UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/058
Judgment No.: UNDT/2016/004
Date: 11 January 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

YAZAKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicole Washienko, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member with the Department of Public Information ("DPI") in New York, contests the decision to grant her mobility count of H-4 instead of H-5 for the purpose of calculating mobility allowance. The Applicant requests the Tribunal to order the Administration to grant her a mobility count of H-5 and three months' net base salary as moral damages for the undue delay in the Administration's response to her requests for clarification of her mobility count, which caused her significant stress.

Facts

2. The following chronology of facts is based on the facts agreed upon by the parties pursuant to their joint submission dated 20 February 2015 in response to Order No. 6 (NY/2015), dated 14 January 2015.

3. In 2003, the Applicant was initially appointed as an Associate Statistician at the P-2 level in the Department of Economic and Social Affairs ("DESA"). Her duty station was New York. In 2007, the Applicant was reassigned as an Associate Programme Officer in DPI in New York. The Applicant was promoted to the P-3 level in 2008.

4. From 15 February 2009 until 14 May 2010, the Applicant was deployed on mission detail assignment to the United Nations Integrated Mission in Timor-Leste ("UNMIT") in Dili, Timor-Leste, as a Coordination Officer. The Applicant retained a right to return to her post in New York for up to two years. Initially her detail assignment started on 15 February 2009 until 14 February 2010, and it was then extended from 15 February 2010 until 14 May 2010.

5. During her mission detail assignment to UNMIT, the Applicant received a Mission Subsistence Allowance ("MSA"), a daily allowance for living expenses

incurred by staff members in the field in connection with their temporary assignment or appointment to a special mission. The Applicant's Personnel Actions related to this mission detail assignment recorded her duty station as Dili. The Applicant continued to receive post adjustment and allowances applicable to her official (parent) duty station, New York.

6. In May 2010, the Applicant returned to New York and resumed her functions with DPI. The personnel action forms related to the Applicant's return from her mission detail assignment recorded her duty station as New York.

7. From 14 April 2011, the Applicant was assigned to UNMIT in Dili, Timor-Leste, as a Best Practices Officer at the P-3 level, for an initial period of one year. The Applicant's assignment was subsequently extended to 15 November 2012. The Applicant's personnel action form related to this assignment recorded her duty station as Dili. The Applicant received an assignment grant and other entitlements upon her change of official duty station to Dili. The Applicant submits that this assignment was made at the "initiative of the Organization", rather than through any request originating from the Applicant and that throughout the course of this assignment she retained a right to return to her post in New York for up to two years (in the 20 February 2015 joint statement, the Respondent indicates that he either disagrees with or has no knowledge of this).

8. On 16 November 2012, the Applicant returned to the position of Programme Officer with DPI in New York. The Personnel Action related to the Applicant's return from this mission assignment recorded her duty station as New York and the Applicant's official duty station changed to New York. The Applicant was accordingly paid an assignment grant and other entitlements.

9. The Applicant further contends that (in the 20 February 2015 joint statement, the Respondent indicated that he either disagrees with or has no knowledge of this):

> … Upon the Applicant's return to New York in November 2012, she sought information and clarification from the Executive Office of DPI on her correct assignment number and mobility count, after noting from her payslip that she had incorrectly received no payment whatsoever in relation to her mobility count. DPI initially informed the Applicant that it was obtaining clarity on this from the Office of Human Resources Management ["OHRM"], but then subsequently told the Applicant that she should contact OHRM directly about the matter. The Applicant did so, but was told by OHRM that she should contact DFS [Department of Field Support]. The Applicant contacted DFS accordingly, but the DFS Officer responsible for processing assignment numbers never returned any of the Applicant's calls or emails and was not available when the Applicant attempted to meet with her in person. The Applicant then met with OHRM in or about late 2012. During this meeting, OHRM advised the Applicant to collect additional information that would assist it in assessing her correct assignment number. The Applicant collected the information requested by OHRM. This included memos from UNMIT's then-Chief of Staff, Deputy Special Representative … ; DPKO's Director of DPET, …; and the Executive Officer of DPI, … . The Applicant provided this additional information to OHRM.
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> … In July 2013, having received no response from the Administration, the Applicant contacted the Office of the Ombudsman for assistance in resolving the matter of her assignment number and mobility count. After engaging the Ombudsman, the Applicant did not receive a response from the Administration.
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> … On 28 February 2014, the Applicant submitted a memo to OHRM requesting a review and clarification of her assignment number and mobility count. On 19 March 2014, the Applicant received an email from […], Chief, Human Resources Services, OHRM. This email informed the Applicant that his review indicated that her assignment number should be. In the same email, [Chief, Human Resources Services] asked the Applicant to inform him if she had any further questions or concerns regarding the calculation.

> … On 21 March 2014, the Applicant responded by email to [Chief, Human Resources Services]. In this email, she indicated that she did not believe that an assignment number of 4 was in accordance with the relevant rules of the Organization and requested a meeting with [Chief, Human Resources Services] to discuss the matter.
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> … On 24 March 2014, the Applicant and [Chief, Human Resources Services] met and discussed the Applicant's various moves within the United Nations and the relevant rules of the Organization. During this meeting, [Chief, Human Resources Services] expressed regret about the handling of the matter pertaining to the Applicant's assignment number, including: the length of time that it took the Administration to assess the issue, the different number of Offices and colleagues to whom the Applicant had been advised to address this matter, and the amount of documentation that she had been asked to obtain. At the end of this conversation, [he] stated that it was the Administration's decision that the Applicant's assignment number should be H-4. He informed the Applicant that if she did not agree, she could request an evaluation of this decision from the MEU [Management Evaluation Unit].

10. Through correspondence dated 16 and 23 May 2014, the Applicant filed a request for management evaluation concerning her mobility count, which was received by the Management Evaluation Unit on 23 May 2013.

Procedural background

11. On 22 September 2014, the Applicant filed the application. On 25 September 2014, the application was served on the Respondent instructing him to submit his reply by 27 October 2014.

12. On 2 October 2014, the Applicant filed a motion to amend her application predicated on the fact that she only received the management evaluation report on 23 September 2014, subsequent to her filing the application. By Order No. 272 (NY/2014) dated 3 October 2014, the Tribunal (Duty Judge) denied this motion but instead granted her leave to file a response to the Respondent's reply by 1 December 2014.

13. The Respondent filed his reply on 27 October 2014 contending that the application has no merit. On 1 December 2014, the Applicant filed her response to the Respondent's reply.

14. Pursuant to Order No. 334 (NY/2014) dated 11 December 2014, the Tribunal (Duty Judge) held a case management discussion with the parties on 18 December 2014 to ascertain the facts and law at issue as well as other matters.

15. By Order No. 6 (NY/2015) dated 14 January 2015, the Tribunal (Duty Judge) instructed the parties to file a jointly signed statement outlining agreed and disputed legal issues and facts as well as the parties' position as to whether they would be amenable to resolving the matter informally either through the United Nations Ombudsman and Mediation Services or through *inter partes* discussions.

16. In response to Order No. 6 (NY/2015), on 20 February 2015, the parties filed a joint submission with agreed and disagreed issues and facts, also indicating that they were not able to resolve the matter informally.

17. On 22 July 2015, the case was assigned to the undersigned Judge.

18. By Order No. 206 (NY/2015) dated 28 August 2015, the Tribunal ordered the parties to file a jointly signed statement informing the Tribunal if additional evidence would be requested and if the case could be decided on papers. In case no further evidence was to be produced and the parties agreed that the case could be decided on the papers, the Tribunal ordered the parties to file their closing submissions by 23 October 2015.

19. By joint submission dated 2 October 2015, the parties informed the Tribunal that no further evidence were requested to be produced, that they agreed that the case could be decided on the papers, and that an oral hearing would not be necessary.

20. By 23 October 2015, the parties filed their closing submissions.

Applicant's submissions

21. The Applicant's contentions may be summarized as follows:

a. On 8 March 2007, the former administrative instruction ST/AI/2007/1 (Mobility and hardship scheme) entered into force. This was subsequently replaced by the current administrative instruction ST/AI/2011/6 (Mobility and hardship scheme). The current administration instruction became effective on 1 July 2011, and expressly abolished ST/AI/2007/11;

b. ST/AI/2011/6 and ST/AI/2007/1 differ in one significant respect for purposes of the present case, namely regarding the method of calculation of a staff member's assignment number;

c. According to ST/AI/2007/1, service on mission detail for a period of one year or longer followed by a return to the parent duty station counted as one assignment. However, according to ST/AI/2011/6, changes of duty station for one year or longer shall count as an assignment and there are no restrictions which apply to service on mission detail. Further, there is no provision indicating that return to the parent duty station shall be considered as a continuation of the previous assignment at the parent duty station. Accordingly, under the current scheme, service on mission detail followed by a return to the parent duty station counts as two assignments (provided that each of these assignments is for a period of one year or longer);

d. It is not correct that the counting of the Applicant's assignments in connection with her service in UNMIT from February 2009 to May 2010 and her return to her parent duty station is determined by ST/AI/2007/1, which was in force until 30 June 2011. Such contention is based on

the erroneous assumption that the former administrative instruction survived the abolishment of the Instruction itself;

e. Pursuant to sec. 9.2 of ST/AI/2011/6, the "Administrative instruction ST/AI/2007/1 on the mobility and hardship allowance is hereby abolished", effective 1 July 2011. No specific provision was made that permitted this instruction to have a future legal effect;

f. In light of the express language of ST/AI/2011/6, the Applicant respectfully submits that it is this administrative instruction that applies to the counting of her assignments throughout her tenure with the Organization, including, *inter alia*, in relation to her service in UNMIT from February 2009 to May 2010 and her return to her parent duty station;

g. This is not contrary to the rule against retroactive application of law as a law (or rule) is only retroactively applied if it alters a "definitively established legal situation" (Administrative Tribunal of the International Labour Organization Judgment No. 3185 (2013) and also United Nations Administrative Tribunal Judgment No. 108, *Khamis* (1967));

h. The application of ST/AI/2011/6 for the purposes of calculating the Applicant's assignment number that the Applicant submits should be applied in this case constitutes a "retrospective", rather than a "retroactive" application of the current administrative instruction. While these two terms have often been used interchangeably, they have quite different meanings. The distinction between these two was articulated in *Hornby Island Trust Committee v. Stormwell*, 1988, 53 D.L.R. (4th) 435 at 441 (B.C. C.A.), decided by the Court of Appeals, British Columbia, Canada. In this judgment, the Court held:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new

> results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

i. The application of the mechanism for calculating assignment number set forth in ST/AI/2011/6 for the purpose of determining the amount of the mobility allowance to be paid to a staff member after the entry into force of this administrative instruction is not acting retroactively as it does not alter a "definitely established legal situation", nor is it "operating at time prior to its enactment". This is because a staff member's assignment number, in itself, has no legal effect in the absence of the calculation of that staff member's mobility allowance and the attendant payment of this allowance to the staff member;

j. The Applicant in the present case is only contesting the determination regarding her assignment count and attendant mobility allowance for the period following the issuance of ST/AI/2011/6. The current administrative instruction should be retrospectively applied to the calculation of her assignment count, i.e., "look backwards", for the purpose of determining her assignment count and attendant mobility allowance due to her after the issuance of this administrative instruction;

k. While not using the terminology of "retroactive" or "retrospective", the jurisprudence of the Dispute Tribunal supports the Applicant's assertion that an application of a new rule or regulation that does not alter a "legal situation" cannot properly be construed to have a retroactive effect. In *Robineau* UNDT/2012/175, para. 24, the Dispute Tribunal found that, as a general principle, "the Applicant's rights need to

be considered under the rules applicable on the date on which the entitlement arose";

l. In the present case, the Applicant's entitlement to her mobility allowance arises each month upon the Administration's calculation of her appropriate mobility allowance and the issuance of this allowance in the Applicant's paycheck. Accordingly, since ST/AI/2011/6 entered into force on 1 July 2011, the amount of the Applicant's mobility allowance must be calculated in accordance with the provisions of this current administrative instruction. The previous method of calculation set forth in now-defunct ST/AI/2007/1 is no longer relevant;

m. ST/AI/2011/6 defines "assignment" as "either the appointment of a staff member to a duty station or transfer of a staff member to a new duty station for a period of one year or longer". Unlike former ST/AI/2007/1, it contains no restrictions regarding assignment count for service on mission detail;

n. In the present case, the Applicant was sent on a mission detail assignment to UNMIT for the period of 15 February 2009 to 14 May 2010. As indicated by the personnel action form related to this assignment, the Applicant was transferred from Headquarters and her new duty station became Dili, East Timor. Thus, the Applicant's mission to detail to UNMIT during this period falls squarely within the definition of assignment for purposes of calculating assignment number and determining the amount of the attendant mobility allowance;

o. Similarly, unlike ST/AI/2007/1, there are no provisions in ST/AI/2011/6 that provide that, upon a staff member's return to the parent duty station, this service shall be treated as a continuation of the prior assignment at the parent duty station. Accordingly,

the Applicant's return to New York in May 2010, where she stayed until April 2011, counts as another assignment under ST/AI/2011/6. This is consistent with the manner in which the Administration counted the Applicant's second assignment to UNMIT, for the period of April 2011 to November 2012, and her return to her parent duty station as two separate assignments;

p. In light of the foregoing, the Applicant submits that her assignments and resulting mobility count are as follows:

i. 15 April 2003–14 February 2009. Initial appointment to New York, United Nations Headquarters (UNHQ)—H-1;

ii. 15 February 2009–14 May 2010. Mission detail assignment to Dili, UNMIT—D-2;

iii. 15 May 2010–13 April 2011. New York, UNHQ—H-3;

iv. 14 April 2011–15 November 2012. Assignment to Dili, UNMIT—D-4;

v. 16 November 2012 – present. New York, UNHQ—H-5.

q. As remedies, the Applicant requests, *inter alia*, three months of net base salary as moral damages for the undue delay in the Administration's response to her requests for clarification of her assignment number, which caused her significant stress. The Applicant had been requested by OHRM to request various assurances from senior officials within the Administration regarding the terms of her assignments to the various duty stations. The Applicant duly complied with this request and has sought resolution of this matter for three years, during which time she was shuttled between numerous offices, receiving no response from anyone in the Administration until 24 March 2014.

Respondent's submissions

22. The Respondent's contentions may be summarized as follows:

a. The Appeals Tribunal recognized "the general principle of law against retrospective [in his closing submissions, the Respondent wrongly cites this as "retroactive"] effect/application of laws" in *Nogueira* 2014-UNAT-409, para. 14, and has applied the principle in a number of other appeals (*Robineau* 2014-UNAT-396, para. 19; *Hunt-Matthes* 2014-UNAT-444, paras. 25–28; and *Assale* 2015-UNAT-534, para. 34);

b. The Applicant relies on the Dispute Tribunal's Judgment in *Robineau* UNDT/2012/175 to support her argument that ST/AI/2011/6 should be applied to recalculate the number of her assignments and mobility count arising from her service prior to the entry into force of the administrative instruction on 1 July 2011. However, the Appeals Tribunal vacated the Dispute Tribunal's Judgment on appeal (*Robineau* 2014-UNAT-396). In that case, the matter in dispute was the maximum number of accrued leave days that the applicant was entitled to be paid out upon his retirement. The applicable staff rule had been amended a number of times over the periods of the applicant's service with the Organization. The Appeals Tribunal found that Dispute Tribunal erred in law in retroactively applying staff rule 104.3, as amended in January 2003, to the applicant's service prior to this date;

c. The principle against retroactivity should be applied similarly in this case. In the present case, ST/AI/2011/6 introduced a new method of counting assignments for the purpose of determining a staff member's mobility account. The new method cannot be applied retroactively to the Applicant's service prior to the entry into force of ST/AI/2011/6 on 1 July 2011. The number of assignments arising from the Applicant's prior

service (that is, from 15 April 2003 to 30 June 2011) is determined by the previous methods of counting assignments as established by ST/AI/2000/2 and ST/AI/2001/9 (which were abolished on 31 December 2006) and ST/AI/2007/1 (which was abolished on 30 June 2011);

d. The Applicant argues that, as the new method of counting assignments in ST/AI/2011/6 is more generous to staff members, there is no restriction on applying it retroactively. Carried to its logical conclusion, the Applicant's argument would mean that the Organization would be required to apply any change to the salaries, entitlements or allowances that are favourable to staff members on a retroactive basis. This would lead to an unreasonable result and would have a chilling effect on any proposals to improve the conditions of service of staff;

e. In addition to violating the principle against retroactivity, the Applicant's interpretation does not take account of the fact that ST/AI/2011/6 reflected the significant changes to the conditions of service for internationally-recruited staff introduced from 1 July 2009 onwards;

f. ST/AI/2011/6 was promulgated following the General Assembly's approval of new contractual arrangements and the harmonization of conditions of service for staff in its resolutions 63/250 and 65/248. In resolution 63/250, the General Assembly requested the Secretary-General to discontinue the practice of assigning staff from Headquarters to missions on travel status basis for a period of more than three months;

g. The Applicant's mission detail assignment to UNMIT from February 2009 to May 2010 and her subsequent return to her parent duty station in New York is an example of this practice. This practice was also

reflected in the old method of counting of assignments under section 2.6(a) of ST/AI/2007/1;

h. The new method of counting assignments in ST/AI/2011/6 was updated to reflect the discontinuance of the practice of assigning staff from Headquarters to missions on travel status basis for a period of more than three months (see sec. 2.5). In addition, the MSA was also abolished and staff rule 4.8(b) was introduced, which provides for a change of official duty station upon assignment to a field mission for a period exceeding three months;

i. As such, the Applicant's interpretation of ST/AI/2011/6 on a retroactive basis to her mission detail assignment and return to New York would be contrary to the General Assembly's decision to discontinue such assignments and the introduction of staff rule 4.8(b). The new method of counting of assignments in ST/AI/2011/6 goes hand-in-hand with all of the changes to the conditions of service of staff following the adoption of General Assembly's resolutions 63/250 and 65/248.

Consideration

Receivability

23. The Tribunal notes that the Applicant, a current staff member, was notified of the contested decision on 24 March 2014. The Applicant filed requests for management evaluation on 16 and 23 May 2014, which is within 60 days from the date of notification of the contested decision. On 28 May 2014, the Management Evaluation Unit acknowledged receipt of the requests and informed the Applicant that the management evaluation would be completed no later than 22 June 2014. The Applicant filed the present case with the Tribunal on 22 September 2014, within 90 days from the date when the management

evaluation was to be completed. On 23 September 2014, the Applicant received the management evaluation.

24. Therefore, the present application is receivable *ratione personae*, *ratione materiae*, and *ratione temporis*.

Applicable law

25. The former Staff Rules (ST/SGB/2002/1) provided in staff rule 101.6 (Change of official duty station) that:

> **Rule 101.6**
>
> **Change of official duty station**
>
> A change of official duty station shall take place when a staff member is assigned from one office of the Organization to another for a fixed period exceeding six months or transferred for an indefinite period. Detailment of a staff member from his or her official duty station for service with a United Nations mission or conference shall not constitute change of official duty station within the meaning of these Rules.

26. Effective 1 July 2015, the new provisional Staff Rules (ST/SGB/2009/7) went into effect, which stated in staff rule 4.8(b):

> **Rule 4.8**
>
> **Change of official duty station**
>
> …
>
> (b) A change of official duty station shall take place when a staff member is assigned from a duty station to a United Nations field mission for a period exceeding three months.

27. ST/AI/2007/1 (Mobility and hardship scheme), abolished on 1 July 2011 provided as follows regarding determination of the staff member's assignment number:

Section 1

General provisions

Purpose

1.1 The mobility and hardship scheme includes the following non-pensionable allowances:

(a) A mobility allowance, which varies according to the number of assignments and the purpose of which is to provide an incentive for the geographic mobility of staff;

…

Eligibility

1.3 The allowances under this scheme are not considered expatriate benefits, and may be paid to eligible staff members serving in their home country.

1.4 Staff in the Professional category and above, Field Service staff and internationally recruited General Service staff appointed under the 100 series of the Staff Rules shall be eligible for payment of the allowances under this scheme, provided they meet the requirements set out in section 1.5 and the particular conditions governing each allowance, as set out in sections 2, 3 and 4 below. Project personnel appointed under the 200 series of the Staff Rules shall also be eligible, subject to the same requirements and conditions.

1.5 Eligibility for the allowances under this scheme shall require an appointment to a duty station, or a reassignment to a new duty station, for a period of a year or longer, normally giving rise to an assignment grant under staff rule 107.20 or 203.10. However, the allowance may also be paid in the following cases:

(a) Appointment or assignment of less than one year, when it is decided to pay post adjustment and assignment grant under staff rule 103.7(d)(ii). In such cases, the hardship and non-removal allowances shall be paid if the conditions set out in sections 3 and 4 are met;

(b) When an appointment or assignment of less than one year with payment of a daily subsistence allowance or mission subsistence allowance is subsequently extended to one year or longer, the allowance may be paid as of the first day following discontinuation of the subsistence allowance; or

(c) As provided in respect of the hardship allowance in section 3.2 below [see ST/AI/2007/1].

Amount

1.7 The amount of the allowances payable to each eligible staff member vary by grade level and dependency status, and depends:

(a) For the mobility allowance, on the number of assignments of a staff member;

…

1.10 When staff members eligible for payment of the allowances are on temporary assignment or mission detail from their parent duty station, or on travel status, and receive a daily subsistence allowance or mission subsistence allowance as a result, the allowances shall continue to be paid on the basis of their assignment at the parent duty station.

Section 2

Mobility allowance

Qualifying service

2.1 To qualify for payment of the mobility allowance, a staff member must have five years' prior consecutive service as a staff member in the United Nations or another organization of the common system. Service credited towards the five-year requirement may include service as a staff member in one of the categories eligible for payment of the allowance under section 1.4, as well as prior service in a non-eligible category when allowed under section 2.6.

2.2 At all duty stations classified in categories A to E, the mobility allowance is payable from the second assignment, provided the requirement of five years' continuing service has been met. At duty stations classified in category H, the mobility allowance is payable from the fourth assignment and only if the staff member has had two or more assignments, each for a period of one year or longer, at duty stations classified in categories A to E.

2.3 Separate periods of service shall be considered as consecutive for the purpose of section 2.1 when their cumulative duration reaches five years within the prior six-year period, unless broken by one of the following occurrences: resignation, abandonment of post, summary dismissal or dismissal for misconduct, agreed termination, termination for unsatisfactory service and separation from service under staff rule 104.14 (i) (i) of

staff on probationary appointment. Separation due to other occurrences, such as non-renewal of fixed-term appointment, or separation to take up another appointment within the United Nations common system, shall not break the period of service for the purposes of this section.

Determining the assignment number

2.5 Initial appointments of one year or longer, whether or not they required official travel or gave rise to an assignment grant, and assignments of one year or longer which involve a change of duty station, shall be counted as one assignment for the purpose of determining the assignment number of the staff member …

2.6 Counting of assignments shall be made as follows:

(a) Periods of service on daily subsistence allowance or [MSA] for a period of one year or longer at the same duty station or on special mission shall be counted as one assignment, but only on return to the parent duty station, or reassignment or transfer to a new parent duty station. …

…

Section 5

Modalities of payment of the allowances

…

5.2 The allowances shall be paid on a monthly basis.

Section 6

Adjustments of payments

Adjustments of payments shall be made as a result of change of duty station, change of dependency status, promotion, completion of five years' consecutive service at the duty station, period on special leave or separation. An adjustment shall also be made if a staff member receives a special post allowance to a higher level which would bring the staff member's entitlement into another range (this normally would apply for special post allowances at the P-4, D-1 or FS-7 level), thus giving rise to a higher amount of the allowances in accordance with the amounts specified in the tables in the annex.

…

Section 8

Final provisions

8.1 The present administrative instruction shall enter into force on 1 January 2007.

8.2 Administrative instructions ST/AI/2000/2 and ST/AI/2001/9 on the mobility and hardship allowance are hereby abolished.

28. ST/AI/2011/6 (Mobility and hardship scheme) adopted on 1 July 2011 provides in relevant parts:

Section 1

General provisions

Purpose

1.1 The mobility and hardship scheme includes the following non-pensionable allowances:

(a) A mobility allowance, which varies according to the number of assignments and the purpose of which is to provide an incentive for the geographic mobility of staff;

…

Eligibility

1.2 Staff in the Professional and higher categories (i.e., international Professional staff), staff in the Field Service category and internationally recruited General Service staff shall be eligible for payment of the allowances under this scheme, provided they meet the requirements set out in section 1.3 and the particular conditions governing each allowance, as set out in sections 2, 3, 4 and 5 below.

1.3 Eligibility for the mobility and non-removal allowances under this scheme shall require an appointment to a duty station, or a reassignment to a new duty station, for a period of one year or longer, normally giving rise to an assignment grant under staff rule 7.14. However, some of the allowances may also be paid when an appointment or assignment with payment of a daily subsistence allowance is subsequently extended to one year or longer, in which case the allowances may be paid as of the first day following discontinuation of the subsistence allowance.

…

Amount

1.8 The amount of the allowances payable to each eligible staff member varies by grade level and dependency status, and depends:

(a) For the mobility allowance, on the number of assignments of a staff member;

…

1.11 When staff members eligible for payment of the allowances are on assignment or travel status, and receive a daily subsistence allowance as a result, the allowances shall continue to be paid on the basis of their appointment at the parent duty station. Staff members on assignment or travel status at non-family duty stations are not eligible for payment of the additional non-family hardship allowance unless they are eligible on the basis of their appointment to their parent duty station.

Section 2

Mobility allowance

Qualifying service

2.1 To qualify for payment of the mobility allowance, a staff member must have five years' prior consecutive service as a staff member in the United Nations or another organization of the common system. Service credited towards the five-year requirement may include service as a staff member in one of the categories eligible for payment of the allowance under section 1.2, as well as prior service in a non-eligible category when allowed under section 2.6.

2.2 At all duty stations classified in categories A to E, the mobility allowance is payable from the second assignment, provided the requirement of five years' consecutive service has been met. At duty stations classified in category H, the mobility allowance is payable from the fourth assignment and only if the staff member has had two or more assignments, each for a period of one year or longer, at duty stations classified in categories A to E.

…

Determining the assignment number

2.5 For the purpose of this instruction, the term "assignment", when determining the assignment number of the staff member, shall be understood to mean either the appointment of a staff

member to a duty station or transfer of a staff member to a new duty station for a period of one year or longer.

(a) Initial appointments of one year or longer, whether or not official travel was required or such appointment gave rise to an assignment grant, and assignments of one year or longer which involve a change of duty station, shall be counted as one assignment;

…

2.6 Counting of assignments shall be made as follows:

(a) Exceptional periods of service on daily subsistence allowance for a period of one year or longer at the same duty station shall be counted as one assignment, but only upon reassignment or transfer to a new parent duty station;

…

(e) Transfers, secondments and loans to other organizations of the United Nations common system shall be counted in the same manner as movements within the Organization;

…

Section 6

Modalities of payment of the allowances

…

6.2 The allowances shall be paid on a monthly basis.

Section 7

Adjustments of payments

Adjustments or discontinuation of payments shall be made when applicable as a result of change of duty station, change of dependency status, change of designation or classification of duty station, promotion, completion of five years' consecutive service at the duty station, period on special leave or separation. An adjustment shall also be made if a staff member receives a special post allowance to a higher level which would bring the staff member's entitlement into another range (this normally would apply for special post allowances at the P-4, D-1 or FS-7 level), thus giving rise to a higher amount of the allowances in accordance with the amounts specified in the tables in the annex.

…

> **Section 9**
>
> **Final provisions**
>
> 9.1 The present administrative instruction shall enter into force on 1 July 2011.
>
> 9.2 Administrative instruction ST/AI/2007/1 on the mobility and hardship allowance is hereby abolished.

Legal issue

29. In their joint submission dated 20 February 2015, the parties agreed that the legal issue for the Tribunal to consider is as follows:

> From 1 January 2007, the mobility and hardship scheme was promulgated under ST/AI/2007/1 and was subsequently abolished on 1 July 2011 when ST/AI/2011/6 entered into force.
>
> The legal issue is limited to how the mobility and hardship scheme applies to the Applicant's mission detail assignment to [UNMIT] from February 2009, and her return from UNMIT to her parent duty station, New York, in May 2010.

30. The Tribunal agrees that the central issue of the present case comes down to whether, for the purpose of mobility allowance, the currently applicable administrative instruction ST/AI/2011/6 applies to the counting of assignments that the Applicant undertook before the instruction went into effect on 1 July 2011. Specifically, this relates to the Applicant's assignment to UNMIT from 15 February 2009 to 14 May 2010.

Relevant jurisprudence of the Appeals Tribunal

31. In *Nogueira* 2014-UNAT-409, the Appeals Tribunal recalled the general principle of law against retrospective application of law, including administrative issuances:

> 14. The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and holds that since

> the incidents in question occurred before ST/SGB/2008/5 was promulgated it is not applicable in this case.

32. In *Hunt-Matthes* 2014-UNAT-444, the Appeals Tribunal re-affirmed its pronouncement in *Nogueira*. The Appeals Tribunal stated in *Hunt-Matthes*:

> 25. Recently we restated [in *Nogueira*] the well-known principle of law against retrospective application of laws, noting: "The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and holds that since the incidents in question occurred before [the administrative issuance] was promulgated it is not applicable in this case".

33. Similarly, in *Assale* 2015-UNAT-534, the Appeals Tribunal affirmed *Hunt-Matthes* (emphasis added):

> 34. We agree with the Secretary-General and determine that the UNDT made an error of law when it applied the 2011 Administrative Instruction to review the non-renewal decision. In *Hunt-Matthes*, "we restated the well-known principle of law against retrospective application of laws, noting: 'The Appeals Tribunal recalls the general principle of law against retrospective effect/application of laws and hold that since the incident in question occurred before [the administrative issuance] was promulgated it is not applicable in this case.'" [footnote referring to *Hunt-Matthes*] In the context of Mr. Assale's case, the "incident in question" before the UNDT was the non-renewal decision, which was made on 29 November 2010. Since the 2010 Administrative Instruction was in effect on that date, the UNDT made an error of law in retroactively applying the 2011 Administrative Instruction.

34. In *Robineau* 2014-UNAT-396, the Appeals Tribunal overturned *Robineau* UNDT/2012/175, to which the Applicant refers in her closing statement. The Appeals Tribunal stated (emphasis added):

> 19. For reasons of equity and good faith we are more persuaded by Mr. Robineau's arguments than those put forward by the Secretary-General, although we do not accept the entirety of Mr. Robineau's arguments on the discontinuation issue. We are satisfied that in failing to give due consideration to the arguments raised by Mr. Robineau regarding the years 1989 to 1997, *the*

> *UNDT erred in law in retroactively applying Rule 104.3 set forth in ST/SGB/2003/1 to the entirety of his service*. Mr. Robineau was entitled to rely on the statutory provisions in force when he last entered the service of the Organization.

Meaning of "retroactive" vis-à-vis "retrospective"

35. The Applicant submits that the words "retroactive" and "retrospective" have different meaning and the distinction is important to the present case. However, the Appeals Tribunal in *Nogueira*, *Hunt-Matthes*, *Assale,* and *Robineau* does not appear to attach substantively different meanings to the two words; rather, the Appeals Tribunal does not allow both "retrospective" and "retroactive" application of administrative issuances.

36. The Tribunal notes that Merriam-Webster's online dictionary defines "retrospective" as an adjective that means "of or relating to the past or something that happened in the past" or "effective from a particular date in the past". The word "retrospective" is furthermore associated with the word "retroactive" as "affecting things past". In line herewith, "retroactive" is defined as "effective from a particular date in the past". See also Bryan Garner, *A Dictionary of Modern Legal Usage* 2nd Ed. (Oxford University Press, 2001), p. 768:

> **Retroactive; retrospective; retrogressive**. In law, the first two terms are used synonymously in reference to statutes that extend in scope or effect to matters that have occurred in the past. E.g., "[T]he court refused to give effect to a *retroactive* statute creating a special tribunal to try certain suits by a bank against its officers." … "It is presumed that a statute does not have *retrospective* effect." … The one advantage of *retrospective* is that it corresponds etymologically to its antonym *prospective*.

37. The Tribunal concludes that, for all intents and purposes, *retroactive* and *retrospective* are synonymous and, therefore, no meaningful difference exists in the legal understanding of the two words, as also established in the binding judgements of the Appeals Tribunal. The findings of the Court of Appeals, British

Columbia, Canada, as referred to by the Applicant in his submissions, are of no relevance to the present case.

The Applicant's work history and assignment number

38. The Tribunal notes that, as results from the uncontested facts, the Applicant was appointed in 2003 at the P-2 level in DESA, New York. The Applicant was promoted to the P-3 level in 2008 and she continued to work in New York until 14 February 2009. The parties agree that this was correctly counted as the Applicant's first assignment.

39. Starting from 15 February 2009 until May 2010, the Applicant was deployed to UNMIT at the P-3 level, during which period she received MSA and continued to receive post adjustment and allowances applicable to her official duty station in New York. The Applicant, who had five years of prior consecutive service in the United Nations, was eligible to receive MSA in accordance with sec. 1.10 of ST/AI/2007/1 because she was on mission detail from her parent duty station (New York) initially for one year. During this period, which was extended until May 2010, the Applicant's allowances were mandatory ("shall continue") on the basis of her assignment in New York ("at the parent duty station"). Upon her return to her parent duty station in New York, the Applicant's service in UNMIT (category D duty station) counted as one assignment in accordance with the obligatory system of counting assignments established by sec. 2.6 of ST/AI/2007/1 and was considered as the Applicant's second assignment. From May 2010 until April 2011, the Applicant continued to work in New York, and this period was considered by the Respondent to be part of the first assignment.

40. The Applicant argues that ST/AI/2011/6, which entered in force on 1 July 2011, is applicable to the Applicant's assignment from May 2010 to April 2011 as she submits that secs. 2.5 and 2.6 of ST/AI/2011/6 are to be applied

retroactively and that this assignment is therefore to be considered as a separate assignment and representing her third assignment.

41. The Tribunal notes that as clearly follows from sec. 9.1 of ST/AI/2011/6, the instruction entered into force on 1 July 2011 and there were no transitional provisions to provide a temporary retroactive effect. Therefore, ST/AI/2011/6, including secs. 2.5 and 2.6, cannot be applied retroactively. The legal provisions applicable to the period May 2010 to April 2011 are those of ST/AI/2007/1, more specifically sec. 2.6.which remained applicable until 30 June 2011. The Tribunal therefore finds that ST/AI/2007 was correctly applied by the Administration when counting the Applicant's assignment from May 2010 to April 2011 as part of her first assignment.

42. Moreover, no evidence demonstrates that the Applicant received a special post allowance to a higher level than P-3 from 15 February 2009 to May 2010, which would have been the only possibility to bring her entitlement to another range (according to sec. 7 of ST/AI/2007/1, this would normally be applicable for special post allowances at the P-4, D-1, or FS-7 level). The special mobility allowance for this period was calculated and paid on a monthly basis as required by sec. 5.2 of ST/AI/2007/1 and staff rule 101.6, applicable in February 2009 when the Applicant's deployment started.

43. According to former staff rule 101.6, the detailment of a staff member from his or her official duty station for services with a United Nations mission or conference did not ("shall not") constitute a change of official duty station. This staff rule was abolished on 1 July 2009 when ST/SGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules) was adopted and the provisional staff rule 4.8(b) was introduced. Staff rule 4.8(b) redefined the notion of a change of duty station to include not only the assignment of a staff member from one duty station to another for a period exceeding six months or an indefinite transfer, like in the former staff rule 101.6, but also an assignment to a

field mission for a period exceeding three months. However, this rule was applicable only to assignments starting on or after 1 July 2009 and was not retroactively applicable to assignments that started prior to this change, which continued to be governed by the terms and conditions established at the beginning of such assignments. Moreover, this rule remained provisional until 1 January 2011, when ST/SGB/2011/1 (Staff Rules and Staff Regulations of the United Nations) was adopted, which no longer referred to its provisions as "provisional Staff Rules". During this period, ST/AI/2007/1 remained applicable.

44. On 1 July 2011, the new instruction on mobility and hardship scheme, ST/AI/2011/6, which replaced ST/AI/2007/1, went into effect. It updated the mobility and hardship scheme to follow staff rule 4.8(b). ST/AI/2011/6 cannot be applied to the Applicant's second assignment, which correctly included the period when she worked in UNMIT (February 2009 to May 2010). The period starting from May 2010 to April 2011 was therefore correctly considered part of the first assignment under sec. 2.6(a) of ST/AI/2007/1 applicable to the Applicant's deployment. The Tribunal further observes that provisional staff rule 4.8(b), which went into effect on 1 July 2009, was not applicable to the Applicant's "detailment", which started under the applicable terms and conditions before the new rule went into effect. Further, during the entire period of February 2009 to May 2010, she received monthly MSA calculated based on ST/AI/2007/1, which she never contested. The Applicant did not contest her status as on "detailment" after 1 July 2009 (when provisional Staff Rules went into effect) until February 2010, or the extension of detailment after February 2010 until May 2010, and accepted the same conditions and terms, including the monthly payment of MSA under ST/AI/2007/1. The Tribunal considers that the amount of MSA cannot be recalculated based on administrative instruction that did not exist as of the date of those payments. Her official status of "detailment" remained unchanged and she never requested the conversion of her official duty station based on provisional staff rule 4.8(b). It was not until much later, in November 2012, that the Applicant

started to question the method of calculation of the number of her assignments, relying on ST/AI/2011/6. However, she started to raise her claims in November 2012, more than two years after she came back from UNMIT and more than a year after ST/AI/2011/6 went into effect.

45. The Tribunal concludes that the period May 2010 to April 2011 does not represent a third assignment of the Applicant, but a continuation of her first assignment in accordance with sec. 2.6(a) of ST/AI/2007/1, and the Administration correctly counted the number of her assignments at the level H-4. The Applicant's request to grant her mobility count at the H-5 level is to be rejected.

Applicant's request for compensation for undue delay

46. The Applicant requests three months' net base salary as moral damages for her alleged significant stress caused by the delay in the Administration's response to her requests for clarification of her assignment number. The Tribunal notes that the Applicant states that her first inquiry was in late November 2012 and that she received the information that her mobility count would be H-4 on 19 March 2014.

47. The Tribunal considers that various UN rules and administrative instructions include mandatory deadlines and/or recommended periods for consideration of requests of staff. These reflect the Administration's obligation to respond to such requests, as well as the correlative right of staff making such requests to receive a response/decision within the stipulated deadline or, in cases where such deadlines are not indicated, as soon as possible within a reasonable time in accordance with the particular circumstances, nature, and purpose of each request.

48. The Tribunal concludes that it took more than a year for the Administration to respond to the Applicant. This exceeds a reasonable period

of time within which the Applicant's inquiry should have been responded to and constitutes a breach of the Applicant's right to receive a timely decision.

49. However, as the Appeals Tribunal stated in *Antaki* 2010-UNAT-095 "not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages". In the present case, the Tribunal has concluded that the Applicant's number of assignments was correctly calculated. The Applicant adduced no evidence in support of her claim for damages. Therefore, in light of the particular circumstances of the case, the delay in the processing of her requests does not constitute, in and of itself, sufficient ground for the Tribunal to grant the Applicant's request for moral damages.

Conclusion

50. In the light of the foregoing, the Tribunal DECIDES

The application is rejected.

(*Signed*)

Judge Alessandra Greceanu

Dated this 11th day of January 2016

Entered in the Register on this 11th day of January 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York