Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON THE APPLICANT'S MOTION FOR INTERIM MEASURES PURSUANT TO ARTICLE 14 OF THE UNDT RULES OF PROCEDURE

Counsel for the Applicant:
George Irving

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Nusrat Chagtai, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is the Chief of Staff at the D-1 level with the United Nations Mission in Liberia (UNMIL).

2. On 15 August 2017, she filed an application on the merits contesting the decisions to retroactively change her entry on duty (EOD) date in the United Nations Common System (UNCS) to 18 July 2011 and to recover resulting overpayments of mobility allowance.

3. The Respondent filed a reply to the application on the merits on 15 September 2017.

4. On 1 November 2017, she filed a motion for interim measures pending proceedings under art. 10.2 of the United Nations Dispute Tribunal (UNDT) Statute and art. 14 of UNDT's Rules of Procedure, to suspend the implementation of the decision to recover overpayments of mobility allowance during the proceedings before the Tribunal.

5. On 3 November 2017, the Respondent filed a reply to the motion.

Factual and procedural background

6. The Applicant joined the United Nations as a staff member on 15 October 1996. She left on 31 May 1998 to join the private sector and returned on 13 August 2001. Since then she has been in the service of the United Nations Secretariat on various types of appointments.[1]

7. On 3 June 2011, the Applicant was serving as a P-4 Legal Officer with the United Nations Mission in Sudan (UNMIS) when she was notified of her selection

[1] Annex 5 to the application on the merits.

for the position of Senior Legal Officer (P-5/1) at the United Nations Environment Programme (UNEP) in Nairobi.[2]

8. Effective 17 July 2011, the Applicant separated from UNMIS and was re-employed by UNEP on 18 July 2011 at the P-5/V level.[3]

9. On 28 August 2011, the Human Resources Section of the United Nations Office in Nairobi (UNON) informed the Applicant that she was required to resign from UNMIS in order to formalize her recruitment as an external recruit to be remunerated at the P-5/V level.[4]

10. On 1 September 2011, the Applicant submitted her resignation letter to UNMIS to take retroactive effect on 17 July 2011.[5] Prior to it, the Applicant discussed the mode of transfer from UNMIS to UNEP with UNON Administration. The communication reads in relevant part:

> Pursuant to your request, I am submitting herewith my resignation from UNMIS so that my recruitment to UNEP can be considered a reappointment. I understand that, upon receipt of a copy of this memo, UNMIS Human Resources Section will reflect my separation in IMIS and any other human resources systems and records, by shortening my fixed-term appointment with UNMIS and separating me upon appointment expiration, with an indication under remarks that I resigned to take up a new appointment with UNEP. I further understand that, my resignation will not affect any of my benefits under the Staff Regulations and Rules, including Pension, other than my home leave entitlement, which credits will not be carried over from UNMIS.

11. On 1 February 2014, the Applicant was transferred from UNEP to the United Nations Mission in Kosovo (UNMIK) and started to receive mobility allowance. On

[2] Annex 6 to the application on the merits.
[3] Annex 2 to the reply on the merits.
[4] Annex 3 to the reply on the merits.
[5] *Ibid.*

20 June 2016, the Applicant was reassigned to UNMIL and on 18 October 2016, promoted to Chief of Staff at the D-1 level.[6]

12. Towards the end of 2016, the Applicant noticed that her EOD/UNCS had been changed from 15 October 1996 to 30 July 2008. Believing the change to be a computer error occasioned by the introduction of the new UMOJA system, she contacted UNMIL Human Resources personnel to rectify it.[7]

13. On 17 May 2017, the Department of Field Support (DFS) informed the Applicant that her EOD date would be changed to reflect her separation from UNMIS on 17 July 2011 and re-employment with UNEP on 18 July 2011. DFS further informed her that any resulting overpayments on account of mobility allowance in the estimated sum of USD 26,103.90, would be recovered.[8] The decision to recover has not yet been implemented.[9]

14. On 30 May 2017, the Applicant requested management evaluation of the change to her EOD date and of the decision to recover overpayments of mobility allowance.[10]

15. On 21 July 2017, the Under-Secretary-General for Management (USG/DM) informed the Applicant that her management evaluation request regarding the change in her EOD date is not receivable and that the decision to recover overpayments of mobility allowance is upheld.[11]

Applicant's submissions

Prima facie *unlawfulness*

[6] Annexes 4 to 6 of the reply on the merits.
[7] Paragraph 4 of the motion for interim measures.
[8] Annex 2 to the application on the merits.
[9] Paragraph 11 of the reply to the motion for interim measures.
[10] Annex 3 to the application on the merits.
[11] Annex 4 to the application on the merits.

16. The contested administrative decision, on the face of it, is unlawful, it was influenced by improper considerations, was procedurally or substantively defective and contravened the administration's duty to warrant that decisions are proper and made in good faith.

17. The Respondent's actions are arbitrary and in contravention of established policy. The argument that the decision is merely a correction of a past mistake is belied by the existence of a clear administrative directive issued in 2005, based on staff rule 4.18, which states that the EOD date in the United Nations Secretariat should be the initial entry on duty of the staff member whether with the United Nations Secretariat or its Funds and Programmes or any entity of the UNCS. Actions by the Administration represent improper retroactive application of a change in policy as to the interpretation of the EOD that has a direct impact on conditions of service.

18. The decision to amend her EOD date and recover previous mobility payments is based on an incorrect assumption concerning an alleged break in service when in fact there was an uninterrupted transfer from one mission to another.

19. The recovery action is predicated upon a number of administrative actions and assumptions that are of dubious validity and that require full adjudication.

Urgency

20. The Applicant submits that the matter is urgent because the recovery is scheduled to proceed by 10 November 2017 when payroll cut-off for the month occurs notwithsstanding the fact that the amount of recovery as well as the underlying basis for the recovery are still under review.

21. The urgency of the matter is not self-created but arises solely from the actions and intentions of the Administration to penalize her for something that it has categorized as an administrative error.

Irreparable harm

22. The recovery would result in the loss of some USD 26,000 in remuneration. Given her financial obligations for herself and her family, this would be a significant financial burden.

23. The United Nations does not pay interest on payments so even if the money were to be eventually restored, the Respondent cannot restore the loss of use of that money or address the harm that such unforseen reduction in income would entail. This constitutes irreparable harm that may not adequately be compensated by money.

24. By proceeding to execute this recovery action and implement the EOD date for all administrative purposes, her due process rights are being ignored, her record of service, professional reputation and standing in the peacekeeping community will suffer irreparable harm. The implication that she was responsible for these overpayments is unavoidable from the intention of the Organization to proceed with immediate recovery.

25. She has another case that she brought as a result of being penalized for having challenged the policy in the first place. It thus appears retaliatory in nature. The arbitrary manner in which this issue has been handled has occasioned her significant stress and harmed her dignity. The emotional toll occasioned by her "callous mistreatment" by the Administration cannot be compensated monetarily.

Respondent's submissions

Prima facie *unlawfulness*

26. The decision to recover the overpayment of mobility allowance is not *prima facie* unlawful. The Applicant had been receiving mobility payments calculated based on an incorrect EOD in the UNCS. The Applicant's personnel records, however, show that she had resigned and been reappointed at a higher step level and, as such, did not complete five years of uninterrupted service with the Organization.

27. Following the discovery of this administrative error, the Administration advised the Applicant that she had been overpaid in the sum of USD 26,103.90. The Administration has a duty to recover any overpayments made under section 2.3 of ST/AI/2009/1 (Recovery of overpayments made to staff members).

28. The Respondent submits that recovery will be limited to two years and carried out in installments.

Urgency

29. Any urgency is self-created. The Applicant was notified of the decision to recover on 17 May 2017. She did not come to the UNDT at the first available opportunity. Instead, she waited for approximately six months to file this motion.

Irreparable harm

30. The recovery of the overpayments will not cause irreparable harm. It will be limited to the overpayments made during the two-year period prior to 17 May 2017. It will also be effected in installments.

31. In view of the foregoing, the Respondent requests the Dispute Tribunal to dismiss the Application.

Considerations

32. Article 10.2 of the UNDT Statute states:

> At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

33. Article 14 of the UNDT Rules of Procedure states, *inter alia*:

> **Suspension of action during the proceedings**
>
> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

34. It is well-settled jurisprudence that all three cumulative conditions must be fulfilled.

Prima facie unlawfulness

35. The Tribunal considers that the application is unnecessarily centred on the issue of how entries are made in the information management system and on interpretation of terms used by unpromulgated circulars on the utilization of the system. The Tribunal concedes that, as a practical matter, it is not insignificant that staff entitlements are effected by arbitrary changes in the management system and that changes in the data input in the human resources management system may, in certain circumstances, become the expression of an administrative decision. The crux of the matter, however, is in the substantive rules applicable to the legal relations concerned.

36. In this respect, the Respondent's principal contention is that the mobility allowance was not due for the period surrounding the Applicant's re-assignment from UNMIS to UNEP in July 2011 based on the fact that this move had been effected by way of resignation. It is this Tribunal's understanding that other factors relevant for the mobility allowance are not in dispute.

37. It is noted that the staff rules applicable at the time of the contentious re-assignment from UNMIS to UNEP set out the situation of re-employment in a fashion that has not been changed since. Staff rule 4.17 in ST/SGB/2011/1 read in relevant part:

> Rule 4.17 Re-employment
>
> (a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.
>
> (b) The terms of the new appointment shall be fully applicable without regard to any period of former service. When a staff member is re-employed under the present rule, the service **shall not be considered as continuous between the prior and new appointments**.

38. Based on the correspondence on file, it is obvious to the Tribunal that the Applicant was given an option between resignation and transfer, and, having discussed the implications, accepted the former as it gave her the immediate benefit of a higher step within the grade. She was not reinstated. The Applicant's service was thus not "continuous" under the terms of staff rule 4.17.

39. Moving on to the question of mobility allowance, in the same ST/SGB/2011/1, staff rule 3.13 provided in relevant part:

> Rule 3.13 Mobility allowance
>
> (a) A non-pensionable mobility allowance may be paid under conditions established by the Secretary-General to staff members in the Professional and higher categories, […] provided that they: (i) Hold a fixed-term or continuing appointment; (ii) Are on an assignment of one year or more and are installed at the new duty station; and (iii) **Have served for five consecutive years in the United Nations common system of salaries and allowances** (emphasis added).

40. Similar language was employed in staff rule 3.13 on mobility allowance in ST/SGB/2013/3 (Staff Regulations and Rules). ST/AI/2011/6 (Mobility and hardship scheme) contains a similar language:

> 2.1 To qualify for payment of the mobility allowance, a staff member must have **five years' prior consecutive service** as a staff member in the United Nations or another organization of the common system (emphasis added).

41. It falls to be noted, therefore, that the same SGB employs two different notions, that is, "continuing service" and "consecutive years" of service. Any term

may be statutorily defined for the specific purpose of the normative act at hand in a fashion that narrows, broadens or modifies its meaning compared to the ordinary use, such as, for example, "continuing" in staff rule 4.17, or "consecutive" in the former ST/AI/2007/1 (Mobility and hardship scheme). However, the rules of interpretation dictate that where the legislator in one normative act utilizes different terms, they are to be ascribed different meanings. As such, absent an indication to the contrary, continuing service in staff rule 4.17 and consecutive service in staff rule 3.13 are not coterminous notions.

42. It is further noted that provisions on mobility allowance in the implementing administrative issuances before and after 1 July 2011 were changed: section 2.3 from ST/AI/2007/1, which stated that, "[s]eparate periods of service shall be considered as consecutive for the purpose of section 2.1 when their cumulative duration reaches five years within the prior six-year period, unless broken by one of the following occurrences: resignation, abandonment of post, summary dismissal or dismissal for misconduct, agreed termination, termination for unsatisfactory service and separation from service under staff rule 104.14(i)(i) of staff on probationary appointment. Separation due to other occurrences, such as non-renewal of fixed term appointment, or separation to take up another appointment within UNCS shall not break the period of service for the purposes of this section" was abolished by ST/AI/2011/6. ST/AI/2011/6 requires five consecutive years save section 2.3 where service "shall not be considered" as broken by periods of special leave...etc. Apart from this passage, the language of ST/AI/2011/6 does not define any specific conventional meaning ascribed to the term "consecutive". This term remained in use, on the level of both the Secretary-General's Bulletin and the implementing administrative issuance, notwithstanding novelization of staff rules by ST/SGB/2013/3, which would have created an opportunity for amendment.

43. In accordance with the aforesaid, the term "consecutive" in the cited instruments needs to be read in accordance with its ordinary meaning which, as per the Webster's New World dictionary is "following in order, without interruption" and

is also explained as "successive" or "sequential". Conversely, the term "continuing" in the ordinary meaning denotes "incessant", "unceasing", "constant".

44. As such, given that in July 2011 the Applicant moved between UNMIS and UNEP without any break in service and her appointments with the Organization followed consecutively from one day to another, she had possessed at the relevant time "five consecutive years of service" within the meaing of staff rule 3.13 as then applicable. Calculating this move for the purpose of mobility allowance was appropriate. UNON communication with the Applicant which, implicitly, asserted no detriment to this entitlement, was appropriate.

45. It was not until the Staff Rules' revision effected by ST/SGB/2016/1 that staff rule 3.13 was amended to read:

> **Mobility incentive**
>
> (a) A non-pensionable mobility incentive may be paid under conditions established by the Secretary-General to staff members in the Professional and higher categories […] provided that they:
>
> (i) Hold a fixed-term or continuing appointment;
>
> (ii) Are on an assignment of one year or more to a new field duty station and are installed at the new duty station; and
>
> (iii) **Have five years or more of continuous service on a fixed-term or continuing appointment** in the United Nations common system of salaries and allowances (emphasis added)

46. Accordingly, ST/AI/2016/6 (Mobility and hardship scheme) provides:

> Qualifying service
>
> 2.1 To qualify for payment of the mobility incentive, a staff member must **have five years' prior continuous service** on a fixed-term or continuing appointment[12] as a staff member in the United Nations or another organization of the common system and assigned to a category A to E duty station. When qualifying service has been broken by separation from service as defined in staff rule 9.1, such

[12] In accordance with staff rule 13.1 (a), all permanent appointments shall be governed by the terms and conditions applicable to continuing appointments under the Staff Regulations and the Staff Rules, except as provided otherwise under the same staff rule 13.1 (a)).

> service accrued before the separation shall be forfeited and a new period shall begin upon the staff member's re-employment.

47. What the Respondent is purporting to achieve in this case, is to apply ST/SGB/2016/1 and the attendant administrative issuance with a retroactive effect. This is unlawful. As held repeatedly by the United Nations Appeals Tribunal (UNAT), in *Hunt-Matthes*,[13] *Nogueira*,[14] *Assale*[15] and *Al Abani*,[16] there is a general principle of law against retrospective effect/application of laws. UNAT held in each case that the administrative issuance in question could not be applied to incidents that occurred before its promulgation. Moreover, UNAT confirmed in *Castelli*[17] the unlawfulness of artificially creating breaks in service which have bearing on a staff member's entitlements.

48. In conclusion, the contested decision is *prima facie* unlawful.

Urgency

49. The Respondent argues that: any urgency is self-created; that the Applicant was notified of the decision to recover on 17 May 2017 but she did not come to the UNDT at the first available opportunity; and that instead, she waited for approximately six months to file this motion. These arguments are not sustainable as it is clear that the Applicant filed the substantive application on the merits in a timely manner consistent with the UNDT Statute. The documents filed in respect to this motion by the parties indicate that notwithstanding the fact that the Applicant was informed that the recovery of overpayments was to be done on 17 May 2017, it appears that the decision is only to be implemented today when payroll cut-off for November occurs. The Tribunal agrees with the Applicant that this renders the matter urgent.

[13] 2014-UNAT-444 at para. 25.
[14] 2014-UNAT-409 at para. 14.
[15] 2015-UNAT-534 at para. 34.
[16] 2016-UNAT-663 at para. 24
[17] 2010-UNAT-037 at para. 26.

Irreparable harm

50. The Respondent submits that the recovery of the overpayments will not cause irreparable harm to the Applicant since it will be limited to the overpayments made during the two-year period prior to 17 May 2017 and will also be effected in installments. The Applicant, on the other hand, argues, *inter alia*, that the Organization does not pay interest on payments so even if the money were to be eventually restored, the Respondent cannot restore the loss of use of that money or address the harm that such unforseen reduction in income would entail.

51. The Tribunal notes that the purpose of interim measures relief is to grant temporary relief pending the outcome of the substantive application on the merits, and, where there is real likelihood that without receiving the temporary relief, justice will in effect be denied even if the litigant succeeds. In *Gizaw*, Order No. 151 (NY/2017), the Tribunal observed that,

> [t]he general principles upon which such a remedy is granted include the absence of an adequate alternative remedy, and the balance of interests and convenience favoring the granting of an interdict. An interim interdict is temporary in nature and is usually in place as long as a situation prevails until the final outcome can be ascertained; the nature and duration of such temporary relief will depend on the facts and circumstances of each particular case. The Tribunal does the best it can on the papers before it. [18]

52. The Tribunal considers, having found the contested decision to be *prima facie* unlawful, and taking into account that a far greater burden would be inflicted upon the Applicant if the decision were to be immediately executed compared with the relatively small burden for the Organization in maintaining the *status quo*, that, on a balance of interests and convenience, to grant a motion is the appropriate remedy at this stage of the proceedings.

[18] At para. 56.

Conclusion

53. In light of the foregoing, the Tribunal ORDERS that the motion for interim measure is GRANTED and the contested decision is suspended pending the Dispute Tribunal's proceedings.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 10th day of November 2017

Entered in the Register on this 10th day of November 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi