



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Jarvis
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

[No. 2010-UNAT-031]

Before: Judge Inés Weinberg de Roca, Presiding
Judge Jean Courtial
Judge Mark P. Painter

Case No.: 2010-039

Date: 30 March 2010

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Cristian Gimenez Corte

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The acceptance of a lump-sum option for home-leave does not preclude the staff member from claiming before the United Nations Dispute Tribunal (UNDT) for wrongful calculation of it.

Facts and Procedure

2. The Appellant, Michelle Joy Jarvis (Jarvis), is a staff member of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, Netherlands. Her place of home leave is Adelaide, Australia.

3. In May 2008, Jarvis requested that the ICTY administration provide her with an estimate of the amount that she would receive if she chose the lump-sum option for her home-leave travel. On 28 May 2008, the ICTY administration informally informed Jarvis of that sum.

4. An email dated 15 July 2008 from Jarvis to the ICTY Registrar shows that discussions on Jarvis's concern about her home-leave entitlements continued between her and the ICTY administration. It also shows Jarvis's hesitation to decide whether she should take the lump-sum option which was "at least 400 euros" below the cheapest available fare or whether she should ask the ICTY Travel Unit to book her fare.

5. In an email dated 18 July 2008, Jarvis informed the Chief Administrative Officer, ICTY, that "after carefully considering my position over the past couple of days, I have decided that I will exercise the lump-sum option". She stated that she had taken that decision not because she considered the lump-sum amount fair or reasonable, "but to preserve my right to reimbursement if John Hocking's appeal [one of the three co-applicants in the judgment under appeal] is successful... and to preserve my own right to appeal the unfairness of the lump-sum I rec[ei]ve".

6. In a reply email of the same date, the Chief Administrative Officer advised Jarvis that she would be reimbursed if New York decided that ICTY should use a different and higher fare basis to calculate the lump-sum for home leave.

7. On 21 August 2008, Jarvis requested administrative review of the decision on the lump-sum amount in respect of her home-leave travel. On 7 November 2008, she lodged an appeal with the Joint Appeals Board. Her appeal and two other appeals filed by her ICTY colleagues on the same issues were subsequently transferred to UNDT/Geneva.

8. In a judgment dated 29 November 2009, the UNDT/Geneva rejected the applications filed by Jarvis and her two ICTY colleagues as “inadmissible, since the applicants, by opting for the lump-sum payment proposed, forfeited any right of appeal”. According to the UNDT, the procedure of offering staff members an option to receive a lump-sum payment prior to home-leave travel “is advantageous to the Administration only if the exercise of the lump-sum option expressly precludes any subsequent challenge once the payment proposed has been accepted”. The UNDT considered that when Jarvis countersigned the agreement on 22 July 2008, “the Administration and the staff member were not in a contractual situation in which each could negotiate rights. Instead, they were in a situation governed by rules in which the Administration could only apply the rules and the staff member could only accept or reject the lump-sum payment proposed”. It also considered that only Jarvis’s refusal to accept the suggested lump-sum payment would have entitled her to contest the amount.

Submissions

Jarvis’s Appeal

9. UNDT erred in law when it failed to recognize the unconscionable conduct of the ICTY administration. The ICTY administration acted without good faith in its dealings with Jarvis, thereby entitling her to compensation. She was induced to accept the lump-sum payment based on the ICTY administration’s express promise that it would ensure that she received an additional lump-sum payment if it was subsequently instructed by New York to provide a higher amount. The only way for her to benefit from this additional payment was to accept the lump-sum.

10. UNDT erred in fact when it found that she had received “specific and precise” information from the ICTY administration that by accepting lump-sum payment, she would forgo her right to appeal. Jarvis was led to believe the opposite.

11. UNDT misinterprets paragraph 10.4 of administrative instruction ST/AI/2006/4. The acceptance by a staff member of a lump-sum home-leave payment does not preclude

him or her from subsequently challenging the manner in which the lump-sum was calculated.

12. UNDT failed to address her claim that the conduct of the ICTY administration generated a legitimate expectation that its lump-sum calculation was reviewable.

13. While it is true that Jarvis's refusal to accept the lump-sum payment proposed would have entitled her to challenge the ICTY administration's policy, it would have left her without any avenue for redress. If she had not accepted the lump-sum, she would have had to ask the ICTY administration to arrange her travel. However, as soon as she did that, she would have forfeited her right to receive a correctly calculated lump-sum payment, even if she had subsequently prevailed on her challenge.

14. All administrative decisions are subject to review and an administrative instruction such as ST/AI/2006/4 could not change this fundamental right.

Secretary-General's Answer

15. Jarvis only expresses a different interpretation of ST/AI/2006/4 ("Official travel"), and does not establish how the UNDT erred on a question of law in reaching its conclusions.

16. UNDT correctly found that Jarvis had obtained specific and precise information regarding the consequences of choosing the lump-sum payment.

17. The ICTY administration fully explained to Jarvis all her options and the consequences of taking a particular course of action. The administration never promised nor guaranteed any particular outcome. On the contrary, it informed Jarvis that she would be reimbursed only if there was a change in the policy on the methodology of the calculation of the lump-sum. But at no point did the ICTY administration give Jarvis any expectation that she could file an appeal.

18. A staff member could not accept a lump-sum payment as the "full and final amount" and upon receiving the payment proceed to challenge the amount.

19. Jarvis does not have a "right" to a particular amount of lump-sum payment. If she believed that the amount offered was insufficient, she should have opted for the ICTY administration to arrange her travel.

20. Jarvis failed to establish any error in law or fact that would require the reversal of UNDT's conclusion that her application was not receivable because she had forfeited her right to appeal when she accepted the lump-sum payment.

Considerations

21. Jarvis and the other two applicants accepted the lump-sum calculated by the ICTY travel unit while reiterating their disagreement with the calculation.

22. While opting for the lump-sum payment proposed, they made a reservation of their right to appeal:

- 1) Jarvis in correspondence exchanged between her and the ICTY Administration;
- 2) Gabrielle McIntyre in an interoffice memorandum dated 10 November 2008 and signed on 4 December 2008 ("I sign and accept this lump sum to preserve my right to challenge the calculation through the appeal procedures of the United Nations.");
- 3) John Hocking in an interoffice memorandum dated 5 March 2008 and signed on 29 April 2008 ("I sign this because I have been instructed to do so. But I stand by my memo of 12/3/08 and do this without prejudice to my appeal rights.").

23. The interoffice memorandum dated 22 July 2008 to Jarvis includes a paragraph which specifies: "[P]lease note that the lump sum amount is an estimate based on current airline prices and is subject to change in line with airline prices at the actual time of travel" (italics in original).

24. Thus, the Administration recognized it to be an estimate and not a final calculation. Furthermore, there is no document in the case record which provides a detailed calculation of the lump-sum and how the travel unit arrived at that amount.

25. The ICTY Chief Administrative Officer in an internal memorandum to the Officer-in-Charge of the Administrative Law Unit on 8 September 2008 specifies that "[t]he ICTY acknowledges that sums identified under the lump-sum option in some instances have not covered the actual air fare ...".

26. The Administrative Law Unit on 9 October 2008 explains that staff rules 105 and 107, which govern the home leave entitlement as well as ST/AI/2006/4, which provides

details on the administration of payment of home leave travel expenses do not define what constitutes a “full economy-class fare by the least costly scheduled air carrier” between the duty station and the place of home leave.

27. In light of the above, this Court considers that the parties were neither in a situation governed by rules in which the Administration could only apply them and the staff member could only accept or reject the lump-sum payment proposed nor did they forfeit any right of appeal.

Judgment

28. The Court therefore annuls the UNDT decision that the application is not receivable and remands the case to the UNDT for a judgment on the merits.



Judge Weinberg de Roca, Presiding



Judge Courtial



Judge Painter

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT