



Before: Judge Rachel Sophie Sikwese

Registry: New York

Registrar: Isaac Endeley

MOUCHABEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Cristian Gimenez Corte

Counsel for Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat
Tamal Mandal, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Economic Commission for Latin America and the Caribbean (“ECLAC”) based in Santiago, Chile. By an application filed on 28 March 2023, she contests the “decision to separate [her] on early retirement, despite the withdrawal of her request for early retirement”.

2. The Respondent filed his reply on 1 May 2023, arguing that the application lacks merit as the contested decision was “legal, reasonable, and procedurally fair”.

3. For the reasons set out below, the Tribunal has decided to dismiss the application.

Factual and procedural history

4. The Applicant commenced her employment with ECLAC on 11 December 1989. At the time of her separation from the Organization, she held a permanent appointment as a Senior Administrative Assistant, at the G-7 level, in the Travel, Traffic and Local Transportation Unit of the Division of Administration.

5. By the Applicant’s own account in her application, during the first half of 2022, her “health started to deteriorate, and eventually she suffered a complete breakdown”. Due to her poor health, she went “on sick leave from mid-August to end-September 2022”. After the period of sick leave expired and although she had not fully recovered, she resumed her duties, but by “telecommuting”. Because of her ongoing health situation, “she started to consider the possibility of retirement” as she did not feel she could continue working.

6. On 1 September 2022, the Applicant met with the Director of the Division of Administration (“DDA”) of ECLAC to discuss her health situation and review the options available to her. On the same date, following that meeting, the Applicant sent the DDA an email stating that she had decided to go on early retirement from 31 December 2022. After notifying the Acting Executive Secretary of ECLAC, who accepted the resignation, the DDA replied a few hours later acknowledging the

conversation with the Applicant earlier in the day and noting that the Applicant had set a high standard in the Travel Unit. The Applicant also wrote back thanking the DDA and expressing her gratitude towards her ECLAC colleagues for her 33 years of service. The DDA then instructed the Human Resources Section to initiate the Applicant's separation process and a recruitment process to fill the position that would soon become vacant due to the Applicant's separation.

7. Following that exchange, the Applicant started interacting with the Human Resources Section in preparation for her early retirement on 31 December 2022. From 1 September 2022 until 15 December 2022, among other actions, the Applicant undertook the necessary administrative procedures to be separated from the Organization including completing the forms to secure her pension benefits and to ensure after-service health insurance ("ASHI") coverage. On 2 December 2022, the Applicant attended a meeting of all staff from ECLAC's Division of Administration conducted via Microsoft Teams at which she said farewell to her colleagues and expressed excitement about her upcoming retirement. On 15 December 2022, the Applicant communicated with her First Reporting Officer ("FRO") regarding the timely completion of her performance evaluation for the period leading up to her separation on 31 December 2022. Also on 15 December 2022, the Human Resources Section processed the Applicant's separation action in the *Umoja* platform, and the Applicant received a Personnel Action notification in this regard.

8. Meanwhile, the ECLAC Administration, in reliance on the Applicant's decision to submit her resignation and opt for early retirement, started making preparations to fill her post with effect from 3 January 2023. Late in the day on 1 September 2022, the DDA forwarded to the Human Resources Section the email trail on the Applicant's resignation, noting that the Acting Executive Secretary of ECLAC had been informed and had given his approval. The DDA also gave clear instructions for the Applicant's post to be advertised.

9. On 16 December 2022, the Applicant sent the DDA an email stating that since her health condition had improved and she was now able to successfully perform her assigned tasks, she had decided to withdraw her request for early retirement and to continue working at ECLAC beyond 31 December 2022.

10. On 19 December 2022, the Applicant received a response from the Human Resources Section informing her that her request to reverse her decision to go on early retirement could not be accepted. The reasons for the rejection were the following:

a. The request for early retirement dated 1 September 2022 had already been accepted by the Acting Executive Secretary of ECLAC under the current delegation of authority framework.

b. A temporary job opening (“TJO”) had been advertised to fill the post that the Applicant would leave vacant after 31 December 2022, and an internal candidate (“Candidate A”) had already been selected for it.

c. Another internal staff member (“Candidate B”) was being laterally assigned to the post that would be left vacant by Candidate A and had already been notified. (The Respondent later added in the reply that a third staff member (“Candidate C”) was being reassigned to the position that would be left vacant by Candidate B).

d. The Human Resources Section had already undertaken formalities and actions in relation to the Applicant’s separation from the Organization.

e. The professional development opportunities of the affected internal staff members would be harmed if the request to reverse the resignation were accepted.

11. On 23 December 2022, the Applicant filed a request for management evaluation of the decision not to accept the withdrawal of her request for early retirement. Along with the request for management evaluation, she filed a request for suspension of action concerning the decision to separate her from service on 31 December 2022 despite the withdrawal on 16 December 2022 of her resignation on early retirement. On 27 December 2022, the Management Evaluation Unit (“MEU”) rejected the request for suspension of action and stated that the management evaluation of the case would be completed by 6 February 2023.

12. Also on 23 December 2022, the Applicant filed an application for suspension of action with the Dispute Tribunal regarding implementation of the contested decision. On 30 December 2022, the Dispute Tribunal issued Order No. 115 (NY/2022) rejecting the application for suspension of action on the basis that the Applicant had not established that the contested decision was *prima facie* unlawful.

13. On 31 December 2022, the Applicant separated from the Organization. On 7 February 2023, the MEU informed her that the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance (“USG/DMSPC”) had decided to uphold the contested decision.

14. On 28 March 2023, the same date as the application, the Applicant filed a “Motion for Interim Measures Pending Proceedings” (the “Motion”), requesting the Tribunal to order: a) the immediate payment of the Applicant’s salary since January 2023; b) the immediate resumption of her medical insurance coverage and benefits; and c) the suspension of the decision to separate the Applicant on early retirement despite the withdrawal of her request for early retirement.

15. On 3 April 2023, the Respondent filed a response to the Motion arguing that it was not receivable *ratione materiae* because the contested decision had already been implemented on 31 December 2022 and that the Dispute Tribunal lacked jurisdiction to grant the relief requested. The Respondent further submitted that

even if the Tribunal found the Motion receivable, it was without merit as the Applicant had not satisfied the three cumulative conditions for granting interim measures under art. 10.2 of the Statute of the Dispute Tribunal and art. 14.1 of its Rules of Procedure.

16. The undersigned Judge commenced her deployment with the New York Registry on 11 October 2023.

17. On 31 October 2023, she convened a Case Management Discussion (“CMD”) with the parties where they agreed on the legal and factual issues for the Tribunal’s review.

The parties’ submissions

The Applicant

18. The Applicant contends in the application that not only has ECLAC “unlawfully separated [her] from service, but also it has unlawfully deprived [her] of her salary, her medical insurance benefits, and even her potential retirement benefits”. The Applicant maintains that although she sent an email on 1 September 2022 indicating her intension to opt for early retirement, and the DDA acknowledged receipt of the email on the same date, “several weeks passed by without ECLAC accepting her request for early retirement”.

19. The Applicant also submits that as her “health started to improve” due to the courses of treatment she was undergoing, “on 16 December 2022 she sent an email to ECLAC informing [them that] she ‘has decided to withdraw [her] request for early retirement and continue to work for ECLAC”” (emphasis in the original).

20. According to the Applicant, “neither her request for retirement nor a request for resignation has been accepted, since there **is no piece of evidence on record demonstrating that her request for retirement was ever accepted**” (emphasis in the original). The Applicant also insists that she “submitted a request for retirement

but not for resignation” and that her request “has never been accepted by the Executive Secretary” of ECLAC. She adds that “no letter on the ‘acceptance of the resignation’ has been ‘conveyed to staff member in writing’”. Relying on the Human Resources guidelines, the Applicant questions whether “there is some kind of malice or simple ignorance” in the MEU’s affirmation that there is no requirement in staff rule 9.2 that a resignation be formally requested or accepted.

21. The Applicant argues that in order for her offer of resignation to have been valid, the Acting Executive Director of ECLAC, who has delegation of authority in these matters, should have formally accepted it by a letter. She concludes that in the absence of such an acceptance letter, “she has timely withdrawn her request as ECLAC has never accepted her petition”. Therefore, in her view, the ECLAC decision to “unilaterally” separate her from service prior to the mandatory retirement age was unlawful.

The Respondent

22. The Respondent submits in his reply that the contested decision was a reasonable exercise of the Head of Entity’s delegated authority, and took into consideration relevant matters, including ECLAC’s detrimental reliance on the Applicant’s resignation. According to the Respondent, “[a] staff member does not have a right to withdraw a resignation, and there is no legal obligation on the part of the Organization to accept a request to withdraw a resignation”.

23. The Respondent further submits that the Applicant, “of her own will, offered to resign and her offer was accepted”. The Applicant’s “notice to resign was unequivocal and there was no doubt that it was the Applicant’s intention to separate from the Organization at the time she provided notice”. From 1 September 2022 to 15 December 2022, the Applicant engaged with ECLAC’s Human Resources Section to complete the administrative procedures necessary to give effect to her resignation and “repeatedly confirmed, by her actions, that she had resigned and

that she would separate from service on 31 December 2022”. This entailed signing and personally delivering various forms, including forms related to the pension fund and ASHI.

24. The Respondent maintains that the Acting Executive Secretary of ECLAC not only accepted the Applicant’s resignation on 1 September 2022, but also properly exercised managerial discretion by declining to accept the Applicant’s request to withdraw the resignation. Both decisions were relayed through the DDA, “who had the necessary delegated authority”. Moreover, in reliance on the Applicant’s voluntary resignation, ECLAC made several binding commitments vis-à-vis other staff members. Therefore, the Applicant “is estopped from claiming that she has not resigned”.

25. Regarding the Applicant’s assertion that the Administration failed to follow the applicable procedures set out in the Human Resources guidelines, the Respondent notes that “that guidelines are at the very bottom of the hierarchy of the internal legal framework, and lack the legal authority” of duly promulgated issuances such as the Secretary-General’s Bulletins.

Considerations

26. The issue for the Tribunal’s review is whether the decision of the Administration not to accept the Applicant’s withdrawal of her resignation, which she termed early retirement, was unlawful.

27. The Applicant argues that the decision was unlawful because the Respondent did not comply with staff rules 9.2(c) and 9.11(iv) or with the Human Resources guidelines on resignation and early retirement applicable to ECLAC.

28. The Respondent counter-argues that a staff member does not have a right to withdraw a resignation, and there is no legal obligation on the part of the Organization to accept a request to withdraw a resignation. He argues that the cited staff regulations and rules are not relevant to the issue and that the Human Resources guidelines have no binding authority.

29. Staff rule 9.2(c) provides that the Secretary-General may require the resignation to be submitted in person in order to be acceptable.

30. Staff rule 9.11 relates to the last day of service for pay purposes and subparagraph (iv) states that in the case of retirement, the date shall be the date approved by the Secretary-General for retirement.

31. Staff rule 9.12 is concerned with certification of service and provides that any staff member who so requests shall, on leaving the service of the United Nations, be given a statement relating to the nature of his or her duties and the length of service.

32. The Human Resources guidelines, following the language of staff rule 9.2(a), define a resignation as a separation initiated by a staff member. Staff members may resign at any time, giving the statutory notice period. The agreement of the Organization is required if a staff member proposes to resign with a notice period shorter than the statutory period. As a step in the resignation process, the responsible office prepares a written response to the resignation indicating the effective separation date. However, there is no requirement, as otherwise submitted by the Applicant, that the response should be in the form of a signed letter.

33. The Tribunal reminds itself that the first step of the interpretation of any kind of rules, generally, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author. (See, for instance, *Scott 2012-UNAT-225*).

34. Therefore, the Tribunal's role is to interpret the language of the staff regulation or rule based on its plain and ordinary meaning without adding anything to or subtracting anything from it otherwise the Tribunal shall be the author of the regulation or rule.

35. After going through the cited staff regulations and rules and the Human Resources guidelines on resignation and early retirement, the Tribunal agrees with the Respondent that they are only relevant to the issue under consideration insofar as they outline the process by which a staff member may resign and how the Administration is to accept this resignation. They do not address the decision not to accept the withdrawal of resignation. They are concerned with matters relating to acceptance of a resignation or early retirement. The Applicant did not request a management evaluation of any alleged decision not to accept her resignation.

36. The Applicant voluntarily resigned from her position. The legal consequences were that she unilaterally terminated her employment. Under the staff regulations and rules, she was perfectly entitled to do so. Having voluntarily resigned and having had her resignation accepted, the Applicant could not claim that the Respondent had not complied with her terms of appointment or the contract of employment.

37. In the absence of any proof of non-compliance with the terms of her appointment or contract of employment, the matter ought to have been dismissed on the ground of not being receivable *ratione materiae*, based on *Darwish* 2013-UNAT-369. In this judgment, the Appeals Tribunal held that a staff member's decision to request early voluntary retirement and the Administration's acceptance of such request does not give rise to a discretionary administrative decision for the purpose of an appeal. The Tribunal lacks jurisdiction to adjudicate on the application. (Referencing *Maghari* 2010-UNAT-039).

38. The facts in the case at bar are distinguishable from the above jurisprudence in that the Respondent suggested that he exercised managerial discretion not to accept the withdrawal of the resignation. In other words, although the staff regulations and rules do not give the Applicant a right to withdraw her resignation,

management may under certain circumstances consider accepting the request to withdraw a resignation for the proper administration of the Organization.

39. The Respondent's position conforms with the jurisprudence, in that a staff member may challenge a unilateral decision of the Administration involving the exercise of managerial power. For instance, in *Neupane* 2023-UNAT-1378, the Appeals Tribunal held, at para. 26, that (emphasis added):

... According to the consistent jurisprudence of this Tribunal, an administrative decision is defined as “a unilateral decision of an *administrative nature taken by the administration involving the exercise of a power* or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences”.

40. When exercising managerial discretionary authority, the Administration must act in good faith, fairly, transparently and in a non-discriminatory manner. The decision must not be arbitrary or motivated by factors inconsistent with proper administration. (See generally, *Assad* 2010-UNAT-021).

41. On its part, in exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct. (*Sanwidi* 2010-UNAT-084).

42. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration. (*Yolla Kamel Kanbar* 2021-UNAT-1082).

43. The starting point in that process of judicial review is the recognition that there is a presumption that official functions are regularly performed. The Respondent bears a minimal burden to show that he acted lawfully and procedurally. Once the presumption is discharged, the burden shifts to the Applicant who must rebut it through clear and convincing evidence that the impugned

decision is unreasonable or unfair or illegal or procedurally flawed or that it is marred by improper motive. (See *Rolland-UNAT-2011-122*).

44. In this case, it is not disputed that on 1 September 2022, the Applicant sent an email indicating her intention to voluntarily resign from ECLAC on 31 December 2022. The DDA duly accepted the resignation in accordance with the Human Resources guidelines by sending a return email after consulting with the Acting Executive Secretary. For a period of three-and-a-half months until 15 December 2022, the Applicant proceeded to undertake a series of actions aimed at facilitating the implementation of her resignation. She collaborated with the Human Resources Section to ensure the timely completion of all the procedures to give effect to her retirement from 31 December 2022 and attended staff meetings at which she bade her colleagues farewell.

45. The Respondent avers that he exercised his managerial discretion not to accept the Applicant's request to withdraw her resignation because the Applicant's action to resign had set in motion administrative processes within ECLAC that had legal implications on at least three other staff members. The resignation having been accepted, the Administration set forth recruitment processes to fill the Applicant's soon-to-be-vacant post. The Applicant's post was already filled by the time she submitted the request to withdraw her resignation. A candidate had been offered the position and had accepted. The post left by this candidate was also filled by a second staff member and her post was likewise filled by a third staff member. These staff members were waiting for the retirement date of the Applicant, 31 December 2022, to assume their new roles.

46. Consequently, had the Respondent not exercised his discretion to reject the Applicant's request to withdraw her resignation, he would have been compelled to rescind selection decisions already communicated and accepted by three other staff members. This would have constituted a breach of the employment contracts of the three staff members. This breach would have presented adverse legal consequences. Therefore, according to the Respondent, it was prudent to exercise the discretion in favor of not accepting the Applicant's request to withdraw her resignation.

47. The Applicant does not dispute that the Respondent had taken several steps toward implementing her decision to resign. For instance, she does not dispute that the Respondent had recruited her replacement or that the Human Resources Officers were actively collaborating with her to finalize her separation procedures. She also has not contradicted the Respondent that she took steps to implement her resignation, including, signing and personally delivering various forms such as those related to the pension fund and the after-service health insurance scheme, ASHI, and making enquires on the completion of her own performance evaluation as one of the conditions to finalize her separation procedures.

48. The Applicant has not adduced evidence that the Respondent acted in bad faith or that the decision was improperly motivated.

49. Further, the Applicant has not, at any point, alleged that she was coerced or pressured by the Administration to take the decision to resign from her employment. It was a voluntary decision which was accepted in accordance with the prevailing staff regulations and rules.

50. The Tribunal finds that it was reasonable under the circumstances of this case for the Respondent to exercise managerial discretion to not accept the Applicant's request to withdraw her resignation.

Conclusion

51. The Tribunal may rescind the impugned decision if satisfied that the exercise of managerial discretionary power was unlawful, unprocedural, or improperly motivated. The onus is on the Applicant to prove by clear and convincing evidence that such was the case. The Applicant having failed to establish any illegality, procedural irregularity, bad faith or improper motivation in the Respondent's taking of the decision not to accept her request to withdraw her resignation, the application must fail.

Judgment

52. In view of the foregoing, the application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 15th day of December 2023

Entered in the Register on this 15th day of December 2023

(Signed)

Isaac Endeley, Registrar, New York