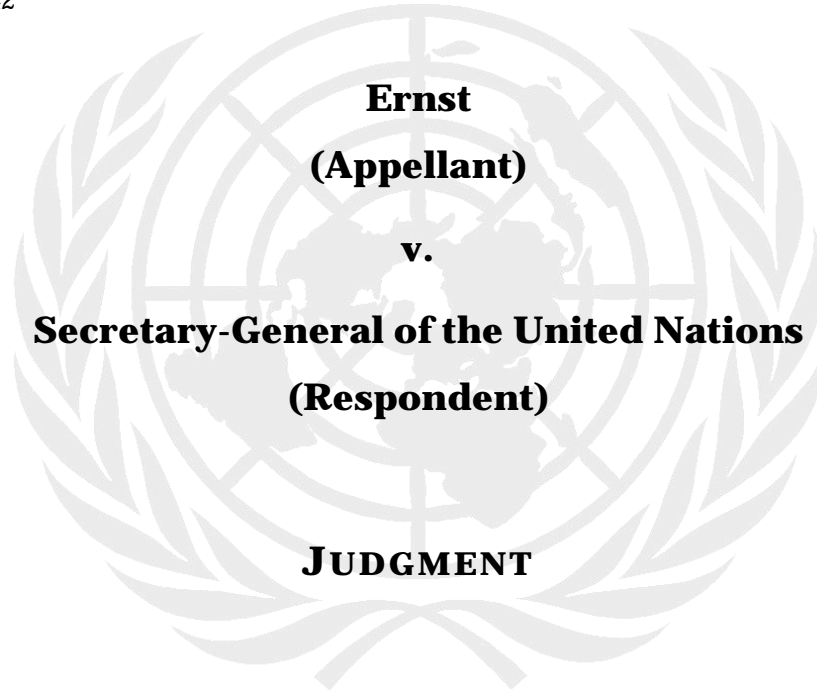




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-242



Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Jean Courtial

Judgment No.: 2012-UNAT-227

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant: Jay W. Wormus

Counsel for Respondent: John Stompor

JUDGE LUIS MARÍA SIMÓN, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Ms. Deborah Ernst on 5 August 2011 against Judgment No. UNDT/2011/047 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 March 2011. The Secretary-General filed his answer on 26 September 2011.

Synopsis

2. Pursuant to the provisions set out in information circular UN/INF.243 (End-of-service allowance for staff members in the General Service and Manual Worker categories) in cases of resignation like the one submitted by Ms. Ernst, was subject to the condition that the resignation was tendered after three or more years of continuous service with the United Nations Office at Vienna (UNOV) to join another organization in the United Nations common system without a break in service.

3. The facts of the case show that the Appellant's resignation did not fulfill the conditions required by the quoted circular. The resignation was taken knowing the risks involved and caused the break in service which determined the ineligibility for collecting the allowance claimed for, acknowledging that Ms. Ernst was requesting an exception from the regulations to receive it.

4. The Appeals Tribunal holds that the UNDT did not err in fact or law in its determination that the applicable information circular did not entitle Ms. Ernst to the end-of-service allowance (EOSA), neither was it contrary to a higher legal norm. A recommendation - not a decision - by the International Civil Service Commission (ICSC) is not binding. It was for the Administration to decide whether or not to adopt the ICSC's recommendation. The Administration accepted the ICSC's recommendation which was based on the Austrian legislation that existed in 1987. Any subsequent changes in Austrian law do not affect a staff member's rights under UN/INF/243. It falls to the Administration to make changes, if any. The Administration, having duly considered the request, exercised legitimate discretion in deciding not to grant an exception to the applicable information circular with regard to the Appellant. So its will cannot be substituted by the Tribunals.

5. Therefore, the appeal is dismissed and the UNDT Judgment affirmed.

Facts and Procedure

6. On 2 March 2004, Ms. Ernst resigned from her position of Senior Recruitment Assistant at the G-7 level with the United Nations Office on Drugs and Crime (UNODC) at UNOV. On 10 March 2004, she requested that she be paid an EOSA in connection with her separation from service. She sought an exception to provisions on eligibility for EOSA payment set forth in information circular UN/INF. Ms. Ernst's resignation became effective on 11 March 2004.

7. Following the effective date of the Appellant's resignation, Ms. Ernst applied for the L-3 post of Project Coordinator of the Integrated Management Information System (IMIS Project Coordinator). The post was created to implement IMIS for the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (Commission). The post was financed by the Commission on the understanding that recruitment and payment of the IMIS Project Coordinator would be undertaken by UNODC. The Appellant was selected and appointed as IMIS Project Coordinator effective 31 March 2004.

8. On 6 October 2004, the Administration informed the Appellant that her request for an EOSA was not granted because she was not eligible for it under information circular UN/INF.243.

9. Ms. Ernst appealed the decision not to pay her an EOSA before the Joint Appeals Board (JAB) in Vienna. The JAB found that the Appellant failed to satisfy any of the conditions for payment of an EOSA under UN/INF.243. It nevertheless recommended that the Secretary-General pay an EOSA because of her dedicated service. The Secretary-General agreed with the JAB's finding that Ms. Ernst failed to satisfy any of the conditions for payment of an EOSA under UN/INF.243. He however disagreed with the JAB's recommendation that an exception to the policy be granted in her case and rejected her appeal.

10. Ms. Ernst contested the Secretary-General's decision before the former Administrative Tribunal. Her application was not heard before the abolition of that Tribunal on 31 December 2009, and was subsequently transferred to the UNDT in Geneva.

11. Following an oral hearing, the UNDT issued Judgment No. UNDT/2011/047 on 8 March 2011. The UNDT noted that the Appellant had resigned with effect from 11 March 2004, and only took up her new appointment on 31 March 2004, after a break in service of 19 days. It

concluded that the Appellant could not rely on the terms of UN/INF.243 to claim an EOSA. She had resigned from her previous post prior to taking up her appointment with an organization - the Commission - which did not apply the United Nations common system.

12. The UNDT rejected the Appellant's contention that some provisions of information circular UN/INF.243, and in particular paragraph 4(b), were unlawful once they could not be reconciled with the amended version of Staff Rule 104.15(b)(ii), administrative instruction ST/AI/2001/8, or the Secretary-General's report A/60/692 to the General Assembly. UN/INF.243 should have been amended by the Administration in line with changes in the rules applicable to United Nations staff members. The UNDT held that even if these allegations were correct, paragraph 5, not paragraph 4(b) of UN/INF.243, made Ms. Ernst ineligible for the EOSA which, except in the two cases expressly provided for, clearly excluded from these entitlements UNOV staff members who resign with a break in service.

13. Similarly, the UNDT rejected the Appellant's submission that under the *Flemming* principle, the Administration was obliged to adapt UN/INF.243 to take into account the Austrian employment law. It recalled that no national laws or regulations were directly applicable to staff members of the Organization and that only those organs of the Organization authorized to do so had the power to transpose a rule of national law into the internal law of the Organization. It stated that the Tribunal had no powers to rule upon whether such transposition was appropriate.

14. The UNDT found that Ms. Ernst had not established that she was entitled to an EOSA and dismissed her application.

Submissions

Ms. Ernst's Appeal

15. Ms. Ernst submits that the UNDT erred in fact and law in identifying the organization by which the Appellant had been recruited, in particular, that she had taken up her appointment as IMIS Project Coordinator with the Commission, rather than with UNODC. She submits that the UNDT therefore erred in law in determining that she was not entitled to rely on the terms of UN/INF.243 to claim an EOSA.

16. Ms. Ernst asserts that the UNDT erred in law in finding that the Appellant's contention that she was eligible for payment of the EOSA under paragraph 4(b) of UN/INF.243 was

irrelevant. The UNDT should have considered her argument that the notion “promotion” in paragraph 4(b) should be read as “recruitment”, that she had been recruited from the general service category to the professional category, and that she was therefore entitled to payment of an EOSA.

17. Ms. Ernst contends that the UNDT erred in law in determining that she had failed to demonstrate that the relevant provisions of UN/INF.243 were contrary to a higher legal norm applicable within the Organization. Specifically, she asserts that the payment of an EOSA, as set out in UN/INF.243 was based on the Austrian legislation that existed in 1987, and that this legislation was revised effective 2003 to allow for the payment of an EOSA upon an employee’s separation for any reason. She claims that the ICSC decided in 1987 to mandate the Austrian legislation on payment of an EOSA, as amended in the future, as the Organization’s policy on such payments. Ms. Ernst submits that any changes in the Austrian legislation are automatically applicable within the United Nations’ scheme for payment of EOSAs.

18. Finally, Ms. Ernst submits that the UNDT erred in law in finding that the Administration properly declined to pay her an EOSA on an exceptional basis. Specifically, she asserts that the Administration failed to consider exercising its discretion to grant her request, which is contrary to the Appeals Tribunal’s ruling in *Hastings*.¹

19. Ms. Ernst requests the Appeals Tribunal to reverse the UNDT Judgment, to award compensation equivalent to the EOSA that she should have received in March 2004, plus interest calculated from April 2004.

Secretary-General’s Answer

20. The Secretary-General contends that the Appellant has failed to establish that the UNDT erred in fact resulting in a manifestly unreasonable decision. He contends that the UNDT explained Ms. Ernst’s appointment in detail, noting that her post was under the administrative auspices of UNODC, while financed by the Commission. He contends that in any event, the entity with which Ms. Ernst took up her appointment was not dispositive to the UNDT’s conclusion that she was not entitled to an EOSA. Rather, the UNDT found that she was not entitled to an EOSA because there was a break in service between her two appointments.

¹ *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

21. The Secretary-General submits that the UNDT correctly determined that Ms. Ernst's argument about paragraph 4(b) of UN/INF.243 was irrelevant to her claim that she was entitled to an EOSA. Even if the notion "promotion" in this provision were to be read as "recruitment", it still would not entitle Ms. Ernst to payment of an EOSA. She resigned from her post as Senior Recruitment Assistant before applying for the post of IMIS Project Coordinator. She therefore applied as an external candidate, and as a former general service staff member.

22. The Secretary-General contends that the UNDT correctly determined that Ms. Ernst had failed to demonstrate that the relevant provisions of UN/INF.243 were contrary to a higher legal norm applicable within the Organization. Contrary to the Appellant's assertion, the ICSC made no decision to establish a scheme of payment of EOSA, but merely recommended to establish a scheme for payment of an EOSA to general service staff comparable to that provided by outside employers. The Administration subsequently decided to adopt such a scheme pursuant to the provisions set out in UN/INF.243. The ICSC's recommendation in 1987 is therefore not a higher legal norm to which the provisions of UN/INF.243 could be contrary. The Secretary-General also submits that the administration of justice system is not an avenue for staff members to obtain an application of a policy.

23. In the Secretary-General's view, the UNDT correctly found that the Administration properly declined to pay Ms. Ernst an EOSA on an exceptional basis. The present case differs from *Hastings* where the Administration had failed to exercise its discretionary authority to consider the staff member's request for an exception. In the case at bar, the Secretary-General did exercise his discretion, considered the arguments put forward by the Appellant, but was not persuaded and rejected her request.

24. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

25. This Tribunal holds that the Appellant has not established that the UNDT erred in fact or law in its decision. Thus, the UNDT Judgment will be affirmed since Ms. Ernst is not entitled to be paid the EOSA she requested.

26. Pursuant to the provisions set out in information circular UN/INF.243, the payment of such allowance, in cases of resignation like the one submitted by Ms. Ernst, was subject to the

condition of having demonstrated three or more years of continuous service with UNOV prior to joining another organization in the United Nations common system without a break of service (paras. 4(f) and 5(c)).

27. The facts of the case, duly considered by the UNDT, show that the Appellant resigned from her post in order to be able to submit an application for the one she later obtained as IMIS Project Coordinator at the Commission. There was a break in service of 19 days and the new position was taken outside the common system of United Nations, so the resignation did not fulfill the condition required by UN/INF.243.

28. Ms. Ernst would not have been able to apply for the job at the Commission if she had not resigned from her post at UNOV, because it required external candidates. Upon resignation, she had no security that she would be selected for the post she later applied as an external candidate and former staff member of UNOV. Therefore, her resignation was taken knowing the risks involved and caused the break in service which determined the ineligibility for collecting the allowance she claimed, acknowledging that she was requesting an exception from UN/INF. 243 to receive it.

29. None of Ms. Ernst's submissions with respect to the above conclusions can stand. Contrary to Ms. Ernst's assertions, there was no recruitment, promotion or reappointment by the Organization in the case. What in fact occurred was a resignation, a non-working period of 19 days and an appointment by another body which does not apply the United Nations common system. But even if we were to consider the situation as recruitment, it necessarily caused the resignation and the break in service, which would still prevent the eligibility of Ms. Ernst to the EOSA *requested as an exception to the regulations*. Paragraph 5(c) of UN/INF.243 cannot be set aside as urged by the Appellant, whose reading of the information circular leaves part of the express textual provision useless and so becomes incorrect.

30. Similarly, the UNDT did not err in finding that the applicable information circular was not contrary to a higher legal norm. Ms. Ernst argues that the EOSA as set out in UN/INF.243 was based on the Austrian legislation that existed in 1987. That legislation was revised in 2003 to allow for payment of an EOSA upon an employee's separation *for any reason*. These changes in the Austrian legislation, she argues, must apply directly to the United Nations' legal framework, and the failure to amend UN/INF.243 accordingly, resulted in it being contrary to the higher legal norm, the ICSC's "decision".

31. However, contrary to Ms. Ernst's assertion, the ICSC did not take any *decision* in 1987, but merely recommended that a scheme for payment of an EOSA to general service staff comparable to that provided by outside employers in Austria in 1987 be established. It was then for the Administration to decide whether or not to adopt such a scheme. The Administration accepted the ICSC's recommendation and consequently issued UN/INF/243, setting out the eligibility criteria and mode of payment for an EOSA. The ICSC's recommendation in 1987 is not a higher legal norm to which the provisions of UN/INF.243 could be contrary. It was a mere recommendation which the Administration acted upon. Any changes in the Austrian national law have no impact on a staff member's entitlement unless the Administration adopts any changes.

32. The Secretary-General also submits, and we agree, that the administration of justice system is not an avenue for staff members to obtain an application of a policy.

33. Finally, having considered the possibility of granting an exception to the applicable circular, as suggested by the JAB, the Administration exercised legitimate discretion in deciding not to make such an exception with regard to the Appellant. Its will cannot be substituted by the Courts, as there were lawful grounds to accept or decline the request and the Administration decided that the case did not warrant an exception.

Judgment

34. The appeal is dismissed in its entirety, and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Courtial

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar