



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/111
Judgment No.: UNDT//2019/178
Date: 16 December 2019
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PORRAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Daniel Trup, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. On 22 July 2019, the Applicant, a former a P-4 Logistics Officer, working with the United Nations Interim Security Force for Abyei (UNISFA), Sudan, subsequently assigned to Gok Machar in South Sudan, filed an application before the Dispute Tribunal contesting a decision not to renew his appointment.¹
2. On 26 August 2019, the Respondent filed a reply, where it is argued that, to the extent the application challenges the decision not to reassign the Applicant back to Abyei, it is not receivable as it is time-barred. Secondly, it is argued that the decision on non-extension of appointment was lawful.
3. The Applicant filed a response to the Respondent's argument on receivability on 5 September 2019.

FACTS

4. On 26 April 2016, the Applicant was temporarily reassigned within UNISFA from Abyei to Kadugli, Sudan.²
5. On 9 February 2017, the Ministry of Foreign Affairs of Sudan sent UNISFA a *Note Verbale* stating, among others, that Sudan was “not willing to have the Applicant as part of mission personnel and wished that he leave UNISFA Kadugli base immediately”. The reason given was that the Applicant had impeded religious practices in the camp, in violation of the Status of Forces Agreement.³
6. On 3 April 2017, the UNISFA Chief Human Resources Officer (CHRO), informed the Applicant of the Government of Sudan’s unwillingness to have him serve as part of UNISFA’s mission. By the same memorandum, the CHRO informed the

¹ Application, section III.

² Application, annex B.

³ Reply, annex 2.

Applicant of UNISFA's decision to temporarily assign him to Gok Machar in South Sudan for 90 days pending UNISFA's efforts to reassign him to another mission.⁴

7. Effective 18 July 2017, following the expiration of the Applicant's 90-day temporary duty assignment period and due to the lack of an alternative reassignment option, the Applicant was reassigned to Gok Machar together with the post, which was reflected in his personnel action.⁵ His fixed-term appointment was renewed first until 30 June 2018⁶ and then until 30 June 2019.⁷

8. On 5 July 2018, the General-Assembly approved, as part of the 2018/2019 budget, the redeployment of the post from Gok Machar in South Sudan to the SCPMU in Abyei.⁸

9. On 4 December 2018, the Applicant acknowledged the reclassification of the post, its changed job description and movement from Gok Machar to the Supply Chain Performance Management Unit (SCPMU) in Abyei.⁹

10. On 14 May 2019, the Applicant was notified of the expiration of his fixed-term appointment and informed that he was to be separated from service upon expiry of the his appointment on 30 June 2019.¹⁰ The Chief of Mission Support (CMS) informed the Applicant that the functions of P-4 Logistics Officer were required in Abyei and not in Gok Machar while the efforts to place him in another mission had not materialized. By the same memorandum, the CMS stated that UNISFA was uncertain that the Applicant would be issued with a Sudan Visa to work in Abyei as a Logistics Officer considering the circumstances under which he had been moved out of Kadugli.

⁴ Reply, annex 6.

⁵ Reply annex 8

⁶ Reply annex 7

⁷ Reply annex 1 and 10.

⁸ A/c.5/72/25 (Approved resources for peacekeeping operations for the period from 1 July 2018 to 30 June 2019).

⁹ Reply annex 11

¹⁰ Application, annex F.

11. The Applicant requested management evaluation on 10 June 2019¹¹ and received the response on 18 July 2019.¹²

Submissions on receivability

12. The Respondent submits that to the extent the Applicant challenges the Organization's decision not to assign him back to Abyei, the application is not receivable *ratione materiae*. UNISFA informed the Applicant that it was not possible for him to serve in Abyei following the Government of Sudan's *Note Verbale* stating that it was not willing to have him as part of UNISFA personnel in Sudan. The Applicant did not request management evaluation of the decision not to reassign him back to Abyei within 60 days of being notified of the decision, as required. The 14 May 2019 non-renewal letter was not a new decision not to reassign the Applicant to Abyei. It did not reset the time limit for requesting management evaluation.

13. In his response to the Respondent's argument on receivability, the Applicant contends that the Respondent inaccurately frames the application as one in which he challenges solely the failure of Administration to reassign him back to Abyei. The application challenges the nature of the obligation relating to the Administration undertaking good faith efforts to reassign a staff member who, through no fault of his own, was declared *persona non grata* (PNG) in the Kadugli duty station and is subsequently notified of his termination. The Applicant maintains that the matter in contention is factual and not one which falls within the remit of receivability.

Submissions on the merits

Applicant's submissions

14. The Applicant submits that the decision to transfer him from Abyei to Kadugli was only made on a temporary basis. There was never an indication that the Applicant could not return to Abyei and certainly the Administration did not formalize the

¹¹ Application, section IV.

¹² Application, annex H.

reassignment of the post. It is apparent that no such decision to transfer the post ever took place and as such the Administration should have reassigned him back to Abyei.

15. The Applicant also contends that it is accepted jurisprudence that in circumstances in which a staff member is declared *persona non grata*, the Administration retains a duty to take steps to alleviate the predicament in which the affected individual finds himself following his expulsion from a local duty station through no fault of his own. The Applicant maintains that, whilst it is accepted that the Administration temporarily reassigned him to an alternative post, there is no indication of any additional active steps they took to assist him find an alternative post save for uploading his profile on COSMOS.

16. The Applicant further avers that it is apparent that the Administration was even unwilling to apply for a visa for him, which would allow him to return to his original duty station to take up a new post of P-4 Logistics Officer. It should be noted that Abyei is separately administered under the 2004 Protocol on the Resolution of the Abyei Conflict and is shared by South Sudan and Sudan. As such, many UNISFA staff are deployed there without seeking consent of any of the Sudanese authorities.

17. As a remedy, the Applicant requests the Tribunal to order rescission of the decision to not renew his appointment. In the alternative, he requests for damages commensurate with the violation of contractual obligations and loss of opportunity.

Respondent's submissions

18. The Respondent submits that the Applicant's appointment expired. It was lawful and reasonable for UNISFA to decide to not renew his appointment because the post in Gok Machar used to finance the Applicant's appointment was no longer available as it was re-deployed back to Sudan pursuant to a General Assembly resolution. The Applicant could not move to Abyei with the post because Sudan, the host country, would not permit his presence in the country. The 9 February 2017 *Note Verbale* makes clear that the Sudanese Government was not willing to have the Applicant "as part of the mission personnel".

19. The Respondent also contends that insofar as the Applicant claims that the Organization had a duty to assist him in finding another suitable position away from Sudan, the Organization did so. Effective 18 July 2017, the Applicant was permanently reassigned to Gok Machar. This placement was solely to accommodate the Applicant. Further, UNISFA endeavoured to identify other suitable positions to which the Applicant could be reassigned. UNISFA uploaded the Applicant's profile in COSMOS for his PHP to be considered for job openings in other missions outside of Sudan.

20. With redeployment of the post to Abyei, there was no longer any post available to finance the Applicant's appointment. UNISFA had no obligation to renew the Applicant's fixed-term appointment beyond its expiration on 30 June 2019. The application should be dismissed.

CONSIDERATIONS

21. On the receivability argument, the Tribunal concurs that decisions related to reassignments are currently outside the temporal jurisdiction of the Tribunal. It observes, nevertheless, that decisions on reassignment have not been placed before the Tribunal; rather, the application is express in identifying the impugned decision as the decision on non-extension of appointment. As such, the question of receivability does not arise.

22. The Applicant's contentions, on the other hand, that all his reassignments had had a temporary character and that he had expectation to return to Abyei are as inaccurate as they are irrelevant for the merits. Questions relevant for determination are: the impact of the PNG status on the terms and conditions of the Applicant's appointment and whether in this connection the Organization has discharged its duty toward him. These will be discussed below.

23. There is no dispute that based on a *Note Verbale* from the Sudanese Ministry of Foreign Affairs, the Applicant was declared *persona non grata* in Sudan. Under international law, it has long been recognized that every sovereign nation has the right to determine whether it will receive a diplomatic envoy from another nation or if he/she

will be allowed to stay. The logical consequence that follows a *persona non grata* declaration is that the sending state must recall its agent. This applies *mutatis mutandis* to staff members working for the United Nations in a country that declares them PNG.¹³ The consequences for the terms and conditions of appointment are inevitable in that the situation forces the exercise of the Secretary-General's discretion in placing the staff member outside the country where he or she lost the legitimacy to perform the function, under some kind of arrangement. In practical terms this may mean redeployment of post, reassignment, administrative leave or, ultimately, non-extension. The claim to remain in the office in the country where the staff member is unwelcome is, in any event, unfounded.

24. To the extent the Applicant invokes the particular status of Abyei, in that it is separately administered under the 2004 Protocol on the Resolution of the Abyei Conflict and shared by South Sudan and Sudan, it would be correct to accept that the sovereign powers over Abyei are limited; these limitations, however, do not justify further incursions. UNISFA operates under a Status of Forces Agreement with the host country, and the host country requires that its personnel obtain a visa. UNISFA enforces visa obligations of its personnel. In the circumstance, the suggestion that the Secretary-General simply ignore the PNG declaration and the visa policy and deploy the Applicant to Abyei without a visa is unreasonable.

25. Regarding the Applicant's proposition that UNIFSA should attempt to obtain a visa for him, the Tribunal notes that, given the level and form of the PNG communication, this case can be distinguished from *Milicevic*, where there was a doubt as to whether the applicant had been declared PNG as the issue had been orally expressed in a meeting and thus left room for negotiations (*nota bene* unsuccessful)¹⁴, and can be distinguished from *Tal*, where it had been signaled that the applicant's visa would not be renewed, but, after a period of time, the applicant claimed having obtained

¹³ See *Hassouna* UNDT/2014/094 para 49 and *Milicevic* UNDT/2018/101 para 32-33 and sources cited therein.

¹⁴ *Milicevic* ibid.

support of his government in applying for a visa afresh.¹⁵ The case, on the other hand, bears similarity to *Hassouna* where the issuance of a categorical *note verbale* by the Sudanese Foreign Ministry signified a firm position, which remained unchanged notwithstanding the Organization's démarche on the level of the Permanent Mission of Sudan.¹⁶ Altogether, considering the views of the Government of Sudan about the Applicant's presence in Sudan and the sensitive political nature of UNISFA operations in Abyei, the Tribunal does not consider that the Administration had a legal obligation to undertake such an attempt.

26. In arguing that the Administration did not take any additional active steps to assist him to find an alternative post save for uploading his profile on COSMOS, the Applicant relies on the Tribunal's Judgment in *Hassouna* where it was held:

[I]in the case of a staff member who has been declared persona non grata and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision [...] a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General. The Tribunal takes the view that under such circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.¹⁷

27. The Tribunal reiterates its position in *Tal* that it concurs with *Hassouna* insofar that it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country through no fault of his or hers. This duty, forming part of a more general "duty of care" discussed by UNAT in *Lauritzen*, in the face of *force majeure* must, however, be interpreted in consideration of balancing legitimate interests of the Organization and the staff member. And thus, the scope of the Organization's duty to alleviate predicaments will be greater with regard to staff holding permanent appointments with the Organization, where a reciprocal interest in maintaining the employment relation is readily built into the terms of appointment. This duty will be more limited with regard

¹⁵ *Tal* UNDT Order No. 109 (NBI/2017).

¹⁶ *Hassouna* ibid. at paras. 16 and 21.

¹⁷ *Hassouna* ibid. at para. 12.

to staff on fixed-term appointments which do not carry an expectancy of renewal. Specifically, legal obstacles in performing the function – just as other *force majeure* obstacles, such as health issues – do not justify the claim to extend or renew the fixed-term appointment indefinitely, until alternative employment is found. Moreover, the scope of the duty of the Organization is to be determined in relation to what is possible and reasonable under the circumstances. In particular, the possibility to redeploy the staff member on the same terms and conditions directly depends on availability of posts.

28. Applying the foregoing to the facts of the present case, the Tribunal considers that by effectively creating for the Applicant a position in Gok Machar, South Sudan, and maintaining it for over two years, the Administration provided him with employment on the same conditions, opportunity to build professional experience and to apply for other jobs, both within and outside the Organization, for a period of time considerably exceeding the term of his appointment at the date of the PNG declaration. Regarding securing another post, the Applicant does not specify what other steps he would have expected the Administration to take other than placing him on the COSMOS platform and informing the then Field Personnel Division of the Department of Field Support (FPD/DFS) of his situation. The Applicant apparently did not dispute non-selection for any of the posts for which he had applied. However, that his multiple applications did not result in obtaining another post is plausibly explained by closing or downsizing of Missions and financial constraints that the Organization has been facing in the same period, plus the Organization's obligation toward its staff members on permanent and continuing appointments, all of which are generally known. Similarly, budgetary concerns substantiate re-deployment of the post to Abyei, a decision whose rationality is not disputed by the Applicant and which has become final.

29. In conclusion, the Tribunal finds that the Organization had fulfilled its legal obligations towards the Applicant and the impugned decision was lawful.

JUDGMENT

30. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 16th day of December 2019

Entered in the Register on this 16th day of December 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi