



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/033/
UNAT/1677
Judgment No.: UNDT/2010/149
Date: 20 August 2010
Original: English

Before: Judge Meeran
Registry: New York
Registrar: Hafida Lahiouel

JEMIAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Joseph Grinblat, OSLA

Counsel for respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The applicant contests the decision not to pay her three months' salary in lieu of notice at the termination of her permanent appointment. In her appeal to the United Nations Administrative Tribunal, she requested the Tribunal to find that she was the victim of a lack of due process, because of a violation of former staff rules 109.3(a) and 109.3(c).
2. The matter was not dealt with by the Administrative Tribunal before it was abolished and the case was transferred to the Dispute Tribunal as of 1 January 2010.
3. The parties have agreed that the legal issue in this case is whether or not the applicant is entitled to the payment of three months' salary in lieu of notice pursuant to former staff rule 109.3(a) and 109.3(c).

Facts

4. On 19 July 2006, the Under-Secretary-General for Management authorised the Office of Human Resources Management (OHRM) to enter into an agreed termination of the applicant's (then fixed-term) appointment, to take effect on 31 July 2006, and the applicant was so informed on 26 July 2006.
5. By email of 1 August 2006, the applicant expressed her willingness to consent to the agreed termination, but asked that in view of her personal circumstances it should take effect from 31 December 2006 instead.
6. On 17 August 2006, OHRM emailed the applicant stating that, after consulting with the Department of Economic and Social Affairs (DESA), her request would be accommodated and the separation date was changed to 31 December 2006. OHRM additionally informed the applicant that it was not in a position to enter into further negotiations or changes in the offer as it had been presented to her and that,

since she had been given advance notice of the arrangement, there would be no payment made in lieu of final notice as she was not entitled to it.

7. On 31 August 2006, the applicant signed a Memorandum of Understanding (MOU) agreeing to the terms governing the termination of her appointment which provided:

In accepting an agreed termination, I agree to the following:

a) that, should the Secretary-General decide to terminate my appointment under the provision of Staff Regulation 9.1(a), effective 31 December 2006, I will not contest such decision or any decision related to this termination action;

b) that I will be paid termination indemnity in accordance with Annex III to the Staff Regulations;

c) that the Organization has no further obligation, financial or otherwise, upon separation. The rights of the United Nations to require a staff member to settle his/her indebtedness to the United Nations is not extinguished on separation;

e) that I agree to withdraw any and all claims and appeals I may have pending against the Organization and to refrain from filing any further claims or appeals against the Organization arising from any terms of appointment;

f) that I am not eligible for employment with the United Nations, its subsidiary organs and programmes, for a period of four years following separation.

I have decided to accept termination of my appointment under the above terms and conditions.

This is subject to the approval of the Secretary-General.

8. On 27 December 2006, the applicant received, from the Officer-in-Charge, OHRM, a formal notice that “the Secretary-General has decided to terminate your permanent appointment” to take effect on 31 December 2006.

9. On 17 April 2007, the applicant wrote to OHRM, drawing attention to the fact that she had not received the three months’ salary in lieu of notice in addition to the

termination indemnity to which she was entitled “according to Regulation 9.3 . . . and Rule 109.3”, in view of the fact that she had only been formally informed of her termination four days prior to it taking effect and taking into consideration the

Legal provisions

15. Former staff rule 109.3 provides as follows:

Notice of termination

(a) A staff member whose permanent appointment is to be terminated shall be given not less than three months' written notice of such termination.

(b) A staff member whose temporary appointment is to be terminated shall be given not less than thirty days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

(c) In lieu of the notice period, the Secretary-General may authorize compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period, at the rate in effect on the last day of service.

Considerations

16. An examination of the legal issue as agreed by the parties and the staff rules being relied upon raises a fundamental question of interpretation as to the intention and purpose of the rules and their application to the particular circumstances of this case.

19. The applicant's position is clear. She is not challenging the contents or terms of the MOU but stating that she is entitled to three months' pay in lieu of notice because it was not until 27 December 2006, a matter of four days before her termination, that she knew that the Secretary-General had approved the MOU.

20. The terms of the MOU were negotiated and agreed between the parties. The following exchange of correspondence took place prior to the applicant signing the MOU:

a. On 1 August 2006, the applicant wrote to Ms. Barada Weisbrot, Human Resources Officer, OHRM, seeking clarification of various questions including the question of whether she would receive three months' salary and allowances.

b. On 17 August 2006, Ms. Weisbrot replied stating, "[g]iven the advance notice of this arrangement, there would be no payment in lieu of final notice." (This message is repeated at paragraph iii of the email in the following terms "...by leaving 31 December 2006, you would not be entitled to any payment in lieu of notice"). Whilst it would have been preferable if Ms. Weisbrot had said that in view of the agreed termination, former staff rule 109.3 did not apply, there is no doubt that the applicant knew before she signed the MOU that she was not being offered any payment in lieu of notice.

21. What was the event that brought about the termination of employment? Was it:

a. the operation of the provisions of staff rules 109.3(a) and 109.3(c); or

b. the MOU, recording the terms of the consensual termination, to be read together with Ms. Weisbrot's email?

Clearly, it was the implementation of the MOU which recorded the terms of the agreed separation from service.

approval was only notified to her on 27 December 2006. To the extent that the applicant is asking the Tribunal to accept that she was in a state of uncertainty as to whether her employment would be terminated on 31 December 2006 in accordance with the MOU, it is surprising that when directed by the Tribunal to state what, if

delay in providing written confirmation where appropriate, such as occurred in this case, does nothing to advance the underlying policy underpinning the beneficial effects to both parties of a consensual termination of the contract of employment.

Conclusion

30. There was no breach of former staff rule 109.3(a) or 109.3(c). The applicant's due process rights were respected. The appeal, first lodged with the Administrative Tribunal on 30 January 2009, fails and is dismissed.

(Signed

Judge Meeran

Dated this 20th day of August 2010

Entered in the Register on this 20th day of August 2010

(Signed

Hafida Lahiouel, Registrar, New York