Translated from French

UNITED NATIONS DISPUTE TRIBUNAL		
	Case No.:	UNDT/GVA/2010/026 (UNAT 1620)
	Judgment No.:	UNDT/2011/047
	Date:	8 March 2011
		English
	Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

ERNST

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Jay Wormus

Counsel for Respondent:
Linda Starodub, UNOV/UNODC

Introduction

1. The Applicant contests the decision of the Secretary-General refusing to pay her the end-of-service allowance granted to staff members in the General Service category pursuant to information circular UN/INF.243 of 6 March 1990.

2. She claims payment of the end-of-service allowance that should allegedly have been paid to her with effect from March 2004, a sum she estimates at around EUR30,000, and she claims interest on that sum calculated as from April 2004. In addition, she claims compensation of three months net salary for the Respondent's negligence in updating the policy governing the end-of-service allowance.

Facts

3. Following a recommendation made in 1987 by the International Civil Service Commission ("ICSC"), the United Nations Office at Vienna ("UNOV") introduced an end-of-service allowance for staff in the General Service and Manual Worker categories. Information circular UN/INF.243 of 6 March 1990 sets out the eligibility criteria and mode of payment of the end-of-service allowance, which were adopted on an interim basis, "pending further review and agreement by the Joint Advisory Committee".

4. In 2003, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (the "Commission") decided to adopt the Integrated Management Information System ("IMIS") in use in the United Nations and to make the United Nations Office at Vienna/United Nations Office on Drugs and Crime ("UNOV/UNODC") responsible for its operation. A post of Project Coordinator was created to implement IMIS, financed by the Commission, on the understanding that the holder of the post would be recruited and paid by UNOV/UNODC.

5. On 1 March 2004, the post of IMIS Project Coordinator was advertised at level L-3.

6. The Applicant, who at the time was employed by UNOV/UNODC as Senior Recruitment Assistant at level G-7, step XI on a permanent appointment, submitted her resignation on 2 March 2004, requesting a waiver of the three-months notice period, which request was granted.

7. By email of 10 March 2004, she claimed payment of the end-of-service allowance, arguing that she had been required to separate from service in order to be able to apply for the post of IMIS Project Coordinator. Because that would necessarily result in a break in service, and given her number of years in the service of the Organization, she requested that an exception be made to paragraph 4(f) of information circular UN/INF.243, which provides for the allowance to be granted to staff members who submit their resignation after at least three years of continuous service with UNOV and join another organization in the United Nations common system without a break in service.

8. The Applicant's resignation took effect on 11 March 2004, after which she applied for the post of IMIS Project Coordinator.

9. Her application having been successful, the Applicant took up appointment as IMIS Project Coordinator with effect from 31 March 2004, after a break in service of 19 days.

10. By an email of 6 October 2004, the Administration informed the Applicant that her request for an exception to be made to paragraph 4(f) of information circular UN/INF.243 could not be granted.

11. By a letter dated 3 December 2004, the Applicant requested the Secretary-General to review the decision not to pay her the end-of-service allowance.

12. Having received no reply to her request, the Applicant referred the matter to the Vienna Joint Appeals Board ("JAB") on 16 March 2005.

13. In its report dated 1 October 2007, the JAB found, first, that the Applicant failed to satisfy any of the conditions set out in paragraph 4 of information circular UN/INF.243. It pointed out, however, that the circular had not been

amended to reflect the Austrian law that had come into force in January 2003 or to take into account the survey of working conditions provided for in paragraph 9 of the circular. Nor, moreover, did it take account of the organizational changes that had taken place within the Organization, or of the amendments to the Staff Rules adopted since the circular had been issued. By referring only to staff members of UNOV, it prevented those of UNODC from benefiting from the end-of-service allowance. Also, paragraph 4(b) of the circular, which provided that the allowance was granted to staff members "promoted" from the General Service category to the Professional category and having accumulated not less than three years of continuous service, was not in accordance with the new staff rule 104.15(b)(ii), which henceforth provided that staff members in the General Service category were "recruited" to the Professional category by competitive examination. The JAB concluded that the decision not to pay the Applicant the end-of-service allowance was based on an obsolete circular, and in view of the rationale for the allowance, which was to reward staff members for their loyalty, and of the Applicant's 18 years of service, it recommended that she be paid the allowance.

14. By a letter of 10 December 2007, the decision of the Secretary-General rejecting her appeal was notified to the Applicant, on the grounds that she did not meet any of the conditions set out in paragraph 4 of information circular UN/INF.243.

15. Having obtained three extensions of time, the Applicant submitted an application on 14 August 2008 to the former UN Administrative Tribunal against the Secretary-General's decision of 10 December 2007. On 5 March 2009, having requested and been granted two extensions of time by the former UN Administrative Tribunal, the Respondent filed his answer to the application. The Applicant filed observations on 21 April 2009.

16. As the case could not be decided by the former UN Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

17. By letter of 27 January 2011, the Registry of the Dispute Tribunal notified the parties of the decision of the Judge assigned to the case to hold a hearing in French.

18. On 16 February 2011, the hearing was held in the presence of Counsel for the Applicant and Counsel for the Respondent, with the Applicant attending the hearing by videoconference.

Parties' contentions

19. The Applicant's contentions are:

a. The Administration has shown negligence in failing to update information circular UN/INF.243 and in not revising its practice with regard to the payment of the end-of-service allowance to bring it into line with the Flemming principle, the amended version of staff rule 104.15(b)(ii) then in force, the structural changes within the Organization, and the new Austrian law;

b. Paragraph 4(b) of information circular UN/INF.243, which provides for payment of the end-of-service allowance to staff members "promoted" from the General Service category to the Professional category after not less than three years of continuous service with UNOV, complies neither with the amended version of staff rule 104.15(b)(ii), administrative instruction ST/AI/2001/8, or the Report A/60/692 of the Secretary-General to the General Assembly, which refer to the "recruitment", not the "promotion", of staff members in the General Service category to the Professional category. In the light of this divergence, and the inconsistent use of the words "promotion" and "recruitment" in the United Nations documents, the Administration should at the very least have interpreted paragraph 4(b) as permitting the payment of the allowance to staff members recruited from the General Service category to the Professional category. A narrow interpretation of the word "promotion" would, in effect, prevent any staff member in the

General Service category from receiving the end-of-service allowance on moving to the Professional category. Since 2001, however, a number of staff members in the General Service category who have moved to the Professional category after taking an examination have received that allowance, which shows that the Administration did amend paragraph 4(b) of the circular *de facto*;

c. There are no competitive examinations to fill posts that are not subject to geographical distribution. In spite of the efforts of the Secretary-General to fill that lacuna, the result of the practice whereby, in the absence of a competitive examination, staff members in the General Service category wishing to apply for a Professional category post not subject to geographical distribution must resign before even applying, is that those staff members find themselves in the position of external applicants, with no possibility of avoiding a break in service. This was the practice followed in the Applicant's case: twice, before submitting her application for the post of IMIS Project Coordinator, she inquired about the possibility of applying without first having to resign, and the Administration confirmed that she was obliged to submit her resignation before submitting her application;

d. In order to resolve the evident contradiction between the terms of paragraph 4(b) and those of paragraph 5 of information circular UN/INF.243, the Tribunal must look to the legislative intent. As the former UN Administrative Tribunal has acknowledged, the end-of-service allowance was devised to provide the General Service staff members of the Organization in Vienna with conditions of employment comparable to those in force in that city, by providing an approximation to the "Abfertigung" which Austrian employees were paid on separation from service. Under an Austrian law in force up to 2002, the aim of the "Abfertigung" was to encourage loyalty among employees, and it was not payable where the employment relationship was terminated by the employee. That same aim was reflected in paragraph 5 of information circular UN/INF.243. But, a staff member submitting his or her

resignation in order to join another organization within the common system could not be treated as a "disloyal employee". Moreover, since 1 January 2003, the "Abfertigung" had served another purpose, which was to encourage mobility and labour market flexibility, and it could now be paid to all Austrian employees, including those who resigned. That change should be reflected in the practice of the Organization under the Flemming principle, whereby the remuneration of staff in the General Service category must be aligned with the best prevailing conditions of employment in each duty station;

e. In line with the view of the former UN Administrative Tribunal, the Administration had a duty to interpret information circular UN/INF.243 in a way that was consistent both with the Staff Rules and with Austrian law. That, moreover, was what it did with regard to paragraph 4(f) of the information circular, in the case of staff members who had resigned from their posts at UNOV/UNODC in order to take up a post at the Commission, even though the Commission was not part of the United Nations common system. Likewise, in March 2005, a staff member who was in the same situation as the Applicant was given a short-term contract from the date of his resignation to the date of his appointment, and was therefore able to obtain the end-of-service allowance;

f. The Secretary-General, wrongly, took the view that the Applicant had requested payment of the end-of-service allowance as an "exception", while the JAB rightly acknowledged that she had acquired the "right" to be paid such allowance, not because of the wording of the circular but on the basis of the legislative intent. In her email of 10 March 2004, she was not seeking an exception but, rather, asking for clarification of the interpretation of paragraph 4(f) of the circular, which did not apply to her. Furthermore, the Secretary-General's interpretation goes against the stated policy whereby he normally accepts the unanimous recommendations of the Joint Appeals Board unless there is a compelling reason of law or

policy not to do so, and, if such is the case, the Secretary-General's decision provides detailed reasons for rejecting the recommendation.

20. The Respondent's contentions are:

a. The JAB had no legal basis for concluding, as it did, that the Applicant was entitled to the end-of-service allowance, as she did not satisfy any of the eligibility criteria set out in paragraphs 4(e) and 4(f). The Applicant made the conscious choice to resign with no guarantee that she would be selected for the post of IMIS Project Coordinator, though it was open to her to keep her permanent appointment and sit the examination enabling staff members in the General Service category to move to the Professional category;

b. The Applicant's appointment to the post of IMIS Project Coordinator should not be treated as a "promotion" because, pursuant to General Assembly resolution 33/143, a promotion from the General Service category to the Professional category may only be obtained by way of competitive examination, and the Applicant never passed that competitive examination;

c. The Organization was unable to accede to the Applicant's request because it would have amounted to creating a new category of beneficiaries, not contemplated in information circular UN/INF.243. In the absence of an express General Assembly resolution, the Administration was free to either amend or maintain the rules governing the end-of-service allowance and it would be unreasonable to reinterpret those rules on the basis of other resolutions dealing with different policies, as the Applicant is suggesting. What is more, the Tribunal may not put itself in the place of the Administration in this area;

d. Even if the Flemming principle were to apply, which is not the case here, information circular UN/INF.243 was in compliance with Austrian law at the time it was issued, and the Applicant, who had submitted her resignation, could not therefore claim entitlement to the end-of-service allowance. Besides that, national law is not part of the law

applicable to the employment relationship between the United Nations and its staff members.

Consideration

21. In contesting the decision of the Secretary-General refusing to pay her an end-of-service allowance, the Applicant relies, first, on the provisions of information circular UN/INF.243 of 6 March 1990.

22. That circular, of which there is no French translation, provides:

> 4. Payment of [the end-of-service allowance] will be made to staff members separating from the United Nations Office at Vienna on one of the following conditions:
> …
> b) Upon promotion from the General Service category to the Professional category after three years or more of continuous service with the United Nations Office at Vienna;
> ...
> e) Upon resignation after childbirth, after five years or more of continuous service with the United Nations Office at Vienna. In this case, half of the allowance …
>
> f) Upon resignation after three years or more of continuous service with the United Nations Office at Vienna to join another organization in the United Nations common system without a break of service;
> …
> 5. [The end-of-service allowance] is not payable in cases of (a) summary dismissal, (b) abandonment of post or (c) resignation, except for the reasons specified in [4](e) and (f) above.

23. The facts as set out above show that the Applicant resigned with effect from 11 March 2004 from her post of Senior Recruitment Assistant at level G-7 at UNOV and that she took up her appointment as IMIS Project Coordinator only on 31 March 2004, in other words after a break in service of 19 days. The Applicant, therefore, is not entitled to rely on the terms of the abovementioned circular to contend that she can claim the end-of-service allowance, as she had resigned from her previous post and broken her service before taking up her appointment in an organization, the Commission, which did not apply the United Nations common system.

24. In addition, while the Applicant maintains that staff members in the same situation or similar situations to her own were granted the said allowance, it should be remembered that, even assuming those allegations to be correct, the fact that the Administration wrongly granted such an allowance to certain staff members does not mean that she is entitled to it, as the Administration has no discretion in the granting of allowances but is, on the contrary, bound to strictly apply the applicable rules, and may in no event make an exception to this rule.

25. While the Applicant contends that, following the practice at UNOV/UNODC, the Administration encouraged her to resign before submitting her application for the post of IMIS Project Coordinator, which deprived her *de facto* of entitlement to the end-of-service allowance, the Tribunal is forced to conclude that the Applicant decided to comply with the said practice without any guarantee by the Administration that she would be granted the disputed allowance.

26. The Applicant furthermore contends that some of the provisions of information circular UN/INF.243 setting the conditions for the grant of the end-of-service allowance are unlawful, as they should have been amended by the Administration in line with changes in the rules applicable to United Nations staff members.

27. While the Applicant is entitled to argue, as she has done, in order to be granted an allowance, that the information circular setting forth the conditions for its grant, or at least certain of its provisions, are vitiated by unlawfulness, she bears the burden of showing that it is, or has become, contrary to higher legal norms.

28. The Applicant maintains that paragraph 4(b) of information circular UN/INF.243 became unlawful once it 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, which refer to the recruitment, and not the promotion, of staff members in the General Service category to the Professional category. Assuming these allegations to be correct, and in any event, it is not the contents of paragraph 4(b) of the circular that stand

in the way of the Applicant's right to the disputed allowance, but of paragraph 5, which, except in the two cases expressly provided for, very clearly excludes from entitlement to the allowance UNOV staff members who resign with a break in service. The Applicant has thus failed to establish that the provision in the circular preventing her being paid the allowance is contrary to a higher legal norm applicable within the Organization.

29. The Applicant maintains that it is for the Tribunal to interpret the circular in such as way as to respect the intention of the ICSC, the circular's original author. It should be remembered, however, that the Tribunal has no power to interpret a clear rule, and that it is bound, like the Administration, to apply the existing rules as long as they are not unlawful.

30. The Applicant contends that, pursuant to the Flemming principle, the Administration was under a duty to adapt the circular in question to take account of changes in Austrian employment law. The Tribunal recalls that no national laws or regulations are directly applicable to staff members of the Organization and that only those United Nations organs authorised to do so have the power to decide to transpose a rule of national law into the internal law of the Organization, with the Tribunal having no powers whatever to rule upon whether such a transposition is appropriate.

31. Lastly, while the Applicant maintains that, if the Administration had applied that principle, it would necessarily have amended information circular UN/INF.243 in such a way as to entitle her to the disputed allowance, the Tribunal views this as pure speculation, and recalls in this connection that, according to the formulation of that principle as approved by the General Assembly in resolution 47/216, "the conditions of service for the locally recruited staff [are to be] determined by reference to the best prevailing conditions of service among other employers in the locality. The conditions of service … are to be among the best in the locality, without being the absolute best."

32. Therefore, the Applicant has failed to establish that she was entitled to the disputed allowance.

33. The Applicant has sought to hold the Administration liable before this Tribunal for having failed to update the rules governing the grant of the end-of-service allowance. However, the letter dated 3 December 2004 whereby the Applicant requested a review by the Secretary-General does not contain any claim for the Administration to be held liable. Consequently that claim, which has been made only before the Tribunal, must be held inadmissible.

34. It follows from the foregoing that the application must be dismissed.

Conclusion

35. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(*Signed*)

Judge Jean-François Cousin

Dated this 8th day of March 2011

Entered in the Register on this 8th day of March 2011

(*Signed*)

Víctor Rodríguez, Registrar, Geneva