Introduction

1. The Applicant is a Security Awareness Induction Training (SAIT) Liaison Officer at the P-3 level with the United Nations Mission for Iraq (UNAMI) based in Amman, Jordan. He filed an Application on 21 February 2012 contesting the following:

a. A decision taken by UNAMI admi

Applicant then proceeded to arrange a doctor's appointment for purposes of obtaining the needed report.

12. The doctors that the Applicant first saw in Canada referred him to Dr. Maurice Boulay who was a psychologist. Therapy sessions were scheduled and conducted on a continuous basis starting 7 June 2009 and went on for a period of about four months.

13. Dr. Boulay then sent his medical Report to Dr. Lennartz and Dr. Tiwathia advising that the Applicant was anxious to return to work as quickly as possible but that he should be posted to a "non-conflict" area as he had had "more than his fair share of being exposed to situations which were life threatening".

14. On 30 August 2009, Dr. Boulay advised Dr. Lennartz that the Applicant was anxious to return to work, and could return though he reiterated his recommendation that the Applicant return to a non-conflict zone.

15. On 15 September 2009, Dr. Lennartz wrote an email to Dr. Boulay informing him to advise the Applicant to see a psychiatrist to obtain a psychiatric report.

16. On 30 September, Dr. Lennartz wrote to the Applicant informing him that Dr. Boulay, being a psychologist was not considered a medical practitioner or doctor and that MSD would require, other than Dr. Boulay's report, a medical report from a psychiatrist.

17.

> as in Canada I have been led to believe the both are professional and interchangeable.
>
> Irregadless I have followed the direction from the mission doctor, I have not returned to the mission prior to any clearance and am now awaiting an appointment with a psychiatrist.
>
> Also, as I advised earlier, I will return today if I am provided clearance or allowed to return.

18. On the same day, the Applicant also wrote to Dr. Lennartz expressing his surprise on realizing that he had been terminated given that he had been following instructions given to him. He explained that he only saw Dr. Boulay because he

23. On 13 January 2010, Dr. Lennartz wrote to the Applicant informing him that he had been cleared to return to mission as of 30 November 2009, and stated that he was surprised that the Applicant had not yet been informed by MSD about his clearance.

24. By a fax dated 1 April 2010, Dr. Tiwathia informed Mr. Sellers that all medical reports from the Applicant's attending doctors had been reviewed by MSD and that based on the medical information provided, the Applicant was "NOT medically fit to return to UNAMI."

25. By a memorandum dated 7 April 2010 from Ms. Muhoho, the Applicant was informed that effective 17 February 2010, he had exhausted his sick leave entitlements. She informed him further that UNAMI would make a request to the United Nations Joint Staff Pension Fund (UNJSPF) for him to be awarded a disability benefit.

26. On 9 April 2010, the Applicant wrote to Dr. Tiwathia expressing his displeasure and discomfort over the fact that he was still not cleared to return to work as per his doctors' recommendations. Dr. Tiwathia responded by informingo "NOhfac7-rhe :n-07.-7.5

33. On 29 March 2011, Mr. Sato sent the Applicant a letter stating:

> …I would like to inform you that we have given full consideration to your situation and have explored current and potential vacancies to place you in another field mission. Regrettably, we have exhausted all available options….in order to keep you on actual contractual status we will place you on Special Leave Without Pay (SLWOP) upon the expiration of your sick leave entitlement from 24 November 2010 until the ABCC finalizes [the] review of your case and issues its decision.

34. On different dates between May and July 2011, the Applicant wrote to Mr. Sato essentially protesting that he was receiving conflicting information from the Administration regarding his contractual status with UNAMI. He arranged to meet with Mr. Sato on 16

Management Evaluation Unit (MEU) responded the next day, 29 November 2011 informing him that his claims were not receivable.

40. The Applicant filed the present Application on 21 February 2012.

41. On 26 March 2012, along with the Reply to the Application, the Respondent also filed a motion requesting to have the issue of receivability in this case decided prior to moving onto the merits.

Respondent's case

42. The Respondent contends that the Application is not receivable *rationae temporis* since the Applicant failed to request for management evaluation of the contested decisions within the 60-day time limit under staff rule 11.2 (c).

43. The Applicant was required to submit his request for management evaluation within 60 calendar days from the date on which he received notification of the contested decisions.

44. The main administrative action in this case is the decision of 1 April 2010 that the Applicant was not medically fit to return to UNAMI and the Applicant was informed of this in writing on 9 April 2010. He, however, did not seek management evaluation of this decision until 28 November 2011, more than one year and five months after he had been notified of it. He therefore did not meet the 60-day time limit under staff rule 11.2 since he was required to submit his management evaluation request by 8 June 2010.

45. It is also the Respondent's case that the Applicant's requests for the Administration to reconsider the decision of 9 April 2010 and his letter of 11 August 2011 to the Secretary-General and the SRSG/UNAMI seeking a "final administrative decision" do not revive the applicable time limits. His efforts to engage the Administration in informal settlements did not absolve him of the obligation to comply with the time limit to seek management evaluation.

46. The other decisions contested by the Applicant are inextricably linked to the decision of 9 April 2010 and are also similarly time-barred.

47.

55. He contends that it was only after realizing that he had exhausted every other avenue to settle his claims, including by speaking with MSD officials, Human Resource personnel, Dr. Lennartz and even the Ombudswoman, that he realized he had no other choice than to appeal his claims. As at this point he had finally realized the extent of his injury after becoming aware with finality that the Administration was not going to return him to work after two years.

56. It was due to the Administration's inaction that the Applicant was forced finally to request the Organization to take action. The facts in this case make it clear that his actions were not those of someone who has "slept on his rights" and consequently failed to comply with time limits.

57. Based on these pleadings, facts and circumstances of the case, the Applicant requests the Tribunal to find his claims fully admissible and receivable.

Issues

58. The Tribunal, for now, only restricts itself to the question of whether the Applicant's claims are receivable which will be tackled under the following headings:

> a. Whether the Tribunal, while precluded from waiving or suspending deadlines for management evaluation is bound by the MEU finding on the receivability of a case.
>
> b. Whether the contested actions form part of the same continuum.

Consideration

Whether the Tribunal, while precluded from waiving or suspending deadlines for management evaluation is bound by the MEU finding of the receivability of a case

59. The Respondent contends that the Application is not receivable and argues that the Applicant did not request management evaluation of the contested decision within the 60 day time limit required under Staff Rule 11.2(c). The

Applicant on the other hand maintains that all his claims are receivable as he is

65. The Respondent argues that the main contested decision is that of 1 April 2010 which the Applicant was informed of on 9 April 2010 regarding the decision to keep him on sick leave. The Respondent's case is that the Applicant, having been informed of this decision on 9 April 2010, had 60 days from that date within which to seek management evaluation by contacting MEU.

66. The Applicant, on the other hand, maintains that what he is contesting are not stand-alone decisions *per se* but rather a series of decisions and non-decisions spanning over the course of more than two years, the final of which were his clearance to return to mission on 21 July 2011 and the non-response to his letter of 11 August 2011 addressed to the Secretary-General. Regarding the decision of 1 April 2010, the Applicant submitted that it was his understanding that despite the non-clearance, the Administration was still working towards returning him to work and that this was not a final decision, particularly so because the letter did not give any sufficient details as to its finality.

67. The Applicant filed his request to MEU on 28 November 2011 to which MEU responded that any administrative decision taken earlier than 29 September 2013, which was exactly 60 days prior to the Applicant's request to the MEU constituted a late submission.

68. In *Igbinedion*[6], pronouncing on the question of whether or not the Tribunal was bound by the findings of the MEU regarding the receivability of a case, Boolell J stated that

> Staff rule 11.2(a) and (c) require a staff member to first approach the Secretary-General for the resolution of a dispute within sixty (60) days of being notified of the impugned decision. That is the threshold of receivability before the Management Evaluation Unit. The threshold for receivability before this Tribunal is governed by Articles 7 and 35 of the Rules of Procedure.
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> …The submission by the Respondent that [the] finding by the MEU [on receivability] binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word 'deadline.'

[6] Judgment No. UNDT/2013/023.

> ...Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It

circumstances of this case must be answered. For instance, were there any administrative decisions to be challenged? When exactly did the claims raised in the Application become ripe to be contested? Or when did it become too late for the Applicant to complain?

72. The former Administrative Tribunal held in *Andronov*[7] that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. This definition of what constitutes an administrative decision has been cited with approval in many cases by the Dispute and Appeals Tribunals.[8] The former Administrative Tribunal further stated in *Andronov*:

> [An] administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

73. In the present case, a series of decisions were set in motion the moment the Applicant took ill and proceeded on sick leave as from 11 May 2009. Were those decisions 'administrative decisions' as per the definition in *Andronov*?

74. As he was readying himself to return to work after the initially scheduled two weeks, on 3 June 2009, the Applicant was advised to remain on sick leave until he obtained a psychiatric report. At these early stages of the series of events that were to later transpire, nothing seemed irregular with this directive and the Applicant could not reasonably foretell that he would remain on sick leave for 26 months. He thus proceeded to see the doctors necessary for him to obtain the required medical report in order to be cleared for duty as per the instructions given to him.

75. The first of the doctors that attended to him in Canada was Dr. Boulay, who cleared the Applicant as fit to return to work but recommended that he return

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[7] Former UN Administrative Tribunal Judgment No. 1157 (2003).
[8] For instance in *Al-Surkhi* 2013-UNAT-304.

81. As at this time, the Applicant was in limbo regarding his employment although laboring under the belief that the mission was still working towards returning him to duty. As such he could not contest any decision as there was in fact no clear administrative decision that he could have contested.

82. In between the clearance from MSD of 30 November 2013 which he had not been informed about until after two months and 1 April 2010, something curious happened. On the latter date, Dr. Tiwathia again wrote to Mr. Sellers informing him that after MSD reviewed the Applicant's medical reports, it was decided that the Applicant was NOT medically fit to return to UNAMI, a sharp contradiction with the clearance she had given five months earlier. No further information or reasons were given for this decision.

83. The Respondent submits that it is this latter decision not to clear the Applicant on 1 April 2010 that forms the core subject of the Applicant's claims in this case. The Applicant's own account on this is that he contests not exclusively the decision of 9 April 2010 but the entire sequence of events starting004 Tc1r(t)6.7(0 Tw. sequ61p4al)6.3

86. Four months later, on 6 August 2010, the Applicant was informed that he had exhausted his sick leave with pay seven months earlier and that starting 16 February 2010 had been placed on sick leave at half pay. He was also informed that he did not receive a salary in June 2010 because he had been erroneously paid at full rate in May.

87. On 21 February 2011, seven months after the previous communication, the Applicant was informed that his appointment with UNAMI had come to an end on 23 November of the previous year. The Applicant wrote back in protest asking to know among other things why the reason for his termination had been indicated as "disabled" when three doctors that he had seen at the instruction of the Organization had advised that he was healthy and fit for duty and why he was being informed of this nearly half a year later. As a response he was informed on 29 March 2011 that the mission had placed him on SLWOP starting 23 November 2010 until the ABCC finalized his case.

88. From the record, in between the months of May and July 2011 the Applicant continued to push for information to understand exactly what was happening in his case. He travelled to New York to speak with Mr. Sato but his trip was unfruitful as Mr. Sato cancelled the scheduled meeting at the last minute.

89. Finally, the efforts of his travels, chains of emails, phone call enquiries came to fruition on 21 July 2011 when he was cleared by MSD to return to mission. This however was not without a tinge of the now familiar state of reigning confusion as he was initially instructed to report to the duty station in Kuwait only to get there and be told to return and to remain in Amman, Jordan.

90.

He now complains that the recklessness of the decisions and the non-decisions on the issue amount to an abuse of authority. He would only be able to take that view at the earliest, after the decision of 21 July 2011 clearing him for duty or at the very latest after his 11 August 2011 letter went unanswered.

97. Thus, on 11 August 2011, he wrote a detailed letter to the Secretary-General and the SRSG/UNAMI setting out the facts of his case, his complaints and the remedies he sought.

98. In line with the previous conduct of some of the Administration's officials where correspondence and enquiries made by the Applicant would often go unanswered, this letter to the Secretary-General and the SRSG titled "Request for a Final Administrative Action" also went unanswered. The Applicant thereafter sent a similar request to the management evaluation on 28 November detailing the very same complaints and seeking the same remedies.

99. In *Andronov*, the former UN Administrative Tribunal decided that administrative decisions are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. The unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions. Going by this, the non-response to the Applicant's letter was in itself an implied administrative decision.

100. The Tribunal finds that the singu4.2(s7.5(t)-)-10-5.4( )- ie2te8thits-4.7(c)-5.5()-theo

101. This entire Application is hinged on prohibited conduct on the part of UNAMI and MSD officials, all other incidences are just manifestations of the continuing abuse and prohibited conduct.

102. It cannot reasonably be argued that every single administrative action perceived to have been taken against the interests of the staff member in this case, which actions affected his employment are no longer actionable or that he can no longer seek relief as soon as 60 days of each of the adverse actions had occurred. In cases of continuous abuse all one needs to show is that there is a pattern of abuse of authority. The Applicant knew at the time when his letter of 11 August 2011 was ignored that this pattern was only going to continue and therefore took formal steps to bring it to an end.

103. In *Gebre*[9], the Applicant had made several efforts seeking the review of the impugned decision to the Registrar of the International Criminal Tribunal for Rwanda (ICTR) but just as in the present case, his correspondences were met with silence. It was not until the statutory time limits had run out for him to send his request for administrative review to the Secretary-General that he was finally advised that he had been sending his letters to the wrong official as a result of which his case had already become time-barred.

104.

soil and would therefore not germinate and yield fruit? Were his requests to the Registrar misdirected, sent to a person other than the

> The silence from [the] management reveals an employer-employee relationship with a regrettable lack of communication from the employer, an act which cannot be condoned by this Tribunal. An employee is required to respond to his/her employer's reasonable inquiries, questions or concerns relating to his employment. In the same way, an employer is expected to respond to an employee's reasonable questions, inquiries and concerns regarding the employment contract.

109. The Applicant thus having complained about the recklessness on the part of the Respondent on 11 August 2011 by writing to the Secretary-General, he ought to have received a response from the Office of the Secretary-General. If not, whoever received the said letter within the Office of the Secretary-General ought to have exercised a measure of reasonableness by forwarding it to MEU as the issues raised therein were the very same ones that the Applicant raised before MEU on 28 November 2011. The letter of 11 August served the same purpose as a request for management evaluation which is to seek administrative review.

110.

112. The actions and inactions of MSD and UNAMI officials with respect to a large part of the 26-month period in which the Applicant's work status was undetermined made it impossible to bring this action earlier.

113. The Respondent sought to counter this point by invoking the Tribunal's decision in *Bernadel*[12] where Carstens J found that an Application was not receivable as the Applicant had failed to file a timeous request for administrative review and which was upheld on appeal. The Tribunal finds that case distinguishable from the instant case in at least one cardinal respect. In *Bernadel*, the letter informing the Applicant of the final administrative decision had been drafted in a language that should have left "no doubt in the mind of the Applicant that the final decision on the case had been rendered" and that in subsequent communications, she was only seeking a reconsideration of that same decision.

114. On the contrary, in the present case, in light of the conflicting information that the Applicant was being given at different times and by different officials from different offices, it was not possible to tell when a final decision was taken. Clearly, the only decision that was taken with finality was tha.2(h)2h0.0.3(tak) il8 1(h)2h204l8 1(h)2h2a5

116. In the instant case, the Tribunal finds that given the actions of UNAMI and MSD officials in keeping the Applicant in limbo, it is utterly unconscionable for the Respondent to seek to bar this case from the purview of the internal justice system by lightly invoking a procedural rule, which was not even breached in the first place.

117. This case raises weighty issues on access to justice. The Tribunal holds that the principle of access to justice upon which the entire internal justice system of the United Nations depends demands that the seemingly legitimate claims raised in the Application must be given a chance to be heard. In the words of Counsel for the Applicant, “the Respondent in this case stood idly and silently as the Applicant was asking questions concerning his contract and pay and now seeks to blame him for not taking requisite action.” Should this be permitted, what will ensue will be a grave miscarriage of justice

118. This is particularly so because the remedies that the Applicant seeks include prayers for the removal from his personnel file of negative and unfounded reports concerning his physical and mental health and that he be given access to the file to confi2987 -1.721c(e.3(sto,e91c3t-0.0i91c3t-0.de4.8(e2.0i91c3(ii)5.7(is)-0.0eam)7.v3(sto,edeco

121. To the preliminary question of whether or not the receivability criteria set out in staff rule 11.2 and art. 8 of the Rules of procedure have been satisfied in this case, the Tribunal finds in the affirmative and holds that it has the jurisdiction to hear this case on the merits.

122. The Application and the claims contained therein are receivable both on substance and in time.

(*Signed*)

Judge Nkemdilim Izuako