

UNDT/2023/008, Piazzzi

UNAT Held or UNDT Pronouncements

Whether the Applicant had a right of return A Human Resources Factsheet, issued for Umoja users, provides that at the end of a loan period, the staff member concerned is expected to return to the Secretariat unless he/she resigns his/her Secretariat position to transfer to the receiving organization. Such practice has been clearly confirmed by the Appeals Tribunal in Iskandar (see Iskandar 2012-UNAT-248). Accordingly, while the Applicant's lien on his former post may have been surrendered in accordance with the Administration's decision of 9 September 2009, he retained a return right to OCHA under the 2018 Loan Agreement. Indeed, surrendering the lien on a specific position does not mean that one's right of return to the Organization is relinquished (see, e.g., sec. 6.7 of ST/AI/2010/3 (Staff selection system)). Nevertheless, para. 2(b) of the 2019 MoU, signed by the Applicant and OCHA on 25 November 2019, provides that "[the Applicant] has no lien or return right to any post in OCHA nor any post in the UN Secretariat." As such, the 2019 MoU unequivocally relinquished the Applicant's right to return to the Organization. The Applicant has failed to discharge his burden of proving that he indeed "withdrew" from the MoU. There is no evidence that the Administration received any of the two emails referred to support his claim for withdrawal. Moreover, the evidence on record shows that the Applicant's signing of the 2019 MoU is a condition for OCHA to extend his reimbursable loan agreement. As such, any formal withdrawal would have been addressed at the time and would have led to further discussions between the Applicant, OCHA and PAM. This is, however, not the case here. Accordingly, the Applicant had unequivocally waived his right of return to the Organization by signing the 2019 MoU. Whether the Applicant was lawfully separated from service First, there is no evidence that the Applicant made an unconditional request for retirement. Instead, the evidence on record shows that the retirement option proposed by the Applicant was always connected to the granting of a one-dollar contract. This is supported by the content of the email of 12 March 2020 from the Applicant to OCHA HR. Moreover, the current HR Business Partner, OCHA, testified during the hearing before the Tribunal that in the discussions that the Applicant had with Human Resources, OCHA, the retirement option had always been connected to the granting of a one-dollar contract. Second, there is no evidence showing that the Applicant ever addressed a definitive request to the Organization requesting to be separated due to retirement. Indeed, he never made an unequivocal retirement request with a specific retirement date. Although there is no specific form to request retirement under staff rule 13.13(b), any written mean used to exercise an acquired right to normal retirement age should, at a minimum, unequivocally express one's desire to do so, indicate a specific retirement date, and be unconditional. Accordingly, processing the Applicant's separation from service on grounds of retirement constitutes a procedural irregularity. Sec. 2(c) of the 2019 MoU provides that "[a]t the end of this reimbursable loan, [the Applicant] will be separated from service and paid all his entitlements, unless he has applied and been selected for a position with the UN". The evidence on record shows that the Applicant's reimbursable loan ended on 30 November 2020, and that he had only applied for one position with the Organization but was not selected to it. Therefore, the decision to separate the Applicant from service on 30 November 2020 is lawful. As such, any procedural irregularity in relation to separation from service on grounds of retirement has no impact on the validity of the decision to separate the Applicant from service. The same holds true for the alleged "retroactive separation" of the Applicant from service. The fact that the Applicant received an automated message from OCHA HR regarding separation formalities on 16 December 2020 instead of a date prior to 30 November 2020, neither means that he was "retroactively separated" nor renders the decision to separate the Applicant from service unlawful or invalid. Accordingly, the Applicant was lawfully separated from service on 30 November 2020. Whether the Applicant is entitled to any termination indemnity A staff member is not eligible to the payment of a termination indemnity if his or her age (at the time of separation from service) is the normal retirement age or more and the contributory service is five years or longer. When he separated from the Organization, the Applicant was 62

years old and, consequently, beyond his normal retirement age. Also, he started contributing to the UNJSPF in 1988 and his contributory service is longer than five years at the time of his separation from service. This entitles the Applicant to a retirement benefit under art. 28 of the UNJSPF Regulations. Accordingly, the Applicant is ineligible to the payment of a termination indemnity pursuant to staff rule 9.8(c).

Decision Contested or Judgment/Order Appealed

The Applicant, a former staff member of the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), contests the decision to separate him due to retirement.

Legal Principle(s)

As for any discretionary decision of the Organization, the Tribunal’s scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable, and procedurally correct to avoid unfairness, unlawfulness, or arbitrariness (see, e.g., Sanwidi 2010-UNAT-084, para. 42; Abusondous 2018-UNAT-812, para. 12). It is not the Tribunal’s role “to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General” (see Sanwidi, para. 40). Nevertheless, the Tribunal may “consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” (see Sanwidi, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see Belkhabbaz 2018-UNAT-873, para. 80). “When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision” (see Belkhabbaz, para. 80). Procedural irregularities in the decision-making process do not necessarily result in a subsequent finding of unlawfulness of the administrative decision and the determination of whether a staff member was denied due process or procedural fairness must rest upon the nature of any procedural irregularity and its impact (see Sarwar 2017-UNAT-757, para. 87).

Outcome

Appeal dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Piazzì

Entity

OCHA

Case Number(s)

UNDT/GVA/2021/36

Tribunal

UNDT

Registry

Geneva

Date of Judgement

3 Feb 2023

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Separation from service
Applicable Law
Administrative Instructions

- ST/AI/2010/3
- ST/AI/404

Agreements, conventions, treaties (etc.)

- Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of Salaries and Allowances

Other UN issuances (guidelines, policies etc.)
Staff Rules

- Rule 10.5
- Rule 9.1
- Rule 9.7(d)

UNDT Statute
UNJSPF Regulations
Related Judgments and Orders
2010-UNAT-084
2018-UNAT-812
2018-UNAT-873
2012-UNAT-248
2017-UNAT-757
UNDT/2019/137
2013-UNAT-386