UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/102
Order No.: 306 (NBI/2015) Corr. 1
Date: 30 September 2015
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SIRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON AN APPLICATION FOR SUSPENSION OF ACTION DURING THE PROCEEDINGS

AND ON A MOTION FOR A STAY OF PROCEEDINGS

Counsel for the Applicant:
Nicole Washienko, OSLA
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Counsel for the Respondent:
Alister Cumming, ALS/OHRM
Steven Dietrich, ALS/OHRM

Introduction

1. On 28 September 2015, the Applicant, a D-2 Director of Mission Support serving with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) filed an Application before the Dispute Tribunal challenging two administrative decisions, namely: 1) the decision to separate him from service on the basis of mandatory retirement ("separation decision"); and 2) the decision to undertake a recruitment process in relation to his post ("recruitment decision").

2. On the same date, the Applicant filed the present Application and Motion praying that the administrative decisions to separate him from service and to undertake a recruitment process in relation to his post be suspended pending the outcome of his Application on the merits.

3. The Applications and Motion were served on the Respondent on the same day and, on 29 September 2015, the Tribunal held a hearing.

4. The Parties filed their closing submissions on 29 September 2015.

Facts

5. On 30 November 1989, the Applicant was appointed to the United Nations Relief and Works Agency for Palestine Refugees (UNRWA).

6. From 1 February 2007 to 11 August 2008, the Applicant served as D-1 Senior Humanitarian Affairs Officer on a reimbursable loan from UNRWA to the United Nations Assistance Mission for Iraq (UNAMI).

7. From 12 August 2008 to 11 November 2009, the Applicant served as D-1 Chief Mission Support on a reimbursable loan from UNRWA to the United Nations Mission in the Central African Republic and Chad (MINURCAT).

8. On 16 December 2009, a Personnel Action Form was issued by UNRWA, which indicated that the Applicant was separated from UNRWA effective 11 November 2009.

9. Following a competitive recruitment process and separation from UNRWA, the Applicant joined the United Nations Secretariat on 12 November 2009 as Director of Mission Support (DMS). He has continued to work in that capacity up till the filing of this Application.

10. In an email dated 10 February 2015, the Applicant was informed by Ms. Chhaya Kapilashrami, Director, Field Personnel Division, Department of Field Support (FPD/DFS) that, based on the review of the records, his mandatory retirement date would be 30 September 2015 at the age of 60 years. The email is reproduced here:

> Dear [Applicant],
>
> Further to our discussion, my team has investigated and wish to confirm that your retirement date is at age 60 years old on 30 September 2015. Based on review of the records, you joined the UN system in UNRWA on 30 October 1989, prior to the cut-off date of 1 January 1990. This transfer without a break in service does not give rise to a new start in terms of the age of retirement which is 60 for all staff who joined the UN Common System prior to January 1990. Any extension beyond 30 September 2015 would be a retention in service which have (sic) to be decided by the relevant authorities with strong justification. *I realize that you were under a different impression based on the fact that you left the UN so would be happy to provide additional clarification. Copying Chaste/Steve to include them in this discussion.* (Emphasis added).

11. A series of exchanges continued thereafter and, on 15 July 2015, the Applicant was informed that after a review of his employment history and consultations with the Office of Human Resources Management (OHRM) and the Pension Fund, it was determined that his mandatory retirement age is 60 and that as a result of this decision, he would be separated on 30 September 2015.

12. On 4 August 2015, the Administration commenced a recruitment process in relation to the Applicant's post.

13. On 13 August 2015, the Applicant filed a Management Evaluation request regarding the separation decision.

14. On 24 September 2015, the Applicant filed a management evaluation request regarding the recruitment decision.

15. On 25 September 2015, the Management Evaluation Unit (MEU) rejected the Applicant's request regarding the separation decision and also rejected the Applicant's request regarding the recruitment decision.

Respondent's submissions on receivability

16. The Respondent challenged the Applicant's submission that the Respondent is estopped from raising receivability at this stage and submitted for his part that the said argument is without merit. He continued that the Under-Secretary-General for Management's letter of 25 September 2015 notifying the Applicant of the Secretary-General's decision to uphold the decision to separate the Applicant, expressly states *inter alia:*

> The Secretary-General expressly reserves the right to raise the issue of receivability at any subsequent hearing of this matter.

Accordingly, the Respondent may raise the matter of receivability at this stage.

17. The Respondent further argued that the Dispute Tribunal is not competent to order the reliefs sought by the Applicant. He pointed out that under art. 10. 2 of the Dispute Tribunal's Statute, the Tribunal may order temporary relief by suspending the implementation of a contested administrative decision during the proceedings, except in cases of appointment, promotion or termination.

18. According to him the present matter concerns a case of appointment. The Applicant challenges a decision to separate him from service on the grounds of mandatory retirement. Separation from service necessarily involves a decision involving appointment. The decision to undertake a recruitment process also involves appointment. Accordingly, the Dispute Tribunal lacks jurisdiction to order the suspension of the implementation of the contested decisions.

19. The Respondent's second submission with regard to receivability relates to time lines. He argued that the Application is not receivable *ratione temporis.*

20. In tracing the facts of the case, he pointed out that on 10 February 2015, the Director, FPD/DFS notified the Applicant that her team had investigated and wished to confirm that his retirement date is at age 60 on 30 September 2015. This

notification was clear and unambiguous. The time for filing a request for management evaluation therefore began to run when the Applicant was first notified that his mandatory retirement date would be 30 September 2015, that is, on 10 February 2015.

21. The Applicant should therefore have submitted a request for management evaluation within 60 days, that is, no later than 11 April 2015. Instead he waited until 13 August 2015.

22. Also on 10 February 2015, the Administration issued a letter of appointment to the Applicant, renewing his appointment until 30 September 2015. The Applicant signed this letter of 17 March 2015, with no reservation or caveat. Accordingly, the issuance of the letter in February 2015 shows that the decision notified to the Applicant on 10 February 2015 was final. Even if the 10 February 2015 notification was not final, then by the time of his signing the letter of appointment, the Applicant knew that he was to separate from service on 30 September 2015.

23. This decision was merely reiterated on 15 July 2015 and 27 July 2015. However, reiterated decisions, even when questioned by the Applicant, do not reset the time limits for requesting management evaluation.

24. It was clear that the decision had already been taken and was final. Even if the Applicant had a basis to believe that the matter was still under consideration that would not absolve him from his responsibility to comply with the statutory time limits.

25. With regard to the Applicant's challenge of the ongoing recruitment process for his post, the Respondent argued that the Applicant has made no submissions on the legality of the decision to commence a recruitment process beyond the assertion that, because the decision to separate him is unlawful, so must be the recruitment process. The Applicant is seeking to circumvent the time limits by challenging a separate decision to recruit a Director of Mission Support to replace him. As the Applicant may not challenge the separation decision, he may not attempt to challenge it through an appeal against a related decision.

26. In relation to the same issue, the Applicant has not identified a final administrative decision.

27. The Applicant has provided no authority for the proposition that a decision to start a recruitment process is a contestable decision. In *Ivanov* 2013-UNAT-378, the United Nations Appeals Tribunal (the Appeals Tribunal) held that there is only one administrative decision that completes the selection process. The selection procedure ends with the selection of the successful candidate, and it is this administrative decision that may be contested. All other decisions within the selection procedure are preparation for the final selection and do not amount to a contestable administrative decision.

28. This aspect of the Application is not receivable, since a decision to initiate recruitment is not an "administrative decision" subject to review by the Dispute Tribunal, as the impugned decision will not have any direct or actual effect on the Applicant's terms of appointment.

Applicant's submissions on receivability

29. It was argued on behalf of the Applicant that the Respondent's contention that the Application is not receivable *ratione temporis* is unfounded for two reasons:

a. The MEU did not conclude that the Applicant's request for management evaluation was time-barred. The said MEU renders decisions on behalf of the Secretary-General. When it concludes that a management evaluation request is receivable and proceeds to assess the merits of the case without raising any time bar issues, the Secretary-General is bound by this determination and cannot raise such arguments before the United Nations Dispute Tribunal (UNDT). The Secretary-General must be consistent in his submissions. He is therefore estopped from raising receivability arguments at such an advanced stage.

b. The Respondent relied on an email which was taken out of context. On 11 February 2015, as soon as the Applicant wrote back to Ms.

Kapilashrami providing additional information regarding his mandatory retirement age, she immediately responded with the following email:

> *Thanks Guy. Thanks for the additional details which you mentioned below and* (sic) *wanted to get the details from you. I will ask my team what is possible given that your desire is to be employed for another year – please confirm.*
>
> *Regards Chhaya*

c. The Applicant, Ms. Kapilashrami and Mr. Chaste subsequently met to discuss options for resolving this matter.

d. The contested decision could not have crystalized or become final until 15 July 2015. The Applicant had no basis to challenge a decision which was not final. If the Applicant had challenged the decision in February 2015, the Respondent would have argued that his challenge is premature.

e. Again, the Respondent argues that the Applicant's mandatory retirement age has always been 60. According to the Respondent, nothing changed in the Applicant's status as a result of his appointment with the United Nations Secretariat in 2009. If this argument is retained, then there could not have been any decision rendered in February 2015 by Ms. Kapilashrami. According to the Respondent, there was no decision to be made and Ms. Kapilashrami's communication dated 11 February 2015 was a mere exchange of information.

f. The Respondent argues that the Application is not receivable because separation from service as a result of mandatory retirement is a matter related to appointments. The Respondent relies on two cases rendered by the Appeals Tribunal. These are *Benchebbak* 2012-UNAT-256 and *Onana* 2010-UNAT-008.

g. In *Onana*, the Dispute Tribunal had suspended the implementation of the administrative decision under Rule 13 pending the outcome of the application on the merits before the UNDT. This case did not deal with the

limitations set out in art. 14 of the UNDT Rules of Procedure. Therefore, this case is completely irrelevant for the purposes of determining whether this application is receivable under art. 14 of the Rules of Procedure.

h. In *Benchebbak*, the Appeals Tribunal reversed the Order issued by the Dispute Tribunal suspending the implementation of the administrative decision beyond the issuance of the management evaluation decision. Once again, the facts are significantly different. In that case, the impugned decision was a refusal to extend or renew the appointment of a staff member. It is not in dispute that the *Benchebbak* case dealt with a matter that can be considered as an appointment.

i. However, in the present case, the Applicant's appointment is not at issue. The sole reason for the Applicant's separation is his alleged mandatory age of retirement. This is not an appointment and cannot possibly be construed as one.

j. Neither can this decision be construed as termination because staff rule 9.5 states that "retirement under article 28 of the United Nations Joint Staff Pension Fund Regulations shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules".

k. If the Respondent's argument on this point is retained, the Dispute Tribunal would effectively be deprived of its powers under art.14 of the UNDT Rules of Procedure.

30. With regard to the Respondent's argument that the Applicant ought to have challenged the extension of his appointment until 30 September 2015 which is shorter than what he would have otherwise obtained, it is submitted that the decision to renew a fixed-term appointment, even for a term that the staff member finds unsatisfactory, cannot be contested before the Tribunal. It is only if a contract expires and is not renewed that the Applicant may contest the decision not to renew it, as that would clearly constitute an adverse decision as held in *Oummih* UNDT/2013/045.

Considerations on receivability

31. Firstly, regarding the issue of time lines for bringing the Application challenging the decision as to the Applicant's retirement date, having carefully reviewed the wording of the 10 February 2015 email from Ms. Kapilashrami to the Applicant, the Tribunal is persuaded that the Administration had not made a final decision on the issue of the Applicant's retirement age as at that date. The email clearly shows that the issue was still subject to ongoing discussions. The final decision on the question of when the correct date for the Applicant's retirement should be was made on 15 July 2015 and the time limits for challenging the decision began to run on that date.

32. Secondly, Counsel for the Respondent submitted that the Applicant is challenging a decision to separate him from service on the grounds of mandatory retirement and that the Tribunal does not have the jurisdiction to hear the Application because art. 10.2 of the Statute of the Dispute Tribunal forbids the grant of an order for temporary relief in cases of appointment, promotion or termination. It is the Respondent's submission that the present matter concerns a case of appointment and that "separation from service necessarily involves a decision involving appointment".

33. The principal issue for determination in this case is whether the applicable law governing the Applicant's retirement has been applied correctly in respect to his case. The prohibition in art. 10.2 of the Statute of the Dispute Tribunal, which covers cases of appointment, promotion or termination is not applicable here. This is not a case of appointment. This is clearly a case in which the Applicant challenges a retirement date set by the Respondent for being in violation of the applicable rules. Even if in the process of determining the proper date of the Applicant's recruitment, the date of his appointment is an issue to be taken into account, this does not convert the instant Application into a case of appointment.

34. The issue of the commencement of the recruitment process for the post currently encumbered by the Applicant is intertwined and closely linked with the issue of his retirement. This fact renders an Application on that score receivable in itself.

35. In view of the foregoing, the Tribunal finds and holds that the present case is receivable.

Applicant's submissions on the merits

a. Application for grant of Stay of Proceedings Pursuant to Art. 19 and 36 of the Rules of Procedure

36. In *Villamoran* 2011-UNAT-160, the Appeals Tribunal held that where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under art. 13 of the Rules of Procedure of the UNDT have elapsed, and where the UNDT is not in a position to take a decision under art. 2.2 of the UNDT Statute, that is, because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render art. 2.2 of the UNDT Statute and art. 13 of the UNDT Rules of Procedure meaningless in cases where the implementation of the contested administrative decision is imminent.

37. The Applicant's appointment with the United Nations Secretariat expires on 30 September 2015. The Applicant sought management evaluation of the separation decision on 13 August 2015. He also sought an Application for a suspension of action in accordance with art. 13 of the UNDT Rules of Procedure.

38. In light of the fact that the Administration has determined that the Applicant must separate on 30 September 2015, it has undertaken a recruitment process with respect to the Applicant's post. The Applicant sought management evaluation of this recruitment decision on 24 September 2015 and also sought suspension of action in accordance with art. 13 of the UNDT Rules of Procedure.

39. The MEU rejected both of the Applicant's requests for management evaluation thereby rendering his applications for suspension of action under art. 13 moot.

40. The Applicant seeks to suspend implementation of the separation decision but he was unable to file an application for suspension of action under art. 14, five

working days prior to the date of his separation as required under art. 14.3 of the Rules of Procedure.

41. In the same manner, the Applicant also seeks to suspend the recruitment process undertaken in relation to his post but again was unable to file an Application for suspension of action under art. 14, five working days prior to the likely finalization of this process as required under art. 14.3 of the Rules of Procedure.

42. The Applicant's separation will occur before the UNDT will have sufficient time to adjudicate the Application for suspension of action under art. 14 of the UNDT Rules of Procedure. Since the Job Opening for the Applicant's post closed approximately one and a half months ago, after being advertised for a mere twelve days, it is also likely that the recruitment process for this post will be finalized before the Tribunal will have time to adjudicate the Application for suspension of action under art. 14 of the UNDT Rules of Procedure.

43. Consequently, in order to preserve his contractual rights, the Applicant requests the Tribunal to provisionally suspend implementation of the separation decision, as well as the ongoing recruitment process, pending the adjudication of this Application for suspension of action pursuant to art. 14 of the UNDT Rules of Procedure.

b. Application for a suspension of action under art. 14 of the Tribunal's Rules of Procedure

Prima facie unlawfulness

44. The separation decision is unlawful for two reasons:

a. The Applicant's mandatory retirement age is 62.

b. The Applicant has a legitimate expectation to retire at the age of 62.

45. A staff member's mandatory age of separation for retirement is regulated by the Staff Regulations of the employing organization.

46. The mandatory retirement age of any staff member employed by an international organization that is part of the United Nations Common System depends on the following two factors: (a) entry on duty date (EOD); and (b) employing entity.

47. Until recently, for a majority of organizations that are part of the United Nations Common System, the mandatory age of separation was 60 years of age for staff whose service began prior to 1 January 1990 and 62 for those who were appointed with their organization on or after that date.

48. In the present case, the Applicant's mandatory separation date is determined by the Staff Regulations and Rules of the United Nations Secretariat. His initial entry on duty in UNRWA is irrelevant for two reasons. First, UNRWA has its own Staff Rules and Regulations. Second, the Applicant has severed all contractual links with UNRWA and therefore, cannot be governed by Staff Rules and Regulations of an entity for which he no longer works.

49. The provision that applies to the Applicant is staff regulation 9.2 which stipulates:

> Staff members shall not be retained in active service beyond the age of 60 years or, if appointed between 1 January 1990 and 31 December 2013, beyond the age of 62 years or, if appointed on or after 1 January 2014, beyond the age of 65 years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.

50. The meaning of the term "staff member" in the context of the United Nations Staff Rules and Regulations is provided in their preamble. The preamble provides that,

> For the purposes of these Regulations, the expressions […] "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter.

51. Regulation 9.2 applies exclusively to staff members of the United Nations Secretariat. This provision does not mention or otherwise refer to staff members of other international organizations within the United Nations Common System.

52. The term "appointment" is not defined in the Staff Rules and Regulations. However, several provisions assist in determining when an appointment occurs within the meaning of Staff Rules and Regulations.

53. Staff regulation 4.1 and staff rule 4.1 make it clear that the term "appointment" refers to appointments in the United Nations Secretariat.

54. In applying staff regulation 9.2, one must determine the age of a current staff member's mandatory retirement age on the basis of his EOD date with the United Nations Secretariat. Staff regulation 9.2 does not allow the Administration to take into consideration the EOD dates with other organizations within the United Nations Common System. Upon accepting an appointment with the United Nations Secretariat, the Applicant was explicitly separated from UNRWA. There are at least two documents establishing that prior to joining the United Nations Secretariat, the Applicant was first separated from UNRWA. Separation from service from one organization entails a fresh appointment with another organization. There can be no continuation in service when a staff member separates from one entity in order to join another.

55. The Respondent has been consistently arguing before this Tribunal that as soon as there is a separation from service, there is inevitably a break in service. The Respondent relies on staff rule 4.17(b) in support of his arguments that any break in service, irrespective of whether or not it is for administrative reasons only, resets the clock for the purposes of determining a staff member's terms of appointment. The Respondent must be consistent in the way he interprets and applies Staff Rules and Regulations. He cannot change his interpretation of statutory provisions depending on what suits him better in a particular case.

56. The plain reading of the Staff Regulations and Rules mandates a finding that the contested decision appears to be at least *prima facie* unlawful.

57. Another issue which arises for consideration in this Application is that of legitimate expectation. The Respondent acted on several occasions in a manner which gave the Applicant a legitimate expectation that he would be allowed to remain in service until the age of 62 as the following facts show:

a. The Administration informed the Applicant that he had to separate from UNRWA in order to accept a new appointment with the United Nations Secretariat.

b. The Respondent required the Applicant to make a written declaration in accordance with staff regulation 1.1(b). If the Applicant had not been separated from service, the Respondent would not have required him to make that written declaration.

c. The Respondent issued a Personnel Action (PA) and entered into the Integrated Management Information System (IMIS) system the Applicant's entry on duty date with the United Nations Secretariat.

d. The IMIS printout placed before the Tribunal clearly shows that the date of the Applicant's mandatory retirement is 30 September 2017.

e. A reasonable person placed in the same circumstances would assume that this information is accurate.

58. The reasons provided by the Administration in support of the decision that the Applicant's due retirement date is 30 September 2015 are unfounded. On 15 July 2015, Ms. Kapilashrami wrote to inform the Applicant of the Respondent's decision. In her email, Ms. Kapilashrami appears to rely on three elements:

a. She states that the Applicant was transferred to the United Nations Secretariat from UNRWA. This is contradicted by the documentary evidence showing that the Applicant was separated from service before joining the United Nations Secretariat. In any event, the United Nations Staff Rules and Regulations do not define the term "transfer" and do not specify how a transfer is implemented.

b. Staff rule 4.1 stipulates that the letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.

c. The Respondent cannot introduce terms and conditions that are neither in the Applicant's letter of appointment nor in the United Nations Staff Rules and Regulations.

d. Ms. Kapilashrami seems to believe that because the Applicant retained his mobility counts, there had never been a break in service. However, the Administrative Instruction governing the mobility scheme applicable at the time, ST/AI/2007/1, (Mobility and Hardship Scheme) (as amended by ST/AI/2011/6) specifically provided at paragraph 2.3 that "Separation due to other occurrences, such as non-renewal of fixed-term appointment, or separation to take up another appointment within the United Nations common system, shall not break the period of service for the purposes of this section."

e. Ms. Kapilashrami's email refers to the Applicant's continuous contribution to the Pension Fund since 1989 without any interruptions. This argument has no bearing on the Applicant's mandatory retirement age. The date a staff member becomes a participant of the United Nations Joint Staff Pension Fund (UNJSPF) can have no incidence on the date of his mandatory retirement age. It only affects the duration of the staff member's contributory service and therefore his pension benefits.

f. Article 21(b) of the UNJSPF Regulations and Rules explicitly provides that contributory service is not interrupted by a mere separation from service if a staff member resumes contributions within 36 months of his separation.

Urgency

59. The Applicant's appointment expires on 30 September 2015. Further, the recruitment for the Applicant's post is currently ongoing and no final decision on the selected candidates has been disseminated. However, the Applicant understands that the Administration is seeking to fill the post as soon as possible and that a decision on the recruitment exercise is imminent, particularly in light of the fact that the Job Opening for the post closed almost a month and half ago, after being advertised for a mere twelve days.

Irreparable harm

60. If the Applicant's appointment is allowed to expire and/or if another individual is offered his post as a result of the recruitment process, his employment prospects with the United Nations will be significantly and adversely affected.

61. The suspension of action is the only remedy available to the Applicant which can prevent the Administration from unlawfully depriving him of two years of employment.

62. No amount of monetary compensation can adequately repair damages caused by such an egregious violation of a staff member's fundamental rights.

Respondent's submissions on the merits

Prima facie unlawfulness

63. The Applicant's mandatory retirement date is 30 September 2015. The General Assembly has set the mandatory retirement age for staff members. The Administration does not have any discretion to deviate from it.

64. Staff regulation 9.2 provides:

> Staff members shall not be retained in active service beyond the age of 60 years or, if appointed between 1 January 1990 and 31 December 2013, beyond the age of 62 years or, if appointed on or after 1 January 2014, beyond the age of 65 years. The Secretary-

> General may, in the interest of the Organization, extend this age limit in exceptional cases.

65. Accordingly, a staff member's mandatory age of retirement is determined on the basis of the staff member's initial appointment or entry into duty in the United Nations Common System and covers the period of the staff member's continuous service. Where a break in service interrupts a staff member's continuity of service, the staff member's reappointment is considered a new appointment under staff rule 4.17. For purposes of staff regulation 9.2, the period of continuous service commences from the date of the staff member's reappointment.

66. The Applicant's reimbursable loan from UNRWA to the United Nations Secretariat, which covered the period from 1 February 2007 to 11 November 2009, and his subsequent transfer on 12 November 2009 was in accordance with staff rule 4.9(a), which provides:

> 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.

67. Accordingly, the Applicant's movement was governed by the Inter-Organization Mobility Accord to which UNRWA is a party.

68. The Applicant expressly agreed to a transfer, on 12 November 2009. During the hearing, the Applicant sought to argue that his agreement was not related to this particular transfer from UNRWA to MINURCAT. However, the surrounding circumstances – his selection for the Director of Mission Support position and his previous loans to MINURCAT – make it clear that his signature could only have related to his transfer from UNRWA to MINURCAT.

69. Article 5.1 of the Accord, which applies to transfers provides:

> Service in the Releasing Organization shall be counted for all purposes, including credit towards within-grade increments, as if it had been made in the Receiving Organization at the duty station(s) where he/she actually served.

70. When agreement was reached regarding the Applicant's transfer to the United Nations Secretariat effective 12 November 2009, and pursuant to article 5.1 of the Accord, the Applicant's administrative entitlements, benefits and rights became subject to the United Nations Secretariat's Staff Regulations and Rules. This included, for the purposes of retirement age under Staff Regulation 9.2, carrying the Applicant's date of entry in service at UNRWA forward into the United Nations Secretariat.

71. Accordingly, as the Applicant served continuously without a break in service since his initial appointment in UNRWA on 30 November 1989, he will reach the mandatory retirement age of 60 years on 30 September 2015, pursuant to staff regulation 9.2.

72. Although there was an error in the Applicant's IMIS record, this cannot supersede the plain meaning of the relevant Staff Regulation. For staff members who transfer from another United Nations Agency, Fund or Programme to the Secretariat where the IMIS systems are not the same, the Entry On Duty Common System (EOD CS) and EOD United Nations should reflect the date they first joined the United Nations system (*e.g.*, 30 November 1989 in the Applicant's case). However, the EOD CS and EOD UN in IMIS are by default set to the initial appointment date with the United Nations Secretariat which, in the Applicant's case, automatically reflected the date when he commenced his reimbursable loan, that is, 1 February 2007. This IMIS data oversight was rectified manually when a correction was processed to reflect 30 November 1989 as the correct date for both EOD CS and EOD UN.

73. The entry in IMIS was an error. The Applicant continued to be a staff member of UNRWA during the entire period of his reimbursable loan from 1 February 2007 to 11 November 2009 and was subject to UNRWA's Staff Regulations and Rules. The commencement of his reimbursable loan on 1 February 2007 cannot therefore be considered as a new appointment within the meaning of former staff rule 104.3, now staff rule 4.17, which would reset his retirement age to 62 years pursuant to former staff regulation 9.5, now staff regulation 9.2.

74. While the Applicant's IMIS PAs containing the erroneous EOD entries have since been rectified, these PAs, by themselves, are mere administrative tools and not a record of his rights and entitlements as a staff member, and therefore cannot create such a right in and of themselves. These IMIS PAs are neither sufficient to overcome the official documentary record of the Applicant's reimbursable loan and subsequent transfer from UNRWA in line with the provisions of the Accord. Neither can it be used as a justification not to apply the Organization's policy on retirement age in the Applicant's case.

75. The Applicant claims that he was explicitly separated from UNRWA upon accepting an appointment with the United Nations Secretariat. While the term "separation" was used by UNRWA in the Applicant's administrative details for its own administrative purposes, this cannot change the fact that the Applicant was transferred, as agreed to by the Applicant himself and by UNRWA, without any break in the continuity of the Applicant's United Nations service and in line with the Accord to which UNRWA is a party. As a result of the Applicant's transfer, his benefits and entitlements, including his annual leave balance and service credits for home leave were carried over to the United Nations Secretariat.

76. Had the Applicant been separated from service from UNRWA, he would have been paid by UNRWA in commutation of his accrued annual leave up to a maximum of 60 days pursuant to UNRWA staff rule 109.7(i), which provides:

> UNRWA Rule 109.7(i) on Commutation of Accrued Annual Leave provides as follows: "If, upon separation from service, a staff member has accrued annual leave, the staff member shall be paid a sum of money in commutation of the period of such accrued leave up to a maximum of 60 working days. The payment shall be calculated:
>
> (i) For staff in the Professional and higher categories, on the basis of the staff member's net base salary plus post adjustment.

77. The Applicant was not paid for this accrued leave when he transferred from UNWRA to the United Nations Secretariat. In order for there to have been a break in service, the break must have been of sufficient duration to constitute a genuine separation and subsequent reappointment to the Organization.

78. Furthermore, there is a limit to the extent that staff members may request a *post hoc* review, made years later, of the circumstances surrounding their separation from service.

79. Where a staff member does not appeal their "transfer" and seek to be formally recognized as having "separated" at the time of such occurrence, they cannot later argue that their transfer cannot be relied on in subsequent decisions Accordingly, the Applicant cannot now claim that his transfer in 2009, which did not involve any resignation or break in service and where his UNRWA entitlements such as annual leave and home leave service credits were carried over to the United Nations Secretariat, interrupted his continuous service with the Organization.

80. The Applicant cannot claim that he had no legitimate expectation that his retirement age was at 62 years. A claim of legitimate expectation can only arise out of a firm commitment. For a legitimate expectation to arise, the Administration must make an express promise to the staff member which the staff member then relies upon to his or her detriment. The Applicant bases his claim of legitimate expectation on a PA form from UNRWA showing that he had been separated, the fact that he made a written declaration under staff regulation 1.1(b) and his IMIS record. None of these supersede the plain terms of staff regulation 9.2 and article 5.1 of the Accord.

81. In any event, the Applicant's assertion that he relied on his EOD date in his IMIS record is undermined by his inability to explain to the Dispute Tribunal the meaning of the various EOD dates shown on his personnel action forms. If the Applicant is unable to describe the meaning of these dates, then he was not in a position to rely on them as a clear expression of the Administration's position. Furthermore, the Applicant was unable to point to any IMIS record which showed a retirement date, or any other communication, that expressly showed his retirement date as 30 September 2017.

82. Furthermore, he clearly must have understood that the EOD dates on his PA were incorrect. The EOD dates incorrectly showed that he joined the United Nations Common System on 1 February 2007. The Applicant was on a

reimbursable loan from UNRWA to MINURCAT at that time. Accordingly, his EOD date in the United Nations Common System was his appointment date with UNRWA, that is, 30 November 1989. It is not credible for the Applicant to maintain that he thought his appointment date in the United Nations Common System was 1 February 2007.

83. Even if there was a legitimate expectation based on the Applicant's IMIS record, this expectation cannot have existed after 10 February 2015, when the Administration notified the Applicant that his date of mandatory retirement was to be 30 September 2015. Whether or not that notification was final, from that date onwards, the Applicant was on notice that he could no longer rely on any representation that his retirement date was in 2017. Furthermore, the Applicant signed his most recent Letter of Appointment on 3 March 2015, which clearly indicates the date of the expiration of his appointment with the Organization on 30 September 2015 that is, the mandatory retirement date. The Applicant did not challenge his date of mandatory retirement as reflected in his seven month renewal of appointment.

84. The decision to undertake a recruitment process in view of the Applicant's anticipated retirement was lawful. Section 3.2 of ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees*)* provides that,

> [h]eads of departments and offices shall regularly monitor all vacancies that are foreseen to occur in their department or office, normally as a result of staff reaching mandatory age of separation, and shall take all necessary steps to ensure that such vacancies are advertised (…) at least six months before the anticipated vacancy occurs.

85. On this basis, DFS was legally required to advertise Job Opening 15-ADM-MONUSCO- 46041-D-KINSHASA, in view of the Applicant's impending mandatory retirement.

Urgency

86. In relation to the challenge to the decision to separate the Applicant from service, there is no situation of urgency in this case. The requirement of particular urgency is not satisfied if the urgency was self-created or caused by the staff member seeking relief.

87. The Applicant was notified of the decision on 10 February 2015. Instead of challenging the unequivocal and final decision at that time, he chose to wait six months before challenging the decision before the MEU.

88. In relation to the decision to undertake a recruitment process, the process is ongoing. The evaluation of candidates is still ongoing and no selection of a candidate to fill the position has been made yet. Currently, short-listed candidates for this and similar vacancies at the same level are being assessed. Selection is not imminent and there is therefore no urgency.

89. The contested Job Opening was posted on 4 August 2015, with a closing date of 16 August 2015. Accordingly, more than six weeks have lapsed between the posting and the date of the Application. The Applicant was entitled to challenge the contested decision earlier, but instead chose to wait. Accordingly, any urgency was created by his own actions.

Irreparable harm

90. Any harm suffered by the Applicant can be compensated financially. Furthermore, as the Applicant has known his mandatory retirement date since 10 February 2015, and the need to recruit to replace him, he has had ample time to mitigate any damage he may suffer. Accordingly, the Applicant has failed to establish irreparable harm.

Considerations

91. Article 10.2 of the Statute of the Dispute Tribunal stipulates:

> At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative

> decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

92. Article 14 of the Tribunal's Rules of Procedure under which the instant Applications are brought makes near-identical provision as follows:

> At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

93. Based on the foregoing provisions, the Tribunal has the power to order suspension of a decision only if all three cumulative conditions, namely prima facie unlawfulness, particular urgency and irreparable damage, are fulfilled. It is well-settled jurisprudence that in case one or more conditions are missing no interim measures can be ordered.

Prima facie unlawfulness

94. In canvassing the issue of whether the decision to set the Applicant's retirement age at 60 years is unlawful, the Applicant's counsel's position is that the said decision is unlawful.

95. It was argued on behalf of the Applicant that upon the expiry of his release on a reimbursable loan by UNRWA to the United Nations Secretariat on 11 November 2009 during which he had served in different United Nations Peacekeeping missions, the Applicant joined the Secretariat on 12 November 2009 as Director of Mission Support for MONUSCO following a competitive selection process. He was thereafter issued a letter of appointment which he signed and returned. He was also required to sign the declaration mandated by staff regulation 1.1(b) of the Staff Rules and Regulations. He was paid a relocation grant as is done for those joining the service and given a new index number. He duly separated from UNRWA.

96. The Applicant placed before the Tribunal a letter from UNJSPF dated 1 February 2010 stating that he separated form UNRWA on secondment to MINURCAT on 11 November 2009. Also before the Tribunal is a PA form from UNRWA stating that the Applicant had separated from the Organization on secondment and that the said separation became effective on 12 November 2009.

97. It has also been argued on behalf of the Applicant that all the Personnel Action forms raised and issued by the Secretariat with regard to his employment for 2011, 2012 and 2014 show that upon leaving UNRWA, he entered into service with the Secretariat in 2007. The Applicant has relied on these and on IMIS records which show that he is due for retirement in 2017 rather than in 2015 as claimed by the Respondent. It was submitted for the Applicant that these representations create a legitimate expectation upon which the Applicant could rely.

98. The Respondent for his part countered that the decision that the Applicant's proper retirement age is 60 rather than 62 years is lawful.

99. The gravamen of the Respondent's case in this Application is that the Applicant joined the Secretariat on a transfer and not on a new appointment. He argued that the Applicant had agreed to a transfer from UNRWA to the Secretariat following the expiry of his service on a reimbursable loan which meant that all his accrued entitlements from UNRWA including his accrued leave days were carried over when he joined the Secretariat.

100. He additionally argued that the Applicant did not have any 'genuine break in service' and that his joining the Secretariat in November 2009 therefore did not constitute a new appointment.

101. With regard to his submission that the Applicant had consented to a transfer to the Secretariat after leaving UNRWA, the Respondent tendered a one-line document before the Tribunal in which it was stated: 'I wish to be transferred to the mission post effective 12 November 2009'. Although the said one-line document was signed by the Applicant, there was no context to the said document.

102. Although both parties to this Application argued their issues extensively and cited several legal authorities in support, this Tribunal having perused them has decided that no good would be done at the level of this interlocutory Application by delving into an examination of the authorities cited.

103. On a proper examination of the arguments however, the Tribunal is persuaded that there is a triable issue before it and that the Applicant has discharged the burden of showing that a *prima facie* case arises here deserving the full determination of the Tribunal. The Tribunal also finds that the other statutory requirements of urgency and irreparable harm have been satisfied in accordance with art. 10.2 of the Statute of the Dispute Tribunal and art. 14 of the Rules of Procedure.

Conclusion

104. In view of the foregoing, the motion for interim measures is successful.

105. The decision to separate him from service on the basis of mandatory retirement and the decision to undertake a recruitment process in relation to his post are suspended until the determination of the case on the merits.

106. The Tribunal shall issue an order setting an accelerated hearing date for the Application for early November 2015.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of September 2015

Entered in the Register on this 30th day of September 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi