



Be : Judge Agnieszka Klonowiecka-Milart

Re : Nairu

Re : Abena Kwame-Berko

WETAMINWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Couns for the

recommended that MONUSCO's financing be reduced by USD464,800 from USD1,023,267,600 to USD1,022,802,800.¹¹

11. On 29 May 2019, the Applicant's duty station was closed.¹² According to the Applicant, the MONUSCO administration told him to stay at home because there was no work for him to do and that if he went to the office, it would be for private reasons.¹³ He claims that he was informed that he would be placed on Special Leave With Full Pay ("SLWFP") through 30 June 2019.¹⁴ He explained in his request for management evaluation, dated 30 May 2019, that he started staying at home on 30 May 2019 but continued to monitor the activities of armed groups in the territories of Bafwasende and Ubundu.¹⁵

12. On 30 May 2019, The MONUSCO OiC Field Operations Manager sent an email to all staff in Kisangani that United Nations applications (Umoja, eMOP and eCMR) would not be accessible after 15 June 2019 due to the decommissioning of the satellite communication link.¹⁶

13. On 9 June 2019, MONUSCO's HumJ ET Q q BT16 Tm [()] TJ ET Q q (0 0BT1 0.0 s

15. The Applicant filed an application, registered as Case No. UNDT/NBI/2019/093, on 28 June 2019 contesting MONUSCO's decision to abolish his post by way of a "dry cut" and not to extend his FTA. This application was summarily dismissed vide Judgment No. UNDT/2019/122 on 3 July 2019.²⁰

16. The Applicant was separated from service on 30 June 2019.²¹

17. On 3 July 2019, 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 16 May 2019.²² On the same day, the General Assembly, in its resolution 73/315, endorsed the ACABQ's conclusions and recommendations.

ISSUES

18. The Tribunal will consider the following issues: (i) whether the application is receivable; (ii) whether the Applicant was placed on SLWFP and whether his appointment was *de facto* terminated; (iii) whether the Applicant should be granted the relief he has requested.

Is the application receivable?

Submissions

19. The Respondent's case is that the application is not receivable under the doctrine of *res judicata* because he has already litigated the decision to separate him from service in Case No. UNDT/NBI/2019/093 and that this matter was summarily dismissed by the Tribunal on 3 July 2019. The Respondent asserts that since the Applicant raised the failure to pay him a termination indemnity in his 13 May 2019 request for management evaluation, he should have also included it in his application if he wanted the claim to be reviewed by the Tribunal. The Respondent, relying on

²⁰ Respondent's reply, annex R/2.

²¹ Application, p. 3.

²² A/73/929, para. 6 (Financing of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo: Report of the Fifth Committee).

O'Neill 2011-UNAT-182, submits that any claims included in the Applicant's request for management evaluation, but not included in the first application were abandoned.

20. The Respondent further asserts that Judgment No. UNDT/2019/122 did not issue a determination on a technical or interlocutory matter but rather, in accordance with art. 9 of the UNDT Rules of Procedure, dismissed the application as a matter of law. Since the Applicant failed to appeal Judgment No. UNDT/2019/122, the Tribunal's decision, which disposed of any claims he included or should have included in the application, is final.

Considerations

21. The Tribunal finds the application receivable for the following reasons.

22. The Tribunal does not agree with the Respondent's assertion that the Applicant is re-litigating the contested decision. The Applicant's earlier application did not put the question of termination indemnity before the Tribunal. Accordingly, Judgment No. UNDT/2019/122 related solely to the Applicant's challenge against MONUSCO's decision to abolish his post by way of a "dry cut" and not to extend his FTA. This judgment made no pronouncements, whether procedural or substantive,²³ on the claim for a termination indemnity, thus the principle of *res judicata* does not apply.

23. Regarding the Respondent's reliance on *O'Neill* in asserting that the Applicant forfeited the claim for termination indemnity by not putting it in his earlier application, the Tribunal recalls that in *O'Neill* UNDT/2010/203, the applicant sought to challenge his non-selection/non-promotion to the P-5 level and the release of a confidential letter regarding the selection process. The Dispute Tribunal dismissed the application as not receivable because: (i) the applicant failed to raise the issue of his non-selection in his application even though he had requested administrative review of the decision; and (ii) he had failed to request administrative review of the decision to release the confidential letter. In affirming Judgment No. UNDT/2010/203, the United Nations Appeals Tribunal ("UNAT") held in *O'Neill* 2011-UNAT-182 that the UNDT correctly

²³ *Andreeva et al.* UNDT/2018/072, paras. 46-48; *Nadeau* UNDT/2018/052, para. 48.

9.7, he should have been given at least 30 calendar days' written notice of termination but this was not the case.

26. The Respondent's case is that an FTA does not carry any expectancy, legal or otherwise, of renewal, irrespective of length of service²⁴ and that the Secretary-General may allow an FTA "to expire through the effluxion of time"²⁵. He submits that the Applicant's post was abolished in accordance with Security Council resolution 2463 (2019). Staff rule 9.6(c) grants the Secretary-General discretion to decide to terminate an appointment due to abolition of post "if the necessities of service require. No such necessities required the termination of the Applicant's FTA. The Applicant's appointment expired about one month after the closure of the Kisangani team site. During his last month of employment, the Applicant did not report to the work site to work but he completed his check-out, including arranging for the travel of his family to Bunia, and he acknowledged in his request for management evaluation that he monitored the activities of armed groups in Bafwasende and Ubundu. Further, the

Applicant, expires automatically, and without prior notice, on the expiration date specified in a staff member's letter of appointment.²⁶ Whereas termination is a separation from service initiated by the Secretary-General.²⁷ Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules.²⁸

29. 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.

30. Termination is an exceptional case of separation. In this connection, it has be6 374.6u3(t)-42((e)-160

preserving the contract and not in generating more profit for the employee. *De lege 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.³⁰

31. In light of the aforesaid, the Tribunal, first, accepts the Respondent's argument that there was no legal basis for termination, as the Applicant's appointment expired without further extension, as foreshadowed in the April 2019 memorandum. Second, the Applicant retained his status as a staff member until the expiration of the appointment as per its original term and received

presented no evidence of harm.

Considerations

34. 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 basis for granting remedies related to termination indemnity.

JUDGMENT

35. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 15th day of April 2020

Entered in the Register on this 15th day of April 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi