



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

SAKO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Nicole Washienko, OSLA

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

## **Introduction**

1. On 22 June 2015 the Applicant filed an application challenging a decision concerning the calculation of his termination indemnity by the Human Resources Section at the United Nations Operation in Côte d'Ivoire (ONUCI). In that Application he stated that the date on which the decision was made was 3 April 2015 and that the date on which the decision was notified to him or he came to know about the decision was 19 November 2014.<sup>1</sup>

## **Procedural history**

2. After retaining counsel, on 14 August 2015 the Applicant filed an amended application with leave of the Tribunal.

3. The Respondent filed a reply dated 18 September 2015 in which he alleged that the Application is not receivable *ratione temporis*.

4. The Applicant filed submissions on receivability on 14 March 2016 in accordance with Order No. 037 (NBI/2016).

## **Facts relating to receivability**

5. The following facts are taken from the submissions and pleadings.

6. The Applicant was a former Associate Judicial Affairs Officer with ONUCI. On 5 November 2014, he was informed that his post would be abolished and as a result his appointment was to be terminated prior to the expiry of his fixed-term appointment.

7. On 19 November 2014, he was received a letter from the ONUCI Human Resources Office in Daloa which read:

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<sup>1</sup> The Application and a number of its annexes were in French. The Tribunal obtained translations of these documents from the English Text-Processing Unit, Documentation Division of the Department for General Assembly and Conference Management at United Nations Headquarters in New York. The parties accepted the accuracy of the translations in submissions filed on 4 March 2016.

We have received the final calculation of your termination indemnity. Please see below for your information.

Should you require further clarification please do not hesitate to let us know.

8. The Applicant immediately responded disputing the decision. He referred to the table that had accompanied the letter from the Human Resources Office, which he said showed he had four years of service with ONUCI rather than nine. He set out the history of his recruitment. He noted that he had never resigned and his contract was never terminated in any way until his division was shut down. He said he believed that the nine years he had spent there represented an achievement that should be factored into the calculations of his termination indemnities.

9. On 20 November 2014, the Human Resources Office responded that his email had been received and they would revert soonest.

10. An invoice for the payment of the termination indemnity was raised on 26 December 2014 and the amount of the invoice was paid into the Applicant's bank account on 12 January 2015.

11. After two reminders sent by the Applicant on 23 December 2014 and 29 January 2015, the Human Resources Office responded that they were waiting for a reply from Headquarters "in order to be able to reply to you with absolute certainty".

12. On 12 March 2015, the Applicant sent a further reminder to the Human Resources Office explaining in some detail his pressing need to know whether there had been any new developments with regard to his indemnities. He wrote again on 30 March 2015.

13. On 3 April 2015, the Human Resources Office confirmed that after consultation with the Field Personnel Division of the Department of Field Support (FPD/DFS) that for purposes of determination of the completed months of service for termination indemnity, the completed length of service must be continuous and the five years he served as a General Service staff could not be taken into account for the calculation of termination indemnity. The letter concluded: "The

Organization considers therefore that it has paid all that is due to you with regards to the termination indemnity”.

14. On 15 May 2015, the Applicant requested management evaluation of the decision not to grant him the termination indemnity that he was owed.

#### **Respondent’s submissions**

15. A mandatory first step for an applicant before the Tribunal is to request management evaluation of a contested decision within 60 days of his/her receiving notification of the contested decision.

16. A staff member must pursue his/her request for management evaluation at the earliest possible time that legal action could have been brought. Staff members are deemed to be aware of the provisions of the staff rules.

17. The Applicant’s enquiries after the 19 November 2014 decision did not extend the dead line for requesting management evaluation under staff rule 11.2(c). Even if the Applicant believed that the matter was still under consideration the statutory time limit was not vitiated, nor did the reiteration of the contested decision on 3 April 2015 re-set the time limit for requesting management evaluation.

#### **Applicant’s submissions**

18. The Applicant submits that he is not seeking waiver or suspension of deadlines as he has acted within the prescribed timeframe throughout the entirety of the judicial process.

19. Before a decision can be challenged it must be final and understandable. He received a table on 19 November 2014 containing several obvious errors including the misstatement of his salary, for which no explanation was provided and which entitled him to seek clarification since he could not understand what was being offered to him as a termination indemnity.

20. The promise of the Human Resources Section to verify the inconsistencies and respond to him with an explanation fully supports the assertion that the decision was not final. He did not believe that the decision was final.

21. The Respondent took more than four months to respond to him. If the Respondent had provided an adequate explanation within a reasonable time he could have exercised his rights within the prescribed period.

22. The reasoning of the Management Evaluation Unit (MEU) promotes a culture of litigation within the organization. MEU essentially expects staff members to initiate administrative and judicial proceedings the moment they receive the slightest communication, without attempting to resolve misunderstandings directly with Human Resources.

23. The Applicant did not receive an appealable decision until 3 April 2015 when the final amount of his termination indemnity was communicated to him. His request for management evaluation was made before the expiry of 60 days from that decision and was therefore in time.

24. The Applicant submits that the decision in *Robineau* 2012-UNDT-175 concerned similar facts and should be applied in this case. This was not a mere reiteration of the decision.

### **Considerations**

25. Staff rule 11.2(a) provides that:

A staff member wishing to formally contest an administrative decision alleging noncompliance 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.

26. Staff rule 11.2(c) provides that a request for management evaluation shall not be receivable by the Secretary-General unless sent within 60 days of notification of the contested administrative decision. The rule allows the Secretary-General to expand this deadline pending efforts for informal resolution

by the Office of the United Nations Ombudsman. There is no provision to waive this deadline.

27. Staff rule 11.2(a) explicitly requires a staff member wishing to formally contest a decision to request management evaluation first. The Tribunal does not accept the submission of the Applicant that in this way the MEU is promoting a culture of litigation. To the contrary, as stated in *Caldarone* UNDT/2009/035, the role of management evaluation in the internal justice system is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by management.

28. If a staff member wishes to pursue informal resolution of his or her complaint the internal justice system allows for the extension of the deadline for requesting management evaluation.

29. Instead of challenging the calculation of his termination indemnity by means of the process, either formal or informal afforded by the internal justice system, the Applicant chose to direct his complaints to the person who conveyed the decision to him.

30. The Applicant's submissions about the response he received when he initially queried the decision with the Human Resources Office misrepresent the evidence and are misleading. There is no evidence that the Applicant raised with the Human Resources Office the inconsistencies about his salary he now refers to in these proceedings and which he alleges justifies his assertion that the decision was not final. The correspondence between him and the Human Resources Office does not show that the Human Resources Office promised to verify the so-called inconsistencies.

31. The fact that the Human Resources Office decided to check its position with FPD/DFS at Headquarters does not suspend or nullify the 19 November decision. In *Robineau* the decision-maker also consulted with United Nations Headquarters about the validity of the decision taken but the Judge specifically

referred in the judgment to advice given by the Office of Human Resources Management to the Applicant that he could await the outcome of the consultations being undertaken before filing his management evaluation request. No such advice was given in this case. *Robineau* is therefore distinguishable on its facts.

32. The impugned decision in this case is the calculation of his termination indemnity conveyed to the Applicant by email on 19 November 2014. As evidenced by his immediate response to that email it is clear that the Applicant understood what the decision was and the basis for it. There is also no doubt that from that date he disputed the calculation on the basis of his understanding of the way his length of service should have been calculated.

33. If there was any lingering doubt about the decision in the Applicant's mind, the payment of his termination indemnity on 12 January 2015 into his bank account should have dispelled that.

34. The Tribunal holds that correspondence sent to the Applicant on 3 April 2015 was confirmatory of the 19 November decision. It was not a new or discrete decision. Accordingly, the 60 days for the Applicant to request management evaluation began to run from 19 November. He failed to meet that dead line and the requirements of staff rule 11.2(c).

### **Decision**

35. The application is not receivable.

*(Signed)*

Judge Coral Shaw

Dated this 20<sup>th</sup> day of April 2016

Entered in the Register on this 20<sup>th</sup> day of April 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi