



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/045
(UNAT 1672)
Judgement No.: UNDT/2011/062
Date: 1 April 2011
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

DIARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGEMENT

Counsel for Applicant:

Razim Abderrahim

Counsel for Respondent:

Stéphanie Cochard, UNOG

Application

1. In an application registered with the secretariat of the former United Nations Administrative Tribunal on 12 February 2009, the Applicant contests the decision whereby the Secretary-General obliged him to retire as of 30 April 2005, whereas his assignment was due to expire on 31 December 2006.
2. He asks the Tribunal to order the Respondent to pay the equivalent of 20 months' salary as compensation, together with expenses incurred in connection with the appeal.
3. Under the transitional measures contained in United Nations General Assembly resolution 63/253, the case, which the Administrative Tribunal was unable to hear before it was dissolved on 31 December 2009, was referred to the Dispute Tribunal on 1 January 2010.

Facts

4. The Applicant, born 25 April 1945, took up his duties with the United Nations Office at Geneva (UNOG) on 13 April 1977 at the G-1 level, on a short-term appointment that was renewed several times. He subsequently obtained a fixed-term appointment that was also extended several times.
5. On 16 December 2003, the officer in charge of the Human Resources Management Service offered the Applicant a three-year appointment as Records Clerk at the G-4 level in the UNOG Library. The letter of appointment stated that the appointment would take effect on 1 January 2004 and expire on 31 December 2006. The officer in charge signed the letter on 16 December 2003 and the Applicant on 20 January 2004.
6. In a memorandum to the Applicant dated 7 March 2005, the officer in charge of the Human Resources Management Service confirmed the substance of a discussion the two had held the previous day on the Applicant's retirement. He reminded him in particular that, given the fact that he had entered the service of the Organization before 1 January 1990, the age limit for retirement was 60, which age he would reach on 25 April 2005. A new fixed-term appointment expiring on 30 April 2005 and replacing the one due to expire on 31 December 2006 was attached to the said memorandum.
7. On 8 March 2005, the officer in charge of the Human Resources Management Service sent the Applicant another memorandum informing him that his appointment would end 30 April 2005 pursuant to Rule 9.5 of the Staff Rules, which sets the age limit for retirement.
8. On 17 March 2005, the Applicant asked the Secretary-General to reconsider the decision to terminate his employment. The following day, he asked the Joint Appeals Board to suspend that decision; his request was dismissed by JAB on 12 April 2005.
9. On 30 April 2005, the Applicant left the Organization.
10. On 5 August 2005, he filed an appeal on the merits before the JAB. In its report dated 13 April 2007, a majority of the members of the Board considered that the Administration had erred in offering the Applicant an appointment whose end date was later than his retirement date. It considered that the Applicant should be compensated for that error and for moral damages and therefore recommended that he be paid six months' net base salary. One Board member, for his part, held that the Administration had unilaterally terminated the Applicant's contract and recommended that compensation equivalent to one year's base salary be paid him.
11. On 20 August 2007, the Under-Secretary-General for Management informed the Applicant that in the Secretary-General's view, mistakes had been made, but that it was up to staff members to know their retirement date. Accordingly, the Secretary-General granted him compensation equivalent to three months of the net base salary he was receiving at the time of his retirement.

12. On 12 February 2009, after receiving eight extensions of the time limit, the Applicant filed with the former United Nations Administrative Tribunal an appeal against the Secretary-General's decision. On 12 August 2009, after having requested and obtained from the Administrative Tribunal two extensions of the time limit, the Respondent submitted its response to the appeal. The Applicant, having been granted an extension of the time limit, submitted comments on 9 October 2009.

13. In a letter dated 11 February 2011, the Registry of the Dispute Tribunal notified the parties of the decision of the judge responsible for the case to hold a hearing.

14. On 10 March 2011, the hearing was held in the presence of the Applicant and his Counsel, with Counsel for the Respondent attending by telephone.

15. At the Tribunal's request, the Applicant on 24 March 2011 filed an additional memorandum to substantiate the moral and material damages he claimed to have suffered. The Respondent submitted comments on that memorandum on 30 March 2011.

Parties' contentions

16. The Applicant's contentions are:

(a) The Administration erred in renewing his contract for a period of three years even though all documents in its possession showed his date of birth. However, it could not terminate a contract that had already been signed and sealed or make him suffer the consequences of its own mistakes;

(b) Under Rule 9.5 of the Staff Rules in force at the time, moreover, the Administration had the discretionary power, on behalf of the Secretary-General and in exceptional circumstances, to waive the age limit in the interest of the Organization. The Applicant was therefore justified in thinking that such a waiver had been granted him, especially inasmuch as the three-year extension of his appointment had been at the behest of his immediate superiors, the Chief Librarian and the Chief of the Registry, Records and Archives Unit;

(c) He should be compensated for the damages suffered because, given the period of one and a half months between the announcement of the termination of his appointment and its actual termination, he found himself in a catastrophic financial and moral situation. He is entitled to what would have been paid had he remained in service until 31 December 2006, taking into account the step increases he would have received;

(d) Given his age and the fact that he was not familiar with the administrative procedure, he needed advice, and the Respondent should be ordered to reimburse the cost of the said procedure.

17. The Respondent's contentions are:

(a) The provisions of the Staff Regulations and Staff Rules regarding the age limit for retirement are clear and take precedence over the terms of an appointment. The Applicant's letter of appointment stated that the appointment was subject to the Staff Regulations and Staff Rules, so that the Applicant cannot adduce his own ignorance or any error on the part of the Administration;

(b) The possibility of keeping a staff member on beyond the age limit is governed by ST/AI/2003/8; but that enactment provides that this is possible only if no qualified candidate has been found for the position. That procedure was not followed in this case, and the Applicant had the duty to know the age limit for his retirement;

(c) The Applicant has been adequately compensated by an award of three months' net base salary and he is not entitled to reimbursement of expenses incurred for his defence, given the simplicity of the procedure.

Judgement

18. It is shown from the facts as described above, which are not disputed by the parties, that the Applicant obtained a three-year extension of his appointment, covering the period from 1 January 2004 to 31 December 2006 even though, under the rules on staff members' age limit, he was obliged to retire no later than 30 April 2005.

19. Rule 9.5 of the Staff Rules in force at the relevant time provided that:

Staff members shall not be retained in active service beyond the age of sixty years or, if appointed on or after 1 January 1990, beyond the age of sixty-two years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.

20. In addition, section 1.1 of Administrative Instruction ST/AI/2003/8 "Retention in service after the age of mandatory separation and employment of retirees", which came into force on 15 November 2003, provides that:

1.1 Retention in service of staff members beyond the mandatory age of separation is an exception to the provisions of staff regulation 9.5, which may be approved by the Secretary-General only when it is in the interest of the Organization. The Secretary-General's authority to retain staff members in service beyond the mandatory age of separation of 60 years, or 62 years in the case of staff appointed on or after 1 January 1990, shall be exercised as provided in this instruction.

21. In the light of these provisions, the Tribunal considers that the Administration, which was fully informed about the Applicant's personal situation, erred in granting an appointment that extended the age of mandatory separation. Though the defence maintains that the Applicant should have informed the Administration that his age was a bar to his receiving an extension of his appointment beyond 30 April 2005, the Tribunal must take into account, on the one hand, that the request for a three-year extension of his appointment came from his supervisors and, on the other hand, the fact that he cannot be accused of having taken any initiative likely to mislead the Administration as to his date of birth. Hence, it follows that the Administration is solely responsible for the misconduct.

22. The Applicant claims that the signing of his appointment by the Administration and himself created rights for him on which it could not unilaterally renege by imposing his separation at age 60.

23. It should be noted, as the Appeals Tribunal held in its judgement UNAT-2010-037, *Castelli*, that the contract by which the Organization hires a staff member is not an ordinary contract because of the special nature of the relationship between the staff member and the Organization and because such a contract is largely governed by the Staff Regulations and Staff Rules.

24. It is clear from these provisions, which are binding on the Administration and staff members alike, that the age limit of 60 years applying to the Applicant may be waived only in the interest of the Organization. It is established that in this case, if the Administration had waived the age limit by keeping the staff member in service until the end of his appointment, that would have been done in the interest of the Applicant and not in the interest of the Organization. The Respondent is therefore right to maintain that the Administration, when it realized its mistake, was obliged, as soon as possible, to change the end date of the Applicant's contract, which also included the following clauses: "This appointment is offered to you on the following conditions and subject to the provisions of the Staff Regulations and Staff Rules," and "[t]he Secretary may terminate a fixed-term appointment before its end date in accordance with the applicable provisions of the Staff Regulations and Staff Rules; in such case, he shall give thirty days' notice in writing."

25. While the Authority is obliged, if it finds that it has made an unlawful decision or an illegal commitment, to remedy it as soon as possible so as not to perpetuate the irregular situation, it must, where no fault is found against the staff member, take upon itself full responsibility for the

unlawful conduct. Thus, it is appropriate to order the Respondent to compensate the Applicant for damages.

26. It should be noted in that regard that, to compensate him for the damages sustained as a result of the Administration's error, the Secretary-General granted him a sum equivalent to three months of the net base salary he was in receipt of on 30 April 2005.

27. In his submission to the Tribunal the Applicant must substantiate the harm suffered and, to evaluate it, the Tribunal must look only at how the fault committed by the Administration caused harm to the staff member in relation to what the situation would have been if the Administration had not erred.

28. In this case, if the Administration had, as it was required to do, taken into account the Applicant's mandatory retirement date of 30 April 2005, his appointment would have been renewed until that date at the latest. But that was in fact the date of the Applicant's separation, so that the Administration's error did not cost him any salary or pension that was legally owed to him.

29. Therefore, the Applicant's claim for compensation equal to what he would have been paid in salary if his appointment had expired on 31 December 2006 must be dismissed. Moreover, he cannot claim salary or pension for service not performed.

30. In his additional memorandum of 24 March 2011, the Applicant asks to be compensated for losses resulting from the taxes to which he was subject as a resident of Switzerland for the years 2005 and 2006. However, as already stated above, the Applicant cannot obtain compensation for amounts that he would in any event have paid if the Administration had obliged him to retire on the mandatory separation date, which is in fact the case with respect to such taxes.

31. Regarding the lease purchase of an automobile on 15 March 2004, while it is possible to link that purchase to the erroneous three-year appointment, the Applicant, who does not claim to have lost money by making the purchase, cannot argue that he has suffered material injury as a result.

32. However, the Applicant is entitled to seek compensation for the damages resulting from the fact that he had hoped to keep working until 31 December 2006 and did not learn until 6 March 2005 that his employment would terminate on 30 April 2005.

33. The "Guidelines on Separation from Service – Retirement", to which both parties referred during the internal appeal procedure, read as follows:

Steps to be taken by responsible Office ...

i. Notifies staff member three months in advance of retirement age, confirming date of separation (i.e. end of the month in which staff member reaches retirement age) and advising that separation formalities will be initiated shortly.

34. The gist of that enactment is that the Administration should have informed the Applicant three months before his separation date that he was nearing legal retirement age and that his appointment would, therefore, be terminated. In this case, the Administration informed him only a month and a half before his separation date, so the Applicant is entitled to receive compensation for the missing notice period, namely a month and a half.

35. Then, the sudden announcement of the end of his contract must have had an impact on his living conditions and caused distress exceeding what is usually caused by retirement, which the Tribunal assesses at one and a half months of his net base salary.

36. Thus, in granting him the sum of three months' net base salary, we may consider that the Secretary-General adequately compensated him for all of the losses recognized above as related to the misconduct.

37. Finally, the Applicant claims reimbursement of expenses incurred in the appeal procedure. In that connection, it should be noted that under Article 10 (6) of its Statute this Tribunal may order a

party to pay costs only if it has manifestly abused the Tribunal proceedings; the Tribunal makes no such finding in this case.

38. Neither would the Applicant have been able to make a successful claim for reimbursement of expenses before the former United Nations Administrative Tribunal since, according to settled case law, that Tribunal granted costs only in exceptional cases “if they [were] demonstrated to have been unavoidable, if they [were] reasonable in amount, and if they exceed[ed] the normal expenses of litigation before the Tribunal.” See judgement No. 237, *Powell* (1979), of the former Administrative Tribunal. Such circumstances are absent in this case. The Applicant has not adduced any particular facts or complications that would have made the procedure more difficult than usual. Accordingly, the Tribunal considers that if his application had been considered by the former Administrative Tribunal, it would have made the same decision to dismiss as this Tribunal.

Decision

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

The application is dismissed.

Judge Jean-François Cousin

So ruled on 1 April 2011

Entered in the Register on 1 April 2011

Víctor Rodríguez, Registrar, Geneva
