



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

Judgment No. 2019-UNAT-968



**Fortis
(Appellant)**

v.

Secretary-General of the United Nations

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

JUDGE SABINE KNIERIM, PRESIDING.

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 Nation

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

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

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

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

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 th -1.72b21.0445 Tw[is' ex that)5.10(e

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.

Judgment

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