UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/037
Judgment No.: UNDT/2020/022
Date: 5 February 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ABDALLAH AHMAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Julia Kyung Min Lee, OSLA

Counsel for the Respondent:
Elizabeth Gall, AAS/ALD/OHR

INTRODUCTION

1. The Applicant is challenging a decision by the African Union – United Nations Hybrid Operation in Darfur ("UNAMID") that he characterizes as his placement "on Special Leave with Full Pay ("SLWFP") until the expiration of his fixed-term appointment when his contract was de facto terminated thereby denying him of termination indemnities".

2. The Respondent filed a reply on 27 April 2019.

3. The Applicant filed observations on the Respondent's reply on 27 May 2019.

4. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining the issues raised in this case and will rely on the parties' pleadings and additional submissions.

FACTS

5. The Applicant, a Field Language Assistant at the G-4 level, joined UNAMID on 29 April 2008 on an appointment of limited duration. On 1 July 2009, his contract was converted to a fixed-term appointment ("FTA"). He was assigned to the Umm Baro team site on 13 April 2016.[1] His FTA was extended from 1 July 2018 to 31 December 2018, a period of six months.[2]

6. On 1 June 2018, the Chairperson of the African Union Commission and the Secretary-General of the United Nations submitted a special report to the Security Council in which they recommended, *inter alia*: the drawdown and repositioning of UNAMID; the closure of team sites outside UNAMID's area of responsibility by 31 March 2019[3]; the "right-sizing" of the civilian staff following an alignment of the staffing requirements with the reconfigured mission staffing structures to be completed

[1] Application, page 3 and annex D.
[2] Ibid. annex A.
[3] S/2018/530 - Respondent's reply, annex R2, para. 62.

by 31 December 2018[4]; closure of the mission by 30 June 2020 and completion of liquidation by December 2020[5]. With respect to the team sites, the following were to remain open in UNAMID's area of operation: Kutum, Saraf Omra, Kabkabiyah, Tawilah, Sortony, Shangil Tobaya, Zalingei, Nertiti, Golo, Kalma, Kass, Menawashei and Khor Abeche. All other team sites and super camps, including the one where the Applicant worked, were to be closed.[6]

7. In resolution 2429 (2018), dated 13 July 2018, the Security Council took note of the recommendation in the Special Report of the Chairperson of the African Union Commission and the Secretary-General and requested that the Secretary-General provide a "detailed and clearly benchmarked exit strategy" for UNAMID.[7]

8. By facsimile dated 29 August 2018, addressed to the Director of the Field Personnel Division, Department of Field Support ("FPD/DFS"), the UNAMID Director of Mission Support ("DMS") submitted a request for approval from the Office of Human Resources Management ("OHRM") to place 65 national staff members, including the Applicant, affected by team site closures between October and 31 December 2018 on SLWFP pursuant to staff rule 5.3(f). The DMS explained that UNAMID had compared the costs for terminating the staff members' appointments and granting SLWFP and concluded that it would be less costly to place them on SLWFP pending the expiry of their FTAs on 31 December 2018.[8]

9. On 24 September 2018, the Director of FPD/DFS requested approval from the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") to place the 65 national staff members of UNAMID on SLWFP from the date of the closure of their respective team sites until the expiry of their FTAs on 31 December 2018.[9]

10. On 27 September 2018, the Chief of the Learning, Development and Human

[4] Ibid.
[5] Ibid.
[6] Ibid. para. 40.
[7] S/RES/2429 (2018) – Respondent's reply, annex R/3.
[8] Respondent's reply, annex R/5.
[9] Ibid.

Resources Services Division, OHRM, recommended that the ASG/OHRM approve the request to place the national staff members on SLWFP. The ASG/OHRM approved the request on the same day.[10]

11. By a memorandum dated 15 October 2018, the UNAMID DMS informed the Applicant that in accordance with Security Council resolution 2429 (2018) 10 team sites, including the one in Umm Baro, would be closed on 28 October 2018. Consequently, his FTA would not be renewed beyond 31 December 2018 and that he was going to be placed on SLWFP until 31 December 2018.[11]

12. The Applicant was placed on SLWFP from 30 October 2018 until the expiry of his FTA on 31 December 2018.[12] On 15 November 2018, he requested management evaluation of the decision to place him on SLWFP until the expiration of his FTA.[13]

13. The Umm Baro team site was closed 8 November 2018.[14]

14. On 5 November 2018 the Secretary-General submitted a revised budget for UNAMID for the period 1 July 2018 to 30 June 2019 which envisaged the abolition of 1,183 posts and positions in three phases (i.e. 211 posts abolished in the 2017/2018 budget, the abolishment of 384 posts and positions at the end of December 2018, 88 at the end of March 2019 and 711 at the end of June 2019).[15] The revised budget envisioned that 13 teams sites in the greater Jebel Marra area would be operational while the remaining teams sites outside of the greater Jebel Marra area would be progressively closed by the end of December 2018.[16] Further, 290 General Service posts in the Engineering Section were proposed for abolishment during the 2018/2019 budget cycle.[17]

[10] Ibid. annex R/6.
[11] Application, annex B.
[12] Respondent's reply, annex R/1.
[13] Application, page 2.
[14] Respondent's reply, para. 8.
[15] A/73/488 (Revised budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019), page 12, para. 35.
[16] Ibid. page 8, para 15.
[17] Ibid. page 51, table 12.

15. In its report dated 13 December 2018, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") stated the following in relation to the proposed phased drawdown of civilian personnel detailed in the Secretary-General's revised 2018/2019 budget: "The Advisory Committee trusts that the drawdown of civilian personnel will proceed as swiftly as possible and as planned, in accordance with Security Council resolutions 2429 (2018) and 2363 (2017)." The ACABQ recommended that while the Secretary-General had requested USD727,522,700 in the revised 2018/2019 budget, the General Assembly appropriate USD725,522,700.[18]

16. On 22 December 2018, the Fifth Committee recommended that the General Assembly adopt a draft resolution that included an endorsement of the conclusions and recommendations contained in the ACABQ report of 13 December 2018.[19] On the same day, the General Assembly, in its resolution 73/278, endorsed the ACABQ's conclusions and recommendations.[20]

17. By memorandum dated 24 December 2018, in response to the Applicant's request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the recommendation of the Management Evaluation Unit to uphold the decision to place him on SLWFP until the expiration of his FTA.[21]

18. The Applicant was separated from service effective 1 January 2019 upon the expiry of his FTA on 31 December 2018.[22] He filed the current application on 25 March 2019.

ISSUES

19. The Tribunal will consider the following issues: (i) whether the Applicant's

[18] Respondent's reply, annex R/7, paras. 11-13 and 38 (A/73/656).
[19] Ibid. annex R/8, para. 6 (A/73/674).
[20] Ibid. annex R/9.
[21] Ibid. annex E.
[22] Respondent's reply, annex R1.

appointment was *de facto* terminated; (ii) whether the placement of the Applicant on SLWFP was unlawful; and (iii) whether the Applicant should be granted the relief he has requested.

Was the Applicant's appointment *de fac*to terminated?

Submissions

20. The Applicant's case is that the Respondent truncated his FTA from 31 December 2018 to 28 October 2018 due to the closure of the Umm Baro team site. Since his appointment was cut short prior to its expiry due to the abolition of his post, his contract was, in fact, terminated pursuant to staff regulation 9.3(a)(i). The Applicant asserts that the facsimile of 29 August 2018 and DFS's letter of 24 September 2018 are evidence of the termination of his appointment. Accordingly, pursuant to staff regulation 9.3(c) and staff rule 9.8(a), he should have been paid termination indemnity instead of being placed on SLWFP and pursuant to staff rule 9.7, he should have been given at least 30 calendar days' written notice of termination but this was not the case. The Respondent's action unlawfully circumvented the applicable legal framework i.e. staff regulation 9.3(c) (*détournement de procédure*) and denied him of the compensatory safeguards that were available to him after his appointment was terminated.

21. The Respondent asserts that since the Secretary-General's proposal in the revised budget to abolish the Applicant's post had not yet been approved by the ACABQ, the Fifth Committee, or the General Assembly, it was not possible to decide to terminate the Applicant's appointment under staff rule 9.6(c) on 27 September 2018 when the ASG/OHRM approved the placement of affected staff on SLWFP. The Applicant's appointment could not be terminated in anticipation of the General Assembly's decision.

Considerations

22. It is recalled that a fixed-term appointment, such as the one held by the Applicant, expires automatically, and without prior notice, on the expiration date

specified in a staff member's letter of appointment.[23] Whereas termination is a separation from service initiated by the Secretary-General.[24] Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules.[25]

23. Under staff regulation 9.3(a)(i), the Secretary-General may terminate a staff member's appointment (temporary, fixed-term or continuing) under a limited set of circumstances (*numerus clausus*), among them, "if the necessities of service require abolition of the post or reduction of the staff". Should the Secretary-General elect to terminate an appointment, the staff member is entitled to notice and "such indemnity payment as may be applicable under the Staff Regulations and Rules" (staff regulation 9.3(c)). Where justified by the interest of the Organization, staff regulation 9.3 also foresees an agreed termination. As such, termination may happen through an authoritative act of the administration or contractually; in any event, it is coterminous with early cessation of the employment relation.

24. By and large, termination is an exceptional case of separation. In this connection, it has been noted that termination indemnity serves to provide sufficient means of survival for the staff member to identify a regular placement in the labour market, and thus is computed dependent on the length of service.[26] In addition, however, of note is that its relatively high rate, compared with regular separation entitlements, is an expression of inviolability of the employment contract: it serves to compensate for the premature loss of employment and also discourages inconsiderate use by the Respondent. This rationale becomes subverted in fixed-term appointments, where indemnification set as a function of the length of continuing service alone, irrespective of the time by which the employment is cut short, might cause that it be more financially attractive for a staff member to be terminated than to have his/her appointment expire at its end. However, termination indemnity operates on the premise that the protected interest is in preserving the contract and not in generating more profit for the employee. *De lege*

[23] Staff rule 9.4.
[24] Staff rule 9.6(a).
[25] Staff rule 9.6(b).
[26] *El-Kholy* 2017-UNAT-730, para 39.

ferenda, the system may need approaches specific for mass layoffs, e.g., encouraging negotiation of a severance package with the staff union. Such as it is, though, the applicable legal framework for abolishment of post does not confer upon a staff member a right to have termination as the modality of separation.[27] Rather, to put it pointedly, the claim as described could be compared to having a high insurance on an old car and wishing that it be stolen.

25. Turning to special leave with or without pay, it denotes suspension of the execution of one (SLWFP) or both (SLWOP) of the essential elements of the employment relation, without however bringing it to a premature end. While both legal institutions, termination and placement on SL are "exceptional" as they are at variance with the regular terms of employment, this distinction is fundamental for the issue at hand.

26. In the light of the aforesaid, the Tribunal, first, accepts the Respondent's argument that there was no legal basis for unilateral termination, given that at the relevant time the abolishment of post had not yet been endorsed by the General Assembly. Second, undisputedly, there was no agreed termination. Third, the Applicant retained his status as a staff member until the expiration of the appointment as per its original term and received his salary and accrued entitlements (leave, pension, seniority, etc.) accordingly. Everything considered, the case of the Applicant cannot be qualified as "disguised termination" and as such, there is no basis for indemnification as per staff regulation 9.3.

Was the Applicant's placement on SLWFP unlawful?

Submissions

27. The Applicant contends that the Respondent's decision to place him on SLWFP

[27] For a similar conclusion see *McCluskey* UNDT/2012/184, where in restructuring and reorganization context SLWFP was an option in alternative with agreed termination. The Tribunal remarked (in rejecting a time-barred application) that it was in the Respondent's discretion to extend or not extend the package of agreed termination upon the applicant.

was erroneous and contravened staff rule 5.3(f), which allows the Secretary-General to place a staff member on SLWFP in "exceptional cases" if such leave is in the interest of the Organization. The Applicant asserts that UNAMID's downsizing process and the closure of his team site do not qualify as "exceptional cases" especially since other missions had downsized and staff members were paid termination indemnities when their appointments were terminated. Allowing the Respondent to place staff members on SLWFP under such circumstances defies the existence of staff regulation 9.3 and staff rules 9.7 and 9.8 as it will always be in the interest of the Organization to save money. Moreover, by placing the Applicant on SLWFP until 31 December 2018, Respondent violated staff regulation 1.2(c) and infringed on his moral right to work[28].

28. The Respondent's case is that the decision to place the Applicant on SLWFP until the expiry of his appointment under staff rule 5.3(f) was lawful and reasonable because posts encumbered by locally-recruited UNAMID staff members working at several team sites were proposed for abolition effective 31 December 2018 as part of the mission's downsizing process. The timing of the closure of the team sites, which were staggered between 4 October and 9 December 2018, was determined by UNAMID's operational plans. The United Nations Appeals Tribunal ("UNAT") recognizes the Secretary-General's broad discretion to determine the interests and needs of the Organization, including budgetary needs.[29] The ASG/OHRM properly exercised her delegated authority[30] when she decided to place the Applicant and other affected staff members on SLWFP as an exceptional case and in the interest of the Organization. The Organization honoured the term of the Applicant's appointment until it expired on 31 December 2018. The closure of the Applicant's team site which rendered it impossible for him to perform his functions as a Generator Mechanic created the exceptional circumstances that resulted in his placement on SLWFP.

[28] *Lauritzen* 2013-UNAT-282.
[29] *Lee* 2014-UNAT-481, para. 28; *Simmons* 2016-UNAT-624, para. 12; *Hassanin* 2017-UNAT-759, para. 45.
[30] ST/AI/234/Rev. 1 (Administration of the Staff Regulations and Staff Rules).

Considerations

29. As consistently held by the Appeals Tribunal, the judicial review role of the Dispute Tribunal entails an examination of whether the administrative decision is legal, rational, procedurally correct, and proportionate. Where a matter involves exercise of discretion, the Dispute Tribunal may consider whether relevant matters were ignored, irrelevant matters were considered and whether the decision is absurd or perverse. However, due deference is always shown to the decision-maker.[31] Regarding the SLWFP, however, given that the requirements of "exceptional circumstances" and "the interest of the Organization" pose a constraint on the discretion of the Secretary-General, the general presumption of regularity of administrative act does not suffice and the Respondent must make a showing where the exceptional circumstances lay and that regarding them as such in the decision-making meets the test of rationality.

30. Noting jurisprudence differentiating "exceptional circumstances" and "exceptional cases"[32] and that in relation to procedural deadlines the conclusion has been that in both cases the matter is about circumstances beyond the applicant's control[33], this Tribunal considers that in the context of staff rule 5.3(f), which is a substantive provision, "exceptional circumstances" denotes not only a *force majeure* but also includes an overriding legitimate interest. In the early jurisprudence arising on the issue of SLWFP it was proposed that the ambit of the Secretary-General's power to place a staff member on SLWFP be informed, through application of the *ejusdem generis* rule, by the criteria listed in relation to the other cases of special leave.[34] Subsequent jurisprudence, however, preferred evaluating "exceptional circumstances" on a case by case basis.[35] There is, in any event, no support in the jurisprudence for

[31] *Sanwidi* 2010-UNAT-084, para. 42; *Abu Lehia* 2018-UNAT-814, para. 20; *Jafari* 2019-UNAT-927, para. 33.
[32] *Morsy* UNDT/2009/036.
[33] *Diagne et al.* 2010-UNAT-067.
[34] *Kamuny*i UNDT/2010/214, not appealed with respect to special leave.
[35] In *Gakumba* 2013-UNAT-387, UNAT condemned SLWFP in the context of a performance dispute, decided by a person who acted illegally outside the scope of his authority; in *Morsy* 2013-UNAT-298 the UNAT did not take issue with SLWFP as a measure imposed in pending performance evaluation at managerial position; in *Kamuny*i, ibid., the UNDT condemned using SLWFP to circumvent specific provisions on suspension pending investigation; in *Allen* 2019-UNAT-951, UNAT confirmed investigation as a circumstance justifying SLWFP to preserve integrity of the Mission.

resorting to SLWFP as a generic cost-saving alternative to termination in downsizing.

31. The closest relevance to the case at hand may be found in *Adewusi***,** where the Appeals Tribunal endorsed SLWOP in the aftermath of abolishment of post and transition from one post to another, having found that it reflected a protective approach adopted by the administration. It held: "the placement of Mr. Adewusi on SLWOP enabled him, in the first instance, to preserve his pension benefits. It granted him, secondly, the opportunity of remaining a staff member of the Organization, for the purpose of applying as an internal candidate for other positions after the expiry of his contract. Thirdly, it made possible his re-location to the position that he eventually accepted".[36] In *Lopes*, in turn, this Tribunal held that placement on SLWFP of a staff member on a continuing appointment whose post had been abolished was not *prima facie* illegal, due to a possible cost-saving for the Organization.[37]

32. Turning to the question of "exceptional circumstances" in the case at bar, the Tribunal notes a contradiction in the Respondent's argument where on the one hand it is posited that the reason for SLWFP had been its cost-effectiveness compared with termination, while, on the other hand, it is argued that termination was not at all an option, in the absence of approval by the General Assembly. Given, nevertheless, the conclusion above that the case did not qualify as termination, and that the issue does not involve a right, the option of termination may be set aside and the appropriateness of the Applicant's placement on SLWFP falls to be evaluated vis-à-vis other modalities of honouring the terms of his appointment.

33. The optimal solution, i.e., to maintain the *status quo* and allow the Applicant to perform his functions as a Generator Mechanic until its expiry, undisputedly became impossible with the closure of the Umm Baro team site. Conversely, the parties do not allege that afterwards there were other suitable assignments available, that the Applicant asked for it and that an effort was made to identify them. The closure of many team sites during the same period did not facilitate a reassignment.

[36] *Adewusi* 2013-UNAT-382, para. 14.
[37] Order No. 064 (NBI/2019).

Telecommuting was ruled out early on, unsurprisingly, because of incompatibility with the character of the Applicant's work.

34. Placing the Applicant on SLWFP may thus have been the only viable course of action under the circumstances, shifting, however, the question to the reason for closing the team site.

35. Closure of the team site is the factual element invoked by the Respondent as the exceptional circumstance. In this respect, the Tribunal notes that the decision had been of the Respondent's making, while a vague reference to "operational plans" does not demonstrate the necessity to close any work site at any given time, and particularly before the approval of post abolition by the General Assembly and before the expiry of the staff member's appointment. The Tribunal, moreover, agrees with the Applicant that the Secretary General's Report on the Revised Budget for UNAMID for the period from 1 July 2018 to 30 June 2019 does not lend support to such imperative either. Whereas staggering closure of team sites between October and December 2018, considering especially the scale of the operation, may have been prompted by overriding interests of politics, logistics, host country relations, cost economy, security of civilian personnel etc., no such justification was put forth before the Tribunal and remains speculative. Under the constraints of staff rule 5.3(f), this Tribunal is not ready to grant a blanket endorsement for SLWFP as a default modality for downsizing, incurring expense for Member States and treating hundreds of staff contracts as collateral in "operational plans" before such plans have been sanctioned by appropriate legislative bodies.

36. In conclusion, on the evidence before it, the Tribunal does not find that exceptional circumstances have been established.

Should the Applicant be granted the relief he has requested?

37. The Applicant seeks the following remedies: (i) rescission of the contested decision; (ii) payment of his termination indemnity and in lieu of notice of termination pursuant to staff regulation 9.3 and staff rules 9.7 and 9.8; (iii) pre-judgment and post-

judgment interest on the termination indemnity from 31 December 2018; and (iv) one month's net-base salary for unfair treatment.

38. The Respondent submits that the Applicant is not entitled to the relief requested because he has failed to establish that the contested decision was unlawful, besides, he presented no evidence of harm.

Considerations

39. Rescission of the contested decision in favour of treating the Applicant's case as termination cannot be granted for the reasons stated *supra*. Accordingly, there is no basis for granting remedies related to termination indemnity. Notwithstanding the finding of an apparent illegality of the impugned decision for different reasons, there is no basis for rescinding it either, given that the SLWFP has been consumed and the employment relation ceased rendering the question moot.

40. Regarding the claim for compensation, it is recalled that illegality of the impugned decision alone does not give rise to compensation unless there is evidence that the staff member suffered harm[38] Financial harm being clearly absent in the present case, the Applicant claims compensation for "unfair treatment" and denial of the moral right to work articulated in *Lauritzen*.

41. The averment of "unfairness" appears to be based on the argument of circumventing the law, which the Tribunal has rejected. As concerns the right to work, the Tribunal stresses that the discussion of illegality of SLWFP must not divert from the fact that a staff member is remunerated although he/she is not rendering work. As noted in the jurisprudence on point, inconsiderate use of SLWFP harms above all the interest of the Organization resulting from not obtaining the equivalent service of the staff member. For the staff member, this situation is asymmetrically profitable, with any associated onerousness attaching usually to the reasons for the SLWFP (i.e., disciplinary proceedings, sickness, abolition of post) but not to the fact of not rendering

[38] *Sina* 2010-UNAT-094, para. 25; *Antaki* 2010-UNAT-095, paras. 20 and 21; and *Zhouk* 2012-UNAT-224, paras. 17 and 18.

work as such. Thus, deriving compensation from SLWFP would only be justified in – again – exceptional circumstances.

42. It is recalled that the Tribunals impugned practices of placing staff on SLWFP and granted compensations in the situations of breaching a specific staff rule[39], acting illegally outside the scope of authority[40], applying SLWFP for an extended period of time[41] and associated reputational harm. No such circumstances are present in the Applicant's case. The Applicant did not render work for two months, which is not disproportionate to the duration of his appointment, and incomparable with the case in *Lauritzen*. The Applicant's work in UNAMID, albeit specialised, is not unique in nature and the period of SLWFP did not deprive him of a significant professional experience. Moreover, as transpires from the management evaluation request and the application, the Applicant did not claim to be given any other assignment and was only concerned about termination indemnity. Last, due to the placement on SLWFP, the Applicant benefited from free time which he could utilise for attending to personal matters and seeking another employment. In these circumstances, and notwithstanding the absence of any evidence of harm, the compensation is not due.

JUDGMENT

43. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 5th day of February 2020

[39] *Kamunyi* UNDT/2010/214**.**
[40] *Gakumba* 2013-UNAT-387.
[41] *Lauritzen* 2013-UNAT-282.

Entered in the Register on this 5th day of February 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi