



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CAUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

AND

**ON A MOTION FILED PURSUANT TO
ARTICLES 19 AND 36 OF THE UNDT
RULES OF PROCEDURE**

(VILLAMORAN)

AND

**ORDER ON THE APPLICANT'S
REQUEST FOR ANONYMITY**

Counsel for the Applicant:
Dorota Banaszewska, OSLA

Counsel for the Respondent:
Christine Graham, ALD/OHR, UN Secretariat
Clémentine Foizel, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”), based in Bamako.

2. On 12 August 2021, she filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi contesting MINUSMA’s decision, dated 6 August 2021, to retroactively terminate her appointment as of 31 March 2021 without any notice of termination. Alternatively, she contests the decision not to extend her appointment beyond 31 March 2021. (“The contested decision”)

3. The Respondent filed a reply on 17 August 2021.

Facts

4. On 1 March 2017, the Applicant worked on a loan from MINUSMA to the Department of Peace Operations (“DPO”). On 29 April 2019, the Applicant signed a Memorandum of Understanding (“MOU”) with MINUSMA, pursuant to which her loan to DPO was extended. At the same time, the Applicant relinquished a specific lien against her post at MINUSMA.¹

5. Under paragraph 4 of the MOU, the Applicant was to retain her fixed-term appointment while serving with DPO on temporary assignment through 29 February 2020.²

6. On 31 January 2020, the Applicant was notified by DPO that her loan would not be renewed due to lack of funding for her post.³

¹ Application, annex A.

² Ibid., para. 4.

³ Application, annex B.

7. On 12 February 2020, MINUSMA, citing the provisions of the MOU signed in April 2019, notified the Applicant of the separation procedures and availed her the separation documents.⁴ This action gave rise to the Applicant's claim before the UNDT in the case UNDT/NBI/2020/039.

8. On 21 February 2020, the Applicant was placed on sick leave. She subsequently remained on sick leave until 11 March 2021. Her appointment was extended on humanitarian grounds pending certifications from the Medical Services. On 11 March 2021, the Medical Services rejected the Applicant's further request for certification of her sick leave.⁵

9. On 30 March 2021, the Applicant requested MINUSMA for a final extension of her appointment on humanitarian grounds through May 2021, as her next medical appointment was scheduled for May 2021.⁶

10. On 14 May 2021, the Applicant was informed that that her appointment would be extended on humanitarian grounds until the end of May 2021 and that subsequently she would be separated.⁷

11. On 17 May 2021, the Tribunal issued Judgment No. UNDT/2021/055, holding that the Applicant did not relinquish her general right to return to MINUSMA and that the Administration was under an obligation to fulfil its duties of reabsorbing her or finding suitable alternative posts for her. The Tribunal rescinded MINUSMA's decision to not renew the Applicant's appointment.⁸

12. In May and June 2021, the Applicant reached out to MINUSMA requesting the payment of her salary and emoluments effective April 2021. The Applicant also requested to be given work in compliance with Judgment No. UNDT/2021/055.⁹

⁴ Application, annex C.

⁵ Application, para. 6.

⁶ Application, annex θ.

⁷ Application, para. 11 and annex κ.

⁸ Application, para. 12 and annex λ.

⁹ Ibid., para. 14.

13. On 29 June 2021, the Applicant submitted a management evaluation request challenging the decision not to pay her salary and emoluments.¹⁰

14. On 16 July 2021, the Administration appealed Judgment No. UNDT/2021/055.¹¹

15. On 4 August 2021, the Applicant requested suspension of the implementation of the decision not to pay her salary and emoluments.¹²

16. On 6 August 2021, the Respondent submitted its reply to the Applicant's Suspension of Action ("SOA") request.¹³ According to the Applicant, it was only from this reply that she learnt that the Administration retroactively separated her as of 31 March 2021.

17. On 10 August 2021, the Dispute Tribunal issued Order No. 160 (NBI/2021), dismissing the SOA request of 4 August 2021 as irreceivable.¹⁴

18. On 12 August 2021, the Applicant submitted a management evaluation request of the contested decision.

Submissions

Receivability

Respondent's submissions

19. The Respondent submits that the SOA application is not receivable *ratione materiae*. The Respondent further submits that the Applicant has not met her burden to establish the existence of a decision to terminate her appointment as she has not

¹⁰ Application, para. 15 and annex p1-2.

¹¹ Application, annex ζ1-3.

¹² Application, annex υ1 – 2.

¹³ Application, annex φ.

¹⁴ Application, annex χ.

provided any evidence or details about this alleged termination decision. The Applicant's appointment expired on 31 March 2021 because her request for sick leave could not be certified in the absence of valid medical reasons. Staff rule 9.4 provides that fixed-term appointments shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. Staff rule 9.1 provides that the expiration of an appointment constitute separation from service. Staff rule 9.6 stipulates that separation upon the expiration of an appointment is not a termination.

20. The Respondent also argues that the application is not receivable *ratione temporis* because, on 7 March 2021, the Chief Human Resources Officer ("CHRO") of MINUSMA informed the Applicant that since her sick leave request could no longer be certified based on valid medical reasons, there was no ground for further extension of her appointment. The Applicant did not request management evaluation within the 60 days' deadline. The non-extension decision is therefore not properly before the Dispute Tribunal.

Applicant's submissions

21. The Applicant filed a rejoinder on the issues of receivability on 18 August 2021.

22. On the argument that her application is receivable *ratione materiae*, she makes the following submissions.

- a. The Respondent's contention that her appointment allegedly expired on 31 March 2021 because her sick leave request was denied by the Medical Services is not factually accurate. She further submits that her appointment was extended on humanitarian grounds beyond 31 March 2021 and, thus, until

at least 5 September 2021. In support of this claim, the Applicant describes conversations and email exchanges between her and the CHRO/MINUSMA.¹⁵

b. The information she received on her appointment extension on humanitarian grounds was provided by the Representatives of the Mission's Human Resources who had the mandate to inform her about her contractual status. Thus, she had also no reasonable grounds to assume that the CHRO and her colleagues acted *ultra vires*.

c. Staff rules 9.4 and 9.6 do not apply directly to her situation since her current appointment is not a regular fixed-term appointment but it is an appointment extended on humanitarian grounds. Therefore, the specificity of the latter should be taken into account when assessing her situation in light of the application of the aforementioned provisions *mutatis mutandis* to her situation. Considering the above, the Applicant submits that it is a clear case of a decision on retroactive termination issued on 6 August 2021 by the Administration. As the latter decision is unlawful, the Applicant considers that she is still a staff member and an employee of the Organization.

d. Even assuming, *arguendo*, that the Respondent's submissions of 6 August 2021 constitute a formal proper written notice of termination, the Applicant maintains that she shall remain employed until at least 5 September 2021 and that even, as alleged by the MINUSMA Administration in the submissions of 6 August 2021, that they made a promise to her by mistake, they are estopped from retracting their promise of employment, as submitted in detail in the application.

e. MINUSMA's retraction of an email of 14 May 2021 by which she was informed that her appointment would be extended on humanitarian grounds until the end of May 2021 needs to be analysed in the broader context of the Administration misleading and misinforming her for months. Thus, a

¹⁵ Applicant's rejoinder on the issues of receivability, para. 5.

retroactive change of an administrative decision to her detriment months after it was taken is unacceptable and would entail unbearable consequences for her.

f. The MINUSMA's Administration's dealing with her does not consist of simple errors. The Administration breached its duty to act justly, fairly and transparently towards her by deciding to withhold her salary for months but at the same time not separating her and misleading her about her contractual status. She argues that by putting her in such limbo the Administration aimed at making her resign out of her own will to avoid the implementation of the Dispute Tribunal's Judgment No. UNDT/2021/055 of 17 May 2021. Therefore, the doctrine of clean hands, expressed as the principle *nemo auditur propriam turpitudinem allegans* is of direct application in the present case. Thus, since the Administration did not act in the case at stake in good faith or according to the requirements of equity, it cannot benefit from its own dealings to deny the receivability of the application.

23. On the argument that her application is receivable *ratione temporis*, she makes the following submissions.

a. Contrary to the Respondent's contention, she was not informed about any administrative decisions aiming at her separation on 7 March 2021. She was informed about the Administration's decision retroactively on 6 August 2021 – and, thus, not directly by the Mission but in the course of the judicial proceedings instituted by her before the Dispute Tribunal.

b. Considering the gravity and the duration of the Administration's inaction and misinformation, the Administration is both estopped and precluded by the doctrine of clean hands to rely on its own previous failures when dealing with her to claim that the application is allegedly irreceivable.

Applicant's motion pursuant to Articles 19 and 36 of the UNDT Rules of Procedure (Villamorán)

24. The Applicant submits that she is aware that she can be separated anytime by the Administration. If the Administration is allowed to proceed and process her separation, she will be separated from her post and suffer harm. In particular, she will be deprived of her right to be covered by a health insurance plan allowing her to continue her medical treatment. She therefore requests the Tribunal to order the suspension of the contested decision pending the art. 13 suspension of action proceedings.

Considerations

The contested decision

25. The Applicant contests “the decision of 6 August 2021 issued by the Administration to retroactively terminate her appointment as of 31 March 2021 without any notice of termination. The decision to terminate her appointment, extended on humanitarian grounds at least until 31 May 2021, and thus without a notice of termination and retroactively, is unlawful”. Alternatively, the Applicant contests the decision not to extend her appointment beyond 31 March 2021 and submits that the latter is unlawful since she received a written promise of employment from the MINUSMA Administration to at least until 31 May 2021. Even assuming, *arguendo*, that the MINUSMA Administration, as they allege, made a promise to her “by mistake”, they are estopped from retracting their promise of employment”.

Receivability

26. The Respondent has urged the Tribunal to find that the application is not receivable *ratione materiae* and *ratione temporis*. In the former case, the Respondent states that the Applicant has not met her burden to establish the existence of a decision to terminate her appointment as she has not provided any evidence or details

about this alleged termination decision. In the later argument the Respondent avers that on 7 March 2021, the CHRO/MINUSMA informed the Applicant that since her sick leave request could no longer be certified based on valid medical reasons, there was no ground for further extension of her appointment. The Applicant did not request management evaluation within the 60 days' deadline.

Receivability ratione materiae

27. 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.

28. The guiding jurisprudence relevant to this application on what constitutes a reviewable administrative decision is *Andati-Amwayi* 2010-UNAT-58, paras. 17-19; where the appellate Tribunal reasoned as follows:

What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

29. In the present case, the Applicant has cited a 6 August 2021 document as the decision which in essence is a reply to an application in proceedings brought by the Applicant in this Tribunal in case number UNDT/NBI/2021/064. In the reply, the Respondent challenged the application citing events that happened in March 2021 and after that date, specifically April 2021 onwards. To put matters into context the relevant record in that case is as follows:

On 5 August 2021, the Applicant filed an application for suspension of action before the United Nations Dispute Tribunal in Nairobi contesting MINUSMA's **decision to not pay her salary and emoluments starting from April 2021** (emphasis added).¹⁶

30. The Respondent filed a reply in that case on 7 August 2021 submitting that:

... the application for suspension of action is not receivable *ratione materiae*. The jurisdiction of the Tribunal is limited to preserving the *status quo*. The *status quo* is that the Applicant's appointment with MINUSMA expired on 31 March 2021. As a result, MINUSMA stopped remunerating the Applicant. By seeking the suspension of the non-payment of salaries and emoluments from April 2021 onwards, the Applicant is requesting the Dispute Tribunal to change the *status quo*, as such an order would require the Organization to appoint the Applicant for the contested period. Further, such an order would also result in final relief to the Applicant in the form of payment of the contested amounts. The Tribunal may not grant an interlocutory order which will result in the final disposition of the application.¹⁷

31. This Tribunal dismissed that application agreeing with the Respondent that,

The decision impugned here is to refuse payment of the salary and emoluments. Contrary to the Respondent's argument, the Applicant is not formally seeking to change the *status quo*; rather, the Applicant's claim is based on an assumption that she remains in employment with the Organization. Notwithstanding the question whether or not the Applicant can demonstrate such a legal relation throughout the period since April 2021, the legally relevant fact is that the present

¹⁶ Paragraph 2 of Order No. 160 (NBI/2021).

¹⁷ *Ibid.*, para. 15.

application for suspension of action seeks to satisfy the principal claim. As such, the Tribunal agrees with the Respondent that it is not receivable.¹⁸

32. In this Tribunal's view, the document cited as the 6 August decision, does not meet the definition prescribed for an administrative decision subject to judicial review because of (a) the nature of the document, (b) the author of the document and (c) the legal framework under which the document was prepared and its purpose.

a) Nature of the document

33. The 6 August 2021 document is a reply defending proceedings filed in this Tribunal. It is therefore expected that any matters arising from that reply in the application would be brought to the attention of the Tribunal handling that particular application for a determination. There is no legal or practical reason provided why the Applicant could not raise a rejoinder to deal with the reply of 6 August 2021 in the application in which it was filed. The Tribunal finds that this is multiplicity of applications and an abuse of Tribunal process.

b) Author of the document

34. The alleged 6 August 2021 document was authored by legal officers acting for the Respondent to defend an application before the Tribunal. It cannot be said that the said author had a legal mandate to notify the Applicant of a decision to terminate her services in the sense that the Applicant wishes the Tribunal to believe. The role of Counsel was to defend the application, and in the defence cited events relevant to disposition of the case specifically that the Applicant could not receive a salary after separation on 31 March 2021. Jurisprudence abound on what constitutes notice of an administrative decision, whether express or implied¹⁹, going by these definitions, the context in which this information was obtained by the Applicant does not qualify as notice. Holding that a reply to judicial proceedings as was the case in this matter

¹⁸ Ibid., para. 17.

¹⁹ See for example *Qassem* 2021-UNAT-1132, para. 23; *Jean* 2017-UNAT-743 para. 23; *Babiker* 2016-UNAT-672 and *Chahrour* 2014-UNAT-406, para. 31.

constituted an administrative decision would be stretching the definition of an administrative decision too far, not contemplated by the Staff Rules and Regulations and certainly not supported by jurisprudence.

c) Legal framework under which the document was prepared and its purpose.

35. As argued above, the legal framework under which the 6 August 2021 document was made was as a defence to an existing case before the Tribunal against the Respondent. In terms of this Tribunal's case management procedures, a proper course of action would have been to present a rejoinder to the reply of 6 August 2021 before the Judge handling the case. This is because the purpose of the 6 August 2021 reply was not to inform the Applicant that her services had been terminated due to effluxion of time but rather to inform the Tribunal that the Applicant's services had been terminated therefore she was not entitled to remuneration after termination.

36. In terms of the provisions of this Tribunal's Statute and relevant jurisprudence and as argued by the Respondent, the application is not receivable as there is no administrative decision which is the subject of an appeal. The Applicant has not satisfied the burden of demonstrating an administrative decision that affects her terms of contract or appointment.

Receivability ratione temporis

Assuming that the reply in case no. UNDT/NBI/2021/064 is an administrative decision as described by the Applicant

37. The Applicant argues that she only got notice of her separation on 6 August 2021 through the reply filed in this Tribunal. This is not entirely correct going by the history of the Applicant's record during the relevant period, 31 March to 6 August 2021. The Respondent has described how, on 7 March 2021, the Applicant was notified that her contract would not be renewed in the absence of approved sick leave. The Applicant did not dispute this, rather she asked that her case be considered on

humanitarian grounds. The Applicant has submitted a trail of emails between her and the CHRO/MINUSMA, on the status of her request for extension of her contract on humanitarian grounds. Of particular interest to the question whether the Applicant had notice that her contract was not renewed after 31 March is the email attached as annex +µ1 dated 17 May 2021 where the Applicant is asking "... can you please confirm that I am extended through May?" This was three days after the CHRO had recalled her email with the Subject "Final extension and separation of [Applicant]". This was also after the Applicant had not been provided with work nor been paid remuneration in the month of April 2021.

38. Arguably, the Applicant states that her contract was extended through 31 May 2021. The Respondent states that the extension was an error (citing the recall message email).²⁰ In the Tribunal's view, there is no doubt that the Applicant was aware that the question relating to the non- renewal of her contract beyond 31 March which includes her separation from service on 31 March 2021 remained unresolved. There was no firm promise of extension of an offer of employment beyond 31 March 2021 hence the Applicant's email of 17 May 2021. As such she was obliged to seek management evaluation of the decision not to extend her contract and to separate her on 31 March 2021 within the stipulated time limit. That the Applicant continued to negotiate with the Administration (based on her correspondences with the CHRO especially) and hope for positive feedback does not act as a waiver of the deadline.²¹

39. Jurisprudence of the Appeals Tribunal provides that the decisive moment of notification for purposes of staff rule 11.2(c) is when "all relevant facts ... were known, or should have reasonably been known".²²

40. In this application, the Applicant has not shown an unequivocal extension of contract beyond 31 March 2021, the Respondent did not assign work nor pay the Applicant salary at the end of April and on 17 May 2021 the Applicant asked for

²⁰ Reply, para. 27.

²¹ See generally, *Ahmad Mustafa et al.* 2021-UNAT-1126.

²² *Mokrova* -2021- UNAT-1092, citing *Krioutchkov* 2016-UNAT-691, para. 21.

confirmation about the status of her contract through May. These factors are consistent with a finding that the Applicant knew or ought to have known by, at the latest, 17 May 2021, that her contract had not been renewed beyond 31 March 2021. This in effect means that it has taken the Applicant more than 80 days to seek management evaluation and suspension of action of the decision. This period is inordinately late and there being no legally valid excuse for the delay, the application may not be sustained. Therefore, the Tribunal agrees with the Respondent's submission that the application is not receivable *ratione temporis* because the Applicant filed her request for management evaluation and SOA application more than 80 days out of time.

Request for a Villamoran Order

41. It is a requirement that for an Order referred to as a *Villamoran* Order to be granted, the implementation of the impugned decision must be imminent with specificity.²³ The Applicant has not provided a specific date of implementation, rendering this application irregular.

Request for anonymity

42. This Tribunal had earlier ruled in a different matter concerning the same parties that since no personal data regarding the Applicant is disclosed in this Order, there is no justification to depart from the general rule that proceedings of the Tribunal must be transparent.²⁴ The Tribunal maintains this stand.

Conclusion

43. The Applicant has failed to satisfy art 2.1 of the Dispute Tribunal's Statute that requires that she must demonstrate that there is an administrative decision for review. In her alternative plea, she has failed to satisfy one of the requirements of urgency under art.2.2 of this Tribunal's Statute in order for this Tribunal to exercise

²³ *Nwuke* 2012-UNAT-230 para. 34 citing *Villamoran* 2011-UNAT-160, para. 43.

²⁴ *Caucci* UNDT/2021/055, para. 30.

its jurisdiction to suspend action pending management evaluation. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 20th day of August 2021

Entered in the Register on this 20th day of August 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi