

UNDT/2020/020, Garbo

UNAT Held or UNDT Pronouncements

Termination indemnity serves to provide sufficient means of survival for the staff member to identify a regular placement in the labour market, and thus is computed dependent on the length of service. It serves to compensate for the premature loss of employment and also discourages inconsiderate use of termination by the Respondent. Termination indemnity operates on the premise that the protected interest is in preserving the contract and not in generating more profit for the employee. 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. The Applicant's case did not qualify as "disguised termination" given that: at the relevant time the abolishment of post had not yet been endorsed by the General Assembly there was no agreed termination and the Applicant retained his status as a staff member until the expiration of his appointment as per its original term and received his salary and accrued entitlements (leave, pension, seniority, etc.). Since there was no unilateral termination of the Applicant's appointment, there was no basis for indemnification as per staff regulation 9.3. The optimal solution, i.e., allowing the Applicant to perform his functions as a Generator Mechanic until the expiry of his appointment, undisputedly became impossible with the closure of his team site. Under the constraints of staff rule 5.3(f), the Tribunal was not willing to grant a blanket endorsement for SLWFP as a default modality for downsizing, incurring expense for Member States and treating hundreds of staff contracts as collateral in "operational plans" before such plans had been sanctioned by appropriate legislative bodies. The Tribunal did not find that exceptional circumstances had been established by the Respondent. Notwithstanding the finding of an apparent illegality of the impugned decision, there was no basis for rescission given that the SLWFP had been consumed and the employment relationship had ceased. Payment of compensation for placement on SLWFP would only be justified in exceptional circumstances i.e. breaching a specific staff rule, acting illegally outside the scope of authority, applying SLWFP for an extended period of time and associated reputational harm. No such circumstances were present in the

Applicant's case thus compensation was not due.

Decision Contested or Judgment/Order Appealed

The Applicant contested his placement "on Special Leave with Full Pay (SLWFP) until the expiration of his fixed-term appointment when his contract was de facto terminated thereby denying him of termination indemnities".

Legal Principle(s)

A fixed-term appointment expires automatically, and without prior notice, on the expiration date specified in a staff member's letter of appointment. Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules. The Secretary-General may terminate a staff member's appointment under a limited set of circumstances including, "if the necessities of service require abolition of the post or reduction of the staff" (staff regulation 9.3(a)(i)). 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)). Regarding SLWFP, given that the requirements of "exceptional circumstances" and "the interest of the Organization" pose a constraint on the discretion of the Secretary-General, the general presumption of regularity of administrative act does not suffice and the Respondent must make a showing where the exceptional circumstances lay and that regarding them as such in the decision-making meets the test of rationality. The jurisprudence shows that "exceptional circumstances" and "exceptional cases" denotes that the matter is about circumstances beyond the applicant's control. In the context of staff rule 5.3(f), "exceptional circumstances" denotes not only a force majeure but also includes an overriding legitimate interest. There is no support in the jurisprudence for resorting to SLWFP as a generic cost-saving alternative to termination in downsizing. A vague reference to "operational plans" does not demonstrate the necessity to close any work site at any given time, and particularly before the approval of post abolition by the General Assembly and before the expiry of the staff member's appointment. Illegality of the impugned decision alone does not give rise to compensation unless there is evidence that the staff member suffered harm.

Outcome

Dismissed on merits

Outcome Extra Text

Although the impugned decision was illegal the Tribunal did not order rescission or compensation because the Applicant did not suffer any harm.

Full judgment

[Full judgment](#)

Applicants/Appellants

Garbo

Entity

UNAMID

Case Number(s)

UNDT/NBI/2019/035

Tribunal

UNDT

Registry

Nairobi

Date of Judgement

5 Feb 2020

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Abolition of post

Appointment (type)

Fixed-term appointment

Non-renewal

Separation from service

Applicable Law

Administrative Instructions

- ST/AI/234/Rev.1

GA Resolutions

- A/RES/73/278

Other UN issuances (guidelines, policies etc.)

- A/73/656
- A/73/674
- S/2018/530

Security Council Resolutions

- S/RES/2429

Staff Regulations

- Regulation 1.2(c)
- Regulation 9.3(a)(i)
- Regulation 9.3(c)

Staff Rules

- Rule 5.3(f)
- Rule 9.6(a)
- Rule 9.6(b)
- Rule 9.6(c)
- Rule 9.7
- Rule 9.8(a)

UNDT RoP

- Article 16.1

Related Judgments and Orders

2020-UNAT-1051