Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

KINGS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. The Applicant, who held a temporary appointment as a Translator from 12 October to 6 November 2015, contests the late payment of her salary for October 2015.

2. As remedies, she requests 5% in default interest on her salary arrears, as well as CHF1,000 in moral damages for the stress and worry.

Facts

3. The Applicant held a temporary appointment as a Translator, at the T-IV level, with the English Translation Section, Languages Service ("LS"), Division of Conference Management ("DCM"), United Nations Office at Geneva ("UNOG"), for a contracted period of 26 days, specifically, from 12 October to 6 November 2015.

4. On 1 November 2015, the Organization deployed Secretariat–wide its new Enterprise Resource Planning ("ERP") system, known as Umoja. From this date, a large number of the Organization's operations were conducted through Umoja, including the administration of payroll and salaries.

5. The Applicant queried at the beginning of her contract when she would be paid her October salary, and DCM indicated, by email of 6 November 2015, that she would receive the salaries for the entire duration of her contract at the end of November 2015, after certification of her attendance in Umoja had taken place.

6. The Applicant received a "Statement of Earnings and Deductions" for the pay period of 1 to 30 November 2015, and was paid for the work she had performed in November only. The statement indicated 30 November 2015 as the "Pay Date".

7. On 27 November 2015, the Applicant wrote to DCM advising that she had been paid for November but not for October, and requesting that necessary actions be taken so that she receive the totality of her salaries at the soonest date.

8. Upon her follow up by phone, the Applicant was instructed to contact the Human Resources Management Service ("HRMS"), UNOG, which she did on 30 November 2015, asking when she would be paid her October salary. A Human Resources Officer, HRMS, replied on the same day as follows:

> Your salary for October 2015 will be treated as IMIS retroactivity. This means that our colleagues in payroll will manually input all the necessary data from IMIS to Umoja for your salary to be paid as soon as possible.

9. The Applicant was hired by UNOG to work for 12 more days in January 2016. On 22 January 2016, the Applicant informed HRMS that she had still not received her salary for October 2015, while mentioning that interest on arrears should be added to the payment. On the same day, HRMS contacted the Finance Section, UNOG, enquiring about the Applicant's salary. The Payments and Payroll Unit then informed that her case, along with others, would be moved from IMIS to then "calculate the retroactivity to pay through Umoja".

10. The Applicant was paid her emoluments for her January 2016 work on 29 January 2016.

11. On 11 February 2016, the Applicant emailed HRMS stating again that she had still not received her October 2015 arrears. A Human Resources Officer, HRMS, apologised for the delay, assuring the Applicant that the different units involved were doing their utmost to expedite all the outstanding payments, and that her delayed salary was likely to be paid in March 2016.

12. On the following day, 12 February 2016, the Applicant informed HRMS that she would need a payslip for tax purposes and added that she had to take money from her savings account to "plug the gap", which resulted in her foregoing interest on that account that she would ask UNOG to make good.

13. By email of 9 March 2016, the Applicant brought to the attention of the Chief, LS, DCM, that she had still not received her salary arrears for October 2015. The Chief, LS, responded on the next day that she had repeatedly raised the issue, unsuccessfully, at various levels on her and other staff's behalf.

14. On 14 March 2016, the Applicant requested management evaluation of "the decision not to pay her for work performed".

15. By letter dated 24 March 2016, the Management Evaluation Unit considered that "no decision ha[d] been taken not to pay [the Applicant] for work performed" and that the payment was rather being processed and should be made at the end of March 2016.

16. On 31 March 2016, the Applicant received the payment of salary corresponding to the three weeks she had worked in October 2015.

17. The present application was filed on 31 May 2016. The Respondent filed his reply on 30 June 2016. The Applicant filed additional comments on 6 July 2016.

18. By Order No. 250 (GVA/2016) of 30 December 2016, two annexes to the Respondent's reply that had been filed *ex parte* were disclosed to the Applicant, and she was invited to submit evidence on the material and moral damage she sustained. She submitted a number of documents on 17 January 2017.

19. On 31 January 2017, a case management discussion was held on this case, where it was agreed that no substantive hearing would take place. On the same occasion, the Applicant gave oral evidence, in particular on the moral damage sustained.

20. Further to the case management discussion, the Tribunal issued Order No. 25 (GVA/2017) of 1 February 2017, inviting the parties to file additional comments on the legal issues to be determined as identified by the Tribunal, which the Respondent did on 13 February 2017 and the Applicant on 24 February 2017, once one of the annexes so submitted had been disclosed to her.

Parties' submissions

21. The Applicant's principal contentions are:

a. It is a well settled principle in international civil service law that the payment of salary for services performed should be made promptly. A delay of five months cannot be regarded as prompt payment. Similar delays affected several temporary staff members who also worked as freelance translators in UNOG;

b. The Administration attributes the delay to the introduction of Umoja. However, this was not an unforeseeable event in respect of which no plans could be made, and the employment of freelance translators and précis-writers in October and November is in fact a recurrent practice. The failure to include this category of staff in the payroll software in time for the Umoja rollout was negligent;

c. While the Respondent claims having always responded promptly to the Applicant, these answers were mere apologies and requests for patience, as opposed to the effective payment of her salary arrears. Furthermore, the contention that the Applicant received other payments from the Organization during the five-month period of delay is irrelevant, as such payments consisted of her salary for November 2015 and January 2016, and not advances on the arrears;

d. There is nothing else that the Applicant could have done to mitigate the harm she suffered. She could not foresee the failure to have her salary paid within a reasonable timeframe. Also, given that she received assurances in December 2015 that the payment was impending, and the indirect information she had obtained that no funds were available for advances, it was fully reasonable for the Applicant to conclude that it was pointless to ask for a salary advance, a possibility that the Administration did not offer. The Applicant repeatedly contacted various officials of the Organization to try to solve the problem;

e. The fact that the payment of her salary was delayed for five months caused more than minor inconvenience and cannot be ignored. It warrants the award of interest on the salary arrears, the Swiss prime rate being of 5%. The absence of a staff rule or other provision expressly catering for the obligation to compensate for failure to timely pay a staff member's salary is no reason to refuse compensating such a delay. Asking the Applicant to produce proof of her material damage seems a negation of the Organization's duty of care vis-à-vis her. Also, the Applicant had to withdraw money from her savings account, thereby foregoing interest; and

f. It is self-evident that she suffered moral damage. She sustained dismay upon finding out that the salary owed to her had not been credited in her bank account, gnawing anxiety—as the situation lasted for almost half a year—without her knowing when the issue would be solved, promises of action turning not to be followed by effective action, and humiliation in having to beg repeatedly for a long overdue payment.

22. The Respondent's principal contentions are:

a. It is acknowledged that the launch of Umoja resulted in delays in payments, in particular for language freelance staff members with temporary contracts. Around 25 other staff members were in this same situation. No decision was made to pay the Applicant later than others;

b. The matter is moot, as the Applicant has now been paid her salary arrears. Hence, there was no implied decision not to pay her for the work performed. As to the interests for late payment that the Applicant's requests, this matter has not been reviewed in management evaluation because, while in her management evaluation request she sought payment of interest, the Applicant did not request review of an implied decision by the Administration not to pay her interest for late payment;

c. The Applicant is not entitled to payment of interest, as the Staff Regulations and Rules and the Financial Regulations and Rules do not contain any provision relating to payment of interest for delay in the payment of entitlements. Yet, the unusual delay in this case may warrant payment of compensation, based only on its exceptional circumstances;

d. Salaries are normally paid at the end of the calendar month, but this is not always the case; in particular, free-lance temporary staff is paid at the end of the next month if their contract expires after the cut-off date of the salary payment in Umoja;

e. The delay in this case is not a valid ground for compensation as the circumstances of the case do not show any negligence or violation of specific rules by the Administration. It was the result of exceptional temporary technical problems, and not of any practice tainted with bad faith towards the Applicant. On the contrary, the Administration has always responded promptly to her; two officers have clearly showed their sympathy to the Applicant, her matter was considered a high priority, and the Administration demonstrated commitment and good faith to settle it;

f. The Applicant has not suffered significant material damages. Given the low interest rate in Switzerland, the Applicant would have accrued less than CHF1 during the five months of the delay, and did not quantify any loss she might have suffered as a result of withdrawing funds from her savings account. Any loss would adequately be compensated by payment of a legal interest rate, such as the US or the Swiss prime rate. Also, she received other payments from the Organization during the five-month delay period; and

g. As to moral damages, it is not disputed that late payment may have created inconveniences and stress for the Applicant. In any event, she took no adequate measures to mitigate her losses; particularly, a request for a salary advance could have been processed. Considering that payment of legal interest may be warranted on the basis of exceptional delay, she should not be entitled to additional compensation.

Consideration

Alleged irreceivability and mootness of the application

23. The Respondent asserts that no decision was ever made not to pay the Applicant for work performed under a temporary contract and that, instead, the payment was simply being processed. This was the position adopted by the MEU and, the Respondent suggests, it is ultimately evidenced by the fact that the Applicant eventually received her salary.

24. This argument is misplaced. The Tribunal recalls that the absence of a positive decision may also amount to a decision (*Tabari* 2010-UNAT-030, *Nwuke* 2010-UNAT-099, *Christensen* 2012-UNAT-218), and emphasises that between the end of November 2015 and 31 March 2016, the Administration failed to take positive action to pay the salary due to the Applicant. Hence, as a matter of fact, she was denied such payment for that period. For an administrative decision to exist there is no requirement that there be a specific intention or plan, or that the Applicant was purposefully targeted. There was an implied decision through inaction not to resolve the failure to make the payment due to the Applicant in a timely manner.

25. Additionally, the Respondent submits that the Applicant's challenge became moot from the moment the arrears she was claiming were paid, on 31 March 2016. The question raised by this contention, ultimately, is whether the fact that the Administration eventually discharged its duty to a staff member cures the previous breach of that duty. If the submissions of the Respondent are correct, it would have a considerable impact upon the rights of staff members to have timely compliance by the Administration of its duties towards them. The Appeals Tribunal pronounced itself on this point—in the context of the right to bring a rebuttal, in *Gehr* 2012-UNAT-253, stating the following:

> 59. We are of the view that in rendering Mr. Gehr's complaint about the rebuttal issue moot in light of the subsequent reversal of the decision … the UNDT Judge failed to give sufficient weight to the central issue, namely the denial to Mr. Gehr, for a period of time, of the right to engage in a rebuttal process (should he wish to

> do so) in the context of the performance appraisal evaluation the Administration provided to him.
>
> …
>
> 63. Mr. Gehr suffered the denial of [his right to rebut his performance evaluation] for a period of weeks and during those weeks was therefore destined to be involved in an appraisal process in which he would have no right to rebut. The Tribunal is of the view that that denial, of itself, was of sufficient seriousness to warrant consideration by the UNDT Judge as to whether compensation was merited.

26. It follows that an applicant's challenge does not automatically become moot when the Administration subsequently rectifies a wrongful course of action. While the eventual payment of a salary due to a staff member will put an end to any breach in respect of the failure to properly comply with the contractual obligations towards a staff member, it does not remove the fact that the breach occurred and existed for a time, with consequent impact. This remains the subject of judicial scrutiny.

27. Lastly, the Respondent submits that the application is irreceivable, insofar as interest is concerned, because the Applicant made no request for management evaluation of any implied decision not grant her compensation for late payment. This submission is misconceived. In fact, such a request was not required, since the refusal to compensate for delay in payment is not a decision impugned in the present proceedings.

28. Indeed, the Applicant never intended to appeal a separate implied decision not to pay her interest. It is clearly articulated both in her management evaluation request and in her application that her case is aimed against one administrative decision alone, namely UNOG's failure to pay the Applicant her salary for her work in October 2015 until 31 May 2016, whereas interest as compensation for delayed payment is merely one of the remedies sought in relation to the impugned decision. Hence, the decision under review was properly put for management evaluation on 14 March 2016.

29. In consequence, the application is entirely receivable.

Compensation for delay in payment of salary

30. It is uncontroversial that the Applicant's October 2015 salary was eventually settled in late May 2016. The matter for the Tribunal to decide comes down to whether the delay in effecting such payment warrants compensation.

31. The Respondent contends that no provision confers to staff members an entitlement to compensation for delayed payment of financial entitlements. In fact, no such specific rule is needed. The Tribunal may grant compensation under art. 10.5 of its Statute, provided that the contested administrative decision violated the Applicant's terms of appointment or contract of employment. Accordingly, the Tribunal must ascertain if, and to what extent, the delayed payment of the Applicant's October 2015 salary constitutes a breach of her rights attributable to the Administration.

32. Without the slightest doubt, the Organization has an obligation to pay the corresponding salary to each staff member in retribution for the work performed, which is the obvious primary duty of any employer towards its employees. This finding is supported by the fact that the salary rate is one of the very few elements of the conditions of service specified in the United Nations letters of appointment (see para. (a)(v) of Annex II to the Staff Regulation), and the determination of the salary scales and components is the subject of numerous staff regulations and rules (notably, but not limited to, Annex 1 to the Staff Regulations).

33. Although there is no specific provision setting the interval of salary accrual and payment, there is a constant practice since the Organization's inception to pay salaries monthly. Apart from this practice being widely-known, the Respondent himself has acknowledged that salaries are normally paid at the end of every month. At the very least, such is an implied condition of contract resulting from the practices of the Organization. The Respondent's submissions, nonetheless, indicate an exception to this course, concerning precisely free-lance temporary employees, the category to which the Applicant belongs, and who, in view of the brevity of their appointments, are often paid the month in which their contracts end.

34. As a matter of fact, the Applicant asked at the beginning of her appointment when she would receive her October salary, and DCM unambiguously answered, by email of 6 November 2015, that she would be paid at the end of November 2015 for the entire duration of her contract in the following terms:

> Bonjour Madame Kings,
>
> Après vérifications, vous serez payée pour la totalité de ce contrat journalier en Novembre, après que votre attendance soit certifiée dans UMOJA.
>
> Bien cordialement,

35. This departed from the normal practice of payment at the end of every month, but matched the specific practice frequently applied to free-lance temporary staff as described above. The Applicant appears to have accepted that she would not be paid at the end of October 2015 for her work during that month, but at the end of her temporary contract, that is, November 2015. Then, in late November 2015, the Applicant was issued a Statement of Earnings and Deductions, which should have included her salary for the entire duration of her contract. This Statement showed 30 November 2015 as "Pay Date". Consequently, the Tribunal is satisfied that the salary at stake became contractually due, at the latest, on 30 November 2015.

36. As from this date, the Administration failed in its obligation to the Applicant to pay her salary in a timely manner. This amounted to an ongoing breach of a contractual obligation, producing effects between the date when the salary became due and payable until it was actually paid (see *Calvani* UNDT/2009/092, *Ba* UNDT/2012/025, *Moise* Order No. 208 (NY/2015), *Kompass* Order No. 99 (GVA/2015)). Having ascertained that the salary at issue was payable on 30 November 2015 and that it was only paid on 31 March 2016, the payment was delayed by four full months. While the eventual payment of arrears put an end to the ongoing breach by the Administration, it did not erase the failure to pay the salary when due, nor the damage occasioned by the lack of payment during four months.

37. This is consistent with the stance taken by the Tribunal in previous cases concerning delayed payment of financial entitlements that the final payment of the amount originally due, where there has been a significant delay, does not suffice to make good for the delay suffered (*Massi* UNDT/2016/100, *Johnson* UNDT/2011/144, *Ho* UNDT/2017/013). Notably, the Tribunal ruled in *Massi* that:

> [T]he retroactive payment made to the Applicant … does not take into account the fact that such payment was delayed. It goes without saying that a delayed payment entails economic consequences … and that it is for the Organization to bear the consequences of its mistake.

38. The Respondent submits that the delay was the result of exceptional circumstances, to wit the deployment in November 2015 of Umoja as the new management system for, *inter alia*, human resources and payroll. In relation to this, he underscores that the late payment of the Applicant's salary was not deliberate and that she was not singled out for belated payment, reminding that several other temporary staff were affected by analogous delays. He adds that the concerned departments displayed good will to solve the technical problems causing the delay and sympathy vis-à-vis the Applicant's situation.

39. The Tribunal stresses that the introduction of a new ERP system can in no way whatsoever justify such a prolonged breach of an important contractual obligation. It is certainly not a case of *force majeure*,[1] since it was not a reasonably unforeseeable and irresistible event objectively preventing to take the required action. Quite the contrary, it was foreseeable because not only had Umoja been in preparation for at least ten years, but its deployment Secretariat-wide, along with the timing, scope and modalities of it, had been decided and announced well in advance of the Applicant being hired. Umoja going live was not an irresistible or uncontrollable circumstance, since the whole Umoja process was driven by the Organization's management. Neither did it create

[1] *Yakovlev* UNDT/2014/040, para. 19: Force majeure applies to events which are considered unpredictable and uncontrollable, rendering the performance of obligations impossible. This is usually due to causes that are completely outside individual control, commonly natural disasters, and that could not be avoided in good faith and through the exercise of due care. See also *Morsy* UNDT/2009/036. According to the Black's Law Dictionary (B.A. Garner (ed.), West, 9th edition) force majeure or vis major is "[a]n event or effect that can be neither anticipated nor controlled".

unsurmountable conditions leaving the Organization with no means of paying it staff's salaries. Before deciding to launch an Organization-wide system like Umoja, it is for the decision-makers in charge to ensure that the system is adequately conceived, developed and tested.

40. Even if that was not done, there was an array of measures that the Administration could have put in place to avoid or ameliorate shortcomings, such as keeping the old system running in parallel for a prudential period, enabling approval of payments outside Umoja, issuing advances of salaries as a matter of course as soon as any problem arose with attendance certification, or, else, placing extra technical resources to solve the functioning problems as a matter of urgency. As hard to believe as it may be, no such alternative mechanisms were devised, even after several months of delay. While the Respondent now asserts that salary advances were possible, this option was not systematically adopted and, in particular, it was not offered to the Applicant at the material time. It is for the Organization to bear the consequences of this.

41. In any event, the failure to make the payment due to the Applicant in a timely manner was a matter entirely within the control of the Respondent. The Organization put the new ERP system in place and was responsible for its operation. If the Administration decided to put into operation an ERP system that was not fully operational or entirely fit for purpose, it was its decision and, thus, its responsibility. The fact is that the failure of Umoja, and any efforts to resolve its problems, resulted in the breach of an obligation towards the Applicant. The reasons for the breach are of no concern of hers.

42. By contrast, the Applicant was diligent in reminding and keeping track of her claim, despite having to deal with changing interlocutors and scarce and confusing information. The Tribunal is unable to see what else could reasonably have been expected from her that may have effectively mitigated the situation. The matter was ostensibly out of her hands, and entirely beyond her control.

43. Regarding the contention that many other staff members found themselves in a similar situation, the Tribunal understands the point that the Respondent tries to make, in the sense that the Applicant was not personally targeted and that the

contested decision was not motivated by bad faith or animosity towards her. This notwithstanding, it remains that the Administration disregarded the Applicant's rights by failing to pay her salary. If anything, the fact that other staff members were affected, far from diminishing the gravity of the matter, reinforces the impression that the Administration did not afford sufficient importance and care to their situation.

44. The Tribunal realises, and does not intend to minimise, that a number of individual officers and departments at various levels may have been struggling and made sincere, but unsuccessful, efforts to address the problem, and might have felt confronted with insurmountable administrative and new functional obstacles. However, the Organization as a whole was in a position to ensure compliance with its obligation. In fact, it had a significant duty to do so. It is not acceptable that with the information about the ascertained sum due as salary to the Applicant and the required personnel being readily available, the Administration inferentially determined to withhold an overdue payment because of a mere IT related problem that remained unresolved for four months.

45. In sum, the failure to timely pay the Applicant's October 2015 salary constitutes a breach of her entitlements exclusively imputable to the Administration's negligence in the performance of its contractual obligations, the discharge of its duty of care to the Applicant as a staff member, and its consequent breach of contract. As such, it warrants compensation for any damage deriving from it.

Remedies

46. Pursuant to art. 10.5 of the Tribunal's Statute, the Tribunal may order one or both of the following:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific

> performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

47. Since the Organization has already paid the salary due to the Applicant, the rescission of the contested decision is neither viable nor appropriate. However, the contested decision entailed both material and moral harm, which merit compensation.

48. As regards material damage, it is patent that the failure to pay the Applicant her October 2015 salary in due time deprived her of the possibility to spend or invest monies on which she could legitimately count. In calculating the *quantum* of compensation on these grounds, the Tribunal must bear in mind that the delay in payment triggering compensation, albeit protracted, was limited in time, and ceased on 31 March 2016.

49. Following the guidance provided by the Appeals Tribunal regarding compensation (*Warren* 2010-UNAT-059, *Iannelli* 2010-UNAT-093), and considering precedents where applicants received interest on account of the Administration's delay in paying monetary entitlements to them (*Johnson* UNDT/2011/144 and *Massi* UNDT/2016/100), the Tribunal grants interest at the United States of America prime rate on the amount corresponding to the Applicant's salary that was not paid when due over the period from the date on which the entitlement became payable, that is, 30 November 2015 (see para. 36 above), until the date of its payment, that is, 31 March 2016.

50. While the Applicant claimed, in addition, that she had foregone interest as she had to withdraw money from her savings account in the absence of payment of her October 2015 salary, she adduced no documents or particulars permitting to quantify any concrete losses on this basis, despite a specific request to do so by the Tribunal. In any event, given the very low interest rate offered by Swiss banks

during the material period, one may conclude that any such loss would have been negligible.

51. In light of the foregoing, the Tribunal considers that the material injury stemming from the contested decision is sufficiently compensated by the award of interest on the sum due for the four months during which its payment was delayed, as per para. 48 above.

52. Turning to moral damages, the Tribunal considers proven that the Applicant endured moral harm as a result of the delay in payment of her salary. Firstly, the Respondent has recognised that the delayed payment of her salary arrears originated inconvenience and stress. Furthermore, the Applicant provided detailed oral evidence in this respect. Specifically, she stated that she found herself under financial strain, especially since, trusting that she would be paid at the end her contract, she had hired a company to carry out works at her residence, an extraordinary expenditure that she was then bound to honour. Moreover, she had to refrain from spending the money that she should normally have had throughout the Christmas period, as well as for a number of family celebrations that took place between December 2015 and March 2016.

53. The Applicant also noted the fact that she was told on a number of occasions that payment of her October 2015 salary was imminent, whilst this turned out not to be correct. As a consequence of this repeated incorrect advice she could never know when she was going to actually receive her arrears, even with delay. This compounded her uncertainty and concomitant anxiety, preventing her from planning how to better cope with the delay. Finally, it is visible from the file that the Applicant spent significant time and effort following up on her claim, and in her communications she conveyed on several occasions the difficulties she was facing.

54. With the above in mind, the Tribunal awards CHF1,000 in moral damages for the Applicant’s stress and worry.

Conclusion

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

a. The Respondent shall pay the Applicant interest at the United States of America prime rate on the amount corresponding to the Applicant's salary for work performed in October 2015, calculated from 30 November 2015 to 31 March 2016;

b. The Respondent shall also pay moral damages to the Applicant in the amount of CHF1,000; and

c. The aforementioned compensations shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date the Judgment becomes executable.

(*Signed*)

Judge Rowan Downing

Dated this 21st day of June 2017

Entered in the Register on this 21st day of June 2017

(*Signed*)

René M. Vargas M., Registrar, Geneva