



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/053

Judgment
No.: UNDT/2016/205

Date: 17 November 2016

Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MANLY-SPAIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Alister Cumming, ALS/OHRM

Introduction

1. At the material time the Applicant was serving as an Administrative Assistant on a fixed-term appointment, at the FS-5/VI level, with the United Nations Support Office for AMISOM (UNSOA). She was based in Nairobi, Kenya.

Procedural History

2. On 25 June 2014, the Applicant challenged the Respondent's decision to recover payments she received as dependency benefits for her child.

3. In his Reply, the Respondent submitted that the Application should be rejected on grounds both of receivability as well as on its substantive merits.

4. The Applicant's comments on the Reply were filed on 18 July 2014.

5. In April 2016, the Tribunal issued Order No. 199 (NBI/2016) in which it directed the parties to provide a detailed and tabulated compilation of the grades and steps occupied by the Applicant and her husband for the period September 2008 through to November 2013, including details of their earnings during that period.

6. The parties filed their submission in response to the Order on 4 May 2016.

7. On 4 August 2016, the parties were informed that this matter had been transferred to the docket of Judge Goolam Meeran.

8. On 11 August 2016, the Tribunal issued Order No. 411 (NBI/2016) inviting the parties to a Case Management Discussion (CMD).

9. The CMD took place on 18 August 2016. Both parties were represented by Counsel and the Applicant was present. The purpose of the CMD was to clarify and agree the issues in contention and to determine what further action, if any, was required in order to reach a judicial determination on the merits. It appeared to the Tribunal, in the course of the CMD, that notwithstanding the issue of receivability the parties should be given the opportunity to explore the benefits of an alternative resolution to their dispute (ADR). The parties agreed and the CMD was suspended.

10. On 19 August 2016, the Tribunal issued Order No. 417 (NBI/2016) in which it directed the parties to file a joint motion indicating whether agreement had been reached to resolve this matter.

11. On 20 September 2016, the parties jointly requested an extension of time to conclude their discussions towards a resolution.

12. By Order No. 437 (NBI/2016) dated 21 September 2016, the Tribunal granted a stay of proceedings until 7 October 2016.

13. On 7 October 2016, the Parties informed the Tribunal that settlement discussions had been unsuccessful and requested that proceedings be resumed.

14. The Tribunal issued Order No. 452 (NBI/2016) for another CMD, on 19 October 2016, to continue the discussions which were kept in abeyance pending the parties' exploration of an alternative resolution.

15. Following the CMD, the Tribunal issued Order No. 459 (NBI/2016) directing the parties to respond to specific questions that arose from the discussions and the documents to date, including the issue of receivability of the claim.

16. The Tribunal received the Applicant's submissions on 4 November 2016, and the Respondent's response to those submissions on 7 November 2016.

The Facts

17. On 28 February 2006, the Applicant's husband became a staff member of the United Nations. He was appointed as an Administrative Assistant at the FS-4 level Step I with the United Nations Mission in Sudan (UNMIS).

18. He claimed dependency benefits on account of his daughter from a previous relationship and was paid at the dependency rate.

19. On 30 July 2006, the Applicant was appointed as an Administrative Assistant at the FS-4 level Step I with UNMIS.

20. On 28 May 2008, a son was born to the Applicant and her husband. In September 2008, the Applicant declared her son as her dependent and began to receive dependency allowance.

21. Before approving the Applicant's dependency benefits claim for her son, the Administration of UNSOA sought the advice of FPD in relation to this claim. FPD was of the view that the Applicant was entitled to dependency benefits for her son because her husband was receiving dependency benefits for a child emanating from another relationship.

22. From 2006 to 1 July 2009, the Applicant and her husband both held appointments of limited duration (ALD) commonly known as the 300 series appointments.

23. At the time of making the claim for dependency, the Applicant and her husband had the same salary level. They both held appointments at the FS-4/I level. They remained at that level and step until 1 July 2009.

24. On 1 July 2009, the Applicant's appointment was converted to a fixed-term appointment at the FS-4/III level. At the time of the conversion, the Applicant had already declared her son as her dependent and was already receiving dependency benefits for him.

25. On 1 July 2009, the Applicant's husband was promoted to the FS-5/II level retroactive to September 2008.

26. In August 2010, the Applicant was also promoted to FS-5/III level with UNSOA. It is noted that as of August 2010, the Applicant and her husband were at the same level and step. There was a brief period between May 2013 and July 2013, when the Applicant was temporarily promoted to FS-6 level and was therefore receiving a higher salary.

27. On 13 November 2013, the Applicant received a letter from the UNSOA Chief Civilian Personnel Office informing her that she was not entitled to receive dependency allowance for her son because, according to the Administration, her husband "has a higher step". The proper meaning and effect of this notification is significant in that it relates directly to the Respondent's contention that the Application is not receivable.

28. In the same letter, the Administration informed the Applicant that it would recover all overpayments made to her since 1 July 2009. The overpayments represented approximately USD27,661. The Applicant's husband received USD 12,369.75 in retroactive payments for dependency allowance which he would have been in receipt of but for the fact that she had claimed, and was in receipt of, dependency allowance which was far in excess of what the Respondent contends was properly due to the couple if they had claimed in accordance with the staff rules. The Applicant does not accept this argument. In any event this difference in interpretation of the applicable rules will fall to be considered on its merits if the Tribunal finds the claim to be receivable.

29. On 24 January 2014, an officer within the Human Resources Unit of UNSOA forwarded an email to the Applicant, dated 23 January 2014, from the Payroll and Disbursement Section of the Office of Programme Planning, Budget and Accounts at United Nations Headquarters in New York. This advised that the overpayment of USD27,661.29 was to be offset by retaining the Applicant's

entire January salary of USD6,222.60, with the remainder to be recovered in installments over the length of the Applicant's appointment.

30. On 8 February 2014, the Applicant received a further email from the Payroll and Disbursement Section, advising her that the remaining balance would be recovered in installments of 3,556.45 USD until the expiry of the Applicant's appointment on 31 July 2014.

31. On 12 February 2014, the Applicant submitted a request for management evaluation, challenging the recovery schedule set out in the emails of on 24 January 2014 and 8 February 2014. Her request did not challenge the substantive decision communicated to her on 13 November 2013 to recover the overpayments. On 2 April 2014, the Management Evaluation Unit (MEU) rejected the request..

32. The Applicant filed this Application on 25 June 2014 challenging the decision that was communicated to her on 13 November 2013, not the recovery schedule that was the subject of her request for management evaluation.

Considerations

33. It is settled law that where a request for management evaluation is necessary, as in this case, it is a mandatory first step in the process leading to a judicial determination on the merits. In *Pirnea* 2013-UNAT-311 and several other rulings the Appeals Tribunal affirmed the policy underpinning the request for management evaluation in that it affords the Administration the opportunity to correct any errors in an administrative decision so as to obviate the need for judicial review before the Tribunal.

34. It is necessary to identify with clarity the administrative decision which the staff member disagrees with and, which is the subject of the request for a review by MEU. In the event of an appeal to the Dispute Tribunal an applicant has to demonstrate that the decision being appealed against had previously been the

subject of a request for management evaluation and that both the request and the claim to the Tribunal complied with the required deadlines and time limits.

35. Accordingly, before considering the merits of the claim the Tribunal is required to make factual findings as to what is the administrative decision being appealed against; when was the decision notified to the Applicant; was that decision the subject of a request for management evaluation; is that the same decision being challenged before the Tribunal and finally were the requisite deadlines complied with. During this stage of preliminary review, the Tribunal is not concerned with the merits of the respective contentions of the parties.

36. The Application, filed on 25 June 2014, describes the contested decision as a challenge to “the decision to recover amounts she received as dependency benefits for her child as of 1 July 2009”. The date of notification of this decision was given as 13 November 2013 and the request for management evaluation was made on 12 February 2014. It is clear from these dates, even without looking at the contents, that the Applicant did not comply with the requirement of staff rule 11.2 (c) to request management evaluation within the period of 60 days from the date of notification of the decision. The deadline expired on 12 January 2014.

37. It is clear from an examination of the entirety of the Application including the remedy sought, at paragraphs 75 and 76, together with supporting documents, which appear as Exhibits C and D, that the appeal to the Tribunal is against the decision notified to the Applicant on 13 November 2013 and not any decision subsequently notified to the Applicant on 23 January 2014 and 8 February 2014 which notified her of the method of recovery.

38. It would appear that the event that triggered the challenge to the decision to recover the overpayments was the notification of the schedule of repayments which could properly have been regarded by the Applicant as a draconian measure to withhold her entire salary for January 2014 without any consultation or discussion with her. This decision was the subject of management evaluation and

could have been filed as an appeal to the Tribunal. It was not the claim that was filed with the Tribunal on 25 June 2014.

JUDGMENT

39. The Application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 17th day of November 2016

Entered in the Register on this 17^h day of November 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi