



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CHAMA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Edwin Nhiliziyo

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM  
Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant is a staff member of the United Nations Interim Force in Lebanon (UNIFIL).
2. On 1 March 2016, he filed an application contesting the “procedures used to arrive at the decision to abolish his post”. He seeks rescission of the decision to abolish that post.
3. The Respondent filed a reply on 7 April 2016 in which it is argued that the application is not receivable.
4. The Applicant made further submissions in response to the Respondent’s submissions on receivability on 21 March 2017 having been granted leave by the Tribunal to do so. The Applicant and Respondent filed additional documents pertaining to the Applicant’s employment history on 14 and 21 July 2017, respectively.
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.

## **Relevant Facts**

6. The facts laid out below are uncontested and supported by the parties’ pleadings and additional submissions.
7. Effective 1 January 2007, the Applicant was appointed on a fixed-term appointment as an FS-4 Geographic Information Systems (GIS) Assistant with UNIFIL.

8. On 19 January 2015, the Report of the Secretary-General A/69/731 (Budget for UNIFIL for the period from 1 July 2015 to 30 June 2016) was issued. Paragraph 37 of the Report proposed to convert one of two FS level posts in the Joint GIS (JGIS) section to a national post.

9. By letter dated 21 April 2015, the Applicant was informed that his post in the JGIS section was being abolished/nationalized in the 2015/2016 budget and that his contract would not be extended beyond 30 June 2015.

10. On 23 May 2015, the Applicant requested management evaluation of this decision and suspension of action.

11. On 27 May 2015, the Management Evaluation Unit (MEU) informed the Applicant that they did not recommend granting suspension of action in his case. MEU also informed that, since the nationalization of the post was not a contestable administrative decision, the MEU would instead interpret the Applicant's submission as requesting management evaluation of the decision not to renew his appointment on the grounds of nationalization of the post that he encumbered.<sup>1</sup> They deferred the decision on management evaluation.

12. On 5 June 2015, the Applicant accepted a fixed-term appointment for a three-month temporary job opening against a temporarily vacant post of GIS Assistant until 30 September 2015. This appointment was then extended for an additional one month, i.e., until 31 October 2015.<sup>2</sup>

13. On 8 June 2015, MEU responded that on 5 June 2015 the Chief Human Resources Officer, UNIFIL, had informed them that he had been placed temporarily against a borrowed post for three months and that his appointment would be extended on a temporary basis until 30 September 2015. MEU concluded that this decision to

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<sup>1</sup> Annex 4 to the application.

<sup>2</sup> Respondent's filing in response to Order No: 122 (NBI/2017). Appointment letters from 1 July and 1 November 2015,

extend the appointment rendered the Applicant's request for management evaluation moot. The MEU advised that the request might be repeated should the appointment be discontinued in the future.<sup>3</sup>

14. On 25 June 2015, the General Assembly adopted resolution A/RES/69/302 (Financing of the United Nations Interim Force in Lebanon). Paragraph 10 of the resolution endorsed the conclusions and recommendations contained in the Report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) A/69/839/Add. 8 (Budget performance for the period from 1 July 2013 to 30 June 2014 and proposed budget for the period from 1 July 2015 to 30 June 2016 of the United Nations Interim Force in Lebanon) of 29 April 2015, including the proposal to convert one FS-type post in the JGIS section to a national post.

15. On 2 October 2015, the Applicant was approached by the UNIFIL Administration to apply for a temporary job opening for a post of administrative assistant and was subsequently recommended for the job.<sup>4</sup> Ever since, he has been employed at this post based on fixed-term appointments, ranging from 3 months to one year.<sup>5</sup>

16. On 22 October 2015, the Applicant requested a second management evaluation of the decisions to abolish his post and to assign him to different functions. On 27 October 2015, MEU addressed to him a memorandum in which it reiterated that the Applicant's challenge to the decision to abolish his post was not receivable. MEU informed that it would review his request to the extent it challenges assigning him to different functions.<sup>6</sup>

17. On 2 December 2015, MEU responded to the Applicant's request for management evaluation of the decision to reassign him to different functions. MEU

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<sup>3</sup> Annex 5 to the application.

<sup>4</sup> Annex 9 to the application.

<sup>5</sup> Respondent's filing in response to Order No. 122 (NBI/2017). Appointment letters from 1 November 2015, 1 February 2016 and 1 July 2017.

<sup>6</sup> Annex A1 to the reply.

concluded that the decision to reassign the Applicant to different functions was supported by the facts and that it was lawful.<sup>7</sup>

### **Respondent's submissions on receivability**

18. The Respondent makes the following submissions on receivability:

a. The Applicant's challenge to the nationalization of the post is not receivable *rationae materiae*. The General Assembly decided to nationalize the post. That decision is not an administrative decision. In *Lee* 2014-UNAT-481, UNAT held that a decision by the General Assembly to abolish a post and the prefatory acts leading up to that decision are not contestable administrative decisions, but that a staff member may contest a subsequent administrative decision which follows from the General Assembly's actions. Accordingly, the Applicant may not challenge the decision to propose the post for nationalization nor the General Assembly's decision to nationalize the post.

b. The Application is also not receivable *rationae temporis*. On 27 May 2015, in response to his first request for management evaluation, the Applicant was informed that his request was not receivable as the proposal to nationalize the post could not be subject to management evaluation.

c. The Applicant received a similar outcome on 8 June 2015. The application was filed before the Dispute Tribunal at least six months outside the 90-day filing period.

d. The deadline for filing the Application does not run from the 2 December 2015 management evaluation outcome. That management evaluation letter does not address the issue of the nationalization of the post. The scope of this management evaluation was limited to other issues.

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<sup>7</sup> Annex 12 to the application.

Therefore, the Dispute Tribunal has no jurisdiction to adjudicate the issue of the nationalization of the post based on the 2 December 2015 letter.

### **Applicant's submissions**

19. The Applicant's submissions on receivability may be summarized as follows.
  - a. He seeks to challenge the failure of UNIFIL Senior Management to comply with the established organizational rules requiring objective criteria to be used in determining which one of the two FS posts in the GIS Unit would be nationalized. UNIFIL Senior Management decided to select his post, from two available FS GIS posts in the office, for conversion. This decision was made without due regard to applicable rules and procedures regarding retention of posts. Reasons presented for the abolition to UNIFIL Senior Management and subsequently to the General Assembly were false and deceptive. The decision to nationalize the Applicant's post was not informed by the needs of the Mission, because the functionality of the GIS post defied nationalization. Indeed, his previous functions have since been removed from the nationalized post and assigned to another international staff member. The decision was dictated by improper motives as GIS functions were assigned to that other international staff member based upon national and family connections in order to save his employment in the nationalization exercise.
  - b. Offering the Applicant a temporary job of Administrative Assistant does not remedy procedural irregularities related to the selection of his post for abolition/conversion and has placed him in an unsustainable position. He has been placed outside his specialization and cannot effectively compete with staff who have long years' experience in the administrative field. The short duration of temporary job openings poses obstacles in claiming home leave and education grant entitlements. The job, in any event, has a finite duration and legally cannot be extended beyond two years.

c. He has filed this application within the time prescribed by art. 8 of the UNDT Statute. His reliance on MEU's decision of 2 December 2015 as marking the commencement of time limit is appropriate, as it is the final disposition of his requests.

d. The substantial issue before the Tribunal has not been fully addressed by MEU which has sought to misinterpret aspects of the decision contested by him and portray it as a challenge to the decision of the General Assembly.

e. Several MEU responses received on 27 May 2015, 8 June 2015 and 27 October 2015 informed him that the General Assembly's decision to nationalize his post could not be challenged but that administrative decisions following on the General Assembly's actions were subject to management evaluation. The Applicant acted upon this information. The Respondent may not rely on delays occasioned by his own established procedures to bar him from seeking relief from the Tribunal.

f. If the Tribunal considers that time limit has indeed lapsed, the Applicant requests the Tribunal, in the interest of justice, to find that a waiver of the time limits is justified in the circumstances.

## **Considerations**

### *Receivability rationae materiae*

20. It has been expressly stated in all submissions originating from the Applicant (the request for management evaluation of 23 May 2015, the present application and the submissions of 21 March 2017), that the subject of his complaint was the decision of the Administration to designate his post for nationalization and to not extend his appointment to that post. That decision was taken on 21 April 2015 and communicated to the Applicant on 22 April 2015. The Administration therein informed in no uncertain terms:

...

The Mission has identified a number of changes to be made in the staffing requirement which has resulted in various posts being abolished and/or nationalized.

...

[y]our post is one of those affected by the changes from 30 June 2015 due to abolishment/nationalization of your post in the 2015/2016 budget and the unavailability of another post at your level. Your **current contract** with UNFIL is valid up to 30 June and **will not be renewed beyond that date** [emphasis added].<sup>8</sup>

21. As shown above, the Mission's decision is categorical and unconditional regarding the non-extension of the Applicant's appointment.

22. The Respondent's argument on receivability related to the resolution of the General Assembly needs to be put in context. The Applicant has not ever contested the decision of the General Assembly; more importantly, the General Assembly neither selected the Applicant's post for abolition/nationalization nor discontinued the Applicant's appointment. This was done by the Mission. The General Assembly resolution approved nationalization of one of two posts in the Applicant's unit two months later. The fact that the Mission's decision was premised on the anticipated resolution of the General Assembly approving the Mission's restructuring and proposed budget is irrelevant for the issue of receivability *rationae materiae*, just as irrelevant for that issue would be any other justification or motive for an administrative decision. In this respect, it would be incorrect to distill from UNAT's holding in *Lee* that only administrative acts which are *subsequent* to regulatory acts of the General Assembly or Secretary-General may be contested before the UNDT. The gist of the issue contemplated in *Lee* is to distinguish regulatory acts from individual administrative decisions when they remain in a normative or other causal relation.<sup>9</sup> However, whether an individual administrative decision would be taken in advance of the General Assembly's resolution or after, or whether it implements it

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<sup>8</sup> Annex 2 to the application.

<sup>9</sup> *Lee* 2014-UNAT-481, at para. 51: "Although Ms. Lee cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made."



correctly or incorrectly are matters valid for the question of legality of an administrative decision<sup>10</sup> and not for the question of its receivability for review.

23. Rather, the issue material for receivability is whether a designation of a specific post for abolition is *per se* capable of being reviewed for compliance with the staff member's terms of appointment. In this respect, the Tribunal notes that UNAT in *Lee* took a firm stance that acts prefatory to abolition of a post have no direct effect on the conditions of employment as these only occur when the abolition is being implemented.<sup>11</sup> It observes, however, that applying *Lee* to deny the staff an ability to autonomously challenge the decision on designation of his or her individually identified post for abolition in the proposed budget effectively removes the matter of legality of abolition of that post from the Tribunal's cognizance. This is because: a) subsequent decisions of the General Assembly which approve the abolition of that specific post are not subject to review before UNDT; b) administrative decisions on non-extension are validated by the General Assembly, which renders the review of legality largely irrelevant since, as held by UNAT in *Ovcharenko*<sup>12</sup>, "decisions of the General Assembly are binding on the Secretary-General and therefore, the administrative decision under challenge must be considered lawful."

24. It would be for the parties to test through appellate processes whether the outcome of *Lee* might be revisited by UNAT in relation to designation of a specific post for abolition, considering that it is a decision of individual application and final in the administrative course of the matter, the immediate consequences of which render the status of the appointment precarious. As such, it carries graver consequences, *e.g.*, non-promotion or non-selection, where processes leading to these decisions are judiciable for legality and fairness even though negative outcomes do not bring a change in the terms and conditions of appointment. As noted by UNAT in *Diallo*, "abolition of a post was always a traumatic experience for the incumbent, and

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<sup>10</sup> See for example *Ovcharenko* 2015-UNAT-530.

<sup>11</sup> *Lee*, *ibid.*, at para. 51.

<sup>12</sup> *Idem.*, at para 35.

therefore greater objectivity, care, good faith and transparency were required.”<sup>13</sup> It is supposed to be decided not with unfettered discretion but in a rule-based process, usually a comparative review, as such it does not escape control of legality by the virtue of the subject matter. Whereas abolition of post is decided with a large margin of discretion<sup>14</sup>, however, judicial review would be warranted to remedy situations where designation of a specific post for abolition would have contradicted the stated criteria or been tainted by cronyism, discrimination, or other arbitrary and unlawful exercise of the discretion, which are criteria for intervention generally accepted by UNAT in situations of restructuring.<sup>15</sup> The processes utilized by ACABQ and the General Assembly who ultimately approves the budget do not focus on these concerns. Moreover, after the endorsement of the abolition of the specific post by the General Assembly no remedy is available to a staff member, no matter the possible error in designation: the post in question ceases to exist and reinstatement becomes impossible whereas validation of the non-extension decision by the General Assembly precludes compensation.

25. In the present case, however, the question does not arise, given that the designation of the post for abolition was readily accompanied by the decision of non-extension of the Applicant’s appointment. Furthermore, even though the Applicant subsequently received another appointment, the abolition of the post affected the Applicant’s terms and conditions of appointment in that the fixed-term appointment then held by the Applicant (“current contract”) was indeed not extended beyond 30 June 2015 and ever since the Applicant has been accommodated against temporary job openings with all the attendant lack of stability.

26. In summing, the impugned decision of 21 April 2015 clearly: a) emanated from the Administration; and b) produced direct legal consequences for the terms and conditions of the Applicant’s appointment. As such, the decision was capable of

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<sup>13</sup> *Diallo* 2014-UNAT-430 at para. 31.

<sup>14</sup> *Simmons* 2014-UNAT-425, para. 31 and references cited therein.

<sup>15</sup> *Simmons* 2016-UNAT-624 at para. 12.

being subject to management evaluation as well as capable of being reviewed by the UNDT.

*Receivability rationae temporis*

27. The UNDT Statute provides in art. 8 that a necessary condition for receivability of an application is that an applicant has previously submitted the contested administrative decision for management evaluation:

...

- 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.

28. The Applicant requested management evaluation of the decision on 23 May 2015. In their letter of 27 May 2015, MEU, having interpreted his claim as directed against the non-extension of his appointment, deferred the management evaluation till later. It indeed responded to the request on 8 June 2015, finding it moot. Whereas the MEU's response did not dispose of the issue brought up by the Applicant, i.e., the designation of the post for nationalization and non-extension of the appointment to the specific position which was being nationalized, it was open for the Applicant to seek redress before the UNDT. As shown by art. 8 of the UNDT Statute, access to the recourse before UNDT is conditioned upon requesting management evaluation of the impugned decision but not upon actually obtaining it. By the same token, a result of management evaluation which does not remove the *gravamen* of the impugned decision does not bar access to the UNDT. As held by UNAT in *Larkin*, a "refusal by the MEU to consider a request for management evaluation on the basis that the MEU found it not receivable *ratione personae*, must be reviewable by the UNDT and this

Court”.<sup>16</sup> The same principle applies in a situation where MEU finds the request moot, i.e., non-receivable *rationae materiae*.

29. In the present case, the Applicant had until 90 days from 8 June 2015 to file an application before UNDT. The Applicant did not do so until 1 March 2016. Repeated requests for management evaluation do not reset the deadline for filing of an application, notwithstanding whether subsequent management evaluations would have been issued.<sup>17</sup> The application is, therefore, late by almost six months.

*The Applicant’s motion to have the deadline waived*

30. Article 8.3 of the UNDT Statute provides that “[t]he 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.” As stressed by UNAT, exceptions to time limits and deadlines must be interpreted strictly.<sup>18</sup> While not expressly required by the statutes, this Tribunal holds that prior to demonstrating exceptional circumstances, the following minimum criteria for waiving the deadline must be fulfilled: that the delay was not occasioned by the applicant’s lack of diligence and that the delay is not excessive, including that an applicant sought to carry out the procedural action at the first opportunity available to him or her. The standard for diligence, as established by UNAT, must be commensurate with the fact of participating in litigation.<sup>19</sup>

31. The Applicant’s motion to have the deadline waived is based on the contention that the administration misinterpreted his claim.<sup>20</sup> Whereas this, to some extent, may be the case, this fact should have been clear to the Applicant since 8 June 2015. It must have been further obvious to the Applicant that as of 30 June 2015, his

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<sup>16</sup> *Larkin* 2011-UNAT-135, at para. 21.

<sup>17</sup> *Lemonnier* 2016-UNAT-679.

<sup>18</sup> E.g., *Abu-Hawaila* 2011-UNAT-118 at para. 29.

<sup>19</sup> It is the staff member’s responsibility to ensure that he/she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse. See for example in *Jennings* 2011-UNAT-184 and *Christensen* 2012-UNAT-218.

<sup>20</sup> Applicant’s submissions in response to the Respondent’s submissions on receivability of 21 March 2017 at paras. 7 and 11.

post was abolished, the related appointment was not extended and temporary jobs that followed pertained to different posts and offered different conditions of employment.

32. The Applicant is blaming MEU for delaying his application through “its own established procedures”. The Tribunal understands that the Applicant refers to the pronouncements in the management evaluations as to mootness of his claim. The Tribunal considers that erroneous or unclear statements in the management evaluation as to the receivability of the case do not justify waiving of the time limit for the application – in all cases where management evaluation is required, applicants before UNDT are those who do not agree with the outcome of the management evaluation. The Tribunal notes, moreover, that the MEU specifically instructed the Applicant about the deadlines for application to the UNDT in their letter of 23 May 2015. That instruction was correct.

33. Finally, the Tribunal notes that at the date of the filing of the application, i.e., 1 March 2016, the Applicant was assisted by Counsel. The arguments about lateness of the application were advanced by the Respondent in April 2016. It was only on 21 March 2017 that the Applicant requested a waiver of the time limit. This does not demonstrate due diligence. In view of the foregoing, the Tribunal finds that the Applicant did not demonstrate exceptional circumstances that would warrant waiving the time limit for the filing of the application.

34. The Tribunal moreover notes that even in the event of restoring the deadline and accepting the application, the Applicant’s claim would anyway fail on the merits. The remedy that he is seeking – rescission of the decision to abolish his post – could not be granted. That decision was taken by the General Assembly and the UNDT has no competence to rescind such decisions.

### **Judgment**

35. The application is rejected as it is not receivable.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 4<sup>th</sup> day of August 2017

Entered in the Register on this 4<sup>th</sup> day of August 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi