



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Nerea Suero Fontecha

AGHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a former Senior Security Officer at the S-3 level with the Department of Safety and Security (“DSS”), contests the non-renewal of his fixed-term appointment following its expiration on 28 February 2017. The Applicant requests the Tribunal to grant his request for special leave without pay (“SWLOP”), to extend his fixed-term appointment for two years and to order the payment of all unpaid salaries.

2. The Respondent contends that the application is not receivable and that, in any event, it is without merit.

Facts

3. The Applicant joined DSS as Security Officer in 2005. He was promoted as Senior Security Officer in February 2016. According to the uncontested statement from the Applicant, he was last issued with a fixed-term appointment from 1 March 2015 to 28 February 2017.

4. From 20 February 2016 to 16 April 2016, the Applicant was on approved annual leave and, from 19 April 2016 to 30 April 2016, he was on approved certified sick leave.

5. The Applicant applied for additional certified sick leave for the period from 1 May 2016 to 18 May 2016, which was not approved by the Medical Services Division (“MSD”) due to lack of supporting documents.

6. In May 2016, the Applicant requested SLWOP for the period from 18 May 2016 to 15 February 2017.

7. On 16 August 2016, DSS informed the Applicant that “SLWOP [could] go up until end of December 2016 based on his wife's employment contract”, but that he was required to return to work after that period.

8. On the same date, the Applicant requested that his SLWOP be extended until the end of January 2017.

9. On 4 October 2016, DSS advised the Applicant that his request for SLWOP had not been approved due to insufficient documentary evidence in support of his request despite repeated reminders from the DSS. The Applicant was instructed to return to work without further delay and that “failure to return within a reasonable period of two weeks may result in administrative actions for abandonment of post”.

10. The Applicant responded to the 4 October 2016 email providing new information and documentation to support his request for SLWOP. The Senior Human Resources Officer of DSS replied stating that the additional information would be brought to the attention of the Chief of the Security and Safety Section (“SSS”). The Senior Human Resources Officer further asked the Applicant to clarify what would be his availability to return to work of his request for SLWOP was granted.

11. On 3 February 2017, the Applicant received an email from the Acting Administrative Officer at DSS requesting an explanation as to why he had not reported back to duty following expiration of the approved leave period. The Applicant was requested to provide an explanation for his absence, or a medical certificate of illness within 10 working days.

12. On 22 February 2017, the Applicant wrote to DSS indicating that his mother had been discharged from the hospital and his doctor had allowed him to travel, so he was returning to New York.

13. On 24 February 2017, the Senior Human Resources Offices of DSS informed the Applicant that SSS had recommended non-extension of his fixed-term appointment beyond its expiry on 28 February 2017.

14. On 13 March 2017, the Applicant wrote to the Under-Secretary-General for Security and Safety (“USG/DSS”) explaining that he overstayed his leave due to his

medical condition and the critical health condition of his mother, which he considered to be extraordinary.

15. On 28 March 2017, the Director of the Division of Headquarters, SSS, wrote to the Applicant on behalf of the USG/DSS. He informed the Applicant that SWLOP was not approved in his case amid multiple follow-up attempts by SSS and that the Applicant failed to respond in a timely manner to a request regarding his continued absence. The Director noted that the Applicant had been given an opportunity to return to work and/or provide medical certification on 4 October 2016 as well as on 3 February 2017.

Procedural history

16. On 16 August 2017, by regular email and not using the prescribed form, the Applicant, a Senior Security Officer at the S-3 , step 9 filed an application contesting “ the decision of the Secretary General United Nations No. MEU /447-A/17/4 (yjk) dated 24.05.2017 for cancelling and setting aside the same as well for grant of two years extension in fixed term employment of appellant W.E.F 28.02.2017 as Senior Security Officer in Department of [...] Security [United Nations] “

17. On 18 August 2017, after the Applicant had uploaded his application using the prescribed form in the eFiling portal, the Registry acknowledged receipt of the application and transmitted it to the Respondent in accordance with art.8.4 of the Rules of Procedure, instructing him to file a reply by 20 September 2017.

18. On 20 September 2017 the Respondent filed his reply in which he submitted that the Applicant’s claim in respect to Special Leave Without Pay is not receivable and that, in any event, the application is without merit.

19. By Order No. 214 (NY/2017) dated 28 September 2017, the Tribunal ordered the Applicant to file a response to the receivability issues presented in the Respondent’s reply by 20 October 2017.

20. On 20 October 2017, the Applicant filed a motion for extension of time requesting that the time limit as per Order No. 214 (NY/2017) be extended for additional 15 days, namely until 5 November 2017, since “due to rejection of visa by the US authorities he was unable to travel US to hire a legal representative [and] in mean while [he] was having some health problems which are stable now”. The Applicant also requested free legal assistance.

21. By email of the same date (20 October 2017), the Registry informed the Applicant that the Tribunal had granted his request for extension of time, that he should file his response as per Order No. 214 (NY/2017) at by 10 November 2017, and that an order confirming the granted extension would follow in due time.

22. By Order No. 235 (NY/2017) dated 23 October 2017, the Tribunal granted the Applicant’s request for a time extension to file a response to the receivability issues presented in the Respondent’s reply and ordered him to file the said response by 10 November 2017. For legal assistance, the Tribunal referred the Applicant to the Office of Staff Legal Assistance (“OSLA”).

23. On 10 November 2017, the Applicant filed another motion for extension of time to file his submissions on receivability stating, *inter alia*, that:

The Applicant contacted OSLA on 26 October 2017. To-date, OSLA is still reviewing the Applicant’s case due to the fact that the Applicant does not have access to his UN electronic mailbox. OSLA requested the Administration to provide the relevant documentation in this case. The documentation has not been provided as of yet.

24. On the same day (10 November 2017), as instructed by the Tribunal and via email, the Respondent filed a response to the motion indicating that he had no objection to the Applicant’s request for a further time extension.

25. On 10 November 2017, the Tribunal informed the parties via email that the Applicant’s motion for an extension of time was granted and a written order would follow.

26. By Order No. 256 (NY/2017) issued on 16 November 2017, the Tribunal granted the Applicant's request for time extension as per Order No. 214 (NY/2017) and instructed him to file the response by Friday, 24 November 2017.

27. By motions dated 19 November and 5 December 2017, the Applicant requested (a) access to his United Nations webmail until the case is resolved or at minimum for a month to retrieve all the emails from the archive and (b) that all email correspondence from 1 March 2016 to 1 March 2017 between him and Mr. MC, Mr. MS, Mr. B and Ms. HG be produced. To his 5 December 2017 motion, the Applicant also attached some email correspondence between Ms. EA and him from 21 to 23 November 2017.

28. By Order No. 273 dated 13 December 2017, the Tribunal provided the following orders (emphasis omitted):

16. The Applicant's motion for production of documents and access to restore his webmail filed on 5 December 2017 is granted in part:

a. The Respondent is to file all email correspondence from 1 March 2016 to March 2017, as indicated by the Applicant in para. 7 of the motion, between him and the following staff members, Mr. MC, Mr. MS, Mr. B and Ms. HG, by 5:00 p.m. on Friday, 12 January 2018; and

b. The request for the Applicant's access to his webmail to be restored is rejected.

17. The parties are to file their closing submissions based on the evidence before Tribunal by 5:00 p.m. on Wednesday, 31 January 2017.

29. On 12 January 2018, the Respondent filed his response to Order No. 273 (NY/2017), para. 16(a).

30. On 31 January 2018 at 3:13 a.m., the Applicant filed a motion for extension of time to file his closing submissions.

31. On the same date 31 January 2018, at 4:15 p.m., the Respondent filed his closing submissions as per Order No. 273 (NY/2017), para. 17.

32. By email of 31 January 2018, the Tribunal informed the Applicant that the motion for extension of time was rejected and instructed him to file his closing submissions no later than Friday, 2 February 2018 at 5:00 p.m. The Applicant was also informed that a formal order would be issued accordingly.

33. By Order No. 23 (NY/2018) dated 1 February 2018, the Tribunal instructed the Applicant to file his closing submissions no later than 2 February 2018, noting that there was no clear evidence on record that OSLA was currently considering representing the Applicant in the present case and submitting the closing submissions on his behalf and that there was therefore no justification for extending the deadline therefor.

34. On 2 February 2018, the Applicant filed another motion for extension to file his closing submissions, contending, *inter alia*, that this was necessary for health reasons and due to his current location.

35. On the same date (2 February 2018), by email from the Registry, the Tribunal requested the Respondent to provide his comments, if any. In response, the Respondent requested that the Applicant's motion be rejected, contending that, "The Applicant has not substantiated any of his allegations regarding his inability to meet the Dispute Tribunal's deadline to file his closing submissions by Friday, 2 February 2018 at 5:00 p.m".

36. By email of 2 February 2018, the Registry informed the parties as follows (emphasis omitted):

Please be advised that, as instructed by the Judge assigned to the case, the Applicant's motion for extension of time filed today, 2 February 2018, is granted.

The Applicant is to file his Closing Submissions, along with a copy of the medical documentation regarding his health conditions, by Friday, 9 February 2018 at 5:00 p.m. (New York time). A formal order will be issued accordingly.

37. By Order No. 30 (NY/2018) dated 8 February 2018, the Tribunal granted the Applicant's request for extension of time to file his closing submissions and directed him to file his closing submissions by 9 February 2018.

38. On 9 February 2018, the Applicant filed his closing submissions.

39. On 25 June 2018, the Applicant filed a motion requesting his reinstatement as of the date of his separation, namely 24 February 2017, and the reimbursement of his losses since that date.

Applicant's submissions

40. The Applicant's principal contentions may be summarized as follows:

a. In January 2016, the Applicant was injured while on duty and had to undergo physical therapy. The Organization considered this injury to be work-related;

b. On 28 February 2016, while on annual leave in Pakistan, the Applicant suffered complications from his injury. He requested medical leave, providing all medical supporting to MSD. However, the Applicant received no response from MSD until March 2017 when MSD rejected his request;

c. While still on leave in Pakistan, the Applicant requested SLWOP due to his mother's and his own critical health situation. The SLWOP was denied as in the Administration's view, the Applicant had failed to submit adequate documentation;

d. The Applicant then submitted additional documentation to the Executive Office of DSS and was assured that his request would be "look[ed] into". The Applicant informed DSS by email that he was returning to work on 22 February 2017. On 23 February 2017, the Executive Office of DSS informed the Applicant via email that DSS had not recommended the

extension of his fixed-term appointment. The email from the Executive Office clearly shows that they knew that the Applicant was sick;

e. The Applicant was unable to respond to the email by Acting Administrative Officer of SSS dated 3 February 2017, because he was in a remote part of Pakistan where internet access is limited. Moreover, the Applicant and his mother were both in poor health. The Applicant was never advised that his lack of response would result in an adverse decision from DSS;

f. SSS' email of 28 March 2017 shows that the Applicant remained in constant contact with DSS during his absence;

g. The Chief of Service of SSS has no authority to discontinue or terminate his contract. At most, the Chief of Service may make recommendations to the Office of Human Resources Management ("OHRM"), which he did not do in this case. Therefore, his action was not within his function, and hence, unlawful;

h. Even though the Applicant was injured several times, his 2015-2016 attendance record shows his willingness to work with UN and he reported 95 percent of the time for the job;

i. Nothing in the record shows that the Applicant failed to meet his basic obligations to report on duty or to respond to queries in a timely manner regarding the alleged prolonged unauthorized absence. The Applicant never intended to abandon his post;

j. The factual grounds relied on by the Management Evaluation Unit ("MEU") in its consideration of his request for management evaluation were flawed, in particular, the Applicant challenges MEU's determination that he had ceased contact with DSS;

- k. The Administration did not provide him the mandatory 30-day notice under staff rules 9.6 and 9.7;
- l. DSS should have been flexible in considering his request for SLWOP as it has done for other staff members in his department. The decision not to grant his request for SLWOP was discriminatory and motivated by his previous disagreements with the Chief of Service;
- m. The Applicant travelled back to New York on 27 February 2017 at his own expense and was fit to report for duty;
- n. The Applicant and his family have suffered severe stress throughout this period. The Applicant has been placed in a situation where he has to look for a new job at the age of 45 years;
- o. The Applicant's request for SLWOP should be granted and his fixed-term extended for two years as of 28 February 2017, including all benefits and withheld salaries and emoluments.

Respondent's submissions

- 41. The Respondent's principal contentions may be summarized as follows:

Receivability

- a. The application is not receivable *ratione materiae* as the Applicant does not contest an administrative decision but the Secretary-General's response to the Applicant's request for management evaluation. The Secretary-General's response to a request for management evaluation does not constitute an administrative decision subject to an appeal before the Dispute Tribunal;

b. The Applicant's claim with respect to SLWOP is time-barred. The Applicant did not request management evaluation of the decision to deny his request for SLWOP within the statutory time limit set out in staff rule 11.2(a);

Merits

c. A fixed-term appointment does not carry any expectancy of renewal and leave may only be taken when authorized;

d. The failure to report for duty lawfully forms the basis for a decision not to renew the Applicant's appointment. The Applicant was absent from the duty station without authorization for ten months, between 1 May 2016 and 28 February 2017;

e. The Applicant had the opportunity to either report for duty or provide evidence of why he could not do so but he failed to do so;

f. The Applicant has failed to meet his burden of establishing prejudice or improper motive;

g. DSS informed the Applicant four days prior to the expiration of his appointment that his appointment would not be renewed;

h. The Organization has overpaid the Applicant as his salary was only placed on hold, pursuant to staff rule 5.1(e)(ii), on 16 August 2017 and he must reimburse the Organization for the salary paid to him from 1 May 2016 to 15 August 2017;

i. The Applicant is not entitled to the payment of compensation of harm as he has not produced evidence of such harm.

Consideration

Applicable law

42. Staff Rule 6.2 on sick leave provides as follows:

Sick leave

Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;

(ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;

(iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

Uncertified sick leave

I A staff member may take uncertified sick leave for up to seven working days in an annual cycle starting 1 April of any year or such other day as the Secretary-General may set for a duty station, when incapacitated for the performance of his or her duties by illness or injury. Part or all of this entitlement may be used to attend to family-related emergencies.

Certified sick leave

(d) Sick leave taken by a staff member in excess of the limits set in paragraph (c) above requires approval in accordance with conditions

established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with staff rule.1 (e) (ii).

Sick leave during annual leave

(e) When sickness of more than five working days in any seven-day period occurs while a staff member is on annual leave, including home leave, sick leave may be approved subject to appropriate medical certification.

Obligations of staff members

(f) Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required under conditions to be specified by the Secretary-General.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.

(h) A staff member shall immediately notify a United Nations medical officer of any case of contagious disease occurring in his or her household or of any quarantine order affecting the household. In such a case, or in the case of any other condition that may affect the health of others, the United Nations Medical Director shall decide whether the staff member should be excused from attendance at the office. If so, the staff member shall receive full salary and other emoluments for the period of authorized absence.

(i) A staff member shall not, while on sick leave, leave the duty station without the prior approval of the Secretary-General.

Review of decisions relating to sick leave

(j) Where further sick leave is refused or the unused portion of sick leave is withdrawn because the Secretary-General is satisfied that the staff member is able to return to duty and the staff member disputes the decision, the matter shall be referred, at the staff member's request, to an independent practitioner acceptable to both

the United Nations Medical Director and the staff member or to a medical board.

- (k) The medical board shall be composed of:
 - (i) A medical practitioner selected by the staff member;
 - (ii) The United Nations Medical Director or a medical practitioner designated by the United Nations Medical Director; and
 - (iii) A third medical practitioner, who shall be selected by agreement between the other two members and who shall not be a medical officer of the United Nations.
- (l) The cost of an independent practitioner or a medical board mentioned in paragraphs (j) and (k) above shall be borne by the Organization and by the staff member under conditions established by the Secretary-General.

Staff Regulation 9.3 concerning separation of service provides in the relevant part:

- (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
 - (i) If the service of the staff member prove unsatisfactory;
 - (ii) If the staff member is, for reasons of health, incapacitated for further service;
 - (iii) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

43. Staff Rule 9.1 provides as follows:

Any of the following shall constitute separation from service:

- (i) Resignation;
- (ii) Abandonment of post;
- (iii) Expiration of appointment;
- (iv) Retirement;
- (v) Termination of appointment;
- (vi) Death.

44. Staff Rule 9.3 on abandonment of post states that:

Abandonment of post is a separation initiated by the staff member other than by way of resignation. Separation as a result of abandonment of post shall not be regarded as a termination within the meaning of the Staff Rules.

45. Staff Rule 9.4 on expiration of appointments provides the following:

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

46. ST/AI/400 (Abandonment of post), in its consolidated version, provides in the relevant part:

What constitutes abandonment of post

4. Abandonment of post is a separation initiated by the staff member other than by way of resignation. It is considered a unilateral repudiation of the contract of employment and not a termination initiated by the Secretary-General as defined in article IX of the Staff Regulations and in staff rule 109.1(b) [currently sr 9.3]. The intent to separate may be presumed from the circumstances, in particular from the failure of the staff member to report for duty.

5. The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1(b) [currently sr 5.1], as special leave under staff rule 105.2 [currently sr 5.3], as sick leave under staff rule 106.2 [currently sr 6.2] or as maternity or paternity leave under staff rule 106.3 [currently sr 6.3], may create a reasonable presumption of intent to separate from the Secretariat unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control.

Procedure

9. Supervisors must report all unauthorized absences to the relevant executive or administrative officer, or the local personnel office in offices away from Headquarters, not later than the end of the fourth day of such absence. The executive or administrative officer should then endeavour to contact the staff member concerned by telephone or by any appropriate means, failing which a written communication should be addressed to the staff member at his or her last known address requesting him or her to report for duty or to provide a plausible explanation for his or her absence. In cases of claimed illness, the executive or administrative officer should call the staff member's attention to the requirements of subparagraphs (v)-(vii) of [staff rule 6.2] (see para. 13 below).

10. Unless the executive or administrative officer receives a medical certificate or plausible explanation for the absence within 10 working days he or she shall refer the matter to the appropriate personnel officer, who should address a further written communication, by registered mail, personal delivery, or other

appropriate means, calling the staff member's attention to the earlier attempts to contact him or her and the absence of an appropriate response. The communication should remind the staff member of the provisions of [staff rule 5.1], under which payment of salary and allowances shall cease for the period of unauthorized absence. It should allow a further period of up to 10 working days for reporting to duty or submission of a medical certification or plausible explanation, and should warn the staff member that failure to do so would be considered abandonment of post and would lead to separation on that ground.

11. It is the responsibility of staff members to inform their supervisors of absences, whether owing to illness or injury or any other cause. It is also the responsibility of staff members to keep the Organization informed of their current address and the person to be notified in case of accident or emergency. If, despite due diligence on the part of the Organization, the staff member cannot be reached or contacted, either in person, by registered letter or other reliable form of communication to the address most recently provided by the staff member, or through family or friends, receipt of such notice will be deemed to have occurred.

12. If by the end of the specified period the staff member has failed to comply with the warning to report for duty or to provide a plausible explanation or medical certificate, the Director, Staff Administration and Training Division, or the head of office at duty stations away from Headquarters, will submit a presentation to the Assistant Secretary-General for Human Resources Management, recommending separation for abandonment of post. The effective date of separation will be the date of the decision of the Assistant Secretary-General for Human Resources Management to treat the staff member's conduct as repudiation of the contract of employment, or the date of expiry of the fixed-term appointment, whichever comes sooner.

Alleged incapacity for reasons of health

13. Where a staff member claims that his or her absence is the result of incapacity for reasons of health, his or her attention should be called to the provisions of [staff rule 6.2], which require the production of a certificate from a duly qualified medical practitioner stating the nature and probable duration of the illness. If the staff member fails to produce such certification or if the certification produced is not acceptable to the Medical Director and sick leave is not certified, the executive or administrative officer shall immediately advise the staff member, with a copy to the personnel officer, that sick leave has been refused and that the staff member must report for duty immediately or be separated for abandonment of post. If the staff member disputes the decision, he or she may request that the matter be

referred to an independent practitioner or to a medical board under the terms of [staff rule 6.2]. Pending a final decision following the report of the medical board, the period following the date of notification that sick leave has been refused should be compensatable. However, should it be decided not to consider the period in question as sick leave, the remuneration received by the staff member during this period shall be recovered by the Organization.

14. The determination as to whether or not the staff member had a valid excuse for failing to submit evidence of incapacity, or a plausible explanation for the absence, within the prescribed or reasonable time limits, lies with the Office of Human Resources Management.

Abandonment of post following annual or special leave

15. Where a staff member has been absent from duty on approved annual or special leave and has failed to report for duty on the expiration of the approved period of leave the supervisor shall report the matter to the executive or administrative officer, who will attempt to communicate with the staff member as in paragraph 9 above. If the staff member fails to report for duty by the end of the approved period and does not furnish a plausible explanation within 10 working days, the matter shall be referred to the Office of Human Resources Management for cases at Headquarters, or the head of office at duty stations away from Headquarters, whereupon the personnel officer or administrative officer concerned will proceed on the same lines as indicated in paragraph 10 above.

Separation action

16. Upon approval of separation for abandonment of post, the personnel officer concerned will process the separation action and will notify the staff member at the address most recently provided by him or her, advising of the Secretary-General's decision and the effective date in accordance with paragraph 12 above. Separation for abandonment of post is not termination and therefore the staff member will not be entitled to any notice of termination or the payment of termination indemnity, and no repatriation grant is payable under the terms of [staff rule 3.18].

Receivability framework

47. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-

UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Dispute Tribunal's Statute prevents it from considering cases that are not receivable.

48. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

49. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability *ratione personae*

50. The application is filed by a former staff member with DSS, United Nations Secretariat. It is therefore receivable *ratione personae*.

Receivability *ratione materiae*

51. The Respondent argues that the application is not receivable because the Applicant is contesting the Secretary-General's response to his request for management evaluation, which does not constitute an administrative decision.

52. The Tribunal notes that while the Applicant indicated in the application under the section "details of the contested decision" that he contested decision is the "decision MEU/447-17/(YJK) DATED 24.05.2017", as results from the grounds of appeal attached to the application, the contested decision is the decision not to extend his fixed-term appointment which was notified to the Applicant on 24 February 2017. This decision constitutes an appealable administrative decision under art. 2.1(a) of the Statute of the Tribunal and the application is therefore receivable.

53. The Tribunal further notes that the Applicant timely filed a request for management evaluation on 20 April 2017, that is within 60 days from the date the contested decision of the non-renewal of his appointment was notified to him on 24 February 2017. As results from this request, the only decision subject to the management evaluation review was the decision not to renew his fixed-term appointment.

54. As part of the relief indicated in his grounds of appeal filed together with the application, the Applicant also asks that his request for SLWOP be granted. The Tribunal agrees with the Respondent that this part of the application is not receivable as the Applicant did not seek management evaluation of this decision and it is not within the Tribunal's jurisdiction to grant or deny SLWOPs.

55. The Tribunal concludes that the application is receivable *ratione materiae* only in part with respect to the decision not to extend the Applicant's fixed-term appointment.

Receivability *ratione temporis*

56. The Tribunal notes that the Applicant filed the present application (which constitutes of the application and the appended grounds of appeal) on 16 August 2017 within 90 days from the date he received the decision on his request for management evaluation, namely 24 May 2017. The Tribunal concludes that the application is receivable *ratione temporis*.

On the merits

Relevant factual background

57. The Tribunal notes that the record shows that, at the end of his authorized leave in May 2016, the Applicant requested a SLWOP. Despite the Applicant's follow-up on the request, he was only notified that his request was denied on 4 October 2016. He was then instructed to report for duty or provide an explanation for his absence within two weeks. On 6 October 2016, the Applicant reiterated his request for a SLWOP until the end of January 2017 and provided additional documentation and information. On 6 October 2016, the Senior Human Resources Officer of DSS (Department of Security and Safety) informed the Applicant that his request would have to be discussed further with the Chief of SSS (Security and Safety Service) of DSS. The Applicant was also requested to clarify what would be his availability to return to work if his request for SLWOP was granted. The Applicant's additional information was forwarded to the Chief of SSS and there is no evidence of any further communication with the Applicant on this matter.

58. On 3 February 2017, the Acting Administrative Officer of SSS wrote the Applicant to ask him to provide an explanation for his unauthorized absence within ten working days. The Applicant replied that his request for SLWOP was pending with the Executive Office of SSS.

59. The Applicant wrote to the Senior Human Resources Officer of DSS on 22 February 2017 stating that his family situation was resolved and that he was prepared

to return to work. By return email the next day (23 February 2017), the Senior Human Resources Officer of DSS informed the Applicant that SSS had recommended that his fixed-term appointment not be extended upon its expiration on 28 February 2017.

60. In subsequent emails, the Applicant submitted additional medical documentation but DSS confirmed its decision not to extend his fixed-term appointment because of his unauthorized absence.

61. These aspects were confirmed in the management evaluation decision in which it is stated as follows:

The MEU noted that the Administration did not pursue your separation on grounds of abandonment of post. It was noted in this regard that you did maintain contact with the Organization. Rather, the reason for your non-renewal was set forth in the email from the Director, DSS dated 28 March 2017. He noted that your SLWOP had not been approved and that you failed to return to work as requested or respond in a timely manner after the follow-ups by the DSS. The MEU further observed that DSS considered such actions as a failure on your part to meet your minimum obligations as a staff member.

62. At the outset, the Tribunal notes that the four-month delay in considering of the Applicant's initial request for SLWOP—from May to October 2016—cannot be attributed to the Applicant. The record shows that the Applicant submitted the requested documentation and information in good faith and in a timely manner.

63. Immediately after he was notified of the rejection of his initial request for SLWOP on 4 October 2016, the Applicant submitted additional documents and information. On 6 October 2016, the Senior Human Resources Officer of DSS responded “[...] I will need to discuss your case with [the Chief of SSS]. Could you please clarify what are your plans [*sic.*]. If your SLWOP is approved, can you commit to returning to work in January 2017? [...]”.

64. The Tribunal understands from this language that, at the relevant time, the Applicant's request for SLWOP was still under consideration by DSS.

65. On 3 February 2017, even when DSS was yet to decide on the Applicant's request for SLWOP, the Acting Administrative Officer of SSS requested that the Applicant advise why he had not reported back to duty following the expiration of his approved leave and directed him to provide an explanation within ten working days. The Applicant replied that his request for SLWOP was still pending with SSS, to which the Acting Administrative Officer responded: "noted".

66. On 23 February 2017, the Applicant was notified of the decision not to recommend the extension of his fixed-term appointment beyond its expiration on 28 February 2017. In March 2017, DSS informed the Applicant that the reason for the non-extension was his unauthorized absence.

The legal framework on separation

67. Under the Staff Regulations and Rules, the Secretary-General may separate a staff member from service in accordance with the terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6.

68. The Tribunal considers that the reasons for separation from service can be organized into five categories:

Separation *ope legis*

69. There are certain types of separation from service that do not involve unilateral action from one party (the Organization or staff member) or the parties' consensus. These include:

- a. Expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);
- b. Death of the staff member (staff rule 9.1(vi));
- c. Retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

Separation by the parties' agreement prior to the expiration of the contract
(staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

70. According to the general principle of legal symmetry—*mutuus consensus*, *mutuus disensus*—a labor contract, which is a consensual contract, can be terminated by agreement between the parties.

71. All types of appointments (temporary, fixed-term or continuing/indefinite/permanent) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the United Nations Charter provided that this action is not contested by the staff member. A termination based on this reason can only take place if the action is not contested by the staff member. In other words, such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally, the offer is then an agreed termination and the parties can come to an agreement orally or in writing.

72. In *Jemai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

Separation initiated by the staff member

73. There are two types of separation which may be initiated by a staff member:

- a. Resignation (staff regulation 9.1 and staff rule 9.2); and
- b. Abandonment of post (staff rule 9.3).

Separation initiated by the Secretary-General

74. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e));

b. Termination for reasons (grounds) related to the staff member:

i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));

ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));

iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should, under the standards established in the United Nations Charter, have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));

iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the United Nations Charter (staff regulation 9.3(a)(iv));

v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:

1. Written censure;

2. Loss of one or more steps in grade;

3. Deferment, for a specified period, of eligibility for salary increment;
4. Suspension without pay for a specified period;
5. Fine;
6. Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
7. Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
8. Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
9. Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

- ii. In addition to the reasons given in the letter of appointment, staff regulation 9.3(a) provides that “in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization to be interpreted principally as a change or termination of a mandate and in accordance with the standards of the Charter”.

iii. This additional reason for termination is distinct from the ones presented above and can be understood as being:

1. Applicable only to a staff member who holds a continuing appointment;
2. A termination without the consent of the staff member;
3. A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.
4. This termination is to be interpreted principally as a change or termination of a mandate.
5. The written notice is three months.

75. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c), namely when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways, either as a change or a termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the United Nations mandate and/or the availability of funds. The Tribunal underlines that the abandonment of post is a form of separation initiated by the staff member under staff rule 9.3 which is distinct from the separation as a result of the expiration of the contract pursuant to

staff rule 9.1(iii) and 9.4, which can only be initiated by the employer. For the Administration to be able to infer the staff member's irrevocable will/intention to abandon his or her post and to put an end to his/her contract, it must follow the procedure stipulated in ST/AI/400.

76. Further, the Tribunal notes that there is no evidence on the record that the mandatory procedure established in secs. 9, 10, 15 and 16 of ST/AI/400 for separation by abandonment of post was followed in the Applicant's case. In this sense, the Tribunal notes that this instruction required several mandatory steps to be taken by the Administration in case of unauthorized absence. These steps include: (a) a superior reports all unauthorized absences to the relevant executive or administrative officer; (b) unless the executive or administrative officer receives a medical certificate or plausible explanation for the absences within 10 working days, he or she shall refer the matter to the appropriate personnel officer who should address a further written communication to the staff member and (c) if the staff member fails to report for duty by the end of the approved period and does not furnish a plausible explanation within ten working days, the matter shall be referred to the Office of Human Resources Management for cases at Headquarters, whereupon the personnel officer or administrative officer concerned will proceed on the same lines as previously indicated.

77. The Applicant, by being in contact with the Organization during the entire period clearly confirmed his real will and interest to maintain his post and therefore to continue his contractual relation with the Organization and there was no legal basis for the Administration to conclude that he willingly abandoned his post.

78. It is undisputed that fixed-term appointments do not carry an expectancy of renewal. However, the Appeals Tribunal also provided that, in deciding not to extend a fixed-term appointment, the Administration must act fairly, justly and transparently with the staff member (*Obdeijn* 2012-UNAT-201 and *He* 2018-UNAT-825).

79. In the present case, the Administration did not act fairly and transparently with the Applicant. DSS lead the Applicant to believe that it was still considering granting him a SLWOP, while, at the same time, it recommended the non-extension of his fixed-term appointment due to his unauthorized absence on the other.

80. The Organization itself, by considering that the Applicant's contract reached its expiration date, affirmed its legal effects until the date of its expiration, 28 February 2017 which contradicts the reason presented for the non-renewal of the Applicant's appointment, namely the abandonment of the post due to his absence from the office. The Organization cannot consider a staff member to be in violation of his or her terms of employment, namely by being in an unauthorized absence interpreted to be abandonment of post, while, at the same time, consider that his or her contract has legal effects until its expiration.

81. The Tribunal considers that the non-renewal decision following the expiration of the Applicant's contract, constitutes a separation decision for abandonment of post, which was issued unlawfully, without following the mandatory procedure established in ST/AI/400.

82. The Respondent argues that failure to report for duty may lawfully form the basis for a decision not to renew an appointment as the Appeals Tribunal determined in *Abdallah* 2010-UNAT-091.

83. The Tribunal notes that in *Abdallah*, the Appeals Tribunal stated that it is a staff member's duty "to report to work on time, regularly and without break. When the absences are pointed out and recorded in the annual report, the staff member should choke up and start coming to work on time". However, the Tribunal considers that this present case differs and is therefore distinguishable from *Abdallah* for the following reasons: (a) the Applicant's request for SLWOP was still under review and the Administration cannot argue that the Applicant's absences were unjustified when it had failed to properly respond to the Applicant's request for SLWOP, and (b) the Applicant's absence from the office was not stated or recorded in an annual report

and/or in an evaluation performance document. This requirement which was established in *Abdallah* is not fulfilled in the present case and the Applicant's absence from the office cannot represent a justification for a non-renewal.

Relief

84. The Statute of the Dispute Tribunal states, as relevant:

Article 10

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

85. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation, which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always

establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression “[t]he Dispute Tribunal shall ... determine an amount of compensation”; and

b. Article 10.5(b) refers to a compensation.

86. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute.

87. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two types of compensation is that each of them separately “shall normally not exceed the equivalent of two years net base salary of the applicant”, namely four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

88. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to:

- a. Confirm the decision; or
- b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or
- c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review

only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10.5(b).

89. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

90. The Organization's failure to comply with all the requirements of a legal separation causes a prejudice to the staff member, since his/her contract was unlawfully separated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his/her reinstatement into service with compensation for the lost salaries (*restitutio in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement, together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

91. The Tribunal considers that, in cases where the separation decision is rescinded and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages, if any, produced by the rescinded decision.

92. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation

that existed prior to the termination. According to the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased, her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

93. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

94. In *Mmatta* 2010-UNAT-092, the Appeals Tribunal stated:

27. [...] Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the [Dispute Tribunal] to compensate for loss of earnings in lieu of reinstatement up to the date of judgment.

95. The Tribunal notes that the Applicant expressly requested his reinstatement as part of the relief, as the contested decision concerns a separation. In light of the above considerations and in accordance with art. 10.5(a) of the Statute of Tribunal, the contested decision issued on 24 February 2016 not to renew the Applicant's fixed-term appointment is to be rescinded. According to art. 10.5(a) of the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the decision and/or to the specific performance ordered by the Tribunal.

96. As results from the above considerations, the contested decision not to renew the Applicant's fixed-term appointment is unlawful and pursuant to art. 10.5(a) of the

Statute Dispute of the Tribunal, is to be rescinded. The Tribunal considers that the rescission of unlawful decisions has the *ope legis* effect of the parties being retroactively placed in the same contractual relationship that existed before the issuance of the rescinded decisions.

97. It results that, when a separation is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date s/he was notified of the upcoming separation until her/his effective date of separation, as determined by the Dispute Tribunal. However, when a party or both parties expressly indicate that, due to the particular circumstances of a case, the effective reinstatement no longer constitutes a possible option, the remedy can consist solely in compensation.

98. The Tribunal notes, in light of the above-mentioned considerations that the unlawful decision is to be rescinded and, in absence of any indication that the reinstatement is not an option in the present case, the Applicant is to be retroactively reinstated under a two-year fixed-term contract starting 1 March 2017 until 28 February 2019, the same duration as his previous contract. Consequently, the Respondent is to retroactively pay the Applicant as compensation for loss of earnings (material damages), the salary corresponding to the period 1 March 2017 until the effective implementation/execution of the present judgment pursuant to art. 10.5(a) of the Tribunal's Statute. In addition, the Applicant shall receive compensation in the amount equal to the contributions (his contribution and the Organization's contributions) that would have been paid to the United Nations Joint Staff Pension Fund ("UNJSPF") for this period.

99. Since the present case is an appointment-related case, pursuant to article 10.5(a), the Tribunal is to establish an alternative compensation to the Applicant's reinstatement. Consequently, shall the Respondent elect to pay the Applicant an alternative compensation *in lieu* of reinstatement, the Tribunal orders the Respondent to pay the Applicant a total compensation of two years net base salary for the period 1 March 2017-28 February 2019 , which will include the compensation for loss of

earnings mentioned in para.101 above to compensate him for loss of earnings in lieu of reinstatement.

Moral damages

100. The Tribunal notes that the Applicant does not claim any moral damages.

Conclusion

101. In view of the foregoing, the Tribunal DECIDES:

a. The application is granted in part. The contested decision not to renew the Applicant's fixed-term appointment beyond 28 February 2017 is rescinded and the Respondent is ordered to retroactively reinstate the Applicant from 1 March 2017 until 28 February 2019;

b. The Respondent is to pay retroactively to the Applicant, as compensation for loss of earnings pursuant to art. 10.5(a) of the Tribunal's Statute, the salary from 1 March 2017 until the effective date of his reinstatement as a result of the execution of the present judgment. In addition, the Applicant shall receive compensation in the amount equal to the contributions (his contribution and the Organization's contributions) that would have been paid to the UNJSPF for this period;

c. As an alternative to the reinstatement, the Respondent is to pay the Applicant a total compensation of two years net base salary corresponding to the period 1 March 2017-28 February 2019, which will include the compensation for loss of earnings mentioned above, to compensate him for loss of earnings *in lieu* of reinstatement.

d. The above shall be paid within 60 days from the date this judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an

additional 5 percent shall be added to the US Prime Rate until the date of payment.

e. The Applicant's request for the Tribunal to approve the SLWOP is rejected as non-receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 20th day of September 2018

Entered in the Register on this 20th day of September 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York