



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/039

Judgment No.: UNDT/2021/055

Date: 17 May 2021

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CAUCCI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Dorota Banaszewsk, OSLA

**Counsel for the Respondent:**  
Nicole Wynn, AAS/ALD/OHR  
Maureen Munyolo, AAS/ALD/OHR

## **Background**

1. On 2 June 2020, the Applicant filed an application with the United Nations Dispute Tribunal in Nairobi challenging the Administration's decision to separate her from the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA") following completion of a loan to the Secretariat - Department of Peace Operations ("DPO") (the contested decision").

2. The Applicant submits that the Administration failed to consider its obligation towards staff members returning from loan, assisting them in obtaining an alternate post. She contends that such an obligation derives not only from the loan agreement but also from established jurisprudence governing placement of staff members returning from secondment to a releasing organisation which *mutatis mutandis* applies to her case.

3. The Respondent filed his reply to the application on 2 July 2020 in which it was argued, *inter alia*, that the application was not receivable *ratione materiae*.

4. The Applicant filed a response to the reply on 22 April 2021.

## **Summary of the relevant facts**

5. On 30 April 2019, the Applicant entered into a Memorandum of Understanding ("MOU") with MINUSMA.<sup>1</sup> Paragraph 4 of the MOU stipulates as follows:

4. The purpose of this MOU is to outline the agreement of the Parties to the following terms and conditions effective 1 May 2019 in order for [the Applicant] to continue on assignment with DPPA-DPO:

a. [The Applicant] will retain a fixed term contract while serving with DPO on temporary assignment through 29 February 2020. However, no specific lien will be maintained against a MINUSMA post.

b. If [the Applicant's] temporary assignment is not extended by DPPA-DPO her fixed-term appointment with MINUSMA will

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<sup>1</sup> Application, annex A and reply, annex 3.

also not be extended, and she will be separated from MINUSMA unless she is selected for a regular position through the staff selection system. This Memorandum of Understanding serves as notice of separation.

c. [The Applicant] is required to apply for vacant positions prior to expiration of her temporary assignment with DPPA-DPO and expiration of her fixed term appointment with MINUSMA on 29 February 2020.

d. [The Applicant] agrees that she will not take legal action against the Organization contesting the terms of the MOU, or any administrative decision related to its implementation.

To confirm the understanding and acceptance of the terms of [the Applicant's] extension of temporary assignment and administrative lien through 29 February 2020, this MOU is signed by the Parties of their own free will and without any duress.

6. On 31 January 2020, DPO/Headquarters notified the Applicant that it would not extend her temporary assignment beyond 29 February 2020.<sup>2</sup>

7. On 12 February 2020, the Applicant was informed that based on the terms of the MOU, her appointment would not be renewed beyond 29 February 2020.<sup>3</sup>

8. On 19 February 2020, the Applicant requested sick leave.<sup>4</sup> On 21 February 2020, the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”) approved the Applicant’s request for sick leave for the period 28 February 2020 through 30 April 2020.<sup>5</sup>

9. On 24 February 2020, the Applicant requested management evaluation of the decision not to renew her appointment beyond 29 February 2020.<sup>6</sup>

10. On 5 March 2020, the Management Evaluation Unit (“MEU”) informed the Applicant that based on the decision of MINUSMA to extend her fixed-term appointment for the duration of her approved certified sick leave pursuant to section

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

<sup>3</sup> Application, annex C.

<sup>4</sup> Application, annex D.

<sup>5</sup> Application, annex E.

<sup>6</sup> Application, annexes F1 and F2.

4.9 of ST/AI/2013/1 (Administration of fixed-term appointments), MEU found that her request for management evaluation was moot.

11. On 25 April 2021, the Applicant was informed that MINUSMA had decided to support her with an extension of appointment up to the end 30 June 2020 on humanitarian grounds.<sup>7</sup>

## Considerations

### *Receivability*

12. This application is receivable *ratione materiae*. The Respondent's argument that the Applicant did not request management evaluation of the contested decision within 60 days is rooted in the erroneous belief that the MOU, which expressly states that it constituted notice that the Applicant's appointment would not be renewed beyond 29 February 2020 and that she would be separated as a result, related to the Applicants general right to be reabsorbed into MINUSMA.

13. The relevant provisions of the MOU are:

a. Paragraph 4(a). “[The Applicant] will retain a fixed term contract while serving with DPO on temporary assignment through 29 February 2020. However, **no specific lien** (emphasis added) will be maintained against **a** (emphasis added) MINUSMA post”.

b. Paragraph 4(b). “If [the Applicant's] temporary assignment is not extended by DPPA-DPO her fixed-term appointment with MINUSMA will also not be extended, and she will be separated from MINUSMA unless she is selected for a regular position through the staff selection system. **This Memorandum of Understanding serves as notice of separation**” (emphasis added).

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

14. In the Tribunal’s view, the use of the word “a” before the words “**MINUSMA post**” in para. 4(a) suggests that the parties agreed that the Applicant retained no specific lien against **any** MINUSMA post. It is understood that the MOU confines itself to the right to a special lien even in respect to the wider context of **any other MINUSMA post**. Paragraph 4(b) without varying or contradicting the contents of para. 4(a) only expounds what is agreed on under para. 4(a).

15 This Tribunal has on occasion<sup>8</sup> observed that the right to a general lien is intrinsic to a secondment, meaning that it is inalienable and so the Applicant could not have contracted herself out of it. In this regard the Tribunal observed that;

38. In sum, it is the characteristic feature of a secondment that—contrary to what is the case for an inter-organization transfer—the “service lien” or the “contractual relationship” between the seconded staff member and the releasing organization remains, and said staff member retains a right to employment in the releasing organization at the end of his/her secondment. **This must not be confused with an entitlement to a lien on a specific post, which—unlike for an inter-organization loan of staff—is not intrinsic to a secondment** (emphasis added).

42. It is the Tribunal’s view that the plain meaning of the term “rights of employment” generally indicates that the seconded staff member will be reabsorbed, and it does not suggest that it entails further conditions like that of the staff member having to secure a vacant position at his/her releasing organisation.

16. It follows that the notice of separation which was communicated to the Applicant under para. 4(b) and the waiver under section 4(d) which bars the Applicant from bringing a claim over the terms of the MOU only relate to her right to a specific lien against any MINUSMA post (which she is not contesting), and not to the general right of employment she retains with the releasing organization.

17. Based on the above, the Tribunal agrees with the Applicant that she did not (and could not contract) herself out of her general right to return to MINUSMA, but only

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<sup>8</sup> *Tran Nguyen 2015/UNDT/002.*

contracted herself out of her right to a special lien on any post at MINUSMA.

18. Following from the above, the Tribunal finds that the separation notice of 30 April 2019 which only relates to the Applicant's right to a special lien is not the relevant Administrative decision, since it does not relate to her not being re-absorbed into MINUSCA as part of the Respondent's general obligation to her at the completion of a loan to DPO. In this regard, separation documents of 12 February 2020 which communicated the Respondent's decision that the Organisation did not intend to fulfil its obligations to effectuate the Applicant's general right of return to MINUSMA is the relevant administrative decision.

19. Since the Applicant filed her management evaluation request on 24 February 2020 (only 12 days after receiving the decision) this application is receivable.

***The merits***

*Whether the Respondent has an obligation to re-absorb the Applicant or to locate a post for her.*

20. It is common cause that the Applicant who was a member of staff of the MINUSMA went to DPO on temporary assignment.

21. In the context of staff members on secondment, the consistent Tribunal jurisprudence<sup>9</sup> is that they do not lose their service lien (i.e., a right to employment in the releasing organization at the end of their secondment).

22. The Respondent maintains that the decision in *Tran Nguyen* 2015/UNDT/002 relates to interagency loans and secondments between United Nations agencies or organizations but not to temporary assignments such as the Applicant's but has provided no legal authority for this assertion.

23. While it is recognized that the Applicant joined DPO on temporary assignment

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<sup>9</sup> *Skoda* 2010/UNAT/017; *Tran Nguyen*, 2015/UNDT/002.

from MINUSMA, the Tribunal agrees with her that there is no significant difference between her situation with regard to retention of a lien of service, and the situation of a staff member who has been seconded to another agency. It is for this reason that she retained a lien on the P-3 Human Rights Officer post that she encumbered in MINUSMA during the two-year assignment, and later, a provision relating to her relinquishing it (which the Applicant rightly argues was limited to her post) was incorporated in the MOU.

24. The Applicant is not contesting the enforceability of the MOU, but rather its import; she in particular raises issues as to whether she contracted herself out of what she claims to be her general right to be re-absorbed in MINUSMA on completion of her assignment with the DPO. In this regard, she raises sub-issues of whether she still has a general right to return to MINUSMA and whether the mission is under any obligation to find alternative suitable positions for her. On the basis of settled jurisprudence (*Nguyen, supra*) the Tribunal finds that the Applicant retained a general service lien in MINUSMA.

*Whether such a service lien obligates the releasing organization to assist a staff member to find alternative posts upon conclusion of his/her secondment.*

25. The Appellate jurisdiction<sup>10</sup> has on occasion answered this question in the following terms;

...the plain meaning of the term “rights of employment” generally indicates that the seconded staff member will be reabsorbed, and it does not suggest that it entails further conditions like that of the staff member having to secure a vacant position at his/her releasing organization...

[...]

...even if the term “rights of employment” were not to be interpreted as an entitlement to mandatory re-absorption, it entails, at the very least, not less than what is due to a staff member holding a permanent appointment in case his post is abolished (under staff regulation 9.3), that is, the Organization must make good faith efforts to identify a post for the staff member.

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<sup>10</sup> *Tran Nguyen*, paras. 42 and 47.

26. On the basis of the above jurisprudence, the Tribunal finds that the Respondent has an obligation to re-absorb the Applicant into MINUSMA or to locate a post for her.

27. It is not disputed that the Respondent served the Applicant with notice of separation, and further that when the Applicant applied for a P-3 post of a Policy and Best Practices Officer, MINUSMA, and informed the Administration about her application, they never reverted to her or assisted her in any way. The Tribunal finds that the Respondent has failed in its obligation to re-absorb or find a suitable alternative post for the Applicant.

28. The Respondent's reliance on the principle that a fixed-term appointment carries no expectancy of renewal misses the point that the Applicant's claim is not rooted in the refusal by the Respondent to renew her contract, but rather on the refusal to recognize her service lien (i.e., a right to employment in the releasing organization at the end of his/her secondment), which requires that the Organization makes good faith efforts to identify a post for her in keeping with Tribunal jurisprudence.<sup>11</sup>

29. The Tribunal finds that as the Applicant did not relinquish her general right to return to MINUSMA, the MINUSMA Administration was under an obligation to fulfil its duties of re-absorbing her or finding suitable alternatives posts for her.

*The application for anonymity*

30. As no personal data regarding the Applicant is disclosed in this judgment, the Applicant's application for anonymity is refused.

**Judgment**

31. The application is allowed.

- a. The decision to not renew the Applicant's appointment is rescinded.
- b. The MINUSMA Administration is ordered to grant an appointment to the

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<sup>11</sup> *Tran Nguyen*, para. 47.



Applicant at the P-3 level.

c. In the event that the appointment cannot be granted, and in view of the fact that the Applicant received one-year fixed-term appointments, the Respondent is ordered to pay the Applicant one year's net base salary as compensation at the P-3 level she encumbered in MINUSMA.

*(Signed)*

Judge Margaret Tibulya

Dated this 18<sup>th</sup> day of May 2021

Entered in the Register on this 18<sup>th</sup> day of May 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi