



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

DORRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

Introduction and Procedural History

1. The Applicant entered into service of the United Nations in May 2006 under the 300-series limited-duration appointments. On 1 July 2009, he was reappointed on a fixed-term appointment. At the time of the Application, he was a Resident Investigator at the P-3 step 11 level with the United Nations Mission in South Sudan (UNMISS) in Juba.

2. The Applicant is challenging the decision made by the Office of Human Resources Management (OHRM) on 18 June 2012 to recover previously paid dependency benefits for the years 2009, 2010 and 2011 (impugned decision).

3. The Application was filed on 14 December 2012. The Respondent's Reply was filed on 5 February 2013.

4. On 1 October 2013, the Parties attended a Case Management Hearing in which they addressed the court on the completeness of the file and their readiness for the matter to be set down for hearing.

5. On 18 October 2013, the Tribunal issued Order No. 226 (NBI/2013) for further management of this case. Parties were asked to state their respective positions on the need for an oral hearing in this matter.

6. The Parties responded to Order No. 226 on 22 October 2013. The Applicant requested that an oral hearing be held and indicated that his mother would testify as to receipt of the disputed payments.

7. The Respondent submitted that this matter could be decided on the papers, and that the testimony of the Applicant's mother was irrelevant given that "payments to third parties" are not acceptable proof of child support.

8. On 13 May 2014, the Tribunal issued Order No. 100 (NBI/2014) setting this matter down for hearing on 1 and 2 July 2014.

9. The hearing took place as scheduled, and the Applicant testified. A written statement was submitted *in lieu* of the Applicant's mother's oral testimony, as the Tribunal did not have the capacity to provide for interpretation to and from Arabic. The Respondent did not object to the Applicant's mother's statement being entered into evidence.

10. The Parties filed their respective closing submissions on 25 July 2014.

FACTS

11. These are the facts as jointly submitted by the Parties.

12. The Applicant was married at the time he entered into the service of the United Nations. His eldest daughter, D1, was established as a dependent.

13. In 2008, the Applicant submitted to OHRM a copy of a divorce decree effective 6 December 2007, which granted custody of his two daughters to his former spouse (the custodial parent). The decree provided that the Applicant would pay the custodial parent's and children's rent (2,000 Egyptian Pounds), as well as expenses for his daughters. The divorce decree did not determine a specific amount to be paid. The Organization continued to pay the Applicant dependency benefits with respect to D1 only.

14. In an email dated 26 May 2010, OHRM advised the Applicant of the applicable policy governing the payment of dependency benefits following his transition to a fixed-term appointment. OHRM told the Applicant what documents he was required to submit as a non-custodial parent in order to be entitled to dependency benefits with respect to his daughter. He was requested to submit such documents by

18 June 2010. OHRM also informed the Applicant that, in case he is “unable to provide sufficient documentary evidence of financial support for D1 [...], OHRM is obligated to [...] discontinue the dependency benefit [...]. This will result in a recovery of the dependency benefits paid to [him]”.¹

15. In order to be entitled to dependency benefits, the Applicant had to submit proof of financial support as follows: a) From 1 July to 31 December 2009: USD 3,623.365 (half of the annual dependency benefits); b) For 2010: USD7479.96; and c) For 2011: USD7647.91.

16. On 12 June 2010, the Applicant submitted bank statements to OHRM showing payments made to the custodial parent’s landlord and to the custodial parent for his daughters.²

17. On 30 September 2010, OHRM asked the Applicant for consolidated bank statements as proof of child support payments; the previously submitted documents were insufficient in this regard.³

18. In March 2012, the Applicant requested additional dependency benefits for his second daughter, D2.

19. On 13 March 2012, OHRM noted that the Applicant had not yet provided documentary evidence demonstrating main and continuous payment of child support to the custodial parent to justify him receiving dependency benefits for D1. OHRM rejected the Applicant’s request for additional dependency benefits for D2. OHRM advised the Applicant that “it is the Organization’s policy that proof of support can only be deemed acceptable if made to the custodial parent” and not to third parties.⁴

¹ Annex R1

² Annex R1.

³ Annex R2.

⁴ Annex R3.

20. On 20 March 2012, OHRM notified the Applicant that he had failed to demonstrate that he had paid the required amount of child support to the custodial parent and was therefore receiving dependency benefits for D1 for which he did not qualify.⁵

21. On 8 May 2012, OHRM notified the Applicant of its decision to recover payments made as of 1 July 2009 onwards pursuant to ST/IC/2009/24.⁶

22. On 11 May 2012, OHRM agreed to reassess the amount of child support payments made for the benefit of D1. Although OHRM exceptionally agreed to include the payments the Applicant had made for rent to the custodial parent's landlord, it also concluded that the Applicant's payments remained below the threshold required to qualify for dependency benefits.⁷

23. On 18 June 2012, OHRM informed the Applicant that it had concluded its final review and that it was going to recover overpayments for the period 2009-2011. The Applicant was also informed that, effective 1 January 2012, he would be paid dependency benefits in respect of his daughters based on the proof of the main and continuous support he provided during the year 2012.⁸

24. On 17 August 2012, the Applicant sought management evaluation of OHRM's decision to recover payments made to him for the years 2009-2011. In the management evaluation letter dated 1 October 2012, the Under-Secretary-General for Management accepted the recommendation of the Management Evaluation Unit (MEU), which concluded that the contested decision was in compliance with the Rules and Regulations.⁹

⁵ Annex R5.

⁶ Annex R6.

⁷ Annex R7.

⁸ Annex R 8.

⁹ Annex 12 to the Application.

25. On 14 December 2012, the Applicant filed the present Application before the Dispute Tribunal.

26. The Respondent asserts that the Applicant has provided the Tribunal with additional documentary evidence of bank transfers to the custodial parent and her landlord, which was not previously provided to OHRM. Following this disclosure, the Respondent concedes that the Applicant met the requirement for salary at the dependent rate for the period 1 July - 31 December 2009.

SUBMISSIONS

Applicant

27. The legal issues in this matter arise because the divorce decree does not stipulate the amounts that needed to be paid and because some of those payments were not made to either the custodial parent or the ultimate beneficiary. Instead, payments were variously made to the custodial parent, her landlord and the Applicant's mother. The Respondent has accepted the payments made to the custodial parent and payments made to the landlord.¹⁰ The only issue is the payments made to the Applicant's mother for the purposes of covering some of D1's expenses.

28. The Respondent's principal claim of being required to reject the Applicant's proof of dependency payments *per* ST/IC/2009/24 is problematic.

29. First, ST/IC/2009/24 is entitled "Review of staff claims for dependency benefits for 2006, 2007 and 2008" which indicates that it must not apply to other years. A different Information Circular, ST/IC/2013/3, on the Review of Staff Claims for Dependency Benefits for 2009, 2010 and 2011 addresses claims pertaining to those years. Counsel for the Respondent conceded that this circular does not apply either; it had not even been introduced at the time of the contested decision.

¹⁰ Parties' Joint Submission and Annex A thereto.

30. The Respondent's argument that ST/IC/2009/24 applies because it provided that it is "in effect until further notice" is misplaced.

31. The Applicant accepts that ST/IC/2009/24 continued to be in effect—but only with respect to "staff claims for dependency benefits for 2006, 2007 and 2008". If the "in effect until further notice" clause meant it was also supposed to apply for the assessment of benefits for other years, why was a new Information Circular promulgated for three other years? ST/IC/2009/24 is simply inapplicable.

32. ST/IC/2009/24 does *not* say that payments must be made directly to either the dependent or their custodial parent. Nor does it provide that a divorce decree must *require* payments be made directly to either the dependent or their custodial parent.

33. As for the putative requirement of direct payment, the Applicant argues that no such requirement existed. Indeed, ST/IC/2013/3, which was introduced *after* the contested decision, expressly requires that payments be "made directly to the child or to his/her legal guardian".¹¹ This rule did not exist before and does not apply to the contested decision.

34. The Respondent has already accepted payments made by the Applicant directly to the landlord of the custodial parent and D1: see also Joint Statement, para. 13. This would not have been possible if ST/IC/2009/24 truly required the Respondent to exclude such payments.

35. The Respondent's belief that it is required to follow a rule that does not exist is tantamount "to an unlawful fetter upon discretion (precludes the exercise of discretion, or deference to that discretion)".

¹¹ Annex III of ST/IC/2013/3.

36. Staff rule 3.6 and ST/AI/2011/5 on Dependency Status and Dependency Benefits do not require the Respondent to disregard the Applicant's proof of dependency payments.

37. A rule that requires a staff member to prove *how* they are spending money on their children, regardless of agreements or orders made under local laws, is grossly intrusive and unreasonable. A rule that requires such proof only in respect of the non-traditional family is discriminatory. The Respondent's response is also punitive: a staff member who can prove payment of the full dependency amount less \$1 will lose approximately \$7500 in benefits.

38. To the extent that the Respondent argues that the impugned decision was discretionary, that discretion must be exercised reasonably and based upon a correct understanding of the facts. On the present facts, it must be said that the decision was not reasonable.

39. Secondly, the Respondent has been inconsistent. It accepted payments made to the custodial parent and her landlord. It will be noted that this was not a compromise, as the Respondent has not reimbursed dependency payments up to the levels of the Applicant's accepted payments. Instead, the Respondent has maintained its position that unless the *full* amount is proven to their satisfaction, it will pay nothing.

40. Thirdly, apart from the subject matter of the payments, it was and is unreasonable for the Respondent to reject the extent of the proof of the payments. The evidence is compelling and consistent: two spousal affidavits, dozens of pages of financial records with contemporaneous notes and sworn evidence of the Applicant and his mother.

41. The evidence plausibly explains that the Applicant transferred money to other parties directly: divorced parties do not always agree and it is not unusual for third

parties to sometimes become involved. In this case, the third parties are the landlord and D1's grandmother.

42. Having conceded the facts in this case, the Respondent cannot maintain the argument of insufficient proof. Nor can the Respondent properly argue that it would have made this concession earlier, but for the "insufficient information." The Respondent has always been on notice of the Applicant's contentions regarding how the money was spent.

43. Any discretion exercised to deny dependency benefits by ignoring payments made through the Applicant's mother is unreasonable and unlawful.

Respondent

44. OHRM's decision to recover dependency benefits paid to the Applicant for the years 2010 and 2011 is lawful. Staff rule 3.6 and ST/IC/2009/24 in effect at the time of the recovery required the Applicant to provide documentation to show main and continuous support for his daughter for the years in question in the amount of any court-ordered child support or the amount of the dependency benefits he received, whichever is higher. The circular specifies that acceptable proof was cancelled cheques, money-order receipts, wire-transfer receipts and original records of bank transactions.

45. Neither the staff rules nor ST/IC/2009/24 provide for payment of support to anyone other than the custodial parent, who is party to the divorce and/or support agreement. The Applicant was informed that payments to third parties are not acceptable. Such payments were not considered "satisfactory to the Secretary-General" as provided in Staff rule 3.6(a)(iv) and under the Information Circular.

46. OHRM's first request for proof of payment records was in May 2010. As the Applicant did not provide the required acceptable documentation for 2010 and 2011, the Respondent lawfully recovered the dependency benefits for those years.

47. The Applicant is not entitled to dependency benefits for the period 2010-2011. Pursuant to staff rule 3.6 (a) (iv), a staff member claiming a child as a dependent must certify that he or she provides main and continuous support for that child. In situations where the staff member does not reside with the child, the staff member must provide documentary evidence demonstrating such support to the satisfaction of the Secretary-General.

48. Section 3 of ST/AI/2011/5 establishes the criteria for a child to be considered a dependent. The documentary evidence required to satisfy the Secretary-General is set out in an Information Circular. ST/IC/2009/24 on the Review of Staff Claims for Dependency Benefits for 2006, 2007 and 2008 was issued on 4 June 2009 and encapsulates the applicable policy for determining staff members' entitlements to dependency benefits for the three preceding years.¹² Under Annex III of the Information Circular, Required Documentation for Continuance of Benefit, a staff member, who is not the custodial parent of a dependent child, must submit to OHRM, upon request, the following documentation as evidence of his or her entitlement to a dependency benefit:

The original or certified copy of the divorce decree or other court document specifying the amount of child support to be paid by the staff member, plus proof of payment in the year concerned in the form of original cancelled cheques, money order or wire-transfer receipts, or records of bank transactions. The amount of payment should be at least the amount of the court-ordered child support, or

¹² Reply, Annex R8 – ST/IC/2009/24. ST/IC/2013/3 *Review of Staff Claims for Dependency Benefits for 2009, 2010 and 2011* was issued on 16 January 2013 and requests the same documentation as ST/IC/2009/24, Reply, Annex R9 – ST/IC/2013/3.

the amount of the child dependency benefit, whichever is higher. In the absence of a court document, a notarized affidavit from the custodial parent must be provided attesting that the staff member provided continuing support and specifying the amounts paid during 2006, 2007 and 2008, along with the proof of payment described in the previous paragraph.

49. In applying the above provisions to the present case, the Applicant is required to provide proof of support in the amount of US\$7,479.96 for 2010 and US\$7,647.91 for 2011 in order to be entitled to dependency benefits. These amounts represent the difference in salary between the single and dependency rate; the rationale being that the salary paid at the dependency rate should be used to support a staff member's dependent spouse and/or children.

50. The total amount of support provided by the Applicant was lower than the amount required (US\$6,515.4 for 2010 and US\$5,080 for 2011). The affidavit from the Applicant's ex-wife is not sufficient proof of payment. Any payments she claims she received must be documented in the form of cancelled cheques, money-order receipts, wire-transfer receipts and original records of bank transactions.

51. The divorce agreement is between the Applicant and his ex-wife. There are no other parties or beneficiaries to the agreement except their children. The agreement requires the Applicant to pay the rent for the apartment in which his ex-wife and children reside and OHRM accepted proof of payment to the landlord. However, the agreement does not provide for any payments to the Applicant's mother for the support of his children.

52. Payments to third parties do not demonstrate that a staff member provides main and continuous support to his or her dependent child. The Organization must set the threshold of proof required for the determination of a staff member's entitlement

to receive dependency benefits. This is to ensure that the additional salary paid at the dependency rate is used for its intended purpose.

53. The Applicant's contention that the policy to only recognise payments made to the custodial parent or the dependent child as child support payments is without merit. A staff member can only challenge an administrative decision under Staff Rule 11.2, not the underlying policy.

54. The Applicant has failed to show that the application of the policy to his case was improperly motivated and unfair when compared to other staff members. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation.

55. All staff members who are non-custodial parents are required to submit the same documentation to receive dependency benefits. The Applicant knew what was required of him. OHRM exceptionally recognised the payments made by the Applicant to the custodial parent's landlord, given the wording of the divorce decree. The same exception could not be made in respect of payments made to his mother. Payments to third parties, who are under no legal obligation to care for the dependent child, are insufficient evidence of payment of main and continuous support.

56. The recovery of previously paid dependency benefits for 2009-2011 is lawful. Under section 3.1 of ST/AI/2009/1 (Recovery of Overpayments Made to Staff Members), overpayments shall normally be recovered in full. The Applicant's contention that the recovery should be limited to the two-year period prior to the notification of the overpayment pursuant to section 3.1 of ST/AI/2009/1 is incorrect. Section 3.2(b) stipulates that the two-year limitation shall not apply when the facts indicate that an overpayment was due to the submission of erroneous, fraudulent or incomplete information by the staff member.

57. On 30 September 2010, OHRM requested the Applicant to provide consolidated bank statements showing proof of support, as the previously submitted documents were insufficient. The Applicant submitted incomplete information to OHRM in 2010, which resulted in overpayments of dependency benefits made to him. Had the Applicant complied with OHRM's request at that time, such overpayments would not have occurred. Therefore, the two-year limitation under section 3.2 of ST/AI/2009/1 does not apply to the Applicant. Accordingly, the contested decision is lawful and the overpayments made to the Applicant should be recovered in full.

DELIBERATIONS

58. The Applicant married the custodial parent in 1993. They divorced in 2007 as evidenced by a certified copy of a court document dated 8 December 2007. Two girls were born from this wedlock, D1 and D2. Custody of the two children was entrusted to the mother.

59. The Applicant submitted a number of documents to establish that he had transferred money to his ex-wife directly. This is corroborated by two declarations which are in the nature of affidavits from his ex-wife. Some payments of the rent were made directly to the landlord or money was sent to the Applicant's mother for the same purpose. This had to be done as very often there was a conflict between the landlord and his ex-wife. He also transferred money to his mother to pay for school fees, private tuition and for other expenses on behalf of the girls.

60. The Applicant also submitted documents showing wire transfers to his mother. He explained that the purpose of the transfer was written on the transfers. These were "Payment for the rent of my daughters' flat"; "Payment for the private lessons of my two daughters D1 and D2"; "payment for the clothes of my daughters D1 and D2"; Payment for my mother to pay my ex-wife for my two daughters"; "Payment of D2's glasses"; "Payment of my daughters' school fees." He explained

that the money for the school fees and private tuition was sent to his mother as she accompanied the girls to the school or to the teacher for private tuition.

61. The Applicant's mother did not testify. She is Arabic speaking and the court could not provide interpretation services to allow for oral testimony. *In lieu* of live testimony, the Tribunal accepted an affidavit from the Applicant's mother. The Respondent did not object. By way of affidavit, the Applicant's mother declared that "I have always spent the funds [the Applicant] transferred to me in accordance with his instructions whether to pay school expenses, apartment rental, giving cash to [his ex-wife] or buy other necessary things for his daughters".

62. The parties have identified three issues in the present Application. They are whether: (i) the Applicant is entitled to dependency benefits for the years 2010 and 2011; (ii) the documentation the Applicant presented to OHRM in support of his claim satisfied the degree or level of proof required by the Respondent; and (iii) whether the recovery of the payments was unlawful.

63. The Applicant who was already in receipt of dependency benefits for his daughter D1 submitted a claim for dependency benefits for his daughter D2. In the process of reviewing that claim, OHRM pointed out to the Applicant that the documentation he had submitted in support of his claim for dependency benefits for his daughter D1 did not constitute sufficient proof that he was entitled to dependency benefits. His claim in respect of D2 was therefore rejected.

64. A staff member who claims dependency benefits must comply with a number of conditions.

- (a) Claims for dependency allowances shall be submitted in writing and supported by evidence satisfactory to the Secretary-General. A separate claim for dependency allowances shall be made each year. A separate claim for dependency allowances shall be made

each year”¹³. (That last requirement was added in the Staff Rules and Regulations in 2011).

- (b) Staff members shall be responsible for notifying the Secretary-General in writing of claims for dependency allowance and may be required to support such claims by documentary evidence satisfactory to the Secretary-General. Staff members shall be responsible for reporting to the Secretary-General any change in the status of a dependent that may affect the payment of this allowance”¹⁴.

- (c) The requirements of the documentation are articulated in Information Circular ST/IC/2009/24 as amended by Information Circular ST/IC/2013/3. As the Applicant is a non-custodial parent he had to submit the following: “The original or certified copy of the divorce decree or other court document specifying the amount of child support to be paid by the staff member, plus proof of payment in the year concerned in the form of original cancelled cheques, money order or wire-transfer receipt or records of bank transactions. The amount of payment should be at least the amount of the court-ordered child support, or the amount of the child dependency benefit, whichever is higher. In the absence of a court document, a notarized affidavit from the custodial parent must be provided attesting that the staff member provided continuing support and specifying the amounts paid during 2006, 2007 and 2008, along with the proof of payment described in the previous paragraph.

¹³ Staff Rule 3.4(e)

¹⁴ Staff Rule 3.6(d)

65. In computing the threshold for the payment of dependency benefits, the Respondent excluded payments that the Applicant made *via* his mother. Had these amounts been added to the transfers made by the Applicant the threshold would have been met.

66. On 13 March 2012, Ms. Juliet Ocampo, a Human Resources Assistant from the OHRM Human Resources Service wrote to the Applicant informing him that:

[I]t is the Organization's policy that proof of support can only be deemed acceptable if made to the custodial parent (in this case MMK, your ex-spouse).

67. On 20 March 2012, a Human Resources Officer from the OHRM Human Resources Service, Mr. Bernard Dayrit referred the Applicant to a clause in the divorce agreement stating that he undertook "to pay the agreed amounts and issues undertaken, at the beginning of each month to be delivered to the Second Party (wife) personally". The email continued:

There was no mention of any other party other than yourself and your former spouse. Hence any payments made to any party other than your spouse would not be acceptable in compliance with the provisions of the ST/IC.

68. There are two aspects to the evidential burden resting on a staff member who claims dependency benefits for his/her child or children where he/she is not the custodial parent. The first aspect relates to the nature of the evidence required and the second aspect concerns the degree of proof required.

69. As for the nature of the evidence required, a staff member will have discharged the evidential burden once he/she has presented documentation pertaining to the existence of the child or children, a divorce decree and proof of custody, proof of payment and the amounts paid and the means of payment. The presumption of regularity will apply to all of these documents until the contrary is proved by the Respondent. The Respondent is charged with scrutinising the evidence presented and

either accepts or rejects it. Rejections must of course be fully motivated according to law and not to a policy or an administrative practice that is not embodied in the legal instruments of the Organization.

70. Once the nature of the evidence has been determined as being valid, the next step is to determine whether it sufficiently satisfies the Secretary General. On the issue of the degree of proof, staff rule 3.4(e) only refers to “evidence satisfactory to the Secretary-General” and does not specify the degree of proof required. The Respondent must determine whether the evidence in support of the claim is credible and sufficient to be acted upon. Normally when the Respondent has some doubt as to the probative value of documentary evidence it will contact the staff member and seek further clarification.

71. The Respondent should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or suspicious. The staff member has to satisfy the Respondent on a balance of probabilities that the evidence presented is capable of belief.

72. Both in regard to the nature of the evidence required and its probative value the Respondent is exercising a discretion vested in it. It is left to the discretion of the Secretary-General to evaluate the proof on a case to case basis. Discretion however should not be exercised whimsically and in a vacuum but must be exercised judiciously and explained clearly. In this regard, the statement of Izuako J in *Contreras* UNDT/2010/154 is instructive¹⁵

It is important to note that the word “discretion” is not synonymous with “power” as these assertions tend to suggest. Discretion while being the power or right to act according to one’s judgment, by its nature involves the ability to decide responsibly. It is about being wise and careful in exercising a power. In public administration, both power and discretion must be used judiciously. The Administrator does not exercise power for its sake or other

¹⁵ See also *Woodson* Order No. 211 (NBI/2014).

extraneous reasons but only in furtherance of the institution's interest.

73. The Respondent rejected the evidence of proof of payment made to the Applicant's mother by wire transfer based on an unknown policy. The Applicant was informed that it is not the policy of the Organization to accept proof of payment unless made to the custodial parent. The Respondent is and should be guided by the Rules and Regulations, Administrative Issuances, Information Circulars of the Organization. The Respondent should not make use of that rather wide and loose term called policy to justify the exercise of discretion or power vested in it to justify a decision. The danger of relying on policy and ignoring the legal provisions of the Organization was canvassed in *Manco* UNDT/2012/135 where the Tribunal held:

Whilst it is perfectly legitimate for the Secretary-General not to ignore a recommendation or stated policy of the General Assembly, the Secretary-General cannot and is not mandated, in the absence of any express statutory provision, to incorporate into the terms of employment of a staff member such policy or recommendations. To condone this would be tantamount to giving both the General Assembly and the Secretary-General an absolute license to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

74. The policy that proof of payment made to a person other than a custodial parent is not valid for the purposes of a claim for dependency benefits is not stated in any of the legal provisions of the Organization which consists of the Charter of the Organization, Resolutions of the General Assembly, Staff Rules and Regulations, Secretary-General's Bulletins, Administrative Issuances with Information Circulars being at the bottom¹⁶. Annex III of ST/IC/2009/24 and ST/IC/2013/3 articulates the proof of payment that is required and that proof consists of original cancelled cheques, money order or wire-transfer receipt or records of bank transactions. For the purposes of the amount of dependency benefits, the required proof is a court document or a divorce decree specifying the amount of child support a staff member should pay. In the absence of a court document an affidavit by the custodial parent

¹⁶ See *Villamorán* UNDT/2011/126.

that the staff member is providing continued support would be sufficient. That latter proof is required to calculate the amount of dependency benefits as that amount would depend on the amount agreed on following the divorce decree.

75. The Respondent relied on a policy that does not accept payment to a non-custodial parent to exclude the computation of the amounts sent to the mother of the Applicant. Yet the Respondent went back on that policy and showed flexibility in accepting transfers made directly to the landlord of the flat occupied by the ex-wife and the daughters of the Applicant. Therein lies the danger of relying on policy. The Tribunal takes the view that the Respondent wrongly and unjustifiably rejected the proof of payment made to the mother. The Applicant provided detailed explanations for the payments he made to his mother, which explanations his mother corroborated by way of affidavit. The rejection was not based on any legal provision of the Organization that binds the Tribunal. The test in matters of child support in the light of the existing provisions is the whether the monies claimed and paid have been effectively used for the child.

76. Once a recipient of dependency benefits has submitted proof to the satisfaction of the Secretary-General that he is entitled to these benefits it is irrelevant who manages the benefits so long as it established on a balance of probabilities that the funds have been used for the purpose for which they are destined.

77. The Tribunal does not agree that payments made to the Applicant's mother do not constitute valid proof of payment of child support.

78. The Tribunal finds that the Respondent erred in making the impugned decisions and orders that the monies recovered from the Applicant be refunded.

(signed)

Judge Vinod Boolell

Dated this 17th day of November 2014

Entered in the Register on this 17th day of November 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi