the Applicant returned to duty.

95. In certain circumstances, one may be subjected to recurring acts of unlawful conduct but may be unable to recognize the true character of the manner of treatment one has been subjected to until after it has continued for an appreciable length of time. The instant case presents one such situation in which the Applicant only came to appreciate the abuse and irregularity of the entire process that had kept him on forced sick leave for over two years after his return to duty.

96. At every juncture during the sequence of events, the Applicant was led to believe that the relevant officials within Administration were acting in good faith.

He now complains that the recklessness of the decisions and the non-decisions on the issue amount to an abuse of authority. He would only be able to take that view at the earliest, after the decision of 21 July 2011 clearing him for duty or at the very latest after his 11 August 2011 letter went unanswered.

97. Thus, on 11 August 2011, he wrote a detailed letter to the Secretary-General and the SRSG/UNAMI setting out the facts of his case, his complaints and the remedies he sought.

98. In line with the previous conduct of some of the Administration's officials where correspondence and enquiries made by the Applicant would often go unanswered, this letter to the Secretary-General and the SRSG titled "Request for a Final Administrative Action" also went unanswered. The Applicant thereafter sent a similar request to the management evaluation on 28 November detailing the very same complaints and seeking the same remedies.

99. In *Andronov*, the former UN Administrative Tribunal decided that administrative decisions are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. The unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions. Going by this, the non-response to the Applicant's letter was in itself an implied administrative decision.

100. The Tribunal finds that the singular issue in this case is that of abuse of authority and that this singular issue became complete at the point when the Administration did not respond to the Applicant's letter in which he was asking for explanations as to why all these things happened. It was only at that point that it became certain that abuse of authority had happened and had been happening. All the other issues that the Applicant contests are not isolated incidences but are part of a continuing pattern of abuse of authority in respect of this particular Applicant.

101. This entire Application is hinged on prohibited conduct on the part of UNAMI and MSD officials, all other incidences are just manifestations of the continuing abuse and prohibited conduct.

102. It cannot reasonably be argued that every single administrative action perceived to have been taken against the interests of the staff member in this case, which actions affected his employment are no longer actionable or that he can no longer seek relief as soon as 60 days of each of the adverse actions had occurred. In cases of continuous abuse all one needs to show is that there is a pattern of abuse of authority. The Applicant knew at the time when his letter of 11 August 2011 was ignored that this pattern was only going to continue and therefore took formal steps to bring it to an end.

103. In *Gebre*[9], the Applicant had made several efforts seeking the review of the impugned decision to the Registrar of the International Criminal Tribunal for Rwanda (ICTR) but just as in the present case, his correspondences were met with silence. It was not until the statutory time limits had run out for him to send his request for administrative review to the Secretary-General that he was finally advised that he had been sending his letters to the wrong official as a result of which his case had already become time-barred.

104. In considering the question of whether a request for administrative review addressed to the ICTR Registrar was in compliance with the requirements of rule 111.2 of the former staff rules[10], the Tribunal found and held that the Applicant had in essence fulfilled these requirements when he wrote timeously to the Registrar of the ICTR who was to all intents and purposes the lawful representative of the Secretary-General at the ICTR and thus his case was held to be receivable. It was further stated that:

> This Tribunal has given considerable thought to the matter of the process to be followed as required by the former Staff Rule reproduced above. It is the Tribunal's finding that the Applicant had made several efforts in seeking a review of the impugned decision. Could it be said that his many efforts directed to the ICTR Registrar in this case were like seeds which fell on the roadside or on infertile

[9] Judgment No. UNDT/2011/140.
[10] Similar to rule 11.2 (c) of the current staff rules.

> soil and would therefore not germinate and yield fruit? Were his requests to the Registrar misdirected, sent to a person other than the Secretary-General to whom they ought to have been sent?
>
> It is well established that a request for the administrative review of a decision already taken is meant to provide the administrator an opportunity to reconsider the impugned decision. This requirement in the Staff Rules was not intended to act as a landmine along the way for the aggrieved staff member.

105. In light of the above, the Applicant's letter of 11 August 2011 formed a proper basis for administrative review by the Secretary-General's office. Staff rule 11.2(c) requires a request for management evaluation to be sent to the Secretary-General within 60 days. The Applicant's letter of 11 August 2011 was accordingly sent to the Secretary-General well within the said 60 days. Should it matter for purposes of administration of justice that the said letter was in a different form or bore a different title from the conventional requests for management evaluation?

106. As per staff rule 11.2(c), a request for management evaluation is sent to the Secretary-General vide MEU. In the present case, the Applicant first sent his request for a final administrative decision directly to the Secretary-General on 11 August 2011, when he was well within the 60-day timeframe. On receiving no response to this, he again reiterated the same requests to the MEU.

107. Unlike in *Gebre* where the Applicant's letters were addressed to the Registrar of the ICTR as an agent and representative of the Secretary-General and the case was still held to be receivable, the Applicant in the case at hand sent his letter requesting administrative review directly to the Secretary-General and obtained no response.

108. In *Rosana*[11] this Tribunal stated that silence from management is an implied administrative decision and that "it was after writing to [the] management several times regarding her post and not getting a response that the Applicant finally took the step of filing for a management evaluation on 3 November 2009." It was held that:

[11] Judgment No. UNDT/2011/217.

> The silence from [the] management reveals an employer-employee relationship with a regrettable lack of communication from the employer, an act which cannot be condoned by this Tribunal. An employee is required to respond to his/her employer's reasonable inquiries, questions or concerns relating to his employment. In the same way, an employer is expected to respond to an employee's reasonable questions, inquiries and concerns regarding the employment contract.

109. The Applicant thus having complained about the recklessness on the part of the Respondent on 11 August 2011 by writing to the Secretary-General, he ought to have received a response from the Office of the Secretary-General. If not, whoever received the said letter within the Office of the Secretary-General ought to have exercised a measure of reasonableness by forwarding it to MEU as the issues raised therein were the very same ones that the Applicant raised before MEU on 28 November 2011. The letter of 11 August served the same purpose as a request for management evaluation which is to seek administrative review.

110. MEU however dismissed his request arguing that management evaluation requests for any decisions taken earlier than 29 September 2011 were time-barred. However, as at 29 September 2011, the Applicant was still awaiting a response to his 11 August letter, which in essence, as already stated was a request for review of his case by the Organization. MEU failed to appreciate the continuous and related nature of the Applicant's claim of abuse of authority. The Tribunal is of the firm view that that the Applicant requested for a management evaluation of his claim in time.

111. The importance of abiding by prescribed time limits and the need to strictly adhere to stipulated procedural requirements prior to the commencement of formal litigation is well ingrained in the jurisprudence of the Tribunals. The instant case however is not one in which the Applicant "slept on his rights" and failed to abide by prescribed time limits; if anything the Applicant's conduct throughout the 26 months in which the alleged abuse was ongoing demonstrates that he was at all times anxious for the resolution of his complaints.

112. The actions and inactions of MSD and UNAMI officials with respect to a large part of the 26-month period in which the Applicant's work status was undetermined made it impossible to bring this action earlier.

113. The Respondent sought to counter this point by invoking the Tribunal's decision in *Bernadel*[12] where Carstens J found that an Application was not receivable as the Applicant had failed to file a timeous request for administrative review and which was upheld on appeal. The Tribunal finds that case distinguishable from the instant case in at least one cardinal respect. In *Bernadel*, the letter informing the Applicant of the final administrative decision had been drafted in a language that should have left "no doubt in the mind of the Applicant that the final decision on the case had been rendered" and that in subsequent communications, she was only seeking a reconsideration of that same decision.

114. On the contrary, in the present case, in light of the conflicting information that the Applicant was being given at different times and by different officials from different offices, it was not possible to tell when a final decision was taken. Clearly, the only decision that was taken with finality was that of 21 July 2011 clearing him to return to duty.

115. In *Bernadel* it was stated that reiterations of the same decision in response to a staff member's repeated requests to reconsider a matter do not reset the clock. This however, is far from what transpired in the instant case as the Applicant was given conflicting directives over the 26 month period by Administration officials. Every directive that was communicated to him was different and together they all formed a conundrum of varied and contradicting actions. Sometimes he was told that he was terminated while at other times he was told differently. At some point he was told that he was a candidate for the award of a disability benefit even when he had been given a clean bill of health by his doctors whom he saw at the Administration's instruction. These are only but a few examples. The record illustrates many others.

[12] Judgment No. UNDT/2010/210.

116. In the instant case, the Tribunal finds that given the actions of UNAMI and MSD officials in keeping the Applicant in limbo, it is utterly unconscionable for the Respondent to seek to bar this case from the purview of the internal justice system by lightly invoking a procedural rule, which was not even breached in the first place.

117. This case raises weighty issues on access to justice. The Tribunal holds that the principle of access to justice upon which the entire internal justice system of the United Nations depends demands that the seemingly legitimate claims raised in the Application must be given a chance to be heard. In the words of Counsel for the Applicant, "the Respondent in this case stood idly and silently as the Applicant was asking questions concerning his contract and pay and now seeks to blame him for not taking requisite action." Should this be permitted, what will ensue will be a grave miscarriage of justice

118. This is particularly so because the remedies that the Applicant seeks include prayers for the removal from his personnel file of negative and unfounded reports concerning his physical and mental health and that he be given access to the file to confirm this. As it is evident that the Applicant was cleared by his doctors, a request for a remedy such as this cannot be denied a hearing.

Conclusion

119. The Tribunal finds that the contested abuse of authority in this case does not arise from a singular, detachable, stand-alone decision by any of the officials in Administration but rather that it is a series of actions and inactions spanning a period of over two years the final of which were in July and August 2011. The Applicant requested management evaluation in time.

120. This is not a case of waiver of time limit, as this is precluded by the Statute and the Staff Rules. It is one in which a finding is made categorically that the Applicant filed for the requisite management evaluation within the stipulated time limits.

121. To the preliminary question of whether or not the receivability criteria set out in staff rule 11.2 and art. 8 of the Rules of procedure have been satisfied in this case, the Tribunal finds in the affirmative and holds that it has the jurisdiction to hear this case on the merits.

122. The Application and the claims contained therein are receivable both on substance and in time.

(*Signed*)

Judge Nkemdilim Izuako

Dated this 4th day of December 2013

Entered in the Register on this 4th day of December 2013

(*Signed*)

Abena Kwakye-Berko, Acting Registrar, Nairobi