



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GARBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Sètondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former Disarmament, Demobilization and Reintegration (“DDR”) Officer, working with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), based in Kinshasa. He held a continuing appointment.¹

2. On 15 February 2021, he filed an application before the Dispute Tribunal contesting MONUSCO’s decision of 8 October 2020 not to pay him three months’ salary in lieu of notice of the termination of his appointment.²

Facts

3. By a letter dated 1 April 2019, the MONUSCO Chief Human Resources Officer (“CHRO”) provided advance notification to the Applicant of an anticipated termination of his continuing appointment arising from the conversion of his post into a national position.³

4. On 21 June 2019, the Chief DDR Section provided the Applicant with the list of staff members being relieved of their duties with MONUSCO, which included the Applicant’s name.⁴

5. On 26 June 2019, the Applicant filed a request for management evaluation of the decision to terminate his continuing appointment and a request for suspension of action. On the same day, 26 June 2019, the Management Evaluation Unit (“MEU”) granted the Applicant’s request for suspension of action pending management evaluation.⁵

6. On 7 November 2019, the Applicant filed an application with the Dispute

¹ Application, section I.

² Application, section V.

³ Reply, annex 2.

⁴ Reply, annex 3, p. 2.

⁵ Reply, annex 4.

Tribunal contesting the decision to terminate his appointment. His application was recorded as Case No. UNDT/NBI/2019/157.⁶

7. In late 2019, the Applicant and MONUSCO entered settlement discussions to resolve the dispute informally.⁷ On 22 January 2020, the then-Applicant's Counsel communicated to him a settlement offer from MONUSCO, which included payment of three-months' salary in lieu of notice.⁸

8. On 23 April 2020, the then-Applicant's Counsel informed the Applicant of MONUSCO's position that he was not entitled to the three months' salary in lieu of notice because he was notified of the termination in July 2019 and he had been paid full salary since then, namely since July 2019.⁹

9. Between 23 to 26 April 2020, the Applicant and his Counsel exchanged various emails regarding the details of the settlement.¹⁰ On 27 April 2020, the Applicant accepted the settlement offer.¹¹

10. On 21 May 2020, the Applicant requested MONUSCO to, among other things, provide him with the details of his separation package.¹² On the same day, MONUSCO provided the Applicant with a breakdown of the payment. MONUSCO also informed the Applicant that he would not receive the three months' payment in lieu of notice as he had already served the period since July 2019,¹³ which including receiving his salary for the three months during the suspension of action which would have covered the period of any termination indemnity.

11. On 24 and 25 June 2020 respectively, MONUSCO and the Applicant signed the settlement agreement. The Applicant agreed, additionally, not to pursue any further

⁶ Application, annex 3.

⁷ Reply, section B, para. 12.

⁸ Reply, annex 6.

⁹ Reply, annex 7, p.7.

¹⁰ Reply, annex 7.

¹¹ Ibid, p.4.

¹² Reply, annex 8, p. 3.

¹³ Reply, annex 8, p.2.

action regarding the termination of his appointment.¹⁴

12. On 1 July 2020, the Applicant separated from the service of the Organization under an agreed upon termination arrangement.¹⁵

13. Upon separation from the Organization, the Applicant filed a notice of withdrawal of Case No. UNDT/NBI/2019/157 from the UNDT on the ground that the parties had reached an agreement to settle the case. By Order No. 180 (NBI/2020), the Tribunal closed and removed the case from its docket.

14. On 13 September 2020, the Applicant contacted MONUSCO demanding payment of three months' salary in lieu of notice.¹⁶ On 8 October 2020, the MONUSCO CHRO responded to the Applicant indicating that the settlement proposal did not include payment of three months' salary in lieu of notice. MONUSCO further stated that his Counsel had accepted the terms of settlement on his behalf.¹⁷

15. On 25 October 2020, the Applicant requested management evaluation of the 8 October 2020 CHRO communication informing him that he was not entitled to three months' salary in lieu of notice.¹⁸ On 17 November 2020, the MEU found the Applicant's request not receivable.¹⁹

Receivability

Respondent's submissions

16. The Respondent contests the receivability of the application on two grounds. First, the Applicant did not request management evaluation of the 21 May 2020 decision. The 8 October 2020 email did not reset the time limit for requesting management evaluation because it was a reiteration of the 21 May 2020 decision. The

¹⁴ Reply, annex 9.

¹⁵ Reply, annex 10.

¹⁶ Application, annex 1, p. 7.

¹⁷ Ibid, p.2.

¹⁸ Application, annex 3.

¹⁹ Ibid.

Respondent contends that the application is, therefore, not receivable *ratione materiae* because the Applicant did not request management evaluation within the 60-day statutory period of staff rule 11.2(c).

17. Secondly, the Respondent submits that the settlement agreement bars the Applicant's claim for additional payment. The Applicant signed the agreement in which he agreed not to pursue any further action or recourse regarding any and all matters arising out of or related in any way whatsoever to the facts and/or issues that were settled. Since the Applicant requested management evaluation of the decision to terminate his appointment, the agreement resolved all matters relating to that decision, including payment of the three months in lieu of notice.

18. The Respondent further argues that the Applicant accepted the settlement offer and signed the agreement without objection after both his lawyer and the CHRO had informed him that it did not include the three months' salary in lieu of notice. Now after the Organization has paid him in good faith, he should not be allowed to renege on his agreement not to contest matters regarding the termination of his appointment. Those matters were fully and finally resolved between the parties.

Applicant's submissions

19. The Applicant maintains that the three months' salary in lieu of notice is a right and there is no room for him to waive such a right.

20. The Applicant further argues that he was originally notified on 21 June 2019 that his appointment would not be extended beyond 30 June 2019. The Applicant challenged that decision before the Dispute Tribunal and the Respondent engaged in an amicable settlement of that decision. It is, therefore, obvious that the decision not to extend his employment no longer stands and the alleged notice had ceased to exist.

21. Thereafter, the Applicant wrote to MONUSCO seeking clarification and it was in that context that the email of 21 May 2020 was sent to him. Subsequently, the Applicant learned that other staff members in similar situations who separated from

MONUSCO were later granted the three months' salary in lieu of notice, in a process whereby the human resources section recognized that it could not be part of any settlement with them. The Applicant was specifically informed of the staff who were paid including Mr. HG, Ms. AB, Ms. DR and Mr. KPS (anonymized for confidentiality). The Applicant was not called, as were other staff members, telling them that there was a mistake which would be corrected by the payment. Hence the query he sent which led to the decision of 8 October 2020.

22. Accordingly, the Applicant submits that the decision of 21 May 2020, like the original non-extension of appointment notice, have ceased to have any effect. As a result, the decision of 8 October 2020 remains a fresh decision he has duly challenged in a timely fashion.

CONSIDERATIONS

The Applicant did not request management evaluation of the 21 May 2020 decision

23. Staff rule 11.2 (c) provides that “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.] Further, art. 8.3 of the Dispute Tribunal’s Statute provides that the Tribunal shall not waive or suspend the deadlines for management evaluation.

24. Based on the foregoing, a staff member must file a request for a management evaluation within 60 calendar days of the date of receipt of notification of the contested administrative decision. While the Applicant indicated that he was notified of the contested decision on 8 October 2020²⁰, this issue was negotiated between him and the Administration as part of the settlement agreement that was signed on 24 and 25 June

²⁰ Applicant’s response to Order No. 201 (NBI/2021), filed on 30 September 2021.

2020, respectively by the Applicant and the Administration. The Applicant's Counsel had explained to him why the payment in lieu of notice would not be paid as part of the settlement offer in her emails to him of 23 and 25 April 2020.²¹

25. The Counsel wrote to the Applicant stating that:

Please note that it is the Mission's position that the staff member is not entitled to 3 months in lieu of notice, as he was informed of the termination in July 2019. Accordingly, the calculations are as follows:

Termination indemnity \$86,313.00.

50% enhancement \$43,156.50.

Sub-total \$129,469.50.

26. The Counsel further emphasized that:

The breakdown is for the termination indemnities. The Organization will not be paying for notice in lieu of termination as the notice was given in July 2019 and you have been paid full salary since then. The breakdown provided is for termination indemnities only. You will be paid all other separation benefits that you are normally entitled to when separating from the UN, including relocation and repatriation grants, any accrued annual leaves.²²

27. On 25 April 2020, the Counsel also clarified to the Applicant as follows:

The settlement amount offered earlier, at the end of January, included the termination indemnity and the payment in lieu of the 3 months of notice of termination. Given that you have been receiving full salary during this entire time, they are factoring in the payments of those amounts. This is why the amount that was offered at the end of January would be less than what they are offering now. They also believe that you have been given sufficient notice since you have been paid full salary since the decision to abolish and terminate your post was made in July 2019.²³

28. The Applicant expressed his acceptance of the terms of the settlement offer to

²¹ Reply, annex 7, p.7.

²² Ibid.

²³ Reply, annex 7, p.4, para. 2.

his Counsel in his email of 27 April 2020.²⁴ He stated:

“With regard to the offer of settlement, as indicated in yesterday’s email, I am willing to take it”.

29. The Human Resources Officer, MONUSCO also informed the Applicant of this fact when he provided him with a breakdown of his termination package on 21 May 2020 before the signing of the settlement agreement.²⁵ Therein, the terms of the settlement agreement specifically provided that the payment of the enhanced termination indemnities resolved all matters relating to the decision to terminate his continuing appointment and he had agreed not to pursue any further action or recourse regarding any and all matters arising out of or related to the facts and/or issues referred to, or described in, the request for management evaluation (MEU/359-19/R and MEU/360-19/SOA).

30. In view of the above, this matter is not receivable not only in terms of the statutory time requirement for filing a request for a management evaluation but also given that the terms of the settlement agreement, to which he agreed, did not permit further action or recourse on this matter.

31. The application is not receivable *ratione materiae* under staff rule 11.2(c) and art. 8.1(c) of the Dispute Tribunal’s Statute. The Applicant requested payment of salary in lieu of notice on 13 September 2020 after he signed the Settlement Agreement,²⁶ yet on 21 May 2020, MONUSCO had already informed him that he would not receive the three months’ payment in lieu of notice.²⁷

32. The 8 October 2020 email did not reset the time limit for requesting management evaluation because it was a reiteration of the 21 May 2020 decision. The Appeals Tribunal has held that “the reiteration of an administrative decision does not reset the clock with respect to the statutory timelines; rather the time starts to run from

²⁴ Ibid, p.2.

²⁵ Reply, annex 8.

²⁶ Application, annex 1, p. 7.

²⁷ Reply, annex 8.

the date the original decision was made.”²⁸ Therefore, the Dispute Tribunal lacks jurisdiction to hear this claim.

The Settlement Agreement bars the Applicant’s claim for additional payment

33. This Tribunal has held that a staff member may not accept an agreed separation package and then appeal the underlying administrative decision.²⁹ An agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.³⁰ The legal consequences of a valid agreement are similar to those of a final judgment (*res judicata*).³¹

34. Therefore, the Dispute Tribunal lacks jurisdiction. The Applicant signed the Settlement Agreement in which he agreed “not to pursue any further action or recourse regarding any and all matters arising out of or related in any way whatsoever to the facts and/or issues referred to, or described in, the [Management Evaluation] Request”.³² The Agreement resolved all matters relating to that decision, including payment of the three months’ in lieu of notice.³³

35. The Applicant accepted the settlement offer and signed the Settlement Agreement without objection after both his lawyer and the CHRO had informed him that it did not include the three months’ salary in lieu of notice. The exchange of correspondence shows that the Applicant was engaged in a free and uninhibited negotiation of the terms of the settlement. He was told prior to signing, that the Agreement did not include the payment of salary in lieu of notice.³⁴ Now after the Organization has paid the Applicant in good faith, he cannot not be allowed to renege on his agreement not to contest matters relating to the termination of his appointment.

²⁸ *Olubowale* 2019-UNAT-933, paras. 20-22.

²⁹ *Jamiai* UNDT-2010-149, para. 28; *Jamiai* 2011-UNAT-137, paras. 13-14.

³⁰ *Ibid.*

³¹ *Pirra* 2015-UNAT-561, para. 14.

³² Reply, annex 9.

³³ *Ibid.*

³⁴ Reply, annex 7 and annex 8.

Those matters were fully, fairly and finally resolved between the parties.

Is the Applicant entitled to the relief that he requests?

36. The Applicant is bound by the terms of the Settlement Agreement which expressly in writing did not include a payment in lieu of notice. The Settlement Agreement, signed by the Applicant and the Special Representative of the Secretary-General (“SRSG”) stated, in part, as follows:

For and in consideration of the Releasor's [Applicant's] undertakings specified in paragraph 1, above, the Releasee [Respondent] does hereby: (a) Agree to a payment of termination indemnity plus 50% enhancement and agree to pay the Releasor US\$ 129,469.50 (United States dollars one hundred twenty-nine thousand four hundred sixty-nine and fifty-cents) in execution thereof ("Settlement Payment") ; (b) Agree that this Agreement is without reference to and does not fall under Section 3.12 of ST/AI/2013/1, and has no impact on any benefits and entitlements that are due to the Releasor upon separation including but not limited to, repatriation grant, relocation grant, travel expenses and payment of accrued annual leave days.³⁵

37. The Applicant also waived any right to contest any further matters related to the termination of his appointment.³⁶ Furthermore, payment in lieu of notice applies to a unilateral termination of an appointment under staff rule 9.7 and does not apply to an agreed termination pursuant to staff regulation 9.3(d).³⁷ The Applicant received all salaries, entitlements and benefits that were due to him.³⁸ The Applicant also received full payment under the Agreement. He has not presented evidence of any harm as required by art. 10(b)(5) of the Dispute Tribunal's Statute.

38. In conclusion, the Tribunal rejects this application.

JUDGMENT

39. The application is dismissed.

³⁵ Reply, annex 9, part 2 (a) and (b).

³⁶ Reply, annex 9.

³⁷ *Zachariah* 2017-UNAT-764, para. 37; *Kallon* 2017-UNAT-742, paras 58-62, 67.

³⁸ Reply, annex 10.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 21st day of October 2021

Entered in the Register on this 21st day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi