UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/070
Judgment No.: UNDT/2015/007
Date: 28 January 2015
Original: English

**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

TEN HAVE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

---

**JUDGMENT**

---

**Counsel for the Applicant:**
Alexandre Tavadian, OSLA
Nicole Washienko, OSLA

**Counsel for the Respondent:**
Katya Melluish, UNON

**The Application and Procedural History**

1. At the time of this Application, the Applicant served as a Programme Officer in the Division of Environmental Law and Conventions (DELC) at the United Nations Environment Programme (UNEP). She serves on a fixed-term appointment at the P4 level.

2. On 18 October 2013, the Applicant filed the present Application challenging the Respondent's decision to recover the Monthly Residential Security Allowance (MRSA) paid to her from April 2011 through January 2013.

3. The Respondent filed his Reply to the Application on 13 November 2013, challenging the receivability of the Application *ratione materiae* and *temporis.*

4. On 2 July 2014, the Tribunal issued Order No. 173 (NBI/2014) directing the Applicant to respond to the Respondent's submissions on the receivability of this Application.

5. The Applicant filed her response to the receivability arguments on 18 July 2014.

**FACTS**

6. The Applicant used to live at the Rosslyn Lone Tree Estate, a property classified by the Security and Safety Service of UNON (SSS/UNON) as a stand-alone house on its own compound within the meaning of the Revised Kenya Minimum Operating Residential Security Standards (MORSS). She was therefore entitled to claim the cost of monthly guard and alarm contracts, the KES40,000 MRSA, and the one-off lump sum for capital expenditures, capped at USD3000.

7. On 1 April 2011, the Applicant moved out of Rosslyn Lone Tree and into Rosslyn Valley Estate (RVE). This house was classified by SSS/UNON as a stand-alone house in a shared compound, within the meaning of the Revised Kenya MORSS. As per the MORSS, residents of shared compounds are not entitled to claim the MRSA for guard and alarm contracts nor the additional MRSA of 40,000 shillings per month.

8. On 24 June 2011, the Applicant submitted a fresh claim for MRSA *via* the online Lotus Notes application. She claimed the "Shared Security Portion" and not the cost of a monthly alarm and guards' contract.

9. On 10 August 2011, SSS/UNON approved the Applicant's claim for the Shared Security Portion, calculated at the rate of USD800 per month. This was calculated on the basis of the amount specified in the Applicant's Lease Agreement. The approved amount of USD800 was indicated in the online Lotus Notes Application, a copy of which was shared with the Applicant.

10. From April 2011, the Applicant received the USD800 MRSA which she had claimed and continued to receive the monthly payment of KES40,000.

11. In December 2012, during the course of a review of another staff member's rental subsidy application, it was discovered that some United Nations staff residing in RVE had been paid incorrect amounts of security allowance. As a result of this discovery, an analysis was undertaken of the payments made to all staff members living in the same compound.

12. In February 2013, the Applicant stopped receiving the KES40,000 KES.

13. On 16 April 2013, the Human Resource Management Service (HRMS) advised SSS/UNON of the overpayments. The Special Investigations Unit (SIU) of SSS/UNON initiated an investigation into the overpayments received by the Applicant and other staff members residing at RVE.

14. The terms of reference of the investigation were to:

> Establish the categories of residential premises currently and previously occupied by [the Applicant], and their respective entitlements to Kenya MORSS;
>
> Find out whether or not the staff member received irregular residential security allowance and if so the circumstances leading to the payment;
>
> Establish whether the staff member followed the required procedure necessary to secure MORSS approval for the former and current residence.

15. On 17 April 2013, Mr. Philip Migire of the Budget and Financial Management Service (BFMS) wrote to the Applicant informing her of overpayments totalling KES800,000. The mail reads:

> Dear [Applicant]
>
> A review of our records indicate that you received a total of 800,000 KES between the period April 2011-Jan 2013. This amount paid to you for additional security allowance to cover expenses related to increased lighting, generator etc. you were not entitled to as you are staying in a shared compound where this service are provided by your Landlord/lady. (*sic*)
>
> Please let us know how you want us to recover this amount effectively from April 2013.

16. The Applicant responded immediately:

> Dear Phillip
>
> I believe UNON is mistaken in this regard.
>
> Can you kindly let me know a time slot tomorrow when I may be able to meet with you.

17. In addition to her objection the Applicant produced a detailed argument as to why she believed she was entitled to the KES40,000.

18. On 22 April 2013, Mr. Migire advised the Applicant to contact SSS/UNON. The Applicant did not do so.

19. The SIU completed its investigation report on 25 April 2013 and concluded that the overpayment was the result of administrative error. It also added that although the Applicant was "expected to declare the irregular payment, it [was] possible that she could have failed to notice the same in good faith". Ms. Martha Gumunyu of SSS/UNON provided a detailed explanation of the rationale behind the classification of the Applicant's residence and her non-eligibility for the additional MRSA and concluded that the Applicant "was irregularly paid KES 40,000 per month for recurrent security related expenditure only applicable to a stand-alone house. BFMS UNON did not fully effect changes of her entitlements in tandem with security report".

20. HRMS/UNON invited the Applicant to a discussion on the security report and the overpayments on 4 June 2013. The Applicant maintained that she was entitled to the additional MRSA.

21. On 4 June 2013, the Applicant received an Inter-Office Memorandum dated 3 June 2013 informing her that she was no longer entitled to the MRSA of KES40,000 that she had been receiving since February 2011 because the residence that she was occupying was part of a shared compound and not a standalone house. She was advised that a total amount of KES889,000 would be recovered from her salary in accordance with section 3 of ST/AI/2009/1 (Recovery of overpayments made to staff members).

**DELIBERATIONS**

***Receivability***

22. The Applicant sought review of the impugned decision by the Management Evaluation Unit (MEU) as provided by staff rule 11.2(c). The request was submitted on Monday, 5 August 2013. MEU rejected the request for management evaluation on the ground that it had been submitted outside the prescribed 60 days under staff rule 11.2(c). The 60 day period ended, according to MEU, on Saturday, 3 August 2013.

23. In an email addressed to counsel for the Applicant on 11 September 2013, Ms. Jennifer Yoo Joung Kim, a Legal Officer at MEU, presumably following a query after the request was found time barred, explained that it has never been the practice of MEU to "bump" the date of the receipt of a request from a staff member. The email from the legal officer adds: "[W]e bump the date only for purposes of when we start our 30 or 45 day clock, but the Staff Rules are clear that is 60 calendar days for the staff member".

24. The Respondent submits that the Application is not receivable *ratione materiae*. Since MEU rejected the request submitted by the Applicant because the Unit found it to have been submitted after the 60-day deadline, the matter is outside of the Tribunal's jurisdiction. It is only in cases where MEU has considered a request that the Tribunal can proceed to hear the case.

25. The Respondent also submits that 60 calendar days must be calculated from 14 April 2013 and not 4 June 2013. That was when the Applicant was informed about the overpayments by Mr. Migire.

26. What the Applicant is challenging is the decision to recover the overpayment totalling KES800,000. That decision could not have been taken on 14 April 2013; the Respondent asked for an investigation into the matter on 16 April 2013, the report for which issued on 25 April 2013.

27. If the Respondent was so sure and clear about the overpayment there would have been no need for an investigation. The tenor of the email to the Applicant was not that of a final administrative decision. Rather Mr. Migire was informing the Applicant of overpayment and asking her whether she would consent to recovery. She was even asked to contact SSS/UNON and had a meeting with HRMS, following which she was informed of the decision to recover the amount overpaid.

28. Staff rule 11.2(c) on the timeline within which a staff member should submit a request reads:

> A request for a 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**. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General. (emphasis added)

29. Staff rule 11.2(d) on the timeline within which the Secretary General should provide a response to the staff member reads:

> **The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York.** The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General. (emphasis added)

30. The Tribunal cannot understand the logic or rationale behind the two-pronged approach or rule in the computation of time as practised by MEU and as espoused in the email of Ms. Jennifer Yoo Joung Kim to counsel for the Applicant.

31. For the purposes of the present matter, the wording of both staff rule 11.2(c) and 11.2(d) is identical in its use of the words "calendar days;" and if, as the Legal Officer writes, the Rules are clear for the staff member they should be equally clear for the Secretary-General.

32. When it comes to the interpretation of identical legal provisions that regulate the same situation there cannot be different interpretations depending on the administrative convenience of the Organization or those who head specific sections of the Organization.

33. The term calendar days is not defined or qualified in the Staff Rules. Both the Statute and the Rules of Procedure of the Dispute Tribunal refer, wherever relevant, to calendar days (see, for example, art. 8 of the Statute and arts. 7 and 10 of the Rules of Procedure). The Statute does not define or qualify calendar days. The Rules of Procedure have tempered what would have been a strict application of the term calendar days by providing the following in art. 34:

> The time limits prescribed in the rules of procedure:
>
> (a) Refer to calendar days and shall not include the day of the event from which the period runs;
>
> (b) Shall include the next working day of the Registry when the last day of the period is not a working day;
>
> (c) Shall be deemed to have been met if the documents in question were dispatched by reasonable means on the last day of the period.

34. In any enactment, expressions relating to time should, in the absence of clear and express definitions or guidance, be interpreted fairly. A literal meaning should not be followed if such an approach will result in injustice and would defeat the spirit and purpose of the enactment; subject, of course, to the need to enforce deadlines in the name of the good administration of justice.

35. The submission of a request for review to MEU before a matter is litigated is the first mandatory step. That being so, MEU must have regard to the provisions on the computation of time in the rules governing the Tribunal. MEU cannot profess to be stricter in the interpretation of the meaning of calendar days than the Tribunal.

36. MEU itself has tempered the rigidity of the Rule, in the absence of any definition or guidance, by adopting a practice of 'bumping days' in respect of the statutory deadlines within which it is required to provide a response to a staff member. That that same principle appears to be rigidly *inapplicable* for the staff member is both inappropriate and unfair.

37. MEU calls this approach a practice. It is well established that a practice or policy has no place in the determination of a dispute between a staff member and the Organization. In *Manco* UNDT/2012/135[1] the Tribunal held that:

> 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 licence to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

38. The Tribunal takes the view that the practice adopted by MEU reflects its own interpretation in the construction of staff rule 11.2(c). The Tribunal takes the view that it could not have been the intention of the framers of the Staff Rule, in the absence of any express provision, to include in the term "calendar days" the days on which the Organization is not working.

39. The Respondent also submits that since MEU rejected the Applicant's request on grounds of timeliness, the Tribunal lacks jurisdiction to consider the substance of the Application.

[1] As affirmed in *Manco* 2013-UNAT-342

40. While art. 8.3 of the Statute prohibits the Tribunal from waiving or suspending deadlines for management evaluation, it does not bind the Tribunal to findings of timelines made by MEU. A decision of MEU is therefore not binding on the Tribunal. The Tribunal will here refer to what it stated in *Igbinedion* UNDT/2013/023[2]:

> The crux of the Respondent's position is that the provision of Article 8 (3) which enjoins the Tribunal from "suspend[ing] or waive[ing] the deadlines for management evaluation" necessarily means that a finding of receivability by the MEU as to timelines and limits binds the court. […]
>
> The submission by the Respondent that this finding by the MEU binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word 'deadline.'
>
> Article 8 (3) of the Statute is clear. It prohibits the Tribunal from waiving or suspending deadlines *for* management evaluation. It does not bind the Tribunal to findings of timelines made *by* management evaluation.
>
> Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation after the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to consider a request by a staff member outside of the time-limits prescribed for such a request.
>
> The MEU made a finding that the request before it was time-barred for the purposes of being reviewed by the Unit. To suggest that that finding is a 'deadline' for the purposes of litigation before the Tribunal is both misconceived and erroneous.
>
> The UNDT and Management Evaluation Unit operate on different receivability thresholds. A litigant must seek management evaluation before looking to have his or her dispute litigated and, for the purposes of litigation, time begins to run either from receipt of a response from the MEU or the expiry of the time-limit set for such a response.

41. This position does not in any way impinge upon the authority of MEU to reject requests that are not submitted within the stipulated deadline when correctly interpreted and applied.

[2] Affirmed by the Appeals Tribunal on issue of receivability in 2014-UNAT-411.

42. The Tribunal therefore holds that the matter is receivable *ratione temporis* and *ratione materiae*.

***Merits***

43. When the Applicant changed her residence in 2011, and moved to RVE, the Residential Security Survey dated 29 March 2011 clearly indicated that it was a shared compound. The MORSS of May 2009, as revised, provides that the MRSA is "only applicable to staff members living in private houses and not for apartment dwellers/staff living in shared compounds" As such the Applicant was not entitled to the monthly MRSA KES40,000.

44. When she moved to RVE, the Applicant claimed the "Shared Security Portion" and not the cost of a monthly alarm and guards' contract. This was approved.

45. It is clear, as submitted by Respondent, that at the time of submitting the claim for the "shared Security Portion," that is 20% of the rent, the Applicant was aware that she was not entitled to the monthly MRSA of KES40,000. That amount was erroneously paid from April 2011 through February 2013. The Respondent concedes this error.

46. The law governing the facts of the present situation is clear. It is governed by section 3.1 of ST/AI2009/1, which provides

> Overpayments 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.

47. The Tribunal pauses here to reflect on the investigation that was requested as a result of the erroneous payment. It appears from the terms of reference of the investigation, that the aim was to establish whether the Applicant had defrauded the Organization, – the Respondent's admission of error notwithstanding.

48. One must ask whether the Applicant was informed about the investigation or if it was an insidious attempt to fish for evidence that would be prejudicial to her. Since the Respondent confessed that they made an error, the investigation into the claims made by the Applicant was ill-advised, misconceived and an absolute waste of the Organization's resources.

49. The Respondent needed to do little more than to institute corrective measures and bring closure to the whole matter.

50. The Tribunal wonders therefore whether the investigation was instituted to cover its own lapses and assign the Applicant with blame for these lapses. The very basis of the investigation can only have been one of bad faith.

51. The Respondent's error extended to a miscalculation of the rental subsidy that the Applicant was entitled to. The Applicant signed a lease which obliged her to pay a monthly sum of USD4,200 in rent. Based on that lease, the MRSA was calculated at USD800. The Respondent then realised that the subsidy should have been calculated on USD3,400; in other words, on the amount payable for rent excluding the security element of the entitlement. As a result, a further USD 11,356.71 also had to be recovered.

52. On 3 June 2013, the Applicant was informed that the overpayments would be recovered and was asked whether she wished the recovery to be effected in one lump sum or in instalments. It was suggested to the Applicant that the recovery would start at the end of June 2013.

53. The Applicant consented to recovery commencing in July 2013. In the same communication, the Applicant expressed concern about her salary entitlements for the coming months in view of her numerous commitments and automated deductions from her account. She also mentioned that she would have to make alternative arrangements.

54. Although one would normally expect a staff member to peruse his/her pay slip to check whether the entitlements mentioned therein are correct, one should also be realistic and ask how many staff members actually do this. Primarily, it is the responsibility of the Respondent to ensure that overpayments are not made

through error, inadvertence or negligence. These repeated lapses place both the Organization and staff members in an invidious position and is not cost effective for proper administration or good governance.

55. There is no doubt that the Respondent's error in this case has caused the Applicant some stress as expressed by her on 26 June 2014.

56. Moral damages were not expressly pleaded. In *Manco* 2013-UNAT-342, the Applicant did not seek moral damages in his pleadings but made a statement at the hearing on it. The Appeals Tribunal confirmed the award of moral damages and observed:

> While Mr. Manco only raised the claim for moral damages during the UNDT hearing, this case is a reiteration of the *Valimaki-Erk* judgment in which the Appeals Tribunal awarded moral damages. There is no reason to depart from this precedent and the award of moral damages is affirmed.

57. In the case of *Valimaki-Erk* UNDT-2012-004, as confirmed by the Appeals Tribunal in 2012-UNAT-276, the Dispute Tribunal held that the unlawful requirement of requesting the Applicant, a citizen of Finland, to renounce her permanent residence status in Australia caused Ms. Valimaki-Erk "some moral injury" and "significant upheaval in her life", for which the UNDT awarded three months' net base salary.

58. It can reasonably be inferred from the tenor of the email that the Applicant sent to HRMS/UNON on 26 June 2013, that the Respondent's error caused significant concern about the predicament she would find herself in following the recovery of the overpayments that were made through no fault of hers.

59. In the circumstances, the Tribunal awards the Applicant with three months net base salary for the moral injury of having been subject to an unnecessary investigation and the financial stress that resulted from the Respondent's error and negligence with the Organization's resources.

**Conclusion**

60. The Application is receivable *rationae materiae* and *rationae temporis.*

61. The Respondent has the authority to institute recovery of overpayments made to a staff member, within the terms of ST/AI/2009/1.

62. To that end, the recovery of two years of overpayments to the Applicant as of **4 June 2013** is lawful.

63. The Tribunal **ORDERS** the refund of the amounts overpaid in April and May 2011.

64. The Tribunal also **ORDERS** the payment of three months net base salary to the Applicant for the moral injury and financial stress she suffered as a result of the Organization's negligence and errors.

*(Signed)*

Judge Vinod Boolell
Dated this 28th day of January 2015

Entered in the Register on this 28th day of January 2015

*(Signed)*
Abena Kwakye-Berko, Registrar, Nairobi