



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/013

Judgment No.: UNDT/2011/214

Date: 19 December 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

RUIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Miouly Pongnon, UNON
Bibi Eng, UNEP

Introduction

1. The Applicant contests the decision dated 5 October 2010 whereby the Chief of the Staff Financial Services Unit, Accounts Section, United Nations Office at Nairobi (“UNON”), informed her that the overpayments in security benefits made to her during the period September 2002 to June 2010 would be recovered in full.

2. She also contests the decision that resulted in her salary being withheld, without any advance warning, for the month of July 2010, as well as the UNON Administration’s 12 October 2010 decision to recover USD2,805 per month from her salary in respect of the aforementioned overpayments, whereas a recovery amount of USD1,000 per month had previously been proposed.

Facts

3. In August 2002, the Applicant joined the United Nations Environment Programme in Nairobi as a legal officer at the P-4 level.

4. On 26 June 2008, she received, in addition to her salary, a security allowance of USD24,662.07. She also received a monthly residential security allowance of KES65,550. Starting in July 2008, she received monthly payments of USD360, identified on her payslip as a regular security allowance, and KES65,550, identified as a residential security allowance.

5. In November 2008, the Applicant was transferred from Nairobi to Geneva.

6. On 26 January 2009, the Applicant informed the UNON Administration of possible errors on her payslip, namely the monthly payments of USD360 and KES65,550 that she was still receiving in regular security allowance and residential security allowance, respectively.

7. On 27 January 2009, she was informed by the UNON Administration that the payment of the aforementioned allowances was stopped. In February 2009, USD2,335.47 was recovered from her salary for overpayments of the monthly

residential security allowance for the period November 2008 to January 2009. Although the monthly residential security allowance ceased to appear on her payslip as from March 2009, the regular security allowance continued.

8. On 14 July 2010, the UNON Administration informed the Applicant that USD6,918.62 in regular security allowance had been paid to her in error; the Applicant requested clarification.

9. The Applicant received no salary for the month of July 2010. Upon appeal, she received a salary advance.

10. On 15 September 2010, the Chief of the Staff Financial Services Unit, Accounts Section, UNON, informed the Applicant that the overpayment in security allowance amounted to USD33,988.26 and proposed to recover the amount in question at the rate of USD1,000 per month.

11. On 5 October 2010, the Chief of the Staff Financial Services Unit informed the Applicant that the amount of USD33,662, corresponding to overpayments in security benefits during the period September 2002 to June 2010, would be recovered in full.

12. On 12 October 2010, the Chief of the Staff Financial Services Unit informed the Applicant, *inter alia*, that the overpayment could not be recovered at the rate of USD1,000 per month because the maximum period for recovery of the full amount was 12 months; the overpayment would therefore be recovered through monthly deductions of USD2,805.17.

13. On 14 October 2010, the Applicant submitted a request for a management evaluation of the decision taken on 5 October 2010.

14. That same day, further to the Applicant's request, the Chief of the Staff Financial Services Unit agreed to recover the overpayment through monthly deductions of USD1,402.58 over a 24-month period.

15. On 2 December 2010, the Under-Secretary-General for Management confirmed the decision of 5 October 2010 in his response to the Applicant's request for a management evaluation.

16. The Applicant submitted her application to the Dispute Tribunal on 2 March 2011.

17. Further to a request by the Respondent, by Order No. 45 (GVA/2011) of 13 April 2011, the Tribunal extended the deadline for the Respondent to submit a reply to 12 May 2011.

18. On 12 May 2011, the Respondent submitted his reply. On 22 July 2011, the Applicant submitted additional observations and on 25 July 2011, the Respondent submitted additional comments.

19. By Order No. 215 (GVA/2011) of 13 December 2011, the Tribunal informed the parties that it considered an oral hearing unnecessary and provided them the opportunity to submit objections. The parties expressed their agreement.

Parties' contentions

20. The Applicant's contentions are:

a. Bearing in mind that the Tribunal should not have granted a time extension to the Respondent for the submission of his reply, she requests the Tribunal to apply article 10.1 of its Rules of Procedure and not to allow the Respondent to take part in the proceedings, including by dismissing his reply;

b. Contrary to the what the Respondent maintains, she requested a management evaluation of the decision to recover monthly instalments of USD2,805.17 from her salary. Her application is therefore receivable in that it contests that decision;

c. Paragraph 3.1 of administrative instruction ST/AI/2009/1 (Recovery of overpayments made to staff members) is applicable to her

situation and limits the Administration's ability to recover an overpayment to the two-year period prior to notification of the overpayment. The amount owed must be calculated at a rate of USD360 per month over 24 months, totalling USD8,640 since the date of notification, or the date on which she received the information from the UNON Administration, was 14 July 2010;

d. She was unaware and could not reasonably have been expected to be aware of the overpayment. The proof of her good faith lies in the fact that she herself informed the Administration of its error in January 2009;

e. Between 2002 and 2006, she had discussed security benefits extensively with the Administration; she was therefore not surprised to note the payment of USD24,662.07 on her June 2008 payslip. She believed that the amount in question was a retroactive payment of security allowance and that the Administration was merely correcting an error made prior to her transfer to Geneva;

f. The mode of recovery of the overpayment was unlawful. Among other issues, the fact that, in July 2010, her salary was withheld completely without prior warning, and that, upon appeal, she received only a salary advance, caused her much distress. Likewise, the fact that on 12 October 2010, the UNON Administration decided, without prior warning, to withhold USD2,805.17 per month from her salary whereas a recovery amount of USD1,000 per month had previously been proposed caused her moral damage;

g. She should not bear the full brunt of the mistakes committed by the Administration, which, moreover continued to occur; she received a statement of accounts receivable indicating an outstanding amount of USD765,592.52 in November 2010 and another statement indicating an outstanding amount of USD640,682.03 in January 2011.

21. The Respondent's contentions are:
- a. The application is not receivable in that the Applicant is contesting two decisions for which a management evaluation was not requested, namely, the decision to withhold her salary completely in July 2010 and the decision of 12 October 2010 relating to the monthly recovery of USD2,805.17 instead of USD1,000;
 - b. Paragraph 3.1 of administrative instruction ST/AI/2009/1 lays down the rules to be applied to the recovery of overpayments by the Administration resulting from an administrative error on the part of the Organization and, more specifically, the principle that overpayments are to be recovered in full, except where the staff member was unaware or could not reasonably have been expected to be aware of the overpayment. In that case, recovery of the overpayment shall be limited to the amounts paid during the two-year period prior to the notification;
 - c. The Applicant is not entitled to invoke this two-year limit since the considerable sum paid to her on 26 June 2008 in addition to her regular salary, which amounted to almost four times her monthly salary, must have alerted her to the unjustified nature of the payment. She cannot claim that she was unaware or could not reasonably have been aware of the overpayment since the payment of the regular security allowance had been stopped in May 2006 for staff members in Nairobi;
 - d. The Applicant failed to discharge her obligation to inform the Organization of the overpayment in accordance with paragraph 2.4 of administrative instruction ST/AI/2009/1. While the Applicant informed the Administration in January 2009 of a possible overpayment of benefits as from her transfer to Geneva in November 2008, she failed to mention the payment made in June 2008;
 - e. The Organization has not prescribed recovery period for overpayments. The decision rests within the discretion of the Secretary-General. Following a discussion with the Applicant, an agreement was

reached whereby the overpayments would be recovered over a 24-month period through monthly deductions equalling 10.5 per cent of her monthly salary. This was agreed with a view to minimizing the financial hardship of recovery for the Applicant.

Consideration

22. In her additional observations, the Applicant contests the Order of 13 April 2011 extending the deadline by which the Respondent could submit his reply to 12 May 2011. She requests the Tribunal to not allow the Respondent to take part in the proceedings, including by dismissing his reply. The Tribunal must reject this request as its Rules of Procedure provide that the judge hearing a case may extend such a time limit if deemed necessary.

23. The Respondent maintains that the application is not receivable in that it contests two decisions for which a management evaluation was not requested, namely, the decision to withhold the Applicant's salary completely in July 2010 and the decision of 12 October 2010 relating to the monthly recovery of USD2,805.17 instead of USD1,000.

24. With regard to the first decision, which resulted in the Applicant's receiving no salary for the month of July 2010, while it is clear from the request for management evaluation made on 14 October 2010 that the Applicant raised the issue, she did not formally contest this decision, the consequences of which, as she herself recognizes, were mitigated by a salary advance effected a few days later. Therefore, the Tribunal must reject the application insofar as it relates to this decision.

25. With regard to the second request, namely, the appeal of the decision by UNON to recover USD2,805.17 per month over a 12-month period, while, contrary to what the Respondent maintains, the Applicant is to be understood as contesting that decision in her request for management evaluation, it appears from the supporting documents that the Administration reversed its decision and reduced the monthly deductions to USD1,402.58 over a period of 24 months after

obtaining the Applicant's agreement. There is therefore no need for the Tribunal to rule on this matter.

26. It remains for the Tribunal to rule on the legality of the decision to recover in full the overpayments made to the Applicant as a result of errors made by the UNON Administration.

27. The Applicant, who does not contest the amount of the overpayments, merely claims that the Administration was entitled to recover only those overpayments made during the two years prior to 14 July 2010, the date on which she was notified of the errors resulting in overpayments to her. The Organization, on the other hand, as set out in the contested decision of 5 October 2010, seeks to recover the amount of USD33,662, which corresponds to the overpayments made during the period September 2002 to June 2010.

28. Paragraph 3.1 of administrative instruction ST/AI/2009/1 (Recovery of overpayments made to staff members) provides that:

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

29. It is clear that the overpayment in question resulted from an error by the Administration, which mistakenly paid the Applicant a security allowance related to her assignment in Nairobi. The Respondent, in support of his claim that the Applicant may not benefit from the aforementioned provisions limiting the Administration's ability to recover the overpayments to a two-year period, argues that as from June 2008, she could not have been unaware that the payment of USD24,662.07, which was in addition to her salary and was identified on her

payslip as “Security Allowance Regular”, was the result of an error by the Administration and was therefore an overpayment of which she should have informed the Administration immediately. The Applicant contends that she acted in good faith and that, given the changes in the rules on security allowances and the Administration’s difficulty in applying these rules, it was possible for her to believe that the payment was, in fact, an adjustment for amounts owed her.

30. The Tribunal considers that given amount of the overpayment, which amounted to almost four times the Applicant’s monthly salary, and given the Applicant’s qualifications as a legal officer at the P-4 level, she could not have been unaware that such a substantial payment could be the result of an error and that she should therefore inform the Organization of the anomaly immediately. Although the Applicant did inform the UNON Administration, on 26 January 2009, of possible errors on her payslip by stating that she was still receiving a security allowance despite having transferred to Geneva, she did not, on that date, inform the Administration of the previous payment in the amount of USD24,662.07.

31. Thus, the Applicant cannot seriously maintain that in June 2008, when she received the payment of USD24,662.07, she could not reasonably have been aware that that amount was unjustified, and she therefore cannot rely on the aforementioned provisions to argue that the Administration’s right to recover overpayments is limited to a two-year period.

Conclusion

32. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 19th day of December 2011

Entered in the Register on this 19th day of December 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry