



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

OMWANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. On 18 October 2016, the Tribunal received an application from a former Security Officer with the United Nations Department of Safety and Security (“DSS”) in New York, seeking suspension, pending management evaluation, of the decision “of UNHQ Payroll to recover USD5,040.20 from [the Applicant’s] Disability Funds”. The Applicant states that he was notified of the contested decision on 26 September 2016, when he received a letter dated 1 July 2016.

2. On 18 October 2016, the New York Registry transmitted the application for suspension of action to the Respondent, stating that the Respondent’s reply was due 1:00 p.m., 20 October 2016.

Background

3. The Applicant commenced his service with DSS on 10 October 2005 as a Security Officer in Nairobi, Kenya. On or about 19 February 2008, he was appointed as a Security Officer with DSS in New York.

4. On 25 November 2015, the United Nations Staff Pension Committee notified the Applicant of its determination of his incapacity for further service, and of his consequent entitlement to disability benefit under art. 33 of the Regulations of the United Nations Joint Staff Pension Fund (“UNJSPF”).

5. On 1 December 2015, the Assistant Secretary-General for Human Resources notified the Applicant that the Secretary-General had decided to terminate his appointment under staff regulation 9.3(a)(iii).

6. On 4 February 2016, the Applicant’s appointment was terminated on medical grounds, with termination indemnity and compensation in lieu of notice.

7. On 26 September 2016, the Applicant received a letter dated 1 July 2016. The Applicant attached a copy of the envelope in which the letter was delivered, stamped “Sep 26 2016”. (It is unclear why it took almost three months for the letter to be delivered.) The letter was signed by Mr. Panagiotis Vergetis, Chief, Payroll Operations, Account Division, Office of Programme Planning, Budget and Accounts. The letter stated:

1. After processing your final pay on Separation 05/02/2016, it was determined that you were overpaid an amount of US\$5,040.20. Please find below an explanation on how the overpayment arrived:

2. Your salary in December 2015 was paid in full by the Organization whereas you were placed retroactively on Sick Leave with Half Pay for the periods 22 to 24 of December 2015 and 28 to 31 of December 2015. This resulted in an overpayment of \$1,139.71.

3. A Personal Action to discontinue Dependency Allowance for your child ... was also approved on 10 May 2016 to be retroactively effective 26 February 2014 as she was not in full time attendance for that period. This PA [Personnel Action form] generated an overpayment of \$2,304.52. That amount was recovered against your final entitlements of Termination Indemnity of \$781.24 arriving at a balance of \$1,523.28.

4. In March 2016 a salary advance of \$2,377.21 was issued to you to be recovered against your final pay. However that advance was never recovered.

5. The sum of such three amounts arrives at a total overpayment of \$5,040.20. In settlement of the receivable, we would appreciate receiving your payment either by

(a) Money Order or Bank Draft/cheque drawn on a bank in the US in the amount of US\$5,040.20 made payable to the United Nations, or

(b) EFT [Electronic Fund Transfer] to the UN bank account, as per instructions on the enclosed note from the U.N. Treasury.

6. If you are forwarding a Money order/Bank Draft or cheque, please make it payable to the United Nations, and mail

it to the attention of the undersigned at 304 East 45th Street, Room FF-326, New York, N.Y. 10017. If you are sending the remittance by EFT, please ensure that your Index number is included in the bank advice.

7. In accordance with ST/AI/155 Rev.2 [Personnel Payroll Clearance Action], copy attached, please be reminded that failure to settle this overpayment will prevent us from completing the processing of your other separation entitlements.

8. On 14 October 2016, the Applicant sent an email to the Management Evaluation Unit (“MEU”) at meu@un.org. The Applicant identifies this email as his request for management evaluation. The email stated (emphasis added):

On 26/09/2016 I received a mail from Mr. T. Wangay [functional title unknown] that the UN has sent a letter to UNJSPF to recover US\$5,040.20 from my disability funds. I acknowledge the overpayment but I had requested OHRM to recover the arrears from my termination indemnity. I have never received the termination indemnity and i am still unwell. This recovery from my disability funds will injure my already injured financial status and [I] request you to put it on hold until my termination indemnity is calculated properly and paid, then the money owed by me can be easily recovered. I joined the UN in 10/10/2005 as a security officer [United Nations Office in Nairobi] and moved to UNHQ as a security officer, DSS in 19/02/2008 until 04/02/2016 when my services were terminated due to medical reasons.

9. On 17 October 2016, the MEU sent an email in response to the Applicant’s communication of 14 October 2016. The MEU stated:

Thank you for your message.

If you intend to file a management evaluation request please complete and sign the attached claim form.

[Attaching a Word document entitled “MER formrev as of Aug 2012.doc”]

For ‘frequently asked questions’ about the MEU and its role please refer to the following address on i-see: <https://iseek-newyork.un.org/m210dept1686>

The deadline for review will start from the date we receive your completed claim form and supporting documentation.

10. On 18 October 2016, the Respondent filed a motion for summary dismissal, stating that the MEU did not treat the Applicant's email of 14 October 2016 as a management evaluation request. The Respondent submitted that the MEU informed the Applicant on 15 October 2016 that, if he wished to file a management evaluation request, he should complete a claim form. Accordingly, there was no pending management evaluation request and the application for suspension of action should be dismissed.

11. By Order No. 240 (NY/2016) dated 19 October 2016, the Tribunal determined that the requirement of pending management evaluation was satisfied and dismissed the Respondent's motion. The Tribunal found that the Applicant's email of 14 October 2016 was addressed to the MEU; identified the Applicant and the contested decision; and explained why the Applicant considered the contested decision to be unlawful (cf. *Lemonnier* 2016-UNAT-679). The Tribunal found that any reasonable person would have concluded that the purpose of the Applicant's email to the MEU was to seek management evaluation of the contested decision.

12. On 20 October 2016, the Respondent filed his reply to the application for suspension of action, repeating the contention that the Tribunal does not have jurisdiction to suspend the contested decision as there was no pending management evaluation. The Respondent submitted in the alternative that the application was without merit as, contrary to the Applicant's claim, the Organization has not decided to recover an overpayment from the Applicant's disability benefit, which was clear from the language of the 1 July 2016 letter. The Administration has merely asked the Applicant to repay an overpayment of salary, which is a lawful request.

Consideration

Legal framework

13. Article 2.2 of the Statute of the Dispute Tribunal provides:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

14. Article 13.1 of the Tribunal's Rules of Procedure states:

The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

15. In accordance with art. 2.2 of the Dispute Tribunal's Statute, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements of art. 2.2 of its Statute have been met.

16. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order

made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits.

17. Parties approaching the Tribunal for a suspension of action order must do so on a genuinely urgent basis, and with sufficient information for the Tribunal to preferably decide the matter on the papers before it.

Pending management evaluation request

18. It follows that the suspension of action of a challenged decision may only be ordered when management evaluation for that decision has been duly requested and is still ongoing (*Igbinedion* 2011-UNAT-159, *Benchebbak* 2012-UNAT-256).

19. In his reply filed on 20 October 2016—after the issuance of Order No. 240 (NY/2016), in which the Tribunal made a finding that the Applicant’s email to the MEU dated 14 October 2016 constituted a management evaluation request—the Respondent asserts that the Applicant has not submitted a valid management evaluation request. The Respondent stated:

... The contested decision is not pending management evaluation. On 14 October 2016, the Applicant sent an email to the Management Evaluation Unit (MEU). The MEU did not accept the Applicant’s email of 14 October 2016 as a management evaluation request. On 15 October 2016, the MEU replied to the Applicant, informing him that if he wished to file a management evaluation request, he should complete a claim form, and submit supporting documentation.

... The Applicant is required to comply with the procedures of the Management Evaluation Unit. The Dispute Tribunal does not have the power to compel the Management Evaluation Unit to receive the Applicant’s claims. The Statue of the Dispute Tribunal does not confer this power upon the Dispute Tribunal.

20. The Respondent's reply disregards Order No. 240 (NY/2016) and advances an argument that is not consistent with the case law of the Appeals Tribunal, which stated in *Lemonnier* 2016-UNAT-679 (emphasis added):

As to the manner in which a management evaluation request should be formulated, we make the following general observation. *While the use of a specific "form" is not a mandatory requirement* for there to be a valid management evaluation request, the use of the MEU's standard form is preferable as it is readily available to staff members, online and from the MEU. *The fundamental point is that a staff member's request for management evaluation, however it is transmitted (including, for example, via a mobile device), must be an unambiguous written request which clearly identifies the staff member and the contested decision.* As already stated, in the present case, the Appeals Tribunal was sufficiently satisfied that the content of the e-mails sent on Mr. Lemonnier's behalf between October and 2 December 2014 satisfied the requirement for an unambiguous request, particularly in light of the management response of 5 February 2015.

21. The Tribunal sees no reason to re-visit the finding made in Order No. 240 (NY/2016). The Tribunal draws the Respondent's attention to sec. 10 (Management Evaluation Unit) of ST/SGB/2010/9 (Organization of the Department of Management), which states, *inter alia*:

10.1 The Management Evaluation Unit is headed by a Chief, who is accountable to the Director of the Office of the Under-Secretary-General for Management.

10.2 The core functions of the Unit are as follows:

(a) Conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with rules and regulations;

(b) Making recommendations to the Under-Secretary-General for Management on the outcome of the management evaluations and proposing appropriate remedies in case of improper decision made by the Administration;

(c) Communicating the decision of the Under-Secretary-General for Management on the outcome of the

management evaluation to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in New York and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York;

(d) Proposing means of informally resolving disputes between staff members and the Administration; making recommendations to the Under-Secretary-General for Management on extending the deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman.

22. The Applicant's email of 14 October 2016 contains sufficient information for the MEU to carry out its functions under sec. 10 of ST/SGB/2010/9. As the Appeals Tribunal stated in *Lemonnier*, "the use of a specific "form" is not a mandatory requirement" and "[t]he fundamental point is that a staff member's request for management evaluation, however it is transmitted (including, for example, via a mobile device), must be an unambiguous written request which clearly identifies the staff member and the contested decision".

23. The Tribunal reiterates the finding that the Applicant's email of 14 October 2016 constituted a valid management evaluation request.

Prima facie unlawfulness

24. For the *prima facie* unlawfulness test to be satisfied, the Applicant is required to show a fairly arguable case that the contested decision is unlawful. For instance, it would be sufficient for her or him to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligation to ensure that its decisions are proper and made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

25. The Respondent submits in his reply that, contrary to the Applicant's assertions, the Organization has not decided to deduct sums from the Applicant's disability benefits. The Organization has merely notified the Applicant of an overpayment of salary and benefits, and requested repayment of these amounts. This overpayment is not disputed by the Applicant, and the Organization is entitled to make this request under ST/AI/2009/1 (Recovery of overpayments made to staff members). The Respondent submits that the Organization has not requested the UNJSPF to recover the overpayment from the Applicant's disability benefit. The Respondent also submits that there is no provision in the UNJSPF's Regulations for the deduction of amounts owed to the Organization, except in cases of fraud. As the overpayment to the Applicant was not a case of fraud, no deductions will be made from his disability benefits.

26. Indeed, it is unclear to the Tribunal on what basis the Applicant claims that deductions will be made from his disability payments. The Respondent denies that any such deductions would be made, and furthermore acknowledges that such deductions would not be allowed under UNJSPF's regulations, except in cases of fraud, which this is not. Further, the letter dated 1 July 2016 does not contain any references to any withdrawals from the Applicant's disability payments.

27. Moreover, in the Tribunal's view, the allegedly outstanding recovery should not have any impact on the processing and payment of the Applicant's disability benefits as those are separate and distinct from his separation entitlements.

28. The Applicant seeks suspension of the decision to recover overpayments from his disability funds. As there has been no decision to make deductions from the Applicant's disability benefits, it follows that there can be no finding of *prima facie* unlawfulness.

29. Considering that one of the cumulative conditions for the granting of suspension of action under art. 2.2 of the Tribunal's Statute has not been satisfied, the Tribunal need not and will not consider whether the requirements of particular urgency and irreparable harm have been met.

Conclusion

30. The present application for suspension of action is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 20th day of October 2016