



ATIONS DISPUTE TRIBUNAL

Introduction

1. The Applicant is a former staff member of the United Nations

reasons and requested a transient posting to Goma. On the same date, the Civil Affairs Division of MONUSCO advised the Applicant that his resignation was considered effective from 28 May 2012.

Procedural Background

17. The Applicant filed the instant Application on 20 December 2012, to which the Respondent filed a Reply challenging receivability on 11 January 2013 and further filed a Motion requesting for receivability to be considered as a

dated 3 May 2012 seeking to nullify the effect of the letter dated 2 May 2012 and requesting the CCPO to disregard the letter of resignation.

22. The Applicant adopts the position that the instruction given by the CCPO for the Applicant's transfer to Kamina was thwarted by a Ms. Eileen Lim, the National Staff Unit Officer at MONUSCO who refused to implement the CCPO's instruction to transfer him.

23. He further maintains that he only knew of the decision to separate him on 31 July 2012 vide an email of that date written to relevant Security Officers at MONUSCO to retrieve his United Nations ID.

24. The Applicant states that he was not notified in writing of the administrative decision to separate him from the Organization and that by virtue

Case No. UNDT/NBI/2012/073

Judgment No. UNDT/2013/037

Consideration

Receivability as a Preliminary Issue

32. The Tribunal must first address the Respondent's principal contention that the Application is not receivable due to the fact that the Applicant did not submit the contested decision for management evaluation before filing the Application or at all.

33. Staff rule 11.2(a) pertinently provides that:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), *shall, as a first step*, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

34. The only exception to the legal prerequisite for submission of a contested decision for management evaluation is to be found in staff rule 11.2(b) rendered thus:

A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

35. The Statute of the Dispute Tribunal provides in part at Article 8(1) (c) that an application shall be receivable if "the Applicant has previously submitted the contested administrative decision for management evaluation, *where required*." (Emphasis added)

36. It therefore follows from article 8.1 of

37. The Applicant however seeks to qualify the requirement for administrative review of the contested decision on the following grounds, *viz.*,

- i) The decision to separate him was never notified to him in writing and was thus an implied decision that could not be subjected to the administrative review process;
- ii) He subsequently withdrew his letter of resignation dated 2 May 2012 by way of an email dated 3 May 2012;
- iii) Purported mediation efforts by the Office of the Ombudsman and Mediation Services sufficed in the present instance.

38. Separation from service by way of resignation is a matter of law and is governed by the Staff Regulations and Staff Rules, which renders it is necessary to have recourse to staff rule 9.2 which provides that:

- a) A resignation, within the meaning of the Staff Regulations and Staff Rules, is a separation initiated by a staff member.
- b) Unless otherwise specified in their letters of appointment, three months' written notice of resignation shall be given by staff members holding continuing appointments, thirty calendar days' written notice by those holding fixed-term appointments and

have an unqualified right to refuse to accept a resignation. If that proposition were true, it would render it impossible for an employee to voluntarily terminate the employer-employee relationship by way of resignation because the employer could choose to repeatedly refuse to accept the resignation extant in the notice of resignation. Save for exceptions that must be expressed either in the applicable rules and guidelines or in the contract of employment itself, the valid resignation of a staff member takes effect from the date specified in the notification of resignation within the parameters set by the Staff Rules.

41. The Tribunal has noted that the Applicant's letter of resignation did not conform to the stipulated 30 day requirement for written notice of resignation for staff members on fixed-term contracts but considers that this does not of itself revoke the validity of his resignation. The Applicant expressed a clear and unequivocal intention to resign in his letter dated 2 May 2012 and has adduced no evidence to support his assertion that he sought to withdraw his resignation vide an email dated 3 May 2012.

42. There is evidence available on record that on 25 June 2012, the Civil Affairs Division of MONUSCO communicated to the Applicant the fact that his resignation was complete as from 28 May 2012 as stipulated in the notice of resignation6(42.)Tj/29Affa

45. The Appeals Tribunal stated:

Without receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. *Therefore, a written decision is necessary if the time-limits are to be correctly calculated*, a factor UNDT failed to consider. Schook never received any written notification that his contract had expired and would not be renewed. He did not receive a notification of the decision in writing, required by Rule 111.2(a).

46. The Appeals Tribunal in the *Schook* case concluded that the Appeal was receivable because the administration had been remiss in failing to issue a written decision notifying the Appellant that he would not continue in service after the relevant date.

47. Likewise, in *Thiam* UNDT/2010/131, the Dispute Tribunal found that the Administration is obligated to send a written notification of the administrative decision to a staff member in order to determine when the sixty-day time limit stipulated for submission of a request for management evaluation starts to run.

48. In his Application dated 20 December 2012, the Applicant submitted that he did not receive a formal letter of separation. In a subsequent submission dated and filed on 28 January 2013, the Applicant stated that the Human Resources Section sent him the 'separation documents' after he filed the present Application with the Dispute Tribunal. The Applicant has however not challenged the Respondent's assertion that he completed check-out procedures from the Mission in May. In the absence of express submissions from the Applicant to the contrary, the Tribunal draws an inference from the Applicant's latter submission that among the separation documents sent to him was a formal notice of separation from service which was sent after he had filed this Application in December 2012.

49. In its judgment in *Abassa*, UNDT/2012/086, the Dispute Tribunal found that the applicant in that case had not been formally notified of the contested administrative decision but had nevertheless submitted a request for management evaluation and it was only thereafter that the applicant was officially notified of the administrative decision. In construing the provisions of staff rule 11.2(a) on

the 60-day time limit for submission of a decision for administrative review, the Dispute Tribunal held that time started running for purposes of the management

jurisdiction which it does not possess, its decision amounts to nothing...”

Conclusion

54. This Application is not receivable and is dismissed in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of February 2013

Entered in the Register on this 28th day of February 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi