



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/120
Order No.: 173 (NBI/2022)
Date: 16 December 2022
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BISTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Manuel Calzada

Counsel for the Respondent:

Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Maazatu Umar-Sadiq, DAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, an Engineer at the United Nations Support Mission in Libya (“UNSMIL”), filed an application on 13 December 2022 seeking suspension of what he describes as the “[d]ecision to implement a deficient notification of separation from service from the ASG for Human Resources.”

2. The Respondent filed a reply to the application on 14 December 2022.

Background

3. The Applicant recently served at the P-3 step 10 level on a fixed-term appointment, which was due to expire on 30 June 2023. His duty station is Tripoli, Libya.¹

4. On 28 November 2022, the Assistant Secretary-General for Human Resources (“ASG/HR”) conveyed to the Applicant the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”), which imposed on him the disciplinary measure of separation from service, with compensation *in lieu* of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii).²

5. The sanction letter was served on the Applicant by email dated 28 November 2022 and he acknowledged receipt of it on 29 November 2022.³

6. On 1 December 2022, the Applicant’s Counsel sent an email to the ASG/HR requesting, *inter alia*, for “extraordinary reconsideration of the disciplinary action imposed, and to hopefully reach an agreement that avoids the need for litigation.”⁴

7. On 5 December 2022, the Applicant’s annual leave request was approved in Umoja for nine days. On 8 December 2022, his Rest and Recuperation (“R&R”) was

¹ Allegations memorandum, unnumbered annex to the application, para. 5.

² Reply, annex R/1.

³ *Ibid.*, at annexes R/2 and R/3.

⁴ *Ibid.*, at annex R/4.

approved for five days.⁵

8. On 8 December 2022, an UMSMIL Human Resources (“HR”) Assistant sent the Applicant an email notifying him of the checkout procedure applicable to his separation from service.⁶ Part of the email from the HR Assistant states,

In connection with your separation from service *effective immediately as per the letter transmitted to you dated 28 November 2022* by DMSPC-OHR-ALD-Director, please find attached the separation from service memorandum together with the related forms pertaining to your separation.

Please complete the forms and return them to HR by email. *Please find attached the separation from service memorandum dated 8 December 2022* together with the pertinent forms for your completion ... (emphasis added).

9. On 12 December 2022, the Applicant requested for management evaluation of what he described as the decision of “UNSMIL Chief of Mission to implement a deficient a sine die notification from the ASG Human Resources of separation as disciplinary action against [him].”⁷

Parties’ submissions

The Applicant

10. The Applicant contends that the notification dated 28 November 2022 from the ASG/HR was deficient and incomplete because it does not indicate the effective date of his purported separation. He submits that the 28 November 2022 notification fails for uncertainty and lack of clarity and that the “decision dated 8 December 2022 is unlawful on the basis of the failure of the notification from the ASG/HR dated 28 November 2022.”

11. He considers this matter to be urgent because the totality of the process leading to the relevant decisions as from 12 December 2022 are tainted by

⁵ Unnumbered annex to the application.

⁶ Application, annex 2.

⁷ *Ibid.*, at annex 3.

inconsistencies, illegalities, and injustice. Finally, the implementation of the decision will cause him irreparable harm because it will unjustly terminate his employment following a flawed investigation and assessment process.

The Respondent

12. The Respondent's reply is not relevant because of apparent miscomprehension of both the subject matter and the regime of the application. The Respondent approached the issue as pertaining to the disciplinary sanction and the application as aiming at suspension pending determination of the merits pursuant to art. 10(2) of the UNDT Statute. The Respondent requests that the Tribunal dismiss the application as irreceivable *ratione materiae*.

Considerations

13. The Tribunal finds that the motion to suspend is clearly directed against the communication contained in the 8 December 2022 email, as the Applicant had indicated in his management evaluation request and in the application.

14. Having reviewed the 8 December 2022 email, however, the Tribunal determines that it does not convey any administrative decision by UNSMIL's Chief of Mission Support, because it does not contain any normative statement. Rather, it only conveys administrative guidance on separation formalities including the forms that the Applicant needs to fill out. Whereas the wording used therein, *effective immediately*, had not been included in the sanctioning letter from 28 November 2022, it presents, nevertheless, a mere re-statement of the applied disciplinary measure of "separation from service, with compensation *in lieu* of notice and with termination indemnity", in reference to staff rule 10.2(a)(viii), which makes it sufficiently clear that the termination decision is effective without the notice period.

15. Part of the confusion in this case is obviously caused by the approval in Umoja of the Applicant's annual leave and R&R on 5 and 8 December 2022 respectively, despite the termination of his employment. While it was clearly

irregular for the Administration to allow the Applicant to render work and approve his leave after the sanctioning decision had been rendered, it was equally inappropriate of the Applicant to proceed on leave, even if in doubt as to the effective date of separation.

16. In this connection, it must be noted that the employment relationship between the United Nations and its staff is unique in its depth and complexity. Staff serving outside their home countries, sometimes in difficult conditions or, as in this case, outright in a war zone, become wholly reliant on the Organization not only for income, but also for residency status and physical safety and protection. The Organization, therefore, cannot expect a staff member to simply pack a box and leave the office, but, rather, is under the obligation to ensure a safe return of a staff member, including a disciplined one, to the designated place. The Tribunal recalls its reasoning in *Clarke*⁸ that it is to be expected that even though the decision to separate a staff member is to be effective immediately, such staff member should be accommodated for the additional days required to complete check-out formalities.

17. The matter will need to be resolved in connection with separation formalities. In the communication of 8 December 2022, however, there is no mention of “retroactivity”, neither is there any indication of what the Administration is intending to do about the situation. As such, as yet there is no case to answer before the Tribunal.

Conclusion

18. The application is rejected as not receivable.

⁸ UNDT/2019/112, at para. 81.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 16th day of December 2022

Entered in the Register on this 16th day of December 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi