



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

DA SILVEIRA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

William Woll

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

## **Introduction**

1. The Applicant was an Administrative Assistant at the FS-4/09 level working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in Goma, attached to the Gender Advisory Section.<sup>1</sup>

2. By an application filed on 28 October 2018, which was registered under Case No. UNDT/NBI/2018/104, the Applicant challenges a decision communicated through a letter dated 10 May 2018 from the MONUSCO Officer-in-Charge (OIC), Human Resources Section (HRS), informing her that her appointment would not be extended beyond 30 June 2018.<sup>2</sup>

3. The Respondent filed a reply on 3 December 2018 in which it is argued that the claim is not receivable *ratione materiae*.

## **Facts**

4. The Applicant served on a continuing appointment.<sup>3</sup>

5. By the letter dated 10 May 2018, the Applicant was informed that on 27 March 2018 the Security Council had adopted resolution 2409 which extended the mandate of MONUSCO until 31 March 2019. The letter further informed the Applicant that in the 2018/2019 budget, there would no longer be any positions in her organizational unit with the same functional title and at the same level. Those posts were to be abolished in an effort to realign resources with mandated priorities. Accordingly, the Applicant's appointment would not be extended beyond 30 June 2018.<sup>4</sup>

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<sup>1</sup> Application, Annex 2

<sup>2</sup> Application, section V, Application Annex 59

<sup>3</sup> Application, Annex 55

<sup>4</sup> Application, Annex 59

6. On 24 April 2018, the Applicant was informed, through counsel, of the procedure regarding her separation for abandonment of post.<sup>5</sup>

7. On 11 May 2018 the Applicant, through counsel, requested management evaluation both of the impugned decision and the decision on the procedure for separation for abandonment of post.<sup>6</sup>

8. On 25 June 2018, the Assistant Secretary-General/Office of Human Resources Management (ASG/OHRM) approved the request to separate the Applicant from service on the grounds of abandonment of post.<sup>7</sup>

9. On 26 June 2018, the Applicant was separated on the grounds of abandonment of post.<sup>8</sup>

10. The management evaluation was issued on 11 August 2018 whereby the complaint against the decision to not extend the Applicant's appointment was found moot and the decision to separate her for abandonment of post was upheld.<sup>9</sup>

11. The decision to separate the Applicant on the grounds of abandonment of post is the subject of a separate application filed on the same date as the present one, that is 28 October 2018, and registered under case No. UNDT/2018/105.

### ***Submissions***

#### *Applicant's submissions*

12. The Applicant points out the illegality of the contested decision and requests the Tribunal by way of remedy to:

- a. nullify the decision of MONUSCO not to extend her appointment beyond 30 June 2018,

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<sup>5</sup> Application, Annex 53

<sup>6</sup> Application, Annex 60

<sup>7</sup> Reply, Annex R/3

<sup>8</sup> Reply, Annex R/1

<sup>9</sup> Application, Annex 63

- b. Order the Administration to pay the Applicant money worth the monthly salary she is entitled to, within 60 days of the judgment, and
- c. Order the Administration to pay EUR 1,000 as legal fees for the counsel.

13. The Applicant did not specifically address the issue of receivability.

*Respondent's submissions on receivability*

14. The Respondent contends that for an application to be receivable, the decision being challenged must be an “administrative decision” which has adverse consequences for the staff member’s appointment. The Applicant served on a continuing appointment that was not subject to renewal. MONUSCO sent the Applicant the non-renewal letter in error. The decision on non-renewal was never implemented and had no adverse consequences to the Applicant’s appointment. Conversely, the Applicant was separated on the grounds of abandonment of post which is a subject of a separate application under case No. UNDT/2018/105. Accordingly, this application should be dismissed.

*Considerations*

15. The Tribunal found that the case is suitable to be considered on the pleadings alone.

16. The Tribunal accepts that the application is not untimely under the terms of the holding of the United Nations Appeals Tribunal (the Appeals Tribunal) in *Neault*, according to which when the management evaluation is received after the deadline of 45 calendar days but before the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT.<sup>10</sup> Taking that the management evaluation was received on 11 August 2018, the Applicant would be still within the 90-day deadline established by Art 8.1 of the UNDT Statute. The application fails for other reasons, as explained below.

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<sup>10</sup> *Neault* 2013-UNAT-345 para 34.

17. It is recalled that a judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. Therefore, the doctrine of mootness recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.<sup>11</sup> More specifically, as found by the UNDT in *Gehr* and confirmed by the Appeals Tribunal

In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations may be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.<sup>12</sup>

18. In the present case, the decision to not extend the Applicant's appointment was effectively rescinded by the subsequent decision in the matter of the Applicant's appointment, i.e., separation for abandonment of post. This new decision, albeit still unfavourable for the Applicant, deprived the dispute over the impugned decision of any legal and practical significance. The main claim of the application was rendered moot even before the commencement of the proceedings before the Tribunal.

19. Regarding the question whether the contested decision would have left any unresolved issues<sup>13</sup>, while no factual basis was invoked to support the claim for damages, the Tribunal finds that its erroneous content was incapable of causing injury. It agrees with the Respondent that the Applicant's appointment was not negatively affected. Notably, the purported date of separation as per the impugned decision was even later than the actual date of her separation for abandonment of post. The contested decision was rescinded promptly after its issuance. The later superseding decision, in

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<sup>11</sup> *Kallon* 2017-UNAT-742 para. 44.

<sup>12</sup> *Gehr* 2011/UNDT/211, para. 37; *Gehr* 2013-UNAT-328, *Kallon* 2017-UNAT-742 para. 46.

<sup>13</sup> *Lahoud* UNDT/2017/009; *Kallon* 2017-UNAT-742 para 45.

turn, is subject to a dispute pending before the Tribunal and any claimed unlawfulness/injury alleged by it will be considered in due course.

20. Regarding the claim for legal costs, the Tribunal does not find that erroneous issuance of a decision on non-extension of the Applicant's appointment was an abuse of process, which would justify granting the legal costs.<sup>14</sup> It further notes that the state of its mootness existed already at the date of the filing of the application. Thus, the responsibility for incurring these costs rests with the Applicant.

## **JUDGMENT**

21. The application is dismissed.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 24<sup>th</sup> day of June 2019

Entered in the Register on this 24<sup>th</sup> day of June 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>14</sup> *Kamunyi* 2012-UNAT-194 at para.36.