



**Before:** Francesco Buffa

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

TOSON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

---

**JUDGMENT ON RECEIVABILITY**

---

**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Yun Hwa Ko, UNFPA

## **Introduction**

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”) serving as Representative at the UNFPA Oman Country Office (“CO Oman”) within the Arab States Regional Office (“ASRO”) at the P-5 level.

## **Procedural History**

2. On 21 July 2021, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the Respondent’s decision to finalise his performance appraisal for the year 2020; the process for which he contends was irregular. This application was registered as UNDT/NBI/2021/058.

3. The Respondent filed his reply on 19 August 2021, challenging the application on grounds of jurisdiction and merits.

4. On 24 January 2022, the Applicant was invited to file a rejoinder limited to the issue of receivability by 31 January 2022.

5. On 31 January 2022, the Applicant filed a motion “for extension of time to comply” with the order to file a rejoinder. In substance, the applicant is seeking a stay of proceedings in until 30 July 2022.

6. On 1 February 2022, the Tribunal issued Order No. 009 (NBI/2022) refusing the motion for suspension of proceedings. The Tribunal however extended the deadline for the filing of his submissions on receivability.

7. On 21 February 2022, the Applicant filed another motion for stay of proceedings on grounds identical to that of his previous motion for extension of time/suspension of proceedings.

8. This Judgment will address the Applicant’s second motion for suspension of proceedings and the receivability issues raised by the Respondent.

## Considerations

### *The Applicant's Second Motion for Suspension of Proceedings*

9. The Tribunal carefully considered the Applicant's second motion for a stay of proceedings. The Applicant's *ex parte* filing of his medical reports was given due regard.

10. At the outset, the Tribunal notes that the Applicant's motion was essentially a reiteration of his previously filed and dismissed motion.

11. In Order No. 009 (NBI/2022), the Tribunal stated that it was not required to seek the Applicant's response to the Respondent's submissions on receivability; and that, indeed, the Tribunal can properly rule on its jurisdiction *proprio motu* and following its own inquiry, with or without hearing the parties' submissions on whether the application is receivable.

12. This principle was also underscored in *Cherneva* UNDT/2021/101, where the Court held thus:

[t]he Tribunal has the competence to review an application's receivability even if the parties do not raise the issue because "it constitutes a matter of law and the Statute prevents the [Tribunal] from receiving a case which is actually non-receivable" (see *Christensen* 2013-UNAT-335, para. 21).

13. The Tribunal is aware of the Applicant's health conditions, which however - also considering time and effort expounded by the Applicant on every motion for extension of time - cannot be considered serious to the extent of preventing him to file brief submissions on the receivability issue he might have had.

14. The Tribunal finds that there are no grounds for it to revise or reconsider its previous ruling on the matter. The Applicant's motion is refused, and the Tribunal will proceed to rule on the receivability of this case.

*Receivability*

15. The Applicant seeks to challenge the Director of the Department of Human Resources' ("DHR") action to place a "temporary marker" on his performance appraisal for the year 2020.

16. Whereas the Applicant contends that the performance appraisal was "finalised by DHR on 17 March 2021," "without the required notification" and ratings, the Respondent submits that the Applicant has misunderstood the process; that the performance appraisal is in fact still open, and that this action was taken in respect of all staff members who had not completed their appraisals by 15 March 2021.

17. The Applicant complains that the marker is equivalent to "not to hire or promote", exceeds power by the DHR (who can put it only when staff member refuses to finalize the evaluation) and prevent him from asking for a rebuttal.

18. The Respondent submits quite categorically that,

[The] Applicant is free to avail himself of the rebuttal process as and when he has a final 2020 PAD, and only then will the rebuttal timeline start.

19. A staff member may not challenge the intermediate or preparatory steps of an administrative decision. Only the final decision which carries direct legal consequences for the staff member's legal rights and obligations is receivable.

20. The well-established jurisprudence on the meaning of an administrative decision, for purposes of the Staff Rules governing receivability, is in the former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), paragraph V, as follows:

It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those

not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

21. Given its neutral content, the marker bore no direct consequence on the Applicant's work relationship and is only a preparatory step of the administrative decision related to the performance evaluation, which was lawfully suspended by the Administration (owing to the situation emerging after the Applicant's complaint of retaliation against his supervisor) and not finalized at the time of the application.

22. In the case at hand, the impugned "decision" carried no "direct legal consequences" given that it was not final and remains open to challenge by way of rebuttal.

23. The application is therefore not receivable *ratione materiae*.

### **Order**

24. The application is dismissed.

*(Signed)*

Francesco Buffa

Dated this 28<sup>th</sup> day of February 2022

Entered in the Register on this 28<sup>th</sup> day of February 2022

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi