



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/159

Judgment No.: UNDT/2020/100

Date: 29 June 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MAMPETA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Lee, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant served as a Field Security Guard at the United Nations Organization Stabilisation Mission in the Democratic Republic of the Congo (“MONUSCO”). He held a fixed-term appointment at the GL-3 level and was based in Kisangani.

2. On 28 November 2019, the Applicant filed his application with the United Nations Dispute Tribunal sitting in Nairobi. He was impugning the Respondent’s decisions to: place him on Special Leave with Full Pay (“SLWFP”) until the expiration of his fixed-term contract when his contract was “*de facto* terminated” on 30 May 2019; and deny him termination indemnity after his *de facto* termination from MONUSCO.

3. On 30 December 2019, the Respondent filed his reply to the application challenging both the receivability and the merits of the application.

4. On 11 June 2020, the Dispute Tribunal directed the Applicant to provide his submissions in response to the Respondent’s position on the receivability of his Application.

5. The Applicant filed his submissions on receivability on 16 June 2020.

Facts

6. The Applicant joined MONUSCO on 23 February 2009 as Field Security Guard at the GL-3 level in Goma, DRC and was moved to Kisangani in July 2018.

7. On 29 March 2019, Security Council resolution 2463 (2019) extended the mandate of MONUSCO until 20 December 2019 to enable a coordinated and sustainable exit of MONUSCO from the host country. On the same date, the Secretary-General submitted his 2019-2020 budget for MONUSCO and proposed the closure by 30 June 2019 of seven field offices in locations unaffected by armed

conflict. This included the office in Kisangani, where the Applicant was deployed and the post he encumbered. To this end, the Respondent set 31 May 2019 as the provisional date for closure of the Kisangani site; staff assigned to the site were kept informed, and offered assistance with finding alternative employment.

8. On 2 April 2019, the Applicant was notified that his contract would not be renewed when it comes to expire on 30 June 2019. This decision was reiterated in a subsequent communication dated 29 May 2020.

9. On 30 May 2019, the Applicant's duty station closed down and all staff members were sent home. The Applicant has not performed any work for MONUSCO in Kisangani since then.

10. On 26 June 2019, the Applicant filed a request for management evaluation to contest the *de facto* termination of his contract on 30 May 2019 and claimed termination indemnities.

11. The Applicant separated from service on 30 June 2019.

12. On 30 August 2019, the Applicant received the decision from the Management Evaluation Unit ("MEU") upholding the impugned decisions.

Parties' submissions

13. It is the Applicant's case that the Respondent's decision to send him home is tantamount to being placed on SLWF). In so doing, he contends, the Secretary-General was in effect circumventing the provisions of staff regulation 9.3 and staff rule 9.8.

14. The Respondent's primary argument is one of receivability. As the Applicant was notified on 2 April 2019 that his contract would not be renewed, time for requesting management evaluation began to run from then. This Tribunal has no jurisdiction to consider the application because the Applicant did not request management evaluation within the statutory time frame.

15. The Respondent makes the further argument that the application should be dismissed for want of merit because the decision to abolish the post encumbered by the Applicant was lawful. He was not placed on “any type of leave at all” and is not, by any reading of the Rules and Regulations of the Organization owed termination indemnity.

Considerations

Receivability

16. The Tribunal is surprised at the Respondent’s submissions on receivability. It reflects a marked misunderstanding of the impugned decision being challenged in this case. The Tribunal finds that the Applicant has clearly articulated his grievance. He is not challenging the abolition of his post.

17. The decision being challenged is the decision which saw the Applicant “sent home” at the end of May 2019, which decision the Applicant characterises as “termination of appointment” under the guise of “special leave with full pay.” As that decision was made on 30 May 2019, the Applicant’s request for management evaluation was well within the timelines stipulated under the rules. The Application is therefore receivable.

Merits

18. The question before the Tribunal is whether the Applicant was placed on SLWFP to disguise the fact that his appointment was being terminated as envisaged in staff regulation 9.3 and staff rule 9.6, subject to which provisions he would also have been entitled to the payment of termination indemnity.

19. The Tribunal begins by noting that staff regulation 9.3 is worded such as to make a decision to terminate discretionary. The Secretary-General *may*, it says, choose to terminate a staff member’s appointment for several reasons including

where the necessities of service call for the abolition of posts or the reduction of the staff.

20. The facts of this case are simple. Having proposed closure of the Kisangani site to the General Assembly and the corollary budgetary reductions, the Respondent proceeded with the implementation of his proposal. The natural consequence of this process was that the Applicant was left with no tasks to perform. Rather than reduce the term of his appointment, the Secretary-General opted instead to lighten his footprint in the Kisangani site asking those whose services were no longer necessary to go home but without it having any effect on their benefits and entitlements. While this may have been an unorthodox arrangement, and the Respondent's submission that this was not "any kind of leave" is curious, nothing in the parties' submissions suggests that the decision was perverse or tainted so as to trigger an inquiry into whether it was based on extraneous factors.

21. In reviewing the Respondent's discretion, the Tribunal is bound by the guidance of the Appeals Tribunal in *Toure*

When judging the validity of the Administration's exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Tribunal to consider the correctness of the choice made by the administration amongst the various courses of action open to it.¹

22. The Tribunal cannot, without more, find that the Respondent's decision in this case was illegal, irrational, procedurally incorrect or disproportionate.

23. The Application is DISMISSED.

¹ 2016-UNAT-660.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 29th day of June 2020

Entered in the Register on this 29th day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi