



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DA SILVEIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

William Woll

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant was an Administrative Assistant at the FS-4/09 level working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in Goma, attached to the Gender Advisory Section.¹

2. By an application filed on 9 May 2018, which was registered under Case No. UNDT/NBI/2018/057, the Applicant contests implied decisions on: (i) the refusal by the administration to transfer her to a duty station where the supply of electricity is stable; or (ii) the refusal to grant her an agreed termination of her appointment with indemnity due to the harassment she had suffered.²

3. The Respondent filed a reply on 14 June 2018 in which it is argued that the claim is not receivable *ratione materiae*. The Respondent also argued that should the Tribunal find that the application is receivable, it is still without merit and should be dismissed.

Facts

4. The Applicant took her first appointment with MONUSCO on 14 June 2006 as an Administrative Assistant at the FS-4 level and on 1 July 2015, she was posted in the Gender Advisory Section.³

5. The Applicant maintains that since October 2015, she has had problems with the Head of the Gender Advisory Section, Ms. Jamila Seftaoui.⁴

¹ Application, section I, p.2

² Application, section V, p.3

³ Application, Annex 2

⁴ Application, section VII, p.4 and Application Annex 4

6. On 1 October 2016, the Applicant went on leave and on 28 November 2016, she submitted, through UMOJA, a request for sick leave certification for the period 18 November 2016 to 17 January 2017.⁵

7. The Medical Services Division (MSD) at United Nations Headquarters in New York approved the request for the period 22 November 2016 to 31 December 2016 and from 3 January 2017 to 17 January 2017.⁶

8. On 9 January 2017, Ms. Seftaoui wrote to the Applicant asking her when she would resume her work.

9. On 19 January 2017, the Applicant informed her supervisors, including Ms. Seftaoui that her medical leave had been extended until 19 April 2017.⁷ She however, did not indicate who had extended her medical leave.

10. On the same day, Ms. Seftaoui informed the Applicant that her request for sick leave for the period 31 December 2016 to 18 January 2017 had been rejected.⁸

11. On 29 June 2017, the Applicant was informed by MSD that “her medical certificate does not explain the symptoms why her condition is preventing her from working and that the report does not provide an update of the progress of treatment ”.⁹

12. On 8 September 2017, the MONUSCO Human Resources Section (HRS) requested the Applicant to provide sick leave certificates approved by MSD.¹⁰

13. On 20 September 2017, Counsel for the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) in New York requesting for:

⁵ Application, para 19, Application, Annex 20

⁶ R/2

⁷ Application, Annex 24

⁸ Application, Annex 24

⁹ Application, Annex 40

¹⁰ Application, Annex 46

(a) The transfer of the Applicant to a country where the electricity supply is stable, or

(b) In the alternative, an agreed termination of her appointment.¹¹

14. On 21 September 2017, the OIC, MONUSCO HRS addressed a letter to the Applicant entitled “Unauthorized Absence” informing her that she had been absent from duty since 17 January 2017.¹²

15. On 12 January 2018, the Applicant requested for management evaluation from the Office of the Under-Secretary-General for Management citing the letter of 20 September 2017 that had been sent to the ASG/OHRM.¹³

Submissions

Respondent’s submissions

16. The Respondent contends that for an application to be receivable, the decision being challenged must be an “administrative decision”. In the present case, no decision has been made denying the Applicant’s request to be transferred to another duty station. The request remains pending. Similarly, no decision has been made denying the Applicant’s request for an agreed termination of her appointment. Accordingly, the Application is not receivable *ratione materiae*.

Applicant’s submissions

17. The Applicant did not specifically address the issue of receivability.

Considerations

18. Whereas in the instant case, the Applicant contests the implied refusal by administration to transfer her to a duty station where the supply of electricity is stable

¹¹ Application, Annex 48

¹² Application, Annex 49

¹³ Application, Annex 53

or to grant her an agreed termination of her appointment with indemnity, the Tribunal has *ex officio* knowledge of subsequent facts, that is an administrative decision dated 26 June 2018, whereby the Applicant was separated from service on the grounds of abandonment of post.¹⁴ This decision is subject to a separate application registered as Case No. UNDT/NBI/2018/105.

19. The Tribunal recalls its holding that an application becomes moot insofar as either the matter is resolved in a manner consistent with the thrust of the application, for example, if the administration withdrew from the decision or the claim was otherwise satisfied to the effect that there is no *gravamen* on the part of the applicant, or the claim cannot be satisfied for objective reasons. However, the question needs to be analysed in relation to the nature and extent of the claim.¹⁵ As later confirmed by the Appeals Tribunal, judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect.¹⁶ In the circumstance, the Applicant is no longer a staff member and her request to be transferred to a duty station where the supply of electricity is stable or to grant her an agreed termination of the appointment has been overtaken by subsequent events rendering the application moot.

20. The situation in the present case needs to be distinguished from the one in *Ross*¹⁷ where the Tribunal suspended proceedings in holding that, following a rescission of a decision on separation from service, the applicant's access to UNDT, as part of his status, would be revived in relation to cases brought during the pendency of the dispute over the separation decision.¹⁸ In the present case, there is no question of the Applicant's procedural standing at the time of filing of the application. Rather, the

¹⁴ UNDT/NBI/2018/105, Reply, Annex 1

¹⁵ *Lahoud* UNDT/2017/009

¹⁶ *Kallon*, 2017-UNAT-742 para.44

¹⁷ UNDT/NBI/2016/056

¹⁸ *Ross* Order No. 010 (NBI) 2019, para 18

issue lies in the nature of the claim, which, in the event of restoring the Applicant in her position, could be brought again, should the circumstances persist. Alternatively, should the Respondent elect a pay-off option, the claim will be rendered moot. Accordingly, the question of suspending the proceedings until final resolution of Case UNDT/NBI/2018/105 does not arise.

JUDGMENT

21. The Application is moot and thus irreceivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 18th day of June 2019

Entered in the Register on this 18th day of June 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi