

Introduction

1. The Applicant, a former Senior Security Officer at the S-3 level with the Department of Safety and Security (“DSS”), contests the non-renewal of his fixed-term appointment following its expiration on 28 February 2017. The Applicant requests the Tribunal to grant his request for special leave without pay (“SWLOP”), to extend his fixed-term appointment for two years and to order the payment of all unpaid salaries.

2. The Respondent contends that the application is not receivable and that, in any event, it is without merit.

Facts

3. The Applicant joined DSS as Security Officer in 2005. He was promoted as Senior Security Officer in February 2016. According to the uncontested statement from the Applicant, he was last issued with a fixed-term appointment from 1 March 2015 to 28 February 2017.

4. From 20 February 2016 to 16 April 2016, the Applicant was on approved annual leave and, from 19 April 2016 to 30 April 2016, he was on approved certified sick leave.

5. The Applicant applied for additional certified sick leave for the period from 1 May 2016 to 18 May 2016, which was not approved by the Medical Services Division (“MSD”) due to lack of supporting documents.

6. In May 2016, the Applicant requested SLWOP for the period from 18 May

8. On the same date, the Applicant requested that his SLWOP be extended until the end of January 2017.

9. On 4 October 2016, DSS advised the Applicant that his request for SLWOP had not been approved due to insufficient documentary evidence in support of his request despite repeated reminders from the DSS. The Applicant was instructed to return to work without further delay and that “failure to return within a reasonable period of two weeks may result in administrative actions for abandonment of post”.

10. The Applicant responded to the 4 October 2016 email providing new information and documentation to support his request for SLWOP. The Senior Human Resources

20. On 20 October 2017, the Applicant filed a motion for extension of time requesting that the time limit as per Order No. 214 (NY/2017) be extended for additional 15 days, namely until 5 November 2017, since “due to rejection of visa by the US authorities he was unable to travel US to hire a legal representative [and] in

26. By Order No. 256 (NY/2017) issued on 16 November 2017, the Tribunal granted the Applicant's request for time extension as per Order No. 214 (NY/2017) and instructed him to file the response by Friday, 24 November 2017.

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extension of his fixed-term appointment. The email from the Executive Office clearly shows that they knew that the Applicant was sick;

e. The Applicant

k. The Administration did not provide him the mandatory 30-day notice under staff rules 9.6 and 9.7;

l. DSS should have been flexible in considering his request for SLWOP as it has done for other staff members in his department. The decision not to grant his request for SLWOP was discriminatory and motivated by his previous disagreements with the Chief of Service;

m. The Applicant travelled back to New York on 27 February 2017 at his own expense and was fit to report for duty;

n. The Applicant and his family have suffered severe stress throughout this period. The Applicant has been placed in a situation 0.00000912 9192 reW*n2 G[(ha)4(s)-30(

established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with staff rule.1 (e) (ii).

Sick leave during annual leave

(e) When sickness of more than five working days in any seven-day period occurs while a staff member is on annual leave, including home leave, sick leave may be approved subject to appropriate medical certification.

Obligations of staff members

(f) Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required under conditions to be specified by the Secretary-General.

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not

A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

46. ST/AI/400 (Abandonment of post), in its consolidated version, provides in the relevant part:

What constitutes abandonment of post

4. Abandonment of post is a separation initiated by the staff member other than by way of resignation. It is considered a unilateral repudiation of the contract of employment and not a termination initiated by the Secretary-General as defined in article IX of the Staff Regulations and in staff rule 109.1(b) [currently sr 9.3]. The intent to separate may be presumed from the circumstances, in particular from the failure of the staff member to report for duty.

5. The absence of a staff member from his or her work, unless properly authorized as leave under staff rule 105.1(b) [currently sr 5.1], as special leave under staff rule 105.2 [currently sr 5.3], as sick leave under staff rule 106.2 [currently sr 6.2] or as maternity or paternity leave under staff rule 106.3 [currently sr 6.3], may create a reasonable presumption of intent to separate from the Secretariat unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control.

Procedure

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Receivability ratione temporis

56. The Tribunal notes that the Applicant filed the present application (which constitutes of the application and the appended grounds of appeal) on 16 August 2017 within 90 days from the date he received the decision on his request for management evaluation, namely 24 May 2017. The Tribunal concludes that the application is receivable *ratione temporis*.

On the merits

Relevant factual background

57. The Tribunal notes that the record shows that, at the end of his authorized leave in May 2016, the Applicant requested a SLWOP. Despite the Applicant's follow-up on the request, he wa2 Tf(up)-21 250.01 439.03 Tm0 G[1 0 0 1 310(t)] TJETQ 612 792 reW

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staff rule 9.1(iii) and 9.4, which can only be initiated by the employer. For the Administration to be able to infer the staff member's irrevocable will/intention to abandon his or her post and to put an end to his/her contract, it must follow the procedure stipulated in ST/AI/400.

76. Further, the Tribunal notes that there is no evidence on the record that the mandatory procedure established in secs. 9, 10, 15 and 16 of ST/AI/400 for separation by abandonment of post was followed in the Applicant's case. In this sense, the Tribunal notes that this instruction required several mandatory steps to be taken by the Adm4()] TJrd s

79. In the present case, the Administration did not act fairly and transparently with the Applicant. DSS lead the Applicant to believe that it was still considering granting him a SLWOP, while, at the same time, it recommended the non-extension of his fixed-term appointment due to his unauthorized absence on the other.

80. The Organization itself, by considering that the Applicant's contract reached its expiration date, affirmed its legal effects until the date of its expiration, 28 February 2017 which contradicts the reason presented for the non-renewal of the Applicant's appointment, namely the abandonment of the post due to his absence from the office. The Organization cannot consider a staff member to be in violation of his or her terms of employment, namely by being in an unauthorized absence interpreted to be abandonment of post, while, at the same time, consider that his or her contract has legal effects until its expiration.

81. The Tribunal considers that the non-renewal decision following the expiration

and/or in an evaluation performance document. This requirement which was established in *Abdallah* is not fulfilled in the present case and the Applicant's absence from the office cannot represent a justification for a non-renewal.

Relief

84. The Statute of the Dispute Tribunal states, as relevant:

Article 10

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establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression “[t]he Dispute Tribunal shall ... determine an amount of compensation”; and

b. Article 10.5(b) refers to a compensation.

86. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute.

87. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two types of compensation is that each of them separately “shall normally not exceed the equivalent of two years net base salary of the applicant”, namely four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

88. When the Tribunal considers an appeal against an administrative decision, the Tribunal can decide to:

- a. Confirm the decision; or
- b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or
- c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review

only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10.5(b).

89. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

90. The Organization's failure to comply with all the requirements of a legal separation causes a prejudice to the staff member, since his/her contract was unlawfully separated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his/her reinstatement into service with compensation for the lost salaries (*restitutio in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement, together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

91. The Tribunal considers that, in cases where the separation decision is rescinded and the Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages, if any, produced by the rescinded decision.

92. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation

that existed prior to the termination. According to the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased, her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

93. In *Tolstopiatov* UNDT/2011/012 and *Garcia*

Statute Dispute of the Tribunal, is to be rescinded. The Tribunal considers that the rescission of unlawful decisions has the *ope legis* effect of the parties being retroactively placed in the same contractual relationship that existed before the issuance of the rescinded decisions.

97. It results that, when a separation is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date s/he was notified of the upcoming separation until her/his effective date of separation, as determined by the Dispute Tribunal. However, when a party or both parties expressly indicate that, due to the particular circumstances of a case, the effective reinstatement no longer

earnings mentioned in para.101 above to compensate him for loss of earnings in lieu of reinstatement.

Moral damages

100. The Tribunal notes that the Applicant does not claim any moral damages.

Conclusion

101. In view of the foregoing, the Tribunal DECIDES:

a. The application is granted in part. The contested decision not to renew the Applicant's fixed-term appointment beyond 28 February 2017 is rescinded and the Respondent is ordered to retroactively reinstate the Applicant from 1 March 2017 until 28 February 2019;

b. The Respondent is to pay retroactively to the Applicant, as compensation for loss of earnings pursuant to art. 10.5(a) of the Tribunal's Statute, the salary from 1 March 2017 until the effective date of his reinstatement as a result of the execution of the present judgment. In addition, the Applicant shall receive compensation in the amount equal to the contributions (his contribution and the Organization's contributions) that would have been paid to the UNJSPF for this period;

c. As an alternative to the reinstatement, the Respondent is to pay the Applicant a total compensation of two years net base salary corresponding to the period 1 March 2017-28 February 2019, which will include the compensation for loss of earnings mentioned above, to compensate him for loss of earnings *in lieu* of reinstatement.

d. The above shall be paid within 60 days from the date this judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an

additional 5 percent shall be added to the US Prime Rate until the date of payment.

e. The Applicant's request for the Tribunal to approve the SLWOP is rejected as non-receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 20th day of September 2018

Entered in the Register on this 20th day of September 2018

(Signed)

Nerea Suero Fontecha, Registrar, New York