



Dispute Tribunal

Case No.: UNDT/GVA/2009/45
UNDT/GVA/2009/46
UNDT/GVA/2009/52

Judgment No.: UNDT/2009/077
Date: 20 November 2009
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

HOCKING

APPLICANT 1

JARVIS

APPLICANT 2

MCINTYRE

APPLICANT 3

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Self-represented

Counsel for respondent:

Adele Grant, ALU/OHRM, United Nations Secretariat

Application

1. On 19 September 2008, 7 November 2008 and 30 March 2009 respectively, applicants 1, 2 and 3, all Australian and all staff members at the International Criminal Tribunal for the former Yugoslavia (ICTY), in The Hague, the Netherlands, submitted appeals to the Joint Appeals Board in New York, contesting the amount of the lump sums paid to them to cover the cost of their most recent home leave travel and seeking payment of the difference between what they actually received and what they should have received according to the rules.

Applicants' submissions

2. The applicants consider that in calculating the lump sum for certain destinations the ICTY Administration applied the Staff Rules and the relevant administrative instructions incorrectly. Whereas previously ICTY had calculated the lump sum on the basis of the full economy-class airfare, the new practice, according to the applicants, is to use the price of a reduced-fare ticket.

3. The consequence for the applicants is that the new calculation method significantly reduces the financial incentive to opt for the lump sum and hence deprives some staff members of the right to opt for the lump sum.

4. The applicants consider that in accepting the lump sum they did not renounce their right of appeal.

5. Applicant 1 contends that:

(a) The Administration cannot adopt internal procedures in an attempt to remove the right of a staff member to challenge its decisions as established in the Staff Rules. The applicant was instructed to countersign the memorandum of agreement, thereby opting for the payment of a lump sum; he did so, specifying that he was acting without prejudice to his right of appeal. It is extraordinary that the respondent should now submit that he agreed to sign away his statutory right of appeal;

(b) The respondent cannot claim that it presented the applicant with a choice, since the respondent had in fact removed that choice by failing to offer him a realistic lump sum;

(c) The application was filed in time, since it relates to the decision of 22 April 2008, which did not confirm an earlier decision.

6. Applicant 2 contends that:

(a) She opted for the lump sum, despite the fact that it did not cover her travel costs, precisely in order to be able to challenge the patent unfairness of the approach adopted by the ICTY Administration;

(b) The respondent is mistaken in stating that administrative instruction ST/AI/2006/4 implies that by opting for the lump sum she waived her right to

challenge the amount proposed or the validity of the Administration's approach to the lump-sum calculation; it simply means that she waived all other entitlements. She is not asking for any additional payments in connection with her home leave, but contests the way in which her lump sum was calculated by the Administration on the ground that the approach was unfair;

(c) To contend, as the respondent does, that staff members who opt for the lump sum waive their right of review is equivalent to saying that the Administration's approach to the question of the lump sum is entirely immune from review, which is unacceptable;

(d) The Administration led the applicant, as well as other staff members, to believe that she would be reimbursed if the new approach was declared invalid, but stated that, to that end, staff members had to opt for the lump sum. For example, the Administration sent applicant 1 an e-mail dated 4 April 2008 stating that his acceptance of the lump sum would not prejudice his rights, thereby raising a legitimate expectation that payment of the lump sum was subject to review.

7. Applicant 3 contends that:

(a) She accepted the lump sum in order to have the opportunity to file an appeal. She considers that if she had refused the option, she would have had no avenue of redress to challenge the lump-sum calculation, because the decision would not have taken effect and therefore she would have had no opportunity to challenge it;

(b) The respondent is mistaken in contending that paragraph 10.4 of administrative instruction ST/AI/2006/4 implies that in opting for the lump sum she waived her right to challenge the calculation of her lump-sum entitlement by the Administration. She is not requesting other entitlements relating to home leave but is challenging the calculation of her lump sum by the Administration on the ground that that calculation was unjust;

(c) She acknowledges that her appeal was not filed within the statutory time limit but considers that the interests of justice dictate that the Tribunal should disregard that procedural flaw and rule on the merits.

Respondent's observations

8. First, the respondent contends that the applications are not receivable, since by accepting the lump sum the applicants waived their right to contest the relevant decision and in particular the amount of the lump sum.

9. Paragraph 10.4 of administrative instruction ST/AI/2006/4 states: "By selecting the lump sum option, a staff member agrees to waive all entitlements relating to home leave ... that would otherwise have been payable ... No additional payment shall be made once the option has been exercised". By countersigning the memorandum of agreement opting for the payment of a lump sum the applicants: (i) certified that they had read and understood the terms and conditions of the lump-sum travel option; (ii) accepted the amount as full and final payment; and (iii) waived all rights to other entitlements relating to home leave under the staff rules normally applicable.

10. The respondent emphasizes that staff members have no right to payment of a lump sum when they undertake official travel but are entitled to opt for a lump-sum payment on the express condition that they are satisfied with the payment offered.

11. The respondent cites Judgement No. 1025, *Walton*, of the United Nations Administrative Tribunal, in which the Tribunal noted that, as in the private sector where it is usual to demand a release before settling a claim, it is reasonable for the Organization to offer a claimant the choice between a settlement and an appeal and for the terms of the settlement to be enforced.

12. The respondent adds that a staff member cannot on the one hand opt for a lump sum, which a staff member should only do if he or she is satisfied with the amount proposed, and on the other challenge the amount proposed. If he or she is not satisfied, the staff member should not opt for the lump-sum payment. The applicants were given a choice and opted for the lump sum. In so doing they lost the right to claim additional payments for their home leave travel by appealing the matter under chapter XI of the Staff Regulations and Rules.

13. Secondly, the respondent submits that the appeals of applicants 1 and 3 are not receivable because they did not comply with the time limits established in staff rule 111.2 (a). Applicant 1 did not write to the Secretary-General within two months of the date on which he received written notification of the contested decision, i.e. 5 March 2008. He cannot claim to be appealing against the decision of 22 April 2008, which is merely a confirmatory decision. Applicant 3 did not submit her appeal within the month following her receipt of the Secretary-General's reply.

Facts

15. In October 2007, applicant 1 asked the ICTY Administration to calculate the amount he would receive if he exercised the lump-sum option for his travel on home leave, in lieu of all the entitlements for which he would otherwise be eligible under chapter VII of the Staff Rules then in force.

16. By a standard memorandum dated 5 March 2008, entitled "Notification of agreement to exercise the lump-sum option", applicant 1 was advised of the lump-sum amount calculated by the Travel Unit on the basis of information provided by the applicant. The memorandum specified that by exercising the lump-sum option the applicant accepted the amount as full and final payment and waived all rights to entitlements accruing on account of home-leave travel under the normally applicable provisions of the Staff Regulations and Staff Rules.

17. By a memorandum dated 12 March 2008 addressed to the Registrar of ICTY, applicant 1 stated that the lump sum offered him by the Administration failed to cover the cost of the cheapest airfare available within the period selected for his home leave. He requested that the Registrar review the Travel Unit's decision with respect to the manner in which the lump-sum entitlement was determined and the amount of the payment.

18. By a memorandum dated 22 April 2008, the ICTY Administration replied to applicant 1 stating that if he was unable to meet his ticket requirements by exercising the lump-sum option, he could take the option of allowing the Organization to make the arrangements for home-leave travel in accordance with the Staff Rules.

19. On 29 April 2008, applicant 1 countersigned the memorandum of agreement on the lump-sum option, thus accepting payment of an amount calculated by the Administration on the terms specified in that memorandum. However, he made the following reservation concerning the memorandum: "I sign this because I have been instructed to do so. But I stand by my memo of 12/3/08 and do this without prejudice to my appeal rights".

20. In May 2008, applicant 2 also asked the ICTY Administration to calculate the amount she would receive if she exercised the lump-sum option for her travel on home leave. On 28 May 2008, the Administration informed her unofficially of that amount.

21. By a letter dated 20 June 2008, applicant 1 wrote to the Secretary-General to request review of the ICTY decision on the lump-sum payment in respect of his home-leave travel.

22. Between the end of June and 18 July 2008, applicant 2 exchanged a series of e-mails with the Administration over the fact that the lump-sum payment proposed would not enable her to cover her travel expenses, while also exploring the possibility of asking the Administration to make the travel arrangements for her.

23. By an e-mail dated 18 July 2008, applicant 2 informed the Administration that she had decided to exercise the lump-sum option, not because the amount offered seemed fair or reasonable, "but to preserve [her] right to reimbursement" if the appeal of applicant 1 was successful and "to preserve [her] own right to appeal the unfairness of the lump-sum [she would] receive". On the same day, the Chief of Administration replied to applicant 2, stating inter alia that she would be reimbursed if New York decided that ICTY should use a different fare basis to calculate the lump sum from the one used thus far.

24. By a standard memorandum dated 22 July 2008, similar to the one sent to applicant 1 on 5 March 2008, applicant 2 was informed officially of the lump-sum amount calculated by the Travel Unit. On the same day, she countersigned the memorandum of agreement on the lump-sum option, just as applicant 1 had done previously.

25. By a letter dated 21 August 2008, applicant 2 wrote to the Secretary-General to request review of the ICTY decision on the lump-sum payment in respect of her home-leave travel.

26. By a letter dated 26 August 2008, the Administrative Law Unit of the United Nations Secretariat, writing on behalf of the Secretary-General, rejected applicant 1's request for review, a decision which applicant 1 appealed to the JAB on 19 September 2008.

27. By a letter dated 9 October 2008, the Administrative Law Unit of the United Nations Secretariat, writing on behalf of the Secretary-General, rejected applicant 2's request for review, a decision which applicant 2 appealed to the JAB on 7 November 2008.

28. In November 2008, applicant 3 also asked the ICTY Administration to calculate the amount she would receive if she exercised the lump-sum option for her home-leave travel.

29. By a standard memorandum dated 10 November 2008, similar to the memorandums sent to applicant 1 on 5 March 2008 and applicant 2 on 22 July 2008, applicant 3 was informed of the lump-sum amount calculated by the Travel Unit.

30. On 4 December 2008, applicant 3, as applicants 1 and 2 had done previously, countersigned the memorandum of agreement on the lump-sum option. However, she made the following reservation concerning the memorandum: "I sign and accept this lump sum to preserve my right to challenge the calculation through the appeal procedures of the United Nations".

31. By an e-mail dated 5 December 2008, the ICTY Human Resources Section acknowledged receipt of the aforementioned memorandum by which applicant 3 opted for the lump sum. In connection with the applicant's reservation, the e-mail reproduced a ruling by the Office of Human Resources Management in the United Nations Secretariat, New York:

"This is not a monetary entitlement to the staff member. The entitlement is that the Organization will cover the cost of roundtrip travel to the place of home leave. The staff member can either opt for the Organization to provide the tickets for the travel or opt for the travel lumpsum. If the lumpsum option is not satisfactory to the staff member, then he or she should opt for the Organization to purchase the tickets."

32. On 17 December 2008, applicant 3 wrote to the Secretary-General to request review of the ICTY decision on the lump-sum payment in respect of her home-leave travel.

33. By a letter dated 17 February 2009, the Administrative Law Unit of the United Nations Secretariat, writing on behalf of the Secretary-General, rejected applicant 3's request for review, a decision which applicant 3 appealed to the JAB on 30 March 2009.

34. Pursuant to the transitional measures laid down in United Nations General Assembly resolution 63/253, the three appeals were transferred to the United Nations Dispute Tribunal as of 1 July 2009.

35. By orders dated 31 July and 5 August 2009 changing the venue for adjudication of the case, the Tribunal ordered the transfer of the three appeals from the New York Registry to the Geneva Registry.

Judgment

36. By their appeals registered under the symbols UNDT/GVA/2009/45, UNDT/GVA/2009/46 and UNDT/GVA/2009/52 respectively, the applicants contest similar decisions and raise the same questions of law. Thus the Tribunal considers that there are grounds for joining the three appeals and having one ruling.

37. Provision 105.3 of the Staff Rules in force at the time of the contested decisions stipulates:

"Subject to the conditions specified in chapter VII of these Rules, a staff member shall be entitled to claim, in respect of authorized travel on home leave, travel time and expenses for himself or herself and eligible family members for the outward and return journeys between the official duty station and the place of home leave".

38. Chapter VII of the Staff Rules describes the various benefits and allowances to which staff members are entitled in connection with their home leave.

39. Administrative instruction ST/AI/2006/4, on official travel, lays down the conditions for the implementation of some of the provisions of chapter VII. In section 10, it introduces the possibility for staff members to opt for a lump-sum payment to cover travel costs, including for home-leave travel.

40. Paragraph 10.4 of the administrative instruction states:

“By selecting the lump-sum option, a staff member agrees to waive all entitlements relating to home leave ... that would otherwise have been payable ... No additional payment shall be made once the option has been exercised”.

41. The three applicants, after obtaining from the Administration specific and precise information regarding the amount of the payment each would receive if he or she exercised the lump-sum option in order to cover travel expenses, and regarding the consequences of that choice, opted for the lump sum while expressing doubts — on the acceptance form in the case of two applicants and by e-mail in the case of the remaining applicant — about the approach used to calculate that amount and while also reserving the right to challenge the amount accepted.

42. It is clear from the above excerpts that the Staff Rules provide, principally, that the Administration shall pay the home-leave travel expenses of a staff member and, subsidiarily, that a staff member shall be able to opt to receive a lump-sum payment prior to travel in order to defray the expenses to be incurred. The creation of the lump-sum option was intended to introduce a streamlined procedure that would enable the Administration to limit official expenditure while simplifying its work and would give staff members a precise idea of the amounts available to them for their home-leave travel expenses. It is obvious that this procedure is advantageous to the Administration only if the exercise of the lump-sum option expressly precludes any subsequent challenge once the payment proposed has been accepted. Thus the intent of the author of the administrative instruction is clear and can only be interpreted as barring any challenge of the lump-sum payment once it has been accepted.

43. In the present case, the reservations which each of the applicants formulated upon accepting the lump sum are not binding on the Administration since, at the time the agreement was signed, the Administration and the staff member were not in a contractual situation in which each could negotiate rights. Instead, they were in a situation governed by rules in which the Administration could only apply the rules and the staff member could only accept or reject the lump-sum payment proposed.

44. The applicants contend that only by accepting the lump-sum payment with reservations could they challenge the basis on which the Administration calculated that payment. This contention is ill-founded. The standard memorandum by which the Administration notified each applicant of the lump-sum payment he or she would receive upon exercise of that option constituted an administrative decision; in other words, it was a unilateral act by the Administration of a conclusive and individual nature. As such, it was appealable as soon as its adverse effect was felt if the lump-sum payment was rejected because of the incorrect basis of calculation. Contrary to what the applicants contend therefore, only a refusal to accept the lump-sum payment entitled them to contest the amount.

45. It is therefore clear from the foregoing that there is no need to decide whether the appeals were submitted on time before ruling that the three applications must be rejected as inadmissible, since the applicants, by opting for the lump-sum payment proposed, forfeited any right of appeal.

46. For these reasons, the Tribunal DECIDES:

The applications are rejected.

Judge Jean-François Cousin

Dated this 20th day of November 2009

Entered in the Register this 20th day of November 2009

Víctor Rodríguez, Registrar, UNDT, Geneva
