



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RUBWINDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE RESPONDENT'S
MOTION TO HAVE RECEIVABILITY
DETERMINED AS A PRELIMINARY
MATTER**

Counsel for the Applicant:

Evelyn W. Kamau, OSLA

Counsel for the Respondent:

Lucienne Pierre, AAS/ALD/OHR

Natalie Puchalka, AAS/ALD/OHR

Introduction

1. The Applicant, a former staff member of the Regional Service Center in Entebbe (“RSCE”), filed an application on 5 October 2020 to contest the 7 July 2020 decision to withdraw his entitlement to after-service life insurance (“ASHI”). The Applicant seeks the following remedies: (a) rescission of the impugned decision; (b) the retroactive reinstatement of ASHI from 7 July 2020; (c) financial compensation for the economic loss incurred due to the improper withdrawal of ASHI; and (iv) compensation of six months’ net base salary as moral damages for the harm, stress and anxiety caused by the Respondent’s actions.

2. The Respondent’s deadline to file a reply is 5 November 2020.

3. On 30 October 2020, the Respondent filed a motion to have receivability determined as a preliminary matter and moved the Tribunal to suspend the deadline for the filing of the reply pending determination of the motion. The Respondent asserts in his motion that the application is not receivable *ratione materiae* because: (i) the contested decision is not one of the specifically delineated disciplinary measures set forth in staff rule 10.2(a) thus the Applicant should have requested management evaluation pursuant to staff rule 11.2 but did not do so; and (ii) the matter is moot because the Applicant’s entitlement to ASHI is being restored after he made a payment to the Organization of sums owed.

Facts

4. The Applicant had previously been the subject of a disciplinary process relating to a separate matter. In January 2020, he signed a Letter of Undertaking (“LoU”) accepting the disciplinary measure of separation from service with compensation *in lieu* of notice and without termination indemnity and with a fine. He also undertook to repay the Organization USD145,077 within four weeks of receipt of the sanction letter but he claims he was unable to pay immediately due to the adverse financial effects of the COVID-19 pandemic. The LoU stated that the

disciplinary measure would have no impact on any entitlement to retirement benefits or to eligibility to ASHI.¹ He was separated from the Organization effective 11 February 2020.

5. On 1 April 2020, the Applicant received a request to provide comments on an Investigation Report prepared by Cigna’s Fraud Investigation Unit (“FIU”). The Report alleged that there were irregularities relating to an invoice that the Applicant had submitted for USD1,375 for an inpatient admission of one of his children. The Office of Human Resources (“OHR”) sought to recover the reimbursed amount of USD1,370 from the Applicant.² The Applicant did not provide any comments.

6. By a letter dated 7 July 2020, the administration informed the Applicant of its decision to withdraw any entitlement he had to ASHI, effective from the issuance of the letter. The letter also made reference to the prior disciplinary matter, recalling that though the Applicant had undertaken to reimburse the USD145,077, he had not done so. The Administration further noted that the RSCE could decide to treat the USD1,370 that the Applicant had received from Cigna as an overpayment and thus as indebtedness to the Organisation, and seek its recovery prior to releasing his final entitlements.³

7. The Applicant has submitted a payment to the Organization which includes, *inter alia*, the amount owed to the Organization as noted in the FIU Report.⁴

Considerations

8. The dispute concerns applicability of staff rule 11.2(b), which provides:

A staff member wishing to formally contest [...] a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the

¹ Application, annex 1.

² Ibid., annexes 2 and 3.

³ Ibid., annex 4.

⁴ Respondent’s motion of 30 October 2020, para. 16.

completion of a disciplinary process is not required to request a management evaluation.

9. Staff rule 10.2 lists the available disciplinary measures under (a) and subsequently provides:

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

- (i) Written or oral reprimand;
- (ii) Recovery of monies owed to the Organization;

...

10. In this connection, ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides:

9.5 In conjunction with a decision to impose a disciplinary measure, the Under-Secretary-General for Management [...] may [...] decide to recover, in part or in full, any financial loss suffered by the Organization pursuant to staff rule 10.1(b).

11. It is undisputed that the present matter does not concern any of the legally recognized disciplinary measures. The Respondent considers it to be an “administrative measure”, but maintains that staff rule 11.2(b) is inapplicable as there had not been a completion of disciplinary process pursuant to ST/AI/2017/1. This Tribunal disagrees.

12. As transpires from the letter of 7 July 2020, the measure in question was imposed in connection with two events. One was a par excellence disciplinary process, which resulted in a disciplinary measure of separation and an agreement between the Organization and the Applicant pursuant to which, among other, the Applicant would return the equivalent of undue payments that he had received while the Organization would keep his health insurance and pension intact. The Applicant failed to follow his undertaking and the Organization imposed the impugned measure. The crux of the matter, thus, is in recovery of monies owed to the Organization as contemplated in staff rule 10.2 and section 9.5 of ST/AI/2017/1. The Respondent’s

contention about the absence of completion of the disciplinary process may only be related to the second event. The second event concerns another allegation of misconduct, an inquiry and a request for comments from the Applicant, who at the time had been already separated from the Organization. The Tribunal finds that the fact that the Organization chose not to strictly follow the formalities of ST/AI/2017/1 in relation to a former staff member, does not remove the disciplinary character from the process nor the feature of a “non-disciplinary measure pursuant to staff rule 10.2” from the decision that resulted from it, whether legal or not.

13. As such, notwithstanding the ambiguity of the letter of 7 July 2020, the intention and result of the communication places it within the ambit of staff rule 11.2(b). Thus, for the application to be receivable it was not necessary to request management evaluation.

14. As concerns the argument about mootness, the Tribunal considers that the Respondent’s assertion that the health insurance “is being restored” does not render the claim for remedy moot. First, it is not demonstrated that the insurance has already been restored; second, that it has been restored with a retroactive effect, as requested by the Applicant; third that compensation for financial and moral loss has been offered. Notwithstanding that, in accordance with the jurisprudence on “clean hands”, the Applicant’s expectations for moral damages may need to be moderated, there are still live issues in the application which call for settlement or adjudication.

15. Based on the aforesaid, the Tribunal shall proceed on an assumption that the application is receivable.

ORDER:

16. The Respondent shall file a reply on the merits within the statutory deadline;

17. The reply shall address, in particular, the issue of: (i) authorship of the letter of 7 July 2020, which is unsigned; (ii) legality of the applied measure; and (iii) the status of “restoration” of the Applicant’s health insurance.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 4th day of November 2020

Entered in the Register on this 4th day of November 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi