



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MOFILING

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Nusrat Chagtai, ALS/OHRM

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant is serving as a Humanitarian Affairs Officer at the P-3 level with the African Union - United Nations Mission in Darfur (UNAMID). He filed an application on 3 January 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting decisions to recover USD6,138.06 from his salary on 29 June 2016 and USD157.51 on 29 December 2016 for education grant payments that were made in 2015 whilst he was employed with the Office for the Coordination of Humanitarian Affairs (OCHA).
2. The Respondent filed his reply to the application on 2 February 2017.
3. The Applicant filed a response to the Respondent's reply on 6 March.
4. The Tribunal, in its Order No. 111 (NBI/2017) of 16 June 2017, ruled that the Applicant's challenge against the 29 December 2016 recovery was not receivable. Further, the parties were directed to discuss the possibility of the Tribunal referring the challenge against the 29 June 2016 recovery to the Office of the United Nations Ombudsman and Mediation Services for Mediation (UNOMS) for mediation.
5. On 17 July 2017, the Respondent informed the Tribunal that he is not amenable to the Tribunal referring the matter to UNOMS.

Relevant facts

6. The Applicant served with OCHA in various positions until 16 April 2016 when he entered into service with UNAMID.
7. On 29 June 2015, the Applicant, whilst still in the employ of OCHA in Mauritania, submitted claims for education grant for his three children for the school year 1 September 2014 to 30 June 2015 for EUR665.47.
8. On 30 October 2015, OCHA's Human Resources Office approved a total payment of USD12,909.46 for the Applicant's education grant claims, which included flat rate boarding for each child.

9. In November 2015, OCHA Payroll processed a payment to the Applicant totaling USD19,047.52. The Applicant received this payment on 26 November 2015 along with his November 2015 salary.

10. On 26 June 2016, an amount of USD6,138.06 was recovered from the Applicant's salary. The only explanation in the pay slip was that the recovery was for an "EG Claim".

11. On 5 July 2016, the Applicant wrote to OCHA seeking an explanation since his last education grant claim was made to OCHA. He received a response from an OCHA staff member the same day indicating that his education grant claims for 2014-2015 were properly settled thus, the recovery may have been for his 2015-2016 claims. He was advised to contact his human resources officer at UNAMID for an explanation.

12. On 3, 7, 8 and 11 July 2016, the Applicant wrote to the Human Resources Office at the United Nations Regional Service Center Entebbe (HRO/RSCE) seeking an explanation for the recovery. He indicated that he had not been previously notified of an overpayment or the recovery.

13. On 11 July 2016, HRO/RSCE responded to the Applicant that there was no record of the recoveries in their education grant database. On 12 July, HRO/RSCE informed the Applicant that the issue had been raised to Payroll in New York for an explanation.

14. Between 15 July and 12 August 2016, the Applicant continued to communicate with HRO/RSCE seeking an explanation for the recovery.

15. On 15 August 2016, the Applicant submitted a request for management evaluation of the decision to recover USD6,138.06 from his salary to the Management Evaluation Unit (MEU).

16. By an email dated 7 October 2016, MEU advised the Applicant that the recovery occurred due to an overpayment in November 2015 because of a technical issue with Umoja.

17. On 1 December 2016, the Under-Secretary-General for Management (USG/DM) informed the Applicant that the Secretary-General had decided to endorse the findings and recommendations of MEU and to uphold the contested decision.

Hearing

18. Pursuant to art. 16.1 of the UNDT Rules of Procedure, the Dispute Tribunal has discretionary authority as to whether to hold an oral hearing. Additionally, art. 19 of the Rules of Procedure provides that the Tribunal may at any time issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

19. In the present matter, the Tribunal has concluded that the issue before it is purely one of law and interpretation. Hence, an oral hearing is not necessary. A determination will therefore be made based on the parties' pleadings and supporting documentation.

Considerations

20. Since the Tribunal has previously ruled that the 29 December 2016 recovery is not receivable, this judgment will be limited to the 26 June 2016 recovery. Additionally, since the Applicant is not disputing the fact that OCHA overpaid his 2014-2015 education grant claim, there is no need for the Tribunal to make a pronouncement on this issue. The Tribunal will, however, take note of the Applicant's explanation that he was confused about the recovery because his June 2016 pay slip did not provide a clear reason for the deduction. It merely indicated "EG Claim" as opposed to "Deduction for overdue EG claim 2014-2015", which would have immediately explained the basis of the recovery to him. It did not help that neither OCHA nor UNAMID could provide him with an explanation even though he communicated with them almost daily between 3 July and 12 August 2016. It was not until 7 October 2016 that MEU provided him with a reason for the recovery. The Tribunal is of the considered view that if a clear explanation had been given to the Applicant from the outset, the current dispute could have been avoided.

21. The Tribunal will make determinations on the following issues:
- a. Whether the Respondent followed proper procedure in effecting the recovery;
 - b. Whether the remedies sought by the Applicant should be granted.

Did the Respondent follow proper procedure in effecting the recovery?

22. The Applicant is contesting the lawfulness of the procedure employed by the Respondent in carrying out the recovery. He submits that pursuant to ST/AI/2009/1 (Recovery of overpayments made to staff members), he should have been notified of the overpayment and he should have been given the opportunity to explore a recovery option such as payment by installment. The Respondent's failure to abide by ST/AT/2009/1 amounts to a violation of his rights.

23. The Respondent submits that the recovery was lawful because the Applicant was overpaid his 2015 education grant entitlement. Further, although OCHA did not notify the Applicant of the overpayment, he knew or should have known of the overpayment when he received an education grant payment in November 2015 that exceeded his claim and entitlement. Thus, he suffered no harm due to the lack of notification of overpayment. Additionally, pursuant to ST/AI/2009/1, the Applicant had an obligation to immediately inform the Organization of the overpayment but he failed to do so. He was also not entitled to re-pay his debt through monthly installments.

24. Section 2 of ST/AI/2009/1 (Recovery of overpayments made to staff members) provides as follows:

2.1 The present instruction shall apply to the recovery of overpayments, not to recovery of advances, which shall normally be recovered immediately and in full against the monthly payments received by staff members.

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). However, the Director of the Accounts Division for staff members payrolled in New York, or the Chief of Administration or the Chief Civilian Personnel Officer for staff members payrolled at other duty stations, may agree with the staff member who has received overpayments on alternative means of repaying the amount due, such as payment by bank cheque or personal cheque from the staff member.

2.3 If the Organization discovers that an overpayment has been made, the office responsible for the determination and administration of the entitlement shall immediately notify the staff member. That office shall keep a record of such notification.

2.4 If a staff member discovers that an overpayment has occurred, he or she shall advise the Organization immediately.

25. Having taken note of the Applicant's submission at paragraph 22(c) of his application that he never asserted that he was not overpaid, the Tribunal finds that the Organization was within its rights to recover the amount overpaid. The Applicant is however aggrieved by the process used for the recovery.

26. Under the legal framework, the Organization's right to recover overpayments is not unqualified. The right to recover under sections 2.1 and 2.2 of ST/AI/2009/1 is interwoven with a duty, under section 2.3, to "immediately notify the staff member" of the overpayment once it is discovered. The Tribunal assumes that the underlying premise for this notification is to: (i) prevent confusion on the part of staff members as to the basis of the recovery; and (ii) allow staff members to prepare themselves for a potential financial squeeze.

27. The Respondent admits that OCHA did not notify the Applicant but he deems this breach to be negligible because the Applicant failed in his duty to report the overpayment to the Organization and he knew or should have known of the overpayment when he received a payment that exceeded his claim and entitlement. The Tribunal does not agree with this line of reasoning simply because ST/AI/2009/1 does not make the Respondent's obligation to notify contingent upon the Applicant's duty to report. As long as the staff member has not reported the overpayment, the Organization's duty under section 2.3 remains.

The Respondent's failure to notify the Applicant of the overpayment was a breach of its obligation under section 2.3 of ST/AI/2009/1.

28. The Tribunal has taken note of the duty staff members have under section 2.4 of ST/AI/2009/1 to advise the Organization immediately of overpayments that have been discovered. Was the Applicant negligent in this duty?

29. The Applicant explains at paragraph 4 of his application that the security situation in Mauritania had become so volatile that OCHA withdrew its presence in the country by December 2015. He was left alone in Mauritania without clear procedures. This submission has not been denied by the Respondent. Consequently, the Tribunal accepts that the Applicant was caught up in a perilous security situation at the time he received his pay slip at the end of November 2015, which may have caused him to not advise OCHA of the overpayment. In view of the foregoing, the Tribunal cannot conclude that the Applicant was negligent in his duty to report the overpayment.

30. Did the Respondent exercise his discretion in an arbitrary manner by recovering the overpayment fully in June 2016?

31. The Applicant submits that he should have been given the opportunity to explore a recovery option such as payment by installment.

32. Sections 2.1, 2.3 and 3.1 of ST/AI/2009/1, confer on the Organization the discretionary authority to either recover the amount overpaid fully from a staff member's monthly payment, agree with the staff member on alternative means of repaying the amount due, either by bank or personal cheque or agree with the staff member on installment payments.

33. The Tribunal notes that the installment payment option stipulated at section 3.1 may be utilized only after certain elements have been met. It must be established that the overpayment resulted from an administrative error on the part of the Organization and, the staff member must prove that he was unaware or could not reasonably have been expected to be aware of the overpayment.

34. In the present matter, was there an administrative error on the part of the Administration that caused the overpayment? The emails submitted by the Applicant show that neither OCHA nor UNAMID were aware of the overpayment until at least 16 August 2016 when the Applicant submitted a request for management evaluation to MEU. It was not until MEU requested a response from Administration that it came to light that a technical glitch with Umoja had caused the overpayment and that Umoja, having detected the overpayment, automatically processed the recovery. In view of this chain of rather unfortunate events, the Tribunal concludes that there was an administrative error on the part of the Organization that caused the overpayment. Hence, the first component of section 3.1 has been met.

35. Was the Applicant unaware or could not reasonably have been expected to be aware of the overpayment? The Applicant put in a claim for EUR665.47 for his three children on 29 June 2015. His November 2015 pay slip clearly shows a payment of USD19,047.52 for his education grant claim. Even without knowing the precise formula used by the Organization to calculate staff members' education grant entitlements, the Applicant should have been put on notice by his November 2015 pay slip that he had been paid an amount that was far more than the claim he had submitted in June 2015. The Tribunal concludes that the Applicant was aware of or should have been aware of the overpayment as of 26 November 2015. Thus, the second component of section 3.1 has not been met.

36. The Tribunal holds that since the second element set out in section 3.1 of ST/AI/2009/1 has not been satisfied, a recovery by installment could not have been used in this case. In *Aliko* 2015-UNAT-539, the United Nations Appeals Tribunal (the Appeals Tribunal) held that:

The ground of appeal with regard to the recovery of overpayments by using Mr. Aliko's pending entitlements must also fail. As that procedure is permitted under Staff Rule 3.18(c) and ST/AI/2009/1, it was lawful for the Administration to use Mr. Aliko's pending entitlements to recover part of the indebtedness to the Organization.

37. In view of the foregoing, the Tribunal further holds that the Respondent had a right to recover the overpayment in full from the Applicant's June 2016 payment and that he did not act arbitrarily under the circumstances.

Should the remedies sought by the Applicant be granted?

38. The Applicant submits that his reputation and honor have been tarnished because of the contested decision. The Applicant is requesting the following as remedies: (i) return of the USD6,138.06 to him; (ii) notification confirming the education grant overpayment to be sent to him in a way that he can agree to recovery in monthly installments; and (iii) an award of moral damages.

39. The critical question here is whether the Respondent's failure to notify the Applicant of the overpayment caused him any prejudice to warrant the remedies he seeks. The Tribunal holds that the Applicant did not suffer any prejudice because: (i) he was aware or should have been aware of the overpayment; and (ii) he was not entitled to the USD6,138.06 in the first place. In *Bertucci* 2011-UNAT-114, the Appeals Tribunal reaffirmed its disapproval for the awarding of compensation in the absence of actual prejudice. This Tribunal sees no need to depart from this approach.

40. Further, apart from wasting valuable resources, it would serve no purpose for the Tribunal to order the Respondent to return the USD6,138.06, which the Applicant was not entitled to in the first place, just to take it back from him in installments. The Tribunal concluded earlier that the Applicant failed to satisfy the requirements of section 3.1 of ST/AI/2009/1 thus, he was not, in any case, eligible for installment payments.

41. The Tribunal empathizes with the Applicant that he had to bear the brunt of the full recovery from his June 2016 salary but since it has already been concluded that the Respondent did not act arbitrarily, an award of moral damages would not be appropriate.

Judgment

42. The application is refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 21st day of July 2017

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi