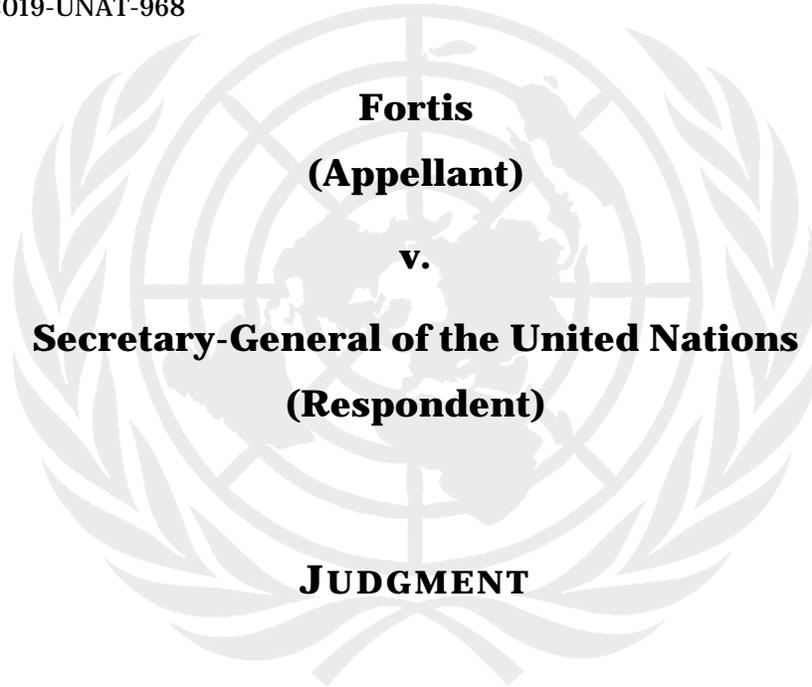




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-968



Before:	Judge Sabine Knierim, Presiding Judge Martha Halfeld Judge Kanwaldeep Sandhu
Case No.:	2019-1268
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Fortis:	Afshin Salamian
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE SABINE KNIERIM, PRESIDING.

1. This case arose from an advance paid to Mr. Didier Michel Fortis against his final emoluments which, it turned out, significantly exceeded the amount Mr. Fortis was in fact entitled to and the ensuing request by the Administration to recover its overpayment. Mr. Fortis contested both the calculation of the overpayment in connection with the payment of dependency benefits to his ex-wife and daughter, as well as the Administration's request to recover it. The UNDT dismissed the application, partly on receivability and partly on the merits. We affirm.

Facts and Procedure

2. At the time of the events of the present case, Mr. Fortis held the position of Security Officer and was based at the United Nations Office at Geneva.

3. By order dated 28 August 2014, a French Court, the *Tribunal de Grande Instance de Thonon-Les-Bains*, determined that Mr. Fortis owed his wife and daughter a maintenance allowance. The Court subsequently revised its order several times. In February 2015, Mr. Fortis' wife informed the Administration that Mr. Fortis was not fully complying with the court orders regarding the maintenance allowance. After several attempts by the Administration to provide proof that he was fulfilling his maintenance obligations towards his wife and daughter, the Administration stopped paying him dependency benefits for his wife in April 2016 and for his daughter in June 2016. In August 2016, the Chief of the Human Resources Management Services (HRMS) informed Mr. Fortis that if he failed to fulfil his maintenance obligations towards his wife and daughter for 2015 and 2016 and to provide proof that he had done so, the Organization would recover the dependency benefits paid to him. In September 2016, Mr. Fortis was separated from the Organization owing to disability.

4. Between September and October 2016, Mr. Fortis and the Administration exchanged a host of e-mails regarding the formalities associated with his separation which could not be completed as long as the issue of the dependency benefits remained unresolved. On 10 October 2016, the Administration suggested two options to Mr. Fortis to resolve the situation. According to option 1, the Organization would pay on his behalf 7,000 Euros to Mr. Fortis' wife to settle the maintenance allowance he owed her and would deduct this sum from his final emoluments. Furthermore, it would pay him the dependency benefits he had not received for 2016 but would deduct the 2015 dependency benefits from his final emoluments. Mr. Fortis

responded on 11 October 2016 and accepted that the Organization pay 7,000 Euros to his ex-wife and the 2016 dependency benefits to himself. He, however, expressly opposed the deduction of the 2015 dependency benefits from his final emoluments. That same day, the Administration informed him that it was going to proceed with option 1.

5. In November 2016, the Administration paid the amount of 7,000 Euros to Mr. Fortis' wife. It also paid the amount of CHF 16,800 to Mr. Fortis as an advance against his final emoluments which mainly consisted of a termination indemnity for termination owing to disability, based on estimates of the United Nations Joint Staff Pension Fund (Pension Fund). By letter dated 28 November 2016, Mr. Fortis was informed that the payments had been made on 18 November 2016 and 1 November 2016, respectively.

6. In December 2016, the Pension Fund informed the Administration of the actual amount of Mr. Fortis' disability benefit, which was higher than the estimate that had been initially provided. By letter dated 10 April 2017 addressed to HRMS, Mr. Fortis requested that the Administration proceed to pay the balance of his final emoluments and in the alternative render a reviewable administrative decision. By letter dated 24 April 2017, the Administration informed Mr. Fortis that he had received the balance of his final emoluments on 30 January 2017 and that, once the final calculations received from the Pension Fund had been used to determine his termination indemnity, it had been found that he had received an overpayment of CHF 11,996.46 which was now being claimed from him.

7. On 23 June 2017, Mr. Fortis submitted a request for management evaluation of the request for reimbursement dated 24 April 2017. On 18 August 2017, the Management Evaluation Unit informed Mr. Fortis that his request was not receivable. By application dated 6 November 2017, Mr. Fortis filed an application before the UNDT contesting the deduction of the amount of 7,000 Euros paid to his ex-wife and of the 2015 dependency benefits from his final emoluments and the request for recovery of overpayment.

8. On 11 April 2019, the UNDT issued Judgment No. UNDT/2019/053 dismissing the application. The UNDT found that the application was not receivable *ratione materiae* with respect to both the deduction of the amount of 7,000 Euros and the 2015 dependency benefits because Mr. Fortis had failed to timely request management evaluation within 60 days from 28 November 2016, the date of his notification that the payments had been made. With regard to the request to recover the overpayment made, the UNDT found the application receivable,

but dismissed it on the merits. The UNDT found that under Administrative Instruction ST/AI/2009/1 (Recovery of overpayments made to staff members), the Organization was entitled to claim from Mr. Fortis the amount of CHF 11,996.49 that it had paid to him by mistake.

9. Mr. Fortis filed an appeal to the United Nations Appeals Tribunal (Appeals Tribunal) on 6 June 2019, and the Secretary-General filed his answer on 13 August 2019.

Submissions

Mr. Fortis' Appeal

10. The UNDT made errors of fact and law. The UNDT failed to take into consideration the fact that the Organization had paid Mr. Fortis no income in September, October and most of November 2016, causing him material and moral harm. This placed him in a precarious financial situation. Through the sole fault of the Organization, Mr. Fortis no longer had even the minimum to meet his needs. The UNDT failed to consider the fact that Mr. Fortis, who suffered from multiple sclerosis and depended on daily treatments and medications, could no longer afford to pay his health insurance contributions and his health further suffered from the stress resulting from the situation, in which he had been placed.

11. Mr. Fortis further contends that the UNDT failed to consider the abuse of power and coercion that the Organization had demonstrated against him by unlawfully blocking the payment of his salary or his placement on disability scheduled for September 2016, thereby forcing him to accept the "agreement" proposed by the Organization regarding the 2015-2016 dependency benefits. Furthermore, the UNDT failed to consider the serious lack of diligence and the slow response by the Organization in managing his case, which considerably delayed his placement on disability and the payment of his final emoluments, despite the "agreement" reached in October 2016.

12. The UNDT erred in law in finding that Mr. Fortis' application regarding the recovery of 7,000 Euros paid to his wife was not receivable *ratione materiae*. Mr. Fortis had been forced to accept the "agreement" reached in October 2016 regarding the payment of 7,000 Euros to his wife and the 2015 dependency benefits rendering the "agreement" void *ab initio*. Moreover, the payment of the 7,000 Euros to Mr. Fortis' wife in November 2016, or more specifically, the letter from the Organization of 28 November 2016 informing Mr. Fortis that payment of 7,000 Euros had been made to her, did not constitute an administrative decision

subject to management evaluation within the meaning of Staff Rule 11.2. That letter was sent to Mr. Fortis merely in response to his letter dated 9 November 2016 requesting that the Organization resolve his situation and pay him his final emoluments. Moreover, Mr. Fortis was not in a position to contest the payment of 7,000 Euros before receiving the Organization's final decision on his emoluments dated 24 April 2017, as there had been no other decisions by the Organization in that regard. Mr. Fortis' application regarding the deduction from his final emoluments of the amount of 7,000 Euros and the dependency benefits paid in 2015 was therefore receivable and should have been considered by the UNDT.

13. Mr. Fortis further contends that the UNDT erred in law by determining that the Organization was entitled to recover the overpayment in the amount of CHF 11,996.46. In this regard, it should be noted that the UNDT rightly determined that the Organization had made an administrative error in paying Mr. Fortis an advance that exceeded the threshold of 80 per cent permissible under Staff Rule 3.16(a)(iii) and even the amount he was entitled to. In examining the issue, the UNDT failed to consider the "cruel lack of diligence and consideration, and even humanity" demonstrated by the Organization in managing his case.

14. In particular, by forcing Mr. Fortis to repay a significant amount which he no longer had as he had spent it immediately upon receipt in November 2016 after having received neither a salary nor a disability benefit since August 2016 to meet his daily needs and treat his illness, Mr. Fortis was again put in a difficult financial situation as a result of mismanagement by the Organization. Finally, the Organization had failed to warn him that the advance paid in November 2016 was subject to recovery by the Organization. Mr. Fortis emphasizes that in any event he also contests that the Organization was entitled to deduct from his final emoluments 7,000 Euros as well as the dependency benefits that had been paid to him in 2015 and submits that it was not entitled to recover the overpayment of CHF 11,996.49.

15. Finally, Mr. Fortis claims that the UNDT erred in declining his request for damages. It is clear that the Organization engaged in bullying and abused its power in managing Mr. Fortis' case, in particular by forcing him to accept an "agreement" in October 2016 by threatening to block his placement on disability for an unspecified period of time and pay him no salary/final emoluments, if he did not accept. The abuse of power and lack of diligence exhibited by the Organization left Mr. Fortis without a salary or disability benefit during the months of September, October, and November 2016, as a result of which he could no longer meet his daily needs or even buy medications required to treat his illness. Mr. Fortis' overall health deteriorated

owing to the lack of financial resources and the significant stress resulting from this situation. He was also put in a situation in which it was impossible for him to pay the maintenance allowance owed to his family, as a result of which his wife filed several criminal claims against him with the French courts.

16. Mr. Fortis requests that the Appeals Tribunal vacate the UNDT Judgment; find that the “agreement” was void and that therefore the Organization was not entitled to deduct 7,000 Euros and the 2015 benefits from his final emoluments; find that the Organization is not entitled to recover its overpayment in the amount of CHF 11,996.46; award compensation in the amount of CHF 120,000 (CHF 100,000 for administrative delays, harassment, and abuse of power and CHF 20,000 for legal fees); and order that the Organization shall bear all legal costs of both the first and second instance proceedings. In the alternative, Mr. Fortis repeats the aforementioned claims and requests that he be allowed to pay back in instalments the overpayment in the amount of CHF 11,996.46 according to an instalment plan accepted by him. In the further alternative, Mr. Fortis requests that the Appeals Tribunal vacate the UNDT Judgment, remand the case to the UNDT for a new decision and order that the Organization shall bear all legal costs of both the first and second instance proceedings.

The Secretary-General’s Answer

17. The UNDT committed no errors in dismissing Mr. Fortis’ application. Mr. Fortis failed in his maintenance obligations towards his wife and daughter. In order to be able to carry out the formalities related to Mr. Fortis’ separation, the Administration proposed various options to him to ensure that he complied with his maintenance obligations. In October 2016, he opted for a proposal whereby the Administration would pay directly to his wife the dependency benefits that he had not paid to her in 2016, equivalent to a sum of 7,000 Euros. This option clearly indicated that this amount would subsequently be deducted from his final emoluments. Since Mr. Fortis was informed on 28 November 2016 that the Administration had paid the sum of 7,000 Euros to his wife, he should have requested management evaluation within the 60-day time limit under Staff Rule 11.2. He, however, did not contest the payment made to his wife, or the recovery that would inevitably ensue, until 23 June 2017, several months after the 60-day time limit had lapsed. The UNDT therefore correctly found that the application was not receivable *ratione materiae* in that regard.

18. The UNDT also rightly found that the contestation of the recovery of the 2015 dependency benefits was not receivable *ratione materiae*. Despite the Administration's repeated requests, Mr. Fortis failed to provide any supporting evidence that he had paid to his wife the dependency benefits that had been paid to him for his wife and daughter for 2015 and 2016. The exchanges between the Administration and Mr. Fortis on the matter led Mr. Fortis to choose an option whereby he accepted that the Administration would recover the dependency benefits paid to him for 2015 for which he had not provided adequate supporting evidence. On 28 November 2016, the Administration informed him that his chosen option had been implemented. Since Mr. Fortis only requested management evaluation in June 2017, months after having been informed of the recovery, the UNDT correctly held that his application in this regard was not receivable *ratione materiae*.

19. Furthermore, there is no merit in Mr. Fortis' contention that neither the payment of the sum of 7,000 Euros to his wife, or the recovery in November 2016 of the dependency benefits paid in 2015, or the letter of 28 November 2016 informing him of the implementation of the "agreement" of October 2016 covering the aforementioned payment and recovery were administrative decisions. On 28 November 2016, Mr. Fortis was informed that the Administration had paid the sum of 7,000 Euros to his wife and had paid him the sum of CHF 16,800 as an advance against his final emoluments, from which the sum paid to his wife and the overpayment of the 2015 dependency benefits were to be deducted. This is clearly an administrative decision with direct legal consequences affecting his terms and conditions of appointment. Absent a timely request for management evaluation of this administrative decision, the application cannot be receivable insofar as it concerns the payment of the sum of 7,000 Euros and the recovery of the 2015 dependency benefits.

20. The UNDT rightly found that the Administration was entitled to claim reimbursement of the overpayment made as an advance against Mr. Fortis' final emoluments. When Mr. Fortis was paid an advance against his final emoluments, the Administration miscalculated his termination indemnity which resulted in an overpayment of CHF 11,996.46. In accordance with ST/AI/2009/1, payments made by the Administration to a staff member in excess of his or her entitlements create an indebtedness on the part of the staff member, making it necessary to recover such payments. The sum of CHF 11,996.46 constituted an overpayment, which the Administration was entitled to recover from Mr. Fortis.

21. Moreover, Mr. Fortis has not proved any error justifying the vacation of the Judgment. First, Mr. Fortis has not shown that the UNDT erred by failing to find that he had acted under duress when he chose one of the options proposed by the Administration. After many exchanges with Mr. Fortis, the Administration proposed various options to him in order to ensure that he fulfilled his maintenance obligations and that the Administration could carry out the formalities related to his separation in September 2016. Mr. Fortis chose one of those options and the Administration took note of it on 11 October 2016. Mr. Fortis did not contest the fact that the Administration had proceeded on the basis of his chosen option.

22. Moreover, duress would only apply if Mr. Fortis' consent was required. In accordance with Staff Rule 3.18, Secretary-General Bulletin ST/SGB/1999/4 (Family and child support obligations of staff members) and Administrative Instruction ST/AI/2000/12 (Private legal obligations of staff members), the Administration is entitled to make deductions from the salary of a staff member who has not produced proof that he or she is meeting his or her maintenance obligations towards his or her family. Thus, the fact that Mr. Fortis was given options in order to ensure that he complied with his maintenance obligations towards his wife and daughter created no obligation to obtain his consent before recovering the debt to his wife and daughter, which was judicially established and had not been settled. Mr. Fortis did not contest the implementation of the chosen option and did not provide proof that, in October 2016, he had chosen the option under duress or even that his consent was required. It follows that Mr. Fortis has not shown that the UNDT erred by failing to find that he had acted under duress when he chose one of the options proposed by the Administration.

23. The Secretary-General also rejects Mr. Fortis' contention that the UNDT did not take into account the Organization's attitude towards him, including the fact that the Organization put him in a difficult financial situation. Mr. Fortis provides no explanation demonstrating how the failure to take into account these issues constitutes an error of law or fact on the part of the UNDT, or how taking them into account would have led to a different decision. On that basis alone, this ground of appeal should be rejected. Moreover, Mr. Fortis contested the final calculation of his final emoluments, which led to the request made on 24 April 2017 for the reimbursement of an overpayment. He did not contest the non-payment of his salary that is now alleged in his appeal. He also does not establish any connection between the alleged non-payment of his salary and the final calculation of his final emoluments. With regard to the alleged lack of diligence or slow response on the part of the Administration, as demonstrated by

the series of exchanges between Mr. Fortis and the Administration, the latter fully cooperated with Mr. Fortis between February 2015 and October 2016 in order to reach an agreement to enable him to fulfil his maintenance obligations.

24. With regard to Mr. Fortis' argument that he had never been informed that his final emoluments could be subject to recovery, he fails to indicate how that could have had any impact on the decision of the UNDT that the request for reimbursement of the overpayment was lawful. In accordance with ST/AI/2009/1, payments made by the Administration to a staff member in excess of his or her entitlements create an indebtedness on the part of the staff member, making it necessary to recover such payments. ST/AI/2009/1 does not provide for the possibility of taking into account the personal situation of a staff member in the context of a request for the recovery of an overpayment and Mr. Fortis provides no other legal basis to support his argument that his personal situation should have been taken into account by the Administration and the UNDT in their respective determinations. He has therefore not shown any error of law or fact in the UNDT's finding regarding the lawfulness of the recovery of the overpayment.

25. Lastly, Mr. Fortis has not shown any error of law in the refusal by the UNDT to consider his request for damages. He provides no proof that he chose one of the options proposed by the Administration under duress, or that the Organization abused its power or showed a lack of diligence. Moreover, because the UNDT rightly found that the application was not receivable with respect to the payment of 7,000 Euros to Mr. Fortis' wife and the recovery of the dependency benefits paid in 2015 and that the request for the recovery of the overpayment was lawful, there is no legal basis for awarding damages to Mr. Fortis. Mr. Fortis has therefore not shown that there was any error of law in the refusal by the UNDT to consider his request for damages.

26. The Secretary-General requests that the Appeals Tribunal reject the appeal and uphold the UNDT Judgment.

Considerations

Deduction of 7,000 Euros paid to Mr. Fortis' ex-wife from his final emoluments

27. The UNDT held that Mr. Fortis' application in this regard was irreceivable *ratione materiae*. The relevant administrative decision, in the view of the UNDT, was the payment of 7,000 Euros to Mr. Fortis' ex-wife. As Mr. Fortis was notified on 28 November 2016 that this payment had been made, the UNDT found that he should have requested management evaluation within 60 days from this date.

28. We agree, although for different reasons than those proffered by the UNDT, with the finding that Mr. Fortis' application was irreceivable *ratione materiae*. The relevant legal framework, i.e. Article 8 of the UNDT Statute and Staff Rule 11.2, reads as follows:

Article 8, UNDT Statute

1. An application shall be receivable if:

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

Staff Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

29. In our view, the relevant administrative decision was the e-mail dated 11 October 2016 by which the Organization informed Mr. Fortis that it would proceed with option 1. This option, as had been explained in detail to Mr. Fortis one day earlier by e-mail dated 10 October 2016, provided, *inter alia*, that the Organization pay 7,000 Euros to

Mr. Fortis' ex-wife and that this amount would be deducted from his final emoluments. Hence, the 11 October 2016 e-mail which informed him that the Organization would proceed with option 1 was a notification of the Organization's decision that 7,000 Euros would be paid to his ex-wife and that this sum would be deducted from his final emoluments. Consequently, the time limit to file a request for management evaluation started to run on 11 October 2016 and Mr. Fortis was thus required to file his request within 60 days from this date. As he filed his request for management evaluation only on 23 June 2017, he was clearly outside the time limit of Staff Rule 11.2(c) and his application was therefore not receivable *ratione materiae*.

30. We note, further, that by e-mail dated 11 October 2016, Mr. Fortis expressly accepted the payment of 7,000 Euros to his ex-wife; additionally, his counsel, after having been informed by letter dated 28 November 2016, that the payment had been processed, sent an e-mail on 29 November 2016 acknowledging that the amount of 7,000 Euros would be deducted from Mr. Fortis' final emoluments. It is clear that Mr. Fortis knew and had expressly accepted that the 7,000 Euros paid to his ex-wife would be deducted from his final emoluments.

Deduction of 2015 dependency benefits from Mr. Fortis' final emoluments

31. We find no error with the UNDT's holding that Mr. Fortis' application challenging the deduction of dependency benefits for 2015 was irreceivable *ratione materiae* and refer to the reasoning above: As the deduction of the 2015 dependency benefits was part of option 1, the 11 October 2016 e-mail notified Mr. Fortis not only that the Organization had decided to pay the sum of 7,000 Euros to Mr. Fortis' ex-wife but also that it would deduct the 2015 dependency benefits from his final emoluments. The fact that Mr. Fortis had expressly opposed such a deduction did not prevent the Organization from issuing an administrative decision to this effect. By e-mail dated 10 October 2016, the Organization explained option 1 to Mr. Fortis which contained the deduction of the 2015 dependency benefits from his final emoluments. The 11 October 2016 e-mail informing Mr. Fortis that the Organization would proceed with option 1 thus contained a notification that the 2015 dependency benefits would be deducted from Mr. Fortis' final emoluments, and Mr. Fortis should have filed a request for management evaluation within 60 days from that date.

Recovery of CHF 11,996.49

32. The UNDT did not err in holding that this part of the application was receivable but was without success on the merits. The Organization lawfully claimed the overpayment from Mr. Fortis. Under our consistent jurisprudence, the Administration has the right and duty to correct its own errors.¹

33. With regard to the recovery of overpayments, ST/AI/2009/1, in relevant parts, reads as follows:

Section 1: Definitions

The following definitions shall apply for the purposes of the present instruction:

(a) "Overpayments" are payments made by the Organization to a staff member in excess of his or her entitlements under the Staff Regulations and Rules and relevant administrative issuances. Overpayments may occur in conjunction with periodic payments (for example, salary, post adjustment, dependency allowance, rental subsidy and mobility, hardship and non-removal allowance) or settlement of claims (for example, education grant, tax reimbursement and travel expenses);

...

Section 2: General provisions

...

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.

Section 3: Amounts to be recovered

3.1 Overpayments shall normally be recovered in full. However, when the Controller determines that the overpayment resulted from an administrative error on

¹ *Kellie v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-875, para. 30.

the part of the Organization, and that the staff member was unaware or could not reasonably have been expected to be aware of the overpayment, recovery of the overpayment shall be limited to the amounts paid during the two-year period prior to the notification under section 2.3 of the present instruction, or to the advice under section 2.4 of the present instruction, if earlier. Such recovery could, if circumstances so warrant, be made in instalments as determined by the responsible officials referred to in section 2.2 above. Any overpayment in excess of the same entitlement that may be made after the date of such notification or advice shall be recovered in full.

34. In Mr. Fortis' case, the overpayment clearly resulted from an administrative error on the part of the Organization. Mr. Fortis neither caused or contributed to the overpayment nor was he aware of it. Consequently, in Mr. Fortis' favour, a recovery for overpayment is limited to the amounts paid during the two-year period prior to the notification under Section 2.3 of ST/AI/2009/1. However, this does not help Mr. Fortis because the overpayment happened on 18 November 2016 and thus within the two-year period prior to the notification of the overpayment which took place (at the latest) on 24 April 2017.

35. We deem it possible that the circumstances of the case warrant that Mr. Fortis be allowed to reimburse the overpayment in instalments under Section 3.1 of ST/AI/2009/1. However, as such a decision is discretionary and does not automatically follow from the administrative error committed by the Organization but would also require an examination of Mr. Fortis' financial situation and personal needs, the Appeals Tribunal is prevented from issuing an order to this effect. We strongly recommend that the Administration evaluate the situation and determine whether Mr. Fortis may pay back the overpayment in instalments and the amount of such instalments.

Judgment

36. The appeal is dismissed and Judgment No. UNDT/2019/053 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Sandhu

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar