



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/070

Judgment No.: UNDT/2015/007

Date: 28 January 2015

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TEN HAVE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Alexandre Tavadian, OSLA
Nicole Washienko, OSLA

Counsel for the Respondent:
Katya Melluish, UNON

The Application and Procedural History

1. At the time of this Application, the Applicant served as a Programme Officer in the Division of Environmental Law and Conventions (DELIC) at the United Nations Environment Programme (UNEP). She serves on a fixed-term appointment at the P4 level.
2. On 18 October 2013, the Applicant filed the present Application challenging the Respondent's decision to recover the Monthly Residential

8. On 24 June 2011, the Applicant submitted a fresh claim for MRSA on the online Lotus Notes application. She claimed the “Shared Security Portion” and not the cost of a monthly alarm and guards’ contract.

9. On 10 August 2011, SSS/UNON approved the Applicant’s claim for the Shared Security Portion, calculated at the rate of USD800 per month. This was calculated on the basis of the amount specified in the Applicant’s Lease Agreement. The approved amount of USD800 was indicated in the online Lotus Notes Application, a copy of which was shared with the Applicant.

10. From April 2011, the Applicant received the USD800 MRSA which she had claimed and continued to receive the monthly payment of KES40,000.

11. In December 2012, during the course of a review of another staff member’s rental subsidy application, it was discovered that some United Nations staff residing in RVE had been paid incorrect amounts of security allowance. As a result of this discovery, an analysis was undertaken of the payments made to all staff members living in the same compound.

12. In February 2013, the Applicant stopped receiving the KES40,000 KES.

13. On 16 April 2013, the Human Resource Management Service (HRMS) advised SSS/UNON of the overpayment. The Special Investigations Unit (SIU) of SSS/UNON initiated an investigation into the overpayments received by the Applicant and other staff members residing at RVE.

14. The terms of reference of the investigation were to:

Establish the categories of residential premises currently and previously occupied by [the Applicant], and their respective entitlements to Kenya MORSS;

25. The Respondent also submits that 60 calendar days must be calculated from 14 April 2013 and not 4 June 2013. That was when the Applicant was informed about the overpayments by Mr. Migire.

26. What the Applicant is challenging is the decision to recover the overpayment totalling KES800,000. That decision could not have been taken on 14 April 2013; the Respondent asked for an investigation into the matter on 16 April 2013, the report for which issued on 25 April 2013.

27. If the Respondent was so sure and clear about the overpayment there would have been no need for an investigation. The tenor of the email to the Applicant was not that of a final administrative decision. Rather Mr. Migire was informing the Applicant of overpayment and asking her whether she would consent to recovery. She was even asked to contact SSS/UNON and had a meeting with HRMS, following which she was informed of the decision to recover the amount overpaid.

28. Staff rule 11.2(c) on the timeline within which a staff member should submit a request reads:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty 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. (emphasis added)

29. Staff rule 11.2(d) on the timeline within which the Secretary General should provide a response to the staff member reads:

The Secretary-General's response, reflecting the outcome of the management evaluation, shall be communicated in writing to the staff member within thirty calendar days of receipt of the request for management evaluation if the staff member is stationed in New York, and within forty-five calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York. The deadline may be extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General. (emphasis added)

30. The Tribunal cannot understand the logic or rationale behind the two-pronged approach or rule in the computation of time as practised by MEU and as espoused in the email of Ms. Jennifer Yoo Joung Kim to counsel for the Applicant.

31.

40. While art. 8.3 of the Statute prohibits the Tribunal from waiving or suspending deadlines for management evaluation, it does not bind the Tribunal to findings of timelines made by MEU. A decision of MEU is therefore not binding on the Tribunal. The Tribunal will here refer to what it stated in *Unionedion* UNDT/2013/023:

The crux of the Respondent's ~~plea~~ ^{position} is that the provision of Article 8 (3) which enjoins the Tribunal from "suspend[ing] or waive[ing] the deadlines for management evaluation" necessarily means that a finding of receivability by the MEU as to timelines and limits binds the court. [...]

The submission by the Respondent that this finding by the MEU binds the Tribunal reflects an incorrect reading of the relevant provisions of the Statute and Rules of Procedure, and an incorrect understanding of the word 'deadline.'

Article 8 (3) of the Statute is ~~clear~~ ^{obscure}. It prohibits the Tribunal from waiving or suspending deadlines ~~for~~ ⁱⁿ management evaluation. It does not bind the Tribunal to findings of timelines made ~~by~~ ⁱⁿ management evaluation.

Put very simply, the Tribunal would be acting in excess of its jurisdiction if it allowed a litigant to seek management evaluation after the sixty (60) day deadline. It would also be exceeding its jurisdiction if it ordered the Management Evaluation Unit to

42. The Tribunal therefore holds that the matter is receivable *ratione temporis* and *ratione materiae*.

Merits

43. When the Applicant changed her residence in 2011, and moved to RVE, the Residential Security Survey dated 29 March 2011 clearly indicated that it was a shared compound. The MORSS of May 2009, as revised, provides that the MRSA is “only applicable to staff memb

through error, inadvertence or negligence. These repeated lapses place both the Organization and staff members in an invidious position and is not cost effective for proper administration or good governance.

55. There is no doubt that the Respondent's error in this case has caused the Applicant some stress as expressed by her on 26 June 2014.

56. Moral damages were not expressly pleaded *Manco* 2013-UNAT-342, the Applicant did not seek moral damages in his pleadings but made a statement at the hearing on it. The Appeals Tribunal confirmed the award of moral damages and observed:

While Mr. Manco only raised the claim for moral damages during the UNDT hearing, this case is a reiteration of *Valimaki-Erk* judgment in which the Appeals Tribunal awarded moral damages. There is no reason to depart from this precedent and the award of moral damages is affirmed.

57. In the case of *Valimaki-Erk* UNDT-2012-004, as confirmed by the Appeals Tribunal in 2012-UNAT-276, the Dispute Tribunal held that the unlawful requirement of requesting the Applicant, a citizen of Finland, to renounce her permanent residence status in Australia caused Ms. Valimaki-Erk "some moral injury" and "significant upheaval in her life", for which the UNDT awarded three months' net base salary.

58. It can reasonably be inferred from the tenor of the email that the Applicant sent to HRMS/UNON on 26 June 2014, that the Respondent's error caused significant concern about the predicament she would find herself in following the recovery of the overpayments that were made through no fault of hers.

59. In the circumstances, the Tribunal awards the Applicant with three months net base salary for the moral injury having been subject to an unnecessary investigation and the financial stress that resulted from the Respondent's error and negligence with the Organization's resources.

Conclusion

60.