



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

GORBACH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Daniel Trup, OSLA
Robbie Leighton, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction and Procedural History

1. The Applicant holds a permanent appointment with the United Nations. She is currently an Information Analyst at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). She serves at the P-2 level and is based in Goma, Democratic Republic of the Congo (DRC).
2. On 15 December 2014, the Applicant filed an Application with the United Nations Dispute Tribunal in Nairobi challenging the decision denying her the lump-sum relocation grant for the shipment of her personal effects on being reassigned from Kinshasa to Goma in 2014.
3. The Respondent replied to the Application on 15 January 2015.
4. The Tribunal held a case management discussion in this matter on 18 February 2015 during the course of which the Tribunal urged the Parties to consider informal resolution of the dispute.
5. On 20 March 2015, the Parties filed a motion seeking additional time for their ongoing informal settlement discussions. On 23 March 2015, the Tribunal issued Order No. 102 (NBI/2015) granting the motion.
6. On 29 April 2015, the Parties jointly informed the Tribunal that the informal discussions had failed to resolve the dispute between them and requested that the matter proceed before the Tribunal.
7. On 13 May 2015 the Tribunal issued Order No. 171 (NBI/2015) ordering the Parties to, *inter alia*, jointly file a concise statement of facts and identify the legal issues arising from those facts for determination by the Tribunal and to notify the Tribunal if they wished to have this matter set down for an oral hearing.
8. On the evening of 15 June 2015, the Parties filed a motion requesting that the deadline be extended up to Friday, 19 June 2015.

9. On 17 June 2015, the Tribunal issued Order No. 208 (NBI/2015) granting the motion, and extended the deadline as requested by the Parties.

10. The Parties filed a joint statement of facts on 20 June 2015. The Applicant submitted that the matter could be decided on the papers without an oral hearing because the legal issues arising for determination are technical. The Respondent sought an oral hearing in order to proffer a witness from the Office of Human Resources Management (OHRM) to offer testimony regarding the rationale and basis for the policy regarding payment of the relocation grant and the application of the policy in this case.

11. The Tribunal has decided, in accordance with art. 16.1 of its Rules of Procedure, to determine this Application on the basis of the pleadings filed by both Parties.

Facts

12. By resolution 2098 (2013) of 28 March 2013, the Security Council decided, *inter alia*, that “MONUSCO shall strengthen the presence of its military, police and civilian components in eastern DRC and reduce, to the fullest extent possible for the implementation of its mandate, its presence in areas not affected by conflict in particular Kinshasa and in western DRC [...]”

13. As a result, MONUSCO decided to move its main activities and resources to the Eastern DRC. This involved the redeployment of a number of personnel.

14. On 21 January 2014, the Applicant was informed by memorandum that he was being reassigned to MONUSCO offices in Goma, DRC.

15. The Applicant was requested to contact the Movement Control Section (MOVCON) in order to make all the necessary arrangements, including the shipment of all his personal effects up to a maximum of 1000 kilograms to his new duty station.

16. The Applicant was advised that she would be entitled to the payment of an Assignment Grant, comprising a lump sum of one month's net base salary, plus post adjustment, and thirty days Daily Subsistence Allowance (DSA).

17. The Applicant was also informed that she would not be eligible for Relocation Grant as her reassignment was within the same mission.

Applicant's submissions

18. Staff are entitled to "official travel" "on change of official duty station"¹.

19. Pursuant to staff rule 7.15, a reimbursement mechanism is provided for the shipment of personal effects and household goods upon "assignment"².

20. Under staff rule 7.15(h) and (i), these entitlements are governed by the nature of the appointment (temporary or fixed-term) and the duration of the relocation. The amounts can either be 100 kgs/0.62m³ for shorter-term appointments and moves, or a full relocation.

21. Pursuant to this scheme, the Administration established lump-sum equivalents of the "relocation grant"³. ST/AI/2006/5 (Excess baggage, shipments and insurance) has the same scheme, triggered by "assignment" or "transfer" to another duty station.

22. As the reassignment memo indicates, it is clear that the Applicant was being reassigned to a new duty station. Indeed, the reassignment memo confirms the Applicant's eligibility for an assignment grant, which depends upon either travel at United Nations expense to a duty station for an assignment"⁴ or a change of official duty station"⁵. The reassignment memo also confirms that the DSA portion will be at the destination duty station rate.⁶

¹ Staff rule 7.1(a) (iii), and staff rule 4.8.

² Staff rule 7.15(h) or "transfer to another duty station" Staff rule 7.15(i)(i).

³ Section 11 ST/AI/2006/5.

⁴ Staff rule 7.14(e).

⁵ Staff rule 7.14(f).

⁶ Staff rule 7.14(c).

23. “Duty station” is uniformly considered to be a city, not a country, a province, area or a Mission. This is apparent from the International Civil Service Commission (ICSC) Hardship Classification⁷, OHRM’s list of non-family duty stations as at 1 January 2014, the list of the largest duty stations that the Secretary-General has reported to the General Assembly⁸, the categorization by the United Nations Department of Safety and Security and the Applicant’s letters of appointment and personnel action forms.

24. Pursuant to section 11.1 of ST/AI/2006/5, a staff member who is eligible may opt for a lump-sum payment *in lieu* of the entitlement to shipping. No discretion is conferred upon the Administration to take a decision in specific cases. There is nothing in ST/AI/2006/5 that could be plausibly read as creating an exception for “Mission area” or “within country” travel.

25. The Organization, subject to certain constraints, can amend administrative issuances to change benefits. It can grant the Respondent discretion to provide benefits. It can even abolish benefits outright. In short, it can change the law. What the Organization cannot do is ignore the law as it stands. If ST/AI/2006/5 provides that a benefit must be given, it must be given.

Respondent’s submissions

26. There is no merit to the Application. Intra-mission transfers in the DRC are made using United Nations Transportation. For reasons of efficiency and reliability, the Organization transports staff members’ personal effects to the location of their new assignment. Since staff members do not incur transportation costs when they move intra-mission, there is no basis for payment of a lump sum *in lieu* of reimbursement of transportation costs.

27. The mission offered the Applicant the opportunity to transport her personal effects at no cost to him by United Nations Transport to Entebbe. He declined the

⁷ ICSC/CIRC/HC, January 2014.

⁸ (A/68/256, 30 August 2013).

offer. She cannot claim a relocation grant *in lieu* of reimbursement of costs, when she did not have to incur any costs. At all times, MONUSCO undertook to transport the Applicant's personal effects to her new duty station.

28. ST/AI/2006/5 implements staff rule 7.15. Section 11 of ST/AI/2006/5 provides staff members with the right to opt between their right to reimbursement of costs under staff rule 7.15(d) and a lump sum *in lieu* of reimbursement of the actual costs incurred.

29. The relocation grant option is a lump sum payment *in lieu* of the entitlement to reimbursement for costs incurred in the shipment of personal effects. Where a staff member opts for payment of a lump-sum relocation grant, the staff member waives his/her normal entitlement to reimbursement for the costs of shipment of personal effects under the Staff Rules. The staff member agrees to accept full responsibility for arrangements relating to the shipment of personal effects as well as for the costs related to and resulting from the shipment of personal effects including, but not limited to, customs charges, insurance claims and damage to personal effects.

30. In circumstances where the Organization ships the unaccompanied personal effects of staff members, the right to reimbursement under staff rule 7.15(d) does not arise because the staff member does not incur any costs. Since the right to reimbursement does not arise, a staff member cannot elect to receive a relocation grant *in lieu* of this right.

31. On 7 January 2007, OHRM issued the OHRM Guidelines on Relocation Grant (OHRM Guidelines). The Guidelines state in paragraph 5 as follows:

The RLG [Relocation Grant] option does not apply to movements within countries. In these cases, staff members retain their rights to unaccompanied shipments.

32. The OHRM Guidelines acknowledge that in a field operation, mission staff may frequently be reassigned between duty stations within the mission area by the Chief/Director of Mission Support due to operational needs. For moves between

mission duty stations, the mission itself arranges the shipment of the staff member's personal effects from the previous duty station to the new duty station free-of-charge using United Nations air transportation and/or a United Nations vehicle.

33. The relocation grant option is not applicable where there is no prospect of the staff member incurring costs and, as such, no obligation to reimburse the staff member could possibly arise. Where there are no potential costs that may be reimbursed under staff rule 7.15(d), the right to reimbursement does not arise, nor does the right to opt out and receive a relocation grant in lieu of reimbursement.

34. The application of staff rule 7.15(d) and section 11.1 of ST/AI/2006/5 to intra-mission transfers, as detailed in paragraph 5 of the Guidelines, was confirmed in two communications from the Administration to the missions (Field Personnel Division (FPD) guidance).

35. On 15 January 2007, the Personnel Management Support Service (now FPD) provided additional guidance on applying the relocation grant option in the context of peacekeeping operations and special political missions where it clarified that the relocation option is not applicable to movements within the same country or for within-mission transfers and that, in these cases, staff members retain their right to unaccompanied shipment of personal effects.

36. In a subsequent fax of 24 June 2009, FPD provided guidance on the movement of staff within a non-family mission from 1 July 2009 and reiterated that staff members transferred within a mission are entitled to shipment of their personal effects from the previous mission duty station to the new duty station, to be arranged by the mission, and that there is no option for payment of relocation grant *in lieu* of shipment of personal effects for within-mission transfers, even if the within-mission transfer is to a different country within the mission area.

37. The Applicant's argument that the Guidelines, and the FPD Guidance, unlawfully supplement the policy regarding relocation grant and/or the determination of how it is to be implemented has no merit. Staff rule 7.15(d) clearly states that staff

members have a right to reimbursement for costs incurred for unaccompanied shipments. Section 11.1 of ST/AI/2006/5 provides that a staff member may opt for lump sum payment of relocation grant *in lieu* of reimbursement for the costs of an unaccompanied shipment of personal effects. There is no provision that allows a staff member to claim a relocation grant where there are no costs that may be incurred and, consequently, no reimbursement that could be due. The Guidelines and FPD guidance implement this provision consistent with the Staff Rules and relevant administrative issuances.

38. The Applicant has no contractual right to opt for a lump sum relocation grant *in lieu* of reimbursement of costs that may be incurred, since there were no potential costs that she may have incurred. In the absence of any right to reimbursement under staff rule 7.15(d), there cannot arise any right to relocation grant in lieu of a claim for reimbursement.

Considerations

Issues

39. The only legal issue arising for consideration is whether the Applicant was entitled to a relocation grant for his assignment from Kinshasa to Goma within MONUSCO.

40. Staff rule 4.8 provides:

Change of official duty station

(a) A change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period.

(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.

41. The Applicant was being assigned from Kinshasa to Goma, both duty stations being within the MONUSCO mission area. Since both duty stations are in MONUSCO, can that assignment be interpreted to mean that the Applicant was not entitled to a lump-sum relocation grant on grounds, as the Respondent informed the Applicant on 206 August 2014 that her reassignment “was in the same mission”?

42. Mission area was not defined in ST/AI/2006/5. However, the ICSC Hardship Classification⁹ gives a list of duty stations located in a country and, for the DRC where MONUSCO is, Kinshasa and Goma are classified as separate duty stations. It is not DRC that is classified as one duty station but the two different regions of Kinshasa and Goma that are classified as such. For purposes of classification of family duty stations or non-family duty stations, OHRM’s list of non-family “duty stations,” as at 1 January 2014, classifies Kinshasa and Goma as two distinct duty stations. In addition the report of the Secretary-General to the General Assembly of, the list of refers to Kinshasa and Goma as two duty stations¹⁰.

43. The Tribunal finds that the ICSC’s list and classification of duty stations has informed, and forms the basis of, the Secretary-General and OHRM’s own lists and reports. DRC is clearly the Mission Area, within which Kinshasa and Goma exists as distinct duty stations.

44. At the time when the Applicant was informed she was being assigned to Goma from Kinshasa the relevant applicable law was ST/AI/2006/5¹¹.

45. Section 11.1 of ST/AI/2006/5 provided that:

On travel on appointment or assignment for one year or longer, transfer or separation from service of a staff member appointed for one year or longer, internationally recruited staff members entitled to unaccompanied shipment under staff rules 107.21 [staff rule 7.15], 207.20 [cancelled] or 307.6, as detailed above, may opt for a lump-

⁹ (ICSC/CIRC/HC, January (2014),

¹⁰ (A/68/256, 30 August 2013)

¹¹ ST/AI/2015/1 has since been promulgated to replace ST/AI/2006/5.

sum payment in lieu of the entitlement. This lump-sum option shall be known as a “relocation grant”.

46. The wording of section 11.1 above is clear. The option or discretion to opt for the relocation grant vests in the staff member and not with the Respondent.

47. The Respondent has referred in his Reply to the application of staff rule 7.15(d) and section 11.1 of ST/AI/2006/5 to intra-mission transfers, as detailed in paragraph 5 of the Guidelines and as confirmed in two communications from the Administration to the Missions (FPD guidance).

48. The Respondent also submitted that on 15 January 2007, the Personnel Management Support Service (now FPD) provided additional guidance on applying the relocation grant option in the context of peacekeeping operations and special political missions where it clarified that the relocation option is not applicable to movements within the same country or for within-mission transfers and that, in these cases, staff members retain their right to unaccompanied shipment of personal effects.

49. Reference was also made to a fax of 24 June 2009 from FPD that provided guidance on the movement of staff within a non-family mission as of 1 July 2009, and reiterated that staff members transferred within a mission are entitled to shipment of their personal effects from the previous mission duty station to the new duty station, to be arranged by the mission, and that there was no option for payment of relocation grant in lieu of shipment of personal effects for within-mission transfers, even if the within-mission transfer is to a different country within the mission area.

50. It is perfectly permissible for the Respondent to issue Guidelines or manuals that may explain the implementation of a Staff Rule or an Administrative Issuance. But these Guidelines cannot replace the clear provisions of an Administrative Issuance or Staff Rule.

51. This principle has been discussed, and applied, both by the Dispute and Appeals Tribunals in several cases.

52. In *Asariotis* 2015-UNAT-496, the Court held that an *Instructional Manual for the Hiring Manager on the Staff Selection System* does not have legal force. The Appeals Tribunal observed:

“[R]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances.”¹²

53. Similarly, in *Verschuur*¹³ the Appeals Tribunal stated that Staff Selection Guidelines and the Guide to Workflow and Rules for Processing Vacancies in Galaxy, are “merely comments and guidelines issued with a view to facilitate the implementation of the applicable law. Those comments and guidelines can in no way prevail over the administrative instruction”.

54. In *Mashhour*¹⁴, the Appeals Tribunal held that the principle of legislative hierarchy determined in *Villamoran*¹⁵ is applicable only where there is a conflict between guidelines and manuals and a properly promulgated administrative issuance. In the absence of an Administrative Issuance, the manual or guideline is applicable.

55. A policy that is not reflected in an administrative issuance has no legal basis¹⁶.

56. In the case of the impugned decision at hand, the issue is not whether there was a conflict between the Guidelines and ST/AI/2006/5. The issue is whether the Guidelines should have been made to prevail over the Administrative Instruction given the principle of legislative hierarchy as held by Judge Ebrahim-Carstens in *Villamoran*:

At the top of the hierarchy of the Organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar*

¹² *Charles* 2013-UNAT-286.

¹³ 2011-UNAT-149 and *Contreras* 2011-UNAT 150.

¹⁴ 2014-UNAT-483.

¹⁵ UNDT-2011-126, as confirmed in 2011-UNAT-160.

¹⁶ *Manco* 2013-UNAT-342; *Valimaki-Erk* 2012-UNAT-276.

UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

57. The Tribunal concludes therefore that it was not lawful for the Administration to substitute ST/AI/2006/5 with its own Guidelines, so as to deprive the Applicant of his right to opt for the relocation grant.

58. The circumstances surrounding this Application, however, fall squarely within the ambit of ST/AI/2006/5; which affords the Applicant with the right to a relocation grant.

Conclusion

59. The Tribunal orders rescission of the impugned decision.

(Signed)

Judge Vinod Boolell
Dated this 13th day of June 2016

Entered in the Register on this 13th day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi