



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1051

**Altayb Garbo
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge Jean-François Neven
Case No.:	2020-1383
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Mr. Garbo: Julia Kyung Min Lee, Osla

Counsel for Secretary-General: Maryam Kamali & Francisca Lagos Pola

JUDGE SABINE KNIERIM, PRESIDING.

1. Mr. Altayb Garbo, a Generator Mechanic with the African Union-United Nations Hybrid Operation in Darfur (UNAMID), contested before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision to place him on Special Leave with Full Pay (SLWFP) for two months, and requested termination indemnity. The UNDT, while finding that the contested decision was unlawful, dismissed his application in its entirety. Mr. Garbo appeals, and the Secretary-General files a cross-appeal. For the reasons set out below, we reject both the appeal and the cross-appeal and affirm the UNDT Judgment.

Facts and Procedure

2. Mr. Garbo joined UNAMID as a Generator Mechanic in October 2009 under a fixed-term appointment (FTA). He was reassigned to the Umm Baro team site on 1 October 2017. His FTA was extended for the last time for eight months from 1 May 2018 to 31 December 2018.

3. In 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, recommending the drawdown and phased closure of UNAMID. Umm Baro and nine other team sites were to be closed between 8 October and 9 December 2018. 66 national staff members, including Mr. Garbo, were thus affected.

4. By facsimile dated 29 August 2018 addressed to the Director of Field Personnel Division, Department of Field Support (FPD/DFS), the Director of UNAMID's Mission Support requested approval by the Office of Human Resources Management (OHRM) to place the affected national staff members of UNAMID on SLWFP from the date of the closure of their respective team sites until the expiry of their FTAs on 31 December 2018. The Director of Mission Support explained that since the closure dates of the team sites would not coincide with the expiry of the appointments of the affected staff, "it will require the Mission to terminate the appointments of the staff members". However, since the costs related to the payment of termination indemnity were significant, UNAMID intended to place those affected staff members on SLWFP, and UNAMID was seeking DFS's endorsement of that approach and OHRM's approval thereof.

5. On 24 September 2018, the Director of FPD/DFS requested the approval from the Assistant Secretary-General for OHRM (ASG/OHRM) of UNAMID's request to place its 66 national staff members on SLWFP, ranging from 12 weeks to three weeks, from the date of the closure of their respective team sites until the expiry of their FTAs on 31 December 2018. According to an internal analysis conducted, it would cost over USD 350,000 more to terminate the contracts of the 66 national staff members than to place them on SLWFP until the expiry of their respective contracts. According to the Director of FPD/DFS, UNAMID had explored the option of allowing those affected staff to telecommute after the closure of the team sites, but concluded that this would not be a viable option given their specific functions. On 27 September 2018, the ASG/OHRM approved the Director of FPD/DFS's request.

6. On 15 October 2018, UNAMID informed Mr. Garbo of the decision to place him on SLWFP at the end of October 2018, when the Umm Baro team site would be closed, through 31 December 2018, when his FTA was due to expire, but would not be renewed. The Umm Baro team site was closed on 8 November 2018.

7. Meanwhile, 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 *inter alia* the abolition of 384 posts and positions at the end of December 2018 and the progressive closure of team sites including Umm Baro by the end of December 2018. The Advisory Committee on Administrative and Budgetary Questions (ACABQ) supported the Secretary-General's phased drawdown proposal but recommended that the General Assembly appropriate two million US Dollars less than what the Secretary-General had proposed, in the amount of USD 725,522,700. On 22 December 2018, the General Assembly endorsed ACABQ's recommendations in resolution 73/278.

8. Mr. Garbo was separated from service with UNAMID effective 1 January 2019.

9. Mr. Garbo appealed by first requesting a management evaluation of the decision to place him on SLWFP. He was seeking the quashing of the SLWFP decision so that his case could be considered as a termination due to closure of the team site and he could be granted a termination indemnity.

10. On 24 December 2018, the Under-Secretary-General for Management informed Mr. Garbo that the Secretary-General had decided to uphold the contested decision. Because his case was that of expiration or non-renewal of an FTA and not a termination, it was within the discretion of the Secretary-General to treat Mr. Garbo's case as exceptional and continue his service on the SLWFP basis rather than terminating it, in the interest of the Organization, due to financial considerations, given that it might be less costly to pay him salary for the remainder of his FTA contract than a termination indemnity.

11. Mr. Garbo applied to the Dispute Tribunal on 25 March 2019, maintaining that his placement on SLWFP was a *de facto* termination of his FTA, and that he had been denied the termination indemnities.

12. In Judgment No. UNDT/2020/020, the Dispute Tribunal dismissed Mr. Garbo's application. In the view of the Dispute Tribunal, his case could not be considered as a *de facto* termination. The Dispute Tribunal found that the applicable legal framework for abolishment of post did not confer upon a staff member a right to have termination as the modality of separation. It accepted the Secretary-General'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. It further found that there was no agreed termination. Finally it held that Mr. Garbo's case could not be qualified as a disguised termination because he retained his status as a staff member until the expiration of the appointment as per its original term, and received his salary and accrued entitlements (leave, pension, seniority, etc.). Consequently, there was no basis for payment of a termination indemnity. As for placing Mr. Garbo on SLWFP until the expiry of his FTA, the Dispute Tribunal found no support in the jurisprudence for resorting to SLWFP as a generic cost-saving alternative to termination or a default modality for downsizing. It did not find that the Secretary-General had established exceptional circumstances justifying placing Mr. Garbo and other similarly situated staff members on SLWFP. It also noted a contradiction in the Secretary-General's argument that the reason for SLWFP had been its cost-effectiveness compared with termination, but the termination was not an option in the absence of approval by the General Assembly. Nonetheless, the Dispute Tribunal found no basis for rescinding the contested decision despite its finding of an apparent illegality, given that SLWFP had been consumed and the employment relation had ceased rendering the question moot. As to the claim for compensation, the Dispute Tribunal found that

financial harm had been clearly absent, SLWFP was not disproportionate to the duration of Mr. Garbo's appointment, and there was no deprivation of a significant professional experience.

13. Mr. Garbo filed an appeal on 7 April 2020. The Secretary-General filed an answer on 15 June 2020. On that day, the Secretary-General also filed a cross-appeal. Mr. Garbo filed an answer to the cross-appeal on 17 August 2020.

Submissions

Mr. Garbo's appeal

14. Mr. Garbo requests that the Appeals Tribunal rescind the SLWFP decision and award him USD 7,000, which represented the difference between the termination indemnity and one-month salary in lieu of notice of termination that he would have received and pre-judgment and post-judgment interest on that amount and the salary that he had received while on SLWFP, or an alternative amount that the Appeals Tribunal deems appropriate.

15. Mr. Garbo submits that the UNDT erred in fact and in law by finding that there was no legal basis for terminating his appointment at the end of October 2018, before the General Assembly endorsed the abolition of his post. The Dispute Tribunal conflated the issue of legality of UNAMID's effectively abolishing his post by closing down the Umm Baro team site, prior to the General Assembly's endorsement of the ACABQ's recommendation, with the issue of legality of terminating his contract in anticipation of the General Assembly's approval. By the Administration's own admission, Mr. Garbo's contract was cut short and his post was effectively abolished at the end of October 2018 without the General Assembly's approval, and even before the Secretary-General submitted his revised UNAMID budget for 2018-2019 on 5 November 2018. The decision was clearly unlawful.

16. Mr. Garbo also submits that the Dispute Tribunal erred in law when it failed to rescind the SLWFP decision despite its conclusion that there were not exceptional circumstances justifying that decision. The Dispute Tribunal also erred in law when it contradicted itself by finding that placing Mr. Garbo on SLWFP might have been the only viable solution, while also finding that it was unlawful to place him on SLWFP in the absence of the exceptional circumstances as required by Staff Rule 5.3(f). Since his appointment was *de facto* terminated before the expiry of his FTA, Mr. Garbo was entitled to a termination indemnity.

17. Mr. Garbo further submits that the Dispute Tribunal erred in fact and in law when it rejected his argument that it was an unlawful exercise of discretion for the Administration to place him on SLWFP rather than terminating his FTA for the sole purpose of denying him the termination indemnity in order to save money. According to Mr. Garbo, he would have been entitled to at least USD 15,100.20 in termination indemnities, but he actually received USD 8,081.06 while on SLWFP. By choosing to place Mr. Garbo on SLWFP, the Administration circumvented the safeguards of the proper termination procedure that the Staff Regulations and Staff Rules provided him when his FTA was cut short before its expiry.

The Secretary-General's answer

18. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Garbo's appeal in its entirety.

19. The Secretary-General submits that the Dispute Tribunal did not err in denying Mr. Garbo the termination indemnity, because his contract was not prematurely terminated and his FTA expired in accordance with its terms on 31 December 2018, and that consequently he was not entitled to a termination indemnity.

20. The Secretary-General maintains that, as Mr. Garbo was contesting the decision to place him on SLWFP and not his separation from service, whether the closure of the Umm Baro team site was legally justified and whether his post was lawfully abolished were issues outside the jurisdiction of the Dispute Tribunal. Nevertheless, all parliamentary documents support UNAMID's drawdown and closure of team sites and the subsequent abolition of the post that Mr. Garbo encumbered.

21. The Secretary-General also submits that Mr. Garbo's contention that the Dispute Tribunal erred in not rescinding the SLWFP decision fails to satisfy the requirement of Article 2(1) of the Statute of the Appeals Tribunal, because he does not provide explanation or elaboration. Furthermore, there is no legal obligation for the Dispute Tribunal to rescind a decision even when the challenged decision has been deemed unlawful.

22. The Secretary-General further submits that Mr. Garbo's all other arguments in his appeal are the exact repetition of his submissions before the Dispute Tribunal. Mr. Garbo is in effect re-arguing his case and is requesting the Appeals Tribunal to consider his UNDT arguments *de novo* and to come to a different conclusion.

The Secretary-General's Cross-Appeal

23. The Secretary-General submits that the Dispute Tribunal erred in law when it determined that there were not exceptional circumstances justifying placing Mr. Garbo on SLWFP, as required by Staff Rule 5.3(f). He requests that the Appeals Tribunal reverse that portion of the UNDT Judgment and find Mr. Garbo's placement on SLWFP lawful.

24. The Secretary-General submits that Mr. Garbo's case met both prongs of "exceptional cases" and "in the interest of the Organization" set forth in Staff Rule 5.3(f).

25. With respect to the first prong, the Secretary-General states that the Security Council's mandate to downsize UNAMID, the closing down of the missions, and Mr. Garbo's specific circumstances all qualified as exceptional circumstances.

26. Regarding the second prong of "in the interest of the Organization", the Secretary-General submits that it was in the interest of the Organization to choose the more cost-effective and economic option of placing the affected national staff members including Mr. Garbo on SLWFP, in contrast to the option of terminating their contracts before their expiry and paying them termination indemnities, as it resulted in savings of USD 350,000 for the Organization. Such a determination was well within the broad discretion of the Secretary-General in determining the interests and needs of the Organization, including budgetary needs.¹

Mr. Garbo's Answer to Cross-Appeal

27. The Dispute Tribunal correctly found that the Administration had failed to establish exceptional circumstances that would justify placing Mr. Garbo on SLWFP. Contrary to the Secretary-General's assertion without factual or legal basis, the closing down of a peacekeeping mission is not an exceptional circumstance in itself, but a normal process of peacekeeping operations. The Secretary-General has failed to demonstrate how the closure

¹ Here, the Secretary-General cites *Simmons v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-624, para. 12, which reads: "The jurisprudence of the Appeals Tribunal has been that the Administration has the power to restructure and reorganize its units and its departments to lend to greater efficiency". He also quotes para. 31 of Judgment No. 2014-UNAT-425: "The jurisprudence of the Appeals Tribunal in several cases has been that the Organization has the power to restructure some or all of its units which include cancellation or abolition of posts or reassignment due to organizational or budgetary reasons".

of UNAMID was different from any other mission closure to make Mr. Garbo's case an exceptional one to justify placing him on SLWFP. Notwithstanding its correct finding, the Dispute Tribunal erred in not rescinding the SLWFP decision.

28. As the ILO Administrative Tribunal found in a similar case, the Administration in the present case abused its discretion by unilaterally placing Mr. Garbo on SLWFP.

29. In his cross-appeal, the Secretary-General misinterprets the Appeals Tribunal Judgment in *Simmons*. Unlike *Simmons*, Mr. Garbo is not contesting the decision to abolish his post; he is simply seeking the indemnities that are afforded to staff members whose contracts were cut short before their expiry, as admitted by the Administration in UNAMID Director's facsimile of 29 August 2018 and provided for in the Staff Regulations and Rules.

Considerations

Mr. Garbo's appeal

Termination

30. The applicable law on this matter is as follows: 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, 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)). 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 (Staff Rule 9.6(a)).

31. Mr. Garbo is of the view that the UNDT committed an error of law in accepting the Secretary-General's argument that there was no legal basis for unilateral termination. We are also surprised by the Secretary-General's submission before the UNDT that he could not have terminated the staff members' appointments before the General Assembly had approved his proposal to abolish the posts, while, during the administrative proceedings from June until September 2018, termination on the one hand and placing the staff members on SLWFP on the other hand had been considered as two possible options by the Administration. However,

the Appeals Tribunal does not have to examine whether the UNDT committed an error. Even if it did, this would be of no consequence for the present appeal.

32. For Mr. Garbo's ultimate goal (to receive termination indemnity) it is not sufficient to find that the Secretary-General could have terminated his appointment with effect from the end of October 2018. In order to reach this goal, it is necessary to find that Mr. Garbo's appointment actually was terminated. However, the UNDT correctly held that Mr. Garbo's appointment was not terminated. The Administration, between June and September 2018, came to the conclusion that the fixed-term appointments of the national staff members should not be terminated but that those staff members should be placed on SLWFP until the expiry of their appointments at the end of the year. Thus, the Secretary-General clearly did not intend to terminate Mr. Garbo's appointment. Further, the administrative decision in question, i.e., placing Mr. Garbo on SLWFP in November and December 2018, cannot be regarded as a disguised termination, as the UNDT correctly pointed out. According to Staff Rule 9.6(a), a termination within the meaning of the Staff Regulations and Rules is a separation from service initiated by the Secretary-General. Mr. Garbo was not at all separated from service with effect from the end of October 2018. His fixed-term appointment continued until its expiry on 31 December 2018; until then, he retained the full position, rights and entitlements of a staff member of the United Nations. The fact that he was not able to fulfill his obligation to work because the site had already been closed, and the Administration did not deem it possible to have him work from another site or from home is not sufficient for a finding that he was separated from service, when he clearly remained a staff member receiving his salary and all other entitlements for a staff member of the United Nations.

33. The only other way for Mr. Garbo to reach his goal would have been to request that his appointment be terminated with effect from the end of October 2018. In this case the Tribunals would have had to examine and decide whether such an application was receivable and successful on the merits which would require that a staff member can have, and Mr. Garbo had, a legal right to be terminated in order to receive termination indemnity. While the UNDT addressed and answered this question in the negative, we note that Mr. Garbo, before the UNDT, never requested that his appointment be terminated with effect from the end of October 2018. In his UNDT application, he merely challenged the "[d]ecision to place [him) on Special Leave with Full Pay until the expiration of his fixed-term contract

when his contract was de facto terminated thereby denying him of termination indemnities” and requested the rescission of the SLWFP decision, payment of termination indemnity and related payments, and compensation for unfair treatment. However, a staff member cannot request termination indemnity while, at the same time, keeping the advantages and benefits of remaining a staff member. As laid out above, termination is, by definition, a separation from service, that is, the end of all employment relations between a staff member and the United Nations. Had Mr. Garbo’s appointment been terminated with effect from the end of October 2018, he would, for example, not have been under the Organisation’s health insurance system in November and December 2018, and these two months would not count for his pension benefits (in other cases, even more benefits and entitlements could result depending on a person’s continuing position as a staff member, i.e. education grants, allowances, etc.).

Remedies

34. Mr. Garbo claims that the UNDT should have rescinded the administrative decision of placing him on SLWFP after finding that this decision was unlawful. We do not agree. The UNDT correctly held that the SLWFP decision had been rendered moot because the employment relationship had ceased and the special leave had been consumed. The rescission of this administrative decision would not help Mr. Garbo to reach his real legal goal, which is to receive termination indemnity. If the SLWFP decision was rescinded, Mr. Garbo would have a duty to work for the Organisation in November and December 2018. However, this obligation could no longer be fulfilled. In all other respects, the situation would be exactly the same; like under SLWFP, Mr. Garbo would remain a staff member until the expiry of his appointment on 31 December 2018 and receive his salary and entitlements but no termination indemnity.

35. The UNDT correctly rejected Mr. Garbo’s claim for compensation. According to Article 10.5(b) of its Statute, the UNDT may order compensation for harm, supported by evidence. Under the consistent jurisprudence of the Appeals Tribunal, a causal link is necessary between the administrative decision in question and the harm to the staff member. In other words, the UNDT may only award compensation if the harm, for which compensation is requested, was caused by the administrative decision challenged by the staff

member.² In the present case, there is no direct link between the SLWFP decision and the termination indemnity. Mr. Garbo did not receive termination indemnity because his appointment was not terminated. The SLWFP decision itself did not cause any material harm to Mr. Garbo, as the UNDT correctly pointed out. Apart from the fact that he did not have to work for the Organisation, he would have been in the exact same situation as if the SLWFP decision had not been taken.

36. The other findings of the UNDT with regard to compensation were not challenged on appeal, and we cannot find any fault in them.

The Secretary-General's cross-appeal

37. The Appeals Tribunal does not have to examine whether the UNDT exceeded its competence in deciding on the merits of the SLWFP decision while at the same time stating it was moot, and that the situation was “asymmetrically profitable” for Mr. Garbo,³ thus giving rise to the question whether the application against this decision was receivable. Neither is there any need for the Appeals Tribunal to examine whether the UNDT committed an error of law in holding that the SLWFP decision was unlawful because there were no exceptional circumstances, or, if there were such exceptional circumstances, to consider whether the Secretary-General correctly exercised the discretion bestowed on him under Staff Rule 5.3(f).

38. As the UNDT dismissed Mr. Garbo's application in its entirety, the Secretary-General is not adversely affected by its Judgment. The UNDT's findings on the unlawfulness of the SLWFP decision are merely part of its reasoning but not part of the order of the Judgment. Consequently, they have no binding character or other negative effects for the Secretary-General. Further, Mr. Garbo's appeal remains without success. Under these circumstances, the cross-appeal is not receivable.⁴

² *Thiombiano v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-978, para. 42; *Sarwar v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-868, para. 44; *Dahan v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-861, para. 23.

³ Impugned Judgment, para. 42.

⁴ See *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, paras. 26-38. See also *Ovcharenko et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-530, para. 37; *Saffir & Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, paras. 14-23.

Judgment

39. The appeal and the cross-appeal are dismissed and Judgment No. 2020/UNDT/020 is affirmed.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 4th day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar