



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/089
Judgment No.: UNDT/2021/119
Date: 15 October 2021
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MUKHOPADHYAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George G. Irving

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). He was engaged as an Engineer until 10 September 2020, when he was notified of the termination of his continuing appointment, with immediate effect.

2. There was no provision in the termination letter for either three months’ notice or payment *in lieu* thereof. Accordingly, the Applicant hereby challenges the implied decision made by the Respondent to withhold payment of three months’ compensation *in lieu* of notice.

3. In his application, the Applicant urged the Tribunal to dispose of the matter by way of Summary Judgment. He considered this appropriate as both the regulatory framework and interpretation thereof by UNAT jurisprudence underscore the entitlement to notice or payment *in lieu* thereof upon termination for reasons of post abolition.

4. However, the Tribunal has not proceeded with a view to Summary Judgment. In addition to the Applicant’s submissions, it considered the Respondent’s reply of 14 December 2020 and his closing submission dated 1 October 2021.

5. For reasons further explained in this Judgment, the Applicant’s challenge to the without notice aspect of his termination succeeds.

Facts and Submissions

6. The Applicant’s grounds for contesting the administrative decision are based on the regulatory framework governing termination notice entitlements for staff members serving on a continuing appointment, as follows:

Staff Regulation 9.3

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

...

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations

Staff Rule 9.7

Notice of termination

(a) A staff member whose continuing appointment is to be terminated shall be given not less than three months' written notice of such termination.

...

(d) In lieu of the notice period, the Secretary-General may authorize compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period at the rate in effect on the last day of service.

7. It is based on these clear provisions that the Applicant advocates that he ought not to have been separated with immediate effect and without payment *in lieu* of notice on 10 September 2020. The Respondent contends on the other hand that the preceding events must be taken into account.

8. The events leading up to the 10 September 2020 separation date back to 12 July 2019. On that day, the Chief Human Resources Officer ("CHRO") sent the Applicant a notice of termination of his continuing appointment effective 2 August 2019 due to the abolition of the post he encumbered.

9. On 2 August 2019, the Applicant requested management evaluation of the decision to terminate his continuing appointment ("the first ME request"). On 7 August 2019, the Management Evaluation Unit ("MEU") granted the Applicant's request to

suspend the implementation of the contested decision pending management evaluation. He was then placed on special leave with full pay (“SLWFP”) from 29 October 2019 as the management evaluation as to whether his termination was lawful, proceeded. There was some delay in concluding the first ME, so on 16 December 2019, the Applicant filed an application before the Dispute Tribunal contesting the decision to terminate his appointment.¹

10. On 9 September 2020, MEU upheld the decision to terminate the Applicant’s continuing appointment.

11. One day later, on 10 September 2020, MONUSCO informed the Applicant that he would be separated from the Organization effective that very day.

12. After his termination, the Applicant wrote on 13 and 14 September 2020 to MONUSCO Human Resources (“HR”), requesting payment of three months’ salary *in lieu* of the notice of termination that he did not receive. On 14 September 2020, MONUSCO HR informed him that he was not entitled to payment of salary *in lieu* of notice.

13. The Applicant requested management evaluation of the decision to “deny [him] payment of three months’ salary *in lieu* of notice as part of [his] termination indemnities” on 19 September 2020.

14. The Respondent’s basis for arguing that the Applicant was not entitled to payment *in lieu* of notice was explained in the 27 October 2020 response to the second ME request. According to the Respondent, the Applicant had, by the 10 September 2020 termination date, already received more than three months’ notice.

15. This purported notice period was counted from the time the Applicant was first informed on 12 July 2019 of his pending termination, which was then to have taken place three weeks later, on 2 August 2019. The Respondent’s submission is that the 14

¹ The related case concluded on 22 July 2021 with Judgment No. UNDT/2021/085 ordering the rescission of the Applicant’s termination.

months that had elapsed were to be considered as a lengthy period of notice for purposes of a pending termination because the Applicant: challenged the July 2019 termination decision; was able to work for three months while successfully pursuing suspension of action pending a response to the first ME request; and was thereafter granted SLWFP.

16. The Applicant asserts that the Respondent's position is not supported by the regulatory framework, as interpreted by the Tribunal in *Ahmed* UNDT/2012/186. The Tribunal opined in that case that 'it is not legally permissible to view salary paid while on SLWFP as payment *in lieu* of notice that was undertaken by the Organization.' The Tribunal's decision was upheld in *Ahmed* 2013-UNAT-386.

17. The Respondent argues that the case of *Ahmed* is distinguishable from the facts in this case because there the terms of the Applicant's payments were not governed by the Staff Rules. He was on a fixed term contract which was not being renewed due to performance issues. He was not entitled, based on the regulations, to renewal or any termination notice. But there was a specific agreement between him, and the Organization based on which he was to be given certain payments in lieu of notice.

18. The Tribunal and UNAT determined that those agreed notice payments were not to be equated with the SLWFP that he had received. Thus, despite having received SLWFP before the termination date the applicant still had to receive the agreed notice payments when the termination took effect.

Considerations

19. Although the case of *Ahmed* cited by the Applicant provides valuable guidance, it is not sufficiently on all fours with the facts of this case for this to be a situation of *res judicata* as suggested by the Applicant. On the other hand, the Applicant's reliance

on the literal wording of the regulatory framework, applied to the facts of this case, sufficiently supports his claim for three months' notice payment.

20. On the undisputed factual chronology of events, there was no compliance with the notice requirements provided for in the Staff Rules, in respect of both termination decisions in July 2019 and September 2020. The July termination decision was to have taken effect just three weeks later, on 2 August 2019. The more recent September termination decision was instantaneous, with no notice given to the Applicant.

21. The logic of the Respondent's argument that the three months the Applicant worked, and the following period when he was placed on SLWFP, must be counted as notice is not persuasive. The argument belies the true purpose of termination notice which the Respondent in his reply submissions properly recognizes is 'to allow the staff member time to seek other employment'.

22. If no actual notice is given, the purpose of payment *in lieu* of notice is to tide the staff member over for the period when he was entitled to remain on the job while seeking alternate employment. The period of the two decisions to terminate cannot properly be counted as termination notice.

23. This is so firstly because the planned termination was suspended. It did not take place on 2 August 2019. The assertion that thereafter the Applicant was on notice for a prior termination date defies logic. It is also disingenuous.

24. Secondly, the 14-month period was not a period of notice pending termination. During those months the Applicant's termination was suspended pending determination of his challenge to it. He could not have been expected to treat it as a termination notice period during which he could seek other jobs.

25. The Applicant treating the 14 months as a termination notice period would be contradictory to his pending challenge. He was contending that he ought to be allowed to remain as a staff member whether in his current position or if it was genuinely abolished, be absorbed into another suitable post. That contention was being

considered by the Organization in deliberating on the first ME request, over the 14-month period. It was only at the end of that process that a decision was made on 9 September 2020, not to agree to the Applicant's rationale for retaining him as a staff member.

26. Hence the effective termination date was 10 September 2020. The Applicant was terminated without being given the statutory three months' notice. Without that notice, the regulatory framework provides that compensation *in lieu* of the three months' notice had to be paid.

27. Furthermore, for reasons similar to those stated in *Ahmed*, the grant of SLWFP to the Applicant for part of the period neither supplants nor equates to the Respondent's obligation to have given the Applicant his due notice on 10 September 2010. The Staff Regulation and Rules requires the staff member to either be given notice or payment *in lieu of that notice*. The Applicant before me received neither.

Conclusion

28. The Applicant succeeds in his application. The Tribunal hereby ORDERS:

- i. The decision to withhold from the Applicant three months' compensation in lieu of notice is rescinded.
- ii. The Respondent shall pay the Applicant three months' net base salary *in lieu* of the notice not afforded to him; and
- iii. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

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(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 15th day of October 2021

Entered in the Register on this 15th day of October 2021

(Signed)

Abena Kwakye-Berko, Registrar, UNDT, Nairobi