



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/178
Judgment No.: UNDT/2017/033
Date: 9 May 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.
Registry: Nairobi
Registrar: Abena Kwakye-Berko

MALOOF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Kong Leong Toh, UNOPS

Introduction

1. The Applicant is a former Head of Office in Sudan, at the P-5 level, with the United Nations Office for Project Services (UNOPS). On 4 December 2015, he filed an application with the United Nations Dispute Tribunal (the Tribunal) contesting the following decisions: (1) to cancel his administrative leave “without completing the investigation that had been initiated” against him; (2) to “refus[e] to abide by the terms of [his] temporary reassignment” in the Sudan; and (3) not to renew his contract beyond 30 June 2015.

2. The Applicant is seeking rescission of the decision to cancel his administrative leave. Additionally, he seeks reinstatement in a suitable post or, alternatively, placement on special leave with full pay pending the conclusion of the investigation and production of an investigation report exonerating him of any wrongdoing. He also requests compensation in the amount of two year’s net base pay for loss of employment and an additional one year’s net base pay for loss of entitlements as well as moral damages for harm to his reputation, emotional stress and violations of due process. Furthermore, he requests reimbursement of 20 months of special operations living allowance (SOLA) payment.

Facts

3. The Applicant joined the UNOPS office in the Democratic Republic of the Congo (UNOPS Congo office) in 2007 at the P-5 level. In December 2013, he was temporarily moved to the UNOPS Sudan office as Head of Office at the P-5 level for an initial period of three to four months to assess the situation at that office.

4. In March 2014, UNOPS decided not to close down the UNOPS Sudan office and the Applicant was kept on board as interim Head of Office.

5. By letter dated 4 December 2014, the Deputy Executive Director, UNOPS, informed the Applicant that UNOPS had received allegations of intimidation,

harassment and other misconduct against him from various colleagues in the Sudan office and that, having reviewed these allegations, he considered that the Applicant's continued presence on UNOPS's premises posed a risk to the Organization's best interest. Consequently, the Applicant was placed on administrative leave with full pay with immediate effect.

6. By letter dated 13 March 2015, the Deputy Executive Director, UNOPS, informed the Applicant that since the investigation into the allegations against him was still ongoing, he had decided to extend the Applicant's administrative leave until 4 June 2015.

7. During a telephone conference on 16 March 2015, the Applicant was informed that the job description for the long-term position of UNOPS Head of Office in Sudan had recently been finalized and that, consequently, his temporary assignment as the interim Head of Office in Sudan would end on 30 June 2015.

8. By letter dated 20 March 2015, the Deputy Director, People and Change Practice Group, UNOPS, informed the Applicant of the decision not to renew his appointment beyond 30 June 2015.

9. At the beginning of April 2015, UNOPS advertised the vacancy for the position of Head of Office/Programme Coordinator for the UNOPS Sudan office at the P-4 level. The Applicant did not apply for this position.

10. On 13 May 2015, the UNOPS Internal Audit and Investigation Group (IAIG) completed the investigation in relation to the allegations against the Applicant. The IAIG concluded that:

There was some evidence that [the Applicant] shouted at people in the office. Similarly, it appeared that he improperly favored Ms. Doleeb in a recruitment exercise. IAIG consulted the General

Counsel and in light of [the Applicant's] separation from UNOPS, IAIG decided not to refer the matter for further consideration.¹

11. By email dated 24 June 2015 to the UNOPS Human Resources Officer, the Applicant requested clarifications concerning his administrative leave.

12. By email dated 25 June 2015, the UNOPS Legal Specialist informed the Applicant that “[his] administrative leave ha[d] not been extended and that no disciplinary action [was] being taken against [him] regarding the allegations.”

13. On 30 June 2015, the Applicant was separated from UNOPS service.

14. By memorandum dated 18 August 2015 to the UNOPS Executive Director, the Applicant requested management evaluation of the decision dated 25 June 2015. He also requested management evaluation of the decisions not to “restore [him] to his prior status” and the decision to “terminate [his] employment as of 30 June 2015”. There was no response to his request for management evaluation.

15. On 4 December 2015, the Applicant filed an application with the Tribunal. The application was served on the Respondent on 8 December 2015 with a deadline to file a reply by 9 January 2016.

16. On 16 December 2015, counsel for the Respondent filed a motion in which he sought leave to argue non-receivability as a preliminary issue.

17. By Order No. 394 (NBI/2016) dated 21 December 2015, the Tribunal rejected the Respondent’s motion.

18. On 9 January 2016, the Respondent filed his reply to the application.

19. On 3 February 2016, the Applicant filed his response to the reply.

20. By Order No. 003 (NBI/2017) dated 3 January 2017, the Tribunal ordered the parties *inter alia* to submit a list of potential witnesses and their sworn written

¹ IAIG completion of investigation form dated 13 May 2015. Case no. IAIG 2014/48 in relation to the investigation against the Applicant.

statements by 13 January 2017. They were also ordered to submit a paginated bundle of documents and other trial exhibits by 20 January 2017.

21. On 13 January 2017, the parties separately submitted their list of potential witness and their sworn written statements. The Respondent submitted the written testimonies of Mr. Bruce McKerrow, Officer-in-Charge of the UNOPS Regional Office for Africa from April 2013 to January 2014; Mr. Garry Conille, Regional Director of the UNOPS Regional Office for Africa from January 2014 to September 2015 and Ms. Kelly Swift, Manager of the UNOPS Investigations Unit, IAIG. The Applicant submitted his own written testimony and the written testimonies of Mr. Brian Lee Treacy, former Director of the UNOPS Congo office and Mr. Bamidele Ilebani, former Director of the UNOPS Ethiopia office who was the Applicant's direct line supervisor while in Sudan.

22. On 20 January 2017, the parties made a joint filing pursuant to the Tribunal's Order No. 003 (NBI/2017) dated 3 January 2017 and submitted a bundle of documents for the Tribunal's consideration.

23. On 20 January 2017, the Respondent filed a motion for leave to add the sworn written statement and potential testimony of Ms. Victoria Campbell, UNOPS Human Resources Officer.

24. By Order No. 020 (NBI/2017) dated 25 January 2017, the Tribunal included the bundle of documents submitted by the parties in the case file and granted the Respondent's motion for leave to add another witness.

25. On 25 January 2017, a case management discussion took place. During the case management discussion, the Respondent noted that the testimony of Ms. Victoria Campbell, UNOPS Human Resources Officer was no longer needed.

26. On 3 February 2017, the Respondent submitted to the Tribunal a redacted copy of the completion of investigation form dated 13 May 2015 which was issued by the UNOPS IAIG.

27. On 6 February 2017, the Respondent filed a motion for leave to file additional evidence, in particular, an email from Ms. Victoria Campbell, UNOPS Human Resources Officer to the Applicant dated 2 June 2015.

28. By Order No. 028 (NBI/2017) dated 7 February 2017, the Tribunal admitted as evidence the completion of investigation form dated 13 May 2015 but ordered the Respondent to submit an unredacted version of this document. The Tribunal also granted the Respondent's motion for leave to file additional evidence.

29. On 8 February 2017, the Respondent filed *ex parte* an unredacted version of the completion of investigation form, which upon the Tribunal's review, was turned over to the Applicant since there was no need in keeping its contents confidential.

30. On 8 and 9 February 2017, a hearing on the merits took place with the participation of the Applicant, his counsel, counsel for the Respondent and their respective witnesses.

31. By Order No. 036 (NBI/2017) dated 14 February 2017, the Tribunal ordered the parties to submit their closing statements by 20 February 2017.

32. On 18 February 2017, the Applicant filed his closing submissions and on 20 February 2017, the Respondent filed his closing statement.

Applicant's contentions

33. The Applicant's contentions may be summarized as follows:

- a. At the time the Applicant accepted the position in Sudan, it was on the understanding that this was a temporary assignment and that in due course he would have the option of returning to the Democratic Republic of the Congo (Congo).
- b. The issue of his placement on administrative leave is not clear. He was never informed about the allegations that were supposedly made

against him. It is also not clear whether or not an investigation in this regard was conducted.

- c. The decision to place the Applicant on administrative leave was merely a pretext for his ultimate removal by letting his contract expire.
- d. By maintaining the Applicant on administrative leave indefinitely without providing any justification, and in the interim, advising him of his separation from service, the Respondent is guilty of imposing a disguised disciplinary measure without the benefit of due process.
- e. UNOPS acted with the sole purpose of removing the Applicant not only from his post but from the Organization. This may stem from the irregularities he disclosed in the Congo that led to the departure of the UNOPS Head of Office there. In the absence of any reasonable explanation for his mistreatment, an improper motive may be inferred.

Respondent's contentions

34. The Respondent's contentions may be summarized as follows:

- a. The application is not receivable because the Applicant failed to request management evaluation within the mandatory 60-day deadline.
- b. The decisions not to extend the Applicant's administrative leave and not to take any disciplinary action against him were favorable to the Applicant, hence, an application against these decisions is not receivable.
- c. At the time of the Applicant's move to the UNOPS Sudan office, the Administration agreed that the Applicant would return to his former duty station in the Congo if the UNOPS Sudan office was closed down within three to four months of his move to Sudan. Since UNOPS eventually decided not to close down its Sudan office, the Applicant

had no right to return to the Congo. The Applicant decided to stay in Sudan beyond March 2014 without the Administration promising that he could return to the Congo later.

- d. Even if the Applicant had returned to the Congo, the Respondent would have had no choice but to immediately separate him from service because the Applicant's former post in the Congo was abolished in 2014. Therefore, the Applicant did not suffer any loss.
- e. The decision not to renew the Applicant's appointment was lawful. It was not a "disguised disciplinary measure" as alleged by the Applicant. This submission is not supported by any evidence and thus has no merit.
- f. The investigation in relation to the allegations against the Applicant was completed and, as a consequence, the Applicant was informed that no disciplinary action would be taken against him.
- g. The Applicant decided not to apply for the long-term position of UNOPS Head of Office in Sudan "apparently because it was classified at a lower level than he wanted."

Considerations

35. The Applicant contests the following decisions: (1) to cancel his administrative leave "without completing the investigation that had been initiated" against him; (2) to "refus[e] to abide by the terms of [his] temporary reassignment" in the Sudan; and (3) not to renew his contract beyond 30 June 2015.

1) The decision to cancel the Applicant's administrative leave

36. The Applicant contests the decision to cancel his administrative leave without completing the ongoing investigation.

37. Staff rule 10.4 provides in relation to the administrative leave, as follows:

a) A staff member *may be placed on administrative leave*, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave *may continue throughout an investigation and until the completion of the disciplinary process* (emphasis added).

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration, which, so far as practicable, should not exceed three months.

(c) Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure ...

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

38. The UNOPS Organizational Directive No. 36 on the legal framework for addressing non-compliance with United Nations standards of conduct provides in paragraphs 49 and 50, as follows:

49. Pursuant to Staff Rule 10.4, a staff member *may be placed on administrative leave* by the Deputy Executive Director at any time from the moment complaints of suspected wrongdoing are reported or detected, pending or during an investigation and until the completion of the disciplinary process (emphasis added). Personnel other than staff members may also be placed on administrative leave by the Deputy Executive Director at any time from the moment suspected wrongdoing is reported or detected, pending or during an investigation and until the completion of the administrative process.

50. As a general principle, administrative leave may be contemplated in cases where:

- (a) The conduct in question and/or the continued presence of the personnel on UN premises poses or may pose a security risk, or a threat to other UN personnel or to the Organization's best interest;
- (b) The personnel is unable to continue performing his or her functions effectively, in view of the ongoing investigation or proceedings, and the nature of his or her functions; and/or
- (c) There is a risk of evidence being tampered with or concealed, or of interference with the proceedings.

39. The evidence shows that the Applicant was placed on administrative leave on 4 December 2014 after UNOPS had received allegations of intimidation, harassment and other misconduct against him from various colleagues in the Sudan office. The Applicant did not contest the decision to place him on administrative leave but only the decision dated 25 June 2015 whereby UNOPS informed him that his administrative leave had not been extended and that no disciplinary action was being taken against him regarding the allegations.

40. In accordance with staff rule 10.4 and UNOPS Organizational Directive No. 36 mentioned above, the placement of a staff member on administrative leave is a discretionary measure of a preventive nature. As a consequence, the decision to discontinue the administrative leave of a staff member is also discretionary. Indeed, the decision not to extend the Applicant's administrative leave does not adversely affect his conditions of employment and as such, he has no standing to contest it.

41. The Applicant submits that his administrative leave was canceled prior to the completion of the ongoing investigation. Staff rule 10.4 provides that administrative leave "may continue throughout an investigation and until the completion of the disciplinary process." Indeed, the duration of the administrative leave is discretionary and depends on the circumstances of each particular case. The Applicant was placed on administrative leave on 4 December 2014². His administrative leave was further extended until 4 June 2015. The UNOPS IAIG completion of the investigation form shows that the investigation was, in fact, completed on 13 May 2015. On 25 June

² By letter dated 4 December 2014, whereby the Applicant was placed on administrative leave, he was also informed about the allegations of intimidation, harassment and other misconduct made against him from various colleagues in the Sudan office.

2015, the Applicant was informed of the non-extension of his administrative leave and of the decision not to take any disciplinary action against him regarding the allegations. The Tribunal does not find any procedural error on the part of the Administration. Certainly, in accordance with staff rule 10.4, the Applicant's administrative leave could not have gone beyond the completion of the disciplinary process which, in the present case, concluded on 25 June 2015. The evidence³ also shows that the Applicant did not return to work on 25 June 2015 but that he was allowed to focus on his search for alternative employment for the remainder of his contract.

42. Based on the foregoing, the Tribunal finds that the Applicant's challenge in relation to the decision to cancel his administrative leave is without merit.

2) The decision to "refus[e] to abide by the terms of [his] temporary reassignment" in Sudan

43. The Applicant submits that at the time that he accepted the position in the Sudan, it was on the understanding that this was a temporary assignment and that in due course he would have the option of returning to the Congo. The Respondent concedes that the Applicant would have returned to his former duty station in the Congo if the UNOPS Sudan office was closed down within three to four months of his move to Sudan in December 2013⁴. Since UNOPS eventually decided not to close down its Sudan office, the Applicant had no right to return to the Congo. The Respondent submits that the Applicant decided to stay in Sudan beyond March 2014 without the Administration promising that he could return to the Congo later. In his sworn written statement, Mr. Bruce McKerrow, former Officer-in-Charge of the UNOPS Africa Region noted that "[i]n view of the Applicant's concerns, it was agreed with him that he would go to Sudan for three to four months and, after that

³ Email from Ms. Victoria Campbell, Human Resources Officer, UNOPS to the Applicant dated 2 June 2015.

⁴ In his closing statement, the Respondent noted that "this promise was given to address the Applicant's concern that he was being asked to move to an office that was at the time at risk of being closed down."

short period, decisions would be made as to how to proceed with the Sudan office. The Applicant and I agreed that: a. If the decision was taken to close the office, then the Applicant would return to DR Congo. The Applicant and I never had any discussion about the Applicant returning to DR Congo under other circumstances. b. But if the opportunities could be realized in Sudan and the Sudan office was to continue, then the Applicant would be the logical candidate to head the Sudan office permanently.” The Respondent clarifies that had the Applicant returned to the Congo, he would have been separated from service because his former post in the Congo was abolished in 2014.

44. The Tribunal notes that while the Applicant’s assignment to Sudan took place in December 2013, the Applicant only contested the terms of such assignment when he was separated from UNOPS following the non-renewal of his appointment on 30 June 2015. The Applicant did not submit any evidence in support of the alleged agreement that he would be reassigned to his former position in the Congo at the end of his assignment in Sudan.

45. Furthermore, the Tribunal notes that the Applicant was informed by letter dated 20 March 2015 of the decision not to renew his appointment beyond 30 June 2015. By the same letter, the Applicant became aware of his upcoming separation and, as a consequence, of the decision not to reassign him back to Congo following the non-renewal of his appointment. Accordingly, he should have filed his request for management evaluation by 19 May 2015, at the latest. The Applicant only filed his request for management evaluation on 18 August 2015 which is well after the 60 calendar day deadline set out in staff rule 11.2(c). Therefore, the Applicant’s management evaluation request on the decision not to reassign him back to the Congo following the non-renewal of his appointment was time-barred and his application in respect of this decision is consequently not receivable.

3) *The decision not to renew the Applicant's appointment*

46. At the outset, the Tribunal notes that while the Applicant refers in his pleadings to his separation from service, the contested decision is in fact the non-renewal of his appointment. His separation on 30 June 2015 is, basically, the consequence of the non-renewal decision. Accordingly, the issue before the Tribunal is the non-renewal of the Applicant's appointment.

47. The Respondent submits that the application against the decision dated 20 March 2015 not to renew the Applicant's appointment is not receivable because the Applicant failed to request management evaluation within the mandatory 60-day deadline.

48. Staff rule 11.2 provides, in relevant part, that:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for management evaluation of the administrative decision.

In relation to time-limits:

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless *it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested*. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General (emphasis added).

49. Article 8, para. 3, of the Tribunal's Statute provides that:

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.

50. The United Nations Appeals Tribunal (Appeals Tribunal) has held in several judgments, notably in *Costa* 2010-UNAT-036, that the Dispute Tribunal has no jurisdiction to waive the time limits for requests for management evaluation or administrative review.

51. Considering that the Applicant was informed of the decision not to renew his appointment by letter dated 20 March 2015, he had until 19 May 2015 to file his request for management evaluation. The evidence shows that the Applicant only requested management evaluation of the contested decisions, including the decision not to renew his appointment, by letter dated 18 August 2015 to the UNOPS Executive Director. Therefore, the Applicant's request for management evaluation of the decision not to renew his appointment was time-barred and, as a consequence, his application against this decision is not receivable.

52. Since the Tribunal has found that the application against the decision not to renew the Applicant's appointment is not receivable, it will not consider the merits of this decision, including the reclassification of the Applicant's position in Sudan at the P-4 level and whether or not the non-renewal was a disguised disciplinary measure, as the Applicant submits.

53. Based on the foregoing, the Tribunal finds that there are no grounds to award the Applicant compensation for loss of employment or moral damages. The Appeals Tribunal reaffirmed in *Bertucci* 2011-UNAT-114 its disapproval for the awarding of compensation in the absence of actual prejudice. In the present case, the Tribunal considers that the Applicant did not suffer any prejudice in relation to the decision to cancel his administrative leave, which is the only decision considered on the merits.

Decision

54. In light of the Tribunal's conclusions, the application is dismissed.

(Signed)

Judge Alexander W. Hunter Jr.

Dated this 9th day of May 2017

Entered in the Register on this 9th day of May 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi