



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/015
Judgment No.: UNDT/2022/100
Date: 5 October 2022
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, AS/ALD/OHR, UN Secretariat
Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former D-1 Chief of Service, Political Affairs with the United Nations – African Union Hybrid Operation in Darfur (“UNAMID”).
2. On 8 February 2022, he filed an application contesting the decision not to pay him termination indemnity following the termination of his continuing appointment (“contested decision”).
3. The Respondent filed a reply on 10 March 2022 urging the Tribunal to find that the application is irreceivable *ratione temporis*.
4. On 3 October 2022, the Applicant filed submissions on the issue of receivability.

Facts

5. The Applicant had been employed with the United Nations since 16 October 2001 and was granted a continuing appointment effective 28 October 2016. Before he separated from service on 7 June 2021, the Applicant had been serving in UNAMID in Khartoum as a D-1 Chief of Service.¹
6. On 31 December 2020, the Applicant reached 62 years of age but opted to continue his service until the new normal retirement age of 65 years established under United Nations General Assembly Resolution 70/244.²
7. By letter dated 14 January 2021 from the UNAMID Director of Mission Support (“DMS”), the Applicant was informed that due to UNAMID’s imminent closure, his post would soon be abolished, and he would be separated from service.³ The pertinent parts of the letter are reproduced below.

¹ Application, annex 1.

² Application, para. 4.

³ Application, annex 2.

It is with regret that I have to inform you that your functions are among those no longer required following the termination of UNAMID's mandate.

The Joint Special Representative (JSR) in UNAMID has accordingly approved the termination of your Continuing appointment on the grounds of staff reduction in line with Staff Regulation 9.3 (a)(i) and Staff Rule 9.6 (c)(i).

Your separation will be effective on 13 April 2021. This notice is being issued in line with Staff Rule 9.7.

8. By letter dated 27 February 2021, UNAMID offered the Applicant an exceptional termination indemnity (the offer). In that letter, the DMS informed the Applicant that he was not entitled to a termination indemnity pursuant to staff rule 9.8(c) because he was entitled to a retirement benefit under article 28 of the Regulations of the United Nations Joint Staff Pension Fund ("UNJSPF"). However, the DMS further explained that UNAMID had sought and received approval from the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance ("USG-DMSPC") to pay him a termination indemnity as an exception to staff rule 9.8(c) on the condition that he would not contest the termination decision.⁴

9. On 10 March 2021, the Applicant requested management evaluation of the decision to terminate his continuing appointment without appropriate evaluation and lack of good faith efforts on the part of the Organization to place him in a suitable/available position.⁵

10. By letter dated 11 March 2021, the Management Evaluation Unit ("MEU") informed the Applicant that they had granted his request for a suspension of action pending management evaluation.⁶

11. On 17 May 2021, a UNAMID Human Resources Officer sent an email to the Applicant requesting him to consider UNAMID's offer of exceptional termination

⁴ Reply, annex 1.

⁵ Application, annex 3; reply, annex 4.

⁶ Application, annex 4.

indemnity.⁷ The Applicant responded to the email on 27 May 2021 stating, *inter alia*, that he did not exercise his acquired rights and that his appointment was terminated by the Organization as expressly stated in the letter from the DMS dated 14 January 2021. He argued that he was entitled to termination indemnity and that he was willing to consider accepting exceptional termination indemnity, if offered in accordance with staff rule 9.3(d).⁸

12. On 7 June 2021, the MEU issued its determination letter upholding the decision to terminate the Applicant's continuing appointment.⁹ The letter included a response refuting the Applicant's claim to entitlement to termination indemnity.

13. On 20 September 2021, the Applicant received final payment which did not include payment of termination indemnity.¹⁰

14. He submitted another management evaluation request on 27 October 2021 challenging the fact that his final pay did not include the payment of termination indemnity and requested that he be paid termination indemnity as a staff member with a continuing appointment whose appointment was terminated by the Secretary-General due to abolishment of his post.¹¹

15. On 13 December 2021, the MEU issued a determination letter that the case was not receivable according to *res judicata*.¹²

⁷ Application, annex 5.

⁸ Application, para. 9 and annex 6.

⁹ Application, annex 7.

¹⁰ Application, annex 8.

¹¹ Application, annex 9.

¹² Application, annex 10.

Submissions

The Respondent

16. The Respondent argues that the application is not receivable for the following reasons.

a. The application was filed five months late. The Applicant did not file the application until 8 February 2022, more than 90 days after he received the response to his management evaluation request on 7 June 2021. The Applicant first requested management evaluation of the offer and the refusal to pay him termination indemnity as well as the decision to terminate his appointment on 10 March 2021. In that request, he alleged that the Administration breached procedure because, *inter alia*, he was “informed of an offer of a termination indemnity on an exceptional basis that had conditions despite [his] entitlement to termination indemnity without any undertaking on [his] part.” The MEU evaluated that claim. The USG-DMSPC’s response upheld the decision to terminate the Applicant’s appointment and also informed him that since his “normal retirement age” under the UNJSPF Regulations would be 62, he would not be entitled to termination indemnity under staff rule 9.8(c). Accordingly, the instant application should have been filed no later than 90 days thereafter, or by 5 September 2021.

b. After receiving the response to his 10 March 2021 request for management evaluation, the Applicant filed an application challenging the termination decision but not the non-payment of his termination indemnity. He abandoned his termination indemnity claim when he failed to include it in his application in Case No. UNDT/NBI/2021/071. The claim is now time-barred.

c. The Applicant’s management evaluation request of 27 October 2021 was a duplicate request and cannot re-set the time for filing of his application. As such, the application is not receivable *ratione temporis*.

The Applicant

17. With regards to the MEU's determination that the case was already adjudicated, and therefore it is non-receivable, the Applicant submits that the issue of payment of termination indemnity was not brought before the MEU for its determination before 27 October 2021 and cannot be considered *res judicata*. The management evaluation request ("MER") he filed on 10 March 2021 and the resolution sought thereunder solely related to the termination of his continuing appointment, not to non-payment of termination indemnity. Therefore, the MEU could not have initiated by itself a case and rendered a decision to procedurally disadvantage the Applicant to be used as defence at a later stage.

18. The Applicant submits that he has been in constant communication with the Administration to clarify their position on payment of his termination indemnity but has received contradictory responses and offers, on 27 February 2021 from the DMS, on 17 May 2021 from UNAMID's Chief Human Resources Officer and on 8 and 14 September 2021 from the Regional Service Centre, Entebbe, Chief Client Services Delivery. These contradictory and inconsistent communications caused him confusion as to the Administration's final position until he received the statement of his final payment on 20 September 2021, which omitted termination indemnity.

Considerations

19. In order for the application to be receivable by the Dispute Tribunal the provisions of art. 8 1(d)(i) a of the UNDT Statute had to be satisfied by the Applicant. More specifically, to be receivable the application had to have been filed "within 90 calendar days of the applicant's receipt of the response by management **to his or her submission.**" [Emphasis added].

20. It is clear on a full review of the documentation, that the Applicant first submitted the contested decision on termination indemnity entitlements for management evaluation as part of his 10 March 2021 MER. In the main body of the said request, its purpose was initially articulated by the Applicant as a challenge to

the decision to terminate the Applicant's employment on grounds that his post was abolished.

21. However, the 10 March 2021 MER submission includes a number of attachments, concluding with a letter dated 8 March 2021 addressed by the Applicant to the MEU. In that letter the Applicant raises the issue of his entitlement to indemnity payment upon termination. His position is later reiterated in email correspondence dated 27 May 2021, during negotiations, while the response to the MER was pending.

22. In light of the foregoing, the Applicant's position that the MER submitted on 10 March 2021 and the resolution sought thereunder solely related to termination of his continuing appointment, not to non-payment of termination indemnity, is inaccurate.

23. The USG-DMSPC, in responding to the Applicant's MER stated her understanding of the Applicant's submissions to the MEU that he was contesting the decision both on procedural and substantive grounds. Her 7 June 2021 letter summarises the procedural aspect of the Applicant's contest to the termination decision as follows:

You allege that you received inadequate guidance on administrative matters, including entitlements and benefits. As an example, you state that you were informed of an offer of termination indemnity on an exceptional basis that had conditions despite your entitlement to termination indemnity without an undertaking on your part.

24. Having identified the procedural issue raised by the Applicant in his MER, the 7 June 2021 letter includes, at page six, a full response. The MEU noted *inter alia* that there was "no procedural irregularity in providing you with an offer of termination indemnity on an exceptional basis. Pursuant to Staff Rule 9.8 (c), a termination indemnity is not paid to a staff member who will receive a retirement benefit under article 28 of the Pension Regulations."

25. Whilst the Applicant did not receive his terminal payments on the date of his

termination, which took effect on the same date as this response to his MER, the MEU response made it clear that he had no entitlement to have indemnity payments included in this termination package.

26. The MEU fully considered and responded to the matter of the Applicant's alleged entitlement to termination indemnity payment. As in the case of *Ngoga* 2018-UNAT-823, the MEU response letter dated 7 June 2021 "constituted an unequivocal and final decision in this matter".

27. In these circumstances,

- a. the Applicant's post termination correspondence seeking to clarify what his terminal benefits would be,
- b. his eventual receipt of a statement of payments on 20 September 2021 and
- c. the filing of a new MER on 27 October 2021 reiterating the points previously made and decided on by the MEU,

did not re-set the time for the filing of the instant application. The Applicant waited approximately seven months after receiving the June 2021 MEU response, which addressed his submissions about entitlement to termination indemnity, before filing the instant application. The application is therefore outside the permitted 90-day time limit.

Judgment

28. The application contesting the decision not to pay the Applicant termination indemnity is not receivable *ratione temporis*.

29. The application is dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 5th day of October 2022

Entered in the Register on this 5th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi