



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

ATUYA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**  
Edwin Nhliziyo

**Counsel for the Respondent:**  
Nicole Wynn, AAS/ALD/OHR  
Nusrat Chagtai, AAS/ALD/OHR

## **Introduction**

1. On 25 September 2018, the Applicant, a Human Resources Assistant with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) in Bangui, filed an application before the Dispute Tribunal contesting the following decisions.

a. A 27 March 2018 decision to “lure and detain” her at the United Nations Level II clinic in Bangui.

b. A 29 March 2018 decision to medically evacuate her to her home country of Kenya.

2. The Applicant contends that both decisions were not justified as she was fully capable of travelling to Kenya to consult with a specialist without the humiliation and drama that followed as she was not sick in the sense that she could not manage her own affairs or make decisions for herself or travel to Nairobi on her own.

3. The Respondent filed a reply on 26 October 2018 in which it is argued that the application is not receivable *ratione materiae*.

4. On 20 May 2019, the Applicant filed a motion seeking leave to file submissions in response to the reply. The submissions attached to the motion, however, do not address the issue of receivability.

5. Having reviewed the reply, the Tribunal considers it appropriate to examine the preliminary issue of its jurisdiction or competence to entertain this application.

## **Facts**

6. The facts laid out below are uncontested and supported by the parties’ pleadings and additional submissions.

7. The Applicant has served with the Organization at various duty stations since 1995. She joined MINUSCA on 1 May 2014 and, at the time of filing the

application, held a fixed-term appointment expiring 31 December 2018.<sup>1</sup>

8. On 28 March 2018, Dr. Kadidiatou Gouro of MINUSCA addressed a letter to one “Dr. Sophia” informing her that on that date, she attended to an emergency involving the Applicant and recommended that the Applicant receive a further medical assessment as soon as possible with possible treatment in an “adaptable place”.<sup>2</sup>

9. On 29 March 2018, Dr. Lucila Ojeda, Medical Officer, wrote to the MINUSCA Director of Mission Support recommending that the Applicant be medically evacuated to Kenya for three days.<sup>3</sup>

10. The Applicant was informed of the proposed medical evacuation and between 29 and 31 March 2018, the MINUSCA Medical Officer, Travel Unit and Medevac liaised with the Applicant to arrange her travel on 1 April 2018 to Kenya. Since the Applicant already had a ticket to Kenya for travel on 16 April 2018, she changed the ticket herself to travel on 1 April 2018 and was subsequently reimbursed for the cost of the ticket.<sup>4</sup>

11. On 1 April 2018, the Applicant left the mission to receive medical treatment in Kenya. On 14 April 2018, she saw a Consultant Psychiatrist in Nairobi. The Applicant’s psychiatrist recommended a six-week residential drug treatment program.<sup>5</sup>

12. On 28 June 2018, the Applicant filed a management evaluation request (MER) in which she made the following submissions.

- a. MINUSCA placed her current post/functions/name on a list of posts to be retrenched in a budget proposal now before the General Assembly. She was appealing the inclusion of her post/name/functions on the list of proposed posts for abolition on the grounds that the action was motivated by improper motives and procedural irregularities.

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<sup>1</sup> Reply - Annex 2.

<sup>2</sup> Reply – Annex 3.

<sup>3</sup> Application – Annex 2.

<sup>4</sup> Paragraph 7 and annex 6 to the reply.

<sup>5</sup> Paragraph 8 and annex 6 to the reply and annex 6 to the application.

b. That attempts to force her out of the United Nations have been ongoing for at least two years. On two occasions, she was forcibly and unlawfully detained against her will for reasons that have never been clearly explained to her but were based on a misdiagnosis of her illness. There were veiled allegations that she was either abusing alcohol or was mentally sick and she suffered the humiliation of being frog marched out of her residence and detained for several days in MINUSCA's Level II hospital.

c. The latest detention was triggered by her filing a complaint after she was physically assaulted but ended up being the victim by being tricked into going to the Level II Hospital for x-rays and being detained and evacuated to Kenya.

d. The decision to retrench her was taken while she was on forced sick leave and the "whole fiasco was caused by UN doctors rushing to judgment about the exact nature of her illness".

e. MINUSCA twice confined her against her will based on a misdiagnosis of her medical condition. Her treatment on both occasions was a violation of both her rights as a staff member, and "her human rights against false arrest". On both occasions, there was no evidence that she was a danger to herself or the community.

13. The Management Evaluation Unit (MEU) conveyed its evaluation on 5 October 2018 in which it decided:

a. That the decision on the non-extension of the Applicant's appointment had been rendered moot by the fact that, on 4 September 2018, the MINUSCA Chief of Section, Human Resources Management Service, had confirmed that her appointment would be extended through 31 December 2018.

b. That her request for management evaluation in relation to the decision to hospitalize her was not receivable because, on 13 July 2016, she had submitted a MER of an earlier decision to forcibly remove her

from her home and detain her in the MINUSCA level II Hospital in Bangui for six days and subsequently medically evacuate her to Nairobi for treatment. The Applicant later withdrew that MER and MEU closed that file on 29 March 2017. According to the MEU, the Applicant's 28 June 2018 MER challenged the same substantive issues and could not be revisited.

### **Respondent's submissions on receivability**

14. The Application is not receivable *ratione materiae*. The Applicant does not challenge a reviewable administrative decision. Article 2.1(a) of the Dispute Tribunal's Statute provides that it is competent to hear and pass judgment on an application against an "administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment." For an application to be receivable, the decision being challenged must be an "administrative decision", which has adverse consequences for the staff member's appointment.

15. The admission of the Applicant to the United Nations Hospital in Bangui and her subsequent medical evacuation do not constitute reviewable administrative decisions. They had no direct legal consequences for the terms of the Applicant's appointment. She continued to serve with MINUSCA and to receive all the salary, benefits, and entitlements she was due during her treatment. Moreover, she agreed to and participated in both decisions and their implementation.

16. The Applicant's request for management evaluation does not identify the contested decisions as the decisions to be evaluated. Instead, the Applicant requested evaluation of the 29 May 2018 decision not to renew her appointment beyond 30 June 2018.

17. If the Tribunal construes the Applicant's request for management evaluation to include the contested decisions, the request was untimely. The Applicant alleges that the admission decision was taken on 28 March 2018, and that she was notified of the evacuation decision on 30 March 2018. However, she

did not request management evaluation until 27 June 2018, about 90 days later.

18. The Applicant's claim that she was unable to "deal with the issue until she was released from the medical facility" on 28 May 2018 is unsupported. On the contrary, according to the Applicant, she could manage her own affairs and make decisions for herself during the relevant period. Indeed, she identified her own consultant psychiatrist in Nairobi and admitted herself into the Nairobi addiction treatment center where she was also able to engage representation in this case while admitted.

### **Considerations**

19. It is settled law that to be reviewable, an administrative decision must have the key characteristic in that it must "produce direct legal consequences" affecting a staff member's terms or conditions of appointment. 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.<sup>6</sup> An administrative decision must have a "direct" impact and not be only a prefatory act for subsequent decisions.<sup>7</sup>

20. In this connection the Tribunal observes that using United Nations medical services by a staff member usually does not involve an administrative act. It, however, considers that in the event certain actions of medical services would involve authorized use of physical compulsion toward a staff member (*e.g.*, detention in a medical facility or forced medical evacuation) they would be administrative decisions within the context of art. 2.1(a) of the Dispute Tribunal's Statute. It is necessarily implied in the status of United Nations staff that they will not be physically forced to anything unless it is provided by the Staff Regulations and Rules, is justified for operational and/or other reasons and is proportionate.<sup>8</sup> The contested decisions clearly formed part of the Applicant's MER of 29 June 2018 as detailed at para. 12 above.

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<sup>6</sup> *Ngokeng* 2014-UNAT-460, para. 27, citing *Bauzá Mercére* 2014-UNAT-404, para. 18, as well as *Wasserstrom* 2014-UNAT-457.

<sup>7</sup> *Lee* 2014-UNAT-481.

<sup>8</sup> See in the same vein *Khisa* UNDT/2013/001.

21. With the element of consent being disputed by the parties, the crux of the matter is whether the Applicant sought management evaluation of those decisions in a timely manner. Staff rule 11.2(c) stipulates that a “request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested”.

22. According to the Respondent and as borne out by the documents in support of the parties’ pleadings, by 31 March 2018, the Applicant had all the information necessary to seek management evaluation of the contested decisions. The time limit for seeking management evaluation started running from that date which means that the 60-day deadline for submitting a management evaluation request was 30 May 2018. The Applicant sought management evaluation of the decisions only on 29 June 2018, 29 days out of time. The Tribunal agrees with the Respondent’s arguments at para. 14 of the reply that the Applicant’s claim that she was unable to “deal with the issue until she was released from the medical facility” on 28 May 2018 is unsupported and, in any event, it is trite law that the Dispute Tribunal cannot suspend or waive the deadlines for management evaluation.<sup>9</sup>

### **Conclusion**

23. The application is dismissed as irreceivable.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 20<sup>th</sup> day of May 2019

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<sup>9</sup> Article 8.3 of the UNDT Statute.

Entered in the Register on this 20<sup>th</sup> day of May 2019

*(Signed)*

Legal Officer, for  
Abena Kwakye-Berko, Registrar, Nairobi