UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/065
Judgment No.: UNDT/2022/057
Date: 14 June 2022
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

LAPPER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a staff member of the Office of the High Commissioner for Human Rights ("OHCHR"), contests the "[r]evocation of single parent allowance and retroactive recovery thereof".

Facts and procedural history

2. The Applicant is a Human Rights Officer at the P-4 level, working for the OHCHR in Geneva.

3. The Applicant has three dependent children who live in Austria with his former spouse from whom he separated on 6 February 2017.

4. On 27 September 2017, the Applicant requested a single parent allowance under the provisions of the ST/AI/2016/8 (Dependency status and dependency benefits), which was granted retroactively from the date of his divorce, i.e., 6 February 2017.

5. From 1 May 2018 to 30 April 2021, the Applicant received from the Organization dependency benefits in respect of his three children: the single parent allowance for his first child (6% of net remuneration, approx. USD780), and a child allowance for his second and third children (approx. USD255 per child).

6. On 1 May 2018, administrative instruction ST/AI/2018/6 (Dependency status and dependency benefits) entered into force, superseding ST/AI/2016/8 and changing the conditions to receive the single parent allowance. No change was made at the time to the Applicant's situation with respect to his single parent status, and the Applicant continued to receive the single parent allowance.

7. In the framework of the review of staff claims for dependency benefits for 2018 and 2019, the Administration noted that the Applicant's children do not reside with him and that considering the threshold provided for in ST/AI/2018/6, his entitlement to single parent allowance should have been interrupted with the entry into force of ST/AI/2018/6 on 1 May 2018.

8. On 22 April 2021 and 20 May 2021, the Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG"), informed the Applicant that he had been granted the single parent status while he did not meet the conditions set out in sec. 4.4 of ST/AI/2018/6. The Applicant was further notified about the discontinuance of his single parent status effective 1 May 2021, and that the difference between the single parent allowance and the normal child allowance that he was erroneously paid for the period from 1 May 2018 to 30 April 2021 would be recovered.

9. On 19 July 2021, the Applicant requested management evaluation of the decision to recover in full the overpayments resulting from his single parent status.

10. On 28 July 2021, the Chief, HRMS, UNOG, recommended to the Chief, HRMS, OHCHR, to limit the recovery to the period of 1 May 2019 through 30 April 2021 as provided in sec. 3 of ST/AI/2009/1 (Recovery of overpayments made to staff members). On the same day, the Chief, HRMS, OHCHR approved the recommendation resulting in an amount of USD13,105.70 to be recovered.

11. On 10 August 2021, the Chief, HRMS, UNOG, informed the Management Evaluation Unit ("MEU") that they conceded that the Applicant had been unaware or could not reasonably have been expected to be aware of the overpayment and, as such, it had been decided to limit the recovery to the two-year period prior to the notification and not to recover the sum in full.

12. On 27 September 2021, the MEU informed the Applicant that it considered moot his request that the recovery be limited to two years pursuant to the applicable legal provisions, and that his request to reverse the decision to revoke his entitlement to single parent allowance was not receivable.

13. On 22 December 2021, the Applicant filed the application mentioned in para. 1 above.

14. On 24 January 2022, the Respondent filed his reply.

15. By Order No. 42 (GVA/2022) of 22 March 2022, the Tribunal directed the Respondent to file further submissions on the legality of the eligibility requirements for single parent allowance established by ST/AI/2018/6 and invited the Applicant to file his response to the Respondent's further submissions.

16. On 1 April 2022, the Respondent filed his further submission.

17. On 3 April 2022, the Applicant filed his response to the Respondent's further submission.

18. By Order No. 51 (GVA/2022) of 14 April 2022, the Tribunal notified the parties that it was fully informed on the matter and ordered them to file their respective closing submission by 25 April 2022.

19. On 14 April 2022, the Applicant informed the Tribunal that he had nothing additional to submit because there was no change in circumstances since the filing of his response on 3 April 2022.

20. On 25 April 2022, the Respondent filed his closing submission.

Parties' submissions

21. The Applicant's principal contentions are:

a. The application is receivable in its entirety because the Applicant seeks a remedy to a direct and individual application of an administrative act that he claims is unlawful;

b. The "excessively high" threshold to qualify for a single parent allowance in sec. 4.4 of ST/AI/2018/6, i.e., the amount of gross salary at G-1/1 in Geneva, effectively probably excludes all single parents whose children do not reside with them;

c. Establishing such threshold exceeds the discretion granted to the Secretary-General in implementing the reforms decided by the General Assembly in resolution 70/244 (United Nations common system: report of the International Civil Service Commission) of 23 December 2015; and

d. This new threshold is discriminatory in nature, resulting in unequitable treatment of staff members.

22. The Respondent's principal contentions are:

a. The Applicant's challenge to the legality of the requirements established by ST/AI/2018/6 is not receivable as he is not contesting an administrative decision pursuant to art. 2 of the Tribunal's Statute;

b. The decision to discontinue the payment to the Applicant of the single parent allowance and to recover the amount he unduly received is lawful and proper:

i. Contrary to the Applicant's contention, the Secretary-General did not exceed the discretion granted to him in implementing the reforms decided by the General Assembly in resolution 70/244 of 23 December 2015;

ii. The threshold established by ST/AI/2018/6 is proper; and

iii. ST/AI/2018/6 was properly applied to the Applicant's situation.

Consideration

Whether the application is receivable in its entirety

23. The Respondent claims that part of the application is not receivable *ratione materiae* as it is not directed against an administrative decision subject to appeal. To support his claim, the Respondent submits that the Applicant contests the threshold established by ST/AI/2018/6 to qualify for a single parent allowance and that the decision to set such requirement does not constitute an administrative decision subject to appeal pursuant to art. 2 of the Tribunal's Statute.

24. In this respect, the Tribunal recalls that it falls under its competence "to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review" (see *Massabni* 2012- UNAT-238, para. 26). Therefore, "[i]t is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties' contentions" (see, e.g., *Fasanella* 2017-UNAT-765, para. 20; *Cardwell* 2018-UNAT-876, para. 23).

25. Having reviewed the application and its annexes, the Tribunal considers that the Applicant essentially contests the Administration's decision to discontinue the payment of the single parent allowance and the retroactive recovery of the amount unduly paid to the Applicant.

26. Although the Applicant questioned the legality of the threshold to qualify for a single parent allowance, contained in sec. 4.4 of ST/AI/2018/6, it must be understood as part of his legal reasoning or arguments and cannot be considered as the "contested decision" as suggested by the Respondent.

27. Indeed, the Applicant does not claim in the abstract that the requirement contained in sec. 4.4 of ST/AI/2018/6 is unlawful but rather seeks a remedy to a direct and individual application of such requirement on the grounds that "it exceeds the discretionary power of the Secretary-General, as applied in interpreting a regulatory act in the form of General Assembly resolution 70/244 of 23 December 2015 (or indirectly through A/RES/71/263)". Accordingly, the Applicant essentially sought to challenge the direct and individual application of the specific requirement to his case as it adversely affects his terms of appointment.

28. In light of the above and considering that the legal arguments raised by the Applicant cannot be interpreted or considered as the "impugned decision", the Tribunal finds that the application is receivable in its entirety. To hold otherwise would represent an unacceptable limitation of the Applicant's right to access to justice and a serious limitation of the Tribunal's scope of judicial review.

Whether the contested decision is lawful

29. Having reviewed the parties' submissions, in determining the lawfulness of the contested decision, the Tribunal will examine the following issues:

a. Whether the new requirement in sec. 4.4 of ST/AI/2018/6 exceeds the Secretary-General's discretion in implementing General Assembly resolution 70/244;

b. Whether the requirement established by sec. 4.4 of ST/AI/2018/6 is proper; and

c. Whether sec. 4.4 of ST/AI/2018/6 was properly applied to the Applicant's situation.

30. Before examining each of these issues, the Tribunal will first elaborate upon the applicable legal framework governing the single parent allowance.

The applicable legal framework

31. The Tribunal notes that the single parent allowance is a new entitlement introduced by General Assembly resolution 70/244 adopted on 23 December 2015, established in staff regulation 3.5 and staff rule 3.6 (b)(ii), and implemented by ST/AI/2018/6.

32. General Assembly resolution 70/244 provides, in its relevant part, that:

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…

2. *Decides* that, unless otherwise established, these provisions should come into force on 1 July 2016;

…

5. Single parent allowance

> 19. *Decides* that staff members **who are single parents** and **who provide main and continuous support** for their dependent children shall receive an allowance in respect of the first dependent child, which shall be at the level of 6 per cent of net remuneration, and should be provided in lieu of the child allowance. (emphasis added)

33. To implement the changes to the salary scale as approved by the General Assembly in its resolution 70/244, including the above-mentioned provision, the Secretary-General, in his report A/71/258 of 29 July 2016, proposed amendments to the Staff Regulations and Rules.

34. In A/71/258, new staff regulation 3.5 and staff rule 3.6 (b)(ii) were proposed to establish the single parent allowance. Staff regulation 3.5 provides as follows:

> Staff members without a spouse whose salary rates are set forth in paragraphs 1 and 3 of annex I to the present Regulations shall be entitled to a single parent allowance in respect of the first dependent child in the amount of 6 per cent of net base salary plus post adjustment, **under conditions established by the Secretary-General**. (emphasis added)

35. Staff rule 3.6 (b) provides in its relevant part as follows:

> (ii) Single parent allowance: a staff member in the Professional and higher categories and in the Field Service category recognized as a single parent shall receive a single parent allowance in the amount of 6 per cent of net base salary plus post adjustment in respect of the first dependent child, **under conditions established by the Secretary-General**. A staff member who receives a single parent allowance in respect of the first dependent child shall not be eligible for payment of a child allowance for that child. (emphasis added)

36. The General Assembly approved the above-mentioned amendments to the Staff Regulations and Rules by its resolution 71/263 of 23 December 2016. In so doing, the General Assembly conferred upon the Secretary-General the power to establish conditions concerning the granting of the single parent allowance.

37. For the purposes of implementing, *inter alia*, staff regulation 3.5 and 3.6 and staff rule 3.6, pursuant to sec. 4.2 of ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), the Under-Secretary-General for Management promulgated ST/AI/2018/6, which *inter alia* sets forth the rules governing single parent allowance. It provides in its relevant part that:

> 4.2 The single parent allowance, equivalent to 6 per cent of net remuneration (net base salary and post adjustment), is payable only in respect of the first dependent child of the staff member. The staff member is eligible to receive the dependent child allowance with respect to any other dependent children in accordance with section 3 above.
>
> […]
>
> 4.4 In order to be eligible for the single parent allowance, a staff member who claims a single parent allowance, does not reside with the child or children and who provides financial support in respect of the dependent child or children pursuant to section 3.1 (b) must submit a certification of financial support that is at least the higher of:
>
> (a) The lowest entry level of the United Nations General Service gross salary scale in force on 1 January of the year concerned at the staff member's duty station; or
>
> (b) The gross salary for the lowest entry level in force on 1 January of the year concerned at the base of the salary system (G-2, step 1, for New York).

Whether the new requirement in sec. 4.4 of ST/AI/2018/6 exceeds the Secretary-General's discretion in implementing General Assembly resolution 70/244

38. The Applicant submits that the new requirement in sec. 4.4 of ST/AI/2018/6 exceeds the Secretary-General's discretion in implementing the reforms decided by the General Assembly in resolution 70/244 because it only refers to "main and continuous support" without specifying any criteria or threshold.

39. In support of his claim, the Applicant argues that ST/AI/2016/8 had a different threshold for qualifying for single parent allowance, which he met, and that the Respondent did not provide reasons for amending that administrative instruction two years later.

40. The Tribunal finds no merit in the Applicant's submissions in this respect.

41. First, as discussed in para. 36 above, the Secretary-General was duly authorized by the General Assembly to establish conditions to qualify for a single parent allowance. Therefore, by establishing the threshold in sec. 4.4 of ST/AI/2018/6, the Secretary-General acted in accordance with the General Assembly resolutions 70/244 and 71/263, and exercised his discretion in setting forth conditions pursuant to staff regulation 3.5 and staff rule 3.6(b). As such, there is no normative conflict between the acts of the General Assembly and their execution by the Secretary-General.

42. Second, the Tribunal considers that it falls within the Secretary-General's discretion to introduce a new eligibility criterion in ST/AI/2018/6. In this respect, the Tribunal notes that the evidence on record shows that the eligibility requirements for single parent allowance contained in ST/AI/2016/8 were temporary in nature. Indeed, the broadcast message of 25 September 2017 clearly shows that the single parent allowance was "a new entitlement that [had] not yet been established".

43. Also, the application itself suggests that on 20 February 2018, HRMS, UNOG, informed the Applicant that "[a]s a new ST/AI governing the dependency status and dependency benefits [had] not yet been released […, they] [would] proceed to process [the Applicant's] request in accordance with ST/AI/2016/8".

44. Moreover, the Tribunal is not persuaded by the Applicant's argument that the Respondent did not explain why the requirements in ST/AI/2016/8 were replaced by those in ST/AI/2018/6. In fact, the preamble of ST/AI/2016/8 clearly states that it was issued to implement staff regulations 3.3(b)(i) and 3.4 and staff rule 3.6, whereas the preamble of ST/AI/2018/6 provides that it was issued to implement staff regulations 3.4, 3.5 and 3.6 and staff rule 3.6.

45. Accordingly, the Tribunal finds that contrary to the Applicant's assertion, the Secretary-General has not gone beyond the powers conferred upon him by resolutions 70/244 and 71/263 when setting forth conditions to receive the single parent allowance in sec. 4.4 of ST/AI/2018/6.

Whether the requirement established by sec. 4.4 of ST/AI/2018/6 is proper

46. While the Tribunal recognizes that the Secretary-General as the Chief Administrative Officer of the Organization enjoys a certain margin of discretion in regulating staff member's conditions of service, such discretion is not unbounded.

47. In this respect, the Tribunal recalls that in cases where the implementation of a regulatory decision involves the Administration's exercise of discretion, including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria, such exercise of discretion is subject to judicial review (see *Lloret Alcañiz et al.* 2018-UNAT-840 para. 59). In *Lloret Alcañiz et al.* (see para. 65), the majority of the Appeals Tribunal's Judges further found that:

> [T]he Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty […] purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality.

48. In relation to the single parent allowance, the Tribunal notes that, as pointed out by the Respondent, the underlying rationale for its creation was to protect a certain category of staff members, namely those who were carrying the burden of raising a child on their own or being the sole providers, from the negative impact of the reduction of child dependency benefits.

49. The single parent allowance was discussed by the International Civil Service Commission in its Report A/70/30 to the General Assembly but was not recommended for adoption. The General Assembly decided nevertheless to introduce a single parent allowance after considering the views of staff representatives that the new compensation package would be particularly damaging to the above-mentioned category of staff members, who were considered vulnerable and warranting special protection.

50. Accordingly, paragraph 19 of General Assembly resolution 70/244 clearly limits the beneficiaries to "staff members who are single parents and who provide main and continuous support". As such, the mere marital status of "non married" (e.g., single, widowed or separated) was insufficient for a staff member to be eligible for a single parent allowance. Additional requirements were to be met to ensure that the staff member "provide[s] main and continuous support".

51. In this regard, the Tribunal underlines that the single parent allowance is not intended to compensate for the child support payment that a staff member is to pay. As such, it may not be granted where the staff member only complies with the child support obligation.

52. Therefore, the Tribunal finds that the requirements established by sec. 4.4 of ST/AI/2018/6 in relation to the single parent allowance is in line with its object and purpose and in accordance with the relevant text in General Assembly resolution 70/244.

53. With respect to the Applicant's submission that the new threshold is discriminatory in nature and results in unequitable treatment of staff members, the Tribunal does not find this argument convincing.

54. The Applicant argues that the thresholds adopted by the Respondent *de facto* eviscerates a benefit for a group of staff members, including the Applicant, who formerly benefited from it. However, as discussed in para. 42 above, ST/AI/2016/8 was temporary in nature. The fact that a group of staff members formerly benefited from the single parent allowance pursuant to ST/AI/2016/8 does not create an acquired right to be carried over to ST/AI/2018/6.

55. The Applicant also calls on the principle of equality and non-discrimination. Such principle is only applicable when staff members in similar situations are treated differently. In the present case, the Applicant falls into one of two groups under ST/AI/2018/6—namely staff members whose children do not reside with them—and failed to demonstrate any difference in treatment within that group. The Tribunal also recalls that there is no discrimination when different treatment of staff members "comes from a general consideration of a category of staff members, in comparison to another category" (see *Tabari* 2011-UNAT-177, para. 26).

56. In light of the above, the Tribunal finds that the threshold established in sec. 4.4 of ST/AI/2018/6 in relation to the granting of single parent allowance is proper.

Whether sec. 4.4 of ST/AI/2018/6 was properly applied to the Applicant's situation

57. The Tribunal notes that the Applicant does not claim that the Administration incorrectly applied ST/AI/2018/6 to his case.

58. Moreover, upon the issuance of the ST/AI/2018/6 on 1 May 2018, the Applicant no longer met the requirement under sec. 4 to receive the single parent allowance. In this respect, the Applicant does not dispute that the amount of financial support he provided for his children is below the threshold indicated in sec. 4.4 of ST/AI/2018/6.

59. However, the Applicant received undue payment until 30 April 2021. In this respect, the Tribunal recalls that "the Administration has a duty and is entitled to rectify its own error" and that the "interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions" (see *Kauf* 2019- UNAT-934, para. 22; *Cranfield* 2013-UNAT-367, para. 36).

60. Nevertheless, considering that the Applicant was unaware or could not reasonably have been expected to be aware of the overpayment, the Administration limited the recovery of overpayment to the amounts paid during the two-year period prior to the notification pursuant to sec. 3.1 of ST/AI/2009/1.

61. Therefore, the Tribunal finds that the Organization's decision to discontinue the payment of the single parent allowance and to recover the amount unduly received by the Applicant is lawful.

Whether the Applicant is entitled to any remedies

62. In his application, the Applicant sought to revoke the contested decision and amend ST/AI/2018/6, by replacing the threshold amount in sec. 4.4, by an amount, which does not in fact make the allowance void for a particular group of single parents and their children.

63. Having found that the contested decision is lawful, the Tribunal finds no basis for the remedies pleaded for in the application.

Conclusion

64. In view of the foregoing, the Tribunal **DECIDES** to reject the application in its entirety.

(*Signed*)
Judge Teresa Bravo
Dated this 14th day of June 2022

Entered in the Register on this 14th day of June 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva