



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/155

Judgment No.: UNDT/2020/109

Date: 2 July 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HABAMUNGU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Lee, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant served as a Liaison Assistant at the United Nations Organization Stabilisation Mission in the Democratic Republic of the Congo (“MONUSCO”). He held a fixed-term appointment at the GL-5 level and was based in Kamina.

2. On 7 November 2019, the Applicant filed his application with the United Nations Dispute Tribunal sitting in Nairobi. He was impugning, he submitted, the Respondent’s decisions to place him on Special Leave with Full Pay (“SLWFP”) until the expiration of his fixed-term contract when his contract was *de facto* terminated on 30 May 2019 and to deny him termination indemnity after his *de facto* termination from MONUSCO.

3. On 10 December 2019, the Respondent filed his reply to the application challenging both the receivability and the merits of the application.

4. On 11 June 2020, the Dispute Tribunal directed the Applicant to provide his submissions in response to the Respondent’s position on the receivability of his application.

5. The Applicant filed his submissions on receivability on 17 June 2020.

Facts

6. The Applicant joined MONUSCO on 18 July 2012 as an Information Systems Assistant at the GL-5 level in Kamina.

7. On 29 March 2019, Security Council resolution 2463 (2019) extended the mandate of MONUSCO until 20 December 2019 to enable a coordinated and sustainable exit of MONUSCO from the host country. On the same date, the Secretary-General submitted his 2019-2020 budget for MONUSCO and proposed the closure by 30 June 2019 of seven field offices in locations unaffected by armed

conflict. This included the office in Kamina, where the Applicant was deployed and the post he encumbered. In earlier deliberations reflected in a Concept Note dated 1 March 2019, it was noted that closure of the Kamina site was underway prior to March 2019 so 1 March 2019 was set by the Respondent as the provisional date for closure of the Kamina site; staff assigned to the site were kept informed and offered assistance with finding alternative employment.

8. On 2 April 2019, the Applicant was notified that his contract would not be renewed when it expired on 30 June 2019. The Applicant sought review of this decision at the Management Evaluation Unit (“MEU”) on 9 April 2019.

9. On 24 April 2019, the Mission travelled the Applicant from his field site at Kamina to Bukavu at his request so he could work at the Field Technology Section Office. There, he assisted staff with the return of equipment and provided technical support.

10. The closure of the Kamina site was postponed to 16 May 2019 and all staff members were sent home.

11. On 28 May 2019, MEU upheld the decision that the Applicant first challenged.

12. On 29 May 2019, the Mission asked the Applicant to commence with the process of checking-out.

13. On 26 June 2019, the Applicant filed a second request for management evaluation challenging the 16 May 2020 “de facto termination” decision that is the subject of the instant application.

14. The Applicant separated from service on 30 June 2019.

15. As at the time of this Application in November 2019, the Applicant had not received a decision from the MEU.

Parties' Submissions

16. It is the Applicant's case that the Respondent's decision to send him home is tantamount to being placed on SLWFP. In so doing, he contends, the Secretary-General was in effect circumventing the provisions of staff regulation 9.3 and staff rule 9.8.

17. The Respondent's primary argument is one of receivability. As the Applicant received the MEU decision on 28 May 2019 upholding the decision to not renew his contract when it expires, time for filing the subject application of this judgment began to run from then. The Applicant's second request for management evaluation on 26 June 2019 did not reset the clock, as both requests were for "review of the same administrative decision, namely the decision not to renew" the Applicant's appointment.

18. According to the Respondent, this application before the Tribunal is therefore time-barred.

19. The Respondent makes the further argument that the application should be dismissed for want of merit because the decision to abolish the post encumbered by the Applicant was lawful. The Applicant's claim that he was placed on special leave with full pay is incorrect and there was no *de facto* termination on 16 May 2020.

Considerations

Receivability

20. The Respondent's submissions on receivability reflect a misunderstanding of the impugned decision being challenged in this case. The Tribunal finds that the Applicant has clearly articulated his grievance. He is not challenging the abolition of his post. The decision being challenged is the decision which saw the Applicant "sent home" on 16 May 2019, which decision the applicant characterises as "termination of appointment" under the guise of "special leave with full pay." The MEU

acknowledged receipt of the Applicant's second request for management evaluation and cited the decision being impugned in almost identical terms as articulated by the Applicant. The Applicant's second request for management evaluation was therefore patently not for review of the "same administrative decision" addressed in the MEU's 28 May 2019 response.

21. The Respondent is reminded that, in the interest of just and expeditious resolution of cases before the Tribunal, every effort should be made to be accurate in submissions.

Merits

22. The question before the Tribunal is whether the Applicant was, by implication from being sent home, placed on SLWFP to disguise the fact that his appointment was being terminated as envisaged in staff regulation 9.3 and staff rule 9.6, subject to which provisions he would also have been entitled to the payment of termination indemnity.

23. The Tribunal begins by noting that staff regulation 9.3 is worded in such a way as to make a decision to terminate discretionary. The Secretary-General *may*, it says, choose to terminate a staff member's appointment for several reasons including where the necessities of service call for the abolition of posts or the reduction of the staff.

24. In reviewing the Respondent's discretion, the Tribunal is bound by the guidance of the Appeals Tribunal in *Toure*:

When judging the validity of the Administration's exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Tribunal to consider

the correctness of the choice made by the administration amongst the various courses of action open to it.¹

25. The facts of this case are simple. Having proposed closure of the Kamina site to the General Assembly and the corollary budgetary reductions, the Respondent proceeded with the implementation of his proposal. The natural consequence of this closure would have been that the Applicant would be left at some point in the winding down process with no tasks to perform. The actual occurrence of no tasks to perform at the Applicant's field site took place on 16 May 2019 when staff members were sent home.

26. While the winding down process was in progress, the Respondent acceded to the Applicant's request to be moved to Bukavu where he continued to work. The suggestion that he was placed on leave does not seem to be borne out by the evidence on record. The Applicant's own submissions make no mention of his move to Bukavu, nor does he dispute the Respondent's submission that he worked there until early June 2019.

27. In any event, had the Applicant returned to Kamina and been among those sent home on 16 May 2019 there is nothing in the parties' submissions that suggests that the decision to send staff members home during the winding down process was perverse or tainted so as to trigger an inquiry into whether it was based on extraneous factors. The decision did not amount to a *de facto* termination by cutting short the Applicant's appointment. The appointment continued until the expiration date on 30 June 2019 but was not renewed due to the abolition of the post.

28. It is clear that there was some exercise of discretion on the part of the Respondent who "may" have decided to terminate the appointment immediately, when in the winding down process the tasks to be performed ran out on 16 May 2019.

29. In this case there was no documented SLWFP decision. It was however implied from the Respondent's decision to send staff home. Here, as in *Garbo*

¹ 2016-UNAT-660.

UNDT/NBI/2019/035, there was no application of SLWFP for an extended period of time such as the four years in *Lauritzen* 2013-UNAT-282. The Applicant appears to have been at work until sometime in June 2019 and was paid up to the expiration of his appointment at the end of June 2019.

30. The Tribunal cannot, without more, find that the Respondent's decision in this case was illegal, irrational, procedurally incorrect or disproportionate.

31. The application is DISMISSED.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 2nd day of July 2020

Entered in the Register on this 2nd day of July 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi