



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/059

Judgment No.: UNDT/2012/197

Date: 11 December 2012

Original: English

**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

TOLSTOPIATOV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Jorge Ballesterro, UNICEF

## **Introduction**

1. On 19 July 2011, the Applicant filed an application with the Dispute Tribunal raising a number of issues. For reasons which will be apparent from this Judgment only two of the claims are relevant. They arise from his separation from service from the United Nations Children Fund (“UNICEF”), which was followed by an arrangement whereby he was on Special Leave Without Pay (“SLWOP”) at the end of his notice period so that he would qualify for an early retirement package. These two claims are:

a. That the Respondent “intentionally blocked” the submission of a Separation Notification Form, “PF4”, to the United Nations Joint Staff Pension Fund (“UNJSPF”) for a period of 14 months; and

b. That there was a shortfall in regard to the interest payment on the award under para. 107 of Her Honour, Judge Kaman’s, judgment on compensation in *Tolstopiatov* UNDT/2011/012 dated 13 January 2011.

## **Findings of fact**

2. On 18 August 2010, Judge Kaman issued Judgment on liability in *Tolstopiatov* UNDT/2010/147. The scope of this case was defined in para. 3 of the Judgment in the following terms:

In essence, the applicant’s case is that his separation violated UNICEF employment rules and regulations in effect at the time, a) because UNICEF did not give the applicant as a relevant UNICEF staff member on an abolished post, an “affected staff member” (“ASM”), the assistance required by those rules and regulations and b) because the selection process for the 20 posts was flawed, in part because the applicant was not given the required priority as an ASM to which he was entitled.

3. Judge Kaman, held that UNICEF breached its obligations to the Applicant under his terms of employment, and reserved the issue of compensation to a separate judgment, for which she ordered further submissions from the parties.

4. On 13 January 2011, Judge Kaman, issued *Tolstopiatov* UNDT/2011/012 on compensation. One of the issues before Her Honour, was the Applicant's contention regarding the way in which the Respondent determined the status of his contributions to the UNJSPF. In particular, the Applicant was challenging the Respondent's understanding that an overpayment had been made and that contributions to the UNJSPF made by the Respondent were to be reimbursed. In the circumstances, the delay in releasing the PF4 form was due to the fact that the Applicant was contesting the very matter which affected the data to be supplied to the UNJSPF regarding the contributions record. The issue was adjudicated upon in UNDT/2011/012 and the Tribunal found, at para. 81:

Given the clear terms of the Applicant's termination indemnity package following abolishment of his post with UNICEF, as outlined in the 23 July 2007 letter, the Applicant could reasonably have been expected to be aware of the overpayment to him and yet the Applicant did not make any attempt to notify UNICEF of the error or to rectify the situation. Principles of equitable estoppel apply in this instance to bar the Applicant from arguing that he is not liable for the overpayments made to him by UNICEF.

5. The Applicant was ordered to reimburse such overpayment and accordingly the sum of USD 199,255.86 was deducted from the compensation award. This included the moneys paid to the UNJSPF as well as pension contributions by the Respondent.

6. On 23 March 2011, the Applicant requested management evaluation of the following administrative decisions:

- a. "UNICEF's continued failure to submit the separation notification PF4 form to the UNSJPF";
- b. "UNICEF's decision not to forward the Applicant's payments (contributions) to the Pension Fund, until early retirement age, or accept same".

7. On 30 March 2011, contrary to the Applicant's submission, the PF4 form was released in a timely manner.

8. The submission by the Respondent that the issue regarding the PF4 form had been previously adjudicated upon by Her Honour, Judge Kaman in UNDT/2010/147, is not supported by para. 3 which is in the following terms (emphasis added):

In his closing submission, the applicant also claimed that the respondent has ceased payment of his termination indemnity, that the respondent has ceased payment of relevant contributions to [the UNJSPF] as of 1 January 2010 and that the respondent has blocked applicant's attempts at sending to the UNJSPF statutory forms (Separation Personnel Action), which had the effect of denying applicant's request for early separation under the now abolished UNICEF Human Resource Manual, CF/MN/P.I/18 of September 1997 ... *However, these claims are not properly before the Tribunal at this time.*

9. With regard to the interest due on the compensation award in UNDT/2011/012, the Applicant was reimbursed the shortfall in the sum of USD259.90 on 17 October 2012. The Applicant submits that this sum was due as of 30 March 2011, which is not denied by the Respondent in his response to Order No. 209 (NY/2012) dated 11 October 2012. There remains the outstanding issue regarding the payment of interest on the amount of USD259.90 at the US Prime Rate of 3.25 percent plus 5 percent from 30 March 2011 up to the date of payment on 17 October 2012. In addition to this sum, the interest outstanding will attract further interest at 5 percent above the US Prime Rate until the date of payment in accordance with the Judgment order in UNDT/2011/012.

### **Applicant's submissions**

10. The Applicant submits that, on 15 February 2011, he was notified by the UNJSPF of the failure on the part of the Respondent to submit the PF4 form in a timely manner. The Applicant admits that the PF4 form has now been released, but with an undue delay of 14 months, which the Applicant contends breached his retirement rights as a UNICEF staff member on an abolished post under UNICEF's

Human Resources Manual, including his right to be accommodated for early separation (para. 18.2.16(e) of Chapter 18) and his right to be granted early separation by a special leave arrangement at the end of the notice period to bridge him to early retirement (para. 18.4.6(e) of Chapter 18).

11. The Applicant further contends that, on 30 March 2011, he became aware of the shortfall in the full amount of interest payment due on the compensation awarded in UNDT/2011/012.

12. The remedies, which the Applicant is seeking, are as follows:

a. USD61,884.66, being the equivalent or of 14 months pension payments, as compensation for the enforced hardship in consequence of the Respondent's actions and/or omissions which deprived him of income for the period from March 2010 to May 2011;

b. USD30,000 for UNICEF 's intentional failure to comply with the Human Resources Manual concerning the retirement rights of staff members on abolished posts;

c. USD265.45 as shortfall in the interest due on the Dispute Tribunal's award from 19 July 2011 to the date of payment at the overall applicable rate of interest of 8.25 percent, in accordance with UNDT/2011/012.

### **Respondent's submissions**

13. The Respondent submits that the application be dismissed in its entirety and contends that the main issue in the case is moot as it has previously been adjudicated upon by the Dispute Tribunal in UNDT/2011/012. In his submissions, the Respondent particularly refers to paras. 55, 57 and 61 in which the Dispute Tribunal makes the point that the Applicant "was indeed bridged to early retirement and it was [the Applicant] who decided which benefits to retain and which ones to forfeit" and that "the question of pension was moot insofar as the Applicant was bridged to early

retirement age, precisely to allow him to be eligible for a pension”. Insofar as the Applicant was claiming compensation for non-economic loss, the Respondent refers to para. 61 of UNDT/2011/012, in which, Judge Kaman found that:

Had UNICEF not made the exceptional arrangements for the Applicant that it did, the Applicant would have had his employment with UNICEF terminated on an abolished post without any bridge to retirement benefits whatsoever. The benefit to the Applicant is clear and the Applicant cannot make a legitimate claim for non-economic loss (moral injury, management’s oppression, massive stress or professional trauma)”.

14. In the alternative, the Respondent firstly contends that there was no contractual obligation to require early release of the PF4 form and secondly that UNICEF was not in a position to do so in any event until the Judgment in UNDT/2011/012 had been issued. The Respondent explains that the PF4 form is a financial report by means of which the Respondent informs the UNJSPF of the effective date of separation of a staff member and the status of his/her pension contributions.

15. By its amended reply dated 25 October 2012, the Respondent conceded that there was a shortfall in the sum of USD259.90 in the payment made to the Applicant as a result of UNDT/2011/012. The Respondent submits that this amount has already been paid into the Applicant’s bank account. Notwithstanding the settlement that was made the Respondent continues to take issue with the Applicant for his failure to inform the Administration at an earlier stage that there was a shortfall in the calculations made and thereby giving them an opportunity of putting matters right. Instead, the Respondent submits that the Applicant resorted to proceedings before the Tribunal which the Respondent regards as being unnecessary and an abuse of process. The Respondent points out that had the Administration been given an opportunity to rectify any possible mistake in the calculations, these proceedings would have been unnecessary. The Respondent asks for costs under art. 10.6 of the Statute of the Dispute Tribunal, which provides that “[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party”.

## Considerations

*The Respondent's alleged delay in submitting the PF4 form*

Has the issue undergone management evaluation?

16. The issue regarding the delay in submitting the PF4 form was clearly raised in the Applicant's closing submissions leading to the issuance of UNDT/2011/012 on 13 January 2011. The Applicant considered, at that point in time, that he had a cause of action yet he did not raise it by first filing a request for management evaluation at the time. Such a request is a mandatory first step, in accordance with art. 8.1 of the Statute of the Dispute Tribunal and staff rule 11.2(a). Although the Respondent has not raised the point, the Tribunal finds that on this ground alone this aspect of the claim may arguably not have been receivable. However, this issue has not been addressed by either party and the Tribunal would refrain from making further comment which in light of the Tribunal's findings and conclusion would be of academic interest in any event.

17. The Applicant identified the matter of the alleged delay of the submission of the PF4 form as a complaint in his request for management evaluation of 23 March 2011. The Applicant indicated that he was notified of the delay by the UNSJPF on 15 February 2011 and that time for filing his application should run from 15 February 2011. The Tribunal proceeds on this basis.

Has the issue already been dealt with in UNDT/2011/012 and is it now *res judicata*?

18. This claim is not subject to the doctrine of *res judicata* as is apparent from para. 9 above. It was not an issue to be decided, and was not decided, by Judge Kaman in UNDT/2011/012.

Was it improper for the Respondent not to submit the PF4 form before 30 March 2011?

19. Assuming in the Applicant's favour that he was expecting a written notification and that such notification was only given to him on 15 February 2011, there is still the question as to whether the Respondent is in default by delaying the submission of the PF4 form pending Judge Kaman's judgment in UNDT/2011/012.

20. Having considered this matter, the Tribunal is satisfied that the Respondent was not in a position to complete the necessary data required on the PF4 form regarding the status of the Applicant's pension contributions since this was an issue that fell to be decided by Judge Kaman. The Respondent acted expeditiously and submitted the form within a reasonable period of the Judgment being issued.

21. Accordingly, the Tribunal dismisses the Applicant's claim that the Respondent was at fault in not submitting the PF4 form before 30 March 2011.

*Shortfall in interest payment*

22. The Applicant claimed that the sum of USD259.90 was due to him as ordered in UNDT/2011/012. This aspect of his claim is a request for enforcement of the judgment in accordance with art. 12.4 of the Statute of the Dispute Tribunal, which provides that:

Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out

23. There is no doubt that the Respondent omitted to pay the interest on the award as ordered by the Tribunal. In response to Order No. 209 (NY/2012), the Respondent stated that such payment was made on 17 October 2012 and submitted that this claim was therefore moot. The Respondent is mistaken. The payment of this sum does not extinguish liability to pay interest in accordance with the Judgment Order of



UNDT/2011/012. Accordingly, the Respondent also has to pay the Applicant the interest that has accrued on the payment of the sum of USD259.90 from 30 March 2011 until 17 October 2012 and thereafter the interest which continued to accrue on the outstanding interest at 5 percent above the US Prime Rate..

*The Respondent's claim for costs—Is the Respondent, correct in asserting that the Applicant has brought these proceedings unnecessarily?*

24. Whilst it is clear that the claim for interest could have been resolved informally and, to this extent, it could be argued that the Applicant may have brought proceedings unnecessarily, the fact is that there was, and still is, a sum of money outstanding and properly due to him. The payment of USD259.90 was correct as of 30 March 2011 and has been paid. However, a further amount of interest is still outstanding. To this extent this part of the claim succeeds.

25. Whilst proceedings could have been avoided, the fact is that the Applicant had a legal entitlement to the interest on the award in accordance with UNDT/2011/012. The requirement of good faith and fair dealing cuts both ways. How can the Respondent legitimately argue that had the Applicant informed them that the amount of interest was still outstanding they would have paid it, when it took the Administration 15 months from receipt of the application to the payment of the initial outstanding amount in the sum of USD 259.90? If, at that initial point, the Respondent had made full restitution, which included the interest as ordered the claim would have been satisfied. Whilst the Tribunal would discourage unnecessary litigation, this applies to both staff members and the Administration. The Applicant was exercising his legal right and there has still only been partial satisfaction of the compensation awarded in UNDT/2011/012. Accordingly, the Tribunal finds that there was no abuse of process on the part of the Applicant.

26. The Respondent's claim for costs is refused since the Applicant had a legal right to bring the claim for accrued interest. Furthermore, there remains an additional amount of interest due on the award and the Respondent's continuing failure to meet

the terms of the judgment in full must attract justifiable criticism even if the Tribunal refrains from categorizing such conduct as itself constituting an abuse of process. It does not lie in the mouth of the Respondent, who is himself in default by not complying fully with a Judgment Order, to suggest that the Applicant who pursues his right to a remedy is to be ordered to pay costs for abuse of process.

### **Conclusion**

27. The claim for compensation in respect of the delay in submitting the PF4 form is dismissed.

28. In accordance with power under article 12.4 of the Statute of the Dispute Tribunal, the Respondent is ordered to execute fully the terms of Judgment No. *Tolstopiatov* UNDT/2011/012 and to pay to the Applicant interest on the sum of USD259.90 at the relevant US Prime Rate applicable plus 5 percent from 30 March 2011 until 17 October 2012 and, at the same rate, on the sum still outstanding in respect of unpaid interest that is accruing on a daily basis from 17 October 2012 to the date of final payment.

29. The Respondent's claim for costs is refused.

*(Signed)*

Judge Goolam Meeran

Dated this 11<sup>th</sup> day of December 2012

Entered in the Register on this 11<sup>th</sup> day of December 2012

*(Signed)*

Hafida Lahiouel, Registrar, New York