



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NBI/2022/005  
Judgment No.: UNDT/2022/010/Corr.1  
Date: 9 February 2022  
Original: English

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**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MUKHOPADHYAY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

George Irving

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR

Maureen Munyolo, AAS/ALD/OHR

Notice: Paragraph 2 of this Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Background**

1. The Applicant is former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”).
2. On 6 October 2020, he filed an amended application contesting the decision to abolish the position of Airport Engineer, P-4, which he encumbered until 10 September 2020 (“the contested decision”).
2. The Respondent filed a reply on 2 December 2019.
3. On 22 July 2021, the Tribunal rendered Judgment No. UNDT/2021/085 granting the application. At paragraph 64 of the said Judgment, the Tribunal ordered the rescission of the contested decision and that the Applicant be reinstated in his position from the date of his separation. The Tribunal also, pursuant to art. 10.5(a) of the UNDT Statute, ordered that the Respondent could elect to pay compensation *in lieu* of rescission.
4. On 6 January 2022, the Applicant filed an application for execution of the Judgment. The Respondent filed a response to the application on 26 January 2022. The Tribunal finds no merit in the application, and it is dismissed.

## **Applicant’s submissions**

5. The Applicant’s submissions are summarized below:
  - a. On 25 November 2021, he received a memorandum from the Chief of Section, Human Resources Management (“Chief/HRM”), MONUSCO, advising him that the decision to terminate his appointment was being rescinded but he was directed not to return to his former position as he was reaching the mandatory retirement age of 65 at the end of that month.
  - b. No notice was taken of the fact that the Applicant had retired from service as of 10 September 2020 and was thereafter on a United Nations

retirement pension.

c. Since 25 November 2021, the Applicant has received no further communication or payment of any kind.

d. This case represents a unique instance in which the Respondent has opted for reinstatement rather than payment of *in lieu* compensation. This was done as a cost saving measure for the Organization, which had no intention of reinstating the Applicant to his post, as evidenced from the delay in notification of their intentions. This approach is contrary to the fundamental principles of the justice system.

e. In addition to prevaricating over the implementation of the Judgment, the Respondent has not addressed the issue of impossibility of performance or apparently considered the practical implications of his decision. The Applicant has been retired since the date of his termination and has now reached the age of mandatory retirement. Therefore, while the Respondent can rescind the termination decision in theory, he cannot reinstate him and has not proposed to do so. It therefore remains unclear how he can claim to have executed the Judgment.

f. Considering this impossibility, the Respondent's only proper course of action is to pay him the full amount of *in lieu* compensation. The Applicant therefore requests the Tribunal to so order the execution of Judgment and/or modify the Judgment in question to address the Respondent's failure to implement the Judgment within a reasonable time frame.

g. The Applicant also requests the Tribunal to consider an award of costs for this further legal process in the amount of USD1,000.00.

### **Respondent's submissions**

6. The Respondent responded to the Applicant's arguments as follows:

a. The application for execution of Judgment is not receivable in accordance with art. 11 of the UNDT Statute. The Judgment does not require its execution to be carried out within a certain time.

b. Should the Tribunal find the application receivable, it should be dismissed for lack of merit. It is upon the Organization, not the Applicant or the Dispute Tribunal, to elect rescission or to pay compensation *in lieu* of rescission. The Organization has elected to execute the order of rescission in the Judgment. Execution of that order is ongoing.

c. The Tribunal should not entertain the Applicant's attempts to revise the Judgment through this application. The Applicant has not discovered any decisive fact which was, at the time the Judgment was rendered, unknown to the Tribunal and to the Applicant. To the extent that the Applicant now seeks to introduce the fact of his retirement as a decisive fact, he cannot do so. That fact was known to him at the time of the Judgment. The Applicant was aware of his own decision to retire, and thus received a significant lump sum payment. The Applicant was also aware of the significance of that decision in relation to the remedy he requested in the application, i.e., rescission. If he believed that his retirement frustrated that remedy, he should have disclosed it before now. However, for his own purposes, he chose not to do so. There are no grounds for revising the Judgment.

d. If the Tribunal decides to revise the Judgment to compel the Organization to pay compensation *in lieu* of reinstatement, the compensation award should be offset by income the Applicant received during the two-year damages period, including income he received because of his decision to retire.

e. On 6 October 2021, the Organization elected to rescind the contested decision and to reinstate the Applicant in his position from the date of his separation. MONUSCO informed the Applicant of the decision to reinstate

him on 25 November 2021. It is not up to the Applicant to decide whether to be reinstated or to receive compensation *in lieu* of reinstatement.

f. Contrary to the Applicant's allegations, rescission of his separation is not an isolated case. Rescission in this case is also in line with views expressed to the Internal Justice Council that the Organization should implement an order of rescission outside of compelling operational, administrative or budgetary reasons. In the instant case, the Organization found no compelling reason to elect compensation *in lieu* of rescission.

g. Contrary to the Applicant's claim, the execution of the order of rescission is possible. The Organization is implementing the order by reinstating the Applicant retroactively. This is the accepted process for rescinding decisions of non-renewal or termination of appointment cases where a staff member has already separated. The Judgment also expressly ordered the Organization to take this action if it elected to rescind the contested decision.

h. Unlike a lump sum compensation award, the retroactive reinstatement of a separated staff member cannot be implemented instantaneously. It requires several administrative actions to negate the termination of the appointment and to restore the *status quo ante*. MONUSCO is engaged in extensive discussions with the various stakeholders, including the United Nations Joint Staff Pension Fund ("UNJSPF"), the United Nations Regional Service Centre in Entebbe ("RSCE"), and the United Nations Headquarters payroll, to calculate the benefits and entitlements payable to the Applicant because of his retroactive reinstatement.

i. Execution of the order of rescission has also been delayed by the Applicant's decision to receive his retirement benefit during the pendency of the application before the Dispute Tribunal. Consequently, the UNJSPF must engage an independent actuary to ascertain the impact of the Applicant's

retirement election and the rescission order on the Applicant's pension entitlements, including calculating the additional amount that the Organization will have to contribute to the Fund to finance the Applicant's re-appointment. This step is necessary to avoid duplicative remuneration or underpayment to the Applicant.

j. The Applicant's request for "costs for further legal processes" is baseless. This application is not receivable. The Applicant filed it with full knowledge that the Organization is complying with the Judgment. The sole relief that he requested in his application was rescission of the contested decision. He was granted the relief he requested. The Applicant's dissatisfaction with the Secretary-General's choice of remedy does not render it unjust.

### **Considerations**

7. Judgments of this Tribunal are binding upon the parties. Following expiry of the time limit set for lodging an appeal with the United Nations Appeals Tribunal ("UNAT"), a judgment becomes executable. The legal framework on execution of judgments is outlined below:

8. Article 11(3) of the UNDT Statute provides that:

The judgements and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal. Case management orders or directives shall be executable immediately.

9. Article 12(4) of the UNDT Statute, which is similar in wording to art. 32(2) of the UNDT Rules of Procedure, provides that:

Once a judgment is executable under article 11, paragraph 3 of the present statute, any party may apply to the Dispute Tribunal for an order for execution of the judgment if the judgment requires execution

within a certain period of time and such execution has not been carried out.

10. In support of his application, the Applicant attached a memorandum dated 25 November 2021 from the Chief/HRM, MONUSCO. The subject line of the memorandum is “Rescission of the decision to terminate your appointment with MONUSCO”. The pertinent parts of the memorandum are reproduced below.

1. With reference to Dispute Tribunal Judgement No. UNDT/2021/085 in Case No. UNDT/NBI/2019/165 Mukhopadhyay V Secretary-General of the United Nations and in accordance with order of the Tribunal to rescind the contested decision, the Administration will request RSCE to raise the requisite personnel actions to process your reinstatement effective 11 September 2020.

2. You will not be required to travel to the Mission following your reinstatement as you will reach the mandatory retirement age of 65 at the end of this month. You are therefore requested to stay in your home country. As you had already completed check out procedures when you were separated previously, you are also not required to do any further checkout prior to your mandatory separation on 30 November 2021.

3. Following the process outlined above, the Mission will contact you to discuss arrangements for processing any adjusted amounts of moneys due to you as a result of your reinstatement.

11. It is clear from the communication quoted above that the Respondent complied with the judgment and took steps to execute the judgment accordingly. The Tribunal agrees with the Respondent that on 6 October 2021, the Organization “*elected to rescind the contested decision and to reinstate the Applicant in his position from the date of his separation*”. MONUSCO informed the Applicant of the decision to reinstate him on 25 November 2021. This submission is confirmed by the Applicant’s own submissions in support of his application.

12. The Applicant has failed to show that the judgment remains unexecuted. The express notice in the form of the memorandum from the Respondent advising the Applicant of his reinstatement from date of separation in compliance with the judgment is proof of execution.

13. The Applicant is at liberty to follow up with the Respondent on his reinstatement entitlements from the date of separation to the date of his mandatory retirement from the Organization in accordance with applicable rules, regulations and policies. This function is administrative in nature and does not require the Tribunal's intervention.

### **JUDGMENT**

14. There being no judgment to execute, the application is dismissed.

*(Signed)*

Judge Rachel Sophie Sikwese  
Dated this 9<sup>th</sup> day of February 2022

Entered in the Register on this 9<sup>th</sup> day of February 2022

*(Signed)*

Eric Muli, Legal Officer, for  
Abena Kwakye-Berko, Registrar, Nairobi