

Case No.: UNDT/NBI/2013/052

Judgment No.: UNDT/2014/079

Date: 24 June 2014

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Council for
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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 3 September 2013.
3. Vide Order No. 36 (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 workime5(u)-hiT Q q Ba erehe5(3(e)3(5(u)-hi)1717(T Q q)37

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 OT and CTO for their regular hours of work such that they were mistakenly receiving OT/CTO in accordance with the same policy scheme related to General Service Staff at UNON who receive OT/CTO according to the 7.45-hour day General Service staff work.
 6. Between 10 and 29 August 2012 there was an exchange of emails between staff members of the UNON Budget Section and UNON/DSS concerning the calculation of overtime for UNON/DSS staff members.
 7. On 6 December 2012, Keval Vora, UNON's Chief of Budget, sent an email to Peter Marshall, Chief, UNON/DSS, informing him that he had converted the United Nations Office in Vienna (UNOV) SSS overtime computation note to a UNON/DSS guideline. He also requested for comments on the same in order that the guideline would be promulgated effective 1 January 2013.
 8. On 24 January 2013, some Security Officers from UNON/DSS sent a memorandum to James Ohayo, President of the United Nations Nairobi Staff Union, citing irregularities in the payment of OT for the month of December 2012 and requesting his intervention to resolve the issue. Mr. Ohayo subsequently brought these concerns to the attention of the Chief, UNON/DSS.
 9. On 22 March 2013, Mr. Ohayo sent a management evaluation request on behalf of UNON/DSS staff. The Management Evaluation Unit (MEU) responded to the request on 22 May 2013 in which the contested decision was upheld.
 10. The present Application was filed on 29 July 2013.
- Applicant's submissions
11. The Applicant's case is summarized below:

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. UNON/IC/2002/3 states that the hours to be worked in a regular workweek are 37 hours in total and further that the 37 hour week is to be used for salary

calculate OT and CTO for staff working 12-hour shifts, it was apparent that SSS/UNON had been operating differently from other duty stations and in error in honouring these claims by Security Officers.

25. Upon discovery of this anomaly discussions were held with staff of DSS/UNON in line with the spirit of staff regulation 8.1.

26. Even before the discovery, on 28 May 2012 at a town hall meeting with all DSS/UNON staff, the Chief, DSS/UNON, the DSS Director of Headquarters Security and Safety Services and the DSS Director of Regional Operations had informed staff about the 4.9% reduction in the regular budget and of the fact that this would necessarily impact on DSS/UNON as it would the rest of the Organization.

27. After the discovery of the overpayments on 10 August 2012, a working level

Issues

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

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 categories will 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 that the UNON Administration had, prior to 2012 when the error was discovered, been miscalculating the amount of OT and CTO to Security Officers and Drivers at UNON. The Applicant, as a result had received payments in excess of what was due to him. The UNON Administration has decided not to recover these overpayments. As held in *Bantruche*¹, the Administration has a right and even an obligation to put an end to illegal situations as soon as it becomes aware of them, while preserving any rights acquired by staff members in good faith.

Were staff-management consultations necessary to resolve the dispute?

43. Part of the Applicant's case is that the UNON Administration violated staff rule 8.1 when it failed to convene staff management consultations to resolve the issues arising from its interpretation of and application of UNON/IC/2002/3. Staff rule 8.1(f) and staff regulation 8.1 are reproduced below:

Staff rule 8.1(f)

The staff representative bodies shall be entitled to effective participation, through their duly elected executive committees, in

¹ UNDT/2009/085 at para. 37.

identifying, examining and resolving issues relating to staff ~~are,~~
including conditions of work, general conditions of life and other

