



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1251

Emanuelle Caucci
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2021-1579
Date of Decision:	1 July 2022
Date of Publication:	12 August 2022
Registrar:	Weicheng Lin

Counsel for Ms. Caucci:	Dorota Banaszewska, OSLA
Counsel for the Secretary-General:	Francisca Lagos Pola

JUDGE SABINE KNIERIM, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Emanuelle Caucci contested

d. [Ms. Caucci] agrees that she will not take legal action against the Organization contesting the terms of the MOU, or any administrative decision related to its implementation.

To confirm the understanding and acceptance of the terms of [Ms. Caucci's] extension of temporary assignment and administrative lien through 29 February 2020, this MOU is signed by the Parties of their own free will and without any duress.

5. On 31 January 2020, DPO/Headquarters notified Ms. Caucci that it would not extend her temporary assignment beyond 29 February 2020. On 12 February 2020, she was informed that, based on the terms of the MOU, her appointment would not be renewed beyond 29 February 2020.

6. On 19 February 2020, Ms. Caucci requested sick leave. On 21 February 2020, the Division of Healthcare Management and Occupational Safety and Health (DHMOSH) approved the request for sick leave for the period 28 February 2020 through 30 April 2020.

7. On 24 February 2020, Ms. Caucci requested management evaluation of the decision not to renew her appointment beyond 29 February 2020.

8. On 5 March 2020, the Management Evaluation Unit (MEU) informed Ms. Caucci that based on the decision of MINUSMA to extend her fixed-term appointment for the duration of her approved certified sick leave pursuant to section 4.9 of ST/AI/2013/1 (Administration of fixed-term appointments), she would be eligible for extension of her appointment until 30 April 2020.

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the Respondent's decision that the Organisation did not intend to fulfil its obligations to effectuate Ms. Caucci's general right of return to MINUSMA was the relevant administrative decision.²

11. The UNDT found that since Ms. Caucci filed her management evaluation request on

Procedure before the Appeals Tribunal

15. On 16 July 2021, the Secretary-General filed an appeal of the Impugned Judgment with the UNAT and, on 16 September 2021, Ms. Caucci filed a reply.

Submissions

The Secretary-General's Appeal

16. The Secretary-General requests UNAT to vacate the Impugned Judgment in its entirety.

17. The Secretary-General submits that the UNDT erred on questions of law and fact in concluding that the Application was receivable. The Secretary-General submits that the timelines began to run from the Separation Notice of 30 April 2019, not the Separation Document of 12 February 2020. Accordingly, as the management evaluation request was filed on 24 February 2020, Ms. Caucci filed her request for management evaluation well beyond the deadline of sixty calendar days from the date upon which the staff member received notification of the contested decision (Staff Rule 11.2(c)). Relying on *Bernadel*¹¹ and others for the UNAT jurisprudence that the time limit for requesting management evaluation against an administrative decision starts once the staff member is notified of the decision in writing and in clear and unequivocal terms, the Secretary-General submits that the Separation Notice of 30 April 2019 met this requirement. In support, the Secretary-General recalls the UNAT jurisprudence that the reiteration of an original administrative decision does not reset the clock with respect to statutory timelines (*Kazazi, Mbok*)¹². The Secretary-General submits that Ms. Caucci's application is also barred by the MOU in which she waived the right to bring a claim.

18. The Secretary-General submits that the UNDT finding that the Application was receivable *ratione materiae* is incorrect and the Impugned Judgment should be vacated on that basis alone.

19. The Secretary-General submits that the UNDT erred in law and fact in equating temporary assignments to secondments and in finding that Ms. Caucci retained a general service lien or general right to employment in MINUSMA. The Secretary-General makes this submission on the basis that a general right to employment or right to return is not contemplated

¹¹ *Bernadel v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-180, para. 23.

¹² *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 31; *Mbok v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-824, para.42.

in the legal framework for temporary assignments (under ST/AI/2010/4/Rev.1 on Temporary Appointments), whereas secondments are governed by ST/AI/2010/3 on Staff Selection and the Inter-Organisation Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowance (Inter-Organization Agreement). While the Inter-Organization Agreement provides that a staff member on secondment will retain his or her rights of employment in the releasing organisation, ST/AI/2010/4/Rev.1 does not contemplate such a right, lien or right to return.

20. The Secretary-General submits that the MOU clearly and explicitly provided that Ms. Caucci was on a temporary assignment and did not recognise a general right to employment or right to return. The Secretary-General submits that it should be interpreted in a manner that is consistent with its plain reading, i.e. that Ms. Caucci relinquished any lien on any MINUSMA

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35. Ms. Caucci submits that the Secretary-General's contention that UNDT holding that a general right of employment is supported by the jurisprudence constitutes an error of law is inaccurate and that *Skoda*¹⁶ and *Tran Nguyen*¹⁷ apply *mutatis mutandis* at the very least.

36. Ms. Caucci submits that the Secretary-General's argument that a general right to employ or right to return for staff on temporary assignment would create an unfair advantage over other staff in downsizing missions is inaccurate and irrelevant, pointing out that seconded staff from downsizing missions retain their service liens when seconded.

37. Ms. Caucci submits that, applying the estoppel and clean hands doctrines as per *Kortes*,¹⁸ para. 38, to the present case it would be inequitable not to estop the Secretary-General from raising a whole set of new legal arguments not presented before UNDT. Ms. Caucci submits that this would breach the equality of arms principle and the spirit of Article 2 of the UNAT Statute. Ms. Caucci submits, as per the UNDT Judgment, the Secretary-General did not provide any legal authority for its contentions that the case law and rules applying to secondments do not apply to the temporary assignments.

38. Ms. Caucci submits that the UNDT correctly found that the Administration was under an obligation to reabsorb her or to find her a suitable alternative post.

39. Ms. Caucci submits that the UNDT correctly found that she could not and did not contract herself out of her service lien.

Considerations

40. The crucial issue of the present case is whether the UNDT correctly found that Ms. Caucci held a general service lien in MINUSMA which was not affected by the MOU and which obliged the Administration to reabsorb her into MINUSMA after her fixed-term appointment and temporary assignment at DPO had expired.

¹⁶ *Skoda v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-017.

¹⁷ *Tran Nguyen v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/002.

¹⁸ *Kortes v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-925.

41. The UNDT relied on its judgment in *Tran Nguyen*¹⁹ which deals with a UNICEF staff member who held a permanent appointment and was on secondment to WMO on the basis of the Inter-Organization Agreement.

42. The Inter-Organization Agreement provides, in relevant parts, as follows:

1. (a) The Organizations listed in Annex I have reached the following agreement concerning the rights of a staff member of one organization who is transferred, seconded or loaned to another organization, and the rights and liabilities of the two organizations concerned.

2. (d) "Secondment" is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which the staff member will normally be paid by and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his or her rights of employment in the releasing organization. The period of secondment may be extended for a further fixed period by agreement among all the parties concerned.

9. (a) When a staff member is seconded to another organization, his or her contractual relationship with the releasing organization will, except as may be otherwise provided hereafter, be suspended until the expiry of the agreed period of secondment, or until such earlier date as the parties may agree.

43. In *Tran Nguyen*, the UNDT, based on the Appeals Tribunal's judgment in *Skoda*, held:²⁰

36. However, a seconded employee remains a staff member of the releasing organization. The Appeals Tribunal confirmed in *Skoda* 2010-UNAT-017 that "in cases of secondment, staff members do not lose their service lien with their parent organization". In fact, para. 9 of the Inter-Organization Agreement specifies that:

When a staff member is seconded to another organization his contractual relationship with the releasing organization will, except as may be otherwise provided hereafter, be suspended until the expiry of the agreed period of secondment, or until such earlier date as the parties may agree.

37. What is more, a seconded staff member "will retain his rights of employment in the releasing organization", as the above-cited para. 2(d) of the Inter-Organization Agreement clearly stipulates.

...

¹⁹ *Tran Nguyen v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/002.

²⁰ *Tran Nguyen v. Secretary-General of the United Nations*, Judgment No. UNDT/2015/002; *Skoda v. United Nations Joint Staff Pension Board*, Judgment No. 2010-UNAT-017.

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(b) A temporary appointment does not carry any expectancy, legal or otherwise, of renewal. A temporary appointment shall not be converted to any other type of appointment;

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

member is unsuccessful in his/her applications, will he/she have the right to return to the Secretariat at his/her level at the time of his/her release on secondment.

51. And, finally, ST/AI/2010/4/Rev.1 (Administration of temporary appointments):

2.2 A temporary appointment may be granted for specific short-term requirements that are expected to last for less than one year at the time of the staff member's appointment, such as:

- (a) To respond to an unexpected and/or temporary emergency or surge demand involving, for example, a natural disaster, conflict, violence or similar circumstances;
- (b) To meet a seasonal or peak work requirement of limited duration that cannot be carried out by existing staff members;
- (c) To temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment;
- (d) To temporarily fill a vacant position pending the finalization of the regular selection process;
- (e) To work on a special project with a finite mandate ...

3.7 The selected candidate shall be offered a temporary appointment unless he/she already holds another type of appointment, in which case the following rules apply:

- (a) Candidates holding a permanent or continuing appointment will retain their permanent or continuing appointment and will be assigned to the position to be temporarily encumbered;
- (b) Candidates holding a fixed-term appointment will retain their fixed-term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

52. Section 3.7(a) and (b) ST/AI/2010/4/Rev.1 demonstrate the importance of the staff member's type of appointment

situation, rather than complaining that the Secretary-General “has provided no legal authority for this assertion” it would have been up to the UNDT to explain why it applied *Tran Nguyen* although Ms. Caucci’s situation differs considerably, namely because she was not at all on secondment under the Inter-Organization-Agreement (but on a temporary assignment) and only held a fixed-term appointment.

54. Consequently, all Ms. Caucci had was the specific lien to her former post of Human Rights Officer (P-3) in MINUSMA which was extended until 30 April 2019 together with her fixed-term appointment. However, in entering into the MOU on 30 April 2019, in order to be able to continue working for DPO, Ms. Caucci gave up the specific lien to this or any other MINUSMA post. The MOU makes clear that any renewal of her fixed-term appointment with MINUSMA depends on the continuation of the temporary assignment at DPO. Should the temporary assignment not be extended by DPO, the fixed-term appointment at MINUSMA will also not be renewed, and Ms. Caucci will be separated unless she is selected for a regular position through the staff selection system. In order to secure such a selection, the MOU stipulates that Ms. Caucci applies for vacant positions prior to expiration of her temporary ass Tc -1.719(i)-17.4 (S7 (tm)-7.3 (e)7.7 (n)7.17 (r5)7 (tm)-74c)0.5 (i)

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