



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

KENNES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**

Mohamed Abdou, OSLA

**Counsel for Respondent:**

Matthias Schuster, ALD/OHR, UN Secretariat

Susan Maddox, ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), contests the Administration’s decisions to (a) “refrain from making a finding in respect of the disciplinary charges alleged against [him]”; (b) “refuse to complete the disciplinary process”; and (c) “place a note in [his] Official Status File” following his resignation from the Organization. The application was initially filed with the Nairobi Registry of the Dispute Tribunal on 19 December 2017.

2. On 19 July 2019, the case was transferred to the New York Registry, and on 21 November 2019, it was reassigned to the undersigned Judge.

3. For the reasons below, the Tribunal finds that the application is not receivable.

## **Facts**

4. On 17 April 2017, the Applicant received formal allegations of misconduct, in which he was given an opportunity to respond to them. He was also informed of his right to seek the assistance of counsel.

5. On 12 May 2017, the Applicant received an email which informed him of his selection for a position with the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”) and asked for his confirmation of his continued interest in and availability for this position. In response, the Applicant confirmed that he was still interested in the position, but as to his availability, he wrote that he could be released from his current position after the completion of an administrative inquiry against him.

6. On 15 May 2017, the Applicant notified MONUSCO of his intention to resign. He wrote, “I reserve my rights to duly reply to any allegations that have been

made against me as part of the disciplinary inquiry and I want to stress that my resignation is not linked in any manner to the progress of this inquiry”.

7. On 7 June 2017, the Applicant submitted his comments on the formal allegations of misconduct.

8. Effective 1 July 2017, the Applicant resigned from the Organization.

9. In July 2017, subsequent to the Applicant’s resignation, he was informed of his selection for a position with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) and he confirmed his interest and availability for the position.

10. On 28 July 2017, the Administration sent an email to the Applicant asking him to clarify his intention as he confirmed his interest and availability for positions with MINUSMA and MINUSCA, respectively, and yet he resigned effective 1 July 2017.

11. On 31 July 2017, the Applicant explained his situation and wrote in an email, “I realized that I ran the risk of being dismissed from the United Nations. Instead of undergoing this dishonor, and also to avoid to find myself suddenly without a job and with a family depending on me, I decided to resign and I started another job”. He wrote that he was still interested in the position in MINUSCA but given the situation he was in, he sought the Administration’s advice.

12. On 2 August 2017, in response to the Applicant’s email of 31 July 2017, the Administration explained to him by email that he could withdraw his resignation, in which case he would be immediately placed on administrative leave with full pay pending the completion of the disciplinary process. He was also given an option to maintain his resignation, in which case a note would be placed on his file stating that the Administrative Law Section of the Office of Human Resources Management (“ALS/OHRM”) should be notified if he returns to the Organization in the future. He was informed that, in such case, the disciplinary process against him would resume.

13. On 5 August 2017, the Applicant responded that he chose to maintain the resignation as he could not take a risk of being dismissed. He wrote that he would still contest the allegations against him until his name was cleared.

14. On 3 October 2017, the Chief, ALS/OHRM notified the Applicant that the following note would be placed in his Official Status File and he was requested to provide his comments in accordance with ST/AI/292 (Filing of adverse material in personnel records):

[The Applicant] resigned from the Organization effective 1 July 2017. At that time, a matter concerning [him] had not been resolved.

Please contact the Administrative Law Section, Office of Human Resources Management, at Headquarters, if [the Applicant] should become employed as a staff member within the United Nations Common System in the future.

15. On 26 October 2017, the Applicant submitted his comments. He indicated that he objected to the note being placed in his file. He claimed that he fully cooperated with the Administration and that the only reason why this matter remains unresolved was OHRM's failure to resolve it.

16. On 3 November 2017, the Applicant filed a request for management evaluation.

17. On 27 November 2017, the Applicant received a management evaluation decision. It was found that his request for management evaluation was not receivable on the grounds that there is no right to a completion of a disciplinary proceeding and that he did not allege any procedural irregularity or improper motives in connection with the decision to place a note in his Official Status File.

## Consideration

18. The Tribunal notes that it is competent to raise a receivability issue on its own initiative, whether or not it has been raised by the parties (see, for instance, *O'Neill* 2011-UNAT-182, para. 31).

19. In the present case, the Applicant essentially contests two decisions: the implied decision not to complete the disciplinary process against him and the decision to place a note in his Official Status File. The Applicant submits in his application that both decisions were made and notified to him on 3 October 2017 when he was informed that the note would be placed in his Official Status File.

20. As described below, however, the chronology of the events raises a question as to whether the Applicant requested a management evaluation in a timely manner. The Tribunal notes that on 2 August 2017, subsequent to the Applicant's resignation on 1 July 2017, the Administration informed him that should he withdraw his resignation, he would be immediately placed on administrative leave with full pay pending the completion of the disciplinary process, and that should he maintain his resignation, a note would be placed on his file. The Applicant submits that he became aware of the Administration's decision not to complete a disciplinary proceeding against him when he received this email (see para. 19 of the Applicant's submission on 19 February 2018). The Applicant still submits that such implied decision only became final on 3 October 2017. He requested a management evaluation on 3 November 2017.

### *Whether the Applicant requested a management evaluation in a timely manner*

21. Under staff rule 11.2(c), the statutory time limit for requesting a management evaluation is within 60 days from the notification of the contested decision. Article 8.1 of the Dispute Tribunal's Statute provides that the application is receivable if the

contested administrative decision has previously been submitted for management evaluation, where required.

22. In *Chahrour* 2014-UNAT-406, at para. 31, the Appeals Tribunal stated that to determine the date by which a staff member must seek review of an implied decision, the Dispute Tribunal must establish the date on which “the staff member knew or reasonably should have known of the implied decision”.

23. In the present case, the Tribunal finds that the Organization made it clear by the email of 2 August 2017 that it would not further continue a disciplinary process against the Applicant if he maintained his resignation and that it would resume and complete such process if he becomes a staff member again. As stated above, the Applicant also acknowledges that based on the email of 2 August 2017, it was reasonable for him to assume that the contested implied decision was made. When the Applicant responded on 5 August 2017 that he would maintain his resignation, he knew or reasonably should have known that the Administration decided not to complete a disciplinary process and to place a note in his Official Status File, as stated in the email of 2 August 2017.

24. Accordingly, the Applicant should have requested a management evaluation within 60 days from the notification of the contested decisions on 5 August 2017, but instead he requested a management evaluation on 3 November 2017, more than 60 days later. Therefore, the application is not receivable as time-barred.

*Whether the contested decisions are administrative decisions subject to judicial review*

25. Article 2.1(a) of the Dispute Tribunal’s Statute provides that the Dispute Tribunal shall be competent to hear and pass judgment on an application:

... 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 noncompliance;

26. The Appeals Tribunal has consistently held that the key characteristics of an administrative decision subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment, not a “future injury” (see, for instance, *Lee* 2014-UNAT-481).

27. Since the Applicant is a former staff member, he has standing to contest an administrative decision under art. 3.1 of the Dispute Tribunal’s Statute relating to his former employment with the Organization (see *Shkurtaj* 2011-UNAT-148). Since the Applicant is no longer a staff member, the receivability question for the Tribunal is whether the contested decisions produce direct legal consequences affecting the terms or conditions of the Applicant’s former employment.

The decision not to complete the disciplinary process following the Applicant’s resignation

28. The Respondent argues that the contested decision not to complete the disciplinary process following the Applicant’s resignation produces no direct legal consequences affecting his terms and conditions of appointment as a former staff member because he has no right to the completion of a disciplinary process. Citing *Oummih* 2015-UNAT-518, para. 31, the Respondent submits that “it is not legally possible to compel the Administration to take disciplinary action”.

29. The Tribunal notes that before the Applicant decided to resign, the status of the disciplinary process was that he had been notified in writing of the formal allegations of misconduct, given the opportunity to respond to formal allegations, and informed of the right to seek the assistance of counsel. The only remaining step for the completion of the disciplinary process before his resignation was the Administration’s decision on whether to impose a disciplinary or administrative measure against him, but before the Administration had an opportunity to complete

the process, he resigned within a month after submitting his comments on the formal allegations.

30. The Tribunal agrees with the Respondent that the Applicant has no right to the completion of a disciplinary process since the Administration cannot impose a disciplinary measure on him as a former staff member. The Tribunal finds that the Dispute Tribunal's reasoning in *Applicant* UNDT/2010/069/Corr.2, paras. 12 and 14 persuasive when it states that: "All the disciplinary measures ... assume subsisting employment" because disciplinary proceedings "depend entirely upon the subsistence of the contractual entitlement to subject a staff member to [disciplinary proceedings], on the one hand, and the contractual obligation of the staff member to suffer them in accordance with the relevant instruments, on the other".

31. The Applicant argues that the Administration is duty bound to comply with the procedures prescribed under the relevant rules, especially para. 9 of ST/AI/371 (Revised disciplinary measures and procedures), which provides that once a disciplinary process was initiated, the Assistant Secretary-General of OHRM shall decide either to close the disciplinary case or to recommend the imposition of a disciplinary measure. However, as explained above, the Administration's obligation to complete a disciplinary process is predicated on the fact that a staff member has an ongoing employment relationship with the Organization and such obligation no longer exists toward a former staff member.

32. The Applicant still argues that the decision has direct legal consequences because it (a) will affect his right to be reemployed with the Organization in the future, (b) places an indefinite duty to cooperate with the Organization, and (c) will result him in placing him on administrative leave immediately following any future reemployment. However, all these are only potential consequences that may arise in the future if the Applicant seeks employment with the Organization or is selected for a job and becomes a staff member again. As the Appeals Tribunal stated in *Lee* 2014-



UNAT-481, a decision must have a direct impact and not the potential of a future injury to be considered as an appealable administrative decision.

33. Therefore, the contested decision not to complete the disciplinary process against the Applicant is not an appealable administrative decision as it has no direct legal consequences affecting the terms and conditions of his appointment.

The decision to place a note in the Applicant's Official Status File

34. Regarding the decision to place a note in the Applicant's Official Status File, while not explicitly challenging the receivability of this decision, the Respondent submits that because of the non-prejudicial nature of the language used in the note, it is not adverse to the Applicant in any way in that it does not reflect adversely on the character, reputation, conduct or performance of the Applicant as it only states that a matter was not resolved at the time of the Applicant's separation and that ALS/OHRM should be contacted should the Applicant rejoin the Organization.

35. The Tribunal recalls that the note stated that the Applicant resigned from the Organization effective 1 July 2017 and at that time a matter concerning him had not been resolved. The note further asked that ALS/OHRM be contacted if the Applicant should become a staff member again. From the outset, the Tribunal notes that the information contained in the note placed in the Applicant's file is undisputed in that he resigned on 1 July 2017 and a disciplinary matter concerning the Applicant was unresolved at that time. The note further instructs that ALS/OHRM should be contacted if the Applicant rejoins the Organization. The question for the Tribunal is whether the decision to place a note of this nature is an administrative decision that produces direct legal consequences affecting his terms or conditions of appointment as a former staff member.

36. The Tribunal finds that the note in question is not a separate decision that produces any direct legal consequences but merely a recording of the Administration's decision not to complete a disciplinary process following his

resignation and its intention to resume such process should he rejoin the Organization, as clearly communicated in the email of 2 August 2017. The purpose of this note seems to be to ensure compliance with sec. 6.5(d) of ST/AI/2016/1 (Staff selection and managed mobility system), which provides that “[f]ormer staff members ... shall not be eligible to be considered for positions in the Secretariat following their separation from service on any of the following grounds: ... (d) Resignation during an investigation of misconduct or the initiation of a disciplinary process, unless the former staff member agrees to cooperate with an ongoing investigation or disciplinary process until its conclusion”. Accordingly, the Tribunal agrees with the Respondent that it is not adverse material as defined in ST/AI/292.

37. The Applicant makes various arguments to contend that the placement of the note in his file has direct legal consequences in that, *inter alia*, (a) the note makes his reemployment dependent on future contacts with ALS/OHRM, which affects his contractual rights as a staff member to be reemployed without any such condition; (b) the nature, content and scope of future contacts with OHRM are unclear and may well include disclosure of information related to the disciplinary process to third parties; and (c) the note may be reasonably perceived as a means to circumvent the procedural requirements set out in ST/AI/292 by allowing the Administration to make additional contacts in relation to the “unresolved matter” without necessarily being limited to the specific content of the note placed on file and without affording him the opportunity to comment on such future contacts with OHRM.

38. However, the Applicant’s very arguments show that he contends that he will suffer injuries in the future if he applies and is selected for a position with the Organization and then if his Official Status File is reviewed and ALS/OHRM is contacted according to the note. None of these events have occurred.

39. Therefore, the contested decision to place a note on the Applicant’s Official Status File is not an appealable administrative decision as it has no direct legal consequences affecting the terms and conditions of his appointment.

**Conclusion**

40. The Tribunal rejects the application as not receivable.

*(Signed)*

Judge Joelle Adda

Dated this 7<sup>th</sup> day of January 2020

Entered in the Register on this 7<sup>th</sup> day of January 2020

*(Signed)*

Nerea Suero Fontecha, Registrar, New York