



**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Katrina Waiters, UNFPA

## **Background**

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”) serving as Representative at the UNFPA Oman Country Office within the Arab States Regional Office at the P-5 level.
2. On 19 January 2020, he filed an application challenging what he describes as,
  - 1) Decisions to be considered for reassignment to another duty station in 2020 Rotation cycle, practically, effecting my non-selection for any post in rotation cycle of 2019 and 2) non-selection for 9 posts in Rotation 2019.<sup>1</sup> (“The contested decisions”).
3. The Respondent filed a reply on 19 February 2020 in which the receivability of the application is challenged.
4. On 4 November 2020, the Tribunal issued Order No. 219 (NBI/2020) inviting the Applicant to submit a rejoinder to the Respondent’s submissions on recievability which he did on 17 November 2020.

## **Summary of the relevant facts**

5. As an international staff member on a rotational post, the Applicant is a member of UNFPA’s Leadership Pool and regularly participates in an annual “Rotation exercise” in which both internal and external candidates express their interest in a variety of available posts up to a maximum of five.<sup>2</sup>
6. The candidates are interviewed by a Rotation Panel, assessed and then potentially assigned to key international rotational posts, inclusive of country representatives, deputy country representatives and international operations managers. Such posts range in professional level from the P-3 level to the D-1 level. The Rotation Panel prepares a report of their recommendations for UNFPA’s Executive Director who makes all final decisions on rotation. A candidate is normally only eligible for

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<sup>1</sup> Application, para. V.1

<sup>2</sup> Reply paras. 6 and 7 and annex R1.

selection or reassignment to rotational posts within the specific job type(s) for which he has been approved as ready.<sup>3</sup>

7. On 18 December 2018, UNFPA’s Division for Human Resources (“DHR”) distributed an email announcing the 2019 Rotation Exercise and invited candidates to submit applications.<sup>4</sup>

8. The Applicant applied for nine posts: seven Representative rotational posts and two posts of Chief.<sup>5</sup> The posts he applied for were:

- a. Representative in the Country Office (“CO”) Uzbekistan;
- b. Representative in the CO Ukraine;
- c. Representative in the CO Brazil;
- d. Representative in the CO Yemen;
- e. Representative in the CO Palestine;
- f. Representative in the CO Nigeria;
- g. Representative in the CO Bolivia;
- h. Chief, Gender and Human Rights Branch in the Technical Division (“TD”) at UNFPA’s Headquarters (“HQ”); and
- i. Chief, Executive Board Branch in the Office of the Executive Director (“OED”) at UNFPA’s Headquarters.

He was unsuccessful in all the applications.<sup>6</sup>

9. On 26 September 2019, the Applicant received an email from the Director/DHR

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<sup>3</sup> Ibid., paras. 8 – 10 and annex R1.

<sup>4</sup> Ibid., para. 11.

<sup>5</sup> Application, para. 4 and annex 4.

<sup>6</sup> Reply annexes 2-8.

informing him as follows regarding the rotation exercise:

... I am writing with regards to the next Rotation process. It has been brought to my attention that you have been exceptionally granted three rotation deferrals in your current role as Representative for Oman, a 4-year duty station, which assignment took effect from 1 February, 2013.

Having exceeded your maximum duration in this duty station, I would like to advise that you will be considered for reassignment to another duty station in the 2020 Rotation cycle.<sup>7</sup>

10. On 18 October 2019, the Director/DHR circulated to all UNFPA staff members the list of staff movements that had occurred in UNFPA during the third quarter of 2019.<sup>8</sup>

11. On 6 November 2019, the Applicant sought management evaluation of the contested decisions.

### **Parties' submissions**

#### **Receivability**

##### *The Respondent*

###### *(1) Email notice of possible future reassignment*

12. There has been no decision by the Organization. The 26 September 2019 email merely informs the Applicant that in light of the Annual Rotation exercise, the Director, DHR, may reassign the Applicant if necessary, that is, if the Applicant is not selected during the Rotation. This email notification is not a decision, but a notice of a possible later administrative decision. At best, the Applicant might suggest that it is a preparatory or intermediate step, which can only be disputed in light of the final decision.

13. The email notification does not adversely affect the Applicant's legal status or

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<sup>7</sup> Application, annex 2.

<sup>8</sup> Ibid., annex 3.

rights as a staff member. There has been no change to the Applicant's legal status nor does the Applicant suggest any change, consequence or detriment incurred based on his receipt of this email.

(2) *Email notices of non-selection decisions*

14. In his 23 December 2018 application to the 2019 Rotation Exercise, the Applicant applied for the post of Representative, UNFPA CO Yemen. The Applicant was notified on 14 May 2019 that he was not selected via email from the DHR.

15. In the same application, the Applicant also applied for the post of Representative, UNFPA CO Brazil. Similarly, the Applicant was notified on 12 July 2019 that he was not selected via email from DHR.

16. Outside of the Rotation exercise, the Applicant also applied for the post of Chief, Executive Board Branch at HQ. He was notified on 10 May 2019 via email that he was not selected for the post.

17. The Applicant filed his management evaluation requests ("MERs") on 6 November 2019, well beyond the 60 days of his notification that he was not selected for the posts in CO Yemen, CO Brazil and HQ. The Applicant's MERs were time-barred and not receivable for these three contested decisions.

*The Applicant*

18. The 26 September 2019 email meets the requirements to be considered an administrative decision as per the United Nations Appeals Tribunal Jurisprudence ("UNAT").

19. The decision was taken within the context of his fixed-term appointment and of his membership of the leadership pool subject to reassignment under UNFPA's Rotation Policy.

20. It produced a direct legal impact on his legal status as it was retaliatory, arbitrarily and constituted an abuse of authority. The decision produced substantial moral, health and reputational damage, financial losses related to assignment grant and entitlements. The reputational damage was so severe and irreparable that he was not selected for 22 posts with five different United Nations agencies including those of identical nature to his current job functional level of D-1 with UNFPA.

21. The Applicant avers that the decision contained in the 26 September 2019 email was confirmed by the circular dated 18 October 2019 from the Director/DHR confirming his non-selection for any of the posts he applied for in 2019. This decision was included in his MER.

### **Considerations.**

#### ***Whether the Tribunal is competent to hear the application.***

22. Article 2.1(a) of the UNDT Statute provides that:

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 noncompliance 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.

23. The Applicant maintains that the email sent to him by the Director of DHR on 26 September 2019 is an administrative decision.

24. It is well settled that administrative decisions are characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

25. For a decision to be challengeable under art. 2.1(a) of the UNDT Statute, it must

be final and produce direct legal consequences to the legal order.<sup>9</sup> Conversely, a decision that is final but produces no direct legal consequence on a staff member's terms of appointment or the contract of employment is not receivable by the Tribunal.<sup>10</sup>

26. The statement in the email that,

I would like to advise that you will be considered for re assignment to another duty station in the 2020 Rotation cycle... Should you have any questions or concerns about this process, please do not hesitate to contact me ...

removes any semblance of finality from the email since it leaves room for further engagement with the Applicant over the issue of rotation deferments, thereby removing the email from the categorisation of an administrative decision.

27. Most important is that the email did not affect the Applicant's legal status or rights as a staff member. There is no indication that any change, consequence or detriment was incurred based on the Applicant's receipt of the email. The argument that the contested decision produced direct legal consequences affecting the Applicant's terms of appointment because it was retaliatory, arbitrarily and constituted abuse of authority, and that it produced substantial reputation damage, financial losses related to assignment grant and entitlements should he have been reassigned, moral and health damage evidenced by medical reports, and particularly severe and irreparable reputational damage that he was not selected in posts with five different United Nations agencies including those of identical nature (Representative) to his current job and none of D-1 with UNFPA, is wrongly premised since there can be no injury where there is no right.

28. The Tribunal finds that the application insofar as it relates to the 26 September 2019 email is not receivable *ratione materiae* because that decision is not final. It did not produce a direct legal impact on the Applicant's legal status or have a legal effect

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<sup>9</sup> Former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

<sup>10</sup> *Fairweather* UNDT/2019/134 confirmed by *Fairweather* 2020-UNAT-1003.

on his terms of appointment or contract of employment.

29. The applicable legal decision is the Circular dated 18 October 2019. This Circular confirmed to the Applicant that he had not been selected for any of the posts he had applied for in 2019.

**Whether the application is not receivable *ratione temporis*.**

30. Staff rule 11.2(c) provides that a request for management evaluation is not receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member receives notification of the administrative decision to be contested.

31. The Applicant sought management evaluation of the contested decisions on 6 November 2019, yet some of the decisions had been communicated to him on the following dates; for the post of Representative (D-1), UNFPA Country CO Yemen, the Applicant was notified on 14 May 2019<sup>11</sup>, for the post of Representative (D-1), UNFPA CO Brazil, on 12 July 2019<sup>12</sup> and for that of Chief, Executive Board Branch at HQ on 10 May 2019<sup>13</sup>.

32. The Tribunal agrees with the Respondent's submission that the request for management evaluation as it relates to the above-mentioned three posts was well beyond the 60 days of his notification of his non-selection for the three posts. This application is not receivable *ratione temporis* with regard to the three contested decisions.

**Conclusion**

33. The application is dismissed as irreceivable in relation to the Applicant's contentions regarding the 26 September 2019 email from the Director/DHR.

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<sup>11</sup> Reply, annex R/9.

<sup>12</sup> Ibid., annex R/10.

<sup>13</sup> Ibid., annex R/11.



34. The application is receivable in relation to the Applicant's contention of the 18 October 2019 Circular by which he became aware that he had not been selected to the following posts and for which he was within the statutory deadlines for requesting management evaluation:

- a. Representative in the CO Uzbekistan;
- b. Representative in the CO Ukraine;
- c. Representative in the CO Palestine;
- d. Representative in the CO Nigeria;
- e. Representative in the CO Bolivia; and
- f. Chief, Gender and Human Rights Branch in the TD at UNFPA's Headquarters ("HQ").

The Tribunal will hold a hearing on the merits of these claims on a date to be communicated to the parties by the Registry.

*(Signed)*

Judge Margaret Tibulya

Dated this 4<sup>th</sup> day of December 2020

Entered in the Register on this 4<sup>th</sup> day of December 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi