



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/052

Judgment No.: UNDT/2023/016

Date: 15 March 2023

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KRYVORUCHKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Jason Biafore, OSLA

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction and procedure

1. On 21 June 2022, the Applicant, who was at the time of the contested decision a P-4 Chief of Unit, Logistics-Cargo, at the Regional Service Centre Entebbe (“RSCE”), filed an application with the United Nations Dispute Tribunal contesting: (1) the recovery of USD9,365.85 for four months of New York post adjustment for the period 1 August 2021 to 5 November 2021; and (2) the denial of his request to be paid the New York post adjustment (“NY/PA”) for six additional months from his arrival in Entebbe on 6 November 2021.
2. The Respondent filed his reply to the application on 25 July 2022 in which he alleged that the part of the dispute alleging recovery of USD9,365.85 is moot as the Respondent had since paid the Applicant this amount in full. He prays that this part of the claim be dismissed. Regarding the second part of the dispute, to pay the Applicant NY/PA for six months after reporting in Entebbe, the claim is not receivable as the Applicant did not file management evaluation on time therefore the Respondent argues that the Dispute Tribunal lacks jurisdiction on the matter.
3. The Tribunal held a case management discussion (“CMD”) on 24 January 2023. At the CMD, the parties, *inter alia*, agreed that an oral hearing was not necessary and that the case may be decided based on the documents on the record and additional documents to be filed with the Registry.
4. The parties filed closing submissions on 14 February 2023.
5. On 16 February 2023, the Applicant filed a motion to amend his pleadings and to file a further submission, which was granted by the Tribunal.
6. On 17 February 2023, pursuant to the Tribunal’s directions, the Respondent filed submissions on the issue of who had the power/mandate/authority to make the impugned decision. The Applicant’s submissions on this issue were incorporated in his 16 February 2023 submission.

Facts

7. The Applicant has been serving in the United Nations Secretariat since 14 June 2004 occupying different positions in peacekeeping missions and at Headquarters in New York.¹

8. On 19 January 2021, the Applicant was informed that he had been selected to serve as Chief Of Unit, Logistics - Cargo, at RSCE.²

9. On 22 January 2021, the Chief, Movement Control Section in New York released the Applicant for the assignment to the RSCE.³ On the same date, the Applicant wrote an email to a RSCE Human Resources Assistant (“HR Partner”) requesting for the NY/PA to continue for the first six months of his assignment.⁴

10. On 10 March 2021, the HR Partner emailed the Applicant a revised offer letter which indicated that the period of assignment was from 1 February to 30 June 2021, included a provision for telecommuting from New York, adjustment of the post adjustment to maintain it at the NY rate and revocation of the Entebbe hardship allowance.⁵

11. According to the revised offer letter, the terms and conditions of the assignment were, *inter alia*,

In view of possible delays with travel arrangements due to COVID-19, you will be placed against the position in RSCE, Entebbe and the effective date of your temporary assignment will be reflected as the date of your release to RSCE by your parent office on a remote working basis. All applicable entitlements of your current duty station will remain in effect, until the date of your travel to Entebbe, Uganda and provided you continue to meet the eligibility criteria for those entitlements. Upon your travel to Entebbe, your entitlements will be changed based on Entebbe as your official duty station and as reflected

¹ Application, section VII(4).

² *Ibid.*, at annex 14.

³ Reply, annex 4.

⁴ Application, annex 13, page 11.

⁵ *Ibid.*

in the attached Statement of Emoluments.⁶

12. The Applicant was initially assigned as P-4 Chief of Unit, Logistics-Cargo at the RSCE in Uganda from 1 February 2021 to 30 June 2021. The assignment was subsequently extended to 30 June 2022.⁷

13. The Applicant, however, did not travel to Entebbe because soon after signing the Letter of Appointment (“LOA”) on 10 March 2021, the United Nations went into lockdown due to the Covid-19 pandemic and it was not possible to arrange travel.⁸ The Applicant’s supervisor granted him permission to work from New York away from the Entebbe duty station from 1 February to 6 November 2021.⁹

14. On 10 October 2021, the Applicant wrote to the RSCE HR Partner inquiring about what was required to initiate his travel to Entebbe.¹⁰ The HR Partner responded to the Applicant on 14 October 2021 advising him that he could initiate his travel request in Umoja.¹¹

15. On 30 October 2021, the Officer-in-Charge of the Logistics Division/Office of Supply Chain Management in the Department of Operational Support in New York (“LD/OSCM/DOS”) requested the Applicant to initiate his travel arrangements for Entebbe considering the lifting of Covid-19 restrictions in New York and the Secretary-General’s letter dated 28 October 2021 on the return to normalcy by 15 November 2021.¹²

16. The Applicant departed New York on 5 November and arrived in Entebbe on 6 November 2021. Upon arrival, he requested RSCE/HR to continue his NY/PA for the following six months according to staff rule 3.7.¹³

17. On 3 December 2021, the Applicant was informed that the NY/PA would only

⁶ Application, annex 1.

⁷ Reply, annex 5; application, annexes 17 and 18.

⁸ Application, section VII(6).

⁹ Reply, para. 7.

¹⁰ Application, annex 2.

¹¹ *Ibid.*, at annex 3.

¹² *Ibid.*, at annexes 4 and 5.

¹³ *Ibid.*, at sections VII(13) and (14).

be paid up to 6 November 2021, his arrival date in Entebbe.¹⁴

18. On 8 December 2021, the Applicant was informed by the Chief Human Resources Officer (“CHRO”)/RSCE that taking into account all elements of his case, including the letter and spirit of the policy, the NY/PA could not be continued.¹⁵

19. On 20 December 2021, the CHRO/RSCE informed the Applicant that there had been an overpayment for NY/PA for four months which would be recovered over six instalments starting from December 2021 and that the overpayment also applied to his Settling-in-Grant which was wrongly calculated on the basis of the NY/PA and that a recovery of the amount in excess would also be effected in instalments starting in January 2022.¹⁶

20. On 29 December 2021, the Applicant received his payslip with four-month deductions to the post adjustment and other related payments.¹⁷

21. On 5 February 2022, the Applicant requested management evaluation of the deduction of four-month’s NY/PA and the imposition of Entebbe post adjustment from 1 February 2021.¹⁸

22. On 29 June 2022, the Under-Secretary-General, Department of Management Strategy, Policy and Compliance reversed the recovery decision but upheld the decision not to pay the Applicant additional post adjustment at the New York level from 6 November 2021.¹⁹

23. The Applicant completed his assignment with RSCE on 30 June 2022, and returned to duty with his parent entity effective 1 July 2022.²⁰

¹⁴ Reply, annex 2.

¹⁵ Application, annex 7.

¹⁶ *Ibid.*, at annex 8.

¹⁷ *Ibid.*, at annex 9.

¹⁸ *Ibid.*, at annex 20.

¹⁹ Reply, annexes 1 and 6.

²⁰ Applicant’s submission of 9 February 2023.

Applicant's submissions

24. The Applicant's case is set out below.

a. The matter is receivable. The decision on NY/PA was made on 8 December 2021 by the CHRO/RSCE as Chief HR Officer, and not by the HR Partner as suggested by the Respondent. Pursuant to Annex IV, Chapter III, of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) and staff rule 3.7, the CHRO/RSCE was the appropriate decision-making authority. The HR Partner did not have the mandate to make the decision. Therefore, the Applicant's management evaluation request of 6 February 2022 was on time.

b. The Administration is estopped from challenging the receivability of an application where the underlying decision on management evaluation effectively waived any receivability claim in reviewing the matter.

c. The Administration's decision to deny the Applicant's claim for up to six months of NY/PA is unlawful as it is based on irrelevant considerations. The Administration based its denial of the Applicant's claim upon the assertion that to grant the request for NY/PA would not be in accordance with the letter and spirit of the policy. No other reason was given at the time. Subsequent to the initial decision, the Respondent sought to allege that the denial considered that the benefit envisioned in staff rule 3.7 was more than accommodated for during the initial assignment period when working for RSCE remotely, whereby the Applicant already received nine months of NY/PA, three months more than the Staff Rules provide. Such reasoning is flawed, in that it does not take into account the actual letter and spirit of the policy, let alone its legislative intent.

d. The provisions of staff rule 3.7 are clear, as is the legislative intent. The purpose of the post adjustment policy is to ensure equity in purchasing power across duty stations and expressly when a relocating staff member has left

family members behind (and presumably must continue to provide means of financial support for them) at the previous and more costly duty station. The Applicant met the conditions as contemplated in the applicable Staff Rules. He maintained ongoing financial support for family members left behind at the previous and more costly duty station, and who could not travel with him to Entebbe due to the nature of his short-term assignments and his son's schooling. It was on this basis that the Applicant made his good faith request for the six-month NY/PA continuation pursuant to staff rules 3.7(b)(i).

e. Rather than take these relevant and applicable considerations into account, the Administration sought to at first deny the Applicant's good faith claim for the NY/PA by dismissively asserting that to do so would not be in accordance with the letter or spirit of the policy. This decision makes no mention of the actual letter of the policy, and fails to evaluate the eligibility criteria in any meaningful way.

f. When the Respondent attempts to elaborate upon the basis for the denial in their reply, their insistence that the earlier NY/PA extension more than covered the benefit allowed under staff rule 3.7, fails in any meaningful way to evaluate the actual eligibility criteria as set out in that Staff Rule.

g. Moreover, the initial NY/PA allowance was properly dealt with by the underlying Management Evaluation Unit ("MEU") determination, was duly contemplated and fairly bargained for between the parties as a wholly separate condition of employment not made pursuant to staff rule 3.7 and is no longer an issue before the Tribunal. For these reasons, the denial decision remains unlawful as it failed to consider the relevant factors of the actual eligibility criteria for continuation of the post adjustment benefit as set out in the applicable Staff Rules.

h. The Applicant was entitled to claim up to six months NY/PA after arrival at the Entebbe duty station on 6 November 2021 under staff rule 3.7 and is entitled to have the good faith claim duly and lawfully considered.

i. The Applicant sought to travel to Entebbe as soon as practicable given the global pandemic – as contemplated in the LOA - and it is disingenuous for the Respondent to suggest that the Applicant was able to travel earlier.

j. It is not lawful or proportionate to refuse an extension of NY/PA simply because the Applicant received NY/PA during the time when he could not travel to his duty station due to reasons beyond his control. Moreover, the Applicant's family had good reason to remain in NY, the Applicant was thus otherwise eligible for consideration under staff rule 3.7, and the exceptional provision of NY/PA during the initial assignment period was duly and fairly bargained for between the parties as a condition of employment separate and apart from any consideration of said benefit under staff rule 3.7.

k. The Applicant challenged the Administration's refusal to grant NY/PA for six months after 6 November 2021 and indeed MEU ruled upon it.

25. The Applicant requests the Tribunal to rescind the Administration's decision to deny his claimed benefit for NY/PA for up to six months under staff rule 3.7, award him said benefit in full or in another amount deemed by the Tribunal to be just and proper, or in the alternative to remand the matter to the Administration for further and lawful consideration.

Respondent's submissions

26. The Respondent makes the following arguments:

a. The Applicant did not timely request management evaluation of the decision not to pay him additional NY/PA beyond 6 November 2021. On 3 December 2021, a RSCE HR Partner notified the Applicant that NY/PA would only be paid through 6 November 2021, his arrival date in Entebbe. The 60-day management evaluation deadline began to run from 3 December 2021, meaning that the deadline to request management evaluation was 1 February 2021. The Applicant requested management evaluation on 6 February 2022, five days late.

b. The Applicant's 7 December 2021 communication to the RSCE HR Partner, wherein he insisted that he was entitled to continued NY/PA for six months after he arrived in Entebbe on 6 November 2021, did not reset the deadline. Equally, the 8 December 2021 email from the CHRO/RSCE reiterating that the Applicant was not entitled to NY/PA beyond 6 November 2021 did not reset the timeline. The time limit for requesting management evaluation began to run from the date of the first notification of the decision, 3 December 2021. Because the Applicant's request for management evaluation was untimely, the application is not receivable "*ratione materiae*" (sic).

c. Under ST/SGB/2019/2, the Secretary-General has delegated, to Heads of Entity, the authority to apply post adjustment of former duty station for a maximum of six months. For the RSCE, the Head of Entity is the Director/RSCE.

d. On 1 February 2021, consistent with his delegated authority, the Director/RSCE decided to grant the Applicant NY/PA for the nine months the Applicant was in New York prior to travelling to Entebbe. The HR Partner and the CHRO/RSCE subsequently communicated the Director, RSCE's decision to the Applicant.

e. Neither the CHRO/RSCE nor the HR Partner had the delegated authority to apply post adjustment of the former duty station; they only communicated to the Applicant what the RSCE/Director had already notified the Applicant through his LOA.

f. The Respondent's decision not to grant the Applicant NY/PA beyond 6 November 2021 is lawful and comports with staff rule 3.7(b).

g. The Applicant was assigned to the RSCE duty station on 1 February 2021, when the parent duty station released him to RSCE on a remote working basis. The date of his assignment is not 6 November 2021, when he reported to Entebbe. By email of 22 January 2021 to the HR Partner, the Applicant had

requested that the NY/PA would continue for the first six months of the assignment. The RSCE implemented the Applicant's request per staff rule 3.7(b) and his appointment contract.

h. The fact that the Applicant was working remotely from New York did not entitle him to a NY/PA as a matter of right. Pursuant to section 3.10 of ST/SGB/2019/3 (Flexible Working Arrangement), remote telecommuting does not constitute a change of official duty station within the meaning of staff rule 4.8(a). Also, as per section 3.12 of ST/SGB/2019/3, a staff member shall not be entitled to any additional benefits or entitlements because of telecommuting arrangements outside the staff member's official duty station. The Applicant was paid his entitlements under the temporary assignment contract. Neither the Staff Regulations and Rules nor the Applicant's LOA entitle him to be paid NY/PA beyond six months from the date of his assignment to RSCE. His claim for an additional six-months of post adjustment has no merit.

27. In view of the foregoing, the Respondent submits that the Applicant is not entitled to any relief. He has failed to establish a legal basis for claiming an additional six months in NY/PA beyond 6 November 2021. Compensation cannot be awarded when no illegality has been established and therefore the application should be denied.

Considerations

Receivability

28. The parties did not agree on the date on which the impugned decision was made and whether the Applicant complied with the statutory time limits for filing a request for management evaluation. Staff rule 11.2(c) provides the timeline for filing a request for management evaluation and it states that:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested ...

29. The Respondent contended that the Director/RSCE had delegated authority to make the impugned decision and that he made the decision on 3 December 2021. The Respondent did not, however, produce any evidence to support the contention that the decision “not to continue to pay the Applicant NY/PA six months after his arrival in Entebbe” was made on 3 December 2021 by the Director/RSCE.

30. The Applicant on the other hand submitted that the CHRO/RSCE, Mr. Matthieu Elombo, made the impugned decision. To support his averment, he quoted Mr. Elombo’s email of 8 December 2021 in which he stated;

[c]onsidering all elements of your case, including the letter and spirit of the policy, *the NY post adjustment cannot continue*. [Emphasis supplied].

31. This correspondence was in response to the HR Partner’s, Mr. Kiwanuka’s email of the same date advising the Applicant that, “*to continue with the NY Post adjustment after your travel to Entebbe* on 06 November 2021, Matthieu will advise as appropriate”²¹. [Emphasis supplied].

32. The Respondent has not contradicted the Applicant’s demonstration of the chronology of events leading to the impugned decision.

33. The Applicant, therefore, averred that the elements that must be satisfied in a reviewable administration were met by the communication of 8 December from Mr. Elombo, citing *Babiker*²² that;

38. A reviewing Tribunal must [also] consider the language used in the communications and should not be unduly swayed by either or both parties’ characterization of the communications.

34. In the instant application, the Respondent placed undue weight on the communications between the HR Partner and the Applicant and the non-existent

²¹ Applicant’s motion to amend pleadings and further submissions, 16 February 2023, para. 13.

²² 2016-UNAT-672.

communication from the Director/RSCE. The language in the HR Partner's communication is acknowledgement that he had no authority to make the decision to allow the Applicant to continue receiving NY/PA after he travelled to Entebbe nine months after his assignment. He deferred the issue in clear and unequivocal terms to the Chief/RSCE to advise.

35. The Respondent urged the Tribunal to consider ST/SGB/2019/2, expressing that, the Secretary-General has delegated, to Heads of Entity, the authority to "apply post adjustment of former duty station for a maximum of six months"²³, without considering the nature of the decision in dispute. This provision is irrelevant because the Head of Entity did not make the decision that is subject of this case.

36. The fact that the Director/RSCE decided on 3 December 2021 to grant the Applicant NY/PA for nine months is not relevant to the issue before the Tribunal. The issue is when the Applicant's request to continue receiving NY/PA six months after his arrival in Entebbe was denied.

37. The Tribunal agrees with the Applicant that the Director/RSCE made no such decision on 3 December 2021 as alleged by the Respondent. Let it be recalled that it is "not so much the functionary who takes the decision as the nature of the function performed or the power exercised".²⁴

38. It was on 8 December 2021 that the CHRO/RSCE, notified the Applicant that after considering all elements of his case, including the letter and spirit of the policy, he decided that the NY/PA could not continue²⁵.

39. Pursuant to jurisprudence on the factors to consider in a communication purporting to constitute the date on which an administrative decision was made, the Tribunal finds that the 8 December 2021 communication from the CHRO/RSCE constitutes the impugned decision. It had sufficient *gravitas* having been conveyed by

²³ Respondent's additional submission, 17 February 2023, para.2.

²⁴ *Handy* 2020-UNAT-1044, para. 27.

²⁵ Applicant's motion and further submissions, 16 February 2023, para.15

the CHRO/RSCE as opposed to the HR Partner, it raised relevant factors²⁶ and it had an element of finality²⁷.

40. The Tribunal finds that the Applicant met the timeline for filing a request for management evaluation in accordance with staff rule 11.2(c). The Respondent's motion on receivability is dismissed. The application is receivable.

Merits

41. The parties agreed that staff rule 3.7(b)(i) of ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations (superseded by ST/SGB/2018/1/Rev.1) is the relevant provision applicable to this application and it stipulates that,

(b) 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:

(i) When a staff member is assigned to a duty station whose post adjustment classification is lower than that of his or her previous duty station, he or she may continue to receive for up to six months the post adjustment applicable to the previous duty station while at least one member of his or her immediate family (spouse and children) remains at that duty station.

42. The Applicant contended that this provision entitles him to up six months NY/PA after he arrived in Entebbe on 6 November 2021 although he had by then already received nine months NY/PA after the date of assignment. The Respondent argued that this provision entitled the Applicant up to a maximum of six months NY/PA from the date of his assignment to Entebbe, which was 1 February 2021.

43. Hence, the application turns on statutory interpretation. However, the Applicant alluded to an offer letter which appears in this judgment, paragraph 11 above, to support his entitlement for an extra six-month's NY/PA. Therefore, this shall also be reviewed, interpreted and applied consistent with the spirit of the applicable Staff Rule.

²⁶ *Auda* 2017-UNAT-746, para. 31.

²⁷ *Kebede* UNDT/2019/144, para. 29.

44. Counsel for the Applicant laid out the principles of statutory interpretation, citing UNAT jurisprudence in *Reilly* which held that;

In interpreting a legislative provision such as a resolution of the General Assembly, the principle should be that the words of a legislative provision are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, object of the legislation, and the intention of the legislature²⁸.

45. The Applicant then articulated that the purpose of the post adjustment policy is to ensure equity in purchasing power across duty stations²⁹.

46. The Applicant proceeded to outline the conditions that a staff member must meet to avail this entitlement, to wit, one or more family members of the relocating staff member must remain in the more costly duty station, in this case New York; the entitlement must continue up to six months from date of assignment to allow the staff member a period of adjustment from a more costly duty station to a lesser costly duty station where the PA would be less.

47. The Applicant met the conditions and on that basis he was paid not six months but nine months NY/PA from the date of his assignment due to prevailing circumstances beyond his control that prevented him from travelling to Entebbe immediately after assignment.

48. The question is whether having received NY/PA for not up to six months but nine months due to prevailing circumstances, the Applicant is covered by staff rule 3.7(b)(i) of ST/SGB/2018/1 to receive more. The Applicant answered in the affirmative.

49. The Applicant stated that the LOA assured him that “all applicable entitlements of [his] current duty station [would] remain in effect, until the date of [his] travel to Entebbe, Uganda and provided [he] continue[d] to meet the eligibility criteria for those entitlements. Upon [his] travel to Entebbe, [his] entitlements [would] be changed based

²⁸ 2019-UNAT-975, para. 33.

²⁹ Applicant’s closing submissions para. 19.

on Entebbe as [his] official duty station and as reflected in the attached Statement of Emoluments.”³⁰

50. In essence, the Applicant is asking the Tribunal to incorporate this LOA into the staff rule by substituting the term “ assigned to a duty station” for “arrival to a duty station”. Yet, in his own submissions the Applicant had urged this Tribunal to follow the prevailing jurisprudence on statutory interpretation by ensuring that words are read in their entire context and in their grammatical and ordinary sense. It would be against the rules of statutory interpretation to read into the provision that which was not intended by the framers. The key date in the provision is that of “assignment”, the question being when was the Applicant ‘assigned’? The parties agreed that the Applicant was assigned on 1 February 2021.

51. The Tribunal finds that the language used in the staff rule is clear and unambiguous and must be read and understood to mean what it says without subtracting or adding or substituting anything. To find otherwise would be conferring on the Respondent the liberty to maneuver the determining date of payment of PA arbitrarily. This would be against the spirit behind the provision which is to ensure equality of purchasing power across duty stations - neither to overpay nor underpay.

52. If allowed, the argument canvassed by the Applicant would lead to random factors being considered, hence encouraging unpredictability and inconsistent application of the staff rule which is quite untenable in a system governed by Rules.

53. The date of assignment used by the Staff Rule is an objective criteria for ascertaining the period of payment of post adjustment allowance. It cannot be manipulated by an LOA as advanced by the Applicant.

54. This is because an LOA is subject to the applicable Staff Regulations and Rules. This entails that its contents must be in harmony with the scheme of the legislation,

³⁰ Application, annex 1.

object of the legislation, and the intention of the legislature. In other words, it must be consistent with the Staff Regulation and Rules.³¹

55. In the case at bar, if at all the intention of the LOA was to postpone the date of assignment, such intention lacks legal foundation. It is therefore without merit.

Judgment

56. The Applicant has failed to prove that he was entitled to continue to receive six months NY/PA after his arrival in Entebbe, Uganda. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 15th day of March 2023

Entered in the Register on this 15th day of March 2023

(Signed)

Eric Muli, Legal Officer, for

Abena Kwakye-Berko, Registrar, Nairobi

³¹ See *Cooke* 2012 UNAT 275.