



UNITED NATIONS APPEALS



JUDGE LUIS MARÍA SIMÓN , Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Ms. Deborah Ernst on 5 August 2011 against Judgment No. UNDT/2011/047 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 March 2011. The Secretary-General filed his answer on 26 September 2011.

Synopsis

2. Pursuant to the provisions set out in information circular UN/INF.243 (End-of-service allowance for staff members in the General Service and Manual Worker categories) in cases of resignation like the one submitted by Ms. Ernst, was subject to the condition that the resignation was tendered after three or more years of continuous service with the United Nations Office at Vienna (UNOV) to join another organization in the United Nations common system without a break in service.

3. The facts of the case show that the Appellant's resignation did not fulfill the conditions required by the quoted circular. The resignation was taken knowing the risks involved and caused the break in service which determined the ineligibility for collecting the allowance claimed for, acknowledging that Ms. Ernst was requesting an exception from the regulations to receive it.

4.

Facts and Procedure

6. On 2 March 2004, Ms. Ernst resigned from her position of Senior Recruitment Assistant

concluded that the Appellant could not rely on the terms of UN/INF.243 to claim an EOSA. She had resigned from her previous post prior to taking up her appointment with an organization - the Commission - which did not apply the United Nations common system.

12. The UNDT rejected the Appellant's contention that some provisions of information circular UN/INF.243, and in particular paragraph 4(b), were unlawful once they 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. UN/INF.243 should have been amended by the Administration in line with changes in the rules applicable to United Nations staff members. The UNDT held that even if these allegations were correct, paragraph 5, not paragraph 4(b) of UN/INF.243, made Ms. Ernst ineligible for the EOSA which, except in the two cases expressly provided for, clearly excluded from these entitlements UNOV staff members who resign with a break in service.

13. Similarly, the UNDT rejected the Appellant's submission that under the Fleming principle, the Administration was obliged to adapt UN/INF.243 to take into account the Austrian employment law. It recalled that no national laws or regulations were directly applicable to staff members of the Organization and that only those organs of the Organization authorized to do so had the power to transpose a rule of national law into the internal law of the Organization. It stated that the Tribunal had no powers to rule upon whether such transposition was appropriate.

14. The UNDT found that Ms. Ernst had not established that she was entitled to an EOSA and dismissed her application.

Submissions

Ms. Ernst's Appeal

15. Ms. Ernst submits that the UNDT erred in fact and law in identifying the organization by which the Appellant had been recruited, in particular, that she had taken up her appointment as IMIS Project Coordinator with the Commission, rather than with UNODC. She submits that the UNDT therefore erred in law in determining that

condition of having demonstrated three or more years of continuous service with UNOV prior to joining another organization in the United Nations common system without a break of service (paras. 4(f) and 5(c)).

27. The facts of the case, duly considered by the UNDT, show that the Appellant resigned from her post in order to be able to submit an application for the one she later obtained as IMIS Project Coordinator at the Commission. There was a break in service of 19 days and the new position was taken outside the common system of United Nations, so the resignation did not fulfill the condition required by UN/INF.243.

28. Ms. Ernst would not have been able to apply for the job at the Commission if she had not resigned from her post at UNOV, because it required external candidates. Upon resignation, she had no security that she would be selected for the post she later applied as an external candidate and former staff member of UNOV. Therefore, her resignation was taken knowing the risks involved and caused the break in service which determined the ineligibility for collecting the allowance she claimed, acknowledging that she was requesting an exception from UN/INF. 243 to receive it.

29. None of Ms. Ernst's submissions with respect to the above conclusions can stand. Contrary to Ms. Ernst's assertions, there was no recruitment, promotion or reappointment by the Organization in the case. What in fact occurred was a resignation, a non-working period of

31. However, contrary to Ms. Ernst's assertion, the ICSC did not take any decision in 1987, but merely recommended that a scheme for payment of an EOSA to general service staff comparable to that provided by outside employers in Austria in 1987 be established. It was then for the Administration to decide whether or not to adopt such a scheme. The Administration accepted the ICSC's recommendation and consequently issued UN/INF/243, setting out the eligibility criteria and mode of payment for an EOSA. The ICSC's recommendation in 1987 is not a higher legal norm to which the provisions of UN/INF.243 could be contrary. It was a mere recommendation which the Administration acted upon. Any changes in the Austrian national law have no impact on a staff member's entitlement unless the Administration adopts any changes.

32. The Secretary-General also submits, and we agree, that the administration of justice system is not an avenue for staff members to obtain an application of a policy.

33. Finally, having considered the possibility of granting an exception to the applicable circular, as suggested by the JAB, the Administration exercised legitimate discretion in deciding not to make such an exception with regard to the Appellant. Its will cannot be substituted by the Courts, as there were lawful grounds to accept or decline the request and the Administration decided that the case did not warrant an exception.

Judgment

34. The appeal is dismissed in its entirety, and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(