

5 February 2020

Before

Registration

of

INTRODUCTION

1. The Applicant is challenging a decision by the African Union – United Nations Hybrid Operation in Darfur (“UNAMID”) that he characterizes as his placement “on Special Leave with Full Pay (“SLWFP”) until the expiration of his fixed-term appointment when his contract was de facto terminated thereby denying him of termination indemnities”.
2. The Respondent filed a reply on 27 April 2019.
3. The Applicant filed observations on the Respondent’s reply on 27 May 2019.
4. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal’s Rules of Procedure, that an oral hearing is not required in determining the issues raised in this case and will rely on the parties’ pleadings and additional submissions.

FACTS

5. The Applicant, an Electrician at the G-4 level, joined UNAMID on 1 July 2008 on an appointment of limited duration. On 1 July 2009, his contract was converted to a fixed-term appointment (“FTA”). He was assigned to the Labado team site on 1 July 2014.¹ His FTA was extended from 1 July 2018 to 31 December 2018, a period of six months.²
6. On 1 June 2018, the Chairperson of the African Union Commission and the Secretary-General of the United Nations submitted a special report to the Security Council in which they recommended, *inter alia*: the drawdown and repositioning of UNAMID; the closure of team sites outside UNAMID’s area of responsibility by 31 March 2019³; the “right-sizing” of the civilian staff following an alignment of the staffing requirements with the reconfigured mission staffing structures to be completed

¹ Application, annex D.

² Respondent’s reply, annex R/1.

³ S/2018/530 - Respondent’s reply, annex R2, para. 62.

by 31 December 2018⁴; closure of the mission by 30 June 2020 and completion of liquidation by December 2020⁵. With respect to the team sites, t

Administrative and Budgetary Questions (“ACABQ”) stated the following in relation to the proposed phased drawdown of civilian personnel detailed in the Secretary-General’s revised 2018/2019 budget: “The Advisory Committee trusts that the drawdown of civilian personnel will proceed as swiftly as possible and as planned, in accordance with Security Council resolutions 2429 (2018) and 2363 (2017).” The ACABQ recommended that while the Secretary-General had requested USD727,522,700 in the revised 2018/2019 budget, the General Assembly appropriate USD725,522,700.¹⁸

16. On 22 December 2018, the Fifth Committee recommended that the General Assembly adopt a draft resolution that included an endorsement of the conclusions and recommendations contained in the ACABQ report of 13 December 2018.¹⁹ On the same day, the General Assembly, in its resolution 73/278, endorsed the ACABQ’s conclusions and recommendations.²⁰

17. By memorandum dated 24 December 2018, in response to the Applicant’s request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the recommendation of the Management Evaluation Unit to uphold the decision to place him on SLWFP until the expi(i)17(l)10 0.0 1.0 474.0 490.32 Tm [()] TJ ET Q ; plac0 Tf 0.0 0/9490.

SLWFP was unlawful; and (iii) whether the Applicant should be granted the relief he has requested.

Was the Applicant's appointment *de facto* terminated?

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specified in a staff member's letter of appointment.²³ Whereas termination is a separation from service initiated by the Secretary-General.²⁴ Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules.²⁵

23. Under staff regulation 9.3(a)(i), the Secretary-General may terminate a staff member's appointment (temporary, fixed-term or continuing) under a limited set of circumstances (*numerus clausus*), among them, "if the necessities of service require abolition of the post or reduction of the staff". Should the Secretary-General elect to terminate an appointment, the staff member is entitled to notice and "such indemnity payment as may be applicable under the Staff Regulations and Rules" (staff regulation 9.3(c)). Where justified by the interest of the Organization, staff regulation 9.3 also foresees an agreed termination. As such, termination may happen through an authoritative act of the administration or contractually; in any event, it is coterminous with early cessation of the employment relation.

24. By and large, termination is an exceptional case of separation. In this connection, it has been noted that termination indemnity serves to provide sufficient means of survival for the staff member to identify a regular placement in the labour market, and thus is computed dependent on the length of service.²⁶ In addition, however, of note is that its relatively high rate, compared with regular separation entitlements, is an expression of inviolability of the employment contract: it serves to compensate for the premature loss of employment and also discourages inconsiderate use by the Respondent. This

ferenda, the system may need approaches specific for mass layoffs, e.g., encouraging negotiation of a severance package with the staff union. Such as it is, though, the applicable legal framework for abolishment of post does not confer upon a staff member a right to have termination as the modality of separation.²⁷ Rather, to put it pointedly, the claim as described could be compared to having a high insurance on an old car and wishing that it be stolen.

25. Turning to special leave with or without pay, it denotes suspension of the execution of one (SLWFP) or both (SLWOP) of the essential elements of the

Considerations

29. As consistently held by the Appeals Tribunal, the judicial review role of the Dispute Tribunal entails an examination of whether the administrative decision is legal, rational, procedurally correct, and proportionate. Where a matter involves exercise of discretion, the Dispute Tribunal may consider whether relevant matters were ignored, irrelevant matters were considered and whether the decision is absurd or perverse. However, due deference is always shown to the decision-maker.³¹ Regarding the SLWFP, however, given that the requirements of “exceptional circumstances” and “the interest of the Organization” pose a constraint on the discretion of the Secretary-General, the general presumption of regularity of administrative act does not suffice and the Respondent must make a showing where the exceptional circumstances lay and that regarding them as such in the decision-making meets the test of rationality.

30. Noting jurisprudence differentiating “exceptional circumstances” and “exceptional cases”³² and

resorting to SLWFP as a generic cost-saving alternative to termination in downsizing.

31. The closest relevance to the case at hand may be found in *Adewusi*, where the Appeals Tribunal endorsed SLWOP in the aftermath of abolishment of post and transition from one post to another, having found that it reflected a protective approach adopted by the administration. It held: “the placement of Mr. Adewusi on SLWOP enabled him, in the first instance, to preserve his pension benefits. It granted him, secondly, the opportunity of remaining a staff member of the Organization, for the purpose of applying as an internal candidate for other positions after the expiry of his contract. Thirdly, it made possible his re-location to the position that he eventually accepted”.³⁶ In *Lopes*, in turn, this Tribunal held that placement on SLWFP of a staff member on a continuing appointment whose post had been abolished was not *prima facie* illegal, due to a possible cost-saving for the Organization.³⁷

32. Turning to the question of “exceptional circumstances” in the case at bar, the Tribunal notes a contradiction in the Respondent’s argument where on the one hand it is posited that the reason for SLWFP had been its cost-effectiveness compared with termination, while, on the other hand, it is argued that termination was not at all an option, in the absence of approval by the General Assembly. Given, nevertheless, the conclusion above that the case did not qualify as termination, and that the issue does not involve a right, the option of termination may be set aside and the appropriateness of the Applicant’s placement on SLWFP falls to be evaluated vis-à-vis other modalities of honouring the terms of his appointment.

33. The optimal solution, i.e., to maintain the *status quo* and allow the Applicant to perform his functions as a Generator Mechanic until its expiry, undisputedly became impossible with the closure of the Umm Baro team site. Conversely, the parties do not allege that afterwards there were other suitable assignments available, that the Applicant asked for it and that an effort was made to identify them. The closure of many team sites during the same period did not facilitate a reassignment.

³⁶ *Adewusi* 2013-UNAT-382, para. 14.

³⁷ Order No. 064 (NBI/2019).

judgment interest on the termination indemnity from 31 December 2018; and (iv) one month's net-base salary for unfair treatment.

38. The Respondent submits that the Applicant is not entitled to the relief requested because he has failed to establish that the contested decision was unlawful, besides, he presented no evidence of harm.

Considerations

39. Rescission of the contested decision in favour of treating the Applicant's case as termination cannot be granted for the reasons stated *supra*. Accordingly, there ifavour of tre'

work as such. Thus, deriving compensation from SLWFP would only be justified in – again – exceptional circumstances.

42. It is recalled that the Tribunals impugned practices of placing staff on SLWFP and granted compensations in the situations of breaching a specific staff rule³⁹, acting illegally outside the scope of authority⁴⁰, applying SLWFP for an extended period of time⁴¹ and associated reputational harm. No such circumstances are present in the Applicant's case. The Applicant did not render work for two months, which is not disproportionate to the duration of his appointment, and incomparable with the case in *Lauritzen*. The Applicant's work in UNAMID, albeit specialised, is not unique in nature and the period of SLWFP did not deprive him of a significant professional experience. Moreover, as transpires from the management evaluation request and the application, the Applicant did not claim to be given any other assignment and was only concerned about termination indemnity. Last, due to the placement on SLWFP, the Applicant benefited from free time which he could utilise for attending to personal matters and seeking another employment. In these circumstances, and notwithstanding the absence of any evidence of harm, the compensation is not due.

JUDGMENT

43. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 5th day of February 2020

³⁹ *Kamunyi* UNDT/2010/214.

⁴⁰ *Gakumba* 2013-UNAT-387.

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Entered in the Register on this 5th day of February