



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/007

Order No.: 175 (NY/2016)

Date: 20 July 2016

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

LEMONNIER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 22 February 2016, the Applicant, a former P-5 level Senior Administrative Officer/Supply Chain Manager on a continuing appointment, filed an application contesting the decision to terminate his employment with the United Nations Stabilization Mission in Haiti (“MINUSTAH”) effective 31 August 2015. The Applicant was informed of the contested decision on 1 September 2015. The Applicant submits that the contested decision was unlawful because the Administration failed to take any steps to find him an alternative post pursuant to staff rule 9.6(e). He also submits that he was separated while being on paternity leave, which was due to end on 11 September 2015.

2. The Applicant seeks rescission of the decision to separate him from service or, alternatively, compensation for improper termination.

3. On 16 March 2016, the Respondent filed a reply to the application, submitting that the decision to terminate the Applicant’s appointment was lawful. The Respondent submits that, following the abolition of the post used to finance the Applicant’s appointment on 1 July 2012, the Organization made good faith efforts to retain the Applicant’s services for as long as possible, and to assist him in finding alternative employment. He was therefore placed on a number of temporary assignments since July 2012. Further, contrary to the Applicant’s contentions, between the granting of his continuing appointment effective 1 October 2014 and the termination of his appointment effective 1 September 2015, the Department of Field Support (“DFS”) continued its efforts to assist the Applicant. The Respondent submits that, under the administrative instruction ST/AI/2005/2 (Family leave, maternity leave and paternity leave), there is no prohibition on a staff member’s appointment being terminated due to abolition of the post while he is on paternity leave.

4. This case was assigned to the undersigned Judge on 14 July 2016.

Case management

Joint submission

5. The Tribunal commends Counsel for both parties for presenting concise submissions accompanied by relevant documents. There are several aspects of the case that may require further clarification. To this end, the Tribunal considers it appropriate to order the parties to file a joint submission reflecting the issues identified below.

Scope of the case

6. As stated in the application, this case concerns the decision “to terminate Applicant’s employment with MINUSTAH”. The Applicant submits that the decision to terminate his appointment was unlawful on two grounds: firstly, the Administration failed to take any steps to find him alternative post and, secondly, he was improperly separated approximately ten days before the end of his paternity leave.

7. The Applicant is not disputing the decision to abolish his post in July 2012.

Application of staff rule 9.6(e)

8. The parties disagree as to whether the Administration complied with the provisions of staff rule 9.6(e) with regard to the Applicant as a staff member on a continuing appointment who was affected by the abolition of his post.

9. Further submissions and supporting documents will be required from both parties identifying the efforts made to retain the Applicant, both since July 2012 and since 1 October 2014, when he received a continuing appointment. The parties are

invited to consider whether they wish to introduce oral evidence in order for the Tribunal to properly examine this issue.

10. The Tribunal notes that, in para. 16 of his application, the Applicant states that he “would *contend that [an] attempt appears to have been made* to try to take all reasonable steps to locate an alternate post” (emphasis added). This statement appears to contradict the Applicant’s own position, but it may well be a matter of an awkward wording or an omitted phrase. The Applicant is invited to clarify this statement in the joint submission.

Termination for abolition of post while on paternity leave

11. The parties refer the Tribunal to sec. 11.3 of ST/AI/2005/2, which states:

Section 11

Relationship of paternity leave to other entitlements

...

Extension of fixed-term appointments for utilization of paternity leave entitlement

...

11.3 If, however, on the basis of considerations unrelated to the staff member’s decision to take paternity leave, a decision is made not to offer a new fixed-term appointment and the current appointment is due to expire during the period of paternity leave, the appointment will be extended to cover the full duration of the leave.

12. In their submissions, the parties compare protections afforded to fixed-term and continuing staff, with the Applicant’s view being that staff members on continuing appointments should enjoy at least the same protections as those on fixed-term appointments. The Respondent opposes this view, arguing that sec. 11.3 applies only to fixed-term staff as their appointments—unlike those of continuing staff—are subject to expiration and may expire within the period of paternity leave.

13. However, neither party appears to address the Tribunal on the issue of sec. 11.3 dealing with natural *expiration* of an appointment as opposed to its *termination* by the Secretary-General. For instance, it is unclear whether a fixed-term staff member on a paternity leave whose appointment is being *terminated* would receive an extension of his appointment until the end of his paternity leave, be it under provisions of sec. 11.3 or any other legal instrument.

14. The parties are invited to address the Tribunal on this point in their joint submission, citing relevant legal authority (if any).

Matters of relief

15. The Applicant seeks rescission of his separation or, in the alternative, monetary compensation. However, the application does not appear to contain sufficient particulars as to the exact monetary compensation sought by the Applicant.

16. The Tribunal notes in this regard that, pursuant to art. 10.5(a) of the Tribunal's Statute, when ordering rescission in cases of termination, "the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision."

17. The Tribunal notes the Respondent's submission that, upon termination, the Applicant received a total of USD141,256, which included eleven-and-a-half months' salary as termination indemnity as well as three months' salary in lieu of notice. The Tribunal invites both parties to state their views in their joint submission as to whether, in the event the Applicant prevails on the merits, the amounts already paid to the Applicant should be deducted from any monetary compensation that may be ordered or returned in the event the contested decision is rescinded.

Informal resolution

18. In view of the particular circumstances of this case, the Tribunal invites the parties to consider informal resolution of the dispute. Should the parties decide to attempt informal resolution of the matter, they shall promptly inform the Tribunal thereof and seek suspension of the proceedings.

19. Pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, the Tribunal considers it appropriate and in the interests of a fair disposal of the case to make the following orders.

IT IS ORDERED THAT:

20. By **5:00 p.m., on Wednesday, 17 August 2016**, Counsel are to confer with a view to resolving the matter informally. In the event the parties agree to attempt informal resolution of the matter, they shall file a joint submission asking for a suspension of the proceedings.

21. In the event no informal resolution is possible, by **5:00 p.m., Wednesday, 24 August 2016**, the parties shall file a jointly-signed submission responding under separate headings to each of the following issues. Where there is disagreement over an issue, fact or statement, the submission shall identify the parties' respective positions:

- a. A consolidated list of agreed legal issues and the parties' respective positions on each issue;
- b. A consolidated list of agreed facts in chronological order;
- c. A joint proposal as to the date(s) for a hearing on the merits, ensuring availability of their proposed witnesses;

- d. Lists of witnesses that the Applicant and the Respondent intend to call, confirming whether the witnesses will appear in person and providing their contact information to the Tribunal. The parties shall also include a proposed order of appearance for their witnesses;
 - e. Brief statements of the evidence each party intends to elicit from their respective witnesses;
 - f. A consolidated, paginated bundle of legal authority relied upon by the parties in support of their submissions, including relevant case law of the United Nations Dispute and Appeals Tribunals, as well as the full text of any relevant administrative issuances;
 - g. An agreed bundle of documents which the parties intend to rely upon at the hearing. The bundle shall contain an index of the documents contained therein, with each page of the bundle clearly paginated for ease of reference.
22. The Tribunal will thereafter issue further orders as it deems appropriate.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 20th day of July 2016