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Judgment No. 2023-UNAT-1399

**Michel Raymond Marie Rixe - (C - 0220) - (Ae) - 61d (R) (I)**

Counsel for Mr. Rixen: Christopher Bollen

Counsel for the Secretary-General: Daniel Trup

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Mr. Rixen's role.<sup>4</sup> On 3 September 2020, the Secretary-General approved the postponement of Mr. Rixen's separation to 31 December 2020.<sup>5</sup>

7. On 13 November 2020, WMO advised Mr. Rixen of what it described as the "good news" of a further impending postponement of his separation and sought his confirmation of this.<sup>6</sup> On 24 November 2020, he was accordingly notified that his separation date was delayed to 31 March 2021.<sup>7</sup>

8. On 4 February 2021, the D/SI again sought from the Secretary-General an extension to Mr. Rixen's employment contract to 31 May 2021.<sup>8</sup> His separation was accordingly deferred to that date.<sup>9</sup>

9. Mr. Rixen had agreed to these several changes to his tenure. On 24 March 2021, he was

12. On 29 July 2021, Mr. Rixen filed his application with the UNDT.<sup>14</sup> He pointed out that one consequence of the contested decision was that he was not paid a termination indemnity as he would have received had his employment ended as he had been advised and as he had agreed it would, on 31 May 2021. In addition to his claim to a termination indemnity payment, he asserted that the repeated changes to his end-of-employment date by WMO caused him professional harm and adverse medical consequences.

13. It is unnecessary for the issues on this appeal to set out the various interlocutory steps that preceded the UNDT's Judgment delivered on 22 December 2022.

*The UNDT's Judgment*

14. The UNDT dealt first with the WMO's submission that Mr. Rixen's case was not receivable because its decisions had no adverse impact on the terms of his appointment or his employment contract.<sup>15</sup> On appeal, the Secretary-General challenges the UNDT's conclusion that Mr. Rixen's case was receivable. We will therefore set out the Dispute Tribunal's reasoning for its preliminary conclusion on this point which was decided against the Secretary-General.

15. The UNDT recorded the Secretary-General's justification for the various extensions conveyed to Mr. Rixen on 25 March 2021 as being "the exigencies of the office and the requirements of the ongoing work" in the division in which he was engaged.<sup>16</sup> It recorded the Secretary-General's "careful consideration of the operational needs" of Mr. Rixen's division of WMO. The UNDT referred to Article 2(1) of its Statute requiring challenged administrative decisions to be non-compliant with and to have a direct and adverse impact on the terms of his appointment or his employment contract.

16. For receivability purposes, the UNDT concluded that the repeated cancellations and extensions of Mr. Rixen's departure dates at least arguably breached the Organization's duties of care and due diligence to him.<sup>17</sup> It found that the final decision to abolish his post and terminate his employment before its scheduled expiry date was not, as such, unlawful. However, it held that the contested decision had been taken unilaterally (unlike those previously which had Mr. Rixen's

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<sup>14</sup> *Ibid.*, para. 8.

<sup>15</sup> *Ibid.*, paras. 25–40.

<sup>16</sup> *Ibid.*, para. 26.

<sup>17</sup> Impugned Judgment, para. 30.

consent because he held out some hope of ongoing permanence at WMO), in the Organization's own self-interest, and purportedly for its operational needs.

17. It was significant, also, that the employment relationship between a staff member and an international organization is a bi-lateral agreement contemplating a set of rights of, and obligations on, each party.<sup>18</sup> In the case of the United Nations, the UNDT held that the Organization had a duty of care and due diligence towards Mr. Rixen and its other staff. It noted that the Organization took the (lawful) first initiative to abolish his post and to terminate his appointment before the expiry of the fixed term. The UNDT concluded that the Secretary-General then, however, determined, ultimately unilaterally and for what were described as the Organization's own interests, to repeatedly postpone his separation date because of what it claimed were its changing operational needs. It was significant that until the last proposed postponement, Mr. Rixen had agreed to these changes in the hope of attaining greater permanence with the Organization but had then advised it that he would no longer do so for reasons of career planning, of his own work planning with WMO, and because of the adverse effects of these repeated changes on his health and wellbeing.

18. The UNDT went so far as to describe the contested decision as "an abusive exercise of managerial discretion" affecting his terms and conditions of employment.<sup>19</sup> It said that the Organization had taken undue advantage of Mr. Rixen's goodwill, his good faith and his previous cooperation in an exercise which would see his role replaced by several appointments of lower-graded staff. The UNDT concluded that the previous changes which had been agreed to by Mr. Rixen had created a legitimate expectation in him both that his agreement to the changes the Organization intended to make was needed and, in the absence of his required agreement, he would receive a termination indemnity payment in return for his premature separation from the Organization.

19. In these circumstances, the UNDT concluded that the contested decision did impact Mr. Rixen's legal position adversely.<sup>20</sup> His application to the UNDT was therefore held to have been receivable.

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<sup>18</sup> *Ibid.*, para. 29.

<sup>19</sup> *Ibid.*, para. 37.

<sup>20</sup> *Ibid.*, para. 40.

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failure to award a termination indemnity as constituting a potentially adverse element. However, a termination indemnity requires a finding that the staff member's employment was terminated.<sup>29</sup> His was never terminated but rather expired as originally agreed it would. Consequently, he had no right to a termination indemnity. The UNDT cannot identify the failure to award a termination



referred to by the UNDT had been based on an understanding that his post would be abolished at a given date; according to the 3 June 2020 notification, his separation was contingent on the abolition of his post. Implicit in subsequent notifications as well was that the modality of separation was always contingent on the timing. As the abolition was delayed until the end of his fixed-term appointment, this resulted in non-renewal. Furthermore, the separation document, i.e. a memorandum of 17 August 2021, providing information on his entitlements, makes no reference to a termination indemnity.

33. The Secretary-General submits that even if the original notice of abolition constituted a written promise of termination, the UNDT failed to consider that there was insufficient evidence that it was relied upon or that it culminated in injury to Mr. Rixen. He had, in several ways, waived any reliance on the notification of abolition. Even on 24 March 2021, he indicated that he was open to remaining with WMO. The UNDT erred in concluding that he suffered any financial injury. In identifying moral harm, the UNDT failed to consider how the loss of an alleged legitimate expectation led to the ailments sustained by him. The medical report dated 11 August 2021 provides a diagnosis linked instead to overwork and the non-renewal of his contract and does not provide any reference to medical harm linked to the contested decision and alleged loss of a termination indemnity. In addition, the UNDT failed to establish the nexus between the contested decision and the diagnosis. Moreover, neither overwork nor non-renewal was the subject matter of his complaint.

34. The Secretary-General submits that the UNDT failed to properly consider the extent to

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case law of the UNDT and the Appeals Tribunal fails to adhere to the principle of the staff member's expectations being subservient to the interests of international organizations, a general principle of international civil service law. Even if the WMO's staffing needs were justified, the contested decision, as an abusive exercise of discret7192 (pl)t (s 27)-3.4 (xTw 21.22831.2 (1.4 (m)53.4 (rci)2.2 8) )-10.7 (t)1.00

the UNDT, we consider that the nature of the administrative decision challenged by Mr. Rixen was not to retain him in employment until the original date of expiry of his fixed-term contract. Rather, it was the decision to rescind the termination of his contract on 31 May 2021, contrary to the agreement that had been reached that it would conclude on that date. So it was not a matter of Mr. Rixen establishing direct and adverse consequences of having to work for WMO until 31 August 2021, but rather of these being a consequence of his being unable to cease work on 31 May 2021. His case did establish these consequences of the contested decision, thus fulfilling the receivability test.

45. Mr. Rixen's claim filed with the UNDT alleged that he was compelled to change the personal and professional plans he had made in reliance on his agreed termination date of 31 May 2021, and that he was forced to change his plans in reliance on the agreed termination date of 31 August 2021. He also alleged that he was forced to change his plans in reliance on the agreed termination date of 31 August 2021.

further extension of his termination date, he was not seeking, and would not have been entitled to, both a termination indemnity payment for premature separation, and also the remunerative and other benefits of continuing work for an additional three months. Rather, Mr. Rixen was seeking to adhere to an agreed variation to his contract which, in return for foreshortening his period of employment, entitled him to a termination indemnity. That WMO kept him in employment, under protest by him, after his refusal to compromise on their agreement (and from which WMO benefitted), is a consequence of its unlawful action which should not and did not disqualify Mr. Rixen from applying to the UNDT for relief against that unlawfulness.

47. The Secretary-General also relies on the decision in *Garbo*<sup>36</sup> to support the argument that Mr. Rixen was not entitled to insist that his employment end by termination rather than by expiry or effluxion of the period of his fixed-term contract. That is not, however, the basis of his case as it was put before and decided by the UNDT and so *Garbo* is also distinguishable from his case. Rather, Mr. Rixen sought to enforce an agreed variation to his contract of employment or would seek to negotiate a further variation to achieve its objective. As we elaborate in this Judgment, we also conclude that the date upon which he was to be separated from service was not a matter entirely of WMO's discretion and authority. We do not accept the additional submission that because separation was to occur as initially agreed on 31 August 2021, any earlier separation could not have been an adverse consequence of an administrative decision.

48. The UNDT was correct that Mr. Rixen had established a direct and negative effect, brought about by the implementation of the contested decision, as a condition for receivability. His case adequately established that condition.

49. We are satisfied that the UNDT correctly received Mr. Rixen's claims for consideration on their merits and reject the non-receivability grounds of appeal.

*The appeal on the merits of the impugned Judgment*

50. We turn now to the Secretary-General's challenge to the merits of the UNDT's Judgment.

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<sup>36</sup> *Garbo* Judgment, *op. cit.*

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report by the Council. The Secretary-General relies on the following passages from the Schwebel paper:<sup>40</sup>

The Commission took the view that a contract between a person and the Secretary-General 'must be considered mainly in the light of the principles of public law and administrative legislation. .... Relations connected with public employment are always governed by the exigencies of the public interest, to which the private and personal interests of the officials must necessarily give way.' Thus, 'the administration must always retain discretionary powers, as otherwise it could not ensure the development of these relations with



the Organization's self-perceived and actual needs. As a staff member, Mr. Rixen was entitled to an appropriate degree of personal and career autonomy and not to be held constantly in a temporary state of uncertainty about his professional future. That is not to say that the organizational dynamics of WMO could not be accommodated. But having contracted with Mr. Rixen, if WMO sought to vary those fundamental contractual terms relating to the duration of his employment, it should have obtained his agreement. The employment relationship, with regard to a variation that results in prolonging it, is governed by contract and contractual principles apply, including that such variation is by consent and not unilateral. Indeed, WMO did obtain this consent, albeit impliedly by acquiescence, on several occasions before this was finally denied it by Mr. Rixen for understandable and justifiable reasons. WMO was not entitled to simply override that disagreement to suit its own convenience. This fundamental principle distinguishes a relationship of contract from one of subjugation or servitude. As did the UNDT, we approach the following Secretary-General's submissions on this basis.

*A review of the pertinent facts*

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- h. On 25 March 2021, WMO advised Mr. Rixen that following

of employment. It relies on *Alcañiz*<sup>41</sup> which, if the decision is to be reviewable, requires that there be a causal link between the administrative decision and the terms and conditions of

*No unlawful revocation argument*

66. Even then, the Secretary-General submits that Mr. Rixen must demonstrate that its revocation of the decision to terminate Mr. Rixen's employment on 31 May 2021 was unlawful. This ground of appeal addresses the legitimate expectation analysis of the case. The test of expectation legitimacy is said to be whether the decision was taken in the interests of the Organization and did not harm "disproportionately" the staff member's contractual terms and conditions of employment.

67. It must be remembered that in addition to frustrating the plans and arrangements that Mr. Rixen made in his professional career and personal life in reliance on that assurance, its revocation of the parties' agreed variation to his final date of employment also caused him to suffer ill health for which he went on sick leave for a period. Those cumulative and harmful effects on Mr. Rixen were disproportionate to the benefits that WMO achieved by insisting on the continuation 1.5 (n)7ti35.1 (s)JTJO Tc 0 TjOn2.8 (o)-1.55 (k)6.4n eets2ef-10223 (o2.1( o 60 Tc 155w 5.543

*No commitment beyond intention argument*

69. We do not accept the apparent argument advanced by the Secretary-General that the documentary and other evidence summarised above established merely an “intention” by the Organization that Mr. Rixen would be separated from service when his post was abolished and if he had not then obtained another within WMO. Such an interpretation of the evidence strains unnaturally the words and phrases used in a continuum of correspondence on the subject. Further, it is also not the Organization’s subsequently professed intention that is the sole, or even the predominant, test of legitimate expectation. Rather, it is what all the relevant

of his post so that unless and until that abolition was decided and announced, he would not be separated from service prematurely. A consideration of WMO's 3 June 2020 advice to Mr. Rixen, for example, confirms that his intended separation was not so conditional or contingent. Other documentary evidence of these communications also supports our conclusion.

*No reliance on termination argument*

74. Next, the Secretary-General argues that the UNDT had insufficient evidence to enable it to conclude that any express written promise(s) of premature termination of Mr. Rixen's employment was/were relied on by him to his detriment. The Appellant highlights Mr. Rixen's initial request for management evaluation of the first notification to him of the 3 June 2020 decision to abolish his post. The Secretary-General says that his three subsequent acceptances of delays to this event must negate any detrimental reliance on this advice. The Secretary-General

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must be a proven *nexus* or cause-and-effect relationship between the unlawful administrative decision, and the harm or loss suffered.

82. We are not satisfied that the UNDT erred in this respect. It will be remembered that Mr. Rixen had begun planning and arranging his post-WMO professional and personal life in early March 2021 when he advised the Organization orally that he would not agree to a further extension of his employment.<sup>2(i)5.5 (s).27A1.1 (M 9j-6.8[7 TD[(e1 (t)3.1 (en)TD).5 (2)11.5 (1/LB. H-0.001 Tw -16.7</sup>

**Judgment**

87. The Secretary-General's appeal is dismissed, and Judgment No. UNDT/2022/134 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 27<sup>th</sup> day of October 2023 in New York, United States.

*(Signed)*

Judge Colgan, Presiding

*(Signed)*

Judge Forbang

*(Signed)*

Judge Sheha

Judgment published and entered into the Register on this 7<sup>th</sup> day of December 2023 in New York, United States.

*(Signed)*

Juliet E.