UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/041
Judgment No.: UNDT/2015/055
Date: 22 June 2015
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

GALINDEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicole Washienko, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Nicole Wynn, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 10 June 2014, the Applicant, an Air Operations Officer (P-3) at the United Nations Global Service Center ("UNGSC"), United Nations Logistics Base, Brindisi, Italy, contests the decision to recover underpayment of insurance premiums for the period covering December 2011 to November 2013.

2. The application was served on the Respondent who filed his reply on 11 July 2014.

Facts

3. The Applicant joined the United Nations Organization Mission in the Democratic Republic of the Congo in August 2006, and was separated on 13 February 2009. On 14 February 2009, he was appointed as Air Operations Officer, at the P-3 level, at UNGSC, Brindisi.

4. On 17 February 2009, the Applicant, who had first joined the Vanbreda Health benefit Plan on 6 August 2006, filed a request for change of health insurance coverage, to include his spouse and three dependent children under said Plan. The request, which was signed by the Applicant, stated "I hereby authorize the United Nations to make deductions from my [s]alary to cover contributions to premiums at the rate appropriate to [t]he coverage requested".

5. Due to an oversight, instead of deducting from the Applicant's salary the higher rate applicable to staff members with Italy as their duty station (rate group 3), the Organization deducted contributions at a lower rate, namely that applicable to staff members outside of Western Europe, the United States, Chile and Mexico (rate group 1).

6. By email dated 29 November 2013, a representative of the United Nations Health and Life Insurance Unit informed the Applicant that he had been enrolled in the wrong Van Breda group—namely in the Vanbreda International instead of the Van Breda Western Europe group—and that his rate group was being

corrected retroactively. Accordingly, the Applicant was told that in accordance with sec.3, para. 3.1 of ST/AI/2000/11 (Recovery of overpayments made to staff members), the premiums owed would be recovered retroactively, for the period 1 December 2011 until November 2013, and that deductions were going to be made from his salary, in monthly instalments.

7. On 4 December 2013, the Applicant responded to the above email, expressing his disagreement with the recovery, arguing that no "overpayment" had been made to him, and that, hence, the Administrative Instruction on recovery of overpayments did not apply to his case. He requested that any such deduction be put on hold, until the situation was resolved. He further noted that while he was ready to formally dispute the matter, he was also open to informal settlement.

8. By memorandum dated 16 December 2013, the Chief, Health and Life Insurance Section, Insurance and Disbursement Service, Accounts Division, advised the Chief Civilian Personnel Officer, UNGSC, on the correction of the Vanbreda rate group for a number of staff in Brindisi, stressing that while the erroneous classification was due to administrative oversights, it had to be corrected, for a retroactive period limited to two years.

9. The Applicant filed a request for management evaluation on 28 January 2014. The Under-Secretary-General for Management responded to the Applicant by letter dated 11 March 2014, notified to the Applicant on 12 March 2014, informing him that the Secretary-General had accepted the recommendation of the management evaluation unit to uphold the contested decision.

10. A total amount of USD5,288.41 was recovered from the Applicant's December 2013 salary. To offset the deduction, a salary advance was issued, and the recovery was made through five monthly instalments, beginning in January 2014.

11. Pursuant to Order No. 35 (GVA/2015) of 17 February 2015, the parties informed the Tribunal about their views concerning a judgment being rendered on the papers without an oral hearing.

12. By Order No. 100 (GVA/2015) of 7 May 2015, in light of Counsel for the Applicant having informed the Tribunal that, in her view, a hearing was necessary, the Tribunal convoked the parties to a case management discussion that took place on 20 May 2015, with Counsel for both parties attending via videoconference. During the case management discussion, Counsel for the Applicant stated that her client no longer believed that an oral hearing in this matter was necessary, and asked the Tribunal to permit the filing of a witness statement by the Applicant, with relevant documents, and a rejoinder to the Respondent's reply.

13. The Tribunal granted leave for the above filings, and Counsel for the Applicant, by submission of 27 May 2015, filed a witness statement from the Applicant, with supporting documents, and informed the Tribunal that in light of the information contained in the Applicant's witness statement, she would not be submitting a rejoinder. Pursuant to the Tribunal's directions at the case management discussion, Counsel for the Respondent filed comments on the Applicant's submission of 27 May 2015 on 4 June 2015.

Parties' submissions

14. The Applicant's principal contentions are:

a. ST/AI/2009/1 does not apply to his case since the Organization did not make any overpayment to the Applicant in excess of his entitlements, as per the definition of the administrative instruction;

b. No rule or regulation, or administrative issuance provides for recovery in case of underpayment by staff members; hence, the recovery for the underpayment of the Administration's insurance premiums was not based on any legal authority;

c. The Administration itself noted in its correspondence that the recovery was based on an "underpayment" and not on an overpayment of salary; the administrative instruction on recovery of overpayment only applies in case

any amount greater than his salary had been paid to the Applicant, which did not happen in the case at hand;

d. In an estimation of earnings and deductions and in his payslips, he was quoted an incorrect premium for the Vanbreda Insurance Plan on which he relied; he believed this amount to accurately reflect the deductions that would be made from his salary, related to his medical insurance contribution for him and his family at the Brindisi duty station;

e. In view of the voluntary character of the insurance, he might very well have decided not to subscribe to the Vanbreda insurance policy, had the Administration provided him with the correct premium; therefore, since his joining the Vanbreda insurance was not a certainty, any argument of an overpayment of salary, hence indebtedness, must fail;

f. He cannot be penalized for the Administration's failure to place him in the correct insurance rate group; a staff member who has—although on the basis of an erroneous assessment—received assurances from the Organization with respect to monies due to him can rely on such assurances, and has a legitimate expectation to receive such monies, even if he/she was not actually eligible to an entitlement under the relevant rules (cf. *Wang* UNAT/2011/140);

g. It was the Administration's responsibility to place him in the correct insurance premium rate group, and he could rely on the Organization's actions in this respect; accordingly, the Administration should bear the financial responsibility resulting from the error;

h. Due to the Administration's error, he was "forced" into a retroactive insurance contract, the terms of which he had never accepted;

i. The recovery from his salary over a short five-month period puts undue hardship on him and his family;

j. By declining to adhere to basic contractual principles, the Administration failed to comply with its obligation of good faith and fair dealing with the Applicant; all the elements of a contract between the Administration and the Applicant were present in the case at hand; the Administration could not unilaterally change the terms of the contract after it had been fully executed, which is what it did when it determined, unilaterally, to recover, retroactively, the Applicant's underpayment of his health insurance premiums;

Therefore, the recovery was unlawful; the Applicant requested that the recoveries of underpayments be stopped, and that he be reimbursed for any and all recoveries made.

15. The Respondent's principal contentions are:

a. A failure to deduct the appropriate amount to cover a periodic payment, such as a periodic underpayment of insurance premiums, falls under the definition of overpayments as contained in Administrative instruction ST/AI/2009/1 and, hence, will result in recovery;

b. The Applicant authorized the Administration to deduct the premium amount at the appropriate rate to get the requested medical insurance coverage; the amount that was in fact deducted was lower than what it should have been and resulted in an overpayment of the Applicant's salary, which can be recovered under the terms of the administrative instruction;

c. The Applicant was not given an incorrect amount for the insurance coverage, and does not provide evidence to the contrary; the insurance application form does not include such a premium amount quote;

d. The Applicant agreed to a reduction of his salary in the amount of the "premiums at the rate appropriate to the coverage requested" and these rates are contained in Information Circular ST/IC/2009/4; the Information Circular was available and known to the Applicant; he was not new to the United Nations insurance scheme, and could be expected to consult the cost of the coverage for which he applied; this allowed him to take an informed decision when he chose to apply to the United Nations Vanbreda insurance coverage instead of opting for insurance coverage elsewhere;

e. In recovering the overpayment, the Administration did not breach any implied or express terms of the Applicant's contract; also, since it accepted that the Applicant's assignment to the wrong rate group was not his fault, the Administration limited the recovery to the two-year period under sec. 3.1 of ST/AI/2009/1, and did not seek recovery of the full overpayment, which in fact had occurred over a period of more than four years;

f. Also, in order to mitigate any financial hardship on the Applicant, the Administration paid him a salary advance and proceeded with the recovery over a five-month period; the Applicant was invited to ask for, and could have requested, a longer payment period had a five-month recovery created a hardship for him;

g. When the Administration becomes aware of an administrative error, it is bound to rectify the illegal situation to prevent it from enduring and to ensure equal treatment of its staff members; this fundamental principle of administrative law is contained in secs. 1 and 3 of the administrative instruction on recovery of overpayment; the Applicant did not provide evidence that the Administration acted in bad faith;

h. The Applicant agreed to pay the premiums at the appropriate rate of the coverage and, in turn, received that health insurance coverage for him and his family; the Organization was obliged to refund medical expenses of the Applicant's family at the higher costs prevailing for rate group 3 for Western Europe; by refusing to pay the premium amounts he had agreed to, the Applicant breaches the terms of the agreement he had signed; and

i. The Applicant failed to prove that the contested decision was unlawful; the application should be dismissed.

Consideration

Receivability

16. The Applicant, who received the contested decision on 29 November 2013 and requested management evaluation on 28 January 2014, respected the statutory 60 calendar days provided for by staff rule 11.2 (c).

17. The Management Evaluation Unit reply is dated 11 March 2014, and the Applicant filed his application on 10 June 2014. The Respondent did not challenge the Applicant's statement that he received the management evaluation only on 12 March 2014. Therefore, by filing his application on 10 June 2014, the Applicant respected the statutory time limit for the filing of an application under art. 8.1(d)(i)(a) of the Tribunal's Statute.

18. In view of the foregoing, the present application is receivable *ratione materiae* (*Egglesfield 2*014-UNAT-402) and *ratione temporis*.

Merits

19. With respect to the merits of the application, the Tribunal notes that staff rule 6.6 provides:

> **Medical insurance**
>
> Staff members may be required to participate in a United Nations medical insurance scheme under conditions established by the Secretary-General.

20. Furthermore, staff rule 3.18(c)(ii)[1] in force at the time of the contested decision, stipulates that: "Deductions from salaries and other emoluments may also be made for: … (ii) Indebtedness to the United Nations".

[1] Staff rule 3.18(c)(ii) replaced staff rule 3.17(c)(ii) referred to in ST/AI/2009/1 (Recovery of overpayments made to staff members), albeit with exactly the same wording.

21. ST/AI/2009/1 (Recovery of overpayments made to staff members) specifies:

> **Section 1**
> **Definitions**
>
> The following definitions shall apply for the purposes of the present instruction:
>
> (a) "Overpayments" are payments made by the Organization to a staff member in excess of his or her entitlements under the Staff Regulations and Rules and relevant administrative issuances. Overpayments may occur in conjunction with periodic payments (for example, salary, post adjustment, dependency allowance, rental subsidy and mobility, hardship and non-removal allowance) or settlement of claims (for example, education grant, tax reimbursement and travel expenses);
>
> …
>
> **Section 2**
> **General provisions**
>
> …
>
> 2.2 Overpayment creates on the part of the staff member an indebtedness which shall normally be recovered by means of deductions from salaries, wages and other emoluments under staff rule 3.17(c)(ii).[2]
>
> …
>
> **Section 3**
> **Amounts to be recovered**
>
> 3.1 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 reasonable 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. Such recover could, if circumstances so warrant, be made in instalments as determined by the responsible officials referred to in section 2.2 above.

[2] Replaced by staff rule 3.18(c)(ii) (cf. above)

22. "Overpayment" is a clearly defined term for the purposes of ST/AI/2009/1. The definition is consistent with the plain language definition of overpayment that may be stated as "A payment that is more than the amount owed or due"[3]. "Payment" is defined and understood to mean the action of paying an amount payable. What is "due" is an amount determined by reference to all factors used in the calculation of the entitlements of a person. This is calculated by reference to such matters as a base salary, allowances for education, post adjustment and the like, less any payment by way of deduction for staff assessment and health insurance, this being a payment by direction of the staff member to the Organisation. If a person is paid more than the amount due after a proper calculation, then it is axiomatic, given the precise definition of "overpayment" in ST/AI/2009/1, that there has been an overpayment to that person, as they are in receipt of a greater payment than that to which they were entitled and was due to them.

23. The Vanbreda plan provides for medical insurance coverage worldwide for staff members who are not stationed in the United States. Information Circular ST/IC/2009/4 (Vanbreda medical, hospital and dental insurance programme for staff members away from Headquarters), determines three different premium rate groups established "to enable the determination of premiums that are broadly commensurate with the expected overall level of claims for the locations included within each rate group". A table lists the type of coverage and monthly premiums applying to various groups of staff members, depending on their duty station of assignment and the number of eligible family members to be covered, if any. Rate group 2 covers staff members with duty station Chile and Mexico, while rate group 3 covers Western Europe and includes, *inter alia*, staff members with their duty station in Italy. Finally, rate group 1 encompasses staff members with duty station at "all locations outside of the United States of America other than those listed under rate groups 2 and 3".

[3] Black's Law Dictionary, Tenth Edition, 2004

24. It is uncontested that the Applicant—whose duty station at the relevant time was Brindisi, Italy—fell within rate group 3 and that the Administration erroneously placed him in rate group 1. The Tribunal notes that the form entitled "Group medical, hospital and dental insurance scheme g.c.v. J. Van Breda & C° International, Application or request for change of coverage" does not explicitly refer to the above-referenced information circular and/or mentions the different premium rate groups. However, the Applicant, by signing said request, certified that he authorized "the United Nations to make deductions from [his] salary to cover contributions to premiums at the rate appropriate to the coverage requested".

25. The Applicant notes that he relied on and made his financial planning in light of the information contained both in the estimation of earnings and deductions dated 15 March 2009, and on his payslips, which refer to monthly Medical Insurance contributions of USD262.38. As such, the Applicant seems to suggest, relying on *Wang* 2011-UNAT-140, that he received assurances that he and his family would be entitled to insurance coverage with the monthly premium amount indicated in his payslip. This argument must fail.

26. While the placement of the Applicant in rate group 1 was a mistake imputable to the Organization, the above-mentioned request for change of coverage form, signed by the Applicant, clearly states that he would be entitled to insurance coverage and that he authorized deductions of premiums at the *appropriate* rate. As such, any assurance provided to the Applicant was limited to coverage at the appropriate rate, which, in view of the Applicant's duty station, Italy, could only be rate group 3. The fact that the actual amount contained in the estimation of earnings and on the Applicant's payslips did not correspond to the appropriate premium amount for rate group 3, though constituting an error of the Administration, does not change the fact that the Applicant was given assurance, and had accepted, nothing more than coverage at the "appropriate rate", that is rate group 3.

27. Furthermore, the Applicant was not new to the Insurance Plan—he had joined it in August 2006 when he was working at MONUC—and, as the insured person, he cannot blame the Organization for his failure to inform himself about the relevant rate/conditions, as contained in ST/IC/2009/4, which is a readily available public document.

28. As a result of the administrative error, the Applicant received coverage at the level of rate group 3, but did not pay the corresponding amount for it. The Applicant's argument that this was not a situation of "overpayment" under the relevant provisions, cannot stand, as he was paid more than was due to him.

29. The Tribunal notes that the payment of insurance premiums is, in fact, a payment by directions made by the Organization at the staff member's request. Thus, a deduction is authorized from the salary and emoluments paid by the Organization to the staff member. Insofar as the deduction made is less than that which was due under the appropriate rate, and that which was due between the Applicant and Vanbreda, then the staff member has, in fact, been overpaid each month the difference between the correct amount deductible and the lesser, and incorrect, amount actually deducted. In the present case, the deductions made from the Applicant's salary were less than they ought to have been under the insurance coverage for which he was eligible under the appropriate rate group of the Vanbreda plan, namely for the Western Europe rates. This resulted in the Applicant being paid a net salary that was higher than that he was entitled to, which constitutes an overpayment as per the above-referenced definition under sec. 1 of ST/AI/2009/1, namely a payment in excess of his entitlements.

30. The Tribunal finds that once it became aware of its mistake, it was not only the Organization's right, but its duty to correct it and put an end to the illegal situation (see *Boutruche* UNDT/2009/085), and to proceed with the recovery, as per the terms of ST/AI/2009/1 (cf. *Ten Have* UNDT/2015/007).

31. The Tribunal notes that, in principle, overpayments shall be recovered in full, and that the Applicant had actually paid the lower insurance premium for a period of more than four years. However, the Administration acknowledged its erroneous placement of the Applicant in rate group 1 and applied the two-year limitation provided for in sec. 3.1 of ST/AI/2009/1. The Tribunal is satisfied that, under the circumstances, it was reasonable for the Administration to consider that in view of the information provided to the Applicant on the estimation of earnings and deductions, and in his payslips, he was unaware of the overpayment, and that in the absence of a reference to the relevant information circular he could not be expected to be aware of it.

32. In light of the foregoing, the Tribunal concludes that the decision to recover the amount of USD5,288.41, in monthly instalments, as a result of the underpayment of insurance premiums for the period covering December 2011 to November 2013, was legal.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Rowan Downing

Dated this 22nd day of June 2015

Entered in the Register on this 22nd day of June 2015

(*Signed*)

René M. Vargas M., Registrar, Geneva