UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2023/031
Judgment No.: UNDT/2023/117
Date: 2 November 2023
Original: English

Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

ISUFI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Halil Göksan, AS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 7 June 2023, the Applicant, a staff member of the United Nations Development Coordination Office ("UNDCO"), contests the decision not to renew his fixed-term appointment beyond 31 December 2022 due to unsatisfactory performance.

2. For the reasons set forth below, the Tribunal upholds the application in part and orders the Respondent to return 23 days of annual leave to the Applicant.

Facts and procedural history

3. On 9 January 2020, the Applicant joined UNDCO in Kosovo as an Associate Development Coordination Officer.

4. On 9 November 2022, the Chief of Human Resources ("CHR"), UNDCO, informed the Applicant that his fixed-term appointment expiring on 31 December 2022 would not be renewed due to his unsatisfactory performance and he would be separated from service on 31 December 2022.

5. On 12 December 2022, the Applicant requested management evaluation of the non-renewal decision.

6. On 31 December 2022, the Applicant was separated from service.

7. By Interoffice Memorandum dated 27 February 2023, the Director, Office of the Under-Secretary-General for Management Strategy, Policy and Compliance informed the CHR, UNDCO, that:

> [I]t ha[d] been decided that the contested decision be rescinded, that the Administration reinstates [the Applicant] and implements a Performance Improvement Plan, including any appropriate action to assist him in improving his performance.

8. On 2 March 2023, the Management Evaluation Unit ("MEU") received confirmation from UNDCO that the Applicant was notified of the above.

9. Accordingly, by letter also dated 2 March 2023, the MEU notified the Applicant that his request for management evaluation was moot.

10. On the same day, the Human Resources Officer ("HRO"), United Nations Office at Nairobi ("UNON"), informed the Applicant of the recommendation to reinstate him with immediate implementation of a Performance Improvement Plan ("PIP") for a period of three months. Said HRO also informed the Applicant that under staff rule 4.17, the interval between his separation and his reinstatement would be charged to his annual leave days and asked him to provide a reinstatement effective date.

11. On 9 March 2023, the Applicant received the management evaluation response dated 2 March 2023.

12. On 10 March 2023, the Applicant indicated that he preferred to effectively resume his duties as of 3 April 2023. He further suggested 23 March 2023 as the resumption date, but preferred to use annual leave days to cover the period from 23 March 2023 to 31 March 2023.

13. On the same day, the HRO, UNON, informed him that his absence from work for the period between 2 January and 31 March 2023 inclusive would be charged to his annual leave.

14. On 3 April 2023, the Organization reinstated the Applicant.

15. On 24 April 2023, the Applicant was paid three months of salary for the months of January, February, and March 2023.

16. On 7 June 2023, the Applicant filed the application mentioned in para. 1 above.

17. On 12 July 2023, the Respondent filed his reply.

18. By Order No. 118 (GVA/2023) of 11 September 2023, the Tribunal instructed:

a. The Applicant to file a rejoinder by 22 September 2023;

b. The Respondent to file his comments on the Applicant's rejoinder by 2 October 2023; and

c. The parties to explore resolving the dispute amicably and revert to the Tribunal in this respect by 12 October 2023.

19. On 22 September 2023, the Applicant filed his rejoinder wherein the Applicant informed the Tribunal that the Administration agreed to return to him 30 of the 60 days of annual leave to which his absence was charged.

20. On 2 October 2023, the Respondent filed his comments on the Applicant's rejoinder.

21. By Order No. 135 (GVA/2023) of 6 October 2023, the Tribunal instructed the parties to file their respective closing submission, which they did on 13 October 2023.

22. On 13 October 2023, the parties informed the Tribunal that they did not agree on an amicable resolution of the dispute and requested it to proceed with the adjudication of the case.

Consideration

Whether the application is moot

23. Having perused the case file, the Tribunal notes that one core preliminary issue before it is whether the Administration's actions subsequent to the management evaluation have rendered the case moot.

24. The Respondent submits that the application is moot. In his view, since the contested decision was rescinded on 2 March 2023 and the Applicant was reinstated as of 3 April 2023, there is no longer a live controversy between the parties.

25. The Applicant claims that the case is not moot. He argues that as a very clear injurious consequence flowing from the unlawful separation decision, he lost 60 days of annual leave.

26. The Appeals Tribunal in *Kallon* 2017-UNAT-742 explained the mootness doctrine as follows:

> 44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.

27. Since a finding of mootness results in the drastic action of dismissal of the case, the Appeals Tribunal requires that the mootness doctrine be applied with caution (see *Kallon*, para. 45). Specifically, it stated in *Kallon*, at para. 45, that:

> [A] court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct.

28. The Appeals Tribunal has, thus, consistently emphasised the non-absolute nature of mootness where an applicant still sustains an injury for which the Tribunal can award relief (see, e.g., *Azar* 2021-UNAT-1104, para. 30; *Kallon*, para. 46). Citing para. 46 of *Kallon*, the Appeals Tribunal in *Azar*, at para. 30, held that:

> In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations *may* be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an

> injury for which the Tribunal can award relief, the case should be considered moot.

29. The essence of the Applicant's rebuttal of the Respondent's claim of mootness in the case at hand is his loss of a significant portion of his annual leave balance because the Administration used that leave to address the period of unlawful separation. This ongoing injury is of sufficient collateral consequence to preclude mootness despite the partial reversal of the direct effects of the contested decision.

30. Therefore, contrary to the Respondent's assertion, even if the Applicant was reinstated, there remained a live controversy between the parties. Accordingly, the Tribunal finds that the application is not moot.

Whether the application is receivable ratione materiae

31. The Respondent claims that the application is not receivable *ratione materiae*. He specifically argues that should the Applicant contest the 10 March 2023 decision to charge his absence from work to his accrued annual leave days, he failed to request management evaluation of it, thereby rendering the application not receivable.

32. The Applicant contends that the charging of absence to annual leave is not a new administrative decision that would have required a separate challenge.

33. It is well-settled law that the Tribunal has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see, e.g., *Fasanella* 2017-UNAT-765, para. 20; *Cardwell* 2018-UNAT-876, para. 23).

34. In the present case, the Applicant defines the contested decision as the decision not to renew his fixed-term appointment beyond 31 December 2022. As remedies, the Applicant requests, *inter alia*, that the contested decision be found unlawful and that an order be made for the reinstatement of all leave days utilised

to cover his absence from the date of the unlawful separation until 23 March 2023 or alternatively, for the financial compensation for those leave days.

35. Considering the above, the Tribunal finds that the contested decision in the case at hand is the non-renewal decision. As the Applicant pointed out, there is no separate litigation of the decision to charge absence to annual leave required for the Applicant to be made whole.

36. Therefore, the Respondent's challenge to the receivability in this respect fails. Accordingly, the application is receivable *ratione materiae*.

Whether the contested decision is unlawful

37. The Applicant submits that the non-renewal decision is unlawful and requests the Tribunal to make a finding to this effect.

38. Before the Tribunal, the Respondent does not dispute the unlawful nature of the contested decision. Instead, he argues that there is no need for the Tribunal to decide on the lawfulness of non-renewal decision since it has already been rescinded.

39. The Tribunal recalls its finding in *Staedtler* UNDT/2014/046, at para. 30, that:

> The remedy for an applicant who is dissatisfied with the outcome of an MEU review of an administrative decision is to file an application with the Tribunal. The Tribunal hears the appeal against the administrative decision *de novo* and without regard to the outcome of the MEU review. This gives an applicant a second opportunity to present his or her case afresh to the Tribunal.

40. The evidence on record shows that in response to the Applicant's request for management evaluation, the Administration rescinded the decision in question on 2 March 2023 and reinstated the Applicant as of 3 April 2023. This shows that the Administration admitted that the non-renewal decision was irregular.

41. Under such circumstances, the Tribunal cannot but conclude that the contested decision is unlawful.

Whether and to what extent the Applicant is entitled to any remedies

42. While the Tribunal commends the Administration's efforts to provide administrative remedies in response to the Applicant's request for management evaluation, it notes that the Applicant is not entirely satisfied with the remedies provided to him.

43. Given the evolutionary nature of the matter at issue, the Applicant amended and/or expanded the scope of his request for remedies during the proceedings before the Tribunal. Specifically, in his application, the Applicant requested the Tribunal to find the Administration's reinstatement decision to be insufficient and to award compensation of three months' salary. In his rejoinder and closing submission, the Applicant sought moral damages and requested the Tribunal to reinstate all leave days utilised to cover his absence from the date of the unlawful separation until 23 March 2023 or, alternatively, to order financial compensation for those leave days.

44. Prior to determining whether and to what extent the Applicant is entitled to remedies, the Tribunal will first elaborate upon the applicable law governing remedies.

The legal framework on remedies

45. Art. 10.5 of the Tribunal's Statute confers remedial powers to the Tribunal as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> *(a)* Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

> *(b)* Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

46. Art. 10.5(a) of the Tribunal's Statute authorizes orders for rescission, specific performance and, in certain cases, compensation *in lieu* of rescission or specific performance.

47. Moreover, it is well-settled case law that "the very purpose of compensation is to place the staff member in the same position he or she would have been … had the Organization complied with its contractual obligations" (see, e.g., *Applicant* 2015-UNAT-590, para. 61; *Warren* 2010-UNAT-059, para. 10).

48. In this respect, the Tribunal "may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury" (see, e.g., *Faraj* 2015-UNAT-587, para. 26; *Antaki* 2010-UNAT-095, para. 21).

49. Also, the Appeals Tribunal has consistently held that "compensation must be set by the [Tribunal] following a principled approach and on a case-by-case basis", and that "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case" (see, e.g., *Rantisi* 2015-UNAT-528, para. 71; *Solanki* 2010-UNAT-044, para. 20).

Reinstatement

50. Since the Administration has already rescinded the contested decision, the Tribunal will not make any ruling in this respect. Notably, the rescission of the contested decision implies the reinstatement of the Applicant on his post.

51. While the Tribunal commends the Respondent's effort to reinstate the Applicant, it is not convinced by his submission that the interval between the Applicant's separation and reinstatement was correctly charged to his accrued annual leave days pursuant to staff rule 4.17(b) in ST/SGB/2023/1 (Staff

Regulations and Staff Rules, including provisional Staff Rules, of the United Nations).

52. Staff rule 4.17 governs reinstatement and provides in its relevant part that:

> (a) A former staff member who held a fixed-term or continuing appointment and who is re-employed under a fixed-term or a continuing appointment within 12 months of separation from service may be reinstated under conditions established by the Secretary-General.
>
> (b) On reinstatement, the staff member's services shall be considered as having been continuous, and the staff member shall return any monies received on account of separation, including termination indemnity under staff rule 9.8, repatriation grant under staff rule 9.12 and payment for accrued annual leave under staff rule 9.10. The interval between separation and reinstatement shall be charged, to the extent possible, to annual leave, with any further period charged to special leave without pay. The staff member's sick leave credit under staff rule 6.2 (Sick leave) at the time of separation shall be re-established; the staff member's participation, if any, in the United Nations Joint Staff Pension Fund shall be governed by the Regulations of the Fund.

53. It follows that the purpose of staff rule 4.17 is to "confer continuity of employment on former staff members with fixed-term or continuing appointments who have been re-employed, and who may then be reinstated … on the same type of contract within 12 months of their separation" (see *Egglesfield* UNDT/2012/208, para. 18). This ultimately ensures that "an employee is not disentitled of benefits that normally accrue through continuous service" (see *Egglesfield*, para. 18).

54. Thus, as pointed out in staff rule 4.17(a), this rule is applicable to a former staff member who is re-employed. This is not the Applicant's case. Indeed, with the rescission of the non-renewal decision, the Applicant should not have been separated from service and, consequently, re-employment did not apply to him.

55. A proper remedy in the case at hand further requires the Administration to place the Applicant in the position he would have been if he had never been separated (see, e.g., *Applicant* 2015-UNAT-590, para. 61; *Warren* 2010-UNAT-059, para. 10).

56. Therefore, there is no basis for the Administration to charge the Applicant's annual leave days, which is his entitlement, to make him whole for a period of unlawful separation pursuant to staff rule 4.17(b).

Calculation of the annual leave days that should be returned

57. The evidence on record shows that the Administration initially charged the Applicant 60 days of annual leave to cover his absence from his separation date to his reinstatement date. During the proceedings before this Tribunal, the Administration returned 30 days of annual leave to the Applicant's annual leave quota.

58. The Tribunal will then determine whether and to what extent the Administration should return the remaining 30 days of annual leave.

59. The Tribunal notes that on 2 March 2023, the Applicant was informed of the decision to reinstate him and consulted regarding a reinstatement effective date. Furthermore, the Applicant proposed to use annual leave to cover the period from 23 March 2023 to 31 March 2023.

60. In relation to the period from 3 March to 22 March 2023, which covers 14 working days, the Tribunal finds it appropriate to direct the parties to equally share the responsibilities in line with the principles of justice and fairness, as well as considering the Applicant's obligation to mitigate loss. This means that the Administration may charge the Applicant seven days of annual leave.

61. Considering the above, the Tribunal finds that the Administration shall credit back to the Applicant the remaining 23 days of annual leave. In light of the circumstance of the case, the Tribunal does not find it necessary to make a finding regarding the Applicant's alternative request for a financial compensation for the leave days at issue.

Compensation of three months' salary

62. The evidence on record shows that the Administration paid the Applicant three months of salary for January, February, and March 2023 in April 2023.

63. Accordingly, the Tribunal rejects the Applicant's request for compensation in this respect.

Compensation for harm

64. Under art. 10.5(b) of the Tribunal's Statute, the Applicant may be awarded compensation for damages, such as stress, anxiety, and reputational harm, provided that harm be supported by evidence.

65. The Appeals Tribunal has consistently held that "an entitlement to moral damages may arise where there is evidence produced to the Tribunal, predominantly by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award" (see *Coleman* 2022-UNAT-1228, para. 42; see also *Ashour* 2019-UNAT-899, para. 31; *Kebede* 2018- UNAT-874, para. 20).

66. In support of his claim for moral damages, the Applicant argues that the unlawful non-renewal decision caused reputational harm and made him anxious and distressed. With respect to the alleged reputational harm, other than making general allegations, the Applicant failed to provide any evidence supporting that he suffered such harm.

67. Turning to the alleged impact on his health, the Applicant submits that he was diagnosed with a sub-depressive anxiety condition on 1 May 2023. To substantiate his submission, the Applicant produced two medical reports dated 1 May 2023 and 15 May 2023, respectively. The Tribunal recalls that the non-renewal decision was made on 9 November 2022 and was rescinded on 2 March 2023. As such, the medical evidence does not support the existence of a causal link between the non-renewal decision and the Applicant's medical condition.

68. Considering the above, the Tribunal rejects the Applicant's claim for the award of compensation for harm.

Conclusion

69. In view of the foregoing, the Tribunal DECIDES that:

a. The application succeeds in part;

b. The Administration shall credit back to the Applicant 23 days of annual leave; and

c. All other claims are rejected.

(*Signed*)
Judge Sun Xiangzhuang
Dated this 2nd day of November 2023

Entered in the Register on this 2nd day of November 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva