



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI009/009

Judgment No.: UNDT/2009/053

Date: 22 October 2009

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Jean-Pelé Fomété

ADRIAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON MEDIATION**

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**Counsel for Applicant:**  
Self Represented

**Counsel for Respondent:**  
Joerg Weich, HRMS/UNON

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

## 1. CASE BACKGROUND

1.1 The Applicant, a staff member of the United Nations Human Settlements Programme (UN-Habitat), was initially based in Islamabad, Pakistan. On 10 June 2008, the Human Resources Management Service, UNON, (HRMS/UNON), addressed a memorandum to the Applicant informing him of the administrative arrangements in relation to his reassignment from Islamabad to Washington which included the following entitlements:

- (i) Base salary at L-5 Step 4 of US\$ 134,326.00 gross per annum which after deduction of staff assessment amounted to US\$ 99,842.00 net per annum;
- (ii) Post adjustment at the rate then applicable in Washington of 47% of his net salary per annum at the dependency rate;
- (iii) An Assignment Grant consisting of:
  - (a) 30 days daily subsistence allowance (DSA) in local or convertible currency at the rate applicable in Washington and, if applicable, 30 days DSA at half the daily rate for each of his recognized dependants who travelled at UN expense to the new duty station.
  - (b) A lump sum payment of one month's net salary and post adjustment at the single or dependency rate, also payable in local or convertible currency upon request.
- (iv) Mobility allowance as detailed in the annex to the memorandum if he was eligible for it;
- (v) Non-removal allowance, if applicable;
- (vi) Rental subsidy not exceeding 40% of the rent, if applicable;
- (vii) Home leave entitlement every 24 months;

(viii) Paid travel to Washington; and

(ix) Shipment of his personal effects including shipment insurance.

1.2 On 9 July 2008, the Applicant signed his Letter of Appointment (LOA) which indicated that his post level was at the L-5 step 3 level. The LOA also indicated that the Applicant would be entitled to an assessable salary of US\$ 111,399 gross per annum rising, subject to satisfactory service, to US\$ 113,641 and, that the salary did not include any allowances to which the Applicant may be entitled. On 18 July 2008, the Applicant sent an email to HRMS/UNON raising some concerns regarding his LOA including the fact that his reassignment memorandum dated 10 June 2008 indicated that he would be remunerated at the L-5, step 4 level whereas the LOA indicated that he would be remunerated at the L-5 step 3 level.

1.3 On 21 October 2008, HRMS/UNON informed the Applicant of their findings regarding the various issues related to his reassignment including the fact that the reassignment memorandum dated 10 June 2008 contained an administrative error which HRMS/UNON would correct. The error, according to HRMS/UNON, was incorrectly indicating the grade of L-5, step 4 instead of L-5 step 3. On 30 October 2008, HRMS/UNON sent the Applicant a corrected copy of his reassignment memorandum and informed him that they had corrected the aforementioned error.

1.4 On 12 November 2008, the Applicant requested HRMS/UNON to revise its decision to *post-facto* change his reassignment memorandum and not to grant him the level and salary that had been initially offered to him through the memorandum dated 10 June 2008. On 17 December 2008, HRMS/UNON informed the Applicant that there were no sufficient grounds for HRMS/UNON to advance his next within-grade step increment from March 2009 to the effective date of his reassignment, 19 June 2008, or to pay a salary amount which did not correspond to the approved salary scale.

1.5 On 17 December 2008, the Applicant addressed a letter to the Secretary-General requesting for administrative review of the decision not to honour the remuneration offered to him through the initial reassignment memorandum dated 10 June 2008 and

subsequently filed a Statement of Appeal against the decision with the Nairobi Joint Appeals Board on 20 April 2009.

1.6 The Respondent's Representative filed his Reply to the Statement of Appeal on 15 June 2009. The Applicant and the Respondent's Representative ("the Parties"), were informed that the appeal had been transferred to the Nairobi UNDT in accordance with ST/SGB/2009/11 – *Transitional Measures Related to the Introduction of the New System of Administration of Justice* on 8 July 2009 and 30 July 2009 respectively.

1.7 On 9 October 2009, the Registrar of the Nairobi UNDT informed the Parties that the Judge responsible for the case had perused the documents on record and had formed the opinion that the documentary evidence submitted was adequate for the issuance of a Judgment without the necessity of holding a hearing in accordance with Article 16(1) of the UNDT Rules of Procedure ("the Rules"). The Applicant and the Respondent's Representative indicated that they had no objection to this proposed course of action on 13 October 2009 and on 12 October 2009 respectively.

1.8 On 15 October 2009, the Registrar of the Nairobi UNDT informed the Parties that the Judge responsible for the case was proposing, in accordance with Article 15(1) of the UNDT Rules, to refer the case to the Mediation Division in the Ombudsman's Office for mediation and to suspend further proceedings in the case pending the outcome of the mediation attempt. The Parties were also requested to inform the Tribunal whether they consented to the proposal pursuant to Article 15(2) of the Rules. The Applicant and the Respondent's Representative indicated that they had no objection to this proposed course of action on 16 October 2009 and on 19 October 2009 respectively.

## **2. The Applicable Law**

### **2.1 The proposal of the Tribunal for Mediation**

2.1.2 The relevant provisions of the Rules provide:

*Article 15.1: At any time during the proceedings, including at the hearing, the Dispute Tribunal may propose to the parties that the case be referred for mediation and suspend the proceedings.*

*Article 15.2: Where the judge proposes and the parties consent to mediation, the Dispute Tribunal shall send the case to the Mediation Division in the Office of the Ombudsman for consideration.*

### **2.2 The philosophy behind the Mediation Procedure**

2.2.1 Whilst,

*“[r]eaffirming the decision in paragraph 4 of its resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike<sup>1</sup>,”*

in its Resolution on the Administration of Justice at the United Nations, the General Assembly reiterated the importance of the informal resolution of conflicts arising between the staff and management<sup>2</sup>. The relevant paragraphs of the Resolution read:

*18. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, and emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation;*

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<sup>1</sup> Paragraph 2 of the preamble of General Assembly Resolution A/RES/63/253, 17 March 2009.

<sup>2</sup> General Assembly Resolution A/RES/63/253, 17 March 2009.

*20. Requests the Secretary-General to consider and make proposals at its sixty-fifth session for providing incentives for employees seeking dispute resolution to submit disputes to mediation under the auspices of the Office of the Ombudsman;*

*21. Recalls its request to the Secretary-General, contained in paragraph 67 (a) of its resolution 62/228, to report to it on the revised terms of reference for the Office of the Ombudsman, and requests the Secretary-General to ensure that the terms of reference and guidelines for the Mediation Division are promulgated as soon as possible;*

*22. Requests the Secretary-General to take advantage of existing mechanisms for conflict resolution and mediation, as deemed useful and appropriate, in order to facilitate a renewed dialogue between staff and management*

2.2.3 It is clear therefore that mediation is recognised as playing an important and vital role in the new internal justice system of the Organization. The logic for this is that while it is crucial that staff members who feel aggrieved are able to seek a remedy through the judicial process, the enforcement of these rights should not overlook the basics of working relationships within, and in the interests of, the Organization. To that end, Article 101.3 of the Charter provides:

*The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.*

## **2.3 The Staff Regulations**

2.3.1 Staff Regulations are promulgated by the General Assembly, consonant with the tenor and spirit of the Charter, to regulate the recruitment of staff, their conditions of service and their overall treatment.

2.3.2 The scope and purpose of the Staff Regulations are set out as follows<sup>3</sup>:

*The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat.*

2.3.3 The “highest standards of efficiency, competence, and integrity” cannot always be achieved in a confrontational environment, hence the need, wherever possible and appropriate, to resort to mediation.

## **2.4 The meaning of Proceedings in Article 15.1 of the Rules**

2.4.1 Article 15.1 states that mediation may be proposed “[a]t any time during the proceedings, including at the hearing...” There is no definition or guideline on what should be understood by “proceedings”. The Tribunal takes the view that the use of the word “hearing” means that one may resort to mediation once proceedings have begun in the sense that pleadings are closed and the case is ready for hearing or deliberation even if in actual fact such a hearing or deliberation has not commenced. Article 15.1 must be read together with Article 10.3 of the Statute of the Dispute Tribunal<sup>4</sup> that states that “[a]t any time during the deliberations, the Dispute Tribunal may propose to refer the case to mediation...” Judicial deliberations of a matter typically only commence once pleadings are closed.

## **2.5 The Consent of the Parties**

2.5.1 Where the Tribunal of its own volition proposes mediation, Rule 15.2 also requires that that the parties consent to the matter being mediated. Any attempt at mediation would be futile where the parties do not consent to the mediation process being carried out. While mediation does not always work to resolve a dispute, it can *only ever* work if the parties agree to it being attempted. Mediation provides the parties with the opportunity to address their differences confidentially so that, even

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<sup>3</sup> Staff Regulations ST/SGB/1999/5 Consolidated Text 1 January 2001 and ST/SGB/2009/6.

<sup>4</sup> General Assembly Resolution A/RES/63/253, 17 March 2009.

where the mediation process breaks down, the subject matter of the negotiations remains privileged in accordance with Article 15.7 of the Rules<sup>5</sup>.

## **2.6 The time limit for completion of the Mediation**

2.6.1 By virtue of Article 15.5 of the Rules, the time limit for mediation shall not normally exceed three months. The use of the word “normally” makes it clear that the delay is not mandatory and this view is reinforced by the power given to the Mediation Division to request additional time after the consultation of the parties. There is nothing contained in the Article to enable the Tribunal to set a time limit.

2.6.2 Article 10.3 of the Statute of the Dispute Tribunal<sup>6</sup> allows the Tribunal to propose mediation during deliberations, the proceedings may be suspended with the consent of parties “*for a time to be specified*” by the Tribunal. Article 15.1 of the Rules refers to a possibility of mediation at any time during the proceedings and includes a hearing in such proceedings. It is silent about “deliberations” referred to in Article 10.3 of the Statute of the Tribunal.

2.6.3 It is the Tribunal’s view that proceedings for the purposes of a referral to mediation should also include the deliberation stage. It would follow from this approach that in regard to the time limit to be set for additional time for mediation, if so requested, Article 10.3 of the Statute of the Dispute Tribunal should be read in conjunction with Article 15 of the Rules.

2.6.4 In fact, it cannot be countenanced that a long delay over and above the three months should as a rule be imparted to the Mediation Division. It is the view of the Tribunal that whatever additional time that might be required should be reasonable in the circumstances of the case, the test of reasonability and the length of additional time to be allowed being questions for the Tribunal. This reasoning is motivated by

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<sup>5</sup> Article 15.7 of the Rules reads: *All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal.*

<sup>6</sup> Article 10.3 of the Statute of the Dispute Tribunal reads: *At any time during the deliberations, the Dispute Tribunal may propose to refer the case to mediation. With the consent of the parties, it shall suspend the proceedings for a time to be specified by it. If a mediation agreement is not reached within this period of time, the Dispute Tribunal shall continue with its proceedings unless the parties request otherwise.*



the fact that a case must be determined within a reasonable delay so that parties, that is, both a staff member and the Organization, should be informed of the outcome of the case as soon as is reasonable in the interests of the staff member and the Organization, as well as in keeping with international norms on fair proceedings.

### **3 Time limit and outcome of the Mediation**

3.1 Under Article 15.6 of the Rules, it is the responsibility of the Mediation Division to apprise the Tribunal of the outcome of the mediation in a timely manner. What constitutes “timely manner”?

3.2 In cases where the mediation is *completed* within the normal three months, it is expected that the Tribunal would be informed of the outcome without delay.

3.3 Where the Mediation Division, after consultation with the parties, requests for additional time, the Tribunal may set a time-limit within which it wishes to be appraised of the status or outcome of the process.

### **4. CONCLUSIONS**

4.1 On the one hand, the Respondent has admitted that an error had been made when the initial offer of appointment was forwarded to the Applicant. On the other hand, the Applicant signed the formal letter of appointment on the basis of the initial offer that listed the entitlements as the formal letter did not embody these entitlements. Given these circumstances the Tribunal considers that the case is one that is eminently suitable for mediation. This process will give an opportunity to the Parties to reach a satisfactory solution in what appears to be a case of error and misunderstanding.

4.2 The Tribunal therefore refers the present matter to the Mediation Division in the Ombudsman’s Office for consideration pursuant to Article 15.3 of the Rules.

4.3 The Tribunal also directs the Registry to forward the case file to the Mediation Division pursuant to Article 15.4 of the Rules.

4.4 The outcome of the mediation should, subject to what is prescribed at paragraph 4.5 below, be forwarded to the Tribunal within a reasonable delay after it is completed within three months or before.

4.5 In case the Mediation Division, after consultation with the Parties, requires more time to complete the mediation process, it will notify the Registry indicating the length of time required to complete the process as provided by Article 15.5 of the Rules, based on which notification the Tribunal will make the appropriate order.

4.6 The Mediation Division is also directed to inform the Tribunal of the outcome of the mediation in a timely manner pursuant to Article 15.6 of the Rules. In case additional time is required, the Tribunal will decide on the time limit that should be imparted for the completion of the mediation process. The time limit so allowed would also include the period within which the Tribunal should be informed of the outcome of the mediation.

4.7 The present proceedings are accordingly suspended pending the mediation process as prescribed by Article 15.4 of the Rules.

*(Signed)*

Judge Vinod Boolell

Dated this 22<sup>nd</sup> day of October 2009

Entered in the Register on this 22<sup>nd</sup> day of October 2009

*(Signed)*

Jean-Pelé Fomété, Registrar, UNDT, Nairobi