



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

BASNYAT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

**ON RECEIVABILITY**

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**Counsel for Applicant:**

George G. Irving

**Counsel for Respondent:**

Angela Arroyo, UNDP

## **Introduction**

1. On 3 June 2019, the Applicant, a Special Advisor at the D-2 level with the United Nations Development Programme (“UNDP”) filed the application in which he contests a “[n]otice of termination of permanent appointment following a two-month extension of the search period without having afforded priority consideration for available posts”.
2. On 11 June 2019, the Respondent filed a motion for summary judgment.
3. On 21 June 2019, the Respondent filed the reply in which he contends that the application is not receivable.
4. The case was assigned to the undersigned Judge on 16 June 2020.
5. By Order No. 104 (NY/2020) dated 19 June 2020, the Tribunal rejected the Respondent’s motion for summary judgment and instructed the Applicant to file a response to the Respondent’s submissions on receivability. The Tribunal further directed the parties that unless otherwise ordered, on receipt of the aforementioned response or at the expiration of the provided time limit, the Tribunal would adjudicate on the matter of receivability and deliver Judgment based on the papers filed on record.

## **Facts**

6. The Applicant appends to his application the following email from the Deputy Director of the Office of Human Resources (“OHR”), UNDP, which was sent to the Applicant on 11 April 2019, and which he labels as “the contested decision” (emphasis omitted):

[Subject line:] [The Applicant’s full name] - Notice - 60-day Search Period

Dear [the Applicant],

As you were informed in the message of 6 March 2019, your tenure in the transition pool ended as of 8 April 2019.

UNDP is in the process of reviewing and finalizing standard operating procedures that will be applicable to staff members similarly situated to you. In order to ensure fair and consistent treatment, we have decided to allow you the opportunity to benefit from those procedures, notwithstanding the end of your tenure in the transition pool. As a result and in accordance with changes envisaged, you are now being afforded a 60-day Search Period for the purpose of enabling UNDP a final opportunity to assist you with securing a new assignment. Please be informed that, as a result of the foregoing, UNDP is withdrawing the reference in the 6 March 2019 message that UNDP would proceed with issuing you a Notice of Termination of Appointment at this stage.

You accordingly have the following options:

1. Use the 60-day search period to seek an assignment within the Organization. OHR will assist you in this process by providing you with a list of positions that meet the criteria you identified in terms of your interests during our meeting of 1 March 2019. We understand these criteria are that you are not presently inclined to consider positions at a grade lower than your current D2 level, but that you have no geographic limitations. Kindly note that you must formally apply to any position for which you wish to be considered. Please ensure as well that you do notify me of any application you submit, so that OHR can ensure your candidacy is given all due consideration and advocate on your behalf. As a Permanent Appointment holder, you will be given priority consideration on a noncompetitive basis over equally qualified candidates who do not hold a Permanent Appointment for positions to which you apply, are qualified, and considered fully competent.
2. If you do not wish to seek further employment opportunities within the Organization, you are eligible to apply immediately for an Agreed Separation. Please note that, should you not initially choose this option, you may do so at any time during your Search Period. An Agreed Separation, subject to approval, would pay you additional indemnities beyond those mandated under Annex III of the UN Staff Regulations and Rules, even if you opt not to pursue continued employment. A copy of the application for Agreed Separation is attached.

Please advise me of your decision on which option you would like to proceed within three working days from the communication of this message, i.e. by close of business on 16 April 2019. If by Monday 10 June 2019 you have not secured an assignment, or you have not communicated your intention to pursue an Agreed Separation, the Organization will inform you of the applicable next steps. Please note these next steps may include a decision on the termination of your appointment.

Best Regards,

[The first name of the OHR Deputy Director]

## **Consideration**

### *The parties' submissions*

7. The Respondent (stated first as the moving party), in essence, submits that the Applicant's appeal is "not receivable because the Applicant has not been notified of the termination of his permanent appointment, which is the decision he contests". The Respondent further contends that the Applicant "did not contest a decision to terminate his permanent appointment in a request for management evaluation".

8. The Applicant's submissions on receivability may be summarized as follows:

a. The Appeals Tribunal has "adopted the definition of an administrative decision (see *Al Surkhi* et al. 2013-UNAT-304), as developed by the former Administrative Tribunal in *Andronov* (Judgment No. 1157 (2003))". It is "well-established internal case law that administrative decisions are characterized by the fact they are taken by the Administration, they are unilateral and of individual application, and carry direct legal consequences". The Appeals Tribunal has "established that '[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine' (*Rosana* 2012-UNAT-273, para. 25, affirmed in *Newland* 2018-UNAT-820, para. 34). The Appeals Tribunal has further "stated in *Auda* 2017-UNAT-746 (25-31) that it 'has repeatedly ruled that the decisive

moment of notification for purposes of Staff Rule 11.2(c)' is when all relevant facts were known, or should have reasonably been known", and "added that 'the situation is ... different from one involving an informal or casual verbal communication or one where the content of the verbal communication is disputed and the facts do not support a reasonable basis upon which to make the necessary findings of 'clear and unambiguous' and 'sufficient gravitas'";

b. The notification of 11 April 2019 was a notice of termination of the Applicant's permanent appointment as "the concluding language advising that unless other options were selected by the Applicant within a specific time frame ... would entail 'a decision on the termination of your appointment'". The Respondent "cannot hide behind ambiguous wording to preclude judicial review of his actions";

c. In the Applicant's request for management evaluation, it was stated that "this was a final ultimatum after a long period of uncertainty occasioned by the Respondent's refusal to place him in spite of being fully exonerated of any wrongdoing in connection with his last posting as Country Director in Afghanistan". By specifying "a limited two-month time frame in which to select from two limited options, the Respondent was providing the Applicant with notice of the consequence, namely the termination of his permanent appointment". The Applicant "challenged the contents of this ultimatum and asked that it be withdrawn and that he be placed in accordance with the terms of his permanent appointment", but the Respondent "refused" this;

d. While "the motivation behind the letter appears to be an encouragement for the Applicant to opt for an agreed separation in return for not contesting the termination of his appointment, the letter carries direct legal consequences for the Applicant's contract of employment". Similar wording "was analysed in the recent decision *Patkar* UNDT/2020/105 assessing the issue of receivability based on a similar conditional notification that [...] should the Applicant be

selected for another position before 31 March 2018, the non-renewal decision would cease to be applicable”. However, this “does not mean that the decision communicated to the Applicant on 24 November 2017 was not final”, and “[a]ny subsequent decision to rescind the earlier non-renewal decision due to the Applicant's selection for another position would have been simply a new administrative decision superseding a previous decision”. The Applicant “neither applied for agreed termination nor was he placed by the deadline”, and “[t]he letter was neither withdrawn or superseded”. In the interim “he received approved certified sick leave”;

e. The notice “has to be understood in the context of a series of exchanges over his status over an extended period in order to appreciate why it generated a request for management evaluation”. Most “notices of termination that provide for the required advance notice, are contingent on not [being] placed in the interim”, but “[n]onetheless, they are subject to a request for management evaluation within 60 days”;

f. Those “who wait for the axe to fall do so at their peril”. The case of another “UNDP permanent contract holder”, which was “reported” in *Bissell* Order No. 86 (NY/2019) is “instructive” as “[a]fter several extensions, his contract was terminated by letter as of 4 p.m. that day”;

g. In 2017, the Applicant had “previously been assigned to the transition pool after serving on a temporary assignment”, and “[n]either his request for an extension of the assignment, nor his request to be considered for the Resident Representative assessment, nor his applications to some 24 posts had been received positively”. Only “a short time before the communication of 11 April 2019, [did] the Applicant [receive] a formal notice of termination with unambiguous wording that was withdrawn and replaced by this further final extension of the search period”;

h. The “refusal of the Respondent to withdraw the notice, the continuing refusal to place him, to facilitate his secondment or support his placement on the relevant rosters, and the invocation of forced termination as a consequence of his refusal to apply for agreed termination, constitute an appealable administrative decision”.

*Did the Administration take an appealable decision to terminate the Applicant’s permanent appointment by the email of 11 April 2019?*

9. The key question of the issue of receivability is whether OHR/UNDP’s email of 11 April 2019 constitutes an appealable administrative decision by which the Applicant’s permanent appointment is terminated.

10. According to art. 2.1(a) of the Dispute Tribunal’s Statute, a staff member may appeal “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

11. It is trite law that for an application to be receivable, an applicant must be able to define an appealable administrative decision (see, for instance, *Planas* 2010-UNAT-049, *Haydar* 2018-UNAT-821, *Farzin* 2019-UNAT-917 and *Argyrou* 2019-UNAT-969). Under the consistent jurisprudence of the Appeal Tribunal, the text of a norm is further to be understood in accordance with its plain meaning (see, for instance, *Scott* 2012-UNAT-225, *De Aguirre* 2016-UNAT-705, *Timothy* 2018-UNAT-847 and *Ozturk* 2018-UNAT-892). The Tribunal finds that a similar principle applies to the understanding of the written communication of a possible administrative decision, such as the email of 11 April 2019.

12. In the 11 April 2019 email, OHR states that “UNDP is withdrawing the reference in the 6 March 2019 message that UNDP would proceed with issuing you a Notice of Termination of Appointment at this stage” and presents the Applicant with two alternative options, namely (a) a “60-day search period” for a new position; or

(b) an agreed separation agreement. Only if the Applicant's search for a new position is unsuccessful or he rejects agreed separation agreement "may" a termination of his permanent appointment then be considered.

13. Based thereon, the Tribunal finds that unlike how the Applicant reads the text of email of 11 April 2019, OHR/UNDP therein plainly states that the Applicant's permanent appointment is *not* to be terminated at this state and that the Applicant instead has two other options to choose from. A termination of his permanent appointment has therefore not been decided upon and may solely occur—but it is not even a given outcome—if none of the options materialize. The email of 11 April 2019 can therefore in no possible way be construed as a decision to terminate his appointment. It is further telling that the Applicant has not submitted that UNDP has subsequently intended to terminate his permanent appointment as a matter of fact.

14. Accordingly, the Applicant has not been able to define an appealable administrative decision under art. 2.1(a) of the Dispute Tribunal's Statute and the jurisprudence of the Appeal Tribunal cited above.

### **Conclusion**

15. The application is rejected as not receivable.

*(Signed)*

Judge Joelle Adda

Dated this 22<sup>nd</sup> day of July 2020

Entered in the Register on this 22<sup>nd</sup> day of July 2020

*(Signed)*

for Nerea Suero Fontecha, Registrar, New York