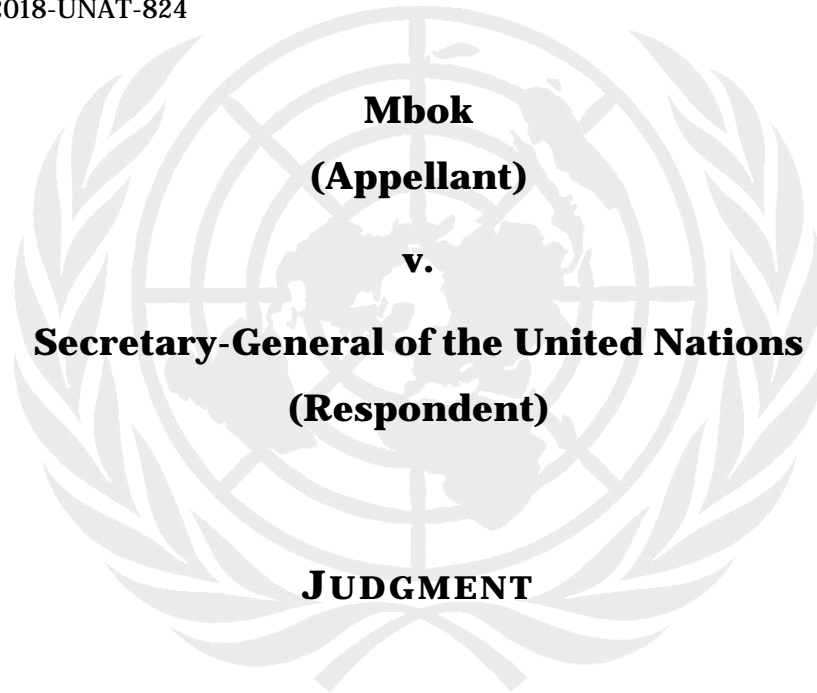




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-824



Mbok

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Sabine Knierim Judge Deborah Thomas-Felix
Case No.:	2017-1113
Date:	22 March 2018
Registrar:	Weicheng Lin

Counsel for Mr. Mbok:	Sètondji Roland Adjovi
Counsel for Secretary-General:	Nathalie Defrasne

Reissued for technical reasons on 30 August 2018

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/061, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 24 July 2017, in the case of *Mbok v. Secretary-General of the United Nations*. Mr. Eric Bertin Mbok filed the appeal on 15 September 2017, and the Secretary-General filed an answer on 13 November 2017.

2. On 15 December 2017, Mr. Mbok filed a motion seeking leave to file additional pleadings and on 26 January 2018, the Secretary-General filed his response objecting the motion.

Facts and Procedure

3. Mr. Mbok entered into service with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) on 7 January 2003.

4. Effective 1 July 2014, he was granted a one-year fixed-term appointment as Special Advisor with MONUSCO.

5. On 31 July 2014, the United Nations Development Programme (UNDP) sent MONUSCO a memorandum requesting Mr. Mbok's release on secondment, for an initial period of one year.

6. On 4 August 2014, Mr. Mbok informed MONUSCO that he had accepted the position of Peace and Development Advisor with UNDP and that he intended to "relinquish [his] current position in MONUSCO".

7. By facsimile dated 15 August 2014, MONUSCO informed UNDP that it was unable to maintain a lien on Mr. Mbok's post, but that it would agree to his transfer.

8. On 30 September 2014, UNDP informed MONUSCO that it was unable to accept the transfer of Mr. Mbok to UNDP, but that instead UNDP would hire "Mr. Mbok after his resignation from MONUSCO". A copy of the same was sent to Mr. Mbok on 1 October 2014.

9. By letter dated 1 October 2014, Mr. Mbok was informed that he had been granted a continuing appointment in the Secretariat of the United Nations, effective 30 September 2014.

10. In response to Mr. Mbok's queries about UNDP's 30 September 2014 memorandum, UNDP confirmed by e-mails dated 2 and 10 October 2014 that Mr. Mbok was not being transferred or seconded to UNDP, but that instead he would be reappointed with UNDP. In its 10 October 2014 e-mail, UNDP clarified that neither a transfer nor a secondment would be possible and that, therefore, benefits and entitlements, such as leave, mobility status and repatriation grant, would not be carried over. The e-mail also stated that Mr. Mbok was being separated from his current appointment with MONUSCO and that his appointment with UNDP would be treated as an initial appointment.

11. By Inter-Office Memorandum (IOM) dated 17 October 2014, Mr. Mbok was informed that due to his selection by UNDP, his appointment would be curtailed effective 24 October 2014 and that his separation from MONUSCO would take effect that same day.

12. Effective 25 October 2014, Mr. Mbok was appointed with UNDP on a one-year fixed-term contract at the P-5/Step 7 level. A separation Personnel Action effective 24 October 2014 was finalized on 29 November 2014 indicating that Mr. Mbok was separated, that his appointment had been curtailed by MONUSCO effective 24 October 2014, and that he was to be reappointed to UNDP.

13. He was then paid USD 17,302.58 for his unused leave in April 2015.

14. On 25 October 2016, Mr. Mbok wrote to the United Nations Headquarters inquiring about his return rights to the Secretariat.

15. On 31 October 2016, the Department of Field Support, Field Personnel Division (FPD/DFS) replied that by separating from the Secretariat on 24 October 2014 in order to take up a fixed-term appointment with UNDP, he relinquished his continuing appointment and his return rights to the Secretariat. The e-mail specified that FPD had consulted with UNDP's Policy Unit which confirmed that UNDP no longer granted continuing appointments, therefore, it would not have been possible to transfer Mr. Mbok holding a continuing appointment at the time with the Secretariat.

16. Mr. Mbok replied that same day that he had never relinquished his continuing appointment, that he never separated from MONUSCO, that he laterally transferred from MONUSCO to UNDP, and that he never received a repatriation grant or other entitlements related to separation from service.

17. On 29 December 2016, Mr. Mbok submitted a request for management evaluation of the decision dated 31 October 2016 that he had relinquished his continuing appointment and that he had no return rights to the Secretariat.

18. By letter dated 23 January 2017, the Management Evaluation Unit informed Mr. Mbok that it determined that the decision he challenged had been taken in October 2014 and that, therefore, his request for management evaluation was rejected as time-barred.

19. On 13 March 2017, Mr. Mbok challenged the decision to terminate his continuing appointment before the UNDT in Nairobi.

20. On 24 July 2017, the UNDT issued Judgment No. UNDT/2017/061 rejecting Mr. Mbok's application as time-barred. The UNDT concluded that the 17 October 2014 IOM unambiguously informed Mr. Mbok of MONUSCO's decision to end his appointment, which at this point was a continuing appointment, by separating him from service on 24 October 2014. The FPD/DFS's response of 31 October 2016 was merely a reiteration of the 17 October 2014 decision received by Mr. Mbok and was therefore not an appealable decision. The UNDT concluded that Mr. Mbok's request for management evaluation was untimely and that therefore the application before the UNDT was time-barred.

Submissions

Mr. Mbok's Appeal

21. The UNDT erred in fact in relying on correspondence that pre-dated the granting of his continuing appointment to interpret the IOM of 17 October 2014. The continuing appointment was notified to Mr. Mbok on 1 October 2014 with an effective date of 30 September 2014. The UNDT relies on communications dated August and September 2014. None of these correspondences could have been understood as having provided a response to a situation that was only generated in October 2014. The UNDT therefore erred in fact when it relied on those correspondences.

22. The 17 October 2014 IOM could not be interpreted as terminating Mr. Mbok's continuing appointment because a) there was no reference to the continuing appointment in the IOM; b) the end of his service with MONUSCO did not curtail his continuing appointment with the Secretariat; c) the memorandum did not meet the requirements of the Staff Regulations and

Rules on separation from service; and d) Mr. Mbok's continuing appointment could only be terminated under specific circumstances which were not mentioned in the IOM. Moreover, the payment for unused annual leave referred to by the UNDT was decided by the Administration and if it constitutes a mistake, the Administration cannot use it against the staff member.

23. In addition, the e-mail dated 31 October 2016 contradicts the interpretation by the UNDT. There was no reason for FPD/DFS to consult UNDP in October 2016 in order to reply to Mr. Mbok's e-mail regarding continuing appointments, if indeed the IOM of 17 October 2014 "notified" Mr. Mbok of the termination of his continuing appointment with the United Nations Secretariat. The e-mail of 31 October 2016 was the first notification he received that his continuing appointment had allegedly been terminated. In this regard, it is important to recall that before the UNDT, the Secretary-General relied on correspondence from UNDP, yet Mr. Mbok's continuing appointment was with the United Nations Secretariat. Mr. Mbok questions how UNDP could be the agency determining the status of his continuing appointment with the United Nations Secretariat.

24. The UNDT erred in assuming that Mr. Mbok sought clarification on the status of his appointment in 2016 out of fear that his contract with UNDP would not be renewed. While Mr. Mbok mentioned that his contract "could expire on March 30", he did not state that he was fearing that he would not be renewed. This assumption by the UNDT was factually wrong and misled the UNDT in its understanding of the circumstances with a perception of a hidden agenda on the part of Mr. Mbok.

25. The Personnel Action Form issued immediately after Mr. Mbok's "end of mission" with MONUSCO still mentioned that he was holding a fixed-term appointment with no reference to the continuing appointment. It was only in 2016, after Mr. Mbok wrote to inquire about his continuing appointment that FPD/DFS sent him the Personnel Action Form finalized on 15 August 2016 reflecting the continuing appointment status. It also showed that his contract expiration date was changed to 31 March 2025. This means that by August 2016, Mr. Mbok was still in the system as a holder of a continuing appointment and that the decision to terminate it was made in October 2016. The UNDT therefore erred in finding his application time-barred.

26. Mr. Mbok requests that the Appeals Tribunal find his appeal receivable, consider the merits of his case and find that his continuing appointment was not terminated with his move from MONUSCO to UNDP; or, alternatively remand the case to the UNDT for a judgment on the merits. Mr. Mbok also requests that the Appeals Tribunal hold an oral hearing.

The Secretary-General's Answer

27. The UNDT correctly concluded that Mr. Mbok's application was not receivable *ratione temporis*. The UNDT thoroughly reviewed the chronology of events and the documents and concluded that Mr. Mbok clearly had been aware by October 2014 that neither a secondment nor a transfer from MONUSCO to UNDP was a viable option in his situation and that he would have had to resign from that position in order to take up the appointment with UNDP. The UNDT noted that Mr. Mbok himself declared his intention to relinquish his position with MONUSCO. The UNDT concluded that the 17 October 2014 IOM unambiguously informed Mr. Mbok that he would be separated from MONUSCO, which is part of the Secretariat.

28. The UNDT correctly concluded that the 17 October 2014 IOM had all the characteristics of an appealable administrative decision and that the e-mail of 31 October 2016 from FPD/DFS merely confirmed his separation from the Secretariat. An appealable administrative decision is a decision which produces direct legal consequences affecting a staff member's terms and conditions of appointment. The reiteration of an original administrative decision does not reset the statutory time limits; rather the time starts to run from the date on which the original decision was made. The UNDT correctly concluded that the e-mail of 31 October 2016 from FPD/DFS merely confirmed his separation from the Secretariat. On that basis, the UNDT correctly concluded that the application was time-barred.

29. The UNDT did not err in relying on correspondence that pre-dated the granting of Mr. Mbok's continuing appointment to interpret the IOM of 17 October 2014. Mr. Mbok first informed MONUSCO of his intention to accept a position with UNDP on 4 August 2014, stating that he intended to relinquish his position with MONUSCO. Between August and October 2014, MONUSCO was in talks with UNDP to determine how Mr. Mbok would move from MONUSCO to UNDP and it was determined that he would need to separate from MONUSCO. While those discussions were taking place, Mr. Mbok was granted a continuing appointment. That context was essential to understand MONUSCO's decision conveyed to Mr. Mbok in the 17 October 2014 IOM that he would be separated from service, since he intended to accept a position with UNDP.

Moreover, at the time of his separation in October 2014, Mr. Mbok held a continuing appointment with MONUSCO which is part of the United Nations Secretariat. Therefore, when he chose to accept the position offered by UNDP and separated from MONUSCO, he thereby clearly separated from the Secretariat.

30. There is no merit in Mr. Mbok's argument that the 17 October 2014 IOM did not meet the conditions and requirements of a separation from service. The Staff Regulations and Rules define a separation from service as either a resignation, an abandonment of post, an expiration of appointment, a retirement, a termination of appointment or death. In the present case, Mr. Mbok's separation from service was initiated by him when he informed MONUSCO of his acceptance of a position with UNDP. The 17 October 2014 IOM was an official acknowledgment of his resignation which gave him an explanation on the procedures to follow upon separation from service.

31. Mr. Mbok's claim that the UNDT erroneously assumed that he requested clarification in October 2016 out of fear of not having his fixed-term appointment with UNDP renewed is irrelevant as the UNDT's conclusion does not rely on any such fact or assumption, even though it is briefly mentioned in the Judgment. The UNDT's conclusion is two-fold: First, the UNDT correctly held that the 17 October 2014 IOM clearly informed Mr. Mbok that MONUSCO was ending his appointment following his expressed intention to take up the UNDP position and that it was an administrative decision that had direct legal consequences for him. Second, the UNDT held that the e-mail from FPD/DFS of October 2016 was a mere reiteration of the 17 October 2014 decision and that, as such, it was not appealable. Mr. Mbok has failed to establish any error in this reasoning.

32. Mr. Mbok failed to establish any exceptional circumstances warranting the admission of new evidence. Out of the 13 annexes Mr. Mbok attached to his appeal, Annexes A02, A04, A05, A06 and A12 were not provided to the UNDT and, therefore, constitute new evidence. Mr. Mbok's self-generated "timeline of facts" is merely a summary of his perspective on the facts. The other documents (the Personnel Action Form dated 11 July 2014, the performance documents from 2015 and 2016 and the e-mail exchange with DFS in July 2016) were all known to him and in his possession at the time he filed his application before the UNDT and should have been presented at that time. In the absence of any exceptional circumstances warranting the admission of new evidence, these documents should be rejected.

33. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

34. We deal first with two preliminary matters.

35. Firstly, Mr. Mbok filed a request for an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. In addition, we do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Accordingly, the request for an oral hearing is denied.

36. Secondly, Mr. Mbok filed a motion for leave to file a reply to the Secretary-General’s answer. The motion states that the purpose of the reply “will be limited to addressing the challenge raised by the Respondent vis-à-vis his annexes. Such clarification would assist the Appeals Tribunal in its determination, in all fairness to the parties.” The reply seeks to challenge the Secretary-General’s opposition to five annexes attached to the appeal which constitute additional evidence.

37. The Statute and the Rules do not provide for an appellant to file an additional pleading after the respondent has filed an answer. Nevertheless, Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal allow the Appeals Tribunal to grant a party’s motion to file additional pleadings if there are exceptional circumstances justifying the motion. In the present case, there are no exceptional circumstances which justify the receipt of the additional evidence, as required by Article 2(5) of the Statute. The additional evidence, with the possible exception of one annex, was known to Mr. Mbok and should have been presented to the UNDT. Moreover, the proposed additional evidence is irrelevant to the determination of his appeal. Accordingly, Mr. Mbok’s motion to file a reply is denied and Annexes Ao2, Ao4, Ao5, Ao6 and A12 to the appeal are not admitted into evidence.

38. We now address the appeal itself. Mr. Mbok claims that the UNDT erred in fact in finding that his application challenging the decision to terminate his continuing appointment was not receivable. He argues that the FPD/DFS response of 31 October 2016 was the first time

that he was informed that his continuing appointment was allegedly terminated because of his acceptance of the offer from UNDP.

39. The IOM of 17 October 2014 clearly conveyed to Mr. Mbok that following his selection by UNDP, his appointment with MONUSCO would be curtailed effective 24 October 2014 and that his separation from MONUSCO would take effect on the same date. The IOM contains a comprehensive explanation of his final check-out and payment of final entitlements. It was a clear and definite administrative decision.

40. We find it inconceivable that Mr. Mbok would not have known that UNDP was not part of the United Nations Secretariat and that accepting a posting with it would necessitate separation from MONUSCO. Indeed, the UNDT opined:¹

... [I]t is apparent that as early as 1 October 2014, the Applicant was aware that a secondment to UNDP was not an option and that he would have to resign to take up the appointment with UNDP. Since secondment was not a possibility as of 1 October 2014, the Applicant knew or should have known that he would be severing his contractual relationship with MONUSCO, which is part of the Department of Peacekeeping Operations and the United Nations Secretariat, once he signed a letter of appointment with UNDP, which is a Programme that is separate and distinct from the United Nations Secretariat.

41. We find no error in the UNDT's finding that the 17 October 2014 IOM²

... (...) unambiguously informed the Applicant of MONUSCO's decision to end his appointment, which at this point was a continuing appointment, by separating him from service on 24 October 2014. The Tribunal holds that the 17 October 2014 inter-office memorandum was an administrative decision because it had a direct and adverse impact on the Applicant's contractual status and had direct legal consequences for him.

42. The 17 October 2014 IOM therefore constitutes the key administrative decision from which time ran to request management evaluation. The UNDT was quite correct in its finding that the FPD/DFS response of 31 October 2016 was a reiteration of the 17 October 2014 decision and was therefore not an appealable administrative decision. The Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines;

¹ Impugned Judgment, para. 35.

² *Ibid.*, para. 39 (internal footnotes omitted).

rather, the time starts to run from the date on which the original decision was made. For this reason, a staff member cannot reset the time for management review by asking for a confirmation of an administrative decision that has been communicated to him earlier. Neither can a staff member unilaterally determine the date of an administrative decision.³

43. The legal framework applied by the UNDT in deciding the case cannot be faulted. It was cognisant that in accordance with Staff Rules 11.2(a) and (c), for an application to be receivable, the applicant must first submit a request for management evaluation within the applicable time limit, which is “60 calendar days from the date on which the staff member received notification of the administrative decision to be contested”. Article 8(1)(c) of the UNDT Statute provides that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation where required. Pursuant to Article 8(3) of the UNDT Statute, the Dispute Tribunal is precluded from suspending or waiving the deadlines for management evaluation.

44. The UNDT correctly found that Mr. Mbok should have requested management evaluation of this administrative decision on or before 16 December 2014; however, he did not do so until 3 January 2017 and so his application was not receivable.

45. The Appeals Tribunal has consistently held that staff members have to ensure that they are aware of the Staff Regulations and Rules and the applicable procedures in the context of the administration of justice in the United Nations’ internal justice system. Ignorance cannot be invoked as an excuse for missing deadlines.⁴

46. We find no error in the UNDT’s Judgment, whether of law or fact. Mr. Mbok’s application was clearly not receivable. We have considered all of his submissions, none of which persuade us that the UNDT Judgment was in any way erroneous. His appeal is entirely without merit.

³ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 31, citing *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, citing in turn *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

⁴ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 35; and *Bezziccheri v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-538, para. 40.

47. We note that the UNDT found his application to be frivolous, vexatious and an abuse of process, yet refrained from making an order for costs, which was very fortunate for Mr. Mbok.

48. The appeal fails.

Judgment

49. The appeal is dismissed and Judgment No. UNDT/2017/061 is affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Thomas-Felix

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar