



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/065

Judgment No.: UNDT/2022/45

Date: 18 May 2022

Original: English

**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BALAKRISHNAN MENON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Pranav Krishna  
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**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR  
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## **Background and procedural history**

1. The Applicant is the Chief of the Aviation Safety Unit, at the P-4 level, at the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”).
2. On 5 August 2021, he filed an application contesting what he describes as the “[r]efusal to include budget proposal for installation of P-5 level post as Chief of Aviation Safety Unit, MINUSMA in line with binding applicable law.”
3. On 1 March 2022, the Tribunal issued Order No. 027 (NBI/2022) in which the Respondent’s motion to suspend the time limit within which to file a reply (pending determination of the Tribunal only on the question of receivability) was denied and the Respondent was directed to file a complete and full reply by 8 March 2022.
4. On 8 March 2022, the Respondent filed the reply.
5. The Applicant filed a rejoinder to the reply on 21 March 2022.
6. The Tribunal held a case management discussion (“CMD”) on 20 April during which the parties were directed to file submissions on whether the application is receivable and whether the United Nations Dispute Tribunal (“UNDT”) has competence to grant the requested remedy.
7. The Applicant and Respondent filed the required submissions on 10 and 11 May 2022 respectively.

## **Summary of the relevant facts**

8. On 25 August 2016, the Applicant joined MINUSMA as a P-4 Chief Aviation Safety Officer on temporary assignment from the United Nations Mission for the Referendum in Western Sahara.
9. On 3 March 2017, he applied for a recruit-from-roster job opening and was

selected as MINUSMA P-4, Chief, Aviation Safety Unit in the Office of the Director Mission Support (“DMS”).<sup>1</sup>

10. On 8 February 2021, the Applicant addressed an email to the DMS in which he requested for a reclassification of his P-4 post to the P-5 level.<sup>2</sup>

11. The DMS responded to the Applicant’s email on the same date declining the Applicant’s request.<sup>3</sup>

12. On 22 February 2021, the Applicant sought management evaluation of the decision not to include a budget proposal for installation of a P-5 level post as Chief of Aviation Safety Unit/MINUSMA.<sup>4</sup>

13. On 11 May 2021, the Management Evaluation Unit (“MEU”) informed the Applicant that MINUSMA would undertake a classification review in line with section 1.3 of ST/AI/1998/9 (System for the classification of posts) to ascertain whether a reclassification of his post, based on the duties and responsibilities performed since it became a Regional Aviation Safety Unit, was warranted and that, therefore, considered his management evaluation request moot.<sup>5</sup>

14. Subsequent to these proceedings, on 29 April 2022 and on 5 May 2022, the Applicant received an email on behalf of MINUSMA’s Chief Human Resources Officer (“CHRO”) requesting his input for the process of reclassification.<sup>6</sup>

15. At the close of pleadings, the Tribunal was asked to determine whether the application is receivable and parties filed submissions for that purpose.

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<sup>1</sup> Reply, para. 5.

<sup>2</sup> Application, annex 22.

<sup>3</sup> Ibid., at annex 2.

<sup>4</sup> Ibid., at annex 3.

<sup>5</sup> Ibid., at annex 4.

<sup>6</sup> Applicant’s submissions on receivability, para. 5(f).

## **Parties' submissions on receivability**

### ***The Respondent***

16. The Respondent's submissions on receivability are summarized below.
- a. The Applicant does not identify a precise decision but rather alleges a continuing violation in failing to include the P-5 level post in the budget. This is contrary to the law that requires a precise decision with a determined date that individually impacts the staff member.
  - b. The Applicant serves at the P-4 level and performs P-4 functions. He has no contractual right to perform functions at the P-5 level or to encumber a P-5 position. Nor does he have any right to reorganize the Aviation Unit.
  - c. The Dispute Tribunal is not competent to review the budget proposal, a prefatory act preceding the General Assembly's decision. The decision not to include the post is not an appealable administrative decision within the meaning of art. 2.1 of the UNDT Statute. A proposed budget does not produce direct legal consequences on terms and conditions of employment and as such it is not receivable.
  - d. The Administration has the discretion to decide on its functions. The Applicant may only contest an administrative decision that directly affects his terms of appointment.
  - e. The Dispute Tribunal lacks subject matter jurisdiction for lack of timely management evaluation. The Applicant was notified orally in November 2020 that his request was rejected. He only requested management evaluation on 22 February 2021. Staff rule 11(2)(c) stipulates that a request for management evaluation must be made within 60 days from when the staff member first became aware of a contested administrative decision.
  - f. The Applicant has not specified the date in November that he was

notified that the post would not be included in the budget proposal. However, at the latest, he was required to request management evaluation by 29 January 2021. The 8 February 2021 reiteration of the decision did not reset the deadline.

g. The Applicant's claim of inordinate delay in reclassifying his position is not receivable. The Applicant's terms of appointment do not provide any time limit for a classification process. There has been no negligence or violation of any specific rules or regulations regarding the classification process. The Applicant cannot create a duty where none exists.

h. The Applicant is estopped from raising a claim of inordinate delay. The Applicant did not submit a request for classification in line with section 1.3 of ST/AI/1998/9. The Applicant's various emails to the DMS were submissions to include a P-5 post in the budget proposal and are not a request for classification envisaged under ST/AI/1998/9. The Applicant himself has delayed. He has not yet responded to a 29 April 2022 request for comments on his job description.

i. The Applicant's claim of inordinate delay, if receivable, may only be considered in the context of a final administrative decision. There has been no final administrative decision on the classification of the post financing the Applicant's position. The final administrative decision is not only pending the Applicant's comments on his job description, but also the outcome of an ongoing review process of the structure of MINUSMA aviation unit and the aviation safety framework for the whole West African Region.

### ***The Applicant***

17. The Applicant's submissions on receivability are summarized below.

a. He is approaching the Tribunal against the Administration's decision dated 8 February 2021 and against the Administration's deliberate breach of MEU's directions of 11 May 2021.

b. The Respondent's decision of 8 February 2021 is a contestable administrative decision, since the decision, besides being in direct contravention with the binding applicable law, is in non-compliance with his contract of employment. The impugned decision has had an adverse legal consequence on his rights and entitlements, impeding his career progression and causing demonstrable economic prejudice. Thus, the contested decision falls within art. 2.1(a) of the UNDT Statute.

c. In accordance with staff rule 11.2(a), prior to filing the present application before the UNDT, he submitted the impugned decision to MEU. After consultation with the experts, MEU took note of the MINUSMA's categorical undertaking in its decision dated 11 May 2021 and specifically recorded the MINUSMA's statement that it would carry out a classification review. He wrote several emails inquiring about the progress and implementation of MEU's directions but received no response.

d. Subsequently, MINUSMA in breach of their specific undertaking given to the MEU in furtherance of their discriminatory actions against the Applicant, carried out a survey in breach of the mandatory procedural requirements, dismantled the Regional Aviation Safety Office - West Africa and replaced it with an arrangement of Cadre of Aviation Safety Officers. This was done specifically to get out of the undertaking given by them to the MEU.

e. After MINUSMA's breach of MEU's specific directions, he filed the present application within 90 days from the outcome of management evaluation.

f. The CHRO's email of 29 April 2022 as confirmed on 5 May 2022, is calculated at circumventing any sort of order/interference from the Tribunal on the *sub-judice* matter.

## Considerations

18. At the CMD held on 20 April 2022, the parties agreed that what was at issue was the reclassification of the Applicant's P-4 post to P-5 level because it was only after this process was implemented that the post of P- 5 could be budgeted for as requested by the Applicant (the impugned decision). This seemed to be consistent with ordinary practice as a budget for a non-existent position could not be justified.

19. Article 2.1(a) of the UNDT Statute confers jurisdiction upon the Dispute Tribunal to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance 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 the alleged non-compliance.

20. The burden is on the Applicant to establish that the administrative decision at issue meets the key characteristics of a reviewable decision under the Tribunal's statute. As was held in *Farzin*<sup>7</sup>, "an appealable administrative decision is a decision whereby its key characteristic is the capacity to produce direct legal consequences affecting a staff member's terms and conditions of appointment".

21. The requirement of direct legal consequences in a reviewable administrative decision was discussed in *Alhawi*, where the staff member was coveting a particular post but it was not offered to him. In its determination, UNAT found that to determine whether the administrative decision had a direct impact on Mr. Alhawi's terms of appointment or contract, the UNDT considered the discretionary power of the Agency in deciding not to advertise the post he was coveting, and to hire someone else under a different modality of contract, the Individual Service Provider. The UNRWA DT was cognizant of the applicable regulatory framework<sup>8</sup>. The UNAT affirmed the UNDT decision dismissing the application.

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<sup>7</sup> 2019-UNAT-917, para. 38.

<sup>8</sup> 2019-UNAT-937, para. 12.

22. The lesson to derive from *Alhawi* is argued by the Respondent in that the Applicant has no right to determine the timelines for the classification process where none is statutorily provided under the Classification Administrative Instruction. In other words, the Secretary General has discretion to restructure MINUSMA; and this includes a (re)classification exercise when he deems it fit due to operational requirements and in accordance with the legal and regulatory framework. Failure to carry out the reorganization at a time convenient to the Applicant just because he covets a particular position does not rise to a reviewable administrative decision. The Applicant avers that the Respondent's decision not to include budget proposal for installation of a P-5 level post as Chief of Aviation Safety Unit, MINUSMA in line with binding applicable law is a contestable administrative decision, since the decision, besides being in direct contravention of the binding applicable law, breaches Applicant's contract of employment. He states:

The Impugned decision has had a direct negative/ adverse legal consequence on Applicant's rights/ entitlements, **impeding his career progression and causing demonstrable economic prejudice**<sup>9</sup>. (emphasis added).

23. The Tribunal does not agree with the Applicant's assertions in this regard. He has not shown which terms of his appointment or which rules and regulations were violated by the Administration's failure to reclassify a post he coveted and to budget for it. The Applicant may project his future career opportunities in the Organization but in order to bring an action, he must demonstrate that the Administration's inaction or omission has direct legal consequences on his current terms and conditions of contract and not future prospects. He has not done this.

24. When considering a reviewable decision, the Tribunal is called upon to consider, apart from the direct legal consequences, the nature of the decision and the legal framework under which the decision was made<sup>10</sup>. In the instant case, the Applicant

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<sup>9</sup> Applicant's submissions on receivability, para. 4.

<sup>10</sup> *Andati-Amwayi* 2010-UNAT-058, para. 19, confirmed in *Lloret Alcaniz et al.* 2018-UNAT-840, para. 62.



asserts that after consultation with the experts, MEU took note of the Mission's categorical undertaking in its decision of 11 May 2021, and specifically recorded the Mission's statement that it will carry out a classification review. The relevant portion reads as under:

*That said, the Mission took note that you considered that a number of functions you presently carry out do present significant changes from its initial classification, and advised the MEU that it will undertake a classification review in line with ST/AI/1998/9, Section 1.3, to ascertain whether a reclassification of the post, based on the duties and responsibilities performed since it became a Regional Aviation Safety Unit, is warranted. (Applicant's emphasis)<sup>11</sup>.*

25. The Tribunal does not consider that the MEU's communication in response to the Applicant's request for management evaluation is a reviewable administrative decision. The nature of the communication does not meet the requirements of a reviewable administrative decision because of the context in which it was made, the office that made it and the legal framework under which it was made.

26. Finality in the administrative decision is another requirement that constitutes a reviewable administrative decision because it is only from a final decision that consequences arising therefrom can be ascertained. In this regard, UNAT dismissed the applicant's appeal in *Olowo-Okello* finding, *inter alia*, that:

[...] the 25 July 2018 statement by the Administration, due to its nature, was not sufficient to qualify as an administrative decision directly affecting the terms of appointment or contract of employment...as required by Article 2(1) of the UNDT Statute. It was not a final decision made by the Administration and did not involve a decision with an adverse, certain and present impact on Mr. Olowo- Okello's status<sup>12</sup>.

27. In that application, Mr. Olowo-Okello was advised by the Administration through a statement made on 25 July 2018 that "a final decision on [his] case was to be taken following the receipt of his comments". Similarly, in the case at bar, the Applicant was advised by the Administration that it was considering facilitating the

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<sup>11</sup> Applicant's submissions on receivability, para. 5(b).

<sup>12</sup> *Ibid.*, para. 37.

classification process. The Applicant has not shown that the classification process has been completed and that he is challenging a final decision from that process as *per* the provisions of ST/AI/1998/9.

28. In conclusion, as pointed out by the Respondent, the Applicant has failed to identify an administrative decision capable of being reviewed, that is, a final, precise decision taken by a competent authority having direct adverse impact on his contractual rights within the meaning of art. 2.1(a) of the UNDT Statute. It is not receivable *ratione materiae*.

29. The application also raises an issue of discrimination. In view of the finding that the application is not receivable, the Tribunal is refrained from making any finding on the allegation of discrimination.

30. The Respondent raised the issue of statute of limitation in relation to the untimely lodging of the application. The Tribunal is of the view that since the matter is not receivable *ratione materiae*, it is not necessary to make any determination on receivability *ratione temporis*.

31. The Tribunal may not make any finding on any allegation concerning events that occurred subsequent to the filing of the application, for instance, whether the Applicant has delayed in submitting his comments for purposes of classification or whether the Administration has instituted classification process to circumvent these proceedings, unless the pleadings are amended to take those new matters into consideration.

## **Judgment**

32. The application is not receivable *ratione materiae* and it is dismissed.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 18<sup>th</sup> day of May 2022

Entered in the Register on this 18<sup>th</sup> day of May 2022

*(Signed)*

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi