



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/037

Judgment No.: UNDT/2020/022

Date: 5 February 2020

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ABDALLAH AHMAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Julia Kyung Min Lee, OSLA

Counsel for the Respondent:
Elizabeth Gall, AAS/ALD/OHR

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, a Field Language Assistant at the G-4 level, joined UNAMID on 29 April 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 Umm Baro team site on 13 April 2016.¹ 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, page 3 and annex D.

² Ibid. annex A.

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, the following were to remain open in UNAMID's area of operation: Kutum, Saraf Omra, Kabkabiyah, Tawilah, Sortony, Shangil Tobaya, Zalingei, Nertiti, Golo, Kalma, Kass, Menawashei and Khor Abeche. All other team sites and super camps, including the one where the Applicant worked, were to be closed.⁶

7. In resolution 2429 (2018), dated 13 July 2018, the Security Council took note of the recommendation in the Special Report of the Chairperson of the African Union Commission and the Secretary-General and requested that the Secretary-General provide a "detailed and clearly benchmarked exit strategy" for UNAMID.⁷

8.

15.

appointment was de facto terminated; (ii) whether the placement of the Applicant on SLWFP was unlawful;

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

was erroneous and contravened staff rule 5.3(f), which allows the Secretary-General to place a staff member on SLWFP in “exceptional cases” if such leave is in the interest of the Organization. The Applicant asserts that UNAMID’s downsizing process and the closure of his team site do not qualify as “exceptional cases” especially since other missions had downsized and staff members were paid termination indemnities when their appointments were terminated. Allowing the Respondent to place staff members on SLWFP under such circumstances defies the existence of staff regulation 9.3 and staff rules 9.7 and 9.8 as it will always be in the interest of the Organization to save money. Moreover, by placing the Applicant on SLWFP until 31 December 2018, Respondent violated staff regulation 1.2(c) and infringed on his moral right to work²⁸.

28. The Respondent’s case is that the decision to place the Applicant on SLWFP until the expiry of his appointment under staff rule 5.3(f) was lawful and reasonable because posts encumbered by locally-recruited UNAMID staff members working at several team sites were proposed for abolition effective 31 December 2018 as part of the mission’s downsizing process. The timing of the closure of the team sites, which were staggered between 4 October and 9 December 2018, was determined by

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,

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. t.

Telecommuting was ruled out early on, unsurprisingly, because of incompatibility with the character of the Applicant's work.

34. Placing the Applicant on SLWFP may thus have been the only viable course of action under the circumstances, shifting, however, the question to the reason for closing the team site.

35. Closure of the team site is the factual element invoked by the Respondent as the exceptional circumstance. In this respect, the Tribunal notes that the decision had been of the Respondent's making, while a vague reference to "operational plans" does not demonstrate the necessity to close any work site at any given time, and particularly before the approval of post abolition by the General Assembly and before the expiry of the staff member's appointment. The Tribunal, moreover, agrees with the Applicant that the Secretary General's Report on the Revised Budget for UNAMID for the period from 1 July 2018 to 30 June 2019 does not lend support to such imperative either. Whereas staggering closure of team sites between October and December 2018, considering especially the scale of the operation, may have been prompted by overriding interests of politics, logistics, host country relations, cost economy, security of civilian personnel etc., no such justification was put forth before the Tribunal and remains speculative. Under the constraints of staff rule 5.3(f), this Tribunal is not ready to grant a blanket endorsement for SLWFP as a default modality for downsizing, incurring expense for Member States and treating hundreds of staff contracts as collateral in "operational plans" before such plans have been sanctioned by appropriate legislative bodies.

36. In conclusion, on the evidence before it, the Tribunal does not find that exceptional circumstances have been established.

Should the Applicant be granted the relief he has requested?

37. The Applicant seeks the following remedies: (i) rescission of the contested decision; (ii) payment of his termination indemnity and in lieu of notice of termination pursuant to staff regulation 9.3 and staff rules 9.7 and 9.8; (iii) pre-judgment and post-

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 is no

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

Entered in the Register on this 5th day of February 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi