UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/073
Judgment No.: UNDT/2016/044
Date: 26 April 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

JEAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Didier Sepho

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a staff member currently employed as an Administrative Assistant in the United Nations Office for Disarmament Affairs. On 16 December 2014, she filed an application before the Dispute Tribunal contesting the decision not to renew her fixed-term appointment in the Office of the Special Adviser on Africa ("OSAA") beyond 31 August 2014, and to thereby separate her from service. At the time of the contested decision, the Applicant was employed as an Office Assistant at the G-4 level in OSAA.

2. The Applicant requests the rescission of the contested decision and the issuance of a new fixed-term contract. In the alternative, she requests that she receive compensation as a result of the alleged unlawful non-renewal of her contract at the G-4 level in OSAA, and also compensation for moral injury as a result of stress, anxiety and humiliation caused by the allegedly unlawful, abusive and unfair treatment to which she was subjected.

3. The Respondent submits that the application is not receivable *ratione temporis* because the Applicant's request for management evaluation of the contested decision, submitted on 29 August 2014, was not submitted within 60 days of receiving notification of the contested decision, as required by the Staff Rules. Should the Tribunal find the application receivable, the Respondent submits that it is without merit and be rejected.

Facts

4. On 20 July 2012, a Personnel Action was approved to extend the Applicant's appointment as an Office Assistant at the G-4 level in OSAA for two years from 1 September 2012 until 31 August 2014. The Personnel Action indicated that the Applicant occupied post number 50387 and BIS post number UNA-011-03010-EOL-0005.

5. On 26 July 2012, the Applicant signed a Letter of Appointment accepting a two-year fixed-term appointment as described above. The Letter of Appointment stated that the appointment would expire "without prior notice" on 31 August 2014. It also stated, "A Fixed-Term Appointment, irrespective of the length of service, does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations".

6. The Respondent submits that at a meeting in March 2013, the Applicant was informed verbally that, because OSAA intended to request reclassification of the post that she encumbered (from the G-4 level to the G-6 level), it was possible that her fixed-term appointment would not be renewed beyond 31 August 2014.

7. On 1 April 2013, the Applicant wrote to the Director of OSAA stating:

> As per our last meeting with the [Under-Secretary-General ("USG")] in his office on Wednesday 27 March informing me that my position will be cut off, I am kindly enquiring about any appropriate action I need to take in this regard.
>
> I thank you for informing me early enough so I can have enough time, as it was stated in the meeting, to apply for another position and explore any other options available.

8. By email dated 30 August 2013, an Administrative Officer from the Executive Office, Department of Economic and Social Affairs ("DESA"), asked the Applicant if she had been contacted by the Office of Human Resources Management ("OHRM") regarding any "placement opportunities". The Applicant responded via email the same day, stating, "Yes, I have".

9. By interoffice memorandum dated 11 September 2013, the USG/OSAA wrote to the Executive Officer, DESA as follows (emphasis in the original):

> Subject: **Association of Post No. UNA-011-03010-EOL-0005 with a [Generic Job Profile ("GJP")] G-6 Staff Assistant**
>
> 1. As you are aware, the G-6 post (Personal Assistant) in OSAA was abolished in the year 2009 as at that time the post of the Special

> Adviser on Africa remained vacant. However, now that the post of the Under-Secretary-General/Special Adviser on Africa has been filled as of May 2012, the need for a Personal Assistant has greatly increased.
>
> 2. So far, we have been using our temporary funds for a G-6 post but these funds would soon be exhausted. We would, therefore, request that our existing Post No. UNA-011-03010-EOL-0005 may be associated with GJP, G-6 Staff Assistant so that we are able to recruit a regular and suitable staff member. …

10. By interoffice memorandum dated 9 October 2013, the Chief of the Personnel Section, Executive Office, OSAA, wrote to the Compensation and Classification Section, Human Resources Policy Services, OHRM, as follows (emphasis in the original):

> Subject: **Post Number: UNA 011-03010-EOL-0005, Senior Staff Assistant, OSAA**
>
> As requested by [the] USG of OSAA, it would be appreciated if you could please approve the association of the subject post with the GJP for a G-6 Senior Staff Assistant. There is no previously classified job description on record for this post, but we are attaching a current organizational chart, together with a list of duties and responsibilities specific to the post in support of our request.
>
> …

11. By email dated 28 October 2014, the Chief of the Compensation and Classification Section, OHRM, wrote to the Chief of the Personnel Section, Executive Office, OSAA stating that "we hereby approve the association of post UNA-011-03010-EOL-0005 to the GJP for GS-6, Senior Staff Assistant".

12. On 22 January 2014, Job Opening number 14-ADM-OSAA-32673-R-NEW YORK (R) was published for the position of Staff Assistant, G-6 in OSAA. The closing date for applications was 21 February 2014.

13. On 4 April 2014, the Applicant reported to the Security and Safety Service, Department of Safety and Security that she had been assaulted by a colleague while seated at her desk.

14. In June 2014, the Applicant attended a number of meetings concerning her employment in OSAA (unsigned minutes produced by the Respondent record the relevant meetings as taking place on 11, 12, 19, and 25 June 2014). The Respondent submits that the Applicant was verbally informed at these meetings that her contract would not be renewed as her post had been reclassified to the G-6 level. The Applicant disputes the assertion that she was verbally informed/notified that her G-4 post was to be reclassified or had been reclassified and/or that she was informed of the non-renewal of her fixed term appointment with OSAA before 26 August 2014. She submits that she understood the purpose of the meetings was to discuss a lateral move which she had requested because of the alleged assault by a colleague that occurred on 4 April 2014.

15. On 11 July 2014, a Personnel Action was approved recording the Applicant's temporary assignment in the Office of Operations, Department of Peacekeeping Operations, for the period 1 July to 15 August 2014.

16. On 26 August 2014, an Administrative Assistant from the Executive Office, DESA, informed the Applicant that her separation from service would take place effective close of business on 31 August 2014 and to provide information on the applicable separation procedures.

Procedural history

17. On 29 August 2014, the Applicant filed a request for management evaluation of the decision not to renew her fixed-term appointment. She stated that she was notified of the decision on 26 August 2014.

18. On 1 October 2014, the USG for Management responded to the Applicant's request for management evaluation, informing her that the Secretary-General had decided to uphold the contested decision.

19. On 16 December 2014, the Applicant filed her application on the merits. On 15 January 2015, the Respondent filed his reply.

20. By Order No. 17 (NY/2015), dated 3 February 2015, the Tribunal (Duty Judge) ordered the Applicant to file a response to the Respondent's reply limited to the issue of receivability of the application.

21. On 2 March 2015, the Applicant filed her response to Order No. 17 (NY/2015).

22. The case was assigned to the undersigned judge on 27 October 2015.

23. By Order No. 1 (NY/2016), dated 11 January 2016, the parties were instructed to attend a Case Management Discussion ("CMD") to discuss the further proceedings in the present case.

24. During the 3 February 2015 CMD, attended by both parties, the Tribunal sought clarification from the parties as to their submissions on the issue of receivability *ratione temporis* invoked by the Respondent in his reply. Counsel for the Respondent did not object to the Applicant's request to hear oral testimony from those in attendance at the meetings which the Respondent submits were held on 11, 12, 19 and 25 June 2014.

25. By Order No. 31 (NY/2016), dated 3 February 2016, the Tribunal ordered all of the participants in the June 2014 meetings to appear as witnesses at a hearing on receivability. The relevant persons, and their positions at the time, were as follows:

a. The Applicant, Office Assistant, OSAA;

b. Mr. AV, Chief, Entitlements Unit, Field Personnel Division, Department of Field Support;

c. Mr. IK, Executive Officer, DESA;

d. Mr. DH, Director, OSAA;

e. Mr. SK, Administrative Assistant, OSAA;

f. Ms. CM, Chief, Unit C, Headquarters Staffing Section, Strategic Planning and Staffing Division, OHRM;

g. Mr. ES, Staff Development Officer, Career Support and Performance Management Section, OHRM;

h. Mr. CS, Administrative Officer, Executive Office, DESA.

26. On 4 March 2016, the parties attended the hearing on receivability. Following a motion filed by the Respondent, which was unopposed by the Applicant, Mr. AV testified first via telephone from Casablanca, Morocco. Thereafter, the Applicant testified in person, followed by Mr. IK, Mr. DH, and Mr. SK, all of whom also testified in person. At the end of the first day of the hearing, the parties agreed that proceedings should be adjourned until 8 March 2016, when the remaining three witnesses would be available to testify.

27. On 8 March 2016, the parties attended the second day of the hearing on receivability. Ms. CM, Mr. ES, and Mr. CS each testified in person. During the hearing, the Respondent sought leave to introduce new documentary evidence as follows:

a. Emails from Mr. SK to Mr. CS dated 11 June 2014, 12 June 2014, 25 June 2014, and 28 August 2014, each showing one or more icons indicating that minutes of a meeting or meetings were attached;

b. An interoffice memorandum from the Chief of the Security and Safety Service to Mr. IK dated 22 April 2014 regarding an alleged assault on the Applicant by her colleague, reported to have taken place on 4 April 2014;

c. An investigation report dated 8 April 2014 regarding the alleged assault;

d. An interoffice memorandum from the Assistant Secretary-General for Human Resources Management to the USG/OSAA dated 19 June 2014 regarding the outcome of the investigation into the alleged assault.

The hearing was adjourned for 30 minutes to allow the Tribunal to review the documents and to allow the Applicant and her counsel to do the same.

28. With regard to the four printed emails produced by the Respondent, Counsel for the Applicant submitted that there was no way of determining whether the attachments did indeed contain minutes of meetings corresponding to those attached by the Respondent as annex R/4 to the reply to the application. With regard to the investigation report dated 8 April 2014, Counsel for the Applicant submitted that the Respondent should produce the annexes to the report.

29. The Tribunal ruled that the evidence produced by the Respondent was relevant and that it was not necessary to produce the annexes to the investigation report. The parties stated that they did not wish to adduce any additional evidence and agreed to file their closing submissions on the issue of receivability by 31 March 2016.

30. By Order No. 70 (NY/2016), dated 9 March 2016, the Tribunal ordered the parties to file, by 31 March 2016, closing submissions, based only on the evidence already before the Tribunal, addressing the receivability of the application.

31. On 30 March 2016, the parties filed a joint motion for an extension of time, requesting that the Tribunal extend the deadline for filing closing submissions on receivability by one week until 7 April 2016, in view of the time required by counsel for both parties to prepare for and participate in hearings in other cases on 29 and 30 March 2016.

32. By Order No. 79 (NY/2016), dated 31 March 2016, the Tribunal granted the parties' joint motion for an extension of time.

33. On 7 April 2016, the parties filed their closing submissions on the issue of receivability.

Respondent's submissions on receivability

34. The Respondent's principal contentions may be summarized as follows:

a. The contested decision in the present case is the decision not to renew the Applicant's fixed-term appointment. The Applicant did not challenge the decision to reclassify the post that she encumbered in either the request for management evaluation or the application to the Dispute Tribunal;

b. The evidence before the Tribunal demonstrates that the Applicant was notified of the contested decision in meetings held on 11, 12, and 19 June 2014;

c. The 60-day time limit to request management evaluation of the contested decision (staff rule 11.2(c)) therefore commenced on 19 June 2014, at the latest, and expired on 18 August 2014. The Applicant submitted her request for management evaluation on 29 August 2014, eleven days late;

d. Staff rule 11.2(c) does not require a staff member to receive written notification of an administrative decision in order for the time limit to start to run, in contrast to former staff rule 111.2(a) (citing *Gusarova* UNDT/2013/072, para. 21);

e. The determination of when an applicant is notified of a contested decision "is based on objective elements that both parties (Administration and staff member) can accurately determine" (citing *Rosana* 2012-UNAT-273, para. 25);

f. The test set out in *Rosana* is satisfied by determining when the "staff member knew or reasonably ought to have known of the […] decision" (citing *Chahrour* 2014-UNAT-406, para. 31 and *Rabee* 2013-UNAT-296, para. 19);

g. A staff member's actual knowledge cannot be ignored for the purposes of calculating time limits (citing *Onana* 2011-UNAT-157, para. 25);

h. Four of the Respondent's witnesses (Mr. IK, Mr. DH, Mr. SK, and Mr. CS) gave oral testimony confirming that Mr. IK had mentioned the expiry of the Applicant's fixed-term appointment at the meetings on 11 and 12 June 2014. Ms. CM and Mr. ES confirmed that the expiry of the Applicant's fixed-term appointment was discussed at the meeting of 19 June 2014;

i. The Applicant's oral testimony that the purpose of the four meetings in June 2014 was to assist her to find a position outside OSAA because she did not wish to work in the same office as the colleague who assaulted her on 4 April 2014 is not credible. This evidence is in direct conflict with the oral testimony of the six witnesses identified above;

j. The oral testimony of the Respondent's six witnesses regarding the purpose of the June 2014 meetings should be accepted by the Dispute Tribunal. Each witness was frank and forthright about what matters they could recall and what matters they did not. The two witnesses from OHRM (Ms. CM and Mr. ES) had no prior connection to the Applicant, and corroborated the evidence of the witnesses who worked in OSAA (Mr. DH and Mr. SK) and the Executive Office of DESA (Mr. IK and Mr. CS). There was no suggestion made during cross-examination that the Respondent's witnesses had any motive or intent not to tell the truth during their oral testimony.

Applicant's submissions on receivability

35. The Applicant's principal contentions may be summarized as follows:

a. In accordance with sec. 2.4 of ST/AI/1998/9 (System for the classification of posts), notification of the reclassification of a post must be provided to the incumbent of the post in writing. The Applicant was never

notified verbally or in writing that the post she encumbered had been reclassified. The Applicant contests the veracity of the testimony of the witnesses who testified that they notified her verbally of the reclassification. In any event, verbal notification of a reclassification is contrary to ST/AI/1998/9;

b. The reclassification of the post that the Applicant encumbered was not finalized until on or about 28 October 2014. Therefore, no final decision was conveyed to the Applicant at the meeting of 27 March 2013, referred to in the Applicant's email to the Director of OSAA dated 1 April 2013;

c. The Applicant was not given notification in the June 2014 meetings that the post had been reclassified or that any final decision had been made on the status of her employment;

d. The June 2014 meetings were prompted by the assault on the Applicant by her colleague in April 2014 and her request not to work in the same office;

e. The Applicant never received a copy of the minutes of the June 2014 meetings;

f. In *Manco* 2013-UNAT-342, the Appeals Tribunal affirmed that unless a decision is notified in writing, the time limit for requesting management evaluation does not start.

Consideration

Applicable law

36. Articles 2, 3, and 8 of the Statute of the Dispute Tribunal state in relevant parts:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(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;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

Article 3

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

…

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and;

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

…

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

…

37. Articles 7 and 35 of the Tribunal's Rules of Procedure state in relevant parts:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat

and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

…

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

…

Article 35 Waiver of time limits

Subject to article 8.3 of the statute of the Dispute Tribunal, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.

38. Staff rules 11.2 and 11.4 of ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations) state in relevant parts (emphasis added):

Rule 11.2
Management evaluation

(a) 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.

(b) 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.

(c) 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*. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.
>
> **Rule 11.4**
>
> United Nations Dispute Tribunal
>
> (a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

Receivability framework

39. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073; *O'Neill* 2011-UNAT-182; *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.

40. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);
>
> b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance

with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

41. It results that for being considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

42. The Applicant, a current staff member in the Office for Disarmament Affairs, was a staff member in OSAA at the time of the contested decision. She was therefore entitled to file an application in accordance with art. 3.1 of the Dispute Tribunal's Statute. The application is therefore receivable *ratione personae*.

Receivability ratione temporis

43. The Tribunal notes that the Applicant filed the present application on 16 December 2014, within 90 days from the date when she received the response the management evaluation 1 October 2014. The application is receivable *ratione temporis*.

Receivability ratione materiae

44. The Tribunal notes that the receivability issue invoked by the Respondent, namely that the Applicant failed to request management evaluation within 60 days of the the date when she was verbally informed that her fixed-term appointment would not be renewed, is related to the receivability *ratione materiae* of the application and not to the receivability *ratione temporis*, as results from the above paragraph.

45. The Applicant contests a non-renewal of her fixed-term contract, which is an administrative decision within the meaning of art. 2.1 of the Tribunal's Statute. The Tribunal will therefore consider whether the application is also receivable *ratione materiae*, namely, whether the Applicant submitted a request for management evaluation of the contested decision within the 60-day time limit established by staff rule 11.2(c). In order to answer this question, it is necessary to determine the date on which the Applicant received notification of the contested decision.

46. In the present case, the Respondent states that the Applicant was verbally notified of the contested decision in meetings held on 11, 12, and 19 June 2014 and that the 60-day time limit to request management evaluation of the contested decision (staff rule 11.2(c)) therefore commenced on 19 June 2014, at the latest, and expired on 18 August 2014. The Applicant submitted her request for management evaluation on 29 August 2014, which, according to the Respondent's submission, was eleven days late.

47. The United Nations Appeals Tribunal has consistently held that the Dispute Tribunal does not have jurisdiction, pursuant to art. 8.3 of its Statute, to waive or extend the deadlines for management evaluation requests (see *Costa* 2010-UNAT-036; *Trajanovska* 2010-UNAT-074; *Sethia* 2010- UNAT-079; *Ajdini* et al. 2011-UNAT-108). Reiterations or repetitions of the same administrative decision in response to the Applicant's communications do not reset the clock with respect to the applicable time limits in which the original decision is to be contested (*Sethia* 2010-UNAT-079; *Bernadel* 2011-UNAT-180; *Cremades* 2012-UNAT-271; *Aliko* 2015- UNAT-539).

48. The Tribunal notes that staff rule 11.2(c) of ST/SGB/2014/1 states (emphasis added):

> (c) 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*. This deadline may be extended by the Secretary-General pending efforts for informal

> resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

49. Staff rule 11.2(c) took effect on 1 July 2009, when provisional Staff Rules were promulgated through ST/SGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules) issued on 16 June 2009. The Tribunal notes that staff rule 11.2(c) replaced former staff rule 111.2(a), which stated (emphasis added): "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision *in writing*".

50. After comparing the two legal provisions, the Tribunal considers that staff rule 11.2(c), which has remained the same since it took effect on 1 July 2009, no longer includes the mandatory requirement for the administrative decision to be notified solely in writing, and from a plain interpretation of staff rule 11.2(c), it results that the provision is generally applicable to all administrative decisions, except the ones of staff rule 11.2(b). In this sense, the Appeals Tribunal has confirmed and defined the application of the plain meaning rule in several judgments, including *Scott* 2012-UNAT-225, in which it stated that:

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

51. Moreover, according to the general legal principle of interpretation, *ubi lex non distinguit, nec nos distinguere debemus*, i.e. where the law does not distinguish, neither should we distinguish, the interpreter of the law cannot distinguish where the law does not distinguish and cannot create and/or add an exception(s) to an

established rule with a general applicability and thereby limit its area of application. Also, the interpreter of the law cannot act in the opposite way, namely to extend the applicability of the general rule to an exception and therefore not to give the required legal effect to such exception(s).

52. The Tribunal concludes that since there is no longer an express stipulation in staff rule 11.2(c) that a valid notification must be given in writing, a notification of the contested decision can be either verbal (oral) and/or in writing.

53. In *Rosana*, 2012-UNAT-273, paras. 21 and 25, affirmed in *Rabee* 2013-UNAT-296 (para. 19), the Appeals Tribunal stated:

> 21. The above-referenced period of sixty days must be considered to have run from the date of the staff member's retirement on 31 August 2009. At that time, the staff member certainly knew that her petition for reclassification of her post or extension of her contract beyond retirement age would not be granted, which thus constitutes the implied administrative decision impugned. Ms. Rosana was necessarily aware of the negative result of her petition when she retired, because her retirement made it impossible to extend her contract.
>
> 25. The date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine. …

54. The Applicant relies on *Manco* 2013-UNAT-342 to support a contention that written notification was required before the time limit under staff rule 11.2(c) began to run. In *Manco*, the Appeals Tribunal stated:

> 19. This Tribunal reaffirms that unless the decision is notified in writing to the staff member, the limit of sixty calendar days for requesting management evaluation of that decision does not start [citing, by way of footnote, *Bernadel* 2011-UNAT-180].
>
> 20. Without receiving a notification of a decision in writing, it is not possible to determine when the period of sixty calendar days for appealing the decision under Staff Rule 11.2(c) starts. Therefore, a written decision is necessary if the time limits are to be correctly,

> and strictly, calculated [citing, by way of footnote, *Schook* 2010-UNAT-013].....

55. The Appeals Tribunal's statement above must be read in the context of the facts of *Manco*, which are distinguishable from the facts in the present case. In *Manco*, the Dispute Tribunal found that the contested decision arose when the Administration failed to respond to a staff member's written challenge to the legality of a specific policy. The contested decision was therefore an implied decision in form of an omission rather than an explicit decision (i.e. written or verbal). The Appeals Tribunal upheld the Dispute Tribunal's finding that the application was receivable.

56. However, in the present case, the Respondent submits that the Applicant received explicit verbal notification of the contested decision. Therefore, it is possible to determine when the contested decision was notified to the Applicant by resolving, based on the evidence before the Tribunal, the factual dispute between the parties as to whether the Applicant did, indeed, receive verbal notification of a final decision regarding the expiry of her fixed-term appointment and, if so, on what date. The facts are therefore distinguishable from *Manco*.

57. In addition, the Tribunal notes that in *Manco*, the Appeals Tribunal cited case law (*Bernadel*, *Schook*) decided by reference to staff rule 111.2(a) rather than staff rule 11.2(c) and did not comment on the obvious difference between the two rules, i.e. the removal of the words "in writing". Finally, the Tribunal notes that, in any event, the jurisprudence regarding implied decisions has evolved since *Manco*.

58. In *Aliko* 2015-UNAT-539, the Appeals Tribunal found that:

> 35. What Mr. Aliko claims to be a new administrative decision—the communication dated 13 December 2012—was merely a reiteration of the original decision denying his request to change his nationality, of which he had been notified on 7 October 2010, 22 June 2011, 4 August 2011, and 8 May 2012. Nothing in the Administration's actions in relation to the requested change in nationality led to a waiver of the time limit to request management evaluation which expired on 21 August 2011. Mr. Aliko's repeated

> communications with the Administration are a mere restatement of his original claim, which did not stop the time limit for contesting the decision from running or give rise to a new administrative decision thereby restarting the time period in which to contest the original decision.

59. In *Staedtler* 2015-UNAT-546, paras. 45 and 46, the Appeals Tribunal stated:

> 45. The UNDT correctly stated that the Appellant was aware of the decision he now contests as of 31 August 2012. As a result of that finding, time began to run for the Appellant to request management evaluation, in accordance with the procedures prescribed by the Staff Regulations and Rules. Contrary to the Appellant's contention, time cannot be said to have started to run for the purpose of requesting management evaluation as of 26 November 2012 when he was again notified in the context of separation formalities that his contract would expire on 31 December 2012.
>
> 46. The Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made.13 Further, we can see no action on the part of the Administration that departed from the principle of good faith or that could be said to have created false expectations on the part of the Appellant that the Administration was considering otherwise.

60. The Appeal Tribunal decided in *Kazazi* 2015-UNAT-557, paras. 28 and 31 that (footnotes omitted):

> 28. We recall that "the key characteristic of an administrative decision subject to judicial review is that the decision must 'produce direct legal consequences' affecting a staff member's terms and conditions of appointment". Further, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine".
>
> 31. Although Mr. Kazazi submits that the Director of Administration's 17 December 2013 letter constitutes the key administrative decision from which time ran to request management evaluation, the Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather the time starts to run from the date on which the original decision was made. For this reason, a staff member cannot

> reset the time for management review by asking for a confirmation of an administration decision that has been communicated to him earlier. Neither can a staff member unilaterally determine the date of an administrative decision.

61. The Tribunal does not consider the statement quoted from *Manco* to be applicable in the present case. Applying the plain meaning rule to the interpretation of staff rule 11.2(c), the Tribunal concludes that, in the light of the above-binding Appeals Tribunal's jurisprudence, for the 60-day time limit for requesting management evaluation to begin to run, the staff member must be aware and informed in a clear and unambiguous manner, including by verbal notification of the content of the administrative decision.

62. In support of his submissions regarding the purported verbal notification of the contested decision to the Applicant, the Respondent submitted minutes of meetings dated 11, 12, 19, and 25 June 2014.

63. The minutes of the meeting of 11 June 2014 include the following passages:

> [Mr. IK] stated that the purpose of the meeting is to apprise [the Applicant] about her situation in OSAA. He mentioned that the G-4 post occupied by [the Applicant] has been reclassified to G-6 level in order to recruit a suitable Personal Assistant for the Under-Secretary-General. The post has been advertised and the recruitment process is in progress. [The Applicant] has therefore to apply for other available posts. … [Mr. IK] advised [the Applicant] that her continuation of services with the Organization will depend on her successful application for any vacancy. ... He asked her if she has any idea what will happen if she does not get any post and her fixed-term contract expires at 31 August 2014. She replied that she does not know as she did not face such situation before. … [Mr. IK] also inquired from [the Applicant] if she thought of agreed termination. If nothing succeeds that would be the last chance. …

64. The minutes of the meeting of 12 June 2014 include the following passages:

> [Mr. IK] briefed [Mr. AV] about the situation of [the Applicant] that because of reclassification of her G-4 post to G-6 level she needs to apply for other posts. Her fixed-term appointment will expire on 31 August 2014 … [Mr. AV] further stated that he will circulate her

> [Personal History Profile ("PHP")] in his Department but that she should also apply for field positions which are at levels [Field Service, "FS"]4 to FS7 levels. He explained to her that she will have to search in INSPIRA [the United Nations online job site] for the posts and apply. … Both, [Mr. IK] and [Mr. AV] empha[sized] to her to be proactive, take part in training courses so as to improve her situation and be successful.

65. The minutes of the meeting of 19 June 2014 include the following passages:

> [Mr. CS] explained the situation stating that the G-4 post, against which [the Applicant] is charged, has been reclassified to G-6 level in order to recruit a suitable staff member for the Personal Assistant post for the Under-Secretary-General. Therefore [the Applicant] is to be redeployed elsewhere as OSAA has no vacant G-4 post. He also explained that the Executive Office has made efforts with the Departments of Field Support and Peace Keeping to see if they have any vacancy and could place her … The meeting concluded that OHRM will circulate her PHP for G-4 posts, [the Applicant] will also apply for G-5 posts and update her training in Inspira. OHRM will let her know as soon as they hear anything.

66. The minutes of the meeting of 25 June 2014 include the following passages:

> [Mr. IK] asked [the Applicant] what she thought of the temporary G-4 position being offered by the Department of Field Support (DFS), as he had forwarded the email to her … [Mr. DH] mentioned that OSAA will release her but other alternatives should also be discussed. [Mr. IK] further advised [the Applicant] that she should also consider the possibility of agreed termination, if other alternatives did not work satisfactorily … [Mr. IK] therefore mentioned that he can either write to DFS to confirm [the Applicant's] agreement now or [the Applicant] should explore the possibility of agreed termination and another meeting can be arranged to assess the situation … In conclusion, it was agreed that [Mr. IK] will write to DFS to confirm [the Applicant's] agreement. She will be released from OSAA effective 1 July 2014 till middle of August 2014.

67. The Applicant disputes the accuracy of the minutes and states that they were not shared with her until the Respondent filed his reply. The meeting minutes are unsigned. The Dispute Tribunal must determine the weight to attach to evidence (*Abbassi* 2011-UNAT-110; *Gehr* 2012-UNAT-234) and may exclude evidence that is lacking in probative value (art. 18.4 of the Dispute Tribunal's Rules of Procedure).

68. The Tribunal held a hearing on receivability in order to determine whether the minutes produced by the Respondent were an accurate reflection of what was said during the June 2014 meetings. Below is a summary of the testimony given, in order of appearance, at the hearing on receivability held over two days on 4 and 8 March 2016.

Testimony of Mr. AV

69. Mr. AV confirmed that he attended a meeting on 12 June 2014 along with the Applicant and three other staff members: Mr. IK, Mr. CS, and Mr. SK. His position at the time was Chief, Entitlements Unit, Field Personnel Division, Department of Field Support. He was invited to the meeting by Mr. IK. The purpose of the meeting, according to his understanding, was to provide information to the Applicant to help her identify job opportunities so that she could stay in the United Nations system. Although he recalled being briefed about the Applicant's situation prior to the meeting, he did not recall being told, at the meeting, that the post encumbered by the Applicant had been reclassified and that her fixed-term appointment was due to expire on 31 August 2014. He recalled providing information to the Applicant about the different kinds of peacekeeping positions available, the process for being selected, and some of the specific requirements. He did not recall being provided with minutes of the meeting prior to receipt from Counsel from the Respondent in connection with these proceedings.

Testimony of the Applicant

70. The Applicant stated that she had not seen the June 2014 meeting minutes prior to these proceedings. She stated that the minutes are inaccurate and that she was never notified, either verbally or in writing, that her post had been reclassified and that her contract would not be renewed. She stated that the June 2014 meetings were mostly to discuss the possibility of finding her another position because of the difficulty of working with the colleague who had allegedly assaulted her in April 2014. With regard to the March 2013 meeting, she stated that she was informed that it

may be necessary to reclassify a G-4 post to the G-6 level. However, she was not told that it was the post she was encumbering specifically that was being considered for reclassification. She also stated that she was informed that OSAA was trying to create the necessary G-6 post without having to reclassify a post.

Testimony of Mr. IK

71. Mr. IK is retired. His position at the time of the June 2014 meetings was Executive Officer, DESA. He stated that he called for and led the meetings of 11, 12 and 25 June 2014. He received minutes from each of the meetings a few days or a week after the meeting. He could not recall how he received them. He recalled telling the Applicant at the 11 June 2014 meeting that her fixed-term appointment would expire on 31 August 2014. Mr. IK also confirmed that he had told the Applicant at the meeting of 12 June 2014 that her post had been reclassified and that her fixed-term appointment would expire. He further confirmed that the minutes of the meetings of 11, 12, and 25 June 2014, as produced by the Respondent, are a fair and accurate summary of what was said during each of those meetings. He stated that the purpose of the meetings he attended was not related to the alleged assault of the Applicant by a colleague in April 2014.

Testimony of Mr. DH

72. Mr. DH is the Director of OSAA. He confirmed that he attended the meetings on 11 and 25 June 2014 and that, in his view, the minutes of those meetings, as produced by the Respondent, are a fair and accurate reflection of what was discussed at the meetings. He confirmed that the 11 June 2014 meeting related to the reclassification of the Applicant's post and not the alleged assault of the Applicant by a colleague in April 2014. He recalled that Mr. IK "absolutely" mentioned to the Applicant during the 11 June 2014 meeting that her contract was

expiring. He was unsure whether the meeting minutes had been shared with the Applicant following the meetings that he attended.

Testimony of Mr. SK

73. Mr. SK is retired. He was an Administrative Assistant in OSAA when he was asked to attend the June 2014 meetings by Mr. DH, the Director of OSAA. Mr. SK testified that he drafted the minutes of the meetings of 11, 12, and 25 June 2014, as produced by the Respondent and that they are a fair and accurate summary of what was said during each of those meetings. He stated that the alleged assault of the Applicant in April 2014 was not discussed at the meetings that he attended. He recalled that he prepared the minutes immediately after each meeting or the next day. He then sent them to Mr. DH, who made some minor changes. The minutes were then sent to Mr. CS, Administrative Officer, Executive Office, DESA. He did not know whether the minutes had been circulated further but believed that they had not.

74. Mr. SK stated that he verbally informed the Applicant in January 2014 that the post that she was encumbering had been advertised and that there was no chance of extending her contract because the post had been reclassified. He confirmed that the expiration of the Applicant's contract on 31 August 2014 was mentioned at the meetings of 11 and 12 June 2014. He also confirmed that at the meeting of 12 June 2014 it was mentioned that the post which the Applicant was encumbering had been reclassified.

Testimony of Ms. CM

75. Ms. CM confirmed that she attended a meeting on 19 June 2014 along with the Applicant, Mr. CS, Mr. SK, and Mr. ES. She recalled that the purpose of the meeting was to discuss the possibility of finding other opportunities for the Applicant because the post she encumbered had been reclassified and she was not eligible to apply for the position because it was two grades higher than her grade at

the time. The reclassification was explicitly mentioned during the meeting. Ms. CM stated that during the meeting she advised the Applicant to apply for positions at both her current grade, and one grade higher, including both fixed-term and temporary appointments. She remembered receiving the minutes of the meeting from Mr. CS shortly after the meeting, though she could not recall exactly when. She stated that the minutes were drafted by Mr. SK. She confirmed that there was nothing missing from the minutes, other than the fact that she had advised the Applicant to apply for temporary as well as fixed-term appointments.

Testimony of Mr. ES

76. Mr. ES confirmed that he attended a meeting with the Applicant, Mr. CS, and Ms. CM, though he did not recall the date of the meeting. The purpose of the meeting was to discuss the possibility of finding other opportunities for the Applicant because the post she encumbered had been reclassified and she was not eligible to apply for the position because it was two grades higher than her grade at the time. He recalled that the expiration date of the Applicant's contract was referred to at the meeting and that there was some urgency to the discussions. He recalled receiving a copy of minutes of the meeting he attended but did not recall how he received them.

Testimony of Mr. CS

77. Mr. CS is an Administrative Officer in the Executive Office, DESA. He confirmed that he attended all four meetings for which the Respondent has produced minutes. He confirmed that the minutes of the four meetings produced by the Respondent were an accurate reflection of what was discussed during the meetings. He was invited to attend the meetings by Mr. DH. The purpose of the first meeting was to discuss the Applicant's situation—the post she encumbered had been reclassified from G-4 to G-6 and her contract was due to expire at the end of August 2014. He recalled Mr. IK mentioning the reclassification and the expiration of the Applicant's contract in the 11 June 2014 meeting and that the expiration of the Applicant's contract was discussed at the 12 June 2014 meeting also. Mr. CS

recalled discussing the reclassification of the Applicant's post with the Applicant prior to the June meetings, around the beginning of May 2014. He testified that it was clear during the meetings that it was the post that the Applicant encumbered that had been reclassified.

78. With the exception of Mr. ES and Mr. AV, all of the Respondent's witnesses confirmed the accuracy of the minutes of the meetings that they attended. Mr. ES was not asked directly to confirm the existence and accuracy of the minutes of the meetings he attended on 19 and 25 June 2014 while Mr. AV could not recall being briefed about the Applicant's situation during the meeting of 12 June 2014.

79. The Tribunal notes that it was confirmed during the hearing that the minutes of the June 2014 meetings were not circulated to the Applicant. However, the Tribunal has no reason to doubt the honesty and veracity of the testimony given under oath by the Respondent's witnesses at the hearing on receivability regarding the existence of the minutes and their content. The Tribunal therefore concludes that the Applicant was indeed verbally informed in the meetings of 11, 12, and 19 June 2014 that her fixed-term appointment in the OSAA would expire on 31 August 2014. Although efforts were made to find the Applicant another position in the United Nations system, it was made clear to her that her fixed-term appointment in OSAA would not be renewed, because the post she encumbered had been reclassified. Given the evidence before the Tribunal, it is reasonable to conclude that the Applicant was informed verbally in a clear and definite manner, before and during the meetings of June 2014, that her contract would not be renewed, and that the Applicant knew, or ought reasonably to have known, by 19 June 2014 at the latest, that her fixed-term appointment in the OSAA would not be renewed. Moreover, the Tribunal notes that the testimony of the Respondent's witnesses is corroborated by the Applicant's email to Mr. DM of 3 September 2014, whereby she acknowledged that after her meeting with the Under-Secretary-General of OSAA on 27 March 2014, she was informed that her position would be cut off and she enquired about any appropriate action she

needed to take, in particular to apply for other positions and explore any other options available.

80. The notification in writing received by the Applicant on 26 August 2014 represents a reiteration of the original verbal non-renewal decision notified to the Applicant at the latest on 19 June 2014, and is not a new administrative decision. The repetition of the contested decision does not reset the time limit to submit a management evaluation request. The Applicant's 29 August 2014 request for management evaluation was therefore submitted outside the 60-day time limit established by staff rule 11.2(c) and the application is not receivable. The request should have been filed by the latest on 19 August 2014.

81. The Tribunal observes that, in his closing submission on receivability, the Applicant submitted that the Respondent failed to comply with sec. 2.4 of ST/AI/1998/9, which states that notification of the reclassification of a post must be provided to the incumbent of the post in writing following the reclassification.

82. The Tribunal notes that, while the decision to reclassify the post encumbered by the Applicant may have been discussed in connection with the decision not to renew the Applicant's fixed-term appointment, the fact that she did not receive written notification of the former, does not preclude her from receiving explicit notification of a final decision regarding the latter. However, the decision to reclassify her post and its notification, if any, had no impact on the date of the verbal notification of the non-renewal of contract decision.

83. In his closing submission on receivability, the Respondent accepted that the Applicant only received written notification of the result of the reclassification process involving the post that she encumbered on 29 August 2014. As further noted by the Respondent, however, the Applicant did not contest the decision to reclassify the post she encumbered, or the outcome of the classification process, in either her request for management evaluation or her application to the Dispute Tribunal.

The Tribunal agrees that these decisions fall outside the scope of this case and are not properly before the Tribunal.

Observations

84. The Tribunal recommends that whenever minutes are made under the instructions of the person calling for a meeting, these minutes should be immediately circulated to all participants in order to ensure their accuracy and full transparency. This would also ensure full information to all participants of the outcome of and/or decision(s) made at a meeting.

Conclusion

85. The application is not receivable *ratione materiae* and is to be dismissed.

86. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected as not receivable.

(*Signed*)

Judge Alessandra Greceanu

Dated this 26th day of April 2016

Entered in the Register on this 26th day of April 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York