



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/91

Judgment No.: UNDT/2011/108

Date: 23 June 2011

Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: Víctor Rodríguez

SCOTT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. In 2008, the Applicant claimed and received a full spousal dependency benefit in the amount of USD12,193 based on his wife's expected income of USD34,200. However, by the end of 2008 her income was USD47,236 which the Applicant declared in the dependency status questionnaire he completed in April 2009. On the basis of this declaration, the Respondent decided that, because the Applicant's spouse had earned more than the monetary threshold allowed, that is, USD38,413, he was ineligible for the full dependency benefit for 2008 though he was entitled to an adjusted benefit. Therefore, he ought to repay portion of what he had been paid.

2. The Applicant challenged this decision. In the course of the management evaluation, the amount to be recovered was adjusted, but the Respondent continues to seek recovery of the balance of USD5,592.40. The Applicant continues to dispute that his wife's earnings in 2008 exceeded the threshold for full dependency benefit.

3. The Applicant seeks the reversal of two of the administrative decisions relating to his entitlement to the dependency benefit, a ruling that he be properly compensated at the dependency rate for all of 2008, that it be determined that the Applicant owes no payment or recovery to the Organization, and that all amounts recovered to date be returned to the Applicant.

Issues

4. The issues are as follows:
- a. Were the contested decisions administrative decisions?
 - b. What is the interpretation of former staff rule 103.24(a), the operative rule for determining whether a staff member's spouse is a dependant for the purpose of entitlement to a dependency benefit?

Facts

5. The Applicant joined the International Criminal Tribunal for the former Yugoslavia (“ICTY”) at The Hague in January 1998. At the material time, he was working as a Senior Prosecuting Trial Attorney, at level P-5. His wife is in part time self employment in The Hague. The volume of her work and therefore income is not easily predicted from year to year. Until 2008, her gross earnings were under the threshold for a dependency benefit and the Applicant’s salary was based on the dependency rather than the single rate. The full dependency benefit received by the Applicant for 2008 amounted to USD12,193.

6. In March 2008, the Applicant completed a yearly dependency status questionnaire for 2007 in which he certified that he was entitled to receive a dependency benefit for his spouse for 2008 and that her expected income would be USD34,200.

7. In April 2009, the Applicant certified that his spouse’s earnings for 2008 had been USD47,236 and estimated that for 2009 they would be USD49,000.

8. The ICTY reviewed the Applicant’s claims for a dependency benefit for 2008 and made four successive decisions:

– On 13 May 2009, the decision was made to discontinue the payment of net base salary and post adjustment at the dependency rate to the Applicant in respect to his spouse;

– On 28 May 2009, that decision was amended. It was decided that the Applicant was entitled to an adjusted dependency benefit in 2008 of USD3,754, instead of USD12,193, as his spouse had earned USD47,236 and the threshold was USD38,413. The Administration sought recovery of USD8,823 from the Applicant;

– On 8 July 2009, the decision was made to amend the previous decisions and to correct the actual adjusted benefit for 2008 to USD3,370 instead of USD3,754. Recovery of USD8,823 was still sought;

– On 11 August 2009, all previous decisions were amended. It was decided that in 2008 the adjusted benefit for the Applicant should have been USD4,836 as his spouse had earned USD47,236 and the threshold was in fact USD39,879 or EUR27,437. Recovery of the balance of the overpayment in an amount equal to USD5,592.40 was sought from the Applicant.

9. When it made the first decision, the Respondent relied on the monetary threshold of spousal earnings as published in two internal memoranda, ICTY/IC/2008/09 of 7 February 2008 and ICTY/IC/2009/08 of 24 February 2009. The figure of USD38,413 was based on the G-2, step I, New York gross salary for 2008.

10. The last two adjustments in July and August were prompted by a reexamination of the correct spousal earning threshold following the Applicant's request for management evaluation of the first decision. The Applicant has not challenged those specific decisions in his request for management evaluation but maintains, in his application, his objection to the method of calculation which was applied to both the full and adjusted benefit.

11. In July 2009, the Respondent began recovery of the alleged overpayment which the Applicant agreed to although under protest.

12. Later that same month, the Respondent became aware that the threshold amount that it had relied on was incorrect. It had been based on the G-2, step I, New York gross salary of USD38,413. This was lower than the correct monetary threshold for determining eligibility for the dependency benefit for the Organization's staff members in the Professional category, namely the G-1, step I, salary level in The Hague.

13. After adjustment to take account of the average 2008 currency fluctuations between the United States dollar and the euro, the G-1, step I, salary level in The Hague was established to be USD39,879. Based on that figure, the Applicant was still ineligible for the full dependency benefit because of the level of his wife's earnings but was entitled to an adjusted benefit. The Respondent then requested

the recovery of USD5,592.40, the balance due after some monies had already been recovered from the Applicant.

Parties' contentions

14. The Applicant's principal contentions are:

a. He has been affected by the contested decisions in that he has lost his entitlement to the dependency benefit of more than USD12,000 per annum and, as staff assessment is collected at the single rate, his actual net salary is reduced;

b. He is not attempting to avoid payment of any recovery following the correct application of and compliance with United Nations rules, principles and policies. However, the Administration did act in breach of those rules, principles and policies;

c. Staff members and their families must be treated in such a way as to ensure at least equivalent purchasing power at each duty station, including in connection with spousal earnings. This position is predicated on the Applicant's interpretation of former staff regulations 12.1 to 12.4, former staff rule 103.24(a), and administrative instruction ST/AI/2000/8 (Dependency status and dependency benefits). The Applicant also refers to a number of non legislative publications:

i. The Noblemaire principle upon which the salaries of professional staff in the United Nations are based;

ii. The International Civil Service Commission ("ICSC") website which notes that the United Nations common system of salaries and allowances is "designed to avoid serious discrepancies in terms and conditions of employment";

iii. An ICSC document entitled "A Framework for Human Resources Management", which states that the core elements of human resources management is to "[a]void any competition in the

employment of staff that may result from fundamental differences in the compensation package”;

iv. A booklet published in 2009 by the ICSC on “United Nations Common System of Salaries, Allowances and Benefits”, which states that “post adjustment is designed to ensure that professional salaries have the same purchasing power at all duty stations”;

d. For the purpose of determining the maximum amount set under former staff rule 103.24(a), account should be taken of “equivalent purchasing power between duty stations”. The 2008 income of the Applicant’s spouse was largely due to the euro-United States dollar “historically high exchange rate” and not because of any increase in purchasing power. His spouse’s income for 2008 equaled EUR32,262 which, based on the average 2008 exchange rate, amounted to USD47,236. If the 2007 average exchange rate had been used, her income would have amounted to USD44,221. In order to restore an equivalent purchasing power between New York and The Hague, the G-2, step I, New York salary should have been multiplied times the 2008 post adjustment multiplier applicable in The Hague. This would have resulted in his case in a 2008 spousal income of USD62,344;

e. The Administration erred in applying former staff rule 103.24(a) because, in his view, from the plain reading of this provision and based on the principles of fair and equivalent treatment, the spousal income which should have been taken into consideration for the purpose of dependency benefit is the spousal income in euros equivalent to that of a G-2, step I, staff member based in New York. Otherwise, there would be a “very serious discrepancy and unfairness between a married staff member in New York and a married staff member in Europe” due to the euro-United States dollar exchange rate;

f. Further, the Applicant submits that, since no G-1 position exists in ICTY, the Administration erred in taking into account the G-1, step I salary level in The Hague. Instead, it should have considered the G-2, step

I salary level in The Hague for the purpose of determining his 2008 entitlement;

g. The determination as to whether a staff member is paid at the dependency or single rate should be made on a “monthly payroll basis” rather than yearly.

15. The Respondent’s principal contentions are:

a. The manner in which the Respondent elects to determine and pay benefits to staff members falls entirely within the discretion vested in him by the General Assembly. The exercise of the rule-making authority is not an “administrative decision”. Further, to the extent that the Applicant in fact requests the Tribunal to re-write the relevant provisions, the claim goes beyond the Tribunal’s scope of review ;

b. The Respondent duly applied all relevant administrative issuances. Post adjustment is in place to accommodate exchange rates and maintain staff members’ purchasing power. Even if the dependency benefit were to be calculated as is suggested by the Applicant, his spouse’s income would still exceed the maximum amount set under former staff rule 103.24(a);

c. Neither staff rule 103.24(a) nor ST/AI/2000/8 allow for the lowest existing level of current staff members to be taken into consideration for the purpose of determining dependency benefits. Since the G-2, step I New York salary was lower than the G-1, step I salary in The Hague, the Administration was correct in considering the latter as the “lowest salary level at the local duty station”;

d. ST/AI/2000/8 does not allow the determination as to whether a staff member is paid at the dependency or single rate to be made on a monthly basis.

The Law

16. Former staff rule 103.24 reads as follows:

Definition of dependency

For the purposes of the Staff Regulations and Staff Rules:

(a) A dependent spouse shall be a spouse whose occupational earnings, if any, do not exceed the lowest entry level of the United Nations General Service gross salary scales in force on 1 January of the year concerned for the duty station in the country of the spouse's place of work, provided that, in the case of staff in the Professional category or above, the amount shall not at any duty station be less than the equivalent of the lowest entry level at the base of the salary system (G-2, step I, for New York).

17. Sections 1.5 and 2.1 of ST/AI/2000/8 (Dependency status and dependency benefits)¹ provides:

1.5 Eligible staff members shall be entitled to receive dependency benefits for those dependants whose dependency status has been recognized, provided the conditions of the present instruction are met.

...

2.1 A spouse shall be recognized as a dependant when the following conditions are met:

(a) For staff members other than those in the Professional category and above, the spouse's annual gross occupational earnings, if any, do not exceed the lowest entry level of the United Nations General Service gross salary scale in force on 1 January of the year concerned for the closest United Nations duty station in the country of the spouse's place of work;

(b) For staff members in the Professional category and above, the spouse's annual gross occupational earnings, if any, do not exceed the higher of:

(i) The amount determined under section 2.1 (a); or

(ii) The gross salary for the lowest entry level in force on 1 January of the year concerned at the base of the salary system (G-2, step 1, for New York).

¹ The Tribunal notes that ST/AI/2000/8/Amend.2, though it amends section 2.1, does not modify the wording of the material conditions of eligibility for dependency benefit with respect to a spouse.

Discussion

Were the contested decisions administrative decisions?

18. Article 2.1 of the Tribunal's Statute provides that the Tribunal is competent to hear and pass judgment on an application appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

19. The former United Nations Administrative Tribunal stated in Judgment No. 1157, *Andronov* (2003):

[T]he administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

20. This definition has been relied upon by the Dispute Tribunal in several judgments² and the latter has stressed that "[t]he reference in *Andronov* to the 'individual application' of the decision should not be interpreted to mean that for the appeal to be receivable the decision must apply *only* to the applicant".³

21. In this case, the Applicant clearly identified the contested decision as being "[t]he decision ... that [his] spousal earnings in 2008 exceeded an allowed level so that [he] was not entitled to receive ... compensation at the dependent rate". Thus, even though he objects to the lawfulness of a method of calculation which applies to all staff, he claims to have been directly affected by the application of such method to his case. He has lost his entitlement to the full dependency benefit and his actual net salary has accordingly been reduced.

22. The Tribunal finds that the decisions contested by the Applicant are administrative decisions. They were made by the act of the Respondent applying a

² See, for instance, *Planas* UNDT/2009/086 as confirmed by *Planas* 2010-UNAT-049; *Larkin* UNDT/2010/108 and *Kunanayakam* UNDT/2011/006.

³ See *Jaen* UNDT/2010/165; *Leboeuf et al.* UNDT/2010/206.

staff rule and related instruments to the Applicant's situation. These decisions directly affected him. The Respondent's submission on that point is rejected.

What is the interpretation of former staff rule 103.24(a), the operative rule for determining whether a staff member's spouse is a dependant for the purpose of entitlement to a dependency benefit?

23. The interpretation of a statutory document proceeds first by establishing the plain meaning of the words in the context of the document as a whole. Only if the wording is ambiguous should the Tribunal have recourse to other documents or external sources to aid in the interpretation.⁴

24. Applying this rule of interpretation, I do not accept the Respondent's submission that the manner in which the Respondent elects to determine and pay benefits to staff falls entirely within his discretion. As a matter of principle, "the Administration has no discretion in the granting of allowances but is, on the contrary, bound to strictly apply the applicable rules".⁵

25. In this case, the Respondent is governed by the plain meaning of staff rule 103.24(a) ("A dependent spouse shall be..."), which does not confer discretion. The Respondent's obligation in relation to this rule is strictly to apply the rule.

26. Section 2.1 of ST/AI/2000/8 details the method by which the calculation under staff rule 103.24(a) is to be made. Again, the wording of that section ("A spouse shall be recognized as a dependant when the following conditions are met...") as well as that of section 1.5 ("Eligible staff members shall be entitled to receive dependency benefits ... provided the conditions of the present instruction are met") leaves no room for the exercise of discretion.

27. The two instruments provide that the dependency benefit eligibility for all staff is determined by what a spouse earns relative to the lowest entry level of the General Service gross salary for the nearest duty station in the country of the spouse's place of work. However, the earning threshold for spouses of staff

⁴ See *Morsy* UNDT/2009/036.

⁵ *Ernst* UNDT/2011/047.

members in the Professional category and above is not limited to the lowest rate at their nearest duty station. If it is to the staff member's advantage, the spouse's earnings can be assessed relative to the lowest entry level in New York. In the latter case, the staff rule says that this amount shall not be less than the equivalent of G-2, step I, for New York.

28. The Applicant asks the Tribunal to interpret the word "equivalent" in staff rule 103.24 as meaning "equivalent purchasing power between duty stations". This submission is rejected on the basis that to do so would be to import extra obligations into the rule than are intended by its plain meaning.

29. The word "equivalent" is used in the staff rule because of the difference between United States dollars and the currencies at different duty stations. In the English version of former staff rule 103.24(a), it is not referred to in the first method of calculating the threshold as that alternative is referenced only to a salary in the local duty station. By definition, the first method of calculation has no relationship to the New York salary scale and does not involve currency differences.

30. However, the second method of calculation, which applies to staff members in the Professional category, may require a currency adjustment to be made. Where the spousal earnings of a spouse who is at a duty station other than New York is calculated, it is necessary to take into account the currency differential between New York and other duty stations. The staff rule says that the *amount* of the lowest entry level of the General Service gross salary scales in force on 1 January of the year concerned for the duty station in the country of the spouse's place of work shall not be less than the equivalent in New York. In this context, the word "equivalent" means that the level of spousal earnings against the New York entry level is calculated according to the *amount* of entry level income once any currency differences have been taken into account.

31. The Applicant's reliance on the concept of purchasing power is not supported by the wording of staff rule 103.24(a). The staff rule is expressed in simple and clear terms. It does not refer to equivalent purchasing power but to equivalence of amounts of money. This is the plain meaning of that rule.

32. Further, the Applicant's proposed interpretation is not supported by the wording of ST/AI/2000/8 in English. Apart from the fact that section 2.1 does not mention the term "equivalent", none of its other provisions allows for the interpretation called for by the Applicant.

33. Additionally, none of the references to publications outside of the Staff Rules are relevant as, first there is no ambiguity in the relevant staff rule requiring reference to external sources and second, they do not specifically deal with dependency benefits.

34. In practice, equivalence is achieved by converting the amount in the currency of the duty station into an equivalent monetary value in United States dollars terms. In that way, equivalence of currency values is obtained. There is no prescribed method of evaluating purchasing power in the specific context of dependency benefits.

35. The only reference to "purchasing power" is in relation to the calculations for post adjustment which is done, not by the Administration of the United Nations but by the ICSC. The Applicant effectively has invited the Tribunal to import a concept designed for the calculation of post adjustment to the interpretation of the method of calculation of dependency benefits. The Tribunal finds that this concept is not relevant to dependency benefit calculation.

36. The Applicant also maintains that the Administration should have considered the G-2, step I salary level, that is, the lowest existing salary in The Hague, for the purpose of determining his 2008 entitlement. However, this would mean an unnecessary implication of a term into former staff rule 103.24(a) and section 2.1 of ST/AI/2000/8 which would detract from their clear meanings.

37. Lastly, the Applicant submits that the currency calculations for determining spousal earnings for the purpose of dependency benefits should be made monthly. Former staff rule 103.24(a) refers to the gross salary scale for the year concerned and ST/AI/2000/8 to annual gross earnings of the spouse. The plain meaning of these words do not allow for monthly calculations.

Conclusion

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

- a. The Respondent's interpretation is correct and staff rule 103.24(a) and ST/AI/2000/8 were properly applied to the Applicant.
- b. The application is dismissed.

(Signed)

Judge Coral Shaw

Dated this 23rd day of June 2011

Entered in the Register on this 23rd day of June 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva