

UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/048

Judgment No.: UNDT/2014/075

Date: 24 June 2014

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Introduction

1. The Applicant is a Security Officer in the Department of Safety and Security (DSS) of the United Nations Office at Nairobi (UNON). In his Application dated 29 July 2013, he is contesting a decision, which he avers he became aware of on 25 January 2013, denying him overtime pay (“OT”) for work performed during the months of January and February 2013.
2. The Respondent filed a Reply on 13 September 2013.
3. Vide Order No. 135 (NBI/2014), the Tribunal informed the Parties that it had decided, in accordance with art. 16.1 of its Rules of Procedure to determine the Application on the basis of the Parties’ written submissions.

Facts

4. On 16 March 2002, an Information Circular, UNON/IC/2002/3 (Official hours of work, overtime compensatory time off and night differential) for UNON was published on the UNON Bulletin Board. The announcement contained definitions of the working week, the regular hours of work and compensatory time off (CTO) amongst other information. The IC also indicated that since Security Officers and Drivers adhere to shifts, the regular working hours were not applicable to them. The shifts for Security Officers and Drivers were defined as follows at paragraph 2 of the IC:

Monday – Sunday

7.30 am – 7.30 pm, with an interruption of 60 minutes for lunch

7.30 pm – 7.30 am, with an interruption of 60 minutes for a meal.

For security officers there is an extra day shift

Monday-Thursday

7.30 am – 4.30 pm, with an interruption of 60 minutes for lunch

Friday

7.30 am – 2.00 pm without an interruption for lunch

5. In mid-2012, an error was discovered by the UNON Administration to the effect that Security Officers in UNON/DSS who work 12-hour shifts were being paid

12. UNON Administration abused its authority when it interpreted UNON/IC/2002/3's definition of DSS officers' "regular work hours" as being their "regular work week" contrary to the definition of a regular working week that applies to all locally recruited United Nations staff in Kenya which includes UNON/DSS officers.

13.

Respondent's submissions

17. The Respondent's case is summarized below:

18. The policy and conditions on OT and CTO are governed by staff rule 3.11 and UNON/IC/2002/3.

19. According to staff regulation 1.3(b), the Secretary-General shall establish a normal working week and shall establish official holidays for each duty station. This is further given effect by staff rule 1.4(a) which states that the Secretary-General shall set the normal number of working hours per week for each duty station.

20. At UNON, the normal working week and normal number of working hours per week are set out in UNON/IC/2002/3. Section 2 of UNON/IC/2002/3 describes a normal working week and normal number of working hours for staff in Kenya as a 37-hour week with specific working hours delineated. Section 2 of the IC provides that Security Officers and Drivers adhere to shifts; regular working hours are therefore not applicable to these staff members.

21. Section 2 also describes the shifts that apply to Security Officers and Drivers.

22. In mid-2012, in the course of reviewing the budget and expenditure in DSS/UNON for the purpose of looking at how to reduce the overall costs in line with the 4.9% reduction in the Secretariat regular budget, it was discovered that Security Officers at UNON were being paid OT and CTO for their regular hours of work rather than overtime. Security Officers working a normal 12-hour shift were in the habit of claiming OT for all the hours in excess of 7.45 hours, that is, the regular working hours of General Service staff oty

30. In the January and February 2013 payroll, properly accrued overtime in accordance with UNON/IC/2002/3 was duly paid based on the submission of claims by individual Security Officers.

31. The Applicant has failed to show how he was entitled to greater payment for overtime in accordance with the rules than he was actually paid for the months of December 2012 and January 2013.

32. In administering staff, the Organization is obliged by law to observe the principle of equality. This has been confirmed by the former Administrative Tribunal as well as the United Nations Appeals Tribunal (UNAT) and the UNDT in *Tabari* 2011-UNAT-177 and *Necovska* UNDT/2013/019.

33. Upon discovery of the fact that Security Officers were regularly claiming and being paid OT and CTO for their regular hours of work, the Administration had no option but to implement corrective measures. This was neither arbitrary, discriminatory nor an abuse of authority.

34. In implementing UNON/IC/2002/3 and correcting erroneous overpayments, there was no requirement to obtain the consent of the staff or an agreement from the Staff Union. The UNON Administration did not act in breach of staff regulation 8.1.

35. The UNON Administration and DSS/UNON attempted to make the transition as comfortable as possible for Security officers including the Applicant. Having discovered the overpayments in August 2012, full implementation of the UNON/IC/2002/3 policy did not occur until December 2012 and the utilization of CTO rather than payment was deferred until March 2013.

36.

Issues

37. Having reviewed the case record the Tribunal identifies the following issues for consideration:

- a. What is the applicable legal framework for calculating overtime and compensatory time?
- b. Was there a mistake in the calculation of OT/CTO in UNON prior to mid-2012?
- c. Do the Applicant's claims have merit?
- d. Were staff-management consultations necessary to resolve the dispute?

Consideration

What is the applicable legal framework for calculating overtime and compensatory time? Was there a mistake in the calculation of OT/CTO in UNON prior to mid-2012?

38. Staff rule 3.11(a) provides that a staff member in the General Service, Security Service or Trades and Crafts category, or in the Field Service category up to and including level FS-5, who is required to work in excess of the working week shall be given compensatory time off or may receive additional payment, under conditions established by the Secretary-General.

39. UNON/IC/2002/3 governs the policy and conditions of OT and CTO at UNON. The IC defines overtime as "time worked in excess of the scheduled work day or in excess of 291(OT)-17981 0 0 143 Q q BT /F10(s)8(c)-16(h)19(e)3(du)-20k

to 12-hour shifts with a 60-minute lunch break therefore regular working hours are not applicable to them.

40. Paragraph 3 of the IC stipulates how the CTO for staff members in the General Service and Professional category shall be calculated. There is no express provision in this paragraph with respect to the calculation of overtime for Security Officers and Drivers.

41. The uncontested evidence before the Tribunal is that the Applicant was earning OT and CTO according to the 7.45 hour day scheme applicable to General Service staff at UNON rather than the 12-hour shift scheme set out by the paragraph 2 of UNON/IC/2002/3.

42. Having carefully reviewed the entire documentary record in this case, the Tribunal finds and holds

identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies, and shall be entitled to make proposals to the Secretary-General on behalf of the staff.

Staff regulation 8.1.

(a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other human resources policies;

(b) Staff representative bodies shall be established and shall be entitled to initiate proposals to the Secretary-General for the purpose set forth in paragraph (a) above. They shall be organized in such a way as to afford equitable representation to all staff members, by means of elections that shall take place at least biennially under electoral regulations drawn up by the respective staff representative body and agreed to by the Secretary-General.

44. The Tribunal has considered the Respondent's arguments on this score and agrees that no staff-management consultations as envisaged by staff rule 8.1(f) were required given the particular circumstances of this case. The documentary record also establishes that, having discovered the error, the UNON Administration made genuine efforts to consult with the Applicant and other affected staff members to correct the error in accordance with staff regulation 8.1.

Conclusion

45. The Application lacks merit and is accordingly refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of June 2014

Entered in the Register on this 24th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi