



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LUVAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katya Melliush, UNON

Introduction

1. The Applicant is a Security Sergeant in the Department of Safety and Security (DSS) of the United Nations Office at Nairobi (UNON). In his Application dated 29 July 2013, he is contesting a decision, which he avers he became aware of on 25 January 2013, denying him overtime pay (“OT”) for work performed during the months of January and February 2013.
2. The Respondent filed a Reply on 13 September 2013.
3. Vide Order No. 134 (NBI/2014), the Tribunal informed the Parties that it had decided, in accordance with art. 16.1 of its Rules of Procedure to determine the Application on the basis of the Parties’ written submissions.

Facts

4. On 16 March 2002, an Information Circular, UNON/IC/2002/3 (Official hours of work, overtime compensatory time off and night differential) for UNON was published on the UNON Bulletin Board. The announcement contained definitions of the working week, the regular hours of work and compensatory time off (CTO) amongst other information. The IC also indicated that since Security Officers and Drivers adhere to shifts, the regular working hours were not applicable to them. The shifts for Security Officers and Drivers were defined as follows at paragraph 2 of the IC:

Monday – Sunday

7.30 am – 7.30 pm, with an interruption of 60 minutes for lunch

7.30 pm – 7.30 am, with an interruption of 60 minutes for a meal.

For security officers there is an extra day shift

Monday-Thursday

7.30 am – 4.30 pm, with an interruption of 60 minutes for lunch

Friday

7.30 am – 2.00 pm without an interruption for lunch

5. In mid-2012, an error was discovered by the UNON Administration to the effect that Security Officers in UNON/DSS who work 12-hour shifts were being paid OT and CTO for their regular hours of work such that they were mistakenly receiving OT/CTO in accordance with the same policy scheme related to General Service Staff at UNON who receive OT/CTO according to the 7.45-hour day General Service staff work.
6. Between 10 and 29 August 2012, there was an exchange of emails between staff members of the UNON Budget Section and UNON/DSS concerning the calculation of overtime for UNON/DSS staff members.
7. On 6 December 2012, Keval Vora, UNON's Chief of Budget, sent an email to Peter Marshall, Chief, UNON/DSS, informing him that he had converted the United Nations Office in Vienna (UNOV) SSS overtime computation note to a UNON/DSS guideline. He also requested for his comments on the same in order that the guideline would be promulgated effective 1 January 2013.
8. On 24 January 2013, some Security Officers from UNON/DSS sent a memorandum to James Ohayo, President of the United Nations Nairobi Staff Union, citing irregularities in the payment of OT for the month of December 2012 and requesting his intervention to resolve the issue. Mr. Ohayo subsequently brought these concerns to the attention of the Chief, UNON/DSS.
9. On 22 March 2013, Mr. Ohayo sent a management evaluation request on behalf of UNON/DSS staff. The Management Evaluation Unit (MEU) responded to the request on 22 May 2013 in which the contested decision was upheld.
10. The present Application was filed on 29 July 2013.

Applicant's submissions

11. The Applicant's case is summarized below:

12. UNON Administration abused its authority when it interpreted UNON/IC/2002/3's definition of DSS officers' "regular work hours" as being their "regular work week" contrary to the definition of a regular working week that applies to all locally recruited United Nations staff in Kenya which includes UNON/DSS officers.

13. UNON/IC/2002/3 states that the hours to be worked in a regular workweek are 37 hours in total and further that the 37-hour week is to be used for the salary setting for locally recruited United Nations staff in Kenya.

14. Part 2 of UNON/IC/2002/3 states that the regular hours of work are Monday to Thursday from 8.00 a.m. to 4.30 p.m. with an interruption of 45 minutes for lunch. It further notes that the regular working hours for DSS officers and drivers is different from the above referenced example because they work on shifts of 12 hours.

15. UNON Administration violated staff rule 8.1 when it failed to convene staff-management consultations to resolve the issues arising from its incorrect interpretation and application of UNON/IC/2002/3.

16. UNON/IC/2002/3 requires UNON Administration to cooperate with the Human Resources Management Services (HRMS) focal point for leave monitoring for the purpose of reviewing their approach to awarding OT and CTO three times each year. This means that the process for awarding OT and CTO was reviewed 33 times by the HRMS focal point and it is highly unlikely that if an error in awarding overtime existed, it could go undetected for a period of 10 years and escape detection in 33 professional reviews.

17. The Applicant requests the Tribunal:

- a. to find that UNON Administration violated UNON/IC/2002/3;

- b. to find that UNON Administration acted in breach of staff rule 8.1;
- c. to direct UNON Administration to resume the implementation of UNON/IC/2002/3 in the manner it was implemented prior to mid-2012, that is, prior to the point at which they incorrectly perceived the existence of an error in its implementation; and
- d. to direct UNON Administration to fully compensate UNON/DSS officers for all overtime and compensatory time off presently due to them.

Respondent's submissions

18. The Respondent's case is summarized below:

19. The policy and conditions on OT and CTO are governed by staff rule 3.11 and UNON/IC/2002/3.

20. According to staff regulation 1.3(b), the Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. This is further given effect by staff rule 1.4(a) which states that the Secretary-General shall set the normal number of working hours per week for each duty station.

21. At UNON, the normal working week and normal number of working hours per week are set out in UNON/IC/2002/3. Section 2 of UNON/IC/2002/3 describes a normal working week and normal number of working hours for staff in Kenya as a 37-hour week with specific working hours delineated. Section 2 of the IC provides that Security Officers and Drivers adhere to shifts; regular working hours are therefore not applicable to these staff members.

22. Section 2 also describes the shifts that apply to Security Officers and Drivers.

23. In mid-2012, in the course of reviewing the budget and expenditure in DSS/UNON for the purpose of looking at how to reduce the overall costs in line with

the 4.9% reduction in the Secretariat regular budget, it was discovered that Security Officers at UNON were being paid OT and CTO for their regular hours of work rather than overtime. Security Officers working a normal 12-hour shift were in the habit of claiming OT for all the hours in excess of 7.45 hours, that is, the regular working hours of General Service staff other than security officers and drivers.

24. It was also apparent that many Security Officers were claiming OT in excess of 40 hours per month contrary to section 3.2 of UNON/IC/2002/3.

25. Following consultations with UNOV and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) as to how those offices calculate OT and CTO for staff working 12-hour shifts, it was apparent that DSS/UNON had been operating differently from other duty stations and in error in honouring these claims by Security Officers.

26. Upon discovery of this anomaly, discussions were held with staff of DSS/UNON in line with the spirit of staff regulation 8.1.

27. Even before the discovery, on 28 May 2012 at a town hall meeting with all DSS/UNON staff, the Chief, DSS/UNON, the DSS Director of Headquarters Security and Safety Services and the DSS Director of Regional Operations had informed staff about the 4.9% reduction in the regular budget and of the fact that this would necessarily impact on DSS/UNON as it would the rest of the Organization.

28. After the discovery of the overpayments on 10 August 2012, a working level discussion was held between staff members of the Budget Unit and DSS/UNON staff on how OT would be calculated.

29. It was decided that from August 2012, overtime would be capped at 65 hours per month falling to 40 hours per month from October 2012. No overtime was to be payable in relation to any other hours worked during a normal, regular 12-hour shift and CTO would not be paid but had to be taken except where the exigencies of service made that impracticable.

30. On 2 November 2012, a town hall meeting was held at which the Chief of the Budget Section explained the budgetary situation and its impact on the operation of DSS/UNON. Subsequent meetings were held with DSS/UNON staff between 14 and 21 February 2013. Throughout the various discussions, management emphasized the necessity of treating all staff in the same manner regardless of where staff work in a particular duty station. It was made clear to all Security Officers that from December 2012, the stricter regime set out in UNON/IC/2002/3 would be implemented. It was further agreed that no attempt would be made to recover previous overpayments incorrectly made to Security Officers.

31. In the January and February 2013 payroll, properly accrued overtime in accordance with UNON/IC/2002/3 was duly paid based on the submission of claims by individual Security Officers.

32. The Applicant has failed to show how he was entitled to greater payment for overtime in accordance with the rules than he was actually paid for the months of December 2012 and January 2013.

33. In administering staff, the Organization is obliged by law to observe the principle of equality. This has been confirmed by the former Administrative Tribunal as well as the United Nations Appeals Tribunal (UNAT) and the UNDT in *Tabari* 2011-UNAT-177 and *Necovska* UNDT/2013/019.

34. Upon discovery of the fact that Security Officers were regularly claiming and being paid OT and CTO for their regular hours of work, the Administration had no option but to implement corrective measures. This was neither arbitrary, discriminatory nor an abuse of authority.

35. In implementing UNON/IC/2002/3 and correcting erroneous overpayments, there was no requirement to obtain the consent of the staff or an agreement from the Staff Union. The UNON Administration did not act in breach of staff regulation 8.1.

36. UNON Administration and DSS/UNON attempted to make the transition as comfortable as possible for Security officers including the Applicant. Having discovered the overpayments in August 2012, full implementation of the UNON/IC/2002/3 policy did not occur until December 2012 and the utilization of CTO rather than payment was deferred until March 2013.

37. In view of the foregoing, the Respondent prayed the Tribunal to dismiss the Application.

Issues

38. Having reviewed the case record the Tribunal identifies the following issues for consideration:

- a. What is the applicable legal framework for calculating overtime and compensatory time?
- b. Was there a mistake in the calculation of OT/CTO in UNON prior to mid-2012?
- c. Do the Applicant's claims have merit?
- d. Were staff-management consultations necessary to resolve the dispute?

Consideration

What is the applicable legal framework for calculating overtime and compensatory time? Was there a mistake in the calculation of OT/CTO in UNON prior to mid-2012?

39. Staff rule 3.11(a) provides that a staff member in the General Service, Security Service or Trades and Crafts category, or in the Field Service category up to and including level FS-5, who is required to work in excess of the working week shall

be given compensatory time off or may receive additional payment, under conditions established by the Secretary-General.

40. UNON/IC/2002/3 governs the policy and conditions of OT and CTO at UNON. The IC defines overtime as “time worked in excess of the scheduled work day or in excess of the scheduled work week, or time worked on UN Official Holidays in Kenya provided that such work has been authorized in advance by the appropriate official.” Paragraph 2 of the IC defines the hours to be worked in a regular work week as 37 hours in total and that Security Officers and drivers adhere to 12-hour shifts with a 60-minute lunch break therefore regular working hours are not applicable to them.

41. Paragraph 3 of the IC stipulates how the CTO for staff members in the General Service and Professional category shall be calculated. There is no express provision in this paragraph with respect to the calculation of overtime for Security Officers and Drivers.

42. The uncontested evidence before the Tribunal is that the Applicant was earning OT and CTO according to the 7.45 hour day scheme applicable to General Service staff at UNON rather than the 12-hour shift scheme set out by the paragraph 2 of UNON/IC/2002/3.

43. Having carefully reviewed the entire documentary record in this case, the Tribunal finds and holds that the UNON Administration had, prior to mid-2012 when the error was discovered, been miscalculating the amount of OT and CTO due to Security Officers and Drivers at UNON. The Applicant, as a result had received payments in excess of what was due to him.

44. The Applicant has pointed out that it is highly unlikely that an error in awarding overtime could go undetected for a period of 10 years. Much as the legal position is that OT ought not to have been paid, the Tribunal is aware that in the interests of justice, the UNON Administration has decided not to recover these

overpayments arising from its miscalculations. As held in *Boutruche*¹, the Administration has a right and even an obligation to put an end to illegal situations as soon as it becomes aware of them, while preserving any rights acquired by staff members in good faith.

Were staff-management consultations necessary to resolve the dispute?

45. Part of the Applicant's case is that the UNON Administration violated staff rule 8.1 when it failed to convene staff-management consultations to resolve the issues arising from its interpretation of and application of UNON/IC/2002/3. Staff rule 8.1(f) and staff regulation 8.1 are reproduced below:

Staff rule 8.1(f)

The staff representative bodies shall be entitled to effective participation, through their duly elected executive committees, in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies, and shall be entitled to make proposals to the Secretary-General on behalf of the staff.

Staff regulation 8.1.

(a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies;

(b) Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in paragraph (a) above. They shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General.

46. The Tribunal has considered the Respondent's arguments on this score and agrees that no staff-management consultations as envisaged by staff rule 8.1(f) were

¹ UNDT/2009/085, at para. 37.

required given the particular circumstances of this case. The documentary record also establishes that, having discovered the error, the UNON Administration made genuine efforts to consult with the Applicant and other affected staff members to correct the error in accordance with staff regulation 8.1.

Conclusion

47. The Application lacks merit and is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of June 2014

Entered in the Register on this 24th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi