



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/142

Judgment No.: UNDT/2012/121

Date: 7 August 2012

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

New York

Introduction

1.

5. In view of the settlement on salary days and mission subsistence allowance, for which Counsel are commended in securing, only two of the Applicant's claims remain outstanding, namely (i) the Applicant's request that the Organization consider her for conversion to a permanent appointment, and (ii) her claims for compensation in connection with the delayed home leave and family leave.

Consideration

Continuity of service

6. As the decisions to subject the Applicant to a retroactive break in service and to place her on an appointment of limited duration between 5 and 30 June 2009 were found unlawful, the Applicant should be treated as if those decisions were never implemented. Thus, her service should be deemed uninterrupted and continuous on a 100 series fixed-term contract. As the United Nations Appeals Tribunal stated in *Castelli* 2010-UNAT-037, "the administration may not subvert the entitlements of a staff member by abusing its powers, in violation of the provisions of the Staff Regulations and Staff Rules". Accordingly, as the Applicant is to be treated as if her service was continuous and uninterrupted, the Tribunal shall make appropriate orders to reinstate the Applicant to the position she would have been if not for the unlawful decisions.

Home leave and family leave

Nature of the delay

7. It is agreed that, with the finding that the Applicant's service is continuous, she should have been eligible for family leave on 1 June 2009 and for home leave on 1 December 2009. Instead, as a result of the unlawful imposition of a break in service, retroactively applied and recorded only in October 2009, the Applicant's entitlement to family leave was deferred to December 2009 and her entitlement to home leave was deferred to June 2010. She seeks compensation in the amount of

three months' net base salary for the emotional turmoil and distress caused by the deferral of her right to home leave and family leave. In the alternative, she requests that she be

The Tribunal considers it fair to award the Applicant the sum of USD1,200 as compensation for the economic loss suffered by her as a result of not receiving her home leave entitlement in December 2009, when it should have been made available to her and when she would have likely used it. As this entitlement would have been made available to the Applicant in December 2009, it follows that it should be subject to retroactive interest, which shall be ordered in accordance with the established case law (see *Warren* 2010-UNAT-059, *Fayek* UNDT/2010/194).

Compensation for emotional distress

11. As the United Nations Appeals Tribunal stated in *Antaki* 2010-UNAT-095, not every violation will necessarily lead to an award of compensation; compensation may only be awarded if it has been established that the staff member actually suffered

In the Tribunal's considered view, art. 10.5(a) should not be interpreted too broadly as if it was meant to cover all decisions somehow related to appointment, promotion, and termination matters. The Tribunal finds that the clause should be interpreted as applying primarily to decisions not to appoint or promote a staff member or to terminate her or his appointment. The likely rationale for including this clause in the Statute is, *inter alia*, to avoid affecting third-party rights and to avoid imposing reinstatement or continued employment where the relationship between the parties has irretrievably broken down.

18. In the Tribunal's considered view, an order for the Administration to consider the Applicant for conversion to a permanent appointment is not an order to appoint the Applicant. There is no indication that the ongoing relationship between the Applicant and the Organization is anything other than successful. Furthermore, no third-party rights would be affected if the Administration considers the Applicant for conversion. If the outcome of such consideration is not in favour of the Applicant, it would result in a new decision capable of being appealed by the Applicant.

salary at the GS-7 level, step X; (ii) 4.5 days of salary at the FS-6 level, step X; and (iii) 9 days of mission subsistence allowance. These sums are to be paid within 60 days after the judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sums are not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

21. The Applicant shall be paid USD1,200 as compensation for the delayed home leave entitlement plus interest at the applicable US Prime Rate from 1 December 2009 until the date of payment. If payment is not made within 60 days of the date this Judgment becomes executable, an additional five per cent shall be added to the US Prime Rate until the date of payment.

22. The Applicant shall be given full and fair consideration for conversion to a permanent appointment.

(Signed)

Judge Ebrahim-Carstens

Dated this 7th day of August 2012

Entered in the Register on this 7th day of August 2012

(Signed)

Hafida Lahiouel, Registrar, New York