



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

DAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Michel Boulianne, UN Women

Marina Lemos Pires, UN Women

Introduction

1. By application filed on 1 March 2022, the Applicant, a former staff member of the United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”), contests the decision to recover the overpayment of 60 annual leave days upon his second separation from the Organization.

Facts and procedural history

2. On 29 September 2016, a day after having separated from the United Nations Development Programme (“UNDP”), the Applicant joined UN Women, Dhaka, as Programme Specialist (NOC) on a fixed-term appointment.

3. In November 2016, the Applicant received from UNDP a lump-sum payment equivalent to 60 annual leave days that he had accrued while employed at UNDP.

4. In March 2021, the Applicant informed his then supervisor, the Country Representative (“CR”), Bangladesh, by phone that he had received an external job offer and would be accepting it. According to the Respondent, during the conversation, the Applicant and the CR discussed the handover of tasks, and she “asked him to consider not taking all his accrued leave days before separating due to operational needs. [The CR] mentioned that fixed-term staff members generally had the option to be paid the accrued annual leave up to 60 days at the end of the employment”.

5. Noting that his last working day would be 31 May 2021, the Applicant submitted his formal resignation from UN Women on 31 March 2021 when he had an annual leave balance of 78 days.

6. On 24 May 2021, UNDP’s Global Shared Service Unit (“GSSU”), which administers the payroll of UN Women personnel, notified a Human Resources (“HR”) Associate, UN Women, that they had wrongly processed the commutation payment of 60 accrued leave days in the Applicant’s next payroll. Thus, the GSSU requested UN Women to liaise with the Applicant to recover the overpayment.

7. On the same day, the HR Associate, UN Women, informed the Applicant that although GSSU had processed a lumpsum payment equivalent to 60 accrued annual leave days in his May 2021 pay slip, his leave balance could not be converted to cash in view of staff rule 4.17. Accordingly, the HR Associate sought the Applicant's cooperation to return the lumpsum amount once received.

8. The Applicant's pay slip dated 25 May 2021 indicated the payment of a lumpsum equivalent to 60 accumulated annual leave days, that is, the gross amount of BDT2,799,399.31 minus its related staff assessment deduction of BDT735,503.91.

9. By email dated 26 May 2021, the Applicant informed the HR Associate, UN Women, that he had received the May 2021 pay slip and was waiting to hear from GSSU on his request for a discussion. He also flagged a difference between the gross and net amounts of the annual leave commutation and stated that an eventual recovery should be based on the net figure.

10. On 31 May 2021, the Applicant was separated from UN Women.

11. By email dated 29 June 2021, following informal discussions between the Applicant, GSSU, and UN Women, the GSSU informed the Applicant, *inter alia*, that:

UNDP and UNFPA are obliged to follow UN Staff Rule 4.17 and monitor separations for staff movement across UN Agencies. As [you] were previously paid 60 days without a break in service between your UN Agency assignments, the payment of another 60 days is not permissible. UNDP GSSU have escalated your concern to UN Women HQ and UN Women regional office and the decision is provided below. We did raise your concern that you were not sufficiently informed or aware of the provisions of this rule, there remains no provision to make exceptions on this basis.

The overpayment is subject to recovery in accordance with ST/AI/2009/1

If the amounts are not recovered now, they would remain on staff member's records and likely recovered when/if he/she is selected for another UN position in the future.

12. On the same day, the Applicant replied claiming, *inter alia*, that some of his earlier arguments had not been addressed, including: (i) the fact that there was no agreement between UNDP and UN Women providing for the transfer of accrued leave between each other at the time of his separation from UNDP in 2016, (ii) some alleged ambiguities in staff rule 4.17, and (iii) that the net amount of the overpayment should be recovered.

13. Further to an internal discussion, by letter of 12 August 2021, notification of which was received by the Applicant on 13 August 2021, the HR Director, UN Women, informed the Applicant that:

On 13 May 2021, UNDP processed your resignation and included in the May payroll a lumpsum payment for 60 days of accumulated annual leave. After the deposit of the payment, it came to UNDP's attention that in September 2016 as part of a previous separation from when you worked with UNDP in the past, you had already been paid for 60 days of annual leave. Subsequently, on 28 June 2021 (notice attached) you were notified of the error and advised that the payment was subject to recover in accordance with ST/AI/2009/1 (Recovery of overpayments made to staff member), a copy of which is enclosed.

All appointments of UN Women staff members are subject to the United Nations Staff Regulations and Rules. In signing your letter of appointment with UN Women you expressly accepted that your appointment with UN Women was subject to the United Nations Staff Regulations and Rules. In accordance with United Nations Staff Rule 4.17(c), when a staff member receives a new appointment in the United Nations common system of salaries and allowances less than 12 months after separating from another organization in the United Nations common system, the amount of any payments at the time of the subsequent separation, when added to the number of days paid for prior periods of service, does not exceed the total of months, weeks or days that would have been paid had the service been continuous. In this regard, and in considering that Staff Rule 9.9 limits commutation of a maximum of 60 annual leave days, you were entitled to one payment equating to 60 annual leave days, not two.

Furthermore, in accordance with paragraph 3.1 of ST/AI/2009/1, UN Women must take action to recover the overpayment, determined to be: BDT 2,799,399.31. Accordingly, please make arrangements for settlement of this account, which will enable the organization to process your final separation.

14. On 18 August 2021, the Applicant responded to the letter of 12 August 2021, repeating his previously made arguments, and attaching supporting documentation.

15. By letter of 1 October 2021, notification of which was received by the Applicant on 2 October 2021, the HR Director, UN Women, informed the Applicant that:

While we acknowledge the various supporting communication you shared in your email of 18 August 2021, regretfully in accordance with ST/AI/2009/1, the organization is obligated to recover the overpayment, including those resulting from an administrative error.

As explained in my letter to you dated 12 August 2021, all staff appointments are subject to the United Nations Staff Regulations and Rules and in signing your letter of appointment with UN Women you expressly accepted that your appointment with UN Women was subject to the United Nations Staff Regulations and Rules.

Since the terms of your hire by UN Women was as a “Rehire” following your resignation with UNDP, carry over of seniority or accumulated entitlements was not possible.

We hope that you find it advantageous to honour the Letter of Appointment you signed with UN Women and make necessary arrangement to return the net overpayment, determined to be: BDT2,063,895.00.

16. There is no record that the Applicant returned the alleged overpayment. On 5 November 2021, the Applicant requested management evaluation concerning the “Administration’s continued failure to compensate [him] for the loss [he] suffered for detrimentally relying on their utterance with regard to the payment of [his] annual leave”.

17. By letter dated 15 December 2021, UN Women responded to said request by informing the Applicant that the request related to the administrative decision to recover the funds paid to him in error was not receivable as it was time-barred.

18. On 1 March 2022, the Applicant filed the application mentioned in para. 1 above.

19. On 31 March 2022, the Respondent filed his reply.

20. By Order No. 16 (GVA/2023) of 6 March 2023, the Tribunal informed the parties that it deemed to be fully informed on the matter and, consequently, it was ready to adjudicate the matter on papers and would be moving forward with its judgment.

Consideration

21. Having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the application is receivable;
- b. Whether the contested decision is lawful; and
- c. Whether the Applicant is entitled to any remedies.

22. The Tribunal will address below these issues in turn.

Whether the application is receivable

23. The Respondent submits that the application is not receivable *ratione materiae* because the Applicant's request for management evaluation of the contested decision was time-barred. Specifically, he argues that the Applicant was notified of the contested decision, at the latest, on 13 August 2021 but he only submitted a request for management evaluation on 5 November 2021, namely more than three weeks after the statutory 60-day deadline. The Respondent further argues that the decision of 1 October 2021 did not constitute a new administrative decision as it merely reiterated earlier notifications.

24. On the contrary, the Applicant claims that the decision of 12 August 2021 was not final as there was an indication that the decision would be reviewed.

25. The Tribunal recalls that it is well-settled law that it has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in

determining the contested or impugned decisions to be reviewed” (see, e.g., *Fasanella* 2017-UNAT-765, para. 20; *Cardwell* 2018-UNAT-876, para. 23).

26. Moreover, “[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine” (see, e.g., *Kerby* 2020-UNAT-1064, para. 37).

27. Having reviewed the application in its entirety, the Tribunal notes that the Applicant identified the decision of 1 October 2021 as the final administrative decision, and that in his request for management evaluation he explicitly listed the decision of 1 October 2021 as the decision to be evaluated.

28. The Tribunal is further not convinced by the Respondent’s submission that the decision of 12 August 2021 is final, thus making the Applicant’s request for management evaluation time-barred.

29. Indeed, the 1 October 2021 decision contains not only new arguments but also refers to a different amount of overpayment to be recovered. The Tribunal fails to understand how a decision to recover an overpayment of BDT2,063,895.00 could have constituted a mere reiteration of the decision of 12 August 2021 to recover an overpayment of BDT2,799,399.31. Noting the difference in the fundamental element of the decisions, i.e., the amount of the overpayment to be recovered, the Tribunal cannot but conclude that the decision of 1 October 2021 constitutes a new administrative decision.

30. Staff Rule 11.2(c) provides that “[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”.

31. Considering that the Applicant received the notification of the contested decision on 2 October 2021 and noting that the Applicant filed his request for a management evaluation of the contested decision on 5 November 2021, the Tribunal concludes that the application is receivable. As such, it will proceed to examine the merits of the case.

Whether the contested decision is lawful

32. The Applicant submits that the contested decision denies his right to entitlements and allowances and his right to remedy following an administrative error. In particular, he argues that he relied on his then supervisor's directions when opting not to use his accrued 60 annual leave days.

33. The Respondent submits that the decision was lawfully made to recover an overpayment of 60 annual leave days by UN Women resulting from an administrative error. Specifically, he argues that the Applicant was "paid 60 accrued annual leave days upon his separation from UNDP in 2016" and, thus, upon his separation from UN Women in 2021, the Applicant was not entitled to any additional payment of accrued annual leave pursuant to staff rules 4.17(c) and 9.9. In his view, staff rule 4.17(c) provides that, when staff members receive a new appointment less than 12 months after separating from another UN entity, the amount of annual leave commutation payment at the subsequent separation, when added to the amount paid for prior periods of UN service, must not exceed what would have been paid had the service been continuous.

34. Accordingly, in determining whether the contested decision is lawful, the Tribunal will address the two issues below in turn:

- a. Whether the Applicant is entitled to a commutation payment of 60 annual leave days under staff rules 4.17(c) and 9.9 in respect of his second separation from service from the Organization; and
- b. Whether the Applicant has a legitimate expectation of receiving another commutation payment of annual leave 60 days.

Whether the Applicant is entitled to a commutation payment of 60 annual leave days under staff rules 4.17(c) and 9.9 in respect of his second separation from service from the Organization

35. The Tribunal notes that upon separation from UNDP in 2016, the Applicant received a new fixed-term appointment from UN Women. As such, he was re-employed, not reinstated. There is no evidence showing that he ever requested to be reinstated upon his new appointment.

36. In this respect, the Tribunal notes that staff rule 4.17, titled “Re-employment”, provides in its relevant part that:

(a) A former staff member who is re-employed under conditions established by the Secretary-General shall be given a new appointment unless he or she is reinstated under staff rule 4.18.

...

(c) When a staff member receives a new appointment in the United Nations common system of salaries and allowances **less than 12 months after separation**, the amount of any payment on account of termination indemnity, repatriation grant or **commutation of accrued annual leave** shall be adjusted so that the number of months, weeks or days of salary to be paid at the time of the separation after the new appointment, when added to the number of months, weeks or days paid for **prior periods of service, does not exceed the total of months, weeks or days** that would have been paid **had the service been continuous**. (Emphasis added)

37. It follows from the wording of the above rule that the Applicant, who received a new appointment less than 12 months after his first separation from service in an organization that is part of the United Nations common system, must be considered, in respect of his entitlement to a commutation payment, as if he had been employed continuously.

38. Turning to the computation of accrued annual leave, staff rule 9.9, titled “Commutation of accrued annual leave”, provides in its relevant part that:

(a) If, upon separation from service a staff member has accrued annual leave, he or she shall be paid a sum of money in commutation of the period of such accrued leave up to a maximum of 18 working days for staff holding a temporary appointment and up to a maximum of 60 working days for staff holding a fixed-term or continuing appointment, in accordance with staff rules 4.17 (c), 4.18 and 5.1. The payment shall be calculated:

(i) For staff in the Professional and higher categories, on the basis of the staff member’s net base salary plus post adjustment[.]

39. The Tribunal is of the view that the purpose of staff rules 4.17(c) and 9.9 is to avoid financial prejudice to the Organization by fictionalizing a continuous employment relationship when a staff member receives another appointment in the UN common system within 12 months of separation from service.

40. In application of staff rule 9.9 cited above, the Applicant's entitlement to a commutation payment is limited to 60 annual leave days for the entire period from his initial appointment with the Organization. The evidence on record shows that in November 2016, the Applicant was paid 60 accrued annual leave days upon his separation from UNDP.

41. Accordingly, the Tribunal finds that upon his separation from UN Women in 2021, the Applicant was not entitled to any additional payment of accrued annual leave pursuant to staff rules 4.17(c) and 9.9.

Whether the Applicant has a legitimate expectation of receiving another commutation payment of annual leave 60 days

42. It is well-established jurisprudence that legitimate expectations may result in the creation of an enforceable legal right (see, e.g., *Popkins* UNDT/2021/072, para. 40; *Candusso* UNDT/2013/090, para. 39; *Sina* UNDT/2010/060, para. 35). Specifically, in *Nwuke* UNDT/2013/157, the Tribunal made it clear that “[t]he doctrine of legitimate expectation applies to administrative decisions” and held, at para. 167, that:

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past Practice.

43. Accordingly, giving a staff member a legitimate expectation may be a good reason for the Tribunal to interfere with the Administration's failure to act accordingly on the grounds of unfairness and unjust dealing with the staff member (see, e.g., *Ahmed* 2011-UNAT-153, para. 46).

44. In this respect, the Tribunal notes that in the context of employment law, “[a] legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation and that the other party does so” (see *Sina* UNDT/2010/060, para. 35, affirmed in *Sina* 2010-UNAT-094).

45. In the present case, the Applicant contends that his then supervisor informed him that his resignation from UN Women would only be accepted on the conditions that “there should be at least a two-month notice period and no leave should be planned during this two-month notice period.” Noting that the Applicant had totalled 78 annual leave days in March 2021, his then supervisor also informed him that encashment of his maximum 60 annual leave days would be done at the time of his departure.

46. The Tribunal notes that the Respondent did not explicitly dispute the Applicant’s above-mentioned contention but rather admitted in his reply that, in March 2021, the Applicant’s then supervisor “asked him to consider not taking all his accrued leave days before separating due to operational needs” and mentioned that “fixed-term staff members generally had the option to be paid the accrued annual leave up to 60 days at the end of the employment”.

47. It is relevant to note that the Applicant’s supervisor has the authority to approve or deny annual leave requests. Indeed, staff rule 5.1, titled “Annual leave”, provides in its relevant part that:

(d) A staff member who holds a fixed-term or a continuing appointment may accumulate and carry forward up to 60 working days of annual leave by 1 April of any year or such other date as the Secretary-General may set for a duty station.

(e) (i) Annual leave may be taken in units of days or half-days;

(ii) Leave may be taken only when authorized.

48. Considering the circumstances of the case, the Tribunal cannot but conclude that a legitimate expectation of receiving a commutation payment for 60 days of annual leave following his second separation from service from the Organization was created by virtue of the Applicant's supervisor's representation.

49. Moreover, the Applicant's supervisor was acting on behalf of the Administration. As such, her representation binds the Organization in line with the principle of good faith. In this respect, the Tribunal recalls that "the Administration has a general duty to act fairly, justly and transparently in its dealing with its staff members" (see *Obedijn* 2012- UNAT-201, para. 33).

50. Accordingly, the Tribunal finds that the Applicant's legitimate expectation of receiving another commutation payment of annual leave 60 days exceptionally justify a payment that he might not have been entitled to under the Staff Regulations and Rules.

51. In light of the above, the Tribunal finds that the decision to recover the overpayment of 60 annual leave days upon the Applicant's second separation from the Organization is unlawful.

Whether the Applicant is entitled to any remedies

52. In his application, the Applicant requested "full compensation for [his] rightly earned [annual leave] days" and/or "any other suitable compensation that would ease some of [his] suffering" caused by the contested decision.

53. The Tribunal recalls that art. 10.5(a) of its Statute provides as follows:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph[.]

54. Having found that the contested decision is unlawful, the Tribunal is of the view that there has been a miscarriage of justice in the present case. As such, the contested decision must be rescinded.

55. Turning to the Applicant's claim for moral damages, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. Nothing that the Applicant did not provide any evidence to support his allegations that he suffered moral damages as a direct result of any such alleged breaches, the Tribunal does not consider that any compensation for harm should be paid to the Applicant as a remedy.

Conclusion

56. In view of the foregoing, the Tribunal DECIDES that:

- a. The application is receivable;
- b. The contested decision is unlawful and is hereby rescinded; and
- c. All other claims are rejected.

(Signed)

Judge Teresa Bravo

Dated this 21st day of April 2023

Entered in the Register on this 21st day of April 2023

(Signed)

René M. Vargas M., Registrar, Geneva