



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/051
(UNAT 1692)
Judgment No.: UNDT/2010/088
Date: 07 May 2010
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

TACONNET *ET AL.*
(29 APPLICANTS)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
None

Counsel for respondent:
Arnold Kreilhuber, UNEP

Introduction

1. In December 2008, 29 applicants, all staff members of the United Nations Environment Programme (UNEP) in Paris, filed an application with the United Nations Administrative Tribunal (UNAT) against the Secretary-General's decision of 11 July 2008 to accept the conclusions and recommendations of the Nairobi Joint Appeals Board (JAB).

2. The application concerns a decision of May 2007 not to pay the applicants retroactively for the overtime they claim to have worked during the period from January 2006 to February 2007, when the number of working hours per week remained at 40 whereas they consider it should have been reduced to 37.5. JAB rejected the applicants' appeal.

3. The applicants request that:

- a. The Secretary-General's decision be reviewed and, if possible, reversed;
- b. In accordance with the JAB recommendation, the UNEP management initiate talks and put in place a system to improve communication with the United Nations lead agency in Paris;
- c. Each of them be paid 5,000 euros as compensation for the extra hours worked during the period from 1 January 2006 to 28 February 2007 because of the belated decision by the UNEP Executive Director to reduce the working week from 40 to 37.5 hours;
- d. Each of them be paid 5,000 euros as compensation for the moral prejudice suffered.

4. Having been pending before UNAT, the application was, pursuant to the transitional measures set out in General Assembly resolution 63/253, transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010.

Facts

5. The applicants are General Service staff who joined UNEP between 1978 and 2005 and are employed at the Paris office of the Division of Technology, Industry and Economics (DTIE).

6. With effect from 1 January 2006, the United Nations Educational, Scientific and Cultural Organization (UNESCO), which is the lead agency for the United Nations common system in Paris, decided to reduce the length of the working week from 40 to 37.5 hours.

7. Following that decision, DTIE General Service staff in Paris began requesting alignment of their working hours with those of UNESCO.

8. By memorandum dated 6 November 2006, the Deputy Executive Director of UNEP informed the staff of DTIE/Paris that the Executive Director had decided, after consultation with the United Nations Secretariat and the Human Resources Management Service (HRMS) of the United Nations Office at Nairobi (UNON), to keep the length of the working week at the Paris office at 40 hours.

9. By memorandum dated 13 November 2006, the General Service staff of DTIE/Paris reacted to that decision by requesting an upwards adjustment of their salaries.

10. On 27 November 2006 one of the applicants emailed the Special Assistant to the Executive Director of UNEP to raise a number of issues, including that of working hours in Paris.

11. By email dated 6 December 2006, the Special Assistant to the Executive Director responded to the aforementioned applicant, stating in particular that “HRMS has been in contact with United Nations Headquarters and has concluded that staff will not lose financially as a result of the retention of the 40-hour working week”. She also said that the UNEP Executive Director had authority to set working hours and that they could differ from the working hours in the host country or other United Nations agencies.

12. By email dated 7 March 2007, the applicants were informed by the Director, DTIE, of the decision by the UNEP Executive Director to reduce working hours from 40 to 37.5 per week with effect from 1 March 2007.

13. By memorandum dated 22 March 2007, the applicants petitioned the Chief, Programme Management and Administration Unit, DTIE, for retroactive payment of the overtime they considered they had worked between 1 January 2006 and 28 February 2007 because of the delayed introduction of the 37.5 hour working week.

14. On 1 June 2007, the applicants received a memorandum dated 11 May 2007 from the Executive Director, UNEP, addressed to the Director, DTIE, whereby the Executive Director, after consultations with HRMS/UNON, and the Office of Human Resources Management in New York, rejected their request for the payment of overtime. In support of his decision the Executive Director said, *inter alia*, that UNESCO's unilateral introduction of a 37.5-hour work week was not applicable to staff of other United Nations agencies and that, since their salary scale was based on a 40-hour week, the staff of DTIE/Paris had not been underpaid during the period January 2006-February 2007.

15. By letter dated 19 June 2007, the 29 applicants requested the Secretary-General to review the above decision.

16. On 18 September 2007, the applicants filed an appeal before the Nairobi JAB.

17. On 9 April 2008, JAB submitted its report to the Secretary-General. JAB concluded in particular that the Executive Director, UNEP, had authority to set the working hours of UNEP staff and that he was in no way bound by the UNESCO Director-General's decision regarding working hours. JAB recommended that the Secretary-General dismiss the appeal and also that the UNEP management should put in place a system to improve communication with the lead agency in Paris.

18. By letter dated 11 July 2008, the Deputy Secretary-General informed the applicants of the Secretary-General's decision to accept the conclusions and recommendations of JAB.

19. On 31 December 2008, after having requested and obtained from UNAT an extension of the deadline, the applicants filed their application.

20. After correction, the application was resubmitted to UNAT in May 2009 and transmitted to the respondent on 3 June 2009.

21. On 4 December 2009, after having requested and obtained from UNAT two extensions of the deadline, the respondent submitted his reply, which was forwarded to the applicants on 8 December 2009.

22. The case, which UNAT was unable to hear before it was abolished on 31 December 2009, was transferred to UNDT.

23. By letter dated 24 February 2010, the Tribunal asked the applicants to submit their observations on the respondent's reply. In addition, noting that all the correspondence with UNAT had been signed by one only of the applicants, it asked them to each submit a signed form authorizing that applicant to represent them before the Tribunal.

24. On 23 March 2010, the 29 applicants submitted their observations on the respondent's reply and the requested signed authorizations for one of them to represent them before the Tribunal.

25. By letter dated 29 April 2010, the Tribunal informed the applicants that it considered an oral hearing unnecessary and asked them to state their position on that matter within a week. It also requested the respondent to provide it with the Secretary-General's delegation of authority to the Executive Director of UNEP in matters relating to human resources.

26. On 5 April 2010, the respondent submitted to the Tribunal a report to the General Assembly (A/56/620) containing information on the delegation of authority to the Executive Director of UNEP in matters relating to human resources.

27. The parties made no objection to the Tribunal's view that an oral hearing was unnecessary.

Parties' contentions

28. The applicant's principal contentions are:

- a. For over 30 years, DTIE has followed the practice of UNESCO, the lead agency in Paris, with regard to salary scale, working hours, allowances and other conditions of employment. The applicants therefore had a legitimate expectancy that DTIE would follow the decision by the Director-General of UNESCO to reduce the working week from 40 to 37.5 hours without cutting salaries;
- b. By its email of 6 December 2006, the Office of the Executive Director gave the applicants the assurance that they would not lose financially as a result of the retention of the 40-hour working week. The applicants could therefore expect in good faith that they would be compensated for the extra 2.5 hours a week they would be working in comparison with their colleagues in UNESCO;
- c. The situation is the result of an accumulation of procedural irregularities, arbitrary decisions, discriminatory treatment and bad faith towards the General Service staff of DTIE/Paris. The management of UNEP has never made it clear which of UNEP headquarters or, as the lead agency in Paris, UNESCO has authority regarding conditions of employment
- d. The bad faith of the UNEP administration and management and the delays and lack of communication regarding working hours have caused them moral prejudice.

29. The respondent's principal contentions are:

- a. The Secretary-General has delegated to the Executive Director, UNEP, full authority to administer the Staff Regulations and Staff Rules, including determining working hours, within UNEP.

Accordingly, UNEP was not bound to follow the example of UNESCO with regard to the determination of working hours and salary scales applicable to DTIE staff in Paris. The applicants therefore had no legitimate expectancy that UNEP would follow the decision of UNESCO with regard to such matters;

- b. Authority for administering UNEP staff vests in the Executive Director of UNEP and not in the Director-General of UNESCO. Any argument to the contrary by the applicants is unfounded. The decision by the Executive Director of UNEP not to grant the applicants overtime pay was a valid exercise of his discretionary authority and was untainted by procedural irregularity or by any other irrelevant factor;
- c. The applicants' salary was based on a 40-hour week. Consequently, they did not perform any overtime by working 40 hours per week instead of 37.5 from January 2006 to February 2007;
- d. The applicants provide no evidence that they suffered financial or moral prejudice as a result of the decision not to pay the overtime they claim for the above-mentioned period. They therefore have no entitlement to compensation.

Judgment

30. The applicants contest the decision not to pay them retroactively 2.5 hours' overtime per week for the period from January 2006 to February 2007, when the number of working hours per week remained at 40 whereas they consider it should have been reduced to 37.5

31. Staff rule 101.4 (a) in effect at the time provided that:

The Secretary-General shall set the normal number of working hours per week for each duty station. Exceptions may be made by the Secretary-General as the needs of service may require. A staff member shall be required to work beyond the normal tour of duty whenever requested to do so.

32. Annexes II, IV and V to administrative instruction ST/AI/234/Rev. 1, “Administration of the Staff Regulations and Staff Rules”, enumerate the provisions of the Staff Rules application of which is within the authority of, *inter alia*, heads of offices away from Headquarters. Pursuant to this document, heads of offices have delegated authority to apply the above-mentioned staff rule concerning the setting of the normal number of working hours.

33. In addition, it is clear from annex V of this administrative instruction and from administrative instruction ST/AI/234/Rev.1/Amend.1 that the Executive Director of UNEP is among the heads of offices away from Headquarters who have delegated authority to set the normal number of working hours.

34. Whereas the above texts give the Executive Director of UNEP authority to set the working hours for UNEP staff, the applicants’ contention that the Executive Director of UNEP should have aligned the length of the working week in Paris with that decided by the Director-General of UNESCO has no basis in law.

35. Hence, by deciding in 2006 not to align the length of the working week with UNESCO but to keep it at 40 hours, the Executive Director of UNEP acted entirely within the bounds of his authority.

36. Furthermore, the length of the working week having legally been 40 hours between January 2006 and February 2007, the applicants cannot claim that they performed overtime during that period by working 40 hours per week instead of 37.5.

37. Although the applicants claim to have received assurances from the Administration regarding payment of the overtime in question, the Tribunal observes that the email of 6 December 2006 on which they base that claim cannot be interpreted in that way: it simply states that the staff will not lose financially as a result of the retention of the 40-hour working week. In fact, the applicants did not suffer any financial loss, since their salary was based on a working week of that length.

38. It follows that the applicants are not justified in claiming the payment of overtime for the period January 2006-February 2007.

39. With respect to the applicants' allegations of procedural irregularities, arbitrary decisions, discriminatory treatment and bad faith on the part of the Administration, the rule is that the burden of proof lies with the party making the allegations. The Tribunal finds that the applicants have provided no proof of their allegations and considers that their complaints are unfounded.

Decision

40. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 7th day of May 2010

Entered in the Register on this 7th day of May 2010

(signed)

Victor Rodríguez, Registrar, UNDT, Geneva