



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2012/025

Judgment No.: UNDT/2012/186

Date: 30 November 2012

Original: English

**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

AHMED

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Salim Shaikh

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a former staff member with the United Nations Information Centre (“UNIC”) in Islamabad, Pakistan, contests the non-payment, upon his separation, of “termination indemnity”, of interest on his reimbursement for unused annual leave days, and of three months’ salary in lieu of notice promised to him by the Organization.

2. The present case arises from the same background described in *Ahmed* UNDT/2010/161, rendered on 9 September 2010. In that case, the Dispute Tribunal found no basis to support the Applicant’s allegation that his due process rights had been violated when the Administration decided not to renew his contract on the basis of poor performance appraisals. The Applicant’s appeal before the United Nations Appeals Tribunal (“UNAT”) was unsuccessful. In *Ahmed* 2011-UNAT-153, published on 29 August 2011, the UNAT affirmed *Ahmed* UNDT/2010/161. The UNAT held that the Dispute Tribunal did not err in limiting the scope of the application to the non-renewal of the Applicant’s fixed-term appointment. Following the promulgation of the UNAT’s Judgment, the Administration processed the Applicant’s final separation payments, which give rise to the dispute in this case.

## **Procedural matters**

3. This application was filed on 28 March 2012 and the Respondent’s reply was received on 30 April 2012.

4. On 9 November 2012, the Dispute Tribunal issued Order No. 224 (NY/2012), informing the parties that the case had been assigned to the undersigned Judge and instructing the Respondent to produce a letter dated 29 December 2005, referred to in the report of the Joint Appeals Board (“JAB”)

of 26 October 2007. According to the JAB report, that letter, sent by the Office of Human Resources Management (“OHRM”), notified the Applicant that he would be separated with affect from 31 December 2005 and would be paid three months’ salary in lieu of notice. The Respondent was unable to produce the document requested by Order No. 224 (NY/2012), but provided the Tribunal with several additional relevant records.

5. Having received no objections to deciding this case on the papers, the Tribunal proceeded accordingly, pursuant to Order No. 224 (NY/2012).

### **Factual background**

6. Although the facts pertaining to the Applicant’s separation are set out in detail in the Dispute Tribunal’s and the UNAT’s judgments, it is necessary for the purposes of consideration of the present application to include additional facts specifically relevant to the issues raised in this case.

#### *Communication regarding post-separation payments*

7. On 20 December 2005, the Chief of the Centres Operations Section, Department of Public Information (“DPI”), sent a memorandum to OHRM, with copies to other senior officials in DPI. The memorandum stated that, due to the Applicant’s poor performance, his contract would not be extended beyond 31 December 2005. However, it stated that to afford the Applicant time to seek alternative employment and, taking into account the length of his service, consideration should be given to providing him with “a three-month extension [which] would serve as notice of non-renewal”. The Chief further requested that “in view of security considerations that have been raised concerning his performance and continued presence at the UNIC, we would request that his extension be granted as special leave with pay and that the local security

coordinator be requested to prevent [the Applicant] henceforth from visiting the centre”. The Applicant was not copied in on this memorandum.

8. OHRM disagreed with the suggestion to place the Applicant on special leave with full pay (“SLWFP”). An internal OHRM memorandum from the Associate Human Resources Officer to the Director of Operational Services Division, OHRM, dated 29 December 2005, expressed the view that the best resolution to this matter was not to place the Applicant on SLWFP but “to separate [him] effective 31 December 2005 at the close of business, and pay him three months’ salary in lieu of notice in recognition of his 19 years of service”. The memorandum stated that thus any security threat would be minimized since the Applicant would not have access to the Centre with effect from 1 January 2006. The Associate Human Resources Officer, OHRM, sought the approval of the Director, Operational Services Division, OHRM, “to separate [the Applicant] effective 31 December 2005 [close of business] and pay him three month[s]’ salary in lieu of notice, as per our recommendation”. The Applicant was not copied in on this memorandum.

9. On 30 December 2005, the Associate Human Resources Officer, OHRM, sent an email to OHRM and DPI officials stating that the Applicant’s fixed-term appointment would not be extended beyond 31 December 2005 and that “[i]n recognition of his years of service, he would be paid three months’ salary in lieu of notice, which should be reflected in his separation personnel action [form]”. The Applicant was not copied in on this communication.

10. On 3 January 2006, the Applicant was informed by email from the Chief of Programme Support Section, DPI, that his contract would not be renewed beyond 31 December 2005. He was further informed that OHRM had approved the payment of “three months’ full salary in lieu of termination notice, in recognition of many years of service with the Organization”. The email contained no references to the Applicant being placed on SLWFP.

11. However, despite the communications described above, the Applicant was placed on SLWFP for the period of 1 January to 31 March 2006. As a staff member on SLWFP, the Applicant was paid salary between January and March 2006 on a monthly basis. In total, during the period of January and March 2006 the Applicant was paid 487,649 Pakistani rupees. The Respondent now submits that this was the payment in lieu of notice in recognition of many years of service with the Organization.

12. On 10 April 2006, the Administration wrote to the Applicant requesting his signature on paperwork related to his separation from service. Although the email mentioned his placement on SLWFP, it did not state that it was equivalent to his payment in lieu of notice in recognition of many years of service with the Organization. The email simply stated that “[a]s you know *31st March 2006* was your *last day (special leave with full pay)* at the UNIC Islamabad” (emphasis added).

13. The Applicant did not sign the forms that were attached to the email because he believed that by doing so he would be acquiescing in what he considered to be an unlawful separation from service.

14. On 16 June 2006, the Executive Officer, DPI, sent a memorandum to OHRM, explaining that “taking into consideration [the Applicant’s] length of service and to afford him sufficient time to seek alternative employment, DPI recommended and OHRM approved, a three-month extension of his contract”. The memorandum further stated that, “[i]n view of the security considerations that had been raised concerning [the Applicant’s] performance and continued presence at the UNIC, the extension was approved as special leave with pay”.

*September 2011 payment*

15. On 19 July 2011, following the judgment in *Ahmed* 2011-UNAT-153, the Applicant emailed the Administration requesting “payment of dues against accrued leave of sixty days”. On 20 July 2011, the Administration responded, informing the Applicant that in order to address his claim he would have to sign and return the paperwork sent to him in April 2006. The Applicant was also informed that he had accrued 56.5 days of annual leave, and not 60 days. The Applicant does not dispute this calculation.

16. The Applicant filled out the forms and submitted them to the Administration on 11 August 2011.

17. On 13 September 2011, the Administration provided the Applicant with a final statement and payment in the sum of 505,218 Pakistani rupees. The final payment consisted of several components. It included payment in respect of unused accrued annual leave (460,404 Pakistani rupees), without any interest for the time the money was held by the Organization. The final payment also included 44,815 Pakistani rupees in relation to the three months’ salary in lieu of notice in recognition of many years of service with the Organization. According to the Respondent, the payment in lieu of notice had been made to the Applicant in January–March 2006 in the form of SLWFP (487,649 Pakistani rupees), but it was later determined that the amount paid to him should have been higher by 44,815 Pakistani rupees, which sum was provided to the Applicant on 13 September 2011.

18. In October 2011, the Applicant submitted a request for management evaluation of the decision not to pay interest on the amounts of money paid to him and not to pay the three months’ salary in lieu of notice. He provided further clarification to the Management Evaluation Unit on 30 November and

21 December 2011. On 18 January 2012, he received a negative response to his request for management evaluation.

## **Consideration**

### *Termination indemnity*

19. The Applicant's separation from service was the subject matter of his previous application. The Dispute Tribunal found that that the Applicant's contract was not terminated (i.e., forcibly ended before its expiration date) but, instead, it was not renewed after its date of expiry. This finding was affirmed by the UNAT. As termination indemnity is payable to staff members upon termination of their appointment and not in cases of non-renewal, the Applicant is not entitled to such payment.

### *Interest rate on compensation for unused annual leave days*

#### Whether the Applicant is entitled to the payment of interest on compensation for unused annual leave days

20. The Respondent submits that the delay in payment of final separation payments was attributable to the Applicant's delay in submitting his separation papers, and thus the payment of interest is unwarranted. The Applicant submits that the reason for not signing the separation forms he received in April 2006 was that he believed that, had he done so, he would have forfeited his right of appeal.

21. The issue is not whether the Administration was entitled to withhold the payment of compensation for unused annual leave days pending completion of separation paperwork but whether the Administration's decision to refuse payment of interest on a sum properly due to the Applicant upon separation from the Organization was lawful.

22. The Tribunal finds that, whilst it may be reasonable for the Administration to require that staff members separating from service comply with certain standard and reasonable separation procedures, the Respondent has failed to state the proper legal basis for the refusal to pay to the Applicant interest on sums outstanding upon separation from employment with the Organization.

23. It could be said that the Administration had the benefit of a sum of money for which they did, should, and could have earned interest and to deny such reimbursement to the Applicant offends against the principle of unjust enrichment. The Tribunal's judgment is also based on the fact that the Respondent has failed to demonstrate the proper legal basis for the decision to withhold payment of interest.

24. Should the Applicant's mistaken belief be held against him so as to deny him the payment of interest? The Tribunal takes judicial notice of the fact that such mistaken beliefs are not uncommon and that it was reasonable for the Applicant to suppose that since his appeal against the Tribunal's judgment was still outstanding he should not sign any document which he may feel, albeit mistakenly, would jeopardize his rights. There is no evidence that the Respondent reminded the Applicant, at any point after April 2006, to sign the papers or that the Respondent warned him of the risk that he may forfeit interest payment on the sums outstanding if he did not sign and return the forms.

25. Accordingly, the Tribunal will order that the Applicant be paid interest on compensation in relation to unused annual leave days that remained outstanding and payable to him from 1 April 2006. This order is not merely compensation for pecuniary loss, but a recovery of accumulated interest on the Applicant's funds that were temporarily held by the Organization.



Applicable interest rate

26. In *Warren* 2010-UNAT-059, the UNAT stated that “[t]he very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations”. As the award in *Warren* was expressed in the United States dollars, the UNAT ordered that interest was to be calculated at the applicable US Prime Rate.

27. In the present case, the final separation-related payments were held by the Organization on the Applicant’s behalf until 13 September 2011 in order to ensure that the necessary separation paperwork was complete. Therefore, interest at the US Prime Rate shall apply to compensation for unused annual leave days until 13 September 11 (*Warren*).

28. However, once the paperwork was completed by the Applicant in August 2011, all remaining separation-related payments should have been made to him in Pakistani rupees on 13 September 2011. As they were not paid to him in full, from that point any underpayment was subject to interest rate as established by the State Bank of Pakistan.

*The Administration’s undertaking to pay to the Applicant three months’ salary in lieu of notice in recognition of many years of service with the Organization*

Receivability

29. The Respondent submits that the Applicant’s claims regarding the issues of SLWFP are time-barred and *res judicata*. The Respondent submits that the Applicant was aware of these decisions when his contract was not renewed as he had been informed, according to the Respondent, that “he would receive three months’ salary in lieu of notice, and that this would be implemented by placing him on SLWFP for three months from 31 December 2005”. The Respondent

submits that the Applicant failed to submit a timely request for administrative review.

30. The Tribunal finds that the Applicant's claims regarding the payment in lieu of notice in recognition of many years of service with the Organization are receivable for the reasons below.

31. The Applicant is not contesting his placement on SLWFP as such, but the decision, announced to him on 13 September 2011, that the salary he received while on SLWFP would be classified as payment in lieu of notice. This claim was articulated in his communications with the Management Evaluation Unit.

32. Contrary to the Respondent's submission, the issue of the Respondent's decision to equate SLWFP with the payment in lieu of notice in recognition of many years of service with the Organization is not *res judicata* as it was not, and could not have been, raised as a separate claim or adjudicated upon by the Dispute Tribunal in the Applicant's first case (see para. 18 of *Ahmed* UNDT/2010/161). The Applicant's application in the first case was filed on 11 April 2008. However, the cause of action did not exist prior to 13 September 2011, when the Applicant was notified for the first time of the decision to equate the placement on SLWFP with the payment in lieu of notice in recognition of many years of service with the Organization. The Tribunal finds on the record before it that, prior to 13 September 2011, the Applicant believed, on reasonable grounds, that the payment of his three months' salary in lieu of notice was still outstanding and would be made payable to him.

33. Accordingly, the Applicant's claims with regard to the payment of three months' salary in lieu of notice in recognition of many years of service with the Organization are receivable.

Did the Administration comply with its undertaking to pay the Applicant three months' salary in lieu of notice in recognition of many years of service with the Organization?

34. The Respondent does not suggest that the three months' salary in lieu of notice in recognition of the Applicant's many years of service should not be paid to him. The Respondent concedes that this amount was due, based on the Respondent's undertaking communicated to the Applicant, but states that the payment was properly made in the form of SLWFP.

35. With respect to SLWFP, the Applicant refers to provisions of the Staff Rules that concern placement on administrative leave pending investigative and disciplinary process. These provisions would not apply to this case as the relevant provision was former staff rule 105.2 (Special leave), which regulated the placement of staff on special leave under various grounds and circumstances. In particular, former staff rule 105.2(a)(i) provided that special leave "may be granted at the request of a staff member" in established cases, or, "in exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considered such leave to be in the interest of the Organization".

36. Thus, placement on SLWFP was governed by particular provisions of the Staff Rules and could not be improperly utilized by the Administration (see *Kamunyi* UNDT/2010/214, *Johnson* UNDT/2011/123, *Cabrera* 2012-UNAT-215). Having placed the Applicant on SLWFP, the Administration cannot maintain that this was equivalent to a payment in lieu of notice in recognition of many years of service with the Organization as this would be contrary to the Staff Rules. As the UNAT stated in *Cabrera* 2012-UNAT-215, "the staff member is always given full pay when placed on special leave by the Secretary-General under former staff rule 105.2(a)(i)". Equating salary paid while on SLWFP with payment in lieu of notice in recognition of many years of service with

the Organization would be tantamount to allowing Staff Rules and corresponding rights and obligations to be overtaken by considerations of administrative convenience. The Tribunal will not give the decision to place the Applicant on SLWFP any meaning that is different from the one assigned by the Staff Rules. Once the Applicant was placed on SLWFP, under the Staff Rules, he had a *right* to full salary, which the Organization was *required* to pay, this being distinct from the payment in lieu of notice in recognition of the Applicant's service, which the Organization *undertook* to pay. It is not legally permissible to view salary paid while on SLWFP as payment in lieu of notice that was undertaken by the Organization.

37. The Respondent states at para. 25 of his reply that "a non-standard contract was proposed and approved" for the period of 1 January to 31 March 2006, during which period the Applicant was placed on SLWFP. This is confirmed by email of 10 April 2006, through which the Administration informed the Applicant that "*31st March 2006 was your last day (special leave with full pay)*" (emphasis added). (See also the memorandum of the Executive Officer, DPI, to OHRM, dated 16 June 2006.) In other words, since the Applicant was still considered a staff member until 31 March 2006, no payment in lieu of notice prior to that date was possible in principle as no final separation actually took place. The monthly payments the Applicant received while on SLWFP were clearly his salary that was due to him pursuant to the Staff Rules.

38. The Tribunal will not examine the lawfulness of the placement on SLWFP as such, although there may be significant issues with that decision. In the Tribunal's considered view, this would be beyond the scope of this case. Rather, the case made by the Applicant is that it was incorrect to equate his placement on SLWFP with the promised compensation in lieu of notice in recognition of the Applicant's many years of service with the Organization. In that, the Applicant is correct.

Applicable interest rate

39. The Tribunal finds that, as discussed above (see paras. 26–28), prior to 13 September 2011, the applicable interest on the sum in lieu of notice owed to the Applicant shall be calculated at the US Prime Rate. Following 13 September 2011, when final separation-related payments should have been made available to the Applicant in Pakistani rupees, any underpayment was subject to interest rate as established by the State Bank of Pakistan.

**Conclusion**

40. The Applicant's claim with regard to termination indemnity is dismissed. The Applicant's claims for interest on compensation for unused annual leave days and the non-payment of three months' salary in lieu of notice in recognition of many years of service with the Organization are upheld.

41. Both Counsel are to be complimented on the brevity of their submissions.

**Orders**

42. The Respondent shall pay to the Applicant retroactive interest on his compensation for unused annual leave days. The interest shall be paid at the applicable US Prime Rate from 1 April 2006 to 13 September 2011. In addition, this sum of retroactive interest shall be subject to interest at the applicable interest rate as established by the State Bank of Pakistan from 13 September 2011 to the date of payment.

43. The Respondent shall pay to the Applicant the amount of three months' net base salary in lieu of notice plus interest at the applicable US Prime Rate from 1 April 2006 to 13 September 2011. In addition, this sum shall be subject to interest at the applicable interest rate as established by the State Bank of Pakistan from 13 September 2011 to the date of payment.

44. If payment on the sums ordered above is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the applicable interest rate as established by the State Bank of Pakistan until the date of payment.

*(Signed)*

Judge Goolam Meeran

Dated this 30<sup>th</sup> day of November 2012

Entered in the Register on this 30<sup>th</sup> day of November 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York