



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/009
(UNAT 1564)
Judgment No.: UNDT/2010/106
Date: 09 June 2010
English
Original: French

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

EID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant contests the decision whereby the United Nations Interim Force in Lebanon (UNIFIL) terminated his appointment with effect from 14 February 2003 although he was unwell and should have been kept in employment until he had recovered.

2. He seeks financial compensation from UNIFIL because of the termination.

Facts

3. The applicant joined UNIFIL on 1 January 1980 as a welder at the GS-3 level on a temporary indefinite appointment (100 series of the former Staff Rules, rule 104.12).

4. On 25 November 2002, he was informed in writing that, because of the downsizing of UNIFIL, his post would be abolished effective 31 December 2002. The Administration informed him of the termination indemnities available under Annex III to the Staff Regulations and offered him the opportunity of increasing them by 50 per cent. The increased financial compensation was conditional on his giving a written undertaking not to enter into any proceedings against the Organization in connection with his termination.

5. The applicant was placed on sick leave from 9 December 2002 to 13 January 2003.

6. On 24 December 2002, UNIFIL, after having sought clarification from the Medical Services Division in New York concerning the application of section 8.9 of administrative instruction ST/AI/1999/3, "Family leave, sick leave and maternity leave", extended his sick leave until 14 February 2003. His contract was extended from 1 January 2003 to 14 February 2003 to enable him to use his sick leave entitlement pursuant to that administrative instruction.

7. On 28 February 2003, he was informed that the medical certificate that he had provided for the period 14 February-14 March 2003 was insufficient to justify further sick leave and that more medical examinations were required.

8. On 31 March 2003, the Medical Services Division informed him that, based on the certificates he had supplied, no further sick leave could be approved beyond 14 February 2003.

9. On 19 June 2003, the Chief Administrative Officer, UNIFIL, wrote to the applicant to inform him that, after examination of his medical file, the Medical Services Division had decided not to approve extension of his sick leave or to grant him a disability pension.

10. On 17 June 2004, further to a communication from the applicant, the Medical Services Division wrote that, if the applicant wished to contest the refusal to grant him further sick leave, he would have to make a written request for the establishment of a medical board.

11. On 18 June 2004, the applicant wrote to UNIFIL formally contesting the decision by the Medical Services Division not to extend his sick leave and asking for his case to be referred, pursuant to staff rule 106.2 (j), to a doctor chosen by both parties or to a medical board.

12. On 19 November 2004, in response to a letter dated 7 September 2004, the Chief Administrative Officer, UNIFIL, informed the applicant that his request for the establishment of a medical board was moot, recommended that he accept the offer of financial compensation, and stated that the relevant provisions of administrative instruction ST/AI/1999/3 did not apply to the applicant's case as they concerned only staff members holding fixed-term appointments, whereas the applicant held a temporary indefinite appointment.

13. On 18 April 2005, the applicant received a letter from the new Chief Administrative Officer confirming the earlier decisions and renewing the advice to him to accept the offer of financial compensation.

14. On 30 May 2005, the applicant contacted the Ombudsman's Office at UNIFIL headquarters, Naqoura, where an official of the Office informed him, in July 2005, of the possibility of filing an appeal in accordance with staff rule 111.2.

15. On 27 January 2006, the applicant asked the Force Commander, UNIFIL, to review his case. By letter dated 21 February 2006, the Force Commander stated that the applicant's situation had been dealt with according to United Nations rules. He stressed that the applicant was wrong to think that he could get anything more than the offered financial compensation and therefore urged him to accept it.

16. On 30 March 2006, the applicant wrote to the Secretary-General requesting administrative review of his case so that the procedure for appointing a medical board to rule on extension of his sick leave could resume. He also asked that he be paid the financial compensation for termination without delay and without having to renounce attempts to obtain the extension of his sick leave.

17. On 22 June 2006, he received a reply dated 16 May 2006 informing him that his request for administrative review was time-barred.

18. On 11 July 2006, he filed an appeal with the New York Joint Appeals Board (JAB).

19. On 19 April 2007, JAB submitted its recommendation to the Secretary-General; the applicant was informed of it on 28 June 2007. JAB concluded that the appeal was not receivable because the applicant provided no evidence that his delay in submitting it was due to exceptional circumstances. The Secretary-General accepted that recommendation.

20. On 20 July 2007, the applicant filed an application before the United Nations Administrative Tribunal. The definitive version of the application was received on 31 January 2008.

21. Pursuant to the transitional measures related to the introduction of the new system for the administration of justice, the case was transferred to the present Tribunal on 1 January 2010.

22. An oral hearing was held on 26 April 2010, at which it was established that the applicant considered himself entitled to remain a staff member while on sick leave and that he wished to receive the financial compensation he had been offered without having to drop the claim he had entered. The respondent asked for the application to be rejected as irreceivable or, failing that, as unfounded. The Tribunal asked the respondent to provide it with additional information on the indemnity offered to the applicant as a result of his termination.

23. By memorandum dated 3 May 2010, the respondent submitted that information. In the light of it, the Tribunal, by Order dated 6 May 2010, gave the parties until 20 May 2010 to reach a settlement. By memorandum dated 20 May 2010, the respondent notified the Tribunal of problems in contacting the applicant. The Tribunal therefore determined that the efforts to reach an amicable settlement had failed.

Parties' contentions

24. The applicant's contentions are:

- a. His appeal before JAB was not late. The delay was due to exceptional circumstances, since the Administration refused to pay him his indemnity unless he renounced his claim. In addition, the fact that he speaks neither English nor French prevented him from obtaining sound information about his rights;
- b. Although obliged to give it, the Administration denied him assistance in contesting its decisions. It gave him hope of a solution and did not provide him with the services of an interpreter;
- c. The complaint he filed against the Chief of the UNIFIL medical staff for expelling him from her office was not followed up, creating uncertainty as to the outcome of his request for extension of his sick leave. He was told the Administration would deal with his problem;

- d. On 18 June 2004 he received a verbal response from the Chief Administrative Officer at Naqoura to the effect that he would be examined by an independent physician appointed by UNIFIL and would be contacted later. He was misled by the Administration, which gave him to understand that a medical board would examine his case;
 - e. He did not have the benefit of counsel, but only the assistance of a friend who helped him on a *pro bono* basis to present his pleas in English.
25. The respondent's contentions are:
- a. The appeal before the Secretary General is time-barred under staff rule 111.2 (f). Since the applicant engaged a lawyer, there are no exceptional circumstances to explain the delay;
 - b. The applicant submitted his request for administrative review on 30 March 2006, almost 16 months after being informed that his request for the convening of a medical board was moot and was therefore refused.

Judgment

26. A distinction must be made at the outset between the termination indemnity and what the Tribunal will refer to hereinafter as the "compensation package". The termination indemnity is automatically due, pursuant to the Staff Regulations and Staff Rules, to every staff member whose contract is terminated and is payable in accordance with the schedule in Annex III to the Staff Regulations. The compensation package includes the termination indemnity and such additional sum as the Organization may choose to give to staff who are terminated. The provision of an additional sum is therefore an *ex gratia* act by the Organization, which opts to pay more than just what is legally required of it. That being so, the Administration may legitimately make it subject to the condition of renouncing any subsequent claim.

27. The applicant, who was recruited on a temporary indefinite contract, contests the decision by which UNIFIL terminated his employment with effect from 14 February 2003 although he was unwell. He also requests that UNIFIL be ordered to pay him the compensation package connected with the abolition of his post.

28. The respondent contends that the whole of the application is irreceivable since the request to the Secretary-General for administrative review was late as defined by the then staff rule 111.2 (f).

29. As regards, first, the decision by UNIFIL to terminate the applicant's contract with effect from 14 February 2003, while the applicant contests the respondent's allegation of lateness by arguing that exceptional circumstances prevented him from submitting his request for administrative review within the time limit, the Tribunal can, without needing to pronounce on the above-mentioned question of receivability, rule immediately on the merits of the application if it finds reason for considering it unfounded.

30. Thus, although the applicant contends that his contract should be extended because he fell ill before it expired, his contention is not based on any document applicable to his status as a staff member recruited on a temporary indefinite contract. The fact that the Administration mistakenly granted him a two-month extension of his contract on the basis of administrative instruction ST/AI/1999/3, which applies only to fixed-term contracts, does not give him any right to have his contract extended again.

31. At all events, then, the application must be rejected in so far as it seeks to contest the refusal to grant the applicant an extension of his contract on the ground of ill-health.

32. The applicant's second plea is that UNIFIL should be ordered to pay him the compensation package connected with the abolition of his post. In response, the Administration, without elaborating in any way on its argument, again contends that the application is time-barred. It behoves the Tribunal, however, to determine whether that contention is justified.

33. It is a fact that there is no explicit decision by UNIFIL refusing to pay the applicant the compensation package. The case file contains only instances, the most recent of them dating from 21 February 2006, of advice to the applicant to sign a declaration renouncing any subsequent contestation, in return for which he would receive the package.

34. Assuming that the Tribunal considers that there was an implicit decision to refuse to pay the applicant the compensation package, the question arises at what date he became aware of it, since he can only have done so by noticing the Administration's prolonged delay in paying him. In this regard, it is noteworthy that he sent a last request to UNIFIL on 27 January 2006 and that the reply to it was addressed to him on 21 February 2006. The respondent cannot claim, therefore, that the applicant was time-barred when, on 30 March 2006, he requested administrative review of UNIFIL's refusal to pay him the package. Consequently, the application must be considered receivable in so far as it concerns the compensation package and the Tribunal must rule on its merits in that regard.

35. The respondent's own statements show that, when the applicant was terminated, he was entitled, under the provisions in force at the time, to receive the following sums:

- 27,684.21 United States dollars, representing the amount of the termination indemnity in accordance with Annex III to the Staff Regulations;
- 2,307.02 United States dollars, representing the amount of special leave with full pay in compensation for years served on a daily-paid appointment;
- 9,552,660 Lebanese pounds, representing the amount due in respect of accrued annual leave.

36. The Tribunal therefore considers it appropriate to order the Administration to pay the applicant the above sums, which, since they should have been paid without any request on his part with effect from

14 February 2003, will bear interest starting from that date and until the payment is made at the rate of eight per cent per annum.

37. On the other hand, the applicant cannot legitimately claim the 50 per cent enhancement of the termination indemnity since that enhancement is not provided for in a regulatory text, stems only from an *ex gratia* decision by the Administration in favour of staff terminated as a result of the General Assembly's decision to downsize UNIFIL and is payable only if the staff member undertakes, which the applicant refused to do, not to contest the termination of his or her appointment.

Decision

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

UNIFIL must pay the applicant the sum of 29,991.23 United States dollars and the sum of 9,552,660 Lebanese pounds, each of which shall bear interest at the rate of 8 per cent per annum from 14 February 2003 until payment is made.

(signed)

Judge Jean-François Cousin

Dated this 9th day of June 2010

Entered in the Register on this 9th day of June 2010

(signed)

Victor Rodríguez, Registrar, UNDT, Geneva