
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

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.

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 F

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.

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.

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.

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, *adjustment after your travel to Entebbe* on 06 November 2021, Matthieu will advise as appropriate²¹. [Emphasis supplied].

32. The Respondent has not contradicted the Applic

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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,

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

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 202