



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NGOMA-MABIALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Christine Graham, ALS/OHRM, UN Secretariat

Cristiano Papile, ALS/OHRM, UN Secretariat

Introduction

1. On Friday 22 July 2011 the Applicant filed an Application with the United Nations Dispute Tribunal (UNDT) contesting (a) the alleged deduction of certain amounts of two of his paycheques of August 2009 and May 2011 and (b) the Administration's alleged failure to pay him certain amounts to which he claims he is entitled.

Facts

2. The Applicant joined the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC") in February 2005 as a Telephone Billing Clerk at Grade GL-4B, on a contract under the 300-series of the Staff Rules ("the 300-series").

3. On 6 November 2008, a memorandum circulated by Alan Doss, Special Representative of the Secretary-General for the Democratic Republic of the Congo (DRC) outlined the results of a post re-classification exercise at MONUC which would see a 20.4% salary rise for General Service Staff. The memorandum stated: "Although the post re-classification does not apply to every national position, at least 64% of national staff posts will be upgraded by one level, with retroactive effect from 1 July 2007". Attached to the memorandum was a table indicating previous and re-classified grade levels for 300-series staff and staff working under the 100-series of the Staff Rules.

4. At the time, the Applicant was still employed at the GL-4B level, under the 300-series, and according to this table he appeared to be a beneficiary of the re-classification process, upgraded to GL-5A with retroactive effect from July 2007. Indeed, the Applicant observed the effect of the retroactive upgrade in his December 2008 payslip, in the form of additional payment to the higher grade level for the months of July 2007 to November 2008.

5. The Applicant was re-appointed effective 1 March 2009, moving up to Grade GL-5/7, 100-series in recognition of completing 4 years of service. The Applicant continued

to be paid at the GL-5/7 salary rate stipulated in this contract from March 2009 to July 2009.

6. On 20 July 2009 Mr. Amadou Koumago, Human Resources Officer, MONUC-Kinshasa sent an e-mail to Mr. Jimmy Mawisa, Associate Human Resources Officer, MONUC-Kinshasa, in which it was stated that the Applicant had been mistakenly reclassified to G-5 level. The Applicant was not copied on this message, nor was he aware of it.

7. Mr. Koumago requested Mr. Mawisa to issue a “Personnel Action correction”. This was done. The “Personnel Action correction” stated that overpayment occurred as follows: from January 2007 to February 2009 the Applicant was paid at the GL-5/A level instead of at GL-4/B, and from March 2009 to July 2009 the Applicant was paid at the GL-5/7 level instead of at GL-4/6. The total alleged “overpayment” was USD2012.82.

8. This “Personnel Action correction” was forwarded to the Finance Department, which promptly began recovery of the “overpayment” in monthly instalments, commencing August 2009.

9. Mr. Koumago advised Mr. Mawisa in the e-mail of 20 July 2009 that “a memo should go to the staff member informing on the mistake”. Marie-Michelle Aurelus, Human Resources Assistant, MONUC-Kinshasa was also asked to amend a new contract “to reflect G-4 level, instead of G-5”.

10. The Applicant says he never received formal notification of the supposed administrative error and decision to recover overpayment, nor did he sign an amended contract.

11. As it happens, the Applicant gave notice of resignation from his post at MONUC on 10 August 2009 and checked out on 21 August 2009. Upon check-out, the process of recovery of overpayments due to an alleged misclassification of his grade was orally communicated to the Applicant by Andy Mukendi, Human Resources Assistant, MONUC-Kinshasa.

12. Upon receipt of his final pay slip of August 2009, the Applicant noted that his grade was marked G4-6 rather than G5-7 as stipulated in his contract and that a sum of \$400 USD had been deducted from his pay.

13. The Applicant contacted relevant officers in the Finance and Human Resources departments about the deduction in pay and apparent reduction in grade in September 2009 but no-one was able to elucidate the official version of events. The Applicant states he did not receive an official justification or notification of the contested decision after he left the Organization in 2009.

14. On 7 April 2011, the Applicant was re-employed by the United Nations Organisation Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) as a Supply/Fuel Assistant at grade GL-4/6, 100-series. While his April 2011 payslip reflected the appropriate remuneration for his grade under the new contract, the Applicant observed a second deduction in his pay slip of May 2011 amounting to USD852.30.

15. With the assistance of the Regional Office of the Ombudsman, the Applicant received a copy of an e-mail from Vesna Stefanic, Finance Assistant on 2 June 2011. The e-mail advises that an initial deduction of \$400 was taken from the Applicant’s salary in August 2009. Then, when the Applicant left the Organization on 21 August 2009, his final entitlements were not sufficient to cover the outstanding balance of overpayment owed to the United Nations. As a consequence, when re-employed by the Organization, the Applicant had an outstanding debit balance of USD852.30 which the Administration sought to recover in his pay for May 2011.

16. Having received this clarification of the alleged administrative error and subsequent recovery of payment, the Applicant contests the mode of recovery of the overpayment without formal notification or an amended contract and seeks reimbursement of the sum deducted as well as compensation for moral damages.

17. The Applicant submitted his application to the Tribunal on 22 July 2011. The Respondent filed a reply to this application on 27 July 2011, requesting leave to have

receivability considered as a preliminary issue. The Applicant was invited to provide a response on this issue.

Parties' Submissions

18. The Respondent's submits as follows:

- a. The Respondent submits that this application is not receivable due to failure to request a management evaluation of the contested decisions.
- b. Article 8.1(c) of the Tribunal's Statute and staff rule 11.2 stipulate that an applicant must have submitted the contested decision for management evaluation before filing an application to the UNDT. In Section IV of the application, the Applicant states he has not sought a management evaluation of the contested decision. The Management Evaluation Unit (MEU) has confirmed that it does not have a case filed by the Applicant. Having failed to take this mandatory first step, the Respondent submits that the Applicant therefore does not have access to the Tribunal's jurisdiction.
- c. The Respondent further submits that the subject-matter of the Application is not exempt from the requirement that the Applicant request a management evaluation pursuant to the exemptions noted in staff rule 11.2(b): the contested decisions did not invoke disciplinary measures nor were they based on advice obtained from technical bodies. Management Evaluation is required for benefits- and entitlement-related decisions as found in the present Application.

19. The Applicant submits as follows:

- a. The Applicant contends that the Application is receivable.

- b. The Applicant avers that the administration did not immediately notify him upon discovery of overpayment, which contravenes the provision in ST/AI/2009/1 Section 2.3 that “If the Organization discovers that an overpayment has been made, the office responsible for the determination and administration of the entitlement shall immediately notify the staff member”. The Applicant further submits that the Personnel Action which corrected his grade level is signed off by the Human Resources Officers but formal notification of the change was not received by the Applicant.
- c. The Applicant further submits that the contested decision was taken on the advice of Mr. Koumago, Human Resources Officer, MONUSCO-Kinshasa, who is “supposed to be a UN expert in management of Human Resources” therefore a management evaluation should not be required. Staff rule 11.2(b) provides that administrative decisions taken on advice obtained from technical bodies are exempt from the pre-requisite of filing a management evaluation.

Consideration

20. It must be considered whether in the present application a management evaluation is required for access to the Tribunal’s jurisdiction.

21. According to staff rule 11.2 (a):

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

22. Article 8.1 of the UNDT Statute further indicates that “an application shall be receivable if...(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required.” The Tribunal notes the fact that

the Applicant has to date not requested a management evaluation of the contested decision.

23. Staff rule 11.2(b) clearly exempts the necessity of a management evaluation in two sets of cases: namely, in cases regarding advice obtained by the Administration from technical bodies and a decision taken after a disciplinary measure. It is further to be noted that in the *Guide to Resolving Disputes* published by the Office of Administration of Justice, “[a] management evaluation is not required if the contested decision was taken by the administration based on the advice of an expert or advisory board, such as the Advisory Board on Compensation Claims or a medical board”. The Respondent argues that neither of these exemptions applies to the present Application. However, the Applicant asserts that since the contested decision was taken on the advice of Mr. Amadou Koumago, supposedly a “UN expert in management of Human Resources”, his Application does fall under the latter exemption. The Tribunal considers that Mr. Koumago, as a Human Resources Officer at MONUC-Kinshasa, does not represent a member of an expert or advisory board. Moreover, the administrative decision was not a disciplinary measure, therefore the claim of exemption from the requirement to request a management evaluation does not stand.

24. The contested decision is therefore not exempt from management evaluation and since the Applicant has not exhausted this otherwise mandatory first step of requesting a management evaluation, the jurisdiction of the Tribunal cannot yet be invoked. The Tribunal has no choice but to reject the present claim as not receivable.

Observations

25. While failure to request a management evaluation denies the Applicant access to the Tribunal’s jurisdiction at present, the Tribunal is deeply concerned that the Applicant was never formally notified of the administrative decision or the reasons therefore.

26. Administrative Instruction ST/AI/2009/1 outlines rules to be applied to the recovery of overpayments made by the Organization to staff members. Section 2.3 states: “[i]f the Organization discovers that an overpayment has been made, the office

responsible for the determination and administration of the entitlement shall immediately notify the staff member. That office shall keep a record of such notification.” The Respondent would appear to have violated this rule, in failing to “immediately notify the staff member”.

27. The Tribunal notes that the Applicant was first informed of the decision to recover overpayments due to the alleged misclassification of his grade orally by a Human Resources Assistant upon check-out on 21 August 2009, a month later. In the view of this Tribunal, that is not immediate. Furthermore, deductions were actually made from the Applicant’s salary before he was notified. The Applicant was only made aware of the 20 July 2009 e-mail and the full breakdown of the alleged overpayment, as well as the Organization’s recovery procedure, in June 2011 thanks to the assistance of the Regional Ombudsman.

28. What is worse is that even when he was informed of the decision, he was not provided with any justification for it. Indeed, in spite of going to the Ombudsman, and in spite of his Application to this Tribunal, no explanation has ever been given to the Applicant as to why he should have remained at the GS4 level while other staff members were reclassified to the GS5 level.

29. The date of “notification” of the alleged overpayment to the Applicant is of significance not only regarding his possible challenge to the MEU and the Dispute Tribunal, but also because section 3.2 of ST/AI/2009/1 states:

Overpayment shall normally be recovered in full. However when the Controller determines that the overpayment resulted from an administrative error on the part of the Organization, and that the staff member was unaware or could not reasonably have been expected to be aware of the overpayment, recovery of the overpayment shall be limited to the amounts paid during the two-year period prior to the notification under section 2.3 of the present instruction or to the advice under section 2.4 of the present instruction, if earlier. (Emphasis added)

30. Whereas this Tribunal is unable to entertain the present Application because there exists no request for management evaluation within the meaning of staff rule 11.2, it

seems to this Tribunal that the Applicant may not yet have received “notification” of the decision within the meaning of that rule.

31. Staff rule 11.2(c) reads:

A request for management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested...

32. Former staff rule 111.2(a) went further, and referred to “notification in writing”:

A staff member wishing to appeal an administrative decision, pursuant to Staff Regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

33. In *Schook*, 2010-UNAT-013, a case in which the former and more explicit staff rule 111.2(a) applied, the Appeals Tribunal found not only that—in line with the rule—a written notification was necessary for the time to start to run, but went on to state that “[w]ithout receiving a notification of a decision in writing, it would not be possible to determine when the period of two months for appealing the decision under Rule 111.2(a) would start. Therefore, a written decision is necessary if the time-limits are to be correctly calculated...”

34. There is no reason to consider that an Applicant should be in any different position under the new staff rules than under the former staff rules.

35. The present case highlights how by flouting its own rules, which it is bound to follow and which it invokes regularly, the Organization, through some of its responsible officers, deny staff members of the possibility of vindicating their rights.

36. It is also to be noted that the situation in this case arose through an alleged mistake of the Administration and through no fault of the Applicant. Not only did the Administration make a mistake but it fell short of notifying the Applicant of the mistake

and of the deductions it proposed to take from his salary. Unfortunately and sadly the Tribunal cannot make any substantive determination on the matter.

Conclusion

37. Regrettably, the Application is dismissed as not receivable due to the absence of a management evaluation request.

(Signed)

Judge Vinod Boolell

Dated this 6th day of September 2012

Entered in the Register on this 6th day of September 2012

(Signed)

Jean-Pelé Fomété, Registrar