



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/081

Judgment No.: UNDT/2015/058

Date: 25 June 2015

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

SCHWANDL

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Robert Nadelson, UNDP

## **Introduction**

1. The Applicant is a former staff member of the United Nations Development Programme (UNDP). She separated from the Organization on 31 December 2000.

2. In her Application dated 8 September 2014, she is challenging the “refusal to allow [her] to pay retroactive Van Breda health insurance premiums (despite timely application to ASHI and processing thereof)”.

3. The Respondent filed a Reply and a Motion on 13 October 2014 in which it is submitted, *inter alia*, that the Application is manifestly inadmissible and should be struck out.

4. The Respondent asserts that the Application should be dismissed as irreceivable because the Applicant has not identified an administrative decision amenable to challenge. The Respondent further submits that even if it is found that the Applicant has identified an administrative decision amenable to challenge, any such decision occurred 13 years ago and is therefore time-barred.

5. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal’s Rules of Procedure, that an oral hearing is not required in determining the preliminary issue of receivability in this case and will rely on the parties’ pleadings and written submissions.

## **Facts**

6. The Applicant separated from service on 31 December 2000 at the age of 52.5 years having opted for early separation.

7. On 27 January 1999, she applied for After Service Health Insurance (ASHI).

8. On 22 May 2000, the Applicant sent a fax to Van Breda and enquired about continuation of health insurance. She received a response on 25 May 2000.

The ASHI premiums were much higher than what she had been paying before as an active staff member and she was therefore not interested.

9. After her separation, the Applicant settled in Brazil. In 2008, she joined a United Nations retirees' association, "AAFIB". During an AAFIB meeting, she discovered that the ASHI premiums were not what she had thought and that they were in fact much lower than the premiums for active staff. Since then she made several attempts to get her Van Breda insurance coverage back.

10. In 2010, she received an email response from the Insurance Unit who informed her that it was not possible to join ASHI at that stage. She then wrote to the Secretary-General on 8 October 2010. She thereafter sought the assistance of the United Nations Ombudsman. The subsequent attempt at mediation was unsuccessful.

11. On 29 January 2014, the Applicant wrote to UNDP to request "an administrative decision". She received a response on 4 April 2014 informing her that there was no evidence that she had informed UNDP of her intention to continue with Van Breda during her Special Leave Without Pay (SLWOP).

12. The Applicant sought management evaluation on 9 May 2014.

### **Receivability**

13. The Respondent has argued that this Application is not receivable. The reasons advanced for this argument are that:

a. The Applicant has not identified an administrative decision amenable to challenge.

b. Even if it is found that the Applicant has identified an administrative decision, any such decision occurred 13 years ago and therefore the appeal is time-barred.

c. The Applicant cannot create an administrative decision by the simple expedient of requesting that the Organization remedy the consequences of her own voluntary action nor can she reset the time limits

to appeal a purported administrative decision by reiterating an earlier request for the purposes of appeal.

d. The administrative decision that the Applicant contests is the purported decision not to allow her to retroactively enroll in ASHI. The Respondent submits that the Applicant sought an agreed separation and executed a Certificate of No Contest (CNC). The agreed separation she sought included a period of Special Leave With Partial Pay followed by a period of SLWOP. During her period of SLWOP, the Applicant decided to discontinue her contributions to a United Nations health insurance scheme prior to separating at the age of 52.

e. The Applicant's decision to discontinue her United Nations health insurance and to separate at age 52 rendered her ineligible for ASHI.

f. The Applicant failed to raise the issue when she separated on 31 December 2000 and she also failed to raise the issue on 12 August 2003 when she turned 55 years of age and understood that she was not going to be covered by ASHI.

g. The Respondent submits that the present appeal is the direct result of the Applicant's decision to seek early separation at age 52 and/or her decision to discontinue her health insurance while on SLWOP prior to separation. The circumstances in which the Applicant finds herself were of her own creation.

h. The Respondent submits that it bears noting that the Applicant was a senior staff member in the Country office dealing with operations and considers it surprising that the Applicant contends that she was somehow mistaken about this significant aspect of staff member entitlements.

i. In her request for management evaluation dated 9 May 2014, the Applicant clearly indicated that she was seeking review of her non-enrolment in ASHI following her separation from UNDP on 31 December 2000. As her request for management evaluation was submitted on 9 May

2014, she has sought formal review approximately 13 years after the alleged decision she seeks to challenge took place.

14. For the foregoing reasons, the Respondent requests that the Application be dismissed in its entirety.

### **Considerations**

15. Article 2(1) (a) of the UNDT Statute reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual [...].

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance [...].

16. It is now well settled what the classic definition of an administrative decision is as determined in the case of *Andronov*.<sup>1</sup>

There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, 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. Thus, the 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. They 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.

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<sup>1</sup> Judgment No. 1157, 20 November 2003, at para. V.

17. The pronouncement has been quoted with approval in a number of judgments of the Appeals Tribunal. In the case of *Andati-Amwayi*<sup>2</sup> the Appeals Tribunal held,

What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

18. The above pronouncement has been followed for example in *Ngokeng*<sup>3</sup>, *Bauzá Mercére*<sup>4</sup> and *Wasserstrom*<sup>5</sup>.

19. What the Applicant is invoking as an administrative decision is the refusal of UNDP to allow her to retroactively enroll in ASHI in order to continue to benefit for coverage for health care. The United Nations offers two types of medical plans Van Breda, now Cigna, and the Medical Insurance Plan (MIP). Van Breda/Cigna is offered for professional staff and their eligible dependents and MIP is offered for General Service staff members and their eligible dependents. In order to enroll in ASHI coverage staff members must be enrolled in a United Nations health insurance plan scheme and the United Nations Joint Staff Pension Funds at the time of separation from service.

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<sup>2</sup> 2010-UNAT-058, para. 17.

<sup>3</sup> 2014-UNAT-460, para. 26.

<sup>4</sup> 2014-UNAT-404, para. 18.

<sup>5</sup> 2014-UNAT-457, para. 34.

20. At the time of her separation the Applicant had agreed to discontinue her coverage with her United Nations contributory health insurance plan, Van Breda, upon its expiry on 6 September 2000. There is nothing on record to indicate that the Applicant informed UNDP of her decision in respect to ASHI or whether she intended to continue with her coverage with Van Breda.

21. A decision by a staff member to join the United Nations medical plan is not an obligation but an option offered by the United Nations as an individual may well opt for some other health coverage plan though joining the plan of the United Nations offers certain advantages. Joining or remaining in a health coverage plan is not part of the terms or conditions of the contract or terms of employment of a staff member. When the Administration informed the Applicant that she could not enroll retroactively in ASHI, that was an administrative decision but it did not have consequences that impacted on her contract or terms of employment. There is nothing in art. 2 of the Statute of the Dispute Tribunal that suggests that the Article should also cover any impact that a decision may have on a retiree's health coverage.

22. The Tribunal holds, therefore, that the decision was not an administrative decision within the meaning of art. 2 of the UNDT Statute.

### *Time Limits*

23. Even if the decision of the Administration could be termed an administrative decision capable of challenge, the Application lamentably fails. The Applicant filed her Application 13 years from the date of receiving the response of the Administration and gives the impression that she woke up and suddenly realized that she had some rights to vindicate. The filing of the Application after 13 years conjures the thought expressed by the famous English poet Wordsworth who wrote the poem "A slumber did my spirit seal".

24. In regard to time limits the Appeals Tribunal has in a number of cases stated<sup>6</sup> that time limits should be strictly complied with. Under art. 8.3 of its

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<sup>6</sup> See for example *Diab* 2015-UNAT-495; *Thambiah* 2013-UNAT-385; *Al-Mulla* 2013-UNAT-393; *Christensen* 2012-UNAT-218; *Reid* 2013-UNAT-389.

Statute, the Dispute Tribunal may waive deadlines upon a written request from a party. This provision would not avail an application filed more than three years from the impugned decision. After three years the guillotine fatally applies to an application and the Tribunal has no power or jurisdiction to consider a request for waiver or to grant one.

25. In *Bangoura*<sup>7</sup> and *Reid*<sup>8</sup> the Appeals Tribunal held that the Dispute Tribunal cannot waive the time limit to file an appeal, more than three years after the applicant's receipt of the contested administrative decision. In *Reid* the Appeals Tribunal also held that given this absolute restriction on its judicial discretion, the Dispute Tribunal ought not to have entered into a review of the possible existence of exceptional circumstances justifying an extension of the time limit.

### **Judgment**

26. The Application is not receivable and is rejected in its entirety.

*(Signed)*

Judge Vinod Boolell

Dated this 25<sup>th</sup> day of June 2015

Entered in the Register on this 25<sup>th</sup> day of June 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>7</sup> 2012-UNAT 268, para. 30.

<sup>8</sup> 2013-UNAT-389, para. 14.