



Before: Judge Goolam Meeran

Registry: New York

Registrar: Nerea Suero Fontecha

MALOKA MPACKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. On 31 December 2018, the Applicant, a former Associate Civil Affairs Officer with the then United Nations Stabilization Mission in Haiti (“MINUSTAH”), filed an application contesting the decision to separate her for abandonment of post with effect from 4 December 2012.

2. The Respondent replied that the application is not receivable because the application was filed more than three years after the Applicant received the contested decision. Further, the application is without merit as the Applicant was separated from service for abandonment of post in accordance with the procedures set out in ST/AI/400 (Abandonment of post).

3. The case was assigned to the undersigned Judge on 23 May 2019.

Facts

4. From 28 June 2012, the Applicant was absent from work. She requested certification of sick leave for her absence.

5. On 13 August 2012, the Personnel Section in MINUSTAH informed the Applicant that since the Medical Services Division (“MSD”) was not able to certify her sick leave request, her absence would be charged to her annual leave until 31 August 2012, and she would be placed on special leave without pay from 1 September 2012 should her sick leave not be certified and should she not report to work.

6. On 1 October 2012, the Applicant sent her medical reports to MSD, copying the Personnel Section. The Personnel Section responded the following day informing the Applicant that the office attempted to contact her many times without success, and attaching a memo dated 28 September 2012 stating that her sick leave was not

certified and that MINUSTAH would pursue abandonment of post procedures if she did not resume her duty on 1 October 2012.

7. On 14 November 2012, the Director of Mission Support, MINUSTAH, requested the approval of the Applicant's separation for abandonment of post on the ground that she failed to return to duty and did not respond to efforts to contact her by phone, email and her next of kin, after exhausting her annual leave and special leave without pay, and that her sick leave was not certified.

8. On 12 December 2012, the then Assistant Secretary-General for Human Resources Management ("ASG/OHRM") approved the Applicant's separation for abandonment of post in accordance with ST/AI/400 based on the 3 December 2012 memorandum addressed to ASG/OHRM recommending the approval of such decision on the ground that the required procedures under ST/AI/400 had been followed.

9. On 7 January 2013, the Office of the Director of Mission Support, MINUSTAH, sent a memorandum to the Applicant's work email address informing her that she would be separated from service for abandonment of post with effect from 4 December 2012. On 11 January 2013, the same memorandum was sent to the Applicant's personal email address, in which she was requested to come to the Personnel Section to complete check-out procedures. On 10-11 January 2013, a security officer of MINUSTAH attempted to hand deliver paperwork, relating to her separation, at the Applicant's residence, but to no avail.

10. On 24 July 2013, the then Accounts Division of the Office of Programme Planning, Budget and Accounts sent a letter to the Applicant's personal email address informing her that it was determined, upon processing her final pay on separation with effect from 4 December 2012 that she was overpaid. Within an hour, the Applicant responded that she had been on sick leave and that she was still a MINUSTAH staff member.

11. In August 2013, there were further email exchanges between the Applicant and a Chief Civilian Personnel Officer of MINUSTAH in which it was reiterated that the Applicant was officially separated with effect from 4 December 2012.

12. On 4 and 7 December 2015, in response to the Applicant's emails, a Chief Human Resources Officer from MINUSTAH again reiterated that the Applicant was separated from service on 4 December 2012 for abandonment of post and that the decision was communicated to the same email address that she was using in the exchanges.

13. In the course of 2016, there were further email exchanges between the Applicant and the then Department of Field Support in which it was reiterated that she was separated for abandonment of post.

14. On 3 December 2018, the Applicant requested a management evaluation of the contested decision.

Considerations

15. This Judgment is concerned with the question whether the application was filed more than three years after the Applicant had received notification of the contested administrative decision. If that is the case, the application is not receivable.

16. The Tribunal recalls art. 8 of the Dispute Tribunal's Statute:

...

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

4. Notwithstanding paragraph 3 of the present article, an application shall not be receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision.

17. The Applicant filed this application on 31 December 2018 to contest the decision to separate her for abandonment of post that took effect on 4 December 2012. The Applicant alleges that she only received paperwork pertaining to her separation on 5 November 2018 from the United Nations Ombudsman and Mediation Services, whereas the Respondent submits that the Applicant received the contested decision more than three years ago. Thus, the question before the Tribunal is when did the Applicant receive notification of the contested decision.

18. ST/AI/400 (Abandonment of post) sets out the detailed procedures that need to be followed to separate a staff member for abandonment of post and in particular where a staff member claims that her absence is the result of incapacity for reasons of health, as in this case.

19. ST/AI/400 provides in relevant part (emphasis in original):

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 106.2(a)(vi) [**currently sr 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 106.2(a)(viii) [**currently sr 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 [“OHRM”].

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 109.5(i) [**currently sr 3.18**].

20. The Tribunal finds that the Administration informed the Applicant that her sick leave was refused and she must report for duty or the separation for abandonment of post process would begin as her annual leave and special leave without pay were exhausted. The Administration properly followed the procedures, including seeking and obtaining the approval of separation for abandonment of post from OHRM, and notifying the Applicant at every important step by email and other means, as documented in the material before the Tribunal. The Tribunal notes that ST/AI/400 lists a few examples of appropriate communication methods, such as registered mail, personal delivery, or telephone, but it allows the utilization of any other appropriate means. Since the Applicant responded to emails sent to her personal

email address, the Tribunal finds that sending information/documents to the Applicant's personal email address was appropriate under ST/AI/400.

21. In this case, the contested decision, namely the separation for abandonment of post, was sent to the Applicant's personal email address on 7 January 2013. Further, the Administration attempted, albeit unsuccessfully, to notify the Applicant of the decision at her residential address via personal delivery on 10-11 January 2013.

22. Even if the Tribunal were to accept the Applicant's claim that she did not receive the separation memorandum sent to her personal email address on 7 January 2013, her responses to the July and August 2013 communications from the Administration show that she was clearly informed that she was separated for abandonment of post with effect from 4 December 2012. The Tribunal notes that ST/AI/400 requires that a staff member be notified of the Secretary-General's decision and the effective date, which was set out in both July and August 2013 communications.

23. Accordingly, the Tribunal finds that the Applicant's application of 31 December 2018 was filed more than three years after her receipt of the contested decision and hence not receivable.

Judgment

24. It is the Judgment of the Tribunal that the claim is not receivable. The application is rejected.

(Signed)

Judge Goolam Meeran

Dated this 29th day of May 2019

Entered in the Register on this 29th day of May 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York