



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

SOLOMON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Bettina Gerber, UNOG

Introduction

1. In an appeal submitted on 9 February 2010 to the United Nations Dispute Tribunal (UNDT), the applicant contests the decision of the Director of Administration, United Nations Office at Geneva (UNOG), not to grant him an agreed termination.

Facts

2. The applicant joined the Organization in 1979 on a short-term contract as a Distribution Clerk at the G-1 level, in the Publishing Service, Conference and General Services, UNOG. After several short-term and fixed-term appointments, the applicant was granted a permanent appointment as File Clerk on 1 April 1984. He was promoted to the G-4 level in January 1993 and was granted a Special Post Allowance at the G-5 level from 1 June 1994 to 31 March 1995. Effective 1 December 2001, the applicant was promoted to the G-5 level as Archives Assistant. On 30 September 2009, the applicant retired.

3. On 26 May 2008, the Chief, Registry, Records and Archives Unit, wrote a note for the file regarding the physical difficulties the applicant claimed to have in performing his duties. In this note, she stated that, because she had noticed that acute back pains affected the applicant, she wanted to clarify the issue of his physical ability to continue performing his tasks. She thus decided to ask UNOG Medical Service to contact the applicant and to conduct a medical evaluation.

4. In a report dated 20 August 2008, the Joint Medical Service, UNOG, conducted a medical review of the applicant's conditions of work ("visite de poste"). They concluded that the applicant was able to perform his duties and recommended that his efforts to carry out his tasks should be taken into account.

5. On 17 September 2008, a meeting took place between the applicant, a former member of the Coordinating Council and the Chief, Registry, Records and Archives Unit, UNOG. During the meeting, the applicant and the former member of the Coordinating Council stated that, in accordance with the General Service Point Rating Worksheet for the applicant's post and the manual used by the Human Resources Management Service (HRMS) for the classification of posts,

the points awarded to the applicant's post under "Physical effort and Environment" were incorrect. The former member of the Coordinating Council suggested that the Unit and the applicant request the reclassification of the applicant's post which in his view could be graded G-6. He also advised the applicant that the reclassification of his post would be time-consuming and that a request for early retirement might be a better solution. After further discussions, the applicant requested that the Chief, Registry, Records and Archives Unit, discuss the possibility of negotiating an early retirement with the Chief Librarian, UNOG.

6. By memorandum dated 25 September 2008, the Chief Librarian requested the Chief, HRMS, that "a negotiation for an early retirement for [the applicant] be considered".

7. By e-mail dated 12 November 2008, a Human Resources Officer (HRO) replied to the Chief Librarian that the applicant was due to retire on 30 September 2009 and that he "may avail of an earlier retirement date by submitting a [three]-months written notice". She added that "any proposal for agreed termination must be presented in such a way as to enable a reasoned and documented decision to be made that it is in the interest of the Organization" and that "only once such justification with supporting evidence is received, HRMS can review the case". She pointed out that "although [the Chief Librarian referred] to the [evaluation] performed by the Medical Services Section, it [did] not indicate that there [was] a medical justification to support an agreed termination". Also, the e-mail contained a list of situations in which an agreed termination would be in the interest of the organization, for example "health problems which prevent proper exercise of the functions but do not rise to the level of incapacity for further service justifying the award of a disability benefit by the Pension Fund" and "performance problems which do not rise to the level of 'unsatisfactory performance' required for termination on that ground, when other alternatives, such as reassignment and/or training, have been exhausted".

8. By memorandum dated 16 December 2008, the Chief Librarian requested the Chief, HRMS, to approve an agreed termination of the applicant's employment. In support of his request, he stated that the post occupied by the

applicant required new capacities and skills which the latter did not possess and that this post therefore needed to be redeployed. He also stated that no further career options could be offered to the applicant within the UNOG Library and that the applicant had expressed the wish to leave the Organization as soon as possible. He appended the report from the Joint Medical Service to his request.

9. By e-mail dated 22 December 2008, the HRO explained to the Chief, Registry, Records and Archives Unit that the Chief Librarian had initially requested early retirement, not an agreed termination for the applicant, and that the Library would have to provide additional justification in support of an agreed termination.

10. By e-mail dated 28 January 2009, an Associate Human Resources Officer, on behalf of the HRO, informed the Chief, Registry, Records and Archives Unit that based on the documentation provided, “there [was] no justification to support an agreed termination that [was] in the interest of the good administration of the Organization with the payment of termination indemnity”. Nevertheless, she stated that “considering all the information and documentation provided ... the Organization would exceptionally accept a resignation from [the applicant] waiving the required three-month notice and in lieu of the notice period pay him a compensation equivalent to three months salary”.

11. By memorandum dated 23 February 2009, the Chief Librarian reiterated his request to HRMS for an agreed termination of the applicant’s contract and provided additional information.

12. By e-mail dated 14 April 2009, the HRO confirmed to the Chief Librarian that HRMS was not in a position to offer the applicant an agreed termination, but could “exceptionally waive the required notice period” if he wished to resign.

13. By memorandum dated 21 July 2009 to the Director, Division of Administration, UNOG, the applicant reiterated his readiness to accept an “agreed termination offer”. He claimed that HRMS promised him an agreed termination, but did not keep its promise. He argued that the “change of position by HRM[S] with regard to the offer previously envisaged and communicated to [him was] not compatible with the principles of good faith and fair dealing” and requested to be compensated for this reason.

14. By letter dated 7 September 2009, the Director of Administration, UNOG, replied to the applicant that the documents provided by the UNOG Library did not provide sufficient justification for an agreed termination.
15. On 30 September 2009, the applicant retired from service, having reached the mandatory retirement age.
16. By letter dated 5 November 2009 to the Secretary-General, the applicant requested a management evaluation of the decision not to grant him an agreed termination.
17. By letter dated 20 December 2009, the Under-Secretary for Management, on behalf of the Secretary-General, replied to the applicant's request for a management evaluation. She decided to uphold the contested decision.
18. On 9 February 2010, the applicant filed an appeal before the UNDT.

Parties' contentions

19. The applicant's principal contentions are:
 - a. An agreed termination should be granted to the applicant as a means of compensation for the non-reclassification of his post before retirement;
 - b. The Administration promised him an agreed termination. During a meeting with the HRO, the latter informed him that he would "finish [his] service on the basis of an agreed early retirement, and would be paid for the 10 months left and [his] pension entitlement would start at this date". He stated that after the HRO went on mission, "HRS and the Chief of the Library suspended any further follow-up measure on the initial agreement and did not carry on the agreed termination which they had, however, accepted previously";
 - c. "By relying on the promises made" by the Administration about the agreed termination, the applicant has been "disadvantaged both professionally and personally" and should be compensated.

20. The respondent's principal contentions are:
- a. An agreed termination is not an entitlement. The Administration is therefore not legally bound to offer an agreed termination to a staff member. Agreed terminations are strictly limited and are considered only in the interest of the Organization and in accordance with the standards of the Charter;
 - b. The decision not to grant the applicant an agreed termination was a valid exercise of the respondent's discretionary authority. After review of the explanations provided by the Library, HRMS concluded that in the case of the applicant none of the conditions required for an agreed termination, including the payment of termination indemnity, were met. No health reasons prevented the applicant from continuing his work, nor did his performance prove unsatisfactory;
 - c. The Administration considered that an agreed termination, including the payment of termination indemnity, was not in the interest of the good administration of the Organization, especially in view of the fact that the staff member was due to retire in a relatively short period of time and could retire earlier with a waiver of the required three-month notice period;
 - d. HRMS never committed to offer the applicant an agreed termination. The applicant did not submit any evidence of a promise made to him about agreed termination.

Considerations

21. At the outset, the Tribunal notes that in his application dated 9 February 2010, the applicant requested the reclassification of his post as a means of compensation. In this regard, the Tribunal clarified at the oral hearing that the decision not to grant him an agreed termination is a decision in itself, which can not be linked to the reclassification of his post. The Tribunal noted that, in fact, no decision in relation to the reclassification of the post he encumbered exists because the procedure to obtain such a reclassification was never initiated. Hence,

the following considerations are restricted to the decision taken by the Director of Administration, UNOG, not to grant the applicant an agreed termination.

22. Former staff regulation 9.1, paragraph (a), provided that:

“The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.”

23. In addition, former staff regulation 9.3, paragraph (a), provided that:

“If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules...”

24. The applicant had no right to an agreed termination. According to the applicable law, the decision to offer an agreed termination is within the discretion of the Secretary-General, provided that such action would be in the interest of the good administration of the Organization. The respondent has issued, as a guideline to ensure equal treatment, a “note for agreed termination” in February 2008. This note lists situations in which “an agreed termination would be in the interest of the good administration of the Organization”, among them “health problems which prevent proper exercise of the functions but do not rise to the level of incapacity for further service justifying the award of a disability benefit by the Pension Fund” and “performance problems which do not rise to the level of ‘unsatisfactory performance’ required for termination on that ground, when other alternatives, such as reassignment and/or training, have been exhausted”.

25. The record of the case shows that the applicant was not in a situation in which the Organization may have considered that an agreed termination was in the interest of good administration. Fortunately, his health problems were not grave enough to prevent the proper exercise of his functions. Although the applicant may have suffered from back pain, the medical “visite de poste” in August 2008 did not reveal any facts or lead to any recommendations, according to which health problems would prevent proper exercise of the applicant’s functions. Neither did the applicant ever face performance problems of a serious kind; on the contrary his performance rating was never below “fully successful performance” during his last years of service.

26. Finally, the Tribunal notes that the case record does not contain any evidence to support the applicant's allegation that the Administration had promised to grant him an agreed termination. Even if the possibility of an agreed termination was discussed with the applicant, there is no evidence of a written or oral promise to offer such type of termination without him fulfilling the indispensable conditions. The record shows that after considering the applicant's case and the documents submitted by his supervisors, the Administration concluded that none of the conditions that could have lead to an agreed termination were met.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 10th day of May 2010

Entered in the Register on this 10th day of May 2010

(Signed)

Víctor Rodríguez, Registrar, Geneva