UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/064
Judgment No.: UNDT/2020/017
Date: 31 January 2020
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

GHANEM-ALI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Nicole Wynn, ALD/OHR, UN Secretariat
Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Senior Rule of Law Officer at the P-5 level with the United Nations Support Mission in Libya ("UNSMIL"), contests the Administration's "calculation of mobility entitlements". Specifically, the Applicant contests the Administration's decision that he is not entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 through 30 June 2013. The Applicant also contests the delay in the calculation and payment of his mobility allowance entitlement, and requests a symbolic compensation of USD1.

2. The application was initially filed with the Nairobi Registry on 13 November 2017.

3. On 19 July 2019, the case was transferred to the New York Registry, and on 16 December 2019, it was assigned to the undersigned Judge.

4. For the reasons below, the application is granted.

Facts

5. On 9 August 2008, the Applicant joined the United Nations Office on Drugs and Crime ("UNODC") as a Project Coordinator at the L-3 level in Tripoli, Libya. His appointment was converted to a fixed-term at the P-3 level with UNODC on 1 July 2009.

6. On 1 June 2011, the Applicant was promoted to the P-4 level with UNODC.

7. On 21 August 2011, following a security evacuation to Cairo, Egypt on 21 February 2011, the Applicant was reassigned to Cairo. The Personnel Action for this reassignment records his entitlement duty station as Cairo.

8. From 1 October 2011 to 31 March 2012, the Applicant was on official travel to Tripoli, Libya. Based on an agreement between UNODC and UNSMIL, he was

deployed to Tripoli, Libya to assume the functions of Rule of Law Officer at the P-4 level in UNSMIL.

9. The Applicant was selected to serve as Rule of Law Officer at the P-4 level with UNSMIL from 1 April 2012 for an initial period of three months. The Personnel Action for this assignment records his entitlement duty station as Tripoli.

10. Effective 1 July 2012, the Applicant was selected to serve as Senior Rule of Law Officer on temporary promotion at the P-5 level with UNSMIL for an initial period of one year.

11. On 1 July 2013, the Applicant was transferred from UNODC to UNSMIL as Senior Rule of Law Officer at the P-5 level.

12. On 1 June 2014, UNSMIL reassigned the Applicant from Tripoli, Libya to Brindisi, Italy.

13. On 17 June 2015, UNSMIL reassigned the Applicant from Brindisi, Italy to Tunis, Tunisia.

14. The Applicant states that he submitted a request for mobility allowance entitlement to UNSMIL in May 2015.

15. In January and March 2017, the Applicant received payment for mobility allowance according to an initial review by the Field Personnel Division of the Department of Field Support ("FPD/DFS"). According to the initial mobility review sheet, the Applicant was not eligible for mobility allowance for his assignment to Cairo from 21 August 2011 to 31 March 2012, and the reason provided was that his assignment lasted less than one year. He was eligible for mobility allowance for his assignment to Tripoli from 1 April 2012 to 30 June 2013.

16. On 19 April 2017, FPD/DFS decided that since the Applicant did not spend at least one year out of Tripoli when he returned to Tripoli on 1 April 2012, he was not entitled to mobility payment for his assignment in Tripoli from 1 April 2012 to 30 June 2013. This decision was notified to the Applicant on 21 April 2017.

17. On 2 June 2017, the Applicant requested a management evaluation to contest the decision to reduce his mobility allowance entitlement. He also asked for two years of interest for a delay of the payment of his mobility allowance.

18. In June and October 2017, the Administration recovered what it considered the overpayment of mobility allowance entitlement. According to the Respondent, one final recovery was yet to be made. According to the management evaluation decision, the contested mobility allowance entitlement amounts to USD26,512.38.

Considerations

The applicable legal framework and the issues of the case

19. The Applicant contests the calculation of his mobility allowance entitlement as well as the delay in the calculation and payment of his mobility allowance. The Respondent raises a receivability question only with respect to the Applicant's claim on the delay. The Tribunal will first set forth the legal framework applicable to the mobility allowance entitlement and define the issue in this regard and then decide whether the claim for the delay is receivable and thus subject to judicial review in this case.

The Applicant's mobility allowance entitlement

20. Staff rule 3.13, which was applicable at the time, is set forth in ST/SGB/2013/3 as follows:

> **Rule 3.13**
>
> **Mobility allowance**
>
> (a) A non-pensionable mobility allowance may be paid under conditions established by the Secretary-General to staff members in the Professional and higher categories, in the Field Service category, and to internationally recruited staff in the General Service category pursuant to staff rule 4.5 (c), provided that they:
>
> (i) Hold a fixed-term or continuing appointment;

(ii) Are on an assignment of one year or more and are installed at the new duty station; and

(iii) Have served for five consecutive years in the United Nations common system of salaries and allowances.

…

(b) The amount of the mobility allowance, if any, and the conditions under which it will be paid, shall be determined by the Secretary-General taking into account the length of the staff member's continuous service in the United Nations common system of salaries and allowances, the number of duty stations at which he or she has previously served for a period of one year or longer and the hardship classification of the new duty station to which the staff member is assigned.

21. ST/AI/2011/6 (Mobility and hardship scheme) (later superseded by ST/AI/2016/6) 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;

…

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.

…

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;

(b) If a staff member is assigned to a duty station for a period of one year or longer and such time is subsequently reduced at the initiative of the Organization to less than one year, such service may be counted as an assignment on an exceptional basis.

22. In this case, it is undisputed that the Applicant meets two of the eligibility criteria for mobility allowance as he holds a fixed-term appointment and has served for five consecutive years in the United Nations common system as required under

staff rule 3.13(a) by August 2013. The issue is rather the number of assignments eligible for mobility allowance.

23. It is also undisputed that the Applicant's initial assignment with UNODC in Tripoli from 9 August 2008 to 20 August 2011 (about three years) counts as an assignment for the calculation of his mobility allowance, as decided by the Administration. The Applicant also does not contest and did not request a management evaluation of the Administration's decision that his assignment with UNODC in Cairo from 21 August 2011 to 31 March 2012 does not count as an assignment for the calculation of his mobility allowance as it lasted less than one year.

24. What the Applicant contests is the Administration's decision that he is not eligible for mobility allowance for his subsequent assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013. The Tribunal will therefore examine whether, under staff rule 3.13 and ST/AI/2011/6, the Administration correctly decided the Applicant's mobility allowance entitlement with respect to his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013.

The delay in the calculation and payment of mobility allowance

25. The Applicant also contests the delay in the calculation and payment of his mobility allowance entitlement. He submits that he made a request for mobility allowance beginning May 2015 and followed up with the Administration multiple times thereafter and yet he only started to receive payment on 31 January 2017.

26. In response, the Respondent submits that this claim is not receivable on the ground that he did not seek management evaluation of the alleged delay when he received mobility allowance beginning 31 January 2017.

27. The Tribunal notes that in the Applicant's request for management evaluation dated 2 June 2017, he challenged the delay in the calculation and payment of his mobility allowance entitlement in addition to the calculation of his mobility allowance entitlement that was notified to him on 19 April 2017.

28. Under the jurisprudence of the Appeals Tribunal, the delay in the completion of certain procedures in itself is not an administrative decision subject to judicial review. In *Auda* 2017-UNAT-786, at para. 30, citing *Birya* 2015-UNAT-562, the Appeals Tribunal held that while the absence of a response to a staff member's request could constitute an implied administrative decision and be contested, the alleged delay in reaching the contested decision is preliminary in nature and "may only be challenged in the context of an appeal after the conclusion of the entire process".

29. Since the Applicant requested a management evaluation to contest the delay in the context of his challenge to the Administration's final calculation of his mobility allowance entitlement, which was filed timely, his challenge to the alleged delay is receivable and subject to judicial review.

30. In light of the above, the Tribunal will have to determine:

a. Whether the Applicant is entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013;

b. Whether there was the delay in the calculation and payment of the Applicant's mobility allowance, and if so, what remedies the Applicant is entitled to.

Whether the Applicant is entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013

31. The main issue in the present case is the interpretation of staff rule 3.13 and ST/AI/2011/6 – what constitutes an assignment for the purpose of the determination of mobility allowance entitlement and whether the assignment in question meets such definition.

32. Staff rule 3.13(a) provides that a staff member who holds a fixed-term or continuing appointment and has served for five consecutive years with the Organization, may be paid mobility allowance when he or she is "on an assignment

of one year or more" and is "installed at the new duty station". Staff rule 3.13(b) further provides that the amount of the mobility allowance shall be determined by, among other things, "the number of duty stations at which he or she has previously served for a period of one year or longer".

33. Section 2.5 of ST/AI/2011/6 provides that "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". Section 2.5(a) clarifies that initial appointments of one year or longer or "assignments of one year or longer which involve a change of duty station" shall be counted as one assignment.

34. Accordingly, under staff rule 3.13 and ST/AI/2011/6, there are only two criteria that need to be met to be considered as an assignment for the purpose of mobility allowance entitlement: (a) an assignment should be for the period of one year or more; and (b) it should be at a new duty station, which means that an assignment should involve a change of duty station.

35. Before the Applicant was assigned to Tripoli on 1 April 2012, his personnel record shows that his previous duty station was Cairo as he was reassigned from Tripoli to Cairo following the security evacuation in 2011. Therefore, when he was assigned to UNSMIL in Tripoli from 1 April 2012 to 30 June 2013, this assignment of one year or longer also involved a change of duty station from Cairo to Tripoli. Therefore, this assignment met the definition of an assignment under staff rule 3.13 and ST/AI/2011/6.

36. As the Appeals Tribunal set out the principles of interpretation in *Scott* 2012-UNAT-225, when the language is plain and common, the text of the rule must be interpreted upon its own reading, without further investigation:

> 28. The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further

> investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

37. This interpretation of the meaning of an "assignment" in this case is further supported by staff rule 4.8. Staff rule 4.8(b) 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". The Applicant was assigned to UNSMIL, a United Nations field mission, for a period exceeding three months, and therefore a change of official duty station took place.

38. There does not appear to be any other way to interpret the definition of an assignment under staff rule 3.13 and ST/AI/2011/6, when read together with staff rule 4.8(b).

39. However, the Respondent argues that because the Applicant returned to the same duty station, Tripoli, where he previously served, after less than one year had passed since his departure in 2011, and because his service in Cairo was not considered an assignment for mobility purpose, his return to Tripoli in April 2012 should be considered to be a continuation of service in that duty station (Tripoli). Therefore, the Respondent argues, the Applicant is not entitled to mobility allowance for this assignment in Tripoli from April 2012 to 30 June 2013.

40. The Respondent cites, in support of the case, *Yazaki* UNDT/2016/004 where, at para. 45, the Tribunal determined that when a staff member returned to New York, her previous duty station, after a mission detail assignment in East Timor, her assignment in New York after such mission detail assignment was considered a continuation of her previous assignment in New York under a now abolished Administrative Instruction ST/AI/2007/1.

41. The Applicant's primary submission is that the interpretation put forward by the Respondent is an arbitrary interpretation of ST/AI/2011/6. This is so, he says,

because it creates a fiction that he did not leave Tripoli since 2008, when in reality he left Tripoli and moved to Cairo in 2011, and moved back to Tripoli in 2012. The Applicant argues that this ignores the reason for the existence of the mobility rules, which is to recognize the staff members' move from one duty station to another. The Applicant further argues that under the Administration's reasoning, the decision would have been different if he moved to any duty station other than Tripoli. The Applicant argues that under the general legal principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, which means that where the law does not distinguish, neither should we distinguish, the Administration cannot make such distinction when such differentiation is not explicitly mentioned in the applicable legal framework.

42. Although this primary submission was fully argued by the Applicant, he appeared to have put forward an alternate argument perhaps to cover the possibility that the Tribunal would uphold the Respondent's interpretation of the relevant legal framework. His secondary submission therefore was that the period of his duty in Cairo from 21 August 2011 to 31 March 2012 was reduced to less than one year at the Organization's initiative. Accordingly, citing sec. 2.5(b) of ST/AI/2011/6 which provides that a staff member's service for a period of less than one year may be counted as an assignment on an exceptional basis when it was reduced, at the Organization's initiative, to less than one year, he ought not to have been considered to have been on an assignment for less than one year away from Tripoli. The parties were given the opportunity to file further submissions on this point and the records did not conclusively support that the reduction of the period in Cairo was initiated by the Organization. This proved irrelevant, however, as the Applicant's primary submission stands to be determined on its own merit.

43. Shortly after the challenged decision was received by the Applicant, he queried it. In an emailed response on 4 April 2017, he was informed by the Administration as follows: "you did not spend one year in Cairo therefore the counts [have] changed and the [Entry on Duty] mobility will be on 01 June 2014 instead of 09 August 2013".

44. This statement however fails to reflect the literal meaning of the applicable legal framework. On a literal reading of sec. 2.5(a) of ST/AI/2011/6, the one-year definition of an assignment is for the purpose of counting assignments under sec. 2 of ST/AI/2011/6. There is nothing in the wording of sec. 2.5(a) that prescribes for ruling out of the count of one-year assignments that were preceded by an assignment that lasted less than a year. Accordingly, even though the prior assignment of nine months in Cairo did not itself count as an assignment, the following period in Tripoli, which was for one year, fully meets the requirements to be counted as an assignment.

45. In other words, the fact that the Applicant's assignment in Cairo lasted less than one year and that he was therefore not entitled to mobility allowance for his assignment in Cairo does not detract from the fact that his duty station officially changed from Cairo to Tripoli under staff rule 4.8(b) when he was newly assigned to Tripoli on 1 April 2012 for a period exceeding three months.

46. The Tribunal finds that there is no room to interpret the relevant provisions to claim, like the Respondent does, that his return to Tripoli in April 2012 should be considered as a continuation of service in Tripoli as he only served in Cairo less than one year. The Respondent is adding a clause that does not exist in the relevant legal framework.

47. If the Administration intended to apply the rule in this manner, it could have done so explicitly by setting forth such conditions in the applicable legal framework, like it did with regard to settling-in grant. For example, staff rule 7.14 has a specific provision governing such situation and reduces the settling-in grant when a staff member returns to a duty station where he or she previously served within one year:

> (f) If a change of official duty station or a new appointment involves a return to a place at which the staff member was previously stationed, the full amount of the settling-in grant shall not be payable unless the staff member has been absent from that place for at least one year. In the case of a shorter absence, the amount payable shall normally be that proportion of the full grant that the completed months of absence bear to one year.

48. There is no similar clause in the legal framework for mobility allowance entitlement that treats staff members differently when one returns to a place at which he or she was previously stationed as opposed to someone who goes to a place at which he or she was not previously stationed. As the Appeals Tribunal stated in *Faust* 2016-UNAT-695, where the law does not distinguish, neither should we distinguish.

49. The case of *Yazaki* cited by the Respondent is distinguishable from the instant matter as it turned on a now abolished Administrative Instruction (ST/AI/2007/1) under which the counting of assignments was less generous. The case also arose from different circumstances. There, the issue was whether service on mission detail counted separately. Unlike ST/AI/2007/1, which applied in the *Yazaki* case, the relevant Administrative Instruction to the instant case contains no restrictions regarding assignment count for service on mission detail. In any event, that is not the issue being determined in this case.

50. More importantly, ST/AI/2011/6, which is applicable in this case, contains no restriction on counting an assignment to a prior duty station that follows one of less than a year away from that duty station. There is no provision that return to a prior duty station shall be considered as a continuation of the previous assignment at that duty station merely because the intervening period of service away from the location was for less than a year.

51. To say that because the Applicant spent less than one year in Cairo he did not move at all from Tripoli would be a fiction that would undermine the expressed purpose of the mobility allowance as set forth in sec. 1.1(a): “the purpose of which is to provide an incentive for the geographic mobility of staff1”. Furthermore, it is a fiction that is not provided for in the relevant legal framework.

52. Therefore, under staff rule 3.13 and ST/AI/2011/6, the Applicant is entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013.

The delay in the calculation and payment of mobility allowance

53. The Applicant argues that it took two years to process his claim for mobility allowance despite his regular follow-ups, and the compensation should correspond to the "deprived gain" since if the payment was made in a timely manner, it would have generated bank interests over time. However, he only requests a symbolic compensation of USD1 so that this could serve as a reminder that staff entitlements should be transferred in a timely manner.

54. The Tribunal notes that sec. 2.2 of ST/AI/2011/6 provides that 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". It further provides that "[a]t 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".

55. The Applicant submits that it took two years to process his claim for mobility allowance, which the Respondent does not dispute. The Tribunal further notes that the mobility review sheet completed by the Administration in 2017 reviewed the Applicant's six assignments starting from August 2008. The initial review noted the effective date of his mobility allowance entitlement as August 2013, and the contested decision noted the effective date of his mobility allowance entitlement as June 2015.

56. Therefore, there was a significant delay even under the Administration's own revised determination of the Applicant's mobility allowance entitlement that is the subject of this application.

57. In *Warren* 2010-UNAT-059, the Appeals Tribunal held that the Dispute Tribunal has "the power to award interest in the normal course of ordering compensation" (see para. 14). The Appeals Tribunal explained that "the very purpose of compensation is to place the staff member in the same position he or she would

have been in had the Organization complied with its contractual obligations. In many cases, interest will be by definition part of compensation" (see para. 10). The Appeals Tribunal further held that the interest be awarded at the United States Prime Rate applicable at the due date of the entitlement, "calculated from the due date of the entitlement … to the date of payment of the compensation awarded" (see para. 17).

58. In this case, the Applicant specifically asked for USD1 as a symbolic compensation with regard to the delay in the payment of his mobility allowance entitlement, and the Appeals Tribunal held that the Dispute Tribunal "is not competent to award compensation of the specific kind … without a previous claim for such damage and compensation" (see *Sirhan* 2018-UNAT-860, para. 20).

59. Considering that the contested mobility allowance entitlement amounts to USD26,512.38, the interest for such amount even for one year would have certainly exceeded USD1. However, since the Dispute Tribunal cannot award more compensation than the amount requested by the Applicant, the Tribunal will not make a determination as to how much he could have been awarded for interest.

60. Accordingly, the Tribunal awards USD1 as compensation for the delay in the payment of his mobility allowance entitlement as requested by the Applicant.

Conclusion

61. In light of the foregoing, the Tribunal DECIDES:

a. The application is granted;

b. The Administration's decision that the Applicant is not entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 through 30 June 2013 is rescinded and the Applicant shall be paid mobility allowance for the said assignment;

c. The Applicant shall be paid USD1 as compensation for the delay in the payment of his mobility allowance entitlement;

d. If payment of the above amounts set forth in (b) and (c) is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 31st day of January 2020

Entered in the Register on this 31st day of January 2020

(Signed)
Nerea Suero Fontecha, Registrar, New York