



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/019

Judgment No.: UNDT/2022/121

Date: 11 November 2022

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HANJOURY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Edwin Nhliziyo

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is an FS-4 Administrative Assistant with the United Nations Interim Security Force for Abyei (“UNISFA”) based in Kadugli, Sudan.
2. On 21 February 2022, she filed an application before the Dispute Tribunal contesting the decision not to pay her daily subsistence allowance (“DSA”) for 23 days, from 24 August to 24 September 2021.
3. The Respondent filed a reply on 23 March 2022 urging the Tribunal to find that the contested decision was lawful.

Facts

4. In an email Broadcast dated 3 November 2016, UNISFA’s Office of the Chief of Mission Support (“OCMS”) reminded all international staff members, Military Observers, Staff Officers, United Nations Police Officers, United Nations Volunteers and contractors to submit their Sudanese visa renewal applications in a timely manner.¹ The pertinent parts of the Broadcast read as follows:

[...]

2. Staff are advised that renewal of Visa is a personal responsibility of the Visa holder. Visa renewal applications should be submitted to the office of the CMS, [...] and/or Mr.[...], maximum 5 weeks and minimum 3 weeks prior to the expiration date of the Sudanese visa.

3. Under no circumstances can staff travel out of Abyei and/or Sudan without a visa valid within three weeks beyond the return date of their journey. Should the visa expire while absent from Abyei and/or Sudan, return travel to the mission should not be initiated unless visa is obtained.

4. Staff will be responsible for any expenses incurred for re-granting of a new entry and resident visa. The expenses may include, but not limited to, accommodation and food while in transit in Entebbe, cost of commercial airline tickets for travel to Khartoum and,

¹ Reply, annex R/1.

accommodation and food while in transit in Khartoum.

5. Periods of absence while waiting for renewal of Sudanese visa will be charged against annual leave/MSA leave.

5. On 24 June 2021, the Applicant travelled from her duty station, Kadugli, to Palestine on annual leave to be followed by Rest and Recuperation (“R&R”). She was approved to be absent on annual leave for one day, 24 June 2021, and for R&R from 12 July to 16 July 2021. According to the Applicant’s approved travel request, she was scheduled to return to her duty station on 8 August 2021.²

6. The Applicant submits that due to the closure of the Gaza/Israel border, she was unable to travel out of Gaza for some two weeks and when she finally got her exit permit, she was scheduled to arrive in Sudan on 23 August 2021 but had another one-day flight delay in Istanbul enroute to Khartoum. Her visa expired on arrival in Khartoum on 24 August 2021 where she remained stranded.³

7. On 24 August 2021, the Applicant addressed a memorandum to the Chief of Mission Support (“CMS”) informing him that she would work from Khartoum from 24 August to 24 September 2021 pending the renewal of her visa. She also requested the CMS to authorize payment of DSA while in Khartoum awaiting the renewal of her visa.⁴

8. On 5 September 2021, the CMS denied the Applicant’s request for DSA.⁵

9. On 6 September 2021, the CMS explained that the Applicant was not entitled to DSA for the 23 days that she requested to work from Khartoum and advised her to seek approval for the 23 days to be recorded as telecommuting.⁶

10. The Applicant requested for management evaluation of the CMS’ decision on

² Reply, para. 4.

³ Application, section VII(1) and annex A/5.

⁴ Application, annex A/2.

⁵ *Ibid.*

⁶ Reply, annex. R/4.

25 October 2021.⁷ By letter dated 22 December 2021, the Management Evaluation Unit upheld the contested decision.⁸

11. The Tribunal held a case management discussion (“CMD”) on 28 September 2022. At the CMD, the Tribunal determined that there was no need for an oral hearing of the case in view of the legal issues arising for adjudication in the case.

12. Pursuant to Order No. Order No. 135 (NBI/2022) issued on 29 September 2022, the Applicant and Respondent were directed to file closing submissions on 5 and 12 October 2022, respectively. The Applicant was also granted leave to file any subsequent final submissions by 19 October 2022.

13. On 5 October 2022, the Applicant filed what he described as a “Response to UN[I]SFA Broadcast Regarding Visa Application”.

14. The Respondent filed his closing submissions on 12 October 2022. The Applicant filed a response to the Respondent’s closing submissions on the same day.

Submissions

The Applicant’s case

15. The Applicant’s case is summarized below.

a. Staff rule 7.10 provides that a staff member travelling at United Nations expense is entitled to DSA at rates set from time to time. There are no disqualifying factors, at least not during the first 30 days of this entitlement. The entitlement is not given at the discretion of the Secretary-General.

b. The Respondent is attempting to avoid the staff rule by falsely claiming that her travel on R&R and leave were not approved travel.

⁷ Application, annex A/3.

⁸ *Ibid.*, annex A/4.

c. During the first 30 days of DSA travel, the only requirement is that a staff member be on official travel which covers any staff member travelling at United Nations expense. Therefore, whatever the circumstances were that forced her to remain in Khartoum, she remained in travel status, and she is entitled to DSA for the actual days she was in Khartoum. The Secretary-General does not have discretion to withhold this entitlement until after the initial 30 days. The refusal to pay her DSA is therefore unlawful, violates her right to equal treatment and the right to be treated fairly and justly. Other staff members who spent two to three days in Khartoum enroute to Kadugli were paid their DSA.

d. The Respondent's argument that her stay in Khartoum was not authorized as official travel is faulty because it does not explain who else was supposed to authorize her travel. The staff rule she is relying upon for her DSA claim does not give a manager the authority to redefine the rules under which a staff manager can claim DSA. The Respondent appears to suggest that returning from extended period on R&R has the effect of disqualifying such travel from being official travel.

e. The Respondent operates under a mistaken belief that her stay in Khartoum needed to be approved. The reason why she was forced to remain in Khartoum is not relevant to whether or not she is entitled to DSA under the circumstances. The same considerations apply to whether or not she worked remotely while in Khartoum. Her entitlement to DSA is unaffected by whether or not she worked while she was stranded.

f. The decision not to pay her DSA is part of a pattern of harassment she has endured in the mission. She has seen junior staffers promoted over her despite her excellent performance reviews. She has been stuck at the FS-4 level for nearly 20 years. She believes the decision to deny her DSA was part of this pattern. The decision was made to deny her DSA first and then the Mission "looked around for any possible excuses" that they could use to

justify the decision.

g. While she has not sought medical help to deal with her mental state, she has always sought the help of the staff counsellor to deal with the stress of the situation she has to deal with constantly. The pattern of lies and deceit by management is well established and she has a case before the United Nations Appeals Tribunal dealing with this type of issue. She was rostered for FS-5 Administrative Assistant in 2010. but she found out years later that she was no longer on that roster. It took her a long time to get a coherent answer why she was no longer rostered and when she asked that her membership on the roster be restored, management gave her several misleading statements about the situation. They promised to remedy the situation in a variety of ways until she realized she was being lied to. That was when she decided to take the matter to the Tribunal.

h. The Respondent provided the Tribunal with a redacted automatic visa renewal reminder Broadcast. The reasons the Administration did not send the actual reminder addressed specifically to the Applicant is because it undermines their argument and is an attempt to mislead the Tribunal. The Applicant requests for unnamed staff members to be referred to the Secretary-General for disciplinary action under art. 10(8) of the UNDT Statute.

i. Paragraph 2 of the Broadcast states that a renewal application should be submitted maximum five weeks before the visa expires. Since the Applicant's visa was due to expire on 24 August 2021, that five-week limit was 13 July 2021. The Applicant left the mission on 24 June 2021 with plans to return on 8 August 2021, more than two weeks before her visa was due to expire. She therefore could not have submitted her visa application and passport on that date because she was already on travel status. According to the Broadcast, that was the earliest date she could have submitted her application. By that time, she was already three weeks into her R&R/Leave combo.

j. Applying the same reasoning to the minimum time required to renew her visa, she would still have been out of the mission area on 3 August 2021 and scheduled to return five days later, with more than two weeks before her visa expired.

k. The reminder that the Administration refers to was issued on 27 July 2021. To renew her visa, the Applicant would have needed to submit her passport as well, something she could not have done because she was still travelling and needed her passport with her.

l. The Administration is trying to deny her the DSA entitlement by using a deceptive argument that has no merit. She was already on travel status when the maximum and minimum times for renewing her visa took effect. Besides this, her approved itinerary allowed her plenty time to return to the mission area before her visa expired. The only reason this did not happen was because of the Gaza/Israel exit restrictions that are well known to the United Nations.

m. The Administration issued a Broadcast about visa renewal as supporting its refusal to pay DSA. After the Applicant's response to that claim, they shifted focus and are basing their arguments on staff rule 7.10(g). The allowance is paid for stopovers and the Applicant's situation qualified as a stopover. The intent of the provision is to ensure that anyone travelling at United Nations expense does not end up bearing the costs of unplanned expenses such as delays and stopovers which are beyond their control.

16. The Applicant seeks the following reliefs: that her DSA be paid in accordance with the existing rules; and that she be awarded compensation for a pattern of harassment that now spans several years.

The Respondent's case

17. The following is a summary of the Respondent's case:

a. The contested decision was lawful. DSA is paid to staff members on official travel who are authorized by the Secretary-General to participate in activities related to the work of the Organization which are organized by a government, intergovernmental organization, non-governmental organization or other private source. Official travel must be authorized before it is undertaken.

b. A staff member is responsible for obtaining the proper authorization before commencing travel. Pursuant to staff rule 7.1(c) and section 2.3 of ST/AI/2013/3 Amend.3, (Official travel), the Secretary-General may reject any claim for payment or reimbursement of travel expenses which are incurred by a staff member in contravention of any provision of the staff rules and ST/AI/2013/3 Amend.3.

c. The Applicant was not entitled to DSA for her stay in Khartoum. She was not on official travel for which DSA is payable. Her travel to Khartoum was not pre-authorized. On the contrary, the Applicant's stay in Khartoum was a direct result of her disregard of UNISFA's instruction not to travel on a visa that was about to expire.

d. UNISFA instructed all internationally recruited staff not to travel out of Sudan without a visa valid for at least three weeks beyond the date of their planned return to the Mission. The Applicant was scheduled to return to Kadugli on 8 August 2021 but she travelled knowing that her visa would expire on 24 August 2021, less than three weeks after her return date. Contrary to the Applicant's claim, she could not travel on the United Nations flight to Kadugli on 24 August 2021 without a valid visa. Sudanese visa requirements apply to United Nations staff members and United Nations flights alike.

e. No other leave or travel had been pre-authorized as required by staff rules 1.2(w), 7.10(a), and 7.4 and section 3.1 of ST/AI/2013/3 Amend.3.

Before the Applicant left the duty station, she was told that periods of absence while waiting for renewal of a Sudanese visa were to be charged against annual leave. She was also told that she would have to bear the cost of any stay in Khartoum.

f. The Applicant worked remotely from Khartoum between 24 August and 24 September 2021. DSA is not payable during a Flexible Work Arrangement (“FWA”). To the extent that the Applicant claims she was on FWA while in Khartoum, section 2.1(g) of ST/SGB/2019/3 (Flexible working arrangements), provides that no extra costs may be incurred by the Organization due to an FWA. Moreover, UNISFA has no record of an FWA agreement with the Applicant.

g. DSA is also not payable during R&R. The Applicant’s allegation to the contrary is without merit. The Applicant was not on R&R in Khartoum because her approved R&R had ended on 16 July 2021, almost one month before she arrived there. Even if she were on R&R, the General Assembly has decided that R&R does not include payment of DSA. Accordingly, ST/AI/2018/10 (Rest and Recuperation) states that the entitlement is limited to the cost of travel between the duty station and the designated R&R destination, and payment of the staff member’s salary during the R&R leave.

h. The Applicant has not produced any evidence that the contested decision was ill-motivated. Her allegation that the denial of DSA is part of a pattern of harassment is unsupported. She has not rebutted the presumption that the Mission acted lawfully, nor has she identified any regulation or rule entitling her to DSA. Insofar as the Applicant makes a new allegation of harassment, it is not receivable because she has not exhausted the internal remedies provided under ST/AI/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). The Applicant has produced no evidence that any staff member was treated any differently than she was and was paid DSA while waiting for a visa renewal.

i. The Applicant's allegations regarding her roster membership do not demonstrate ill-motive. In Case No. UNDT/NBI/2021/080, she alleged that she had been removed from the roster for FS-5 positions in the Claims Assistant and Administrative Assistant category. The application was dismissed as not receivable in Judgment No. UNDT/2021/114, issued on 28 September 2021. However, there is no nexus between the alleged decision to remove the Applicant from a roster and the contested decision. Further, the alleged decision to remove the Applicant from a roster was attributed to someone other than the CMS, the person who made the contested decision in the instant case. Mere allegations do not satisfy the Applicant's burden to prove ill motive.

18. In view of the foregoing, the Respondent submits that the Applicant is not entitled to the relief she requests. Compensation cannot be awarded when no illegality has been established. There is no breach of the Applicant's rights or administrative wrong in need of repair. Under art. 10(5)(b) of its Statute, the Dispute Tribunal may not award compensation absent proof of harm suffered. The Applicant has presented no evidence that she suffered moral harm under article 10(5)(b) of the UNDT Statute.

Considerations

19. The starting point for judicial review is a presumption that official acts have been regularly performed.⁹ A determination as to whether the presumption has been rebutted turns on the facts of the case and an interpretation of the applicable regulatory framework.¹⁰ The framework governing whether the Applicant was entitled to DSA for the period when she was stranded in Khartoum is as follows:

⁹ *Krioutchkov* 2021-UNAT-1168, para. 27, citing *Lemonnier* 2017-UNAT-762, para. 32, citing *Rolland* 2011-UNAT-122, para. 5.

¹⁰ See for example, *Rockcliffe* 2022-UNAT-1207, para. 45.

Staff Rules

1.2(w) Travel and **per diem for outside activities**

Staff members who are authorized by the Secretary-General to participate in activities related to the work of the Organization which are organized by a Government, intergovernmental organization, non-governmental organization or other private source **may receive from that organizing entity** accommodation, travel and **subsistence allowance** generally in line with those payable by the United Nations. In such cases the daily subsistence allowance that may otherwise be payable by the United Nations shall be reduced as envisaged by staff rule 7.10(a).

5.2 Home leave

(a) Internationally recruited staff members, ... who are residing and serving outside their home country and who are otherwise eligible shall be entitled once in every 24 months of qualifying service to visit their home country at United Nations expense for the purpose of spending in that country **a reasonable period of annual leave**. Leave taken for this purpose ...**shall hereinafter be referred to as home leave**.

7.1 **Official travel** of staff members

(a) Subject to conditions established by the Secretary-General, **the United Nations shall pay the travel expenses of a staff member** under the following circumstances:

...

(ii) When required to travel on **official business**;

...

(vi) **On home leave**, in accordance with the provisions of staff rule 5.2;

...

(c) The Secretary-General may reject any claim for payment or reimbursement of travel ... expenses which are incurred by a staff member in contravention of any provision of the Staff Rules.

7.4 Authorization to travel

Before travel is undertaken, it shall be authorized in writing. ...A staff member shall be responsible for ascertaining that he or she has the proper authorization before commencing travel.

7.5 Travel expenses

Travel expenses that shall be paid or reimbursed by the United Nations under the relevant provisions of the Staff Rules include:

...

(iii) Daily subsistence allowance;

7.10 Daily subsistence allowance

(a) **Except as provided in paragraph (g)** below, a staff member authorized to travel at United Nations expense shall receive an appropriate daily subsistence allowance ...

(f) The Secretary-General **may establish conditions** under which daily subsistence allowance may be paid during sick, annual or special leave taken while on travel status.

(g) No daily subsistence allowance shall be payable in respect of travel ...on home leave, ..., provided that the allowance may be paid for **stopovers** actually made during such travel **under conditions established by the Secretary-General**. [Emphasis added]

ST/SGB/2019/3

2.1(g) No extra costs may be incurred by the Organization as a result of any of the flexible working arrangements;

20. The Applicant's claim is based on her assertion that she was on official travel status and at United Nations expense when she was forced to have a stopover of 23 days in Khartoum. Accordingly, she claims that she was entitled to DSA in accordance with staff rule 7.10.

21. However, on a literal interpretation of the provisions highlighted above, there is no category of entitlement to DSA under which the Applicant's time in Khartoum falls. Firstly, there is no proof of any involvement by the Applicant in authorized outside work for which she would be allowed to receive a per diem from a source external to the United Nations under staff rule 1.2(w).

22. Secondly, the Applicant was not required to travel on official United Nations business as envisaged under staff rule 7.1(a)(ii). Although on the first day of her stopover awaiting a visa in Khartoum the Applicant applied to be treated as on official duty, the response was that the request was "**not** approved." She was advised that if she was working in Khartoum, she needed to seek permission for a flexible work arrangement, namely telecommuting.

23. Thirdly, the Applicant's subsequent request to have the period in Khartoum treated as telecommuting was refused. Even if it had been granted the regulatory framework indicates that there is to be no cost to the Organization based on flexible work arrangements.

24. Fourthly, if the Applicant were to be considered as being on a stopover in returning from R&R, the last basis for her leave, there is no provision in the regulatory framework for persons on R&R to be entitled to DSA.

25. It is only based on her annual leave that the Applicant could possibly qualify as being on "official travel status" but there are factual deficiencies in her case that detract from this possibility. The factual deficiencies are that under staff rule 7.1, the sole category for which the Applicant could be considered on official travel status is her annual leave which under that provision may be considered home leave. However, on the facts of this case the Applicant's annual leave amounted to only one day, which was 24 June 2021.

26. Thereafter, her absence from duty was for other reasons including R&R from 12 July to 16 July 2021. On 8 August 2021 when the Applicant was scheduled to return to work, she was not on home leave and her R&R was long concluded. Then, after her delayed arrival in Khartoum, during her time awaiting visa renewal the Applicant was not on home leave. Accordingly, there was no factual basis for her to be considered on official travel status pursuant to staff rule 7.1.

27. Even if the Applicant's time in Khartoum could be considered as a continuation of "official travel", the Staff Rules expressly exclude DSA as an entitlement for staff members in the 'home leave' category of official travel. Staff rule 7.5 provides that persons on official travel are entitled to four types of travel expenses including DSA. However, under staff rule 7.10(g), DSA is not payable to persons on home leave except for stopovers under conditions established by the Secretary-General.

28. The Applicant has not submitted that there are any such conditions that have

been established by the Secretary-General. On the other hand, there is no dispute between the parties that there was a Mission-wide Broadcast in 2016, of a policy that UNISFA internationally recruited staff needed to have a visa valid for at least three weeks beyond the date of their planned return to the Mission or else they would not be allowed to travel.

29. The fact that the Applicant was only sent a personal reminder of the Broadcast on 24 July 2021 while already on travel status was a point raised by her Counsel concerning reminders about the policy¹¹. This, however, does not detract from the fact that the Respondent made the policy known since 2016 and the Applicant was aware of it.

30. Staff members were also expressly notified in the 2016 Broadcast that they would be responsible for any costs they incurred due to failure to timely renew their visas. The Broadcast further warned that periods of absence while waiting for renewal of Sudanese visa will be charged against annual leave. The responses given to the Applicant to her August - September correspondence seeking DSA were in keeping with the regulatory framework and this 2016 policy.

31. Although, according to the Applicant, her approved itinerary allowed her time to return to the Mission by 8 August 2021, before her visa expired, that time period was very close to the expiry date of the visa. It was a risk the Applicant took on her own behalf. There is no basis from the fact that her visa expired by the delayed time she was able to travel, to treat the time in Khartoum as a stopover for which DSA is payable.

32. Having considered the literal interpretation of the regulatory framework, the 2016 policy expressly put in place to address circumstances such as the stopover travel period the Applicant faced in Khartoum and the factual background to the stopover, it is the Tribunal's finding that there was no illegality in the decision to

¹¹ Annex AA/1 attached to the Applicant's submission filed on 5 October 2022.

deny the Applicant's request for DSA. Although the Applicant submitted that there were three other staff members who received DSA for other periods of stopover in Khartoum, she has presented no evidence that the circumstances of their stop overs were like hers.

33. There is no basis for a conclusion that not granting DSA to the Applicant was either an unlawful deprivation of an entitlement or part of a pattern of harassment she has endured in the mission.

Judgment

34. The application is dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 11th day of November 2022

Entered in the Register on this 11th day of November 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi