

Judge Vinod Boolell

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Introduction and Procedural History

1. The Applicant entered into service of the United Nations in May 2006 under the 300-series limited-duration appointments. On 1 July 2009, he was reappointed on a fixed-term appointment. At the time of the Application, he was a Resident Investigator at the P-3 step 11 level with the United Nations Mission in South Sudan (UNMISS) in Juba.

2. The Applicant is challenging the decision made by the Office of Human Resources Management (OHRM) on 18 June 2012 to recover previously paid dependency benefits for the years 2009, 2010 and 2011 (impugned decision).

3. The Application was filed on 14 December 2012. The Respondent's Reply was filed on 5 February 2013.

4. On 1 October 2013, the Parties attended a Case Management Hearing in which they addressed the court on the completeness of the file and their readiness for the matter to be set down for hearing.

5. On 18 October 2013, the Tribunal issued Order No. 226 (NBI/2013) for further management of this case. Parties were asked to state their respective positions on the need for an oral hearing in this matter.

6. The Parties responded to Order No. 226 on 22 October 2013. The Applicant requested that an oral hearing be held and indicated that his mother would testify as to receipt of the disputed payments.

7. The Respondent submitted that this matter could be decided on the papers, and that the testimony of the Applicant's mother was irrelevant given that "payments to third parties" are not acceptable proof of child support.

18 June 2010. OHRM also informed the Applicant that, in case he is “unable to provide sufficient documentary evidence of financial support for D1 [...], OHRM is obligated to [...] discontinue the dependency benefit [...]. This will result in a recovery of the dependency benefits paid to [him]”.¹

15. In order to be entitled to dependency benefits, the Applicant had to submit proof of financial support as follows: a) From 1 July to 31 December 2009: USD 3,623.365 (half of the annual dependency benefits); b) For 2010: USD7479.96; and c) For 2011: USD7647.91.

16. On 12 June 2010, the Applicant submitted bank statements to OHRM showing payments made to the custodial parent’s landlord and to the custodial parent for his daughters.²

17. On 30 September 2010, OHRM asked the Applicant for consolidated bank statements as proof of child support payments; the previously submitted documents were insufficient in this regard.³

18. In March 2012, the Applicant requested additional dependency benefits for his second daughter, D2.

19. On 13 March 2012, OHRM noted that the Applicant had not yet provided documentary evidence demonstrating main and continuous payment of child support to the custodial parent to justify him receiving dependency benefits for D1. OHRM rejected the Applicant’s request for additional dependency benefits for D2. OHRM advised the Applicant that “it is the Organization’s policy that proof of support can only be deemed acceptable if made to the custodial parent” and not to third parties.⁴

¹ Annex R1

² Annex R1.

³ Annex R2.

⁴ Annex R3.

20. On 20 March 2012, OHRM notified the Applicant that he had failed to demonstrate that he had paid the required amount of child support to the custodial parent and was therefore receiving dependency benefits for D1 for which he did not qualify.⁵

21. On 8 May 2012, OHRM notified the Applicant of its decision to recover payments made as of 1 July 2009 onwards pursuant to ST/IC/2009/24.⁶

22. On 11 May 2012, OHRM agreed to reassess the amount of child support payments made for the benefit of D1. Although OHRM exceptionally agreed to include the payments the Applicant had made for rent to the custodial parent's landlord, it also concluded that the Applicant's payments remained below the threshold required to qualify for dependency benefits.⁷

23. On 18 June 2012, OHRM informed the Applicant that it had concluded its final review and that it was going to recover overpayments for the period 2009-2011. The Applicant was also informed that, effective 1 January 2012, he would be paid dependency benefits in respect of his daughters based on the proof of the main and continuous support he provided during the year 2012.⁸

24. On 17 August 2012, the Applicant sought management evaluation of OHRM's decision to recover payments made to him for the years 2009-2011. In the management evaluation letter dated 1 October 2012, the Under-Secretary-General for Management accepted the recommendation of the Management Evaluation Unit (MEU), which concluded that the contested decision was in compliance with the

25. On 14 December 2012, the Applicant filed the present Application before the Dispute Tribunal.

26. The Respondent asserts that the Applicant has provided the Tribunal with additional documentary evidence of bank transfers to the custodial parent and her landlord, which was not previously provided to OHRM. Following this disclosure, the Respondent concedes that the Applicant met the requirement for salary at the dependent rate for the period 1 July - 31 December 2009.

SUBMISSIONS

Applicant

27. The legal issues in this matter arise because the divorce decree does not stipulate the amounts that needed to be paid and because some of those payments were not made to either the custodial parent or the ultimate beneficiary. Instead, payments were variously made to the custodial parent, her landlord and the Applicant's mother. The Respondent has accepted the payments made to the custodial parent and payments made to the landlord.¹⁰ The only issue is the payments made to the Applicant's mother for the purposes of covering some of D1's expenses.

28. The Respondent's principal claim of being required to reject the Applicant's proof of dependency payments *per* ST/IC/2009/24 is problematic.

29. First, ST/IC/2009/24 is entitled "Review of staff claims for dependency benefits for 2006, 2007 and 2008" which indicates that it must not apply to other years. A different Information Circular, ST/IC/2013/3, on the Review of Staff Claims for Dependency Benefits for 2009, 2010 and 2011 addresses claims pertaining to those years. Counsel for the Respondent conceded that this circular does not apply either; it had not even been introduced at the time of the contested decision.

¹⁰ Parties' Joint Submission and Annex A thereto.

36. Staff rule 3.6 and ST/AI/2011/5 on Dependency Status and Dependency Benefits do not require the Respondent to disregard the Applicant's proof of dependency payments.

37. A rule that requires a staff member to prove *how* they are spending money on their children, regardless of agreements or orders made under local laws, is grossly intrusive and unreasonable. A rule that requires such proof only in respect of the non-traditional family is discriminatory. The Respondent's response is also punitive: a staff member who can prove payment of the full dependency amount less \$1 will lose approximately \$7500 in benefits.

38. To the extent that the Respondent argues that the impugned decision was discretionary, that discretion must be exercised reasonably and based upon a correct understanding of the facts. On the present facts, it must be said that the decision was not reasonable.

39. Secondly, the Respondent has been inconsistent. It accepted payments made to the custodial parent and her landlord. It will be noted that this was not a compromise, as the Respondent has not reimbursed dependency payments up to the levels of the Applicant's accepted payments. Instead, the Respondent has maintained its position that unless the *full* amount is proven to their satisfaction, it will pay nothing.

40. Thirdly, apart from the subject matter of the payments, it was and is unreasonable for the Respondent to reject the extent of the proof of the payments. The evidence is compelling and consistent: two spousal affidavits, dozens of pages of financial records with contemporaneous notes and sworn evidence of the Applicant and his mother.

41. The evidence plausibly explains that the Applicant transferred money to other parties directly: divorced parties do not always agree and it is not unusual for third

parties to sometimes become involved. In this case, the third parties are the landlord and D1's grandmother.

42. Having conceded the facts in this case, the Respondent cannot maintain the argument of insufficient proof. Nor can the Respondent properly argue that it would have made this concession earlier, but for the "insufficient information." The Respondent has always been on notice of the Applicant's contentions regarding how the money was spent.

43. Any discretion exercised to deny dependency benefits by ignoring payments made through the Applicant's mother is unreasonable and unlawful.

Respondent

44. OHRM's decision to recover dependency benefits paid to the Applicant for the years 2010 and 2011 is lawful. Staff rule 3.6 and ST/IC/2009/24 in effect at the time of the recovery required the Applicant to provide documentation to show main and continuous support for his daughter for the years in question in the amount of any court-ordered child support or the amount of the dependency benefits he received, whichever is higher. The circular specifies that acceptable proof was cancelled cheques, money-order receipts, wire-transfer receipts and original records of bank transactions.

45. Neither the staff rules nor ST/IC/2009/24 provide for payment of support to anyone other than the custodial parent, who is party to the divorce and/or support agreement. The Applicant was informed that payments to third parties are not acceptable. Such payments were not considered "satisfactory to the Secretary-General" as provided in Staff rule 3.6(a)(iv) and under the Information Circular.

the amount of the child dependency benefit, whichever is higher. In the absence of a court document, a notarized affidavit from the custodial parent must be provided attesting that the staff member provided continuing support and specifying the amounts paid during 2006, 2007 and 2008, along with the proof of payment described in the previous paragraph.

49. In applying the above provisions to the present case, the Applicant is required to provide proof of support in the amount of US\$7,479.96 for 2010 and US\$7,647.91 for 2011 in order to be entitled to dependency benefits. These amounts represent the difference in salary between the single and dependency rate; the rationale being that the salary paid at the dependency rate should be used to support a staff member's dependent spouse and/or children.

50. The total amount of support provided by the Applicant was lower than the

to receive dependency benefits. This is to ensure that the additional salary paid at the dependency rate is used for its intended purpose.

53. The Applicant's contention that the policy to only recognise payments made to the custodial parent or the dependent child as child support payments is without merit. A staff member can only challenge an administrative decision under Staff Rule 11.2, not the underlying policy.

54. The Applicant has failed to show that the application of the policy to his case was improperly motivated and unfair when compared to other staff members. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation.

55. All staff members who are non-custodial parents are required to submit the same documentation to receive dependency benefits. The Applicant knew what was required of him. OHRM exceptionally recognised the payments made by the Applicant to the custodial parent's landlord, given the wording of the divorce decree. The same exception could not be made in respect of payments made to his mother. Payments to third parties, who are under no legal obligation to care for the dependent child, are insufficient evidence of payment of main and continuous support.

56. The recovery of previously paid dependency benefits for 2009-2011 is lawful. Under section 3.1 of ST/AI/2009/1 (Recovery of Overpayments Made to Staff Members), overpayments shall normally be recovered in full. The Applicant's contention that the recovery should be limited to the two-year period prior to the notification of the overpayment pursuant to section 3.1 of ST/AI/2009/1 is incorrect. Section 3.2(b) stipulates that the two-year limitation shall not apply when the facts indicate that an overpayment was due to the submission of erroneous, fraudulent or incomplete information by the staff member.

57. On 30 September 2010, OHRM requested the Applicant to provide consolidated bank statements showing proof of support, as the previously submitted documents were insufficient. The Applicant submitted incomplete information to OHRM in 2010, which resulted in overpayments of dependency benefits made to him. Had the Applicant complied with OHRM's request at that time, such overpayments would not have occurred. Therefore, the two-year limitation under section 3.2 of ST/AI/2009/1 does not apply to the Applicant. Accordingly, the contested decision is lawful and the overpayments made to the Applicant should be recovered in full.

DELIBERATIONS

58. The Applicant married the custodial parent in 1993. They divorced in 2007 as evidenced by a certified copy of a court document dated 8 December 2007. Two girls were born from this wedlock, D1 and D2. Custody of the two children was entrusted to the mother.

59. The Applicant submitted a number of documents to establish that he had transferred money to his ex-wife directly. This is corroborated by two declarations which are in the nature of affidavits from his ex-wife. Some payments of the rent were made directly to the landlord or money was sent to the Applicant's mother for the same purpose. This had to be done as very often there was a conflict between the landlord and his ex-wife. He also transferred money to his mother to pay for school fees, private tuition and for other expenses on behalf of the girls.

60. The Applicant also submitted documents showing wire transfers to his mother. He explained that the purpose of the transfer was written on the transfers. These were "Payment for the rent of my daughters' flat"; "Payment for the private lessons of my two daughters D1 and D2"; "payment for the clothes of my daughters D1 and D2"; Payment for my mother to pay my ex-wife for my two daughters"; "Payment of D2's glasses"; "Payment of my daughters' school fees." He explained

that the money for the school fees and private tuition was sent to his mother as she accompanied the girls to the school or to the teacher for private tuition.

61. The Applicant's mother did not testify. She is Arabic speaking and the court could not provide interpretation services to allow for oral testimony. *In lieu*

each year”¹³. (That last requirement was added in the Staff Rules and Regulations in 2011).

- (b) Staff members shall be responsible for notifying the Secretary-General in writing of claims for dependency allowance and may be required to support such claims by documentary evidence satisfactory to the Secretary-General. Staff members shall be responsible for reporting to the Secretary-General any change in the status of a dependent that may affect the payment of this allowance”¹⁴.

- (c) The requirements of the documentation are articulated in Information Circular ST/IC/2009/24 as amended by Information Circular ST/IC/2013/3. As the Applicant is a non-custodial parent he had to submit the following: “The original or certified copy of the divorce decree or other court document specifying the amount of child support to be paid by the staff member, plus proof of payment in the year concerned in the form of original cancelled cheques, money order or wire-transfer receipt or records of bank transactions. The amount of payment should be at least the amount of the court-ordered child support, or the amount of the child dependency benefit, whichever is higher. In the absence of a court document, a notarized affidavit from the custodial parent must be provided attesting that the staff member provided continuing support and specifying the amounts paid during 2006, 2007 and 2008, along with the proof of payment described in the previous paragraph.

¹³ Staff Rule 3.4(e)

¹⁴ Staff Rule 3.6(d)

65. In computing the threshold for the payment of dependency benefits, the

extraneous reasons but only in furtherance of the institution's interest.

73. The Respondent rejected the evidence of proof of payment made to the Applicant's mother by wire transfer based on an unknown policy. The Applicant was informed that it is not the policy of the Organization to accept proof of payment unless made to the custodial parent. The Respondent is and should be guided by the Rules and Regulations, Administrative Issuances, Information Circulars of the

that the staff member is providing continued support would be sufficient. That latter proof is required to calculate the amount of dependency benefits as that amount would depend on the amount agreed on following the divorce decree.

75. The Respondent relied on a policy that does not accept payment to a non-custodial parent to exclude the computation of the amounts sent to the mother of the Applicant. Yet the Respondent went back on that policy and showed flexibility in accepting transfers made directly to the landlord of the flat occupied by the ex-wife and the daughters of the Applicant. Therein lies the danger of relying on policy. The Tribunal takes the view that the Respondent wrongly and unjustifiably reDf

(signed)

Judge Vinod Boolell

Dated this 17th day of November 2014

Entered in the Register on this 17th day of November 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi