



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

MARIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Thomas Jacob, UNDP

Introduction

1. On 20 April 2016, the Applicant filed an application contesting the decision not to process his agreed separation prior to the conclusion of a disciplinary case against him. The decision was made on 6 October 2015 and communicated to him on 14 October 2015.

2. In his reply, dated 22 June 2016, the Respondent submitted both procedural and substantive arguments denying any liability.

Facts

3. The Applicant worked for the United Nations since 1981 and for the United Nations Development Programme (“UNDP”) since 1985.

4. In December 2011 he was seconded to the Department of Peacekeeping Operations (“DPKO”) for a period of one year to work for the United Nations Interim Security Force for Abyei (“UNISFA”).

5. In August 2012, while the Applicant was on secondment, the Office of Internal Oversight Services (“OIOS”) launched an investigation against him at the request of his supervisor in UNISFA. The allegations made by his supervisor did not merit further investigation. However, during the course of the investigation the Applicant’s work computers were examined and, as a consequence, he became the subject of a further investigation for inappropriate use of information and telecommunication (“IT”) resources.

6. Following directions by the General Assembly, UNDP undertook a one-time review (“OTR”) for staff members eligible for conversion to permanent appointment to be considered before the impending abolition of this kind of appointment by the amendment of the Staff Rules that entered into force on 1 July 2010. To this end, UNDP issued, in December 2010, the *UNDP Policy on Consideration for conversion to a permanent appointment of UNDP staff members eligible to be considered as at 30 June 2009* (“OTR Policy”).

7. Sec. 17(b) of the OTR Policy, insofar as it relates to staff on inter-agency secondment or loan, whose return to UNDP was subject to the availability of suitable positions for which they had to apply in a competitive exercise, provides that in the event of their conversion to permanent appointments such conversion would become effective only on the date of the staff members' return to UNDP. Pursuant to this Policy, in late October 2012, the OTR team wrote to a Human Resources Specialist, Regional Bureau for Africa ("RBA"), Office of Human Resources ("OHR"), UNDP, to ascertain when the Applicant was to return to UNDP.

8. On 30 November 2012, the Department of Field Support ("DFS"), which administers personnel in peacekeeping operations, wrote to UNDP requesting that the Applicant's secondment be extended by three months in order to allow UNIFSA to place him on administrative leave pending the investigation into his possible misconduct. Although UNDP was prepared to grant such an extension and, in the interim, to defer consideration of his suitability for a permanent appointment, the Applicant declined to accept an extension. Accordingly, his secondment ended on 5 December 2012 and he returned to UNDP on 7 December 2012.

9. Under sec. 15 of the OTR Policy, "[b]eing the subject of an investigation at the time of the review [would] not necessarily disqualify the eligible staff members from being considered for a [permanent appointment]. However, "[c]onsideration of such staff [was to] be placed on hold pending the completion of the processes under the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct." Pursuant to this, on 5 December 2012, the then-Project Manager, OTR/OHR, UNDP, asked to be kept informed of the results of the investigation referred to in para. 5 above. The review of the Applicant's suitability for a permanent appointment was deferred pending the outcome of the investigation.

10. In addition to being eligible for consideration under the OTR Policy, the Applicant was also eligible for an agreed separation under UNDP Agreed Separations Arrangements, as modified in 2009. As a long-serving staff member

on a fixed-term appointment, the Applicant could, on expiry of his appointment, be considered for an agreed separation, which would allow him, though on a fixed-term appointment, to benefit from the terms usually applicable to permanent appointees upon their termination, such as the payment of a termination indemnity.

11. By email of 18 March 2013, a Human Resources Specialist, Career Transition Unit, OHR, UNDP, informed the Applicant that, upon his return to UNDP, on 7 December 2012, he had been placed on three months' notice, and that following this, on 7 March 2013, he would begin to utilise his accrued annual leave balance. She suggested that, if he preferred, the Applicant could first use his annual leave balance and then his notice period, and asked that he indicate which option he preferred. The Applicant responded on the same day indicating that he preferred to utilise his accrued annual leave prior to utilising the three months' notice.

12. On 8 April 2013, the same Human Resources Specialist advised the Applicant that his annual leave would last until 17 April 2013, and that the notice period would begin on 18 April 2013, ending on 17 July 2013. The Applicant used his accrued annual leave from 8 December 2012 to 17 April 2013. On 18 April 2013, he was placed on three months' notice.

13. On 1 July 2013, the Human Resources Specialist wrote to the Applicant indicating that with effect from 17 July 2013, the options available to him were applying for Special Leave Without Pay ("SLWOP") or for an agreed separation.

14. On 6 July 2013, the Applicant requested an agreed separation, opting for the payment of a lump sum combined with SLWOP for a period of two years, nine months and thirteen days, namely from 17 July 2013 to 30 April 2016. He asked that 30 April 2016 be his separation date on an exceptional basis, justifying the request by referring to his very long period of service with UNDP and in order to reach 30 years of contributions to the United Nations Joint Staff Pension Fund.

15. By letter of 1 August 2013, the Deputy Director, Office of Human Resources (“OHM”), Bureau of Management (“BOM”), UNDP, informed the Applicant that he had exceptionally been granted one year of SLWOP, from 18 July 2013 to 17 July 2014. She further clarified that “the granting of this SLWOP or any consecutive extensions would not impact any rights [the Applicant] may have had for consideration of the Agreed Separation package”.

16. On 17 January 2014, the Director, OHR, BOM, UNDP, sent an email to all UNDP staff notifying them that as all existing cases submitted to the Advisory Bodies had been reviewed, the UNDP OTR project would close on 31 January 2014. Given that, in 2012, the OTR team had deferred review of the Applicant’s case in light of the ongoing investigation for misconduct, the latter had not been considered for a permanent appointment. The Applicant did not challenge the decision not to grant him a permanent appointment in the context of the OTR.

17. On 11 July 2014, the Director, OHR, UNDP, informed the Applicant that his SLWOP was exceptionally extended until 30 September 2014. On 8 October 2014, he wrote again to advise the Applicant that his application for an extension of SLWOP had been exceptionally approved for a further period from 1 October 2014 to 17 July 2015, which would bring the total period of SLWOP to the maximum of 24 months allowed. In his letter, he stated that the Applicant’s application for agreed separation selecting the option of lump-sum and “bridging” was “still under review”.

18. On 4 February 2015, OIOS released its investigation report and forwarded a copy to UNDP.

19. On 17 July 2015, the Applicant reached the maximum limit of two years on SLWOP, whereupon his fixed-term appointment expired, and the Applicant was separated. At the time of the expiry of his appointment the investigation into possible misconduct against the Applicant was still ongoing.

20. On 25 September 2015, the Applicant was invited to submit comments on the investigation report.

21. By letter dated 6 October 2015, the new Director, OHR, UNDP, informed the Applicant of the following:

Subject: Expiration of your appointment

Reference is made to your application for agreed separation submitted to the Office of Human Resources on 6 July 2013.

It is noted that subsequent to submitting your application for agreed separation, you were granted Special Leave without Pay (SLWOP) effective 28 August 2013, after having exhausted all of your accumulated annual leave. It is further noted that you were unable to find regular placement and that due notification was provided to you. In accordance with UN Staff Rule 4.13(c), your Fixed-Term Appointment expired following the end of your SLWOP period, effective close of business 17 July 2015.

Given that at the time of your separation a disciplinary process against you was still ongoing, UNDP was not in a position to consider your application for Agreed Separation. However, in order to avoid any prejudice to you, please be advised that your request for Agreed Separation will be considered upon completion of the disciplinary process in your case.

In the interim, I would like to thank you for your contribution to this organization and wish you every success in your future career.

22. The Applicant requested management evaluation of the decision communicated via the 6 October 2015 letter, and he received a negative response on 21 January 2016.

23. Having received the application and the Respondent's reply, the Tribunal convened a case management discussion ("CMD"), on 23 February 2017. The parties indicated that an oral hearing in this case was not necessary.

24. Following the CMD, the parties informed the Tribunal that they wished to explore the possibility of an alternative resolution to this dispute. The proceedings were suspended to allow the parties time to engage in discussions for this purpose. However, on 17 March 2017, the parties jointly moved for a resumption of the proceedings.

25. On 24 March 2017, the Respondent informed the Tribunal that UNDP had sent the Applicant a letter notifying him that, had he remained in its employ, a recommendation would have been made to charge him with misconduct. He was given 15 days to comment thereon.

Parties' submissions

26. The Applicant's principal contentions are:

a. Regarding receivability, the letter dated 8 October 2014 cannot indicate that a decision to grant the Applicant his agreed separation was being made conditional on the outcome of the disciplinary process, because such letter preceded UNDP's knowledge of the investigation against him. The reference in the letter to the application being "still under review" must refer to the optional 50% uplift of the termination indemnity and/or to the possible extension of the SLWOP for bridging purposes;

b. According to sec. 11 of UNDP Agreed Separation Arrangements, read in conjunction with its sec. 10, only holders of a fixed-term appointment who have been granted agreed separation receive a three-month notice. Therefore, the fact that the Applicant was given and served a three-month period notice shows that he had been granted an agreed separation. If this were not the case, he would have received, at most, a one-month notice period. Having treated the Applicant as a staff member under an agreed separation, UNDP should be estopped from retroactively rendering the implementation of the agreement conditional upon the outcome of a subsequent disciplinary process. Moreover, an agreed separation, as requested by the Applicant, comprises a lump-sum with SLWOP combined; the communication granting him SLWOP confirms that they were requested together. The signature of a Certificate of no Contest is not a prerequisite for granting an agreed separation;

c. As a result of the Applicant's long service, together with the Administration's failure to convert his appointment into a permanent or continuing one, the Applicant had accrued a right to an agreed separation. Such arrangement had been put in place precisely to mitigate the Organization's failure to implement rules providing for conversion to permanent/continuing appointments. Sec. 18(ii) of UNDP Agreed Separation Arrangements provides for two elements to be paid to: the standard termination indemnity under Annex III of the Staff Rules and the 50% uplift. Only the uplift could be discretionary;

d. The ongoing investigatory process is not relevant to the processing of the Applicant's agreed separation. Contrary to what the letter of 25 September 2015 suggests, the existence of outstanding disciplinary proceedings does not bar the processing of a staff member's agreed separation. UNDP Agreed Separation Arrangements could have expressly provided so—just as they require that no challenge against the employer may subsist at the time of the agreed separation—but such a requirement was not included. Furthermore, for such a rule of general application to be applicable it must be duly promulgated;

e. The manifest delay in processing the Applicant's disciplinary case renders the decision unreasonable. The Applicant responded to the investigation report on 15 December 2015. The investigation took from August 2012 to February 2015, despite the fact that almost all evidence in support of these findings were secured from his work laptop. The length of the investigation can thus not be justified; it represents in and of itself an unreasonable delay. UNDP received the completed investigation report on 4 February 2015. At that point, UNDP was aware that the Applicant would be separated five months later. Notwithstanding that, UNDP did not act to ensure the he was afforded due process and that any decision resulting from the misconduct findings were taken while he remained employed. On the contrary, it took nearly eight months to ask for comments, although the Applicant's separation was imminent.

27. The Respondent's principal contentions are:

a. If the Applicant was under the erroneous impression that he had been granted an agreed separation in 2013, the letter of 8 October 2014, stating that his request was still under review, should have alerted him to the fact that he had not been granted such agreed separation or, else, that the Administration had now rescinded its agreement. Accordingly, he should have requested management evaluation within the statutory time limits. Since he failed to do so, his challenge is irreceivable *ratione materiae*;

b. The Applicant has not been granted an agreed separation. This decision could not possibly have been made prior to his requesting one, nor without going through the Advisory Panel and the Director of the Bureau of Management Services. The fact that the Applicant was afforded a three-month notice period not only does not change this but it is in fact consistent with sec. 18(i) of UNDP Agreed Separation Arrangements, which provides that a staff member not selected for a position by the time of his or her return to UNDP from secondment will be placed on a three-month notice. In fact, such staff members are first allowed to serve their notice and only after exhaustion of the notice period are they expected to apply for an agreed separation. While the Applicant avers that the language in some communications by the Administration supports his contention, this is a plain misreading of such communications;

c. Since the Applicant has not shown that he relied upon this to his detriment or was in any manner prejudiced by being allowed a three-month notice period, there are no grounds to estop the Respondent from arguing that the Applicant was not granted an agreed separation;

d. The Applicant has not fulfilled the requirements for an agreed separation, in particular, he did not sign the Certificate of no Contest required under secs. 14 and 29 of UNDP Agreed Separation Arrangements;

e. Staff rules 4.5(c), 4.13(c), 9.4, 9.6(b) and sec. 9 of UNDP Agreed Separation Arrangements make it clear that staff on fixed-term appointments, whatever the length of their service, do not accrue an entitlement to a termination indemnity. The Applicant's fixed-term appointment was not terminated. It expired;

f. Insofar as the Applicant may be found to have engaged in misconduct, UNDP is obliged to consider this finding in deciding whether to approve or not an agreed separation. Sec. 16(f) of UNDP Agreed Separation Arrangements deems staff separated from UNDT for misconduct as not eligible for an agreed separation. It would be nonsensical to retroactively pay termination indemnity to a staff member who, had he not been previously separated, would have been terminated for misconduct. Accordingly UNDP acted properly in waiting until the conclusion of the disciplinary process to determine whether or not the Applicant would have been separated from service. Further, sec. 24(d) of UNDP Agreed Separation Arrangements requires the Advisory Panel to consider the interests of the Organization in recommending agreed separation. While not determinative, if a staff member is found to have committed misconduct it would be relevant to a determination as to whether it is in the Organization's interest to reward him or her with a termination indemnity;

g. The duration of the investigation was not unreasonable. Some of the time that elapsed was due to efforts to ensure respect of the Applicant's due process rights, notably that to respond to adverse findings that took almost three months. In any event, the passage of time has not in itself prejudiced the Applicant in that it did not render him ineligible for agreed separation. In waiting until completion of the process, the Respondent has in fact tried to avoid causing harm to the Applicant.

Consideration

Scope and receivability of the application

28. The Applicant describes the contested decision as the decision not to process his agreed separation prior to the conclusion of a disciplinary case against him.

29. It is common ground that the Applicant is not challenging the failure or omission of the Respondent to grant him a permanent appointment in the context of the OTR. His challenge is predicated on the ground that he was granted an agreed separation package in 2013 and that the Respondent's decision not to process the package prior to the conclusion of the disciplinary case against him was unlawful.

30. It is clear from the evidence that the impugned decision is not a refusal of the request for an agreed separation, given that the Administration has repeatedly stated that no decision has been made in this matter. However, the Applicant takes issue with the postponement of it and submits that the fact that he was subject to a disciplinary process was not a proper basis for deferring the processing of his agreed separation package.

31. The Tribunal finds that the link between the deferment of the final decision on the Applicant's request for an agreed separation and the completion of the disciplinary process against him had not been clearly articulated until the letter of 6 October 2015. Since the Applicant received this letter only on 14 October 2015, it is reasonable to consider that the date on which the Applicant came to know about the contested decision was 14 October 2015. This being so, the Applicant did not miss the mandatory time limit to formally contest the decision.

Respondent's outstanding motion

32. At the CMD on 23 February 2017, the Tribunal asked Counsel for the Respondent to state the current position regarding the disciplinary process to which parties referred to in their submissions. Counsel was not aware of it and

agreed to make enquiries. By a “Motion to Adduce Additional Evidence”, the Respondent informed the Tribunal that, by letter dated 17 March 2017, the Applicant was notified that, had he still been a staff member, he would have been charged with misconduct, and was given 15 calendar days to comment. Whilst appreciating Counsel’s assistance in providing this information, the Tribunal considers that it is not directly relevant to the facts in issue. Even if it could be construed as conveying a decision, it postdates the impugned decision identified above, that is, the decision notified to the Applicant on 14 October 2015 not to process his agreed separation package prior to completion of the disciplinary process. Moreover, it follows from the information received that the disciplinary process, which has taken an inordinate length of time, has not yet been concluded, though it appears to be in its final stages of completion.

33. Consequently, though the motion is accepted as arising from the Tribunal’s question at the CMD, it does not affect the Tribunal’s factual findings on the issues relevant to this case and will be disregarded.

The alleged prior decision to grant agreed separation

34. Turning to the merits of the case, the Applicant’s challenge before the Tribunal is based first and foremost on his view that his request for an agreed separation had been granted.

35. First, the Applicant’s reliance on the fact that he was placed on an initial three-month notice, on his return from secondment, to conclude that this necessarily implied that he had been granted an agreed separation is misplaced. Sec. 18(b)(i) of UNDP Agreed Separation Arrangements provides that “[i]f no placement is identified by the end of the initial three-month search, the displaced staff member can apply for agreed separation, or may opt to further extend the search by the available options above”. Some of the options in question are serving the notice period or taking SLWOP. Accordingly, the application for agreed separation comes after exhaustion of a search period that yielded no alternative post.

36. The Tribunal notes that the Applicant submitted his request for agreed separation on 6 July 2013, that is to say, approximately two months after he was placed on notice. In these circumstances, it is difficult to see how the Applicant could have mistakenly understood that he had been granted agreed separation upon being placed on notice in April 2013, before he had even asked for it.

37. Second, it is clear from a plain reading of the UNDP Agreed Separation Arrangements that an agreed separation is not automatically granted upon request. Indeed, sec. 14 expressly stipulates that “[t]he approval of agreed separation ... is *at the discretion of the Organization* and is in no way an entitlement to eligible staff” (emphasis added). Sec. 14 also makes it clear that “[i]n all cases agreed separation is subject to the staff member renouncing to(sic) any claim or appeal in relation to his/her appointment with UNDP or his/her separation from UNDP”, by submitting a “Certificate of no Contest” signed by the staff member. The Tribunal finds that, the Applicant did not sign a Certificate of no Contest.

38. Third, sec. 13 provides that “[a]pplications for agreed separation ... are considered and reviewed by the Advisory Panel on Separations which makes recommendations to the Director of BOM for final decision”. In this case, there is no evidence, that such a consideration and review had been conducted.

39. Finally, the Tribunal notes that the Administration’s successive communications clearly indicate that no implicit or explicit decision had been taken regarding the granting of an agreed separation to the Applicant. In particular, the letter of 1 August 2013 conveying to him the decision to grant him one year of SLWOP specified that “the granting of this SLWOP or any consecutive extensions, would not impact any rights [the Applicant] may have had for consideration of the Agreed Separation package ... prior to the beginning of this SLWOP period”. Even more explicit was the letter of 8 October 2014, advising the Applicant of the extension of his SLWOP, which stated that his application for agreed separation was “still under review”.

40. The Tribunal finds that the Applicant has failed to show that the Respondent had granted him an agreed separation package. Given that no agreed separation had been granted under the specific UNDP legal scheme, the Applicant cannot claim payment of any termination indemnity, since the Staff Rules do not foresee such entitlement for holders of fixed-term appointments.

Disciplinary procedure as the basis for postponing the agreed separation decision

41. The Applicant contends that UNDP was in error in deferring the processing of his agreed separation package pending completion of the disciplinary process against him. He asserts that the outcome of the disciplinary process was irrelevant to the decision to grant him an agreed separation.

42. It is clear that UNDP Agreed Separation Arrangements, read as a whole, are intended to provide benefits to long-serving staff members on fixed-term appointments beyond the entitlements provided for in the Staff Regulations and Rules, subject to certain conditions.

43. However, UNDP Agreed Separation Arrangements state unambiguously, in sec. 14, that the granting of such benefits is discretionary. Furthermore, sec. 24 provides that “the interest of the organization” is to be taken into account in making a recommendation on applications for agreed separation.

44. There is a good policy reason for the Administration taking into account issues of conduct when deciding whether to confer a discretionary benefit on a staff member. To this extent, the Tribunal finds that it was not an impermissible option for the Administration to *defer* the decision on an agreed separation package until the end of a disciplinary process.

45. Nevertheless, the fact that an investigation for misconduct was ongoing cannot in itself constitute a proper basis for *excluding* the Applicant from consideration, though it may be used as a reason for deferring such consideration. Quite apart from the fact that, as a general principle, the Administration may not fetter its discretion by applying unpromulgated exclusionary criteria, it would be wholly irrational to do so when the application of the particular criterion in

question in this case is inconsistent with its own policy in that it was not one of the non-eligibility factors set forth in sec. 16 of the UNDP Agreed Separation Arrangements (see *mutatis mutandi* the reasoning in *Roberts* UNDT/2015/020, appealed unsuccessfully in relation to moral damages only in *Roberts* 2016-UNAT-614; see also *Santos* 2014-UNAT-415 in relation to conversion to permanent appointment, the principles of which may be considered to have some consonance with this case). As the Respondent has repeatedly asserted, a final decision remains to be made on the Applicant's agreed separation request and the lawfulness of this decision may or may not fall to be considered if and when it is made. It is not before the Tribunal in this case.

Delay in making a final decision

46. The Tribunal notes with regret the inordinate delay in concluding the disciplinary process. The OIOS investigation took two and a half years and it took UNDP another eight months to ask the Applicant for his comments. Such delay should be of particular concern to the UNDP Administrator since UNDP was fully aware of the fact that the Applicant was approaching the maximum duration allowed for SLWOP and his separation was imminent. The Administration carries a responsibility to handle disciplinary cases within a reasonable timeframe, particularly in circumstances where it had decided to impose a condition precedent to consideration of his request for an agreed separation package.

47. Having said that, whilst the Applicant endured uncertainty for a considerable period not only about the outcome of the disciplinary process against him but, how that outcome may affect his application for agreed separation, he has not been able to show that this prejudiced him to the extent required by art. 10.5 of the Tribunal's Statute as amended by General Assembly resolution 69/203.

Conclusion

48. The Applicant, who claims to have been granted an agreed separation package, has failed to prove the existence of any such agreement. His contention

that the decision by the Director, OHR, UNDP, to defer consideration of his request for an agreed separation until the conclusion of a disciplinary case against him was not in and of itself an unlawful exercise of managerial discretion.

49. In view of the inordinate delays that occurred in the circumstances of this case (see para. 46 above), the Tribunal considers it appropriate to refer this case to the UNDP Administrator for possible action to enforce accountability, in accordance with art. 10.8 of its Statute.

Judgment

50. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 21st day of April 2017

Entered in the Register on this 21st day of April 2017

(Signed)

René M. Vargas M., Registrar, Geneva