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Counsel for the Respondent:
Elizabeth Gall, AAS/ALD/OHR

INTRODUCTION

1. The Applicant is challenging a decision by the African Union – United Nations Hybrid Operation in Darfur ("UNAMID") that he characterizes as 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".

2. The Respondent filed a reply on 27 April 2019.

3. The Applicant filed observations on the Respondent's reply on 27 May 2019.

4. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining the issues raised in this case and will rely on the parties' pleadings and additional submissions.

FACTS

5. The Applicant, a Field Security Assistant at the G-3 level, joined the United Nations on 6 August 2008 on an appointment of limited duration. On 1 July 2009, his contract was converted to a fixed-term appointment ("FTA").[1] He was assigned to the Labado team site on 1 November 2016.[2] On 29 May 2018, his FTA was extended from 1 July 2018 to 31 December 2018, a period of six months.[3]

6. On 1 June 2018, the Chairperson of the African Union Commission and the Secretary-General of the United Nations submitted a special report to the Security Council in which they recommended, inter alia: the drawdown and repositioning of UNAMID; the closure of team sites outside UNAMID's area of responsibility by 31 March 2019[4]; the "right-sizing" of the civilian staff following an alignment of the staffing requirements with the reconfigured mission staffing structures to be completed

[1] Application, annex D.
[2] Ibid. annex A.
[3] Ibid.
[4] S/2018/530 - Respondent's reply, annex R2, para. 62.

SLWFP was

specified in a staff member's letter of appointment.[24] Whereas termination is a separation from service initiated by the Secretary-General.[25] Separation due to resignation, abandonment of post, expiration of appointment, retirement or death is not regarded as a termination under the Staff Rules.[26]

23. Under staff regulation 9.3(a)(i), the Secretary-General may terminate a staff member's appointment (temporary, fixed-term or continuing) under a limited set of circumstances (*numerus clausus*), among them, "if the necessities of service require abolition of the post or reduction of the staff". 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)). Where justified by the interest of the Organization, staff regulation 9.3 also foresees an agreed termination. As such, termination may happen through an authoritative act of the administration or contractually; in any event, it is coterminous with early cessation of the employment relation.

24. By and large, termination is an exceptional case of separation. In this connection, it has been noted that 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.[27] In addition, however, of note is that its relatively high rate, compared with regular separation entitlements, is an expression of inviolability of the employment contract: it serves to compensate for the premature loss of employment and also discourages inconsiderate use by the Respondent. This rationale becomes subverted in fixed-term appointments, where indemnification set as a function of the length of continuing service alone, irrespective of the time by which the employment is cut short, might cause that it be more financially attractive for a staff member to be terminated than to have his/her appointment expire at its end. However, terminat7om [( )] TJ E.04 Tm [( )] TJ ET Q q BT /F1 12.0 Tf 0.0 0.0 0.0 rg 0.9981 0.0 0.JTm

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ferenda,the system may need approaches specific for mass layoffs, e.g., encouraging negotiation of a severance package with the staff union. Such as it is, though, 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.[28] Rather, to put it pointedly, the claim as described could be compared to having a high insurance on an old car and wishing that it be stolen.

25. Turning to special leave with or without pay, it denotes suspension of the execution of one (SLWFP) or both (SLWOP) of the essential elements of the employment relation, without however bringing it to a premature end. While both legal institutions, termination and placement on SL are "exceptional" as they are at variance with the regular terms of employment, this distinction is fundamental for the issue at hand.

26. In the light of the aforesaid, the Tribunal, first, accepts the Respondent's argument that there was no legal basis for unilateral termination, given that at the relevant time the abolishment of post had not yet been endorsed by the General Assembly. Second, undisputedly, there was no agreed termination. Third, the Applicant retained his status as a staff member until the expiration of the appointment as per its original term and received

Considerations

29. As consistently held by the Appeals Tribunal, the judicial review role of the Dispute Tribunal entails an examination of whether the administrative decision is legal, rational, procedurally correct, and proportionate. Where a matter involves exercise of discretion, the Dispute Tribunal may consider whether relevant matters were ignored, irrelevant matters were considered and whether the decision is absurd or perverse. However, due deference is always shown to the decision-maker.[32] Regarding the SLWFP, however, 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.

30. Noting jurisprudence differentiating "exceptional circumstances" and "exceptional cases"[33] and that in relation to procedural deadlines the conclusion has been that in both cases the matter is about circ0( )] TJ(ap23(a)3(s)8(e).9981 0)8(e).9981 27(i)42n. of r

resorting to SLWFP as a generic cost-saving alternative to termination in downsizing.

31. The closest relevance to the case at hand may be found in *Adewusi* where the Appeals Tribunal endorsed SLWOP in the aftermath of abolishment of post and transition from one post to another, having found that it reflected a protective approach adopted by the administration. It held: "the placement of Mr. Adewusi on SLWOP enabled him, in the first instance, to preserve his pension benefits. It granted him, secondly, the opportunity of remaining a staff member of the Organization, for the purpose of applying as an internal candidate for other positions after the expiry of his contract. Thirdly, it made possible his re-location to the position that he eventually accepted".[37] In *Lopes*, in turn, this Tribunal held that placement on SLWFP of a staff member on a continuing appointment whose post had been abolished was not *prima facie* illegal, due to a possible cost-saving for the Organization.[38]

32. Turning to the question of "exceptional circumstances" in the case at bar, the Tribunal notes a contradiction in the Respondent's argument where on the one hand it is posited that the reason for SLWFP had been its cost-effectiveness compared with termination, while, on the other hand, it is argued that termination was not at all an option, in the absence of approval by the General Assembly. Given, nevertheless, the conclusion above that the case did not qualify as termination, and that the issue does

Telecommuting was ruled out early on, unsurprisingly, because of incompatibility with the character of the Applicant's work.

34. Placing the Applicant on SLWFP may thus have been the only viable course of action under the circumstances, shifting, however, the question to the reason for closing the team site.

35. Closure of the team site is the factual element invoked by the Respondent as the exceptional circumstance. In this respect, the Tribunal notes that the decision had been of the Respondent's making, while 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. The Tribunal, moreover, agrees with the Applicant that the Secretary General's Report on the Revised Budget for UNAMID for the period from 1 July 2018 to 30 June 2019 does not lend support to such imperative either. Whereas staggering closure of team sites between October and December 2018, considering especially the scale of the operation, may have been prompted by overriding interests of politics, logistics, host country relations, cost economy, security of civilian personnel etc., no such justification was put forth before the Tribunal and

judgment interest on the termination indemnity from 31 December 2018; and (iv) one month's net-base salary for unfair treatment.

38. The Respondent submits that the Applicant is not entitled to the relief requested because he has failed to establish that the contested decision was unlawful, besides, he presented no evidence of harm.

Considerations

39. Rescission of the contested decision in favour of treating the Applicant's case as termination cannot be granted for the reasons stated supra Accordingly, there is no basis for granting remedies related to termination indemnity. Notwithstanding the finding of an apparent illegality of the impugned decision for different reasons, there is no basis for rescinding it either, given that the SLWFP has been consumed and the employment relation ceased rendering the question moot.

40. Regarding the claim for compensation, it is recalled that illegality of the impugned decision alone does not give rise to compensation unless there is evidence that the staff member suffered harm[39] Financial harm being clearly absent in the present case, the Applicant claims compensation for "unfair treatment" and denial of the moral right to work articulated in Lauritzen

41. The averment of "unfairness" appears to be based on the argument of circumventing the law, which the Tribunal has rejected. As concerns the right to work, the Tribunal stresses that the discussion of illegality of SLWFP must not divert from the fact that a staff member is remunerated although he/she is not rendering work. As noted in the jurisprudence on point, inconsiderate use of SLWFP harms above all the interest of the Organization resulting from not obtaining the equivalent service of the staff member. For the staff member, this situation is asymmetrically profitable, with any associated onerousness attach

work as such. Thus, deriving compensation from SLWFP would only be justified in – again – exceptional circumstances.

42. It is recalled that the Tribunals impugned practices of placing staff on SLWFP and granted compensations in the situations of breaching a specific staff rule[40], acting illegally outside the scope of authority[41], applying SLWFP for an extended period of time[42] and associated reputational harm. N

Entered in the Register on this 5th day of February 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi