



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/033/  
UNAT/1677  
Judgment No.: UNDT/2010/149  
Date: 20 August 2010  
Original: English

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**Before:** Judge Meeran  
**Registry:** New York  
**Registrar:** Hafida Lahiouel

JEMIAI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**  
Joseph Grinblat, OSLA

**Counsel for respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The applicant contests the decision not to pay her three months' salary in lieu of notice at the termination of her permanent appointment. In her appeal to the United Nations Administrative Tribunal, she requested the Tribunal to find that she was the victim of a lack of due process, because of a violation of former staff rules 109.3(a) and 109.3(c).

2. The matter was not dealt with by the Administrative Tribunal before it was abolished and the case was transferred to the Dispute Tribunal as of 1 January 2010.

3. The parties have agreed that the legal issue in this case is whether or not the applicant is entitled to the payment of three months' salary in lieu of notice pursuant to former staff rule 109.3(a) and 109.3(c).

## **Facts**

4. On 19 July 2006, the Under-Secretary-General for Management authorised the Office of Human Resources Management (OHRM) to enter into an agreed termination of the applicant's (then fixed-term) appointment, to take effect on 31 July 2006, and the applicant was so informed on 26 July 2006.

5. By email of 1 August 2006, the applicant expressed her willingness to consent to the agreed termination, but asked that in view of her personal circumstances it should take effect from 31 December 2006 instead.

6. On 17 August 2006, OHRM emailed the applicant stating that, after consulting with the Department of Economic and Social Affairs (DESA), her request would be accommodated and the separation date was changed to 31 December 2006. OHRM additionally informed the applicant that it was not in a position to enter into further negotiations or changes in the offer as it had been presented to her and that,

since she had been given advance notice of the arrangement, there would be no payment made in lieu of final notice as she was not entitled to it.

7. On 31 August 2006, the applicant signed a Memorandum of Understanding (MOU) agreeing to the terms governing the termination of her appointment which provided:

In accepting an agreed termination, I agree to the following:

a) that, should the Secretary-General decide to terminate my appointment under the provision of Staff Regulation 9.1(a), effective 31 December 2006, I will not contest such decision or any decision related to this termination action;

b) that I will be paid termination indemnity in accordance with Annex III to the Staff Regulations;

c) that the Organization has no further obligation, financial or otherwise, upon separation. The rights of the United Nations to require a staff member to settle his/her indebtedness to the United Nations is not extinguished on separation;

e) that I agree to withdraw any and all claims and appeals I may have pending against the Organization and to refrain from filing any further claims or appeals against the Organization arising from any terms of appointment;

f) that I am not eligible for employment with the United Nations, its subsidiary organs and programmes, for a period of four years following separation.

I have decided to accept termination of my appointment under the above terms and conditions.

This is subject to the approval of the Secretary-General.

8. On 27 December 2006, the applicant received, from the Officer-in-Charge, OHRM, a formal notice that “the Secretary-General has decided to terminate your permanent appointment” to take effect on 31 December 2006.

9. On 17 April 2007, the applicant wrote to OHRM, drawing attention to the fact that she had not received the three months’ salary in lieu of notice in addition to the

termination indemnity to which she was entitled “according to Regulation 9.3 . . . and Rule 109.3”, in view of the fact that she had only been formally informed of her termination four days prior to it taking effect and taking into consideration the conversion of her contract from fixed-term to permanent with effect from 1 September 2006.

10. OHRM responded on 25 June 2007, informing the applicant that, after having consulted with the Legal Policy Office, it would make no change in the original decision.

11. On 24 July 2007, the applicant wrote to the Secretary-General requesting a review of OHRM’s decision to refuse to give her three months salary in lieu of notice at the termination of her permanent contract.

12. In a letter dated 12 September 2007, the Chief, Administrative Law Unit (ALU), OHRM, reminded the applicant that she had been informed in advance of the arrangement that there would be no payment made in lieu of final notice as the relevant notice period had been observed. On 31 August 2006, the applicant signed the MOU, which reflected all the terms of her agreement with the Organization and raised no objections at the time. The Chief, ALU, concluded that the case had been handled in accordance with the relevant Staff Regulations and Rules as well as with the MOU.

13. On 18 September 2007, the applicant submitted a statement of appeal. On 15 October 2008, the Joint Appeals Board (JAB) submitted its report to the Secretary-General, finding that no recommendation should be made in support of the applicant. On 9 December 2008, the applicant was notified of the Secretary-General’s acceptance of the JAB’s recommendation.

14. On 30 January 2009, the Administrative Tribunal received the applicant’s appeal against the Secretary-General’s decision.

## **Legal provisions**

15. Former staff rule 109.3 provides as follows:

### **Notice of termination**

(a) A staff member whose permanent appointment is to be terminated shall be given not less than three months' written notice of such termination.

(b) A staff member whose temporary appointment is to be terminated shall be given not less than thirty days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

(c) In lieu of the notice period, the Secretary-General may authorize compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period, at the rate in effect on the last day of service.

## **Considerations**

16. An examination of the legal issue as agreed by the parties and the staff rules being relied upon raises a fundamental question of interpretation as to the intention and purpose of the rules and their application to the particular circumstances of this case.

17. Former staff rule 109.3 is titled "Notice of termination". It is, in substance, no different to the standard protection afforded to employees universally. A UN staff member whose contract of employment is terminated unilaterally by the Secretary-General is entitled to be given one months' notice for a temporary appointment and three months for a permanent appointment. In lieu of such notice, the equivalent compensation and associate entitlements are paid.

18. However, former staff rule 109.3 does not deal with agreed termination of employment for the simple reason that such an agreed termination is in terms that would have been negotiated between the parties and for the benefit of the parties.

19. The applicant's position is clear. She is not challenging the contents or terms of the MOU but stating that she is entitled to three months' pay in lieu of notice because it was not until 27 December 2006, a matter of four days before her termination, that she knew that the Secretary-General had approved the MOU.

20. The terms of the MOU were negotiated and agreed between the parties. The following exchange of correspondence took place prior to the applicant signing the MOU:

a. On 1 August 2006, the applicant wrote to Ms. Barada Weisbrot, Human Resources Officer, OHRM, seeking clarification of various questions including the question of whether she would receive three months' salary and allowances.

b. On 17 August 2006, Ms. Weisbrot replied stating, "[g]iven the advance notice of this arrangement, there would be no payment in lieu of final notice." (This message is repeated at paragraph iii of the email in the following terms "...by leaving 31 December 2006, you would not be entitled to any payment in lieu of notice"). Whilst it would have been preferable if Ms. Weisbrot had said that in view of the agreed termination, former staff rule 109.3 did not apply, there is no doubt that the applicant knew before she signed the MOU that she was not being offered any payment in lieu of notice.

21. What was the event that brought about the termination of employment? Was it:

a. the operation of the provisions of staff rules 109.3(a) and 109.3(c); or

b. the MOU, recording the terms of the consensual termination, to be read together with Ms. Weisbrot's email?

Clearly, it was the implementation of the MOU which recorded the terms of the agreed separation from service.

22. The fundamental issue in this case relates to the confusion between a unilateral decision to terminate the staff member's employment, in which event the notice requirement of staff rule 109.3 comes into play and a consensual termination which involves negotiations between the parties resulting in agreed terms which would include both the date when the contract would end as well as the terms of the termination package and benefits.

23. It is not being argued that the decision to terminate was wrong but only that there was a failure to pay her the three months' pay in lieu of notice to which the applicant says she is entitled.

24. The exchange of correspondence clearly indicates that the applicant was engaged in a free and uninhibited negotiation of the terms of the MOU, including the very issue which is the subject of this appeal. She knew that the management view was that she would receive no further payments other than those outlined in Ms. Weisbrot's email of 17 August. She was not obliged to accept the terms of the MOU.

25. The jurisprudence of the Administrative Tribunal is consistent in holding that a staff member may not accept an agreed separation package and then submit an appeal. In Judgment No. 547, *McFadden* (1992), where the applicant accepted a separation package, the Administrative Tribunal held as follows:

VIII. In this case, the Applicant was necessarily on notice of and bound by staff regulations 9.1(a) and 9.3(b), the effect of which is to make the Secretary-General's authority to pay the termination indemnity received by the Applicant dependent on an uncontested termination of the Applicant's appointment. Accordingly, the Applicant could not, at the same time, accept benefits under staff regulations 9.1 and 9.3 and institute or maintain an appeal as he has sought to do. If he wished to pursue the latter course, he should have refrained from accepting the termination package. He was not at liberty to do both. . . . If he wished to pursue the latter course she should have refrained from accepting the termination package. He was not at liberty to do both.

26. The applicant places great weight on the fact that the MOU includes the statement "[t]his is subject to the approval of the Secretary-General" and that such

approval was only notified to her on 27 December 2006. To the extent that the applicant is asking the Tribunal to accept that she was in a state of uncertainty as to whether her employment would be terminated on 31 December 2006 in accordance with the MOU, it is surprising that when directed by the Tribunal to state what, if any, steps she had taken to chase up progress, her response, through counsel, was that she had taken no such steps because she knew from experience that the answer would be that she would have to wait. This explanation is not convincing. The evidence is more consistent with her knowing from experience that the agreed termination date was 31 December 2006, that the clause stating that the MOU was subject to the approval of the Secretary-General was a standard clause and that the probability of the Secretary-General not consenting was virtually nil. Even if I were minded to consider ordering the respondent to make a payment for distress caused by the last minute formal confirmation that her employment status was that of a permanent employee and her date of termination was as indicated in the MOU, I could not do so because there is no evidence of such damage or loss.

27. It is further noted that the MOU contained a clause whereby the applicant waived her right to challenge the implementation of any decision relating to the termination.

28. It is in the best interest of all concerned that an agreed termination on terms negotiated freely between the parties, preferably upon proper advice, should be effective and honoured. Such consensual terminations of employment are an essential feature of good employment relations and in the absence of duress, misrepresentation or any other circumstances which would justify the agreement being set aside, the Tribunal will be reluctant to interfere.

### **Guidance to managers**

29. Those acting under power delegated to them by the Secretary-General would be well-advised in future to reconsider the implication of standard clauses like “subject to the approval of the Secretary-General”. They should also take note that

delay in providing written confirmation where appropriate, such as occurred in this case, does nothing to advance the underlying policy underpinning the beneficial effects to both parties of a consensual termination of the contract of employment.

**Conclusion**

30. There was no breach of former staff rule 109.3(a) or 109.3(c). The applicant's due process rights were respected. The appeal, first lodged with the Administrative Tribunal on 30 January 2009, fails and is dismissed.

*(Signed)*

Judge Meeran

Dated this 20th day of August 2010

Entered in the Register on this 20th day of August 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York