UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2019/030
Judgment No.:	UNDT/2021/027
Date:	23 March 2021
Original:	English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

YAMAGUCHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY AND MERITS

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
Matthias Schuster, UNICEF
Alister Cumming, UNICEF

Introduction

1. The Applicant served on a permanent appointment at the United Nations Children's Fund ("UNICEF"). Her appointment with the Organization was terminated on 31 March 2019, at the end of approved Special Leave Without Pay ("SLWOP").

2. On 30 April 2019, the Applicant filed an application before the United Nations Dispute Tribunal to challenge the Respondent's decision to terminate her appointment.

3. The Respondent filed his Reply on 3 June 2019. It is the Respondent's case that the application should be dismissed as time-barred. He also argues that the impugned decision was lawfully made, and that UNICEF acted as it was entitled to under the circumstances of the case.

4. On 4 February 2021, the Tribunal issued Order No. 27 (GVA/2021) inviting the Applicant to make any submissions she might have in response to the Respondent's reply. The Respondent was afforded the opportunity to make final submissions on the matter. Both parties filed their respective submissions as directed by the Tribunal.

Facts and Submissions

5. The Applicant had served UNICEF since 1 August 2002 and held a permanent appointment.

6. It is the Applicant's case that UNICEF was obliged to make a good faith effort to place her in a suitable position so that she can return to duty after being placed on SLWOP. UNICEF's failure to meet this obligation, she argues, and their eventual decision to terminate her employment with the Organization, violated her rights as a staff member on a permanent appointment.

7. On 20 January 2015, the Applicant applied for SLWOP, initially for a period of six months from 1 April 2015 to 30 September 2015. The request enabled her to accompany her spouse, who was employed with another United Nations entity, to New York, where he had obtained a new position.

8. SLWOP was granted but the Applicant was required to relinquish the lien she held on her post and apply to vacant positions when she was ready to return to work.

9. While in New York, the Applicant undertook a short-term assignment at the UNICEF office there. Once this assignment ended, she continued to be placed on SLWOP until December 2017. By this time, she had submitted 13 applications for various positions at the P-4 and P-5 levels. None were successful.

10. On 27 December 2017, the Applicant applied for a further extension of her SLWOP. This was granted through to 31 March 2019. In the communication granting the extension, the Chief of the Mobility and Staffing Section, UNICEF, informed the Applicant that she "will be separated from service if she is not successful with her applications." The memorandum noted that as at 31 March 2019, the Applicant will have completed "the maximum period allowed on SLWOP."

11. Following another request for extension of SLWOP in early 2019, the Applicant was informed on 19 March 2019 that she would be separated from service at the end of that month.

12. The Applicant challenged this decision by seeking a request for management evaluation on 20 March 2019.

13. On 26 April 2019, the Management Evaluation Unit ("MEU") upheld the impugned decision on two grounds. Firstly, MEU found that the Applicant's request for review of the decision was time-barred and, secondly, that the obligations of UNICEF in respect of staff members on permanent appointments do not apply to those looking to return to active service following SLWOP. MEU took the view that the impugned decision was made on 27 December 2017, and that time for challenge of that decision began to run from then.

14. The Respondent urges the Tribunal to dismiss the application on grounds of receivability. The Applicant came to know of the decision she now impugns on 27 December 2017, and so should have challenged it within 60 days of that date. Her failure to challenge it within the statutory timeframe renders her application not receivable.

15. The Applicant argues that the memorandum extending her SLWOP merely put her on notice that she would be separated *if* she was not successful in any of her applications for positions within UNICEF. It was therefore conditional and not final.

16. She continued to serve on SLWOP and applied for positions for a further 17 months after that date. She contends that it was the email dated 19 March 2019 that should correctly have triggered any action by her. She was eventually separated on 31 May 2019. Indeed, between 27 December 2017 and 19 March 2019, she was not contacted by the Respondent with any guidance or instructions on separation procedures.

17. Substantively, the Applicant submits that the Respondent failed in his obligation to make good faith efforts to place her on a suitable alternative position. Staff Rule 9.6(e) provides for staff on permanent appointments, who are affected by post abolition, to be prioritised for retention. This priority, she argues, must translate into staff members being transferred and assigned outside the ordinary selection process. UNICEF did not prioritise the Applicant for placement, despite her fitness and competence to be considered for those positions.

18. The Respondent draws a distinction in his obligations to staff members whose posts are being abolished and those on SLWOP. The Organization was required to properly consider her for positions she applied to, and did, but not on any preferential or non-competitive basis.

Consideration

Issues

19. The first issue to be determined arises from the Respondent's contention that this application is not receivable. The issue turns on whether the Applicant is correct in contending that the challenged termination decision was made in March 2019. The Respondent posits that the decision was made by email sent on 27 December 2017 and then confirmed on 19 March 2019. As will be explained in this Judgment, a determination has been made that the decision was made on 27 December 2017 and thus the application is not receivable.

20. This finding of non-receivability depends to an extent on one's perception as to the finality of words used in the decision email. There is a degree of uncertainty and the issues raised on the merits are of general interest. Therefore, applying the approach taken by the United Nations Appeals Tribunal ("UNAT") in *Haq and Kane* 2019-UNAT-922 the issues related to the merits of the case will also be determined. The issues are as follows:

a. Is the application receivable?

b. Did the Respondent breach the Applicant's entitlements under the governing rules by not assisting her re-entry to the workforce by finding her a suitable post following her authorized period of SLWOP?

c. If so, was the decision to terminate her appointment unlawful?

Receivability

21. Under staff rule 11.2(c) a request for management evaluation must be filed within 60 days from the date on which the staff member received notification of the administrative decision. The Applicant's request for management evaluation was submitted on 20 March 2019.

22. In the detailed submissions included in her application, the Applicant explains that by email dated 19 March 2019 the Respondent informed her that she would be terminated as of 31 March 2019 because she had been unable to obtain a new

position. If the actual date of the contested decision was in fact on 19 March 2019, the Applicant's request for management evaluation would have been well within time as it was filed just one day after receipt of the decision.

23. The Respondent contends that the 19 March 2019 email was only a confirmation of a decision communicated to the Applicant by email dated 27 December 2017. If that email communicated the final termination decision, then the Applicant's request for management evaluation was made several months beyond the 60-day time limit.

24. The determination therefore depends on the extent to which the wording of the 27 December 2017 amounted to a final decision. The email from the Mobility and Staffing Section to the Applicant[1] was as follows (emphasis in the original):

> Please be advised that your request for extension of …(SLWOP) has been approved for a **final** period of (1) one year, from 1 April 2018 to 31 March 2019. […]
>
> As outlined in the attachment, since you do not have a lien against any position while on SLWOP, regretfully, you will have to apply for available vacancies and be selected for a position in order to return to active duty. Noting that you will complete the 2 years maximum period allowed on the conclusion of this extension, regretfully, you will be separated from service on 31 March 2019 if you are not successful with your applications. We therefore encourage you to continue to apply for suitable vacancies.

25. The word "final" was highlighted in bold font in the 27 December 2017 email. Enclosed with the email was a copy of UNICEF's "CF/AI/2010-003 Amend 2 - on Special Leave" ("the Guidelines") with which the Applicant was asked to familiarize herself. As from April 2017, the said guidelines were no longer applicable as they had been replaced by DHR/Procedure/2017/003. However, this made no material difference.

26. In an apparent error, the Applicant's submission on receivability is based firstly on the premise that the communication dated 27 December 2017 was only

[1] Annex R7 to the Respondent's reply, to which a memorandum of the same date, addressed by the Mobility and Staffing Section of the Human Resources Division to a Human Resources Specialist, which is Annex C to the Applicant's application, was attached.

addressed to a Human Resources Specialist and not to the Applicant herself. It was clarified in the Respondent's submission in reply that there was in fact a communication directly to the Applicant on 27 December 2017. It is attached as Annex R7 to the Respondent's reply. Accordingly, this aspect of the Applicant's submission on receivability fails.

27. The Applicant's second basis for contending that the application is receivable, is that the decision communicated on 27 December 2017 had no negative impact on the Applicant and was merely preparatory/conditional. However, this submission is not supported by the decisions in *Andati-Amwayi* 2010-UNAT-058, *Lee* 2014-UNAT-481 and *Garcia Iglesias* 2015-UNDT-035 cited by the Applicant.

28. *Garcia Iglesias* was cited as authority that preparatory decisions are not considered administrative decisions as they modify neither the scope nor the extent of a staff member's rights. In that case, the Applicant was challenging an eligibility decision, made at a stage before completion of the selection process. The Tribunal noted that a selection procedure ends with the selection of the successful candidate, which results in the non-selection of other candidates. It is only that end-result of the selection process and not preparatory steps that can be considered an administrative decision for purposes of challenge before the Tribunal.

29. In this case, the challenged decision was not part of a process with many steps. It was complete in and of itself and was clearly expressed as a termination decision with a specific date. The fact that the Applicant was encouraged to apply for vacant positions which could lead to the result that she would remain with the Organization did not render the decision conditional or a preparatory step.

30. In all the circumstances, the 27 December 2017 email can be interpreted as expressing a final termination decision. The decision was contested more than one year beyond the permitted time. The Respondent has therefore succeeded in establishing that the application is not receivable.

Merits

31. In these circumstances, it is not strictly necessary to determine the issues raised as to the merits of the application. However, for completeness, the observation is made that even if the application can be considered receivable based on a different interpretation of the finality of the 27 December 2017 email, it fails on the merits.

32. The Respondent has proven that based on the applicable guidelines embodied in both the former CF/AI/2010-003 and its replacement DHR/Procedure/2017/003, there is no requirement for the Respondent to treat the Applicant in the same way as a staff member governed by staff rule 9.6(c)(i) whose post has been abolished.

33. The relevant provisions are as follows:

DHR/Procedure/2017/003

> **Special leave against a specific post**
>
> 30. Staff who were granted special leave **against a specific post**[2] will return to their post on the first working day following the end of their special leave. (emphasis added)
>
> 31. The provisions of CF/AI/2010-001 Amend. 3 on Separation from Service that apply to staff on abolished posts are **also applicable to staff on special leave against a specific post, which is abolished** while the staff member is on special leave. (emphasis added)
>
> …
>
> **Special leave on a general basis**
>
> 33. A staff member who was granted special leave on a general basis is required to apply for suitable posts and be selected for one, in order to be reabsorbed at the end of the leave period. To facilitate this process, the staff member should contact his/her HR/Operations manager at least three months before the end of the special leave, for assistance.

[2] Footnote 6 of the guidelines explains that "Special leave against a *specific post* means that the staff member may return to his/her specific post after the period of special leave. This option does not exist when special leave is granted on a *general basis*, as the post that the staff member encumbered prior to his/her special leave will be staffed with another incumbent." (emphasis in the original)

…

36.2. **In the case of a staff member holding a continuing or permanent appointment**, the staff member shall be separated in accordance with UN Staff Rule 9.6 (c) (i) (abolition of post or reduction of staff), and the relevant provisions of CF/AI/2010-001 Amd. 3 on Separation from Service." (emphasis added)

Staff Regulations and Rules of the United Nations (ST/SGB/2017/1)

Rule 9.6
Termination

…

Termination for abolition of posts and reduction of staff

(e) Except as otherwise expressly provided in … staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

(i) Staff members holding continuing appointments;

Rule 13.1
Permanent appointment

…

(d) If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, **staff members with permanent appointments shall be retained in preference to those on all other types of appointments**, provided that due regard shall be given in all cases to relative competence, integrity and length of service." (emphasis added)

34. Accordingly, the Respondent is only required to treat staff members returning from SLWOP with the same type of preferential treatment as must be afforded to staff members whose post has been abolished, if the SLWOP was granted in certain circumstances. Those circumstances are that the SLWOP was against a specific post

and the staff member whilst on SLWOP was "*holding a continuing or permanent appointment.*" The preferential treatment regime under staff rule 9.6(c)(i) is inapplicable where, as in the Applicant's case, SLWOP was on a general basis. This is clearly expressed at paragraph 33 of the Guidelines.

35. The Respondent had made clear in all correspondence to the Applicant concerning her SLWOP, dating back to the first grant of leave in 2015, that she was placed on SLWOP on a general basis without a lien to a specific post. In those circumstances, based on paragraph 33 of the Guidelines and the express contents of her leave letters, the Applicant was required to apply for posts while on leave. It was thus open to her to make efforts to be reabsorbed at the end of the leave.

36. To that end, the Guidelines stipulate that it was the Applicant's responsibility to contact her Human Resources Department at least three months before the end of the leave period to seek assistance. The Guidelines do not further state what role the Respondent should then play in assisting. There is merit to the Respondent's contention that there is no basis for importing into this requirement for assistance that the Respondent must go to the lengths explained in the case of *Timothy* UNDT-2017-080 cited by the Applicant. That case explained the Respondent's obligations where a staff member's employment was terminated as part of an office restructuring. UNAT only partially upheld the decision in *Timothy* 2018-UNAT-847 and ruled that even in a restructuring, the Respondent is not required to place affected staff members in new positions for which they are not qualified or have not applied.

37. The Applicant does not dispute the contention that the Respondent did assist within the three-month period by circulating the Applicant's details and *Curriculum Vitae* (CV) to Human Resource departments in New York. This was done to assist in identifying suitable positions for her. It remained the Applicant's responsibility to apply for positions. The Respondent has therefore gone beyond any responsibility prescribed in the regulatory framework to assist the Applicant.

38. In all the circumstances, the Applicant has not proven her case on the merits.

Conclusion

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

To reject the application as not receivable and without merit.

(*Signed*)
Judge Eleanor Donaldson-Honeywell
Dated this 23rd day of March 2021

Entered in the Register on this 23rd day of March 2021
(*Signed*)
René M. Vargas M., Registrar, Geneva