



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

PIAZZI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Ana Giulia Stella, OSLA

Counsel for Respondent:

Bettina Gerber, LPAS, UNOG

Introduction

1. By application filed on 14 June 2021, the Applicant, a former staff member of the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), contests the decision to separate him due to retirement.

Facts and procedural history

2. In 1985, the Applicant joined the United Nations as a Junior Professional Officer for the United Nations Development Programme in Addis-Ababa. In 1988, he joined OCHA, formerly named the Office of the United Nations Disaster Relief Coordinator (“UNDRO”). On 1 April 2001, the Applicant was promoted to the P-5 level and, in 2006, his contract was converted to a permanent appointment under a regular budget post.

3. On 28 November 2007, OCHA informed the Applicant that he had been identified to serve as the Secretary-General of the Parliamentary Assembly of the Mediterranean (“PAM”), in Malta, on a reimbursable loan for an initial period of one year, effective 1 December 2007.

4. The Applicant’s assignment was governed by an Inter-Organization Reimbursable Loan Agreement (hereafter “the 2007 Loan Agreement”) signed by OCHA, the Inter-Parliamentary Union (“IPU”) and the Applicant on the same day.

5. By letter dated 9 September 2009, OCHA agreed to an extension requested by IPU on 29 June 2009 and informed the Applicant that:

In accordance with the provisions of ST/AI/404, which constitutes the general policy on keeping a lien on a post while on mission, secondment or loan, and OCHA’s Human Resources Management Guidelines, OCHA shall reabsorb staff up to a period of two years. You have been released on reimbursable loan to the IPU effective 01 December 2007. The release was for an initial period of one year, which has subsequently been extended for second year through 30 November 2009.

OCHA cannot guarantee your return rights to your P-5 post with the Office of the Director, OCHA Geneva, beyond 30 November 2009. While you will have to give up the lien on your post effective

1 December 2009, you will continue to be considered as an internal candidate for OCHA vacancies.

6. The 2007 Loan Agreement was subsequently extended for different periods until 30 November 2017.

7. Further to IPU's withdrawal from the 2007 Loan Agreement in February 2018, OCHA, PAM and the Applicant signed an Inter-organization Agreement covering his reimbursable loan from OCHA to PAM (hereafter "the 2018 Loan Agreement").

8. The 2018 Loan Agreement covered the Applicant's reimbursable loan for an initial period from 1 December 2017 to 30 November 2018, which was subsequently extended until 30 November 2020.

9. By email of 24 October 2019, the then Human Resources ("HR") Business Partner, OCHA, contacted the Applicant to formalize the administrative nature of his lien, stating that:

Considering OCHA has released you on loan to other Organisations since 2008 and you do not hold a lien to any specific post with OCHA, we would like to take this opportunity to formalize the administrative nature of your lien. Whilst it does not provide return rights (i.e. a selection would need to take place for your return to the UN Secretariat), an administrative lien will provide you with an administrative "anchor" to the Organisation so that your release on reimbursable loan to PAM can be further extended.

10. By the same email, OCHA sent the Applicant a draft Memorandum of Understanding ("2019 MoU") for his review and signature.

11. On 25 November 2019, the Applicant emailed a photograph of the signed MoU to OCHA.

12. According to the Applicant, by email dated 26 November 2019, he informed the then HR Business Partner, OCHA, of the withdrawal of his consent to the 2019 MoU, stating that he was not obliged to sign it, and that he had the right to return to the releasing office at the completion of the reimbursable loan as a staff member on a permanent appointment. This email was not found by the Administration.

13. On 27 November 2019, the then HR Business Partner wrote to the Applicant as follows:

Thank you very much for this, well received. I'm liaising internally so that OCHA may formally revert to PAM on the current one-year extension request of your reimbursable loan. Let's touch base once this is sorted to discuss further the one-dollar option or extension of your current RLA until May 2023.

14. By email of 6 December 2019, OCHA agreed to extend the Applicant's reimbursable loan until 30 November 2020 while referencing the 2019 MoU.

15. According to the Applicant, by email of 8 December 2019, the Head of Administration at PAM reminded the then HR Partner, OCHA, that the Applicant told him that "he had already rejected one of the documents" referred to by the latter.

16. By email dated 12 March 2020, the Applicant wrote to OCHA HR as follows:

As anticipated, in Athens my mandate as PAM/SG was extended, previous consultations with UNNY, by acclamation until March 2025. For this reason, as already discussed with Adrien in November, I would like to seek your kind assistance in order to, and based on your suggestions 1. To process asap my retirement request for personal reasons and 2. most important in order for me to be able to continue performing my particular support mission to the UN system (OCT, UNSC/CTED, OCHA, DPA, UNSCO, WHO, UNCTAD, Libya and Syria, etc) from Geneva through PAM, simultaneously proceed, as done with Rashid, with a 1 USD contract (retaining the UN email, the L/P and the cartes de legitimations) for the foreseeable future.

17. On 22 November 2020, the Applicant reached out to the Chief, Human Resources Management Service (“HRMS”), United Nations Office at Geneva (“UNOG”), and requested a meeting indicating that “the idea is to retire and simultaneously assume a senior position with PAM’s representation in Geneva”.

18. On 30 November 2020, the Applicant met informally with the Chief, HRMS, UNOG.

19. By email dated 2 December 2020, the Applicant informed OCHA that he had “duly reported to OCHA-GVA yesterday 1 December morning”, that he “shall use immediately ... 32 days of compensatory time and the 27.5 days of annual leave for the period from April 2020 to February 2021”, and that discussions should take place on whether he would resume duties or be offered a separation package.

20. On the same day, OCHA HR reminded the Applicant that he did not have return rights to any post in OCHA, as provided in the 2019 MoU, and that he had agreed to be separated at the end of the loan. Hence, separation would be effective as of 1 December 2020.

21. The Applicant replied mentioning that he had withdrawn his consent the day after he had sent the signed version and referred to an email exchange of 26 and 27 November 2019 with OCHA HR.

22. On 3 December 2020, OCHA HR replied that it had not found the email of 26 November 2019, and confirmed that only the 6 December 2019 message agreeing to the Applicant’s extension of his reimbursable loan (see para. 14 above) was in its archive.

23. On 8 December 2020, OCHA HR proposed a meeting to discuss the matter. On 9 December 2020, the Applicant answered that he was not available as he was abroad and would revert with another date suggestion when he could return to Geneva.

24. On 16 December 2020, the Applicant received an automated message from OCHA HR Service regarding separation formalities.

25. On the same day, the Chief, HRMS, OCHA, emailed the Applicant informing him that OCHA would proceed with the processing of his separation upon retirement, with an effective date of 1 December 2020, and noting that the Applicant did not have any return rights since 1 December 2009.

26. On 17 December 2020, the Applicant answered that as he had been “stuck in Italy due to force majeure”, he would like to meet upon his return to Geneva, tentatively on 3, 4 or 5 January 2021. He further contested the decision to “terminate” unilaterally his appointment on 1 December 2020 without notice and requested that it be put on hold.

27. On the same day, the Chief, HRMS, OCHA, indicated her availability to meet by any virtual mode. She referred to the 2018 Loan Agreement and the 2019 MoU with an end date of 30 November 2020, which served as a notification of his separation in the absence of an extension of the loan agreement. Further, she recalled his earlier request for processing his retirement.

28. On 29 January 2021, the Applicant requested management evaluation of the contested decision mentioned in para. 1 above.

29. By letter dated 16 March 2021, the Under-Secretary-General for Management Strategy, Policy and Compliance, responded to said request by informing the Applicant that she had decided to uphold the contested decision.

30. On 14 June 2021, the Applicant filed the application mentioned in para. 1 above, which was 17 pages long. In his application, the Applicant requested permission to exceed the page limit referred to in the Tribunal’s Practice Direction No. 4 on grounds of the factual complexity of the case.

31. On 15 June 2021, the application was transmitted to the Respondent who was instructed to file his reply by 15 July 2021.

32. On 30 June 2021, the Respondent filed a motion for extension of time to file his reply until 23 July 2021, which was granted by the Tribunal via Order No. 123 (GVA/2021) of 1 July 2021.

33. On 23 July 2021, the Respondent filed his reply, which was also 17 pages long. In his reply, he did not object to the Applicant's request to exceed the page limit and equally requested permission to exceed the page limit on grounds of the factual complexity of the case and the Applicant's alleged misrepresentation of facts.

34. On 4 October 2021, the Applicant filed a motion requesting permission to adduce additional documents in support of his application and respond to certain portions of the reply. At the same time, he submitted his rejoinder responding to the reply.

35. By Order No. 104 (GVA/2022) of 7 November 2022, the Tribunal invited the Respondent to file his comments on the Applicant's rejoinder and granted:

- a. The parties' requests to exceed the page limit;
- b. The Applicant's motion to adduce additional evidence; and
- c. The Applicant's request for leave to respond to certain portions of the reply.

36. By Order No. 108 (GVA/2022) of 14 November 2022, the Tribunal convoked the parties to a case management discussion ("CMD").

37. On 17 November 2022, the Respondent filed his comments on the Applicant's rejoinder pursuant to Order No. 104 (GVA/2022).

38. On 21 November 2022, the CMD took place virtually through Microsoft Teams with Counsel for each party and the Applicant present. During the CMD, after hearing the parties' views, the Tribunal decided to hold a hearing on the merits. In addition, the Applicant requested the Tribunal to order the Respondent to produce documentary evidence showing his desire to retire at the age of 65, namely

the 2018 email exchanges between the Administration and the Applicant seeking to invite him to participate in training seminars on retirement.

39. On 22 November 2022, the Applicant filed a motion for confidentiality, requesting that the hearing be closed to the public.

40. By Order No. 112 (GVA/2022) of 23 November 2022, the Tribunal instructed the Respondent, *inter alia*, to file his comments on the Applicant's motion for confidentiality by 28 November 2022 and inform it whether it is possible to grant the Applicant access to his United Nations electronic mailbox ("UN mailbox") by 30 November 2022, and ordered the parties to file their respective list of witnesses, and to attend a hearing on the merits via Microsoft Teams on 12 December 2022, commencing at 9.30 a.m. (Geneva time).

41. On 28 November 2022, the Respondent filed his response to the Applicant's motion for confidentiality.

42. By email dated 28 November 2022, the Respondent informed the Tribunal about his position in relation to the Applicant's access to his former UN mailbox.

43. By Order No. 117 (GVA/2022) of 29 November 2022, the Tribunal decided to reject the Applicant's motion for confidentiality. Consequently, the hearing was held open to the public virtually via Microsoft Teams. By the same Order, the Tribunal ordered that the Applicant's Counsel be granted access to the Applicant's UN mailbox by 30 November 2022, and the parties file relevant documentary evidence by 6 December 2022.

44. On 30 November 2022, the Applicant filed his list of witnesses, and, on 1 December 2022, the Respondent filed his list of witnesses.

45. On 2 December 2022, the Applicant filed documentary evidence pursuant to Order No. 117 (GVA/2022), namely, a 2017 email exchange between the Administration and him allegedly showing that he did not intend to retire before the age of 65.

46. On 6 December 2022, the Respondent filed documentary evidence pursuant to Order No. 117 (GVA/2022).

47. On 6 December 2022, the Applicant filed a motion, requesting permission to adduce additional evidence, and submitted a letter dated 6 December 2022 (hereafter “the 6 December 2022 letter”) from Foxwall, explaining why it was not possible to find the email of 26 November 2019 sent by the Applicant to the Administration.

48. By Order No. 122 (GVA/2022) of 7 December 2022, the Tribunal granted the Applicant’s motion to adduce additional evidence and accordingly admitted the 6 December 2022 letter into the case record.

49. On 12 December 2022, the hearing on the merits took place, as scheduled, virtually through Microsoft Teams.

50. By Order No. 124 (GVA/2022) of 13 December 2022, the Tribunal instructed the parties to file their respective written closing submission, which they did on 23 December 2022.

51. In his closing submission, the Applicant requested permission to file the following documentary evidence:

- a. A written statement dated 14 December 2022, showing, *inter alia*, that he accepted the assignment “on the condition that he would retain his status of UN Officer with a permanent appointment, as well as the right to resume his functions at OCHA upon the completion of his PAM assignment”;
- b. A Concept Note, titled “Proposed establishment of a United Nations Special Representative for Parliamentary Relations – Terms of Reference”; and
- c. A letter from the Swiss Embassy dated 13 July 2013, confirming that the Swiss Minister of Foreign Affairs granted to the office of PAM in Geneva full diplomatic status in 2013.

52. On 6 January 2023, the Respondent filed a motion requesting the Tribunal to order that the new evidence introduced in the Applicant's closing submission be stricken from the record.

53. By Order No. 1 (GVA/2023) of 10 January 2023, the Tribunal granted the Applicant's request and admitted the documentary evidence listed in para. 51 into the case record and denied the Respondent's motion to strike.

54. By the same Order, the Tribunal invited the Respondent to file his comments on the newly admitted evidence, which he did on 17 January 2023.

Consideration

Scope and standard of judicial review

55. The present case concerns the Administration's decision to separate the Applicant from service due to retirement.

56. As for any discretionary decision of the Organization, the Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable, and procedurally correct to avoid unfairness, unlawfulness, or arbitrariness (see, e.g., *Sanwidi* 2010-UNAT-084, para. 42; *Abusondous* 2018-UNAT-812, para. 12). In this regard, the Tribunal recalls that it is not its role "to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40).

57. Nevertheless, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see *Belkhabbaz*, para. 80).

58. In view of the foregoing, and having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the Applicant had a right of return;
- b. Whether the Applicant was lawfully separated from service;
- c. Whether the Applicant is entitled to any termination indemnity; and
- d. Whether the Applicant is entitled to any remedies.

59. The Tribunal will address these issues in turn.

Whether the Applicant had a right of return

60. The Applicant submits that he had the right to return to his releasing Organization, OCHA, at the end of his special reimbursable loan agreement. To support his submission, he strongly contests the application to his case of Administrative Instruction ST/AI/404 concerning assignments to UN Missions, with no mention at all of its applicability to loans. Moreover, he argues that OCHA unsuccessfully tried to waive his return rights by asking him to agree to an MoU in 2019. Finally, he contends that as a permanent appointee facing termination, there is no doubt that the Administration had the obligation to place him in a suitable alternative post.

61. The Respondent claims that the Applicant did not have a return right to OCHA. In support of his claim, he specifically argues that on 9 September 2009, OCHA informed the Applicant that his lien to his post would be kept for a maximum of two years, i.e., until 30 November 2009, and that the Applicant was not able to substantiate his allegation that he had withdrawn from the MoU, which forms an integral part of the 2018 Loan Agreement.

62. Noting that PAM is an intergovernmental organization with the status of permanent observer to the United Nations General Assembly, the Tribunal recalls that staff rule 4.9, titled “Inter-organization movements”, provides that:

(a) Inter-organization movements are defined in and shall be governed by an inter-organization agreement among the organizations applying the United Nations common system of salaries and allowances.

(b) The Secretary-General may allow a staff member to serve in a specialized agency or other intergovernmental organization, provided that such movement *in no way diminishes the rights or entitlements of the staff member* under his or her letter of appointment with the United Nations (emphasis added).

63. While PAM is not a party to the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations Applying the United Nations Common System of Salaries and Allowances of 1 January 2012 (hereinafter “2012 Inter-Organization Agreement”), the Tribunal notes that the preamble of the 2018 Loan Agreement, to which PAM was a signatory, clearly referenced it as legal basis.

64. Sec. 2(e) of the 2012 Inter-Organization Agreement defines the term “loan” as

the movement of a staff member from one organization to another for a limited period, normally not exceeding one year, during which the staff member will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization.

65. The 2012 Inter-Organization Agreement further provides in its relevant part that:

10. (a) When a staff member is loaned, that staff member will be under the administrative supervision of the receiving organization, but will have no contractual relationship with it, continuing to be subject to the staff regulations and rules of, and *retaining his or her contractual rights with, the releasing organization.* (emphasis added).

66. Notably, the 2018 Loan Agreement, which sets forth the conditions governing the reimbursable loan, provides in its relevant part that (emphasis added):

2. Under the terms of the agreement, [the Applicant] shall, *inter alia*:

- a) be on a reimbursable loan from UNOCHA to PAM;
- b) be subject to the administrative supervision of PAM;
- c) ***continue to be employed by UNOCHA*** on a UN Secretariat letter of appointment;
- d) be subject to the United Nations (UN) Staff Rules and Regulations; and
- e) continue to be paid on UNOCHA's payroll and receive all benefits and entitlements to which he is entitled under the UN Staff Rules and Regulations.

...

28. [The Applicant's] reimbursable loan to PAM may be reviewed for either:

- a) Extension, subject to the agreement of PAM, UNOCHA and [the Applicant], and with at least three months' notice by the initiating party to the others; or
- b) ***Early Termination***, with at least ***three months' notice*** by the initiating party to the others.

67. A Human Resources Factsheet, issued for Umoja users, provides that at the end of the loan period, the staff member concerned is expected to return to the Secretariat unless he or she resigns his Secretariat position to transfer to the receiving organization. Such practice has been clearly confirmed by the Appeals Tribunal in *Iskandar* (see *Iskandar* 2012-UNAT-248).

68. Accordingly, the Tribunal finds that while the Applicant's lien on his former post may have been surrendered in accordance with the Administration's decision of 9 September 2009, he retained a return right to OCHA under the 2018 Loan Agreement. In this respect, the Tribunal wishes to highlight that surrendering the lien on a specific position does not mean that one's right of return to the

Organization is relinquished (see, e.g., sec. 6.7 of ST/AI/2010/3 (Staff selection system)).

69. Turning to whether the Applicant has waived his right to return to OCHA, the Tribunal notes that the 2019 MoU, signed by the Applicant and OCHA on 25 November 2019, provides in relevant part that (emphasis added):

2. The purpose of this MoU is to outline the agreement of the Parties to the following terms and conditions for the extension of [the Applicant's] current reimbursable loan with the Parliamentary Assembly of the Mediterranean (PAM):

a) [The Applicant's] release on reimbursable loan to PAM will be extended until 30 November 2020 and may be extended further if requested by PAM and agreed by the staff member.

b) **[The Applicant] has no lien or return right to any post in OCHA nor any post in the UN Secretariat.**

c) **At the end of this reimbursable loan, [the Applicant] will be separated from service and paid all his entitlement, unless he has applied and been selected for a position with the UN.**

70. Accordingly, the 2019 MoU unequivocally relinquished the Applicant's right to return to the Organization.

71. The core issue in relation to the Applicant's right of return before the Tribunal is thus whether the Applicant validly withdrew from the 2019 MoU as he claims. In support of his contention, the Applicant points to an email dated 26 November 2019 he sent to the then OCHA HR Business Partner withdrawing his signature from the MoU, and to an email dated 8 December 2019 from PAM to the then OCHA HR Business Partner suggesting the Applicant's rejection of the 2019 MoU.

72. The Tribunal finds that there is no merit in the Applicant's submissions in this respect.

73. First, the Tribunal finds no evidence that the Administration received any of the two emails mentioned in para. 71 above. Indeed, the emails retrieved by the Information and Communication Technology Service (“ICTS”) from the then OCHA HR Business Partner’s account do not include either the 26 November 2019 email or the 8 December 2019 email. The then OCHA HR Business Partner further confirmed that he did not have any recollection of these emails about the Applicant retracting from the 2019 MoU. Rather, the available email records indicate that the then HR Business Partner forwarded the signed MoU for placement in the Applicant’s Official Status File on 6 December 2019.

74. Second, the Tribunal finds that the Applicant has failed to discharge his burden of proving that he indeed “withdrew” from the MoU as he and PAM sent the emails of 26 November 2019 and 8 December 2019 respectively. While the Applicant provided documentary evidence and testimony during the hearing explaining why he was not able to find the 26 November 2019 email in his former UN mailbox, this is not sufficient to demonstrate that he had indeed withdrawn his signature from the 2019 MoU. The Applicant also fails to substantiate that alleged IT issues faced by PAM in November 2019 necessarily resulted in the non-delivery of the emails dated 26 November 2019 and 8 December 2019. Indeed, during the hearing, when asked by the Respondent’s Counsel, the Applicant could not point out any other messages or emails that might have not been delivered due to alleged technical issues.

75. Moreover, the evidence on record shows that the Applicant’s signing of the 2019 MoU is a condition for OCHA to extend his reimbursable loan agreement. As such, any formal withdrawal would have been addressed at the time and would have led to further discussions between the Applicant, OCHA and PAM. This is, however, not the case here.

76. Accordingly, the Tribunal finds that the Applicant had unequivocally waived his right of return to the Organization by signing the 2019 MoU.

Whether the Applicant was lawfully separated from service

77. The Applicant submits that he never made a formal request for retirement and that the Administration had no authority to retire a staff member retroactively, forcefully, and unilaterally until the staff member reaches the mandatory age of retirement.

78. The Respondent contends that the Applicant's separation was processed as a result of his retirement request upon expiration of the loan agreement as per the 2019 MoU and, thus, the decision to separate him due to retirement is lawful.

79. The Tribunal recalls that under staff rule 9.1, retirement constitutes separation from service. While the current mandatory age of retirement is 65, staff rule 13.13, titled "Acquired right to normal retirement age", provides in its relevant part that:

(b) Staff members who wish to exercise their acquired right as described in staff rule 13.13 (a) above and separate from service at their normal age of retirement or anytime thereafter before the age of 65 shall give written notice of three months if holding a continuing appointment, or 30 calendar days if holding a fixed-term appointment. The Secretary-General may, however, accept shorter notice.

80. Under art. 1(n) of the Regulations of the United Nations Joint Staff Pension Fund ("UNJSPF"), the term "normal retirement age" shall "mean age 60, except that it shall mean age 62 for a participant whose participation commences or recommences on or after 1 January 1990 but before 1 January 2014, and age 65 for a participant whose participation commences or recommences on or after 1 January 2014."

81. The Tribunal notes that the Applicant's date of commencement of participation is 11 June 1988 and, accordingly, his normal age of retirement is 60. Should the Applicant wish to exercise his acquired right to normal retirement age under staff rule 13.13(b), he should have given written notice of three months because he held what may be equated to a continuing appointment at the relevant time.

82. In this respect, the Tribunal finds no merit in the Respondent's submission that the Applicant's separation was processed because of his retirement request in March and July 2020.

83. First, there is no evidence that the Applicant made an unconditional request for retirement. Instead, the evidence on record shows that the retirement option proposed by the Applicant was always connected to the granting of a one-dollar contract. Indeed, the email of 12 March 2020 from the Applicant to OCHA HR (cf. para. 16 above), whose validity was confirmed in July 2020, states in its relevant part, that:

As anticipated, in Athens my mandate as PAM/SG was extended, previous consultations with UNNY, by acclamation until March 2025.

For this reason, as already discussed with Adrien in November, I would like to seek your kind assistance in order to, and based on your suggestions 1. To process asap my retirement request for personal reasons and 2. most important in order for me to be able to continue performing my particular support mission to the UN system ... from Geneva through PAM, simultaneously proceed, as done with [R.], with a 1 USD contract (retaining the UN email, the L/P and the cartes de legitimations) for the foreseeable future.

84. The current HR Business Partner, OCHA, testified during the hearing before the Tribunal that in the discussions that the Applicant had with Human Resources, OCHA, the retirement option had always been connected to the granting of a one-dollar contract.

85. Second, there is no evidence showing that the Applicant ever addressed a definitive request to the Organization requesting to be separated due to retirement. Indeed, he never made an unequivocal retirement request with a specific retirement date.

86. In the case at hand, the Organization concluded that the Applicant's separation from service was to be grounded on "retirement" based on its reading/interpretations of email messages from the Applicant. In this respect, the Tribunal highlights that although there is no specific form to request retirement under staff rule 13.13(b), any written mean used to exercise an acquired right to normal retirement age should, at a minimum, unequivocally express one's desire to do so, indicate a specific retirement date, and be unconditional.

87. Accordingly, the Tribunal finds that processing the Applicant's separation from service on grounds of retirement constitutes a mere procedural irregularity which bears no impact on the Applicant's legal status.

88. In this regard, the Tribunal wishes to highlight that procedural irregularities in the decision-making process do not necessarily result in a subsequent finding of unlawfulness of the administrative decision and the determination of whether a staff member was denied due process or procedural fairness must rest upon the nature of any procedural irregularity and its impact (see *Sarwar* 2017-UNAT-757, para. 87).

89. The Tribunal notes that sec. 2(c) of the 2019 MoU provides that "[a]t the end of this reimbursable loan, [the Applicant] will be separated from service and paid all his entitlements, unless he has applied and been selected for a position with the UN".

90. The evidence on record shows that the Applicant's reimbursable loan ended on 30 November 2020, and that he had only applied for one position with the Organization but was not selected.

91. Therefore, the decision to separate the Applicant from service on 30 November 2020 is lawful. As such, any procedural irregularity in relation to separation from service on grounds of retirement has no impact on the validity of the decision to separate the Applicant from service.

92. The same holds true for the alleged “retroactive separation” of the Applicant from service. The fact that the Applicant received an automated message from OCHA HR regarding separation formalities on 16 December 2020 instead of a date prior to 30 November 2020, neither means that he was “retroactively separated” nor renders the decision to separate the Applicant from service unlawful or invalid.

93. Accordingly, the Tribunal finds that the Applicant was lawfully separated from service on 30 November 2020.

Whether the Applicant is entitled to any termination indemnity

94. The Applicant submits that if the Administration wanted to separate him, it should have terminated his appointment with at least three months of notice and pay the appropriate termination indemnity.

95. The Respondent argues that the Applicant is not entitled to the payment of termination indemnity.

96. The Tribunal recalls that staff rule 9.8(c) provides in its relevant part that:

Termination indemnity shall not be paid to any staff member who, upon separation from service, will receive a retirement benefit under article 28 of the Regulations of the [UNJSPF].

97. Art. 28 of the UNJSPF Regulations provides in its relevant part that:

(a) A retirement benefit shall be payable to a participant whose age on separation is the normal retirement age or more and whose contributory service was five years or longer.

98. It follows that a staff member is not eligible to the payment of a termination indemnity if his or her age (at the time of separation from service) is the normal retirement age or more and the contributory service is five years or longer.

99. When he separated from the Organization, the Applicant was 62 years old and, consequently, beyond his normal retirement age. Also, he started contributing to the UNJSPF in 1988 and his contributory service is longer than five years at the

time of his separation from service. This entitles the Applicant to a retirement benefit under art. 28 of the UNJSPF Regulations.

100. Accordingly, the Tribunal finds that the Applicant is ineligible to the payment of a termination indemnity pursuant to staff rule 9.8(c).

Whether the Applicant is entitled to any remedies

101. The Applicant requests the rescission of the decision to separate him from service due to retirement and reinstate him. Alternatively, he requests the Tribunal to order the payment of compensation in lieu of notice and a termination indemnity as pecuniary loss, and to award him a compensation in lieu of rescission of two years net base salary as well as to order appropriate compensation for damages.

102. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant...

103. Having found that the Applicant was lawfully separated from service on 30 November 2020, the Tribunal finds no basis for rescinding the decision to separate him from service and reinstating him, or for in-lieu compensation. Similarly, recalling its finding that the Applicant is ineligible to the payment of a termination indemnity, the Tribunal finds no basis to order such payment.

104. In relation to the Applicant's claim for the payment of compensation in lieu of notice, the Tribunal notes that staff rule 9.7(d) provides that "[i]n lieu of the notice period, the Secretary-General may authorize compensation". However, this provision is only applicable to termination of appointments, which is not the case here. Moreover, in the absence of an extension of the loan agreement, the 2019 MoU signed by the Applicant on 25 November 2019 served as a notification of separation. Accordingly, there is no basis to grant the Applicant a payment of compensation in lieu of notice.

105. Finally, the Applicant claims moral and financial damages on the ground of what he portrays as "the delay to properly process his separation" mainly supported by his receipt on 16 December 2020, i.e., roughly two weeks after his date of separation from service, of an automated email message with information on clearance procedures in view of said separation (hereinafter "clearance procedures message").

106. In this respect, the Tribunal notes that good administrative practice calls for the Administration to notify staff members about separation formalities sufficiently in advance to offer a reasonable chance to finalize them (see, e.g., *Robinson* UNDT/2019/137, para. 21). The Tribunal is also mindful of "the fact that staff members are unlikely to be conversant with separation formalities" (see *Ahmed* 2013-UNAT-386, para. 21) but remarks that the Applicant was a seasoned staff member conversant on, *inter alia*, separation matters.

107. Processing of a retirement benefit is subject to the submission of documents from the employing organization (e.g., separation personnel action and separation notification) and the staff member (e.g., choice of retirement benefit and banking instructions for its payment). An employing organization will submit the relevant documents only upon completion of its clearance procedures. In the case at hand, one of those procedures required the Applicant to return the legitimization cards in his possession. The record shows that the Applicant not only did not do this in a timely manner, but a little over eight months after receipt of the above-mentioned clearance procedures message, namely in August 2021, he returned them.

108. Given the above circumstances, the Tribunal finds that issuing the clearance procedures message approximately two weeks after the Applicant's date of separation from service does not amount to an unjustified delay to process his separation. It further finds that the time taken to finalize the separation procedures is not attributable to the Organization and that there are no grounds to grant compensation to the Applicant for alleged moral and financial damages.

Conclusion

109. In view of the foregoing, the Tribunal DECIDES that the application is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 9th day of February 2023

Entered in the Register on this 9th day of February 2023

(Signed)

René M. Vargas M., Registrar, Geneva