



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MWETAMINWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Kyung Min Lee, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

INTRODUCTION

1. The Applicant is challenging a decision by the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) that he characterizes as a “decision to deny [him] termination indemnity by placing [him] on Special Leave with Full Pay (“SLWFP”) until the expiration of his fixed-term appointment when his contract was *de facto* terminated”. The Applicant filed the current application on 10 September 2019.

2. The Respondent filed a reply on 11 October 2019.

3. 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

4. The Applicant served on a fixed-term appointment (“FTA”) as a Programme Management Assistant at the GL-5 level with MONUSCO in Kisangani, Democratic Republic of the Congo.¹

5. The MONUSCO Special Representative of the Secretary-General (“SRSG”) informed the mission’s Senior Management Group (“SMG”) on 13 March 2019 that in line with the mission’s planning assumptions for 2019/2020, certain field locations not affected by armed conflict would be closed in a staggered process. In this regard, the SMG was informed that the Kisangani office, amongst others, had been proposed for closure by 31 May 2019.²

6. The Security Council, by its resolution 2463 (2019), adopted on 29 March 2019, extended MONUSCO’s mandate until 20 December 2019 and called for an independent strategic review of MONUSCO by 20 October 2019, which was to provide

¹ Application, p. 2.

² Reply, annex R/3.

“options for adapting MONUSCO’s future configuration of its civilian, police and military components, including by reducing MONUSCO’s Force and civilian footprint in line with MONUSCO’s priorities during the implementation of the exit strategy and benchmarks and indicators”.³

7. MONUSCO’s budget for 1 July 2019 to 30 June 2020, which was submitted to the General Assembly on 29 March 2019, proposed, *inter alia*: (i) the closure of seven offices, including the one in Kisangani;⁴ and (ii) the abolition of 764 posts⁵, which included the abolishment of the post of a Programme Management Assistant (national General Service) due to the field office closures.⁶

8. By memorandum dated 2 April 2019, the MONUSCO Chief Human Resources Officer (“CHRO”) informed the Applicant that his post had been proposed for abolition in MONUSCO’s 2019/2020 budget and that, in anticipation of the General Assembly’s approval of the budget, MONUSCO would not extend his FTA beyond its expiry on 30 June 2019.⁷

9. The Applicant requested management evaluation on 13 May 2019 seeking to challenge the decision not to renew his FTA. Additionally, he sought termination indemnity for the wrongful termination of his contract.⁸ The Applicant supplemented his management evaluation request with additional documents on 31 May 2019.⁹

10. On 16 May 2019, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) recommended in its report that the General Assembly approve the Secretary-General’s proposals for civilian personnel in the 2019-2020 budget¹⁰ and

³ S/RES/2463 (2019), para. 45.

⁴ A/73/816, para. 5.

⁵ *Ibid.*, para. 23.

⁶ A/73/816, para. 44.

⁷ Application, annex A.

⁸ Reply, annex R/1.

⁹ Application, annex C.

¹⁰ A/73/755/Add.15, para. 33 (Budget Performance for the period from 1 July 2017 to 30 June 2018 and proposed budget for the period from 1 July 2019 to 30 June 2020 of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Advisory Committee on Administrative and Budgetary Questions).

recommended that MONUSCO's financing be reduced by USD464,800 from USD1,023,267,600 to USD1,022,802,800.¹¹

11. On 29 May 2019, the Applicant's duty station was closed.¹² According to the Applicant, the MONUSCO administration told him to stay at home because there was no work for him to do and that if he went to the office, it would be for private reasons.¹³ He claims that he was informed that he would be placed on Special Leave With Full Pay ("SLWFP") through 30 June 2019.¹⁴ He explained in his request for management evaluation, dated 30 May 2019, that he started staying at home on 30 May 2019 but continued to monitor the activities of armed groups in the territories of Bafwasende and Ubundu.¹⁵

12. On 30 May 2019, The MONUSCO OiC Field Operations Manager sent an email to all staff in Kisangani that United Nations applications (Umoja, eMOP and eCMR) would not be accessible after 15 June 2019 due to the decommissioning of the satellite communication link.¹⁶

13. On 9 June 2019, MONUSCO's Human Resources Section ("HRS") emailed a check-out memorandum to the Applicant regarding his separation on 30 June 2019.¹⁷ He responded on 11 and 13 June 2019 with queries regarding his functional title, recalling that he had been recruited as a political affairs assistant, and his repatriation to Bunia, his place of recruitment, before the decommissioning of the satellite communication link.¹⁸

14. The Applicant received a response to his management evaluation request on 13 June 2019, which upheld the impugned decisions.¹⁹

¹¹ Ibid, para. 49.

¹² Application, p. 3.

¹³ Ibid., annex C, page 2.

¹⁴ Ibid., p. 3.

¹⁵ Ibid., annex C, page 2.

¹⁶ Ibid., annex B.

¹⁷ Reply, annex R/4.

¹⁸ Ibid., annex R/5.

¹⁹ Application, annex D.

15. The Applicant filed an application, registered as Case No. UNDT/NBI/2019/093, on 28 June 2019 contesting MONUSCO's decision to abolish his post by way of a "dry cut" and not to extend his FTA. This application was summarily dismissed vide Judgment No. UNDT/2019/122 on 3 July 2019.²⁰

16. The Applicant was separated from service on 30 June 2019.²¹

17. On 3 July 2019, 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 16 May 2019.²² On the same day, the General Assembly, in its resolution 73/315, endorsed the ACABQ's conclusions and recommendations.

ISSUES

18. The Tribunal will consider the following issues: (i) whether the application is receivable; (ii) whether the Applicant was placed on SLWFP and whether his appointment was *de facto* terminated; (iii) whether the Applicant should be granted the relief he has requested.

Is the application receivable?

Submissions

19. The Respondent's case is that the application is not receivable under the doctrine of *res judicata* because he has already litigated the decision to separate him from service in Case No. UNDT/NBI/2019/093 and that this matter was summarily dismissed by the Tribunal on 3 July 2019. The Respondent asserts that since the Applicant raised the failure to pay him a termination indemnity in his 13 May 2019 request for management evaluation, he should have also included it in his application if he wanted the claim to be reviewed by the Tribunal. The Respondent, relying on

²⁰ Respondent's reply, annex R/2.

²¹ Application, p. 3.

²² A/73/929, para. 6 (Financing of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Fifth Committee).

O'Neill 2011-UNAT-182, submits that any claims included in the Applicant's request for management evaluation, but not included in the first application were abandoned.

20. The Respondent further asserts that Judgment No. UNDT/2019/122 did not issue a determination on a technical or interlocutory matter but rather, in accordance with art. 9 of the UNDT Rules of Procedure, dismissed the application as a matter of law. Since the Applicant failed to appeal Judgment No. UNDT/2019/122, the Tribunal's decision, which disposed of any claims he included or should have included in the application, is final.

Considerations

21. The Tribunal finds the application receivable for the following reasons.

22. The Tribunal does not agree with the Respondent's assertion that the Applicant is re-litigating the contested decision. The Applicant's earlier application did not put the question of termination indemnity before the Tribunal. Accordingly, Judgment No. UNDT/2019/122 related solely to the Applicant's challenge against MONUSCO's decision to abolish his post by way of a "dry cut" and not to extend his FTA. This judgment made no pronouncements, whether procedural or substantive,²³ on the claim for a termination indemnity, thus the principle of *res judicata* does not apply.

23. Regarding the Respondent's reliance on *O'Neill* in asserting that the Applicant forfeited the claim for termination indemnity by not putting it in his earlier application, the Tribunal recalls that in *O'Neill* UNDT/2010/203, the applicant sought to challenge his non-selection/non-promotion to the P-5 level and the release of a confidential letter regarding the selection process. The Dispute Tribunal dismissed the application as not receivable because: (i) the applicant failed to raise the issue of his non-selection in his application even though he had requested administrative review of the decision; and (ii) he had failed to request administrative review of the decision to release the confidential letter. In affirming Judgment No. UNDT/2010/203, the United Nations Appeals Tribunal ("UNAT") held in *O'Neill* 2011-UNAT-182 that the UNDT correctly

²³ *Andreeva et al.* UNDT/2018/072, paras. 46-48; *Nadeau* UNDT/2018/052, para. 48.

found that the appeal was not receivable with respect to the applicant's non-selection/non-promotion because, despite having contested the decision before the Secretary-General and the then Joint Appeals Board ("JAB"), the applicant failed to repeat the claim before the UNDT.

24. The Tribunal finds *O'Neill* to be immaterial to the present application for two reasons. Firstly, while the case is specific to JAB/former United Nations Administrative Tribunal proceedings it expresses a principle common to cases before UNDT that, where a specific decision was not subject to administrative review and/or not put before the Tribunal, the Tribunal will not act upon it. Secondly, while UNAT says that a party must clearly express/include all claims in their pleadings, it goes on to explain that "[t]his is because a party's strategy during the administrative and judicial phases may evolve, and after the end of the first part of the proceedings, it is entirely possible for him or her to abandon a part of the claim". UNAT did not state that if a party does not submit a claim instantly, it will not be receivable, neither did it say that all administrative decisions arising from the same set of events must be appealed by way of a single suit. Therefore, insofar as the Applicant's challenge against an implied decision not to pay him termination indemnity was submitted timeously for management evaluation and to the Tribunal in accordance with art. 8 of the UNDT Statute, such claim has not been "abandoned" and is receivable.

Was the Applicant placed on Special Leave with Full Pay and was his appointment *de facto* terminated?

Submissions

25. The Applicant's case is that the Respondent truncated his FTA when his team site was closed on 29 May 2019 and that he was informed he would be placed on SLWFP until the expiry of his contract on 30 June 2019. According to the Applicant, since he was told not to return to work after the closure of his team site and he was not given any work to do, his contract was *de facto* terminated on 29 May 2019 pursuant to staff regulation 9.3(a)(i). Consequently, pursuant to staff regulation 9.3(c) and staff rule 9.8(a), he should have been paid termination indemnity, 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.

26. The Respondent's case is that an FTA does not carry any expectancy, legal or otherwise, of renewal, irrespective of length of service²⁴ and that the Secretary-General may allow an FTA "to expire through the effluxion of time"²⁵. He submits that the Applicant's post was abolished in accordance with Security Council resolution 2463 (2019). Staff rule 9.6(c) grants the Secretary-General discretion to decide to terminate an appointment due to abolition of post "if the necessities of service require. No such necessities required the termination of the Applicant's FTA. The Applicant's appointment expired about one month after the closure of the Kisangani team site. During his last month of employment, the Applicant did not report to the work site to work but he completed his check-out, including arranging for the travel of his family to Bunia, and he acknowledged in his request for management evaluation that he monitored the activities of armed groups in Bafwasende and Ubundu. Further, the Applicant was never placed on SLWFP or any type of leave. He completed his service under the term of his FTA.

Considerations

27. The Applicant claims that he was "informed" that he would be placed on SLWFP through 30 June 2019, but provided no proof that he was, in fact, placed on said leave. As SLWFP is to be applied in exceptional situations, a degree of formality in the issuance of such a decision is expected. Absent an explicit decision, SLWFP should not be presumed only because for a short period of time the Organization did not provide a staff member with a workstation. In the absence of evidence corroborating the Applicant's assertion, the Tribunal accepts the Respondent's submission that the Applicant was not placed on SLWFP between 29 May and 30 June 2019. However, the Tribunal does not consider this matter to be highly relevant.

28. It is recalled that a fixed-term appointment, such as the one held by the

²⁴ Staff regulation 4.5(c) and staff rule 4.13(c).

²⁵ *Maloof* 2017-UNAT-806, para. 36.

Applicant, expires automatically, and without prior notice, on the expiration date specified in a staff member's letter of appointment.²⁶ Whereas termination is a separation from service initiated by the Secretary-General.²⁷ Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules.²⁸

29. 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.

30. 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.²⁹ 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

²⁶ Staff rule 9.4.

²⁷ Staff rule 9.6(a).

²⁸ Staff rule 9.6(b).

²⁹ *El-Kholy* 2017-UNAT-730, para 39.

preserving the contract and not in generating more profit for the employee. *De lege 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.³⁰

31. In light of the aforesaid, the Tribunal, first, accepts the Respondent's argument that there was no legal basis for termination, as the Applicant's appointment expired without further extension, as foreshadowed in the April 2019 memorandum. Second, 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. Third, the period during which the Applicant did not have his work station was relatively short compared with the duration of the appointment and even then, he apparently performed some work from home. 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.

Should the Applicant be granted the relief he has requested?

32. 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 30 June 2019; and (iv) one month's net-base salary for unfair treatment.

33. 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

³⁰ 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.

presented no evidence of harm.

Considerations

34. 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.

JUDGMENT

35. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 15th day of April 2020

Entered in the Register on this 15th day of April 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi