
Case No.: UNDT/NY/2011/059

Judgment No.: UNDT/2012/197

Date: 11 December 2012



4. On 13 January 2011, Judge Kaman, issued *Tolstopiatov* UNDT/2011/012 on compensation. One of the issues before Her Honour, was the Applicant's contention regarding the way in which the Respondent determined the status of his contributions to the UNJSPF. In particular, the Applicant was challenging the Respondent's understanding that an overpayment had been made and that contributions to the UNJSPF made by the Respondent were to be reimbursed. In the circumstances, the delay in releasing the PF4 form was due to the fact that the Applicant was contesting the very matter which affected the data to be supplied to the UNJSPF regarding the contributions record. The issue was adjudicated upon in UNDT/2011/012 and the Tribunal found, at para. 81:

Given the clear terms of the Applicant's termination indemnity package following abolishment of his post with UNICEF, as outlined in the 23 July 2007 letter, the Applicant could reasonably have been expected to be aware of the overpayment to him and yet the Applicant did not make any attempt to notify UNICEF of the error or to rectify the situation. Principles of equitable estoppel apply in this instance to bar the Applicant from arguing that he is not liable for the overpayments made to him by UNICEF.

5. The Applicant was ordered to reimburse such overpayment and accordingly the sum of USD 199,255.86 was deducted from the compensation award. This included the moneys paid to the UNJSPF as well as pension contributions by the Respondent.

6. On 23 March 2011, the Applicant requested management evaluation of the following administrative decisions:

- a. "UNICEF's continued failure to submit the separation notification PF4 form to the UNSJPF";
- b. "UNICEF's decision not to forward the Applicant's payments (contributions) to the Pension Fund, until early retirement age, or accept same".

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Human Resources Manual, including his right to be accommodated for early separation (para. 18.2.16(e) of Chapter 18) and his right to be granted early separation by a special leave arrangement at the end of the notice period to bridge him to early retirement (para. 18.4.6(e) of Chapter 18).

11. The Applicant further contends that, on 30 March 2011, he became aware of the shortfall in the full amount of interest payment due on the compensation awarded in UNDT/2011/012.

12. The remedies, which the Applicant is seeking, are as follows:

a. USD61,884.66, being the equivalent or of 14 months pension payments, as compensation for the enforced hardship in consequence of the Respondent's actions and/or omissions which deprived him of income for the period from March 2010 to May 2011;

b. USD30,000 for UNICEF 's intentional failure to comply with the Human Resources Manual concerning the retirement rights of staff members on abolished posts;

c. USD265.45 as shortfall in the interest due on the Dispute Tribunal's award from 19 July 2011 to the date of payment at the overall applicable rate of interest of 8.25 percent, in accordance with UNDT/2011/012.

Respondent's submissions

13. The Respondent submits that the application be dismissed in its entirety and contends that the main issue in the case is moot as it has previously been adjudicated upon by the Dispute Tribunal in UNDT/2011/012. In his submissions, the Respondent particularly refers to paras. 55, 57 and 61 in which the Dispute Tribunal makes the point that the Applicant "was indeed bridged to early retirement and it was [the Applicant] who decided which benefits to retain and which ones to forfeit" and that "the question of pension was moot insofar as the Applicant was bridged to early

Considerations

The Respondent's alleged delay in submitting the PF4 form

Has the issue undergone management evaluation?

16. The issue regarding the delay in submitting the PF4 form was clearly raised in the Applicant's closing submissions leading to the issuance of UNDT/2011/012 on 13 January 2011. The Applicant considered, at that point in time, that he had a cause of action yet he did not raise it by first filing a request for management evaluation at the time. Such a request is a mandatory first step, in accordance with art. 8.1 of the Statute of the Dispute Tribunal and staff rule 11.2(a). Although the Respondent has not raised the point, the Tribunal finds that on this ground alone this aspect of the claim may arguably not have been receivable. However, this issue has not been addressed by either party and the Tribunal would refrain from making further comment which in light of the Tribunal's findings and conclusion would be of academic interest in any event.

17. The Applicant identified the matter of the alleged delay of the submission of the PF4 form as a complaint in his request for management evaluation.

indicated that he was

Was it improper for the Respondent not to submit the PF4 form before 30 March 2011?

19. Assuming in the Applicant's favour that he was expecting a written notification and that such notification was only given to him on 15 February 2011, there is still the question as to whether the Respondent is in default by delaying the submission of the PF4 form pending Judge Kaman's judgment in UNDT/2011/012.

20. Having considered this matter, the Tribunal is satisfied that the Respondent was not in a position to complete the necessary data required on the PF4 form regarding the status of the Applicant's pension contributions since this was an issue that fell to be decided by Judge Kaman. The Respondent acted expeditiously and submitted the form within a reasonable period of the Judgment being issued.

21. Accordingly, the Tribunal dismisses the Applicant's claim that the Respondent was at fault in not submitting the PF4 form before 30 March 2011.

Shortfall in interest payment

22. The Applicant claimed that the sum of USD259.90 was due to him as ordered in UNDT/2011/012. This aspect of his claim is a request for enforcement of the judgment in accordance with art. 12.4 of the Statute of the Dispute Tribunal, which provides that:

Once a judgement is executable under article 11, paragraph 3, of the present statute, either party may apply to the Dispute Tribunal for an order for execution of the judgement if the judgement requires execution within a certain period of time and such execution has not been carried out

23. There is no doubt that the Respondent omitted to pay the interest on the award as ordered by the Tribunal. In response to Order No. 209 (NY/2012), the Respondent stated that such payment was made on 17 October 2012 and submitted that this claim was therefore moot. The Respondent is mistaken. The payment of this sum does not extinguish liability to pay interest in accordance with the Judgment Order of

UNDT/2011/012. Accordingly, the Respondent also has to pay the Applicant the interest that has accrued on the payment of the sum of USD259.90 from 30 March 2011 until 17 October 2012 and thereafter the interest which continued to accrue on the outstanding interest at 5 percent above the US Prime Rate..

The Respondent's claim for costs—Is the Respondent, correct in asserting that the Applicant has brought these proceedings unnecessarily?

24.

the terms of the judgment in full must attract justifiable criticism even if the Tribunal refrains from categorizing such conduct as itself constituting an abuse of process. It does not lie in the mouth of the Respondent, who is himself in default by not complying fully with a Judgment Order, to suggest that the Applicant who pursues his right to a remedy is to be ordered to pay costs for abuse of process.

Conclusion

27. The claim for compensation in respect of the delay in submitting the PF4 form is dismissed.

28. In accordance with power under article 12.4 of the Statute of the Dispute Tribunal, the Respondent is ordered to execute fully the terms of Judgment No. *Tolstopiatov* UNDT/2011/012 and to pay to the Applicant interest on the sum of USD259.90 at the relevant US Prime Rate applicable plus 5 percent from 30 March 2011 until 17 October 2012 and, at the same rate, on the sum still outstanding in respect of unpaid interest that is accruing on a daily basis from 17 October 2012 to the date of final payment.

29. The Respondent's claim for costs is refused.

(Signed)

Judge Goolam Meeran

Dated this 11th day of December 2012

Entered in the Register on this 11th day of December 2012

(Signed)

Hafida Lahiouel, Registrar, New York