



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/109

Judgment No.: UNDT/2011/180

Date: 21 October 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

CREMADES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Alfred de Zayas

Counsel for Respondent:

Myriam Foucher, UNOG

Introduction

1. The Applicant contests the decision of the United Nations Office at Geneva (“UNOG”) not to pay her upon her retirement a prorated amount for annual leave accrued while she was still employed as a language teacher.

2. The amount which she is seeking in this respect is CHF12,170.26; in addition she requests that the Administration amend the rules so that language teachers can be paid for their annual leave entitlements.

Facts

3. The Applicant entered on duty at UNOG on 1 January 1984 as a Spanish language teacher on a two-year appointment, which was renewed several times up to 1 January 1990, at which time she was awarded a permanent contract.

4. On 29 January 2009, the Applicant requested the Chief of the Human Resources Management Service (“HRMS”) at UNOG to extend her contract until 31 December 2009 in order to allow her to receive a full-year’s pay.

5. By memorandum dated 7 April 2009, HRMS rejected the Applicant’s request.

6. On 1 May 2009, the Applicant requested the Chief of HRMS to extend her contract until 31 August 2009 in order to cover the annual leave corresponding to the first two quarters of 2009 or alternatively to make a payment to compensate her for work performed up to 31 July 2009 and her proportional annual leave entitlement relating to that period.

7. By memorandum dated 3 June 2009, the Chief of HRMS, referring to the reply of 7 April 2009, rejected the Applicant’s request for payment. He pointed out that, according to the jurisprudence of the former United Nations Administrative Tribunal, breaks between terms are considered periods of special leave with pay and not annual leave. He further indicated that staff members’ entitlements stopped as of the date of retirement.

8. On 25 June 2009, the Applicant, referring to the memorandum dated 3 June 2009, submitted the same request to the UNOG Director of Administration. She repeated the request that she had made on 7 July 2009, specifying that she sought payment in the amount of CHF12,000.
9. After meeting with the Applicant, the Deputy Chief of HRMS contacted the Office of Human Resources Management in New York seeking its opinion on the matter.
10. On 1 July 2010, the Chief of HRMS at UNOG informed the Applicant that OHRM had confirmed the legality of the decision taken by UNOG on 3 June 2009.
11. Having reached the mandatory age of retirement, the Applicant was separated from service on 31 July 2009.
12. By a letter dated 25 August 2010, she submitted a request for a management evaluation of the decision notified to her on 1 July 2010.
13. On 16 September 2010, the Chief of the Management Evaluation Unit rejected the Applicant's request as being time-barred.
14. The Applicant submitted an application to this Tribunal on 26 November 2010.
15. On 13 October 2011, a hearing took place with the Applicant and her Counsel and Counsel for the Respondent in attendance.

Parties' contentions

16. The Applicant's contentions are:
 - a. Since no reply had been made to the request to the Office of Human Resources Management by the Deputy Chief of HRMS at UNOG by July 2009, there was no decision, at least not in writing. Moreover, the Applicant had pursued efforts at mediation through the Office of the Ombudsman and had sought the support of the Office of Staff Legal

Assistance in Geneva, and no one had told her that she needed to proceed with filing an application. Thus, her application is not time-barred;

b. The three breaks between the terms should be considered periods of annual leave;

c. Language teachers work 39 weeks in the year and are on leave for the remaining weeks. There are three teaching terms: up until 31 July there are 26 weeks of classes divided into two terms, with the third term beginning in September and running for 13 weeks. Language teachers who, like her, were born before 31 July and hence retired before 1 August did not receive the proportional share of their annual leave payment corresponding to the 26 weeks of teaching already performed. The Applicant was separated from service on 31 July 2009 and was not compensated for the 4.66 weeks of annual leave to which she was entitled;

d. There is an inequality of treatment between the language teachers born before 31 July and those born after. Judgment No. 1212, *Stouffs* (2004), of the former United Nations Administrative Tribunal did not follow the principle of equity and did not take into account the proposals made by the Joint Appeals Board. The administrative rules must be interpreted in good faith.

17. The Respondent's contentions are:

a. The application is not receivable because the Applicant received a decision in writing from the Chief of HRMS on 3 June 2009, rejecting her request. The decision of 1 July 2010 merely confirmed the original decision;

b. The Applicant has not complied with the mandatory two-month time limit laid down in staff rule 111.2(a), which was applicable at the time. In point of fact, she had received the decision rejecting her request by 3 June 2009, and the subsequent decisions were confirmations of that decision and did not restart the reckoning of the time limits for submitting an application;

- c. Contrary to the Applicant's assertions, she has not pursued a formal mediation, even if she has had contacts with the Office of the Ombudsman;
- d. The special conditions of service applicable to language teachers are set out in Appendix F to the 100 series of the Staff Rules. The summer recess and breaks between terms over and above the leave entitlement provided for in the Staff Rules do not constitute annual leave, but are periods of special leave with pay;
- e. The content of appendix F is fully consistent with the Secretary-General's proposals in his report A.C/5.38/41 of 18 November 1983, as approved by General Assembly resolution 38/234, which was the basis for the issuance of administrative instruction ST/AI/316 of 6 March 1984, granting the status of staff member to full-time language teachers;
- f. The conditions of service of language teachers are regulated by the International Civil Service Commission in its report (ICSC/52/R.6/Add.3 of 18 July 2000). The former United Nations Administrative Tribunal affirmed the Administration's position in its judgment No. 1212, *Stouffs* (2004);
- g. The Applicant is not entitled to contest the regulatory measures taken by the Administration;
- h. Pursuant to staff rule 109.10(a), all entitlements cease as of the date of retirement approved by the Secretary-General. There is therefore no reason why the Applicant should be compensated for special leave with pay corresponding to the 26 weeks that she worked in 2009.

Considerations

18. The facts as set out above establish that, beginning on 29 January 2009, the Applicant submitted several requests to the UNOG Administration seeking to receive upon her retirement a prorata payment for accrued annual leave and it was not until 25 August 2010 that she submitted a request for a management

evaluation of the decision that had been notified to her on 1 July 2010 denying her claim to such payment.

19. Allowing that the Administration's replies to the Applicant's requests may not always have been sufficiently explicit such as to be taken as administrative decisions subject to appeal, the documents available on file show that on 1 May 2009 the Applicant requested the Chief of HRMS to extend her contract until 31 August 2009 or, alternatively, to make payment to her for work performed and a proportional amount of her annual leave entitlement. It is also established that, by memorandum dated 3 June 2009, of which the Applicant was informed no later than 25 June 2009, the Chief of HRMS replied to her, rejecting the two options that she had proposed.

20. Staff rule 111.2 (a), which was in force on 3 June 2009, provides:

A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing...

21. Accordingly, the decision of 3 June 2009 should have been contested before the Secretary-General within the two-month period prescribed in the above-mentioned rule. The fact of the matter is, however, that the Applicant did not submit a request for a management evaluation until 25 August 2010. The subsequent decisions of the Administration rejecting new requests from the Applicant relating to the same issue are confirmations of the earlier decision which do not extend the time limit for the filing of an appeal.

22. In any event, the Appeals Tribunal, in *Costa* 2010-UNAT-036, interpreted article 8.3 of the Statute of the United Nations Dispute Tribunal as prohibiting it from suspending or waiving the deadlines for management evaluation.

23. In the instant case, the Tribunal is constrained to note that the Applicant could not have been misled by the change in the rules that occurred on 1 July 2009, when a request for administrative review was replaced by a request for a

management evaluation, since the two-month deadline for contesting an administrative decision was not changed.

24. In the light of the foregoing, the application is not receivable on the ground that it is time-barred and can therefore only be dismissed.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 21st day of October 2011

Entered in the Register on this 21st day of October 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry