



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/061

Order No.: 115 (NY/2022)

Date: 30 December 2022

Original: English

Before: Judge Francis Belle
Registry: New York
Registrar: Pallavi Sekhri, Officer-in-Charge

MOUCHABEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jenny Kim, ALD/AS/OHR, UN Secretariat

Introduction

1. On 23 December 2022, the Applicant, a staff member with the United Nations Economic Commission for Latin America and the Caribbean (“ECLAC”), filed an application for suspension of implementation of the decision to not accept her request to withdraw her resignation from the Organization effective 31 December 2022 pending management evaluation.

2. On 29 December 2022, upon the order of the Tribunal, the Respondent filed his reply stating that the Applicant has failed to establish that the three requirements for suspension of action were met in this case.

Factual background

3. On 1 September 2022, the Applicant gave notice of her decision to resign from the Organization, and take early retirement, effective 31 December 2022.

4. On 1 September 2022, the Director of Administration accepted the Applicant’s resignation on behalf of the Acting Executive Secretary.

5. From 1 September 2022 until 15 December 2022, the Applicant worked with the Human resources (“HR”) Section to complete the administrative procedures necessary for her separation.

6. On 16 December 2022, the Applicant sent an email to the HR Section, stating that she had decided to withdraw her resignation and continue working at ECLAC beyond 31 December 2022.

7. On 19 December 2022, the HR Section communicated to the Applicant the Head of Entity’s decision to not accept the Applicant’s withdrawal of her resignation, which she had confirmed in writing on 1 September 2022 and followed through up until 15 December 2022.

8. On 23 December 2022, the Applicant filed a request for a management evaluation of the contested decision. On the same day, she filed the present application.

Consideration

Legal framework

9. Under art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Rules of Procedure, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision *appears prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can only suspend any contested administrative decision if all three requirements have been met.

Prima facie unlawfulness

10. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

11. The Applicant's principal submissions may be summarized as follows:

- a. The decision to separate the Applicant for early retirement is *prima facie* unlawful;
- b. The Applicant can only be separated for early retirement if she makes such a request to the Organization;
- c. The Organization does not have the authority to unilaterally separate the Applicant from her position until the Applicant reaches the mandatory age of retirement;
- d. There is no rule that prevents staff from reviewing a process before formal acceptance;

- e. The Respondent has violated staff rule 9.2 (c) as the Applicant did not submit a formal request for early retirement; and
- f. The Applicant should not have to bear the cost of the administrative procedures relating to the withdrawal of her request for resignation.

12. The Respondent's principal submissions may be summarized as follows:

- a. The contested decision is lawful. Pursuant to Chapter IX of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), the Head of Entity (i.e., the Acting Executive Secretary of ECLAC) has the discretionary authority to not accept the Applicant's request to withdraw her resignation. A staff member does not have a right to acceptance of a request to withdraw a resignation, and there is no legal obligation on the part of the Organization to accept a request to withdraw a resignation;
- b. The contested decision was a reasonable exercise of the Head of Entity's delegated authority. In good faith, the Organization relied on the Applicant's decision to resign and take early retirement, as communicated to the Organization on 1 September 2022 and consistently affirmed by actions on the part of both the Applicant and the Organization until 15 December 2022;
- c. In taking the contested decision, the Organization considered relevant matters. Particularly, the Organization considered that the Applicant's resignation was submitted on 1 September 2022 and promptly accepted the same day. The Applicant made clear that her last day would be 31 December 2022. The Organization also considered that the formalities and actions corresponding to the separation process had been completed, including generation of a Personnel Action in Umoja for Resignation – Early Retirement, effective 1 January 2023; and

- d. Additionally, the Organization considered that, on good faith reliance on the Applicant's decision to resign, as communicated on 1 September 2022 and consistently affirmed until 15 December 2022, the Organization entered into legally binding employment commitments with three other staff members (offers extended and accepted). Acceptance of the Applicant's request to withdraw her resignation would have been prejudicial to the three staff members who had already accepted their employment offers.

13. The Tribunal's considers that the essence of the Applicant's case is that the contested decision is *prima facie* unlawful as it violates staff rule 9.2(c) on Resignation because she did not submit a formal request for early retirement and that she did not receive a formal acceptance of her resignation for early retirement. The Applicant further argues that in not accepting her request to withdraw her resignation, the Organization is unilaterally taking action to retire her before she reaches the mandatory age of retirement.

14. On review of the record, the Tribunal finds that the Applicant has not met her burden of proof regarding her allegation that the contested decision is *prima facie* unlawful.

15. First, there seems to be no violation of staff rule 9.2(c) as alleged by the Applicant. Staff rule 9.2(c) states that "[t]he Secretary-General may require the resignation to be submitted in person in order to be acceptable." The evidence establishes that on 1 September 2022, the Applicant gave written notice that she would resign and take early retirement effective 31 December 2022. On 1 September 2022, the Director of Administration accepted the Applicant's resignation on behalf of the Acting Executive Secretary. That fact the Secretary-General did not require that the Applicant submit her resignation in person does not render the Applicant's 1 September 2022 resignation to be a violation of staff rule 9.2(c). The Respondent correctly notes that "may" does not mean "shall" for the purposes of staff rule 9.2(c).

16. Second, the Applicant's communications with ECLAC, her communications with the HR Section, and her conduct from 1 September until 15 December 2022, wherein the Applicant affirmatively followed up with the HR Section regarding whether the administrative procedures necessary for her to separate on 31 December 2022 had been

completed demonstrate that she understood that the Administration had accepted her resignation, and was taking formal action in that regard. The Applicant cannot therefore claim legitimate expectancy that her appointment would continue beyond 31 December 2022.

17. Third, the Tribunal finds no evidence to support the Applicant's contention that there was a unilateral decision on the part of the Organization to force the Applicant to retire before she reaches the mandatory age of retirement. The Staff Regulations and Rules clearly define resignation as "separation initiated by a staff member." The evidence on record is that the Applicant initiated her resignation on 1 September 2022, when the Applicant gave written notice that she would resign and take early retirement effective 31 December 2022.

18. The Tribunal understands that the Applicant no longer wishes to proceed with her request for early retirement but finds no *prima facie* unlawfulness in ECLAC's discretionary decision to not accept the Applicant's request to withdraw her resignation from the Organization.

19. As the Tribunal finds that the first element for the granting of an order for suspension of action is not satisfied, the other two conditions do not need to be considered and suspension of action cannot be granted.

Conclusion

20. In light of the above, the Tribunal rejects the application for suspension of action.

(Signed)

Judge Francis Belle

Dated this 30th day of December 2022