



**the Applicant:**

Julia Kyung Min Lee, OSLA

**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

by 31 December 2018<sup>4</sup>; closure of the mission by 30 June 2020 and completion of liquidation by December 2020<sup>5</sup>. With respect to the team sites, the following were to remain open in UNAMID's area of operation: Kutum, Saraf Omra, Kabkabiyah, Tawilah, Sortony, Shangil Tobaya, Zalingei, Nertiti, Go

Resources Services Division, OHRM, recommended that the ASG/OHRM approve the request to place the national staff members on SLWFP. The ASG/OHRM approved the request on the same day.<sup>10</sup>

11. By a memorandum dated 15 October 2018, the UNAMID DMS informed the Applicant that in accordance with Security Council resolution 2429 (2018) 10 team sites, including the one in Umm Baro, would be closed on 28 October 2018. Consequently, his FTA would not be renewed beyond 31 December 2018 and that he was going to be placed on SLWFP until 31 December 2018.<sup>11</sup>

12. On 16 October 2018, the UNAMID Human Resources Management Section (“HRMS”) informed the Applicant that it would commence his check-out process in line with the DMS’ memorandum of 15 October 2018.<sup>12</sup>

13. The Applicant was placed on SLWFP from 29 October 2018 until the expiry of his FTA on 31 December 2018.<sup>13</sup> On 15 November 2018, The Applicant requested management evaluation of the decision to place him on SLWFP until the expiration of his FTA.<sup>14</sup>

14. On 5 November 2018 the Secretary-General submitted a revised budget for UNAMID for the period 1 July 2018 to 30 June 2019 which envisaged the abolition of 1,183 posts and positions in three phases (i.e. 211 posts abolished in the 2017/2018 budget, the abolishment of 384 posts and positions at the end of December 2018, 88 at the end of March 2019 and 711 at the end of June 2019).<sup>15</sup> The revised budget envisioned that 13 teams sites in the greater Jebel Marra area would be operational while the remaining teams sites outside of the greater Jebel Marra area would be progressively closed by the end of December 2018.<sup>16</sup> Further, 290 General Service

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<sup>10</sup> Ibid. annex R/6.

<sup>11</sup> Application, annex B.

<sup>12</sup> Ibid. annex C.

<sup>13</sup> Respondent’s reply, annex R/1.

<sup>14</sup> Application, page 2.

<sup>15</sup> A/73/488 (Revised budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019), page 12, para. 35.

<sup>16</sup> Ibid. page 8, para 15.

posts in the Engineering Section were proposed for abolishment during the 2018/2019 budget cycle.<sup>17</sup>

15. The Umm Baro team site was closed on 8 November 2018.<sup>18</sup>

16. In its report dated 13 December 2018, the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) stated the following in relation to the proposed phased drawdown of civilian personnel detailed in the Secretary-General’s revised 2018/2019 budget: “The Advisory Committee trusts that the drawdown of civilian personnel will proceed as swiftly as possible and as planned, in accordance with Security Council resolutions 2429 (2018) and 2363 (2017).” The ACABQ recommended that while the Secretary-General had requested USD727,522,700 in the revised 2018/2019 budget, the General Assembly appropriate USD725,522,700.<sup>19</sup>

17. On 22 December 2018, the Fifth Committee recommended that the General Assembly adopt a draft resolution that included an endorsement of the conclusions and recommendations contained in the ACABQ report of 13 December 2018.<sup>20</sup> On the same day, the General Assembly, in its resolution 73/278, endorsed the ACABQ’s conclusions and recommendations.<sup>21</sup>

18. By memorandum dated 24 December 2018, in response to the Applicant’s request for management evaluation, the Under-Secretary-General

expiry of his FTA on 31 December 2018.<sup>23</sup> He filed the current application on 25 March 2019.

## **ISSUES**

20. The Tribunal will consider the following issues: (i) whether the Applicant's appointment was *de facto* terminated; (ii) whether the placement of the Applicant on SLWFP was unlawful; and (iii) whether the Applicant should be granted the relief he has requested.

### **Was the Applicant's appointment *de facto* terminated?**

#### *Submissions*

21. The Applicant's case is that the Respondent truncated his FTA from 31 December 2018 to 28 October 2018 due to the closure of the Umm Baro team site. Since his appointment was cut short prior to its expiry due to the abolition of his post, his contract was, in fact, terminated pursuant to staff regulation 9.3(a)(i). The Applicant asserts that the facsimile of 29 August 2018 and DFS's letter of 24 September 2018 are evidence of the termination of his appointment. Accordingly, pursuant to staff regulation 9.3(c) and staff rule 9.8(a), he should have been paid termination indemnity instead of being placed on SLWFP and pursuant to staff rule 9.7, he should have been given at least 30 calendar days' written notice of termination but this was not the case. The Respondent's action unlawfully circumvented the applicable legal framework i.e. staff regulation 9.3(c) (*détournement de procédure*) and denied him of the compensatory safeguards that were av(r)-7(e)34eguar a1-8(r)-7(ds)8( )-22( )29(204xda)3(t)-2511(hi)17

when the ASG/OHRM approved the placement of affected staff on SLWFP. The

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



qualified as “disguised termination” and as such, there is no basis for indemnification as per staff regulation 9.3.

**Was the Applicant’s placement on SLWFP unlawful?**

*Submissions*

28. The Applicant contends that the Respondent’s decision to place him on SLWFP was erroneous and contravened staff rule 5.3(f), which allows the Secretary-General to place a staff member on SLWFP in “exceptional cases” if such leave is in the interest of the Organization. The Applicant asserts that UNAMID’s downsizing process and

Organization. The Organization honoured the term of the Applicant's appointment until it expired on 31 December 2018. The closure of the Applicant's team site which rendered it impossible for him to perform his functions as a Generator Mechanic created the exceptional circumstances that resulted in his placement on SLWFP.

*Considerations*

30. As consistently held by the Appeals Tribunal,

on a case by case basis.<sup>36</sup>

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**Should the Applicant be granted the relief he has requested?**

38. The Applicant seeks the following remedies: (i) rescission of the contested decision; (ii) payment of his termination indemnity and in lieu of notice of termination pursuant to staff regulation 9.3 and staff rules 9.7 and 9.8; (iii) pre-judgment and post-judgment interest on the termination indemnity from 31 December 2018; and (iv) one month's net-base salary for unfair treatment.

39.

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

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 5<sup>th</sup> day of February 2020

Entered in the Register on this 5<sup>th</sup> day of February 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi