



**Before:** Judge Goolam Meeran

**Registry:** Geneva

**Registrar:** René M. Vargas M.

NORLEY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Michael Brazao, OSLA

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. By Application filed on 29 January 2015 with the Tribunal Registry in Nairobi, and later transferred to its Registry in Geneva, the Applicant contests the decisions to:

- a. Pay him Daily Subsistence Allowance (“DSA”) only for an initial period of 30 days upon his temporary assignment to Entebbe (Uganda); and
- b. Calculate his Post Adjustment during the temporary assignment at the rate applicable to Entebbe (Uganda) instead of that applicable to Monrovia (Liberia), which was his duty station upon initial recruitment.

## **Facts**

2. On 23 May 2014, the Applicant was offered a one-year fixed-term appointment (“FTA”) as Chief of Section, Investigations Division (“ID”) in the Office of Internal Oversight Services (“OIOS”) in Monrovia, which he accepted on 30 May 2014.

3. On 3 August 2014, the Applicant took up his one-year FTA and travelled from Amman (Jordan) to Brindisi (Italy) for training/induction. He then travelled on 9 August 2014 from Brindisi to Vienna (Austria) to attend official meetings.

4. In August 2014, due to the Ebola outbreak in Monrovia, the Under-Secretary-General, OIOS, decided to temporarily reassign, among others, the Applicant and his team to Entebbe for six months. Consequently, by email dated 12 August 2014, two of the Applicant’s team members, Mr. Boskett and Ms. Tarr, were informed in detail of different administrative formalities relating to their assignment, in particular the terms of their assignment grant and the application of the post-adjustment for Uganda to their remuneration. The Applicant travelled from Vienna to Entebbe on 19 August 2014.

5. In the context of an email chain with the Applicant about a query relating to his functional title arising from his assignment to Entebbe, the OIOS Executive Office advised the Applicant, by email of 25 August 2014, that:

The decision to temporarily assign staff to Entebbe was an operational one made by management due to the Ebola outbreak and inability to travel within the country to conduct investigations. Should the situation improve[,] you will all return to Monrovia. Therefore, for all intents and purposes, you are still considered an OIOS, UNMIL staff member. Again, the only difference is your physical location and as such *will receive entitlements as they pertain to Entebbe* ... it's a bit messy but for HR purposes and because this has an effect on entitlements [we] just want to make sure everyone is on the same page with that and understand the intricacies of this arrangement (emphasis added).

6. On 19 September 2014, the Applicant received a Personnel Action (PA No. 9458514) specifying the amount of his DSA and his post adjustment based on his temporary assignment to Entebbe. Under item 38, titled "Duty Station", this PA indicated "Monrovia" while in its "Remarks" section the following was noted: "Temporary 6 [months] relocation to Entebbe due Ebola".

7. By email of 22 October 2014 to his Executive Officer, the Deputy Director, ID, OIOS (Vienna), requested her to undertake an urgent review of the applicable rules/regulations and to "clarify the situation regarding the financial and other entitlements of the ID/UNMIL team ... and revert with such clarification". This request was prompted by queries made by Ms Tarr, a member of the ID/UNMIL team.

8. By email of 23 October 2014, the Executive Officer advised that, in summary, after reviewing the inquiries, the ID/UNMIL staff "was relocated to Entebbe on a re-assignment (lateral) basis, not on a TDY [(Temporary Duty)]", and that they were "installed in Entebbe and therefore ... not entitled to receiving DSA for the duration [of the re-assignment]".

9. On 28 October 2014, “Administrative Guidelines for Offices affected by an Ebola Virus Disease (EVD) Outbreak” (“EVD Guidelines”) were issued and disseminated to all OIOS staff. Para. 23(a) of the EVD Guidelines reads:

23. In order to address the needs of the United Nations Organizations in re-tasking their activities in response to the EVD Outbreak, Heads of Departments/Offices may:

- a) temporarily deploy a staff member to a UN office in another location to perform his/her or other duties, or a combination of both. Travel to the location and DSA will be payable.

10. By email of 4 November 2014 to his Executive Officer, the Deputy Director, ID, OIOS (Vienna) asked her how her “[23 October 2014] response now fit with paras. 22-23 from the [EVD Guidelines]”.

11. By email of the same day, the Executive Officer replied that

Assignment and [Temporary Duty] are each a valid modality to ‘temporarily deploy’ staff. An executive decision was made to use the former arrangement, which affords relocated staff travel costs, 30 days DSA, as well as RLG [Relocation Grant] (\$1200) and pro-rated lump-sum portion of the one month net salary.

The administrative guidelines on the Ebola response [provide] organizations with options on how to manage staff during the crisis. The guidelines do not replace the staff regulations and rules however.

The administrative guidelines provide for DSA if a staff member is sent on duty travel. Duty travel is normally short-term. The guidelines in any event do not indicate a maximum time frame for the DSA payment. DSA is not unlimited, however, under the UN staff rules.

My understanding is that the staff member was initially assigned to Entebbe for 6 months from the start. Under staff rule 3.7(ii) “[w]hen a staff member is assigned to a duty station for less than one year, the Secretary-General shall decide at that time whether to apply the post adjustment applicable to the duty station and, if appropriate to pay an assignment grant under staff rule 7.14 and the hardship and non-removal elements of the mobility and hardship allowance under staff rules 3.13, 3.14 and 7.16(h) or, in lieu of the above, to authorise appropriate subsistence payments”. Therefore, you have the discretion to decide whether to install the person at

the temporary duty station and pay post adjustment or pay DSA. However, under staff rule 4.8(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.” Entebbe is a field mission, therefore, if a decision were to be made to pay DSA, the payment of DSA would be limited to 3 months maximum after which the staff member must be installed at the duty station.

That is not [to] say that the staff member has a right to payment of DSA for the first three months. Under staff rule 3.7(c)(iii), “[w]hen a staff member is assigned to a United Nations field mission for a period of three months or less, the Secretary-General shall decide at that time whether to apply the post adjustment applicable to the duty station and, if appropriate, to pay an assignment grant under staff rule 7.14 and the hardship and non-removal elements of the mobility and hardship allowance under staff rules 3.13, 3.14 and 7.16(h), or, in lieu of the above, to authorise appropriate subsistence payments.” Therefore, there is also discretion for you to determine whether to pay DSA for three months or to install the person with payment of post adjustment in Entebbe for an assignment of three months or less.

I hope this settles the matter.

12. On 12 November 2014, the applicant filed a request for management evaluation contesting the administrative decision about his DSA and post adjustment emoluments (see para. 1 above). By letter dated 31 December 2014, the Applicant was advised that the Secretary-General had decided to uphold the contested decision.

13. On 29 January 2015, the Applicant filed his application with the Nairobi Registry of the Tribunal. It was served on the Respondent on 2 February 2015, and he submitted his reply on 4 March 2015.

14. By Order No. 170 (NBI/2016), the case was transferred from the Nairobi to the Geneva Registry, where it was registered under Case No. UNDT/GVA/2016/15. The parties did not object to this transfer.

15. By Order No. 68 (GVA/2016), the Tribunal ordered the Respondent to:
  - a. Clarify the precise meaning and effect on the Applicant's claims of the phrase "receive entitlements as they pertain to Entebbe"; and
  - b. Provide any documentary evidence of the date of notification to the Applicant indicating precisely when and what he had been informed of in relation to DSA payment and Post Adjustment calculation.
  
16. On 13 April 2016, the Respondent responded to Order No. 68 (GVA/2016). By order No. 81 (GVA/2016), the Tribunal requested:
  - a. The Applicant to comment on the Respondent's claim of non-receivability of his application; and
  - b. The parties views on considering and determining this case on the documents on file and, if applicable, their reasons why a hearing would be necessary.
  
17. On 10 May 2016, the Applicant submitted his comments on the Respondent's argument concerning the non-receivability of his application, and the parties agreed that this case may be decided without a hearing.
  
18. By Order No. 106 of 26 May 2016, the Tribunal requested:
  - a. The Applicant to submit a schedule of loss indicating losses incurred as a direct consequence of the decision to install him first in Entebbe and then to Monrovia; and
  - b. The Respondent to file comments, if any, on the Applicant's schedule of loss.
  
19. On 31 May 2016, the Applicant submitted his schedule of loss and, on 3 June 2016, the Respondent filed his comments on it.

## **Parties' submissions**

20. The Applicant's principal contentions are:

### *Receivability*

- a. By not raising the receivability issue, the Management Evaluation Unit ("MEU") implicitly admitted that the claim was not time-barred and, therefore, the Respondent is estopped from raising this argument;
- b. The email of 25 August 2014 does not address the Applicant's claim relating to DSA. It does not include a new Letter of Appointment or a new Personal Action specifying his entitlements as they pertain to Entebbe. It also contains contradictory assertions as well as vague indications about his entitlements and, thus, is not sufficiently clear and comprehensible to be considered as a valid notification of an administrative decision. Consequently, one cannot conclude that, at that time, the Applicant knew or ought to have known that the Administration would refuse his claims; and
- c. The present case is different from the ones dismissed by judgments *Boskett* UNDT/2016/050 and *Tarr* UNDT/2016/053, where both applicants received an email that clearly set out their entitlements and benefits.

### *Merits*

- d. The Administration had no right to alter the Applicant's post-adjustment without formally and officially changing his duty station;
- e. Based on staff rule 4.8(b) and para. 6.3 of Administrative Instruction ST/AI/2012/1 (Assignment Grant), an assignment for six months or less can trigger a change of duty station only when a staff member is assigned from a headquarters duty station to a field mission. As the Applicant was not assigned to Entebbe from a headquarters duty station, this provision does not apply to him;

f. The Secretary-General may only make alternative arrangements concerning a staff member's post adjustment if they benefit him/her. In other words, the Secretary-General cannot exercise his discretion under staff rule 3.7(c) to a staff member's detriment or in a way that would result in a net decrease of a staff member's salary. Therefore, the applicable rate for the calculation of the Applicant's post adjustment should normally be that of Monrovia because it has a higher post-adjustment rate than Entebbe;

g. Entebbe is a regular family duty station and not a field duty station;

h. Since there was no change of the Applicant's duty station, and he meets the DSA eligibility requirements in staff rule 7.10(a) and para. 6.3 of ST/AI/2012/1, the Applicant was entitled to DSA payment for the duration of his assignment, namely six months, and not only for 30 days; and

i. The Applicant was requested to travel to another duty station because of the Ebola virus situation. The EVD Guidelines, which do not contradict the Staff Rules and Regulations but complete them and apply to his case, undoubtedly require paying him DSA.

21. The Respondent's principal contentions are:

*Receivability*

a. The application is time-barred and not receivable because following the email of 25 August 2014, the Applicant ought to have known that he would "receive entitlements as they pertain to Entebbe". Therefore, the time limit for requesting management evaluation expired on 25 October 2014, whereas the Applicant requested it on 12 November 2014.

*Merits*

b. The Applicant is estopped from submitting that his duty station was not Entebbe as he agreed to the terms of his assignment to Entebbe following the email of 25 August 2014;



c. Pursuant to staff rules 3.7(c)(iii) and 4.8(b), staff members cannot be assigned on Duty Travel to field missions for more than three months. As the Applicant's assignment was for six months, he was assigned to and installed in Entebbe;

d. Pursuant to staff rule 4.8(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." As Entebbe is a field mission pursuant to General Assembly Resolutions A/68/742, para. 545 and A/64/269, paras. 17 and 22-24, Entebbe is the new duty station of the Applicant;

e. Despite the foregoing, pursuant to staff rule 3.7(c)(ii), the Administration has discretion to decide which duty station's post-adjustment will be paid when an assignment is for less than one year; and

f. The Applicant's claims that the EVD guidelines provide an undertaking for the payment of DSA are mistaken. EVD guidelines do not supplant the Staff Rules.

## **Consideration**

### *Receivability*

22. The Applicant submits that the deadline to request management evaluation only started to run on 19 September 2014, when he received a Personnel Action detailing his DSA and post adjustment, and not on 25 August 2014, when he received the email advising him that he was to "receive entitlements as they pertain to Entebbe". He concludes, therefore, that his 12 November 2014 request for management evaluation was made within the statutory deadline.

23. The Respondent contends that the Applicant failed to submit a timely request for management evaluation because he was informed of the impugned administrative decision on 25 August 2014 and, thus, had until 25 October 2014 to file his request. The Respondent further claims that “as a result of the Organization’s correspondence with the Applicant, [he] ought to have known of the decision to pay him post adjustment at the rate applicable for Entebbe, and an assignment grant for 30 days based on the DSA rate applicable to Entebbe upon receipt of [the] email of 25 August 2014”.

24. Staff rule 11.2(a) requires a staff member who wishes “to formally contest an administrative decision” to, first, submit a written “request for a management evaluation of the administrative decision ... within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested”. The Tribunal must, therefore, determine the date on which notification occurred. The Appeals Tribunal held that, in doing so, one must consider the “entire circumstances surrounding [communications]” (see *Babiker* 2016-UNAT-672 at para. 38).

25. The evidence on file shows that determining the entitlements of ID/UNMIL staff being relocated from Monrovia to Entebbe entailed several communications within OIOS. It was not a straightforward matter. The record also shows that two ID/UNMIL staff members received an email clearly informing them about their entitlements upon their assignment to Entebbe, whereas, on 25 August 2014, the Applicant only had his initial letter of appointment, referring to his entitlements linked to his move from Amman to Monrovia, and an email with a statement advising that he would “receive entitlements as they pertain to Entebbe”. These two documents appear to be intrinsically contradictory, and this contradiction was compounded by the information in the Personnel Action that the Applicant received on 19 September 2014. Indeed, it indicated, on the one hand, that the Applicant’s duty station was Monrovia while, on the other hand, it referred to a temporary six-month relocation from Monrovia to Entebbe due to the Ebola outbreak.

26. It is only upon receipt of the above-mentioned Personnel Action and review of the entitlement amounts indicated therein, that the Applicant could reasonably have been expected to assess the full and proper effect of the decision to redeploy him from Monrovia to Entebbe.

27. While it may be assumed that the Applicant, as Chief of Section, ID/UNMIL, was privy to all the exchanges/discussions within OIOS about the entitlements of his team members upon their assignment to Entebbe and, thus, could have known about its financial impact on them all as well as on him, the Tribunal holds that there must be certainty and clarity as to what is the decision itself that was notified to the Applicant. He would then be in possession of actual knowledge of the precise decision that affects the terms of his contract. Staff members should not be expected to have to read different communications and draw inferences as suggested by the Respondent. The Administration is obliged to communicate its decisions in a clear and unambiguous manner, particularly if the administrative decision affects a staff member's entitlements (see *Rosana* 2012-UNAT-273 at para. 25 ; *Collas* 2014-UNAT-473, at para. 40; *Terragnolo* 2015-UNAT-566, at para. 36; *Awan* 2015-UNAT-588, at para. 19; and *Survo* 2016-UNAT-644, at para. 25).

28. In the circumstances, the Tribunal finds that notification to the Applicant occurred on 19 September 2014 . Accordingly his 12 November 2014 request for management evaluation was timely. The Application is receivable.

#### *Merits*

29. Questions relating to the applicable post adjustment rate and of the duration of DSA payments are intrinsically related to whether the Applicant's assignment from Monrovia to Entebbe resulted in a change of his official duty station, for the purpose of determining his entitlements. He would then be placed in a position, to calculate whether he suffered any loss as a result of his assignment to Entebbe and, subsequently, to Monrovia.

Change of official duty station

30. The Tribunal notes that staff rule 4.8(b) (see ST/SGB/2014/1 of 1 January 2014) provides that “[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”.

31. Additionally, the Tribunal recalls its remarks in *Yazaki* UNDT/2016/004 that:

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.

32. Finally, para. 6.3 of ST/AI/2012/1 reads:

Pursuant to staff rule 7.10, staff members shall receive an appropriate daily subsistence allowance for periods of duty away from their official duty station, provided that such period does not exceed six months, or in the case of staff members assigned to a United Nations field mission from a headquarters duty station for a period not exceeding three months. Any extension of such assignment, in accordance with staff rule 4.8, shall result in a change of duty station and payment of the post adjustment and related entitlements, notwithstanding staff rule 3.7 (c). The change in duty station may also result in the payment of an assignment grant.

33. Staff rule 4.8(b) refers to an assignment from a *duty station*; it does not narrow it to a “headquarters” duty station, as applicable in the above-quoted administrative instruction, which is an instrument at a lower level than the Staff Rules in the Organization’s legal hierarchy. Accordingly, an administrative instruction cannot limit the scope of a staff rule. The Tribunal finds that a change of official duty station only requires assignment from a duty station to a UN field mission.

34. The Tribunal is satisfied that Entebbe is to be considered as a field mission, as per General Assembly resolution 64/269 (see Section VI, Global Field support strategy, paras. 17 and 22 to 24) and the Secretary-General's report on Global Field support strategy (A/64/633, in particular its Section IV, Service Centres).

35. It follows from the above that, in the Applicant's case, his assignment from Monrovia to Entebbe resulted in a change of his official duty station, despite contradicting information contained in PA No. 9458514 (see para. 6 above).

36. The Tribunal will now examine in turn the Applicant's challenge to the post adjustment rate applied to him and the duration of his DSA payment.

Application of Entebbe's post adjustment rate

37. Having determined that there was a change of official duty station in the Applicant's case, for the determination and calculation of his entitlements during his assignment to Entebbe, the Applicant's argument that the Administration had no right to alter his post adjustment fails.

38. Staff rule 3.7, on Post adjustment and rental subsidy, provides, insofar as it is relevant that:

(a) *Post adjustment is an amount paid to staff members serving in the Professional and higher categories ... to ensure equity in purchasing power of staff members across duty stations.*

...

(c) While the salary of a staff member is *normally* subject to the post adjustment of his or her duty station during assignments for one year or more, alternative arrangements may be made by the Secretary-General under the following circumstances:

...

(ii) *When a staff member is assigned to a duty station for less than one year, the Secretary-General shall decide at that time whether to apply the post adjustment applicable to the duty station and, if appropriate, to pay an assignment grant under staff rule 7.14 and the hardship and non-removal elements of the mobility and hardship allowance under staff rules 3.13, 3.14 and 7.16 (h) or, in lieu of the above, to authorize appropriate subsistence payments;*

(iii) *When a staff member is assigned to a United Nations field mission for a period of three months or less, the Secretary-General shall decide at that time whether to apply the post adjustment applicable to the duty station and, if appropriate, to pay an assignment grant under staff rule 7.14 and the hardship and non-removal elements of the mobility and hardship allowance under staff rules 3.13, 3.14 and 7.16 (h) or, in lieu of the above, to authorize appropriate subsistence payments (emphasis added).*

39. It is clear that the Secretary-General has discretionary authority to determine the applicable post adjustment rate under specific circumstances related to an assignment. The evidence indicates that the Applicant's case falls under the scope of staff rule 3.7(c)(ii). Accordingly, the Secretary-General had discretion to either opt for the payment of subsistence allowance or to "install" the Applicant in Entebbe. Installation, pursuant to staff rule 3.7(c)(ii), involves the application of Entebbe's post adjustment rate together with the payment of an assignment grant and the hardship and non-removal elements of the mobility and hardship allowance. The payment in question is fully documented in the case file.

40. While not challenging the Secretary-General's aforementioned discretionary authority, the Applicant contends that it can only be exercised if it is to the benefit of the staff member concerned. This argument is devoid of merit.

41. Nothing in staff rule 3.7 supports the Applicant's contention that the exercise of the Secretary-General's discretion relating to the application of a specific post adjustment rate requires that there be a "benefit" to the staff member. Additionally, the Applicant was installed in Entebbe from Amman. In any event, there is no evidence of his purchasing power having been negatively affected by the application of the Entebbe rate to the calculation of his post adjustment or that he was disadvantaged with respect to other Entebbe based staff members.

42. In the absence of any evidence of illegality, irrationality and procedural impropriety, the Tribunal sees no basis to interfere with the exercise of the Secretary-General's discretionary authority to install the Applicant in Entebbe, and finds that the application of Entebbe's post adjustment rate in the Applicant's case was lawful.

Payment of DSA for only 30 days

43. Having found that there was a change of official duty station in the Applicant's case, the Tribunal finds that DSA payment for only 30 days was lawful pursuant to staff rule 3.7(c)(ii).

44. Additionally, as noted above, the Organization installed the Applicant in Entebbe. Not only did the Organization pay DSA for 30 days, but it also paid the other component of the assignment grant, applicable when installing staff members. This is the lump sum portion in accordance with staff rule 7.14(b)(ii), together with other entitlements linked to the decision to install the Applicant in Entebbe.

45. The Applicant submitted that, as per para. 23 of the EVD Guidelines, "the Organization [undertook] in writing to pay DSA to staff members who were requested to perform their functions from other duty stations because of the Ebola outbreak". The Tribunal notes that the EVD Guidelines do indeed provide for the payment of DSA and are silent on the question of its duration. The Tribunal holds that the EVD Guidelines cannot contravene and/or limit the scope of properly promulgated administrative issuances on the payment and, most importantly, on the duration of DSA such as staff rules 3.7, 7.10, and 7.14 as well as sec. 6 of ST/AI/2012/1.

Applicant's alleged financial loss

46. In the context of its consideration of this case, the Tribunal sought to assess what loss, if any, did the Applicant incur due to his change of initial assignment to Entebbe instead of Monrovia and his subsequent move to Monrovia at the end of his assignment in Entebbe. The Tribunal ordered the Applicant to file a "Schedule of Loss". The Applicant, a senior official (P-5) within the Organization, head of a team of OIOS investigators, and represented by Counsel from the Office of Staff Legal Assistance, merely listed expenses totalling USD31,630 without accounting for monies received from the Organization as a result of him being installed, first, in Entebbe and, subsequently, in Monrovia.

47. On the basis of calculations submitted by the Respondent, the Tribunal notes that the Applicant received just under USD64,000 over and above his claimed expenses. Accordingly, his claim that he incurred a loss for which he should be compensated by the Organisation is far fetched and difficult to comprehend.

**Judgment**

48. There is no merit in the contentions advanced by the Applicant. The application fails and is dismissed.

*(Signed)*

Judge Goolam Meeran

Dated this 18<sup>th</sup> day of November 2016

Entered in the Register on this 18<sup>th</sup> day of November 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva