



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

AWE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Stephen Margetts, ALS/OHRM
Sarahi Lim Baró, ALS/OHRM

Introduction

1. The Applicant is a Resident Auditor with the Audit Unit of the United Nations Assistance Mission for Iraq (UNAMI) at the P-4 level. He filed the current Application on 20 November 2013 to contest “the decision of [UNAMI] contained in a memo of June 17, 2013 to reverse itself on the interpretation that it gave to [him] through a memo of February 2013 advising [him] to move from [his] assigned duty station in Baghdad to Kuwait” and the “implied decision to unilaterally and arbitrarily breach [...] the contract signed between the UN and [him] as contained in its offer letter of October 7, 2012 and accepted by [him] on October 10, 2013” (Contested Decisions).

Procedural history

2. The Application was filed on 20 November 2013 and served on the Respondent on 22 November 2013.

3. The Respondent filed a Reply on 20 December 2013 in which he asserted that the Application was not receivable *ratione temporis* because the Applicant had failed to request for management evaluation within the deadline prescribed under staff rule 11.2(c).

4. Pursuant to Order Nos. 011 (NBI/2014) and 015 (NBI/2014), the Applicant filed his comments on the receivability issue on 19 February 2014.

5. On 11 March 2014, the Applicant filed a Motion for Protective Measures against certain officials of UNAMI and, on 19 March, the Respondent filed a response to this Motion. On 24 March, the Applicant sought leave of the Tribunal to respond to the Respondent’s 19 March response. In the course of a case management discussion, the Applicant withdrew his motion as he had in the meantime moved to another duty station.

6. On 5 May 2014 and 15 May 2015, the Applicant filed Motions for the production of evidence. The Motions were consolidated and granted in part in Order No. 215 (NBI/2015). On 1 July 2015, the Respondent submitted the

evidence detailed in Order No. 215 on an *ex parte* basis. The Tribunal subsequently disclosed the documents to the Applicant.

Oral hearing

7. The United Nations Appeals Tribunal (UNAT) has previously ruled that¹:

[T]he UNDT has broad discretion in all matters relating to case handling and that, in order to ensure that the case is fairly and expeditiously adjudicated and that justice is served, the Appeals Tribunal should not intervene hastily in the exercise of the jurisdictional power conferred on the Tribunal of first instance.

8. After a careful review of the record, this Tribunal concluded that the issues for decision were clearly defined in the Parties' submissions and that the documentary evidence provided adequately addressed the issues raised.

9. Consequently, the Tribunal, in accordance with art. 19 of the Tribunal's Rules of Procedure, has determined that an oral hearing is not required in this case and will rely on the Parties' pleadings, written submissions and the documentary evidence.

Facts

10. The Applicant was reassigned from the United Nations Mission in Liberia (UNMIL) to UNAMI in accordance with an Offer of Appointment on Reassignment dated 7 October 2012. He was working with the Internal Audit Division of the Office of Internal Oversight Services (IAD/OIOS) as a Resident Auditor for UNMIL.

11. The UNAMI Audit Unit reports to the Special Representative of the Secretary-General (SRSG) of UNAMI but the Applicant's Service Chief and first reporting officer is the Chief of Peacekeeping Audit Services, Internal Audit Division of the Office of Internal Oversight Services (Chief/PAS/OIOS).

12. The Applicant arrived in Baghdad on 10 November 2012. On 13 November 2012, the Office of the UNAMI Chief of Staff announced his arrival in

¹ *Hersh* 2012-UNAT-243. See also *Bertucci* 2010-UNAT-062 and *Calvani* 2012-UNAT-257.

Baghdad to UNAMI staff via a broadcast and on the same day, he received an email from the UNAMI Finance Section informing him of the payment of his relocation grant at the Baghdad rate.

13. According to the Applicant, the Chief of Staff informed him verbally on 14 November 2012 of the decision to relocate him and the Audit Unit immediately to Kuwait because the Mission was facing space constraints as a result of the crisis in Syria. On the same day, the Chief of Staff informed the Chief/PAS/OIOS by email of the decision to reassign and/or relocate the Audit Unit to Kuwait due to the impact the crisis in Syria was having on UNAMI's Baghdad operations. The Applicant was copied on this communication.

14. On 15 November 2012, the UNAMI Chief Administrative Services sent an email to a number of UNAMI officials regarding the relocation of the Auditors to Kuwait. The Applicant was copied on this communication.

15. On 17 November 2012, the Chief/PAS/OIOS responded to the Chief of Staff's email. She pointed out that since it is usual for the resident audit team to be located in the same location as the SRSG, she wanted to discuss the deployment of the OIOS auditors to Baghdad once the situation improved. The Chief of Staff responded the same day apologizing for the unscheduled and sudden decision to relocate the auditors and informed her of the SRSG's view that the OIOS auditors should be accommodated in Baghdad as and when the accommodation capacity improves.

16. The Applicant left Baghdad on 19 November 2012 for Kuwait. At the end of November 2012, he was paid his salary and entitlements as a Baghdad-based staff member but at the end of December 2012, he was paid as a Kuwait-based staff member.

17. In January and February 2013, he was paid as a Baghdad-based staff member. On 13 February 2013, he wrote to the Chief of the UNAMI Human Resources Section (Chief/HRS) seeking clarification as to his duty station in the absence of any formal notification indicating a change from Baghdad to Kuwait.

18. On 14 February, HRS informed him via email that his post had been erroneously changed in IMIS and that this would impact on his February 2013 salary and could lead to an overpayment and subsequent recovery in March 2013.

19. On 17 February, the Chief/HRS informed him that HRS had received a request to change his duty station from Baghdad to Kuwait effective 1 March 2013. A memorandum dated 14 February 2013 confirming the Applicant's change in duty station with effect from 1 March 2013 had been issued by the Officer-in-Charge (OiC) of the Office of the Chief of Staff.

20. A recovery was made from the Applicant's salary at the end of March, which the Applicant protested via email dated 28 March to HRS, the Chief of Staff and the HR Operations Manager.

21. On 3 April 2013, the HR Operations Manager clarified to the Applicant that HRS had "initiated all actions" to have his duty station changed to Baghdad from November 2012 to 28 February 2013 and that his duty station was also changed effective 1 March 2013 to Kuwait.

22. In April 2013, the Applicant submitted an F-10 claim form for payment of Daily Subsistence Allowance (DSA) for the days he had been in Kuwait up until 28 February 2013. He did not receive a response.

23. On 5 May 2013, the Applicant received an email from the Payroll Section, at the Kuwait Joint Support Office that confirmed the payment of his assignment grant and provided a breakdown of the payment.

24. The Applicant followed up on his DSA claim in June 2013 and was informed by the Chief of Finance, Kuwait Joint Support Office, that the timing and location of the place of his assignment had become an issue that needed to be resolved since this would determine the applicable DSA rate. The Finance Unit was therefore waiting for resolution of this issue to make payment.

25. On 19 June 2013, the Applicant received an inter-office memorandum dated 16 June 2013 from the Chief of Staff indicating that the Applicant had departed Baghdad for Kuwait on 19 November 2012 and requesting that the Chief

of Mission Support take the necessary “Personnel” action to formalize the transfer of the Applicant to Kuwait. The effective date of the transfer, 19 November 2012, was handwritten on the memorandum by the Chief Administrative Services.

26. On 9 July 2013, the Applicant requested management evaluation of the decision to retroactively change his duty station in violation of his contract of employment.

27. The Management Evaluation Unit (MEU) informed the Applicant by a letter dated 27 August 2013, that his request for management evaluation was not receivable because the issues he had raised in his request were time-barred.

28. The Applicant filed an Application with the Dispute Tribunal on 20 November 2013.

Issues

29. The issues for determination are:

- a. Whether the Applicant’s Application of 20 November 2013 is receivable; and
- b. If the Application is receivable, whether the reversal of the decision made on 14 February 2013 to change the Applicant’s duty station from Baghdad to Kuwait, effective 1 March 2013, violated his rights.

Is the Application of 20 November 2013 receivable?

Respondent’s submissions

30. The Respondent submits that the Application is not receivable *ratione temporis* because the Applicant failed to request management evaluation of the contested decision within the 60-day statutory deadline provided under staff rule 11.2(c). To this end, the Respondent submits that the Applicant was informed on 14 November 2012 in a meeting with the Chief of Staff of the SRSG’s decision to relocate the Audit Team from Baghdad to Kuwait. The decision was

communicated in writing to the Chief/PAS/OIOS the same day. The decision was subsequently implemented on 19 November 2012 when the Applicant traveled from Baghdad to Kuwait. Accordingly, the Applicant had up until 13 January 2013 to file a request for management evaluation but he did not do so until 8 July 2013, almost six months after the 60-day time limit prescribed under staff rule 11.2(c) had expired.

31. The 16 June 2013 memorandum was not a decision to change the Applicant's duty station. Instead, the memoranda merely confirmed the decision that was taken on 14 November 2012. Thus, the 16 June 2013 memoranda produced no change to the Applicant's duty station. The memoranda merely reiterated that the Applicant's duty station was Kuwait. Additionally, at the time the 16 June 2013 memorandum was issued, the Applicant had already signed a Letter of Appointment on 2 May 2013, which designated his duty station as Kuwait. The Letter of Appointment reflected the reassignment decision which had been notified to the Applicant and implemented on 14 November 2012.

32. Even if the Applicant argues that he was unaware that his duty station was Kuwait from 14 November 2012, he cannot argue that he was unaware that his duty station was Kuwait from 2 May 2013. He expressly agreed to this in his Letter of Appointment. If this hypothetical scenario is followed through, then having signed the Letter of Appointment on 2 May 2013, he should have submitted his management evaluation request by 1 July 2013 but he did not do so until 8 July 2013.

Applicant's submissions

33. The Applicant submits that there are three crucial dates, 14 November 2012, 14 February 2013 and 19 June 2013, that are relevant to the issue of receivability.

- a. 14 November 2012 – this is the date when the Chief of Staff, informed the Applicant of the decision to relocate the auditors to Kuwait. The Applicant's position is that he is not contesting this decision because it was limited to relocating him to Kuwait and did not go further to indicate

that his duty station was changing or that the terms of his Letter of Offer of 7 October 2012 would be affected. The decision on this date was ambiguous and incomplete. Additionally, based on a 25 December 2013 broadcast message from the Under-Secretary-Generals for the Department of Peacekeeping Operations and the Department of Field Support, the use of the word “relocated” did not have the impact of changing the duty stations of staff members affected during a disturbance in South Sudan. The affected staff members were only required to work from other locations until the situation was normalized.

- b. 14 February 2013 – this is the date when the Respondent replied to the Applicant’s request to clarify his contractual status. The Respondent provided a clear and unambiguous statement of an intention to change the Applicant’s duty station with effect from 1 March 2013. The Applicant submits that he accepted this decision with reservations but decided against challenging it in expectation that the Respondent would act in good faith. The Applicant further submits that he signed his Letter of Appointment on 2 May 2013 in reliance on the 14 February 2013 memorandum.
- c. 16 June 2013 – the Respondent sought to reverse himself on the decision he took on 14 February 2013 and sought to have the Applicant’s duty station retroactively changed to Kuwait with effect from 19 November 2012. The memorandum of 16 June 2013 did not merely confirm the decision taken on 14 November 2012 but rather rescinded the decision contained in the 14 February 2013 memorandum. This is the decision the Applicant seeks to contest.

34. The Applicant submits that a general rule of receivability is that “where an organization conceals the existence of a cause of action, time will only run from such time as the cause of action is discovered”. Consequently, even if the Respondent claims that the 14 November 2012 decision included a change in his duty station, this information was only available to him on 14 February 2013. Then, the Respondent materially reversed key elements of the 14 February 2013

decision and created a new cause of action on 16 June 2013. Thus, 16 June 2013 is the final administrative decision the Applicant is contesting and since he submitted his request for management evaluation within 60 days of 16 June 2013, his Application is receivable.

Considerations

35. Pursuant to art. 8.1(c) of the Statute of the Dispute Tribunal, the jurisdiction of the Dispute Tribunal can only be invoked in certain cases if a contested administrative decision has been previously submitted for management evaluation. Thus, a mandatory first step for an applicant prior to the submission of an application to the Dispute Tribunal is to request a management evaluation of the contested administrative decision.

36. Staff rule 11.2(a) provides in relevant part that a staff member wishing to formally contest an administrative decision shall, as a first step, submit a request for management evaluation to the Secretary-General.

37. Staff rule 11.2(c) stipulates that a request for management evaluation shall not be receivable 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.

38. The Respondent is contending that the Applicant is in fact contesting the decision that was communicated to him on 14 November 2012 and that the 16 June 2013 memorandum was a mere reiteration of the 2012 decision. The Respondent also provides a hypothetical argument that even if the Applicant claims he became aware of the decision to reassign him to Kuwait effective 2 May 2013 when he signed his Letter of Appointment his management evaluation request should have been filed no later than 1 July 2013. The Respondent's submissions raise an important issue that must be determined before any other determinations are made - the precise decision that the Applicant is contesting.

39. The Applicant is asserting that he does not seek to challenge the limited and ambiguous decision that was communicated to him on 14 November 2012 but

that he is challenging the decision contained in the 16 June 2013 because this was a final administrative decision that rescinded the decision contained in the 14 February 2013 memorandum.

40. Under these circumstances, it is incumbent on the Tribunal to examine the totality of the circumstances outlined in the Applicant's submissions to ensure that there is no misinterpretation of his/her pleadings.

41. In his request for management evaluation, the Applicant specifies the decision he is requesting MEU to evaluate as the "[d]ecision to retroactively change his duty station in violation of his contract of employment, and without compliance with proper procedures". He indicates that the date he became aware of this decision was 19 June 2013, which corresponds to the date on which the 16 June memorandum from the Chief of Staff was communicated to him by the Chief/HRS. He also indicates in his management evaluation request that he discussed the contested decision with his supervisor on 19 June 2013. The Applicant, in a supplementary document attached to his request for management evaluation, provided the following insight on his request:

Part of an ongoing trend of lack of consideration and attempts at personal humiliation

3. Based on the information that I received from the Chief Personnel Officer that the effective date of my change in duty station was to be March 1, 2013, I presented an F-10 claim which was withheld for 2 months without the courtesy of even reverting to me that there was a problem with it until I persistently demanded for it and 2 months later, I get a memo informing me that my change in duty station was effective in November, 2012.

42. In his 20 November 2013 Application to the Dispute Tribunal, the Applicant describes the contested decision as:

The decision of the United Nations Assistance Mission in Iraq contained in a memo of June 17², 2013 [sic] to reverse itself on the interpretation that it gave to me through a memo of February 2013 advising me to move from my assigned duty station in Baghdad to Kuwait. The initial instructions to move to Kuwait were contained

² The Applicant acknowledged in his response on receivability that 17 June 2013 was an error and that the memorandum was dated 16 June 2013.

in a series of e-mails and verbal communication which were not clear as to intent, and when I sought clarification in February 2013, an interpretation was given to me by the administration which it now seeks to reverse”.

43. He indicates in the Application that the date of the decision is 17 June 2013³ and that it was communicated to him on 19 June 2013.

44. Taking into consideration the Applicant’s specification of the date he became aware of the decision as 19 June 2013 and the extensive explanation he provided in the supplementary document to his management evaluation request regarding the 16 June memorandum, the Tribunal finds that the Respondent misconstrued the decision that the Applicant seeks to contest as the decision communicated to him by the UNAMI Chief of Staff on 14 November 2012.

45. Noting that the Applicant is not a lawyer and that he is not represented by a lawyer, the Tribunal can understand the variances in the language he utilized in his request for management evaluation and his Application. Although the Applicant did not use the exact same wording in the two documents challenging the Contested Decision, it is reasonable to conclude that the decision is the same in both the management evaluation request and the Application.

46. The Tribunal concludes that the decision the Applicant is contesting now and sought management evaluation of was the decision contained in the 16 June 2013 memorandum, which was communicated to him on 19 June 2013.

47. The Respondent asserted irreceivability on two limbs. Firstly, he asserted that the Application is time-barred because the Applicant failed to request management evaluation by 13 January 2013 since the decision was communicated to him on 14 November 2012. Since the Tribunal has already decided that the decision the Applicant is challenging is the one contained in the 16 June 2013 memorandum, the 14 November 2012 date used by the Respondent for his computation of time is rejected. The record shows that the Applicant received the contested decision on 19 June 2013 and that he submitted his request for management evaluation on 8 July 2013, which was well within the delay

³ The correct date is 16 June 2013.

prescribed by staff rule 11.2(c). Accordingly, the Tribunal rejects the Respondent's submission that the Application is not receivable because it is time-barred.

48. The second limb upon which the Respondent relied was that the 16 June 2013 memorandum was not an appealable administrative decision because it was in fact a mere confirmation of the 14 November 2012 decision that was communicated to the Applicant by the UNAMI Chief of Staff.

49. Was the 16 June 2013 memorandum an appealable administrative decision or merely a restatement of an earlier decision?

50. Article 2.1 of the Tribunal's Statute states:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

51. In Judgment No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal defined an administrative decision as follows:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences [...]

52. MEU informed the Applicant that the 14 February 2013 memorandum requesting a change in duty station from Baghdad to Kuwait effective 1 March

2013 was clearly an error that the Administration sought to rectify. MEU further stated that “[b]y an email dated 26 February 2013, the Chief of Administrative Services UNAMI, making reference to the Acting Chief of Staff’s 14 November 2012 email, requested the Chief, Human Resources Section, UNAMI, to ‘adjust the reassignment date to be effective the date of relocation to Kuwait as per the approved MOP’. The Chief of Administrative Services reminded the Chief, Human Resources Section that this remained pending on 31 March 2013”.

53. Whether the 14 February 2013 memorandum was an error or not is a substantive issue that will not be delved into at this stage. However, the record shows that the memorandum of 14 February 2013 produced direct legal consequences for the Applicant because on 17 February, the Chief/HRS informed him that HRS had received a request to change his duty station from Baghdad to Kuwait effective 1 March 2013.

54. Additionally, on 3 April 2013, the HR Operations Manager clarified to the Applicant that HRS had “initiated all actions” to have his duty station changed to Baghdad from November 2012 to 28 February 2013 and that his duty station was also changed effective 1 March 2013 to Kuwait. This was in line with the contents of the 14 February 2013 memorandum. Additionally, this memorandum prompted the Applicant to put in a claim for DSA up until 28 February 2013 for his stay in Kuwait.

55. The 14 February memorandum clearly triggered important Human Resources actions, which in turn triggered changes to the Applicant’s contract of employment. The Administration then decided to reverse the decision contained in the 14 February 2013 memorandum by issuing the 16 June 2013 memorandum.

56. Wittingly or unwittingly, the 16 June 2013 memorandum had the effect of once again changing the Applicant’s contract of employment by retroactively changing the effective date of his transfer from Baghdad to Kuwait from 1 March 2013 to 19 November 2012. Consequently, the Tribunal concludes that this memorandum constitutes an administrative decision pursuant to art. 2.1 of the UNDT Statute as it was a unilateral act of the Administration of individual application carrying direct legal consequences for the Applicant.

Decision

57. The Tribunal finds that the Contested Decision is the decision contained in the memorandum of 16 June 2013, which was communicated to the Applicant on 19 June 2013.

58. The Tribunal also finds that the Application filed by the Applicant on 20 November 2013 is receivable.

Did the reversal of the decision made on 14 February 2013 to change the Applicant's duty station from Baghdad to Kuwait, effective 1 March 2013, violate the Applicant's rights?

Relevant facts

59. These are the facts relevant to the substantive aspect of the Application.

a. On 7 October 2012, the Applicant was serving as Resident Auditor in Monrovia, Liberia with UNMIL. He received an offer for reassignment as Chief Resident Auditor with UNAMI in Baghdad, Iraq.

b. The Applicant was reassigned to UNAMI on 2 November 2012 and arrived in Baghdad on 10 November 2012.

c. On 14 November, he was informed that he would be relocated to Kuwait. He received an email dated 15 November 2012 from the Chief Administrative Services informing him of the decision to relocate him to Kuwait.

d. In an email dated 14 November 2012 addressed to the Chief/PAS/OIOS, the Chief of Staff stated that the relocation of the Resident Auditors was due to the "far-reaching reverberations that stem from the Syrian crisis" and which were impacting operations in Iraq. In the light of this the SRSG decided to redirect the Auditing Unit to Kuwait.

e. In response to the above email the Chief/PAS/OIOS pointed out in a mail of 17 November 2012 to the Chief of Staff that “the bulk of our audit fieldwork will continue to be in Iraq, and I hope that the audit team will be accommodated as needed and as was done in the past”. The Chief/PAS/OIOS added “it is usual for the resident audit team to be located in the same location as the SRSG and therefore, when the situation improves, we can again discuss the deployment of OIOS auditors to Baghdad”.

f. On 19 November 2012, the Applicant signed a document, Movement of Personnel (MOP) Form indicating that he was being reassigned to Kuwait on the same date.

g. On 2 May 2013, the Applicant signed a Letter of Appointment for the renewal of his fixed term contract, effective 19 April 2013. The letter specified that the official duty station was “Kuwait and UNAMI”.

h. Though the Applicant was relocated in Kuwait he still received hardship allowance on the Baghdad scale through a mistake or negligence of the Administration. The payment was subsequently recovered.

Applicant's submissions

60. The Applicant contends that the Respondent is seeking to arbitrarily breach his employment contract by substantially reducing his benefits, a factor that played an important role in his acceptance of the offer to join UNAMI. He submits that it is unfair for the Respondent to implement the Contested Decision without compensation for the inconvenience, loss and damages he suffered as a result of the sudden relocation from Baghdad to Kuwait.

61. The Respondent has breached an existing contract by substituting it with terms and conditions that are unconscionable because it has resulted in substantial financial implications for him in that he has lost more than 40% of his monthly salary.

62. The Respondent has discretionary powers to authorize a change of duty station for staff members but this does not mean that the discretion should be used as a weapon of abuse, oppression or victimization.

63. It is not right to subject a staff member to distress as a result of management's confusion or inconsistency and the personal agenda of individuals who seek to use management as a tool of oppression.

Respondent's submissions

64. The Respondent asserts that the Applicant's claims are not meritorious because:

a. Payment of hazard pay, mobility allowance and other such additional entitlement are not meant to profit staff members of the Organization. These payments are made in recognition of the difficult and stressful work and living environments staff encounter while working in hardship duty stations.

b. The Applicant served in Baghdad, Iraq, for eight days, between 10 and 19 November 2012, and was paid the corresponding allowances. From 19 November 2012, he served in Kuwait. From this date he was not serving in a hardship duty station and is not entitled to payment of the additional entitlements.

c. Staff regulation 1.2(c) provides that staff members are subject to the authority of the Secretary-General, and to assignment by him, to any of the activities or offices of the Organization. Secure accommodation in Baghdad was limited due to ongoing operations in Ashraf and the need to accommodate a large number of humanitarian staff responding to the Syrian crisis. After undertaking a critical review of the accommodation and security issues in Iraq, the SRSG identified a number of functions that could be performed from Kuwait. The decision to re-locate the Mission Audit team, including the Applicant's position, to Kuwait was made due to limited secure accommodation in Iraq and the need to ensure the safety

and security of staff stationed in Baghdad. Thus, it was a lawful and reasonable decision.

d. Finally, on 2 May 2013, the Applicant signed his letter of appointment, confirming his reassignment and designating his duty station as Kuwait. He is bound by this agreement.

Considerations

Was the decision to relocate the Applicant to Kuwait lawful?

65. Staff regulation 1.2(c) provides that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”.

66. It is for the Administration to determine whether a measure relating to assignment of a staff member is in its interest or not⁴.

67. In *Hepworth* 2015-UNAT-503, the United Nations Appeals Tribunal (UNAT) held that “[t]raditionally, the reassignment of staff members’ functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate”.

68. However, the decision to assign or to reassign a staff member must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures⁵.

69. The exercise of the discretion is reviewable according to the test laid down in *Sanwidi* 2010-UNAT-084:

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of

⁴ *Rees* 2012-UNAT 266.

⁵ *Ibid.*

the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

70. The relocation of the Applicant to Kuwait was prompted by administrative and humanitarian reasons based on space constraints in UNAMI in order to accommodate more humanitarian staff. The Tribunal takes the view that the reassignment was a proper exercise of the discretion of the Secretary-General in the organisation of the work in UNAMI. The Secretary-General had the delicate and difficult task of balancing priorities namely the influx of refugees from Syria that required more focus on humanitarian work and the reassignment of the audit team to Kuwait. The exercise of his discretion by the Secretary-General was not tainted by any improper motives. Nor was it perverse or absurd. It is not for the Tribunal to substitute its judgment for that of the Secretary-General regarding organisation of work which remains his sole province. The Tribunal's role is limited to verifying whether a decision was taken for unlawful reasons and in this case, it was not.

71. Should the Applicant have been given an opportunity to express his views given the fact that he was being removed from Baghdad a short while after he had moved there from Liberia and given the policy decision that the resident audit team should be located in the same location as the SRSG? In *Lauritzen* UNDT/2010/172, Cousin J held that the decision to move a staff member from her post "could only have been lawfully taken if she had had an opportunity to submit her views".

72. In *Fernandez de Cordoba Briz* Order No. 186 (NY/2010), Ebrahim-Carstens J held that an obligation to consult a staff member:

[M]ay be inferred from general legal notions such as the principles of equity and natural justice, good faith and fair dealing, and from international best practice and international labour standards. Article 20 of the ILO Workers with Family Responsibilities Recommendation No. 165 of 1981 provides that family responsibilities and considerations should be taken into account when transferring workers from one locality to another and art. 2 of the Workers with Family Responsibilities Convention (No. 156) provides that the Convention (as supplemented by

Recommendation No. 165), applies to all branches of economic activity and to all categories of workers, both in public and private sectors and regardless of whether the activity is for profit.

As an international civil servant, a UN staff member must also expect to be relocated to different places in the world during her/his career. Furthermore, some matters are entirely within the realm of management prerogative provided the dictates of fairness and due process are met. In an instance such as this, once the respondent has made an operational decision, he only has an obligation to consult in good faith and not to negotiate. Consultation is a process by which the views of the party consulted are merely sought or ascertained, this must not mean that the views of this party must necessarily prevail or that the consulting party must change its position.

73. On 14 November 2012, the Applicant was informed at a meeting with the Chief of Staff of the decision of the SRSG to reassign the audit team to Kuwait. The Applicant does not dispute this fact. He then requested that the decision be communicated in writing to his Service Chief, the Chief/PAS/OIOS. This was done on the same day and the email was copied to the Applicant.

74. The Tribunal considers from the above facts that though the Applicant was not expressly asked to give his views, he had an opportunity of doing so. This he did not do. Further, he acquiesced in the reassignment by signing all the relevant documents.

Is the Applicant entitled to the hardship allowance?

75. Section 1.6 of ST/AI/2011/6 (Mobility and hardship scheme) sets out the category and designation of duty stations. It reads:

All duty stations are placed by the International Civil Service Commission in one of six categories: H, and A to E. Duty stations in category H are headquarters and similarly designated locations where the United Nations has no development or humanitarian assistance programme, or locations in countries that are members of the European Union. The A to E categories comprise all other duty stations, classified by order of difficulty of conditions of life and work. Staff are informed of the category of their duty station

on an annual basis or more frequently if there is a change in classification.

76. Section 3 of ST/AI/2011/6 stipulates:

3.1 The hardship allowance shall be payable to eligible staff members who are assigned to duty stations classified in categories B, C, D and E from the beginning of their first assignment to any of those duty stations for the duration of their assignment to those locations.

3.2 Eligible staff members who meet the requirement in section 3.1 above shall be eligible for the hardship allowance upon taking up their first assignment, irrespective of whether they receive an assignment grant.

3.3 If there is a change in the category of the duty station to which a staff member is assigned during the course of an assignment, an appropriate adjustment shall be made in the amount to which the staff member is entitled or the allowance shall be discontinued if no amount is payable, as of the effective date of the implementation of the hardship classification.

77. Lastly, section 7 of ST/AI/2011/6/Amend. 1 states:

Adjustments or discontinuation of payments shall be made when applicable as a result of change of duty station, change of dependency status, change of designation or classification of duty station, promotion, completion of five or six years' consecutive service at the duty station, as applicable, period on special leave or separation. An adjustment shall also be made if a staff member receives a special post allowance to a higher level which would bring the staff member's entitlement into another range (this normally would apply for special post allowances at the P-4, D-1 or FS-7 level), thus giving rise to a higher amount of the allowances in accordance with the amounts specified in the tables in the annex.

78. The classification of duty stations according to conditions of life and work is carried out by the International Civil Service Commission as provided for by ST/AI/2011/6. Duty stations are classified in six categories namely H, headquarters duty stations and from A to E the latter categories being classified by order of difficulty of conditions of life and work as provided by ST/IC/2013/23

(Classification of duty stations and special entitlements for staff members serving at designated duty stations)⁶. Kuwait is classified as a category A duty station and like category H duty stations does not entitle a staff member to any hardship allowance.

79. The hardship allowance is payable to a staff member in a hardship duty station when he or she is physically serving in the location. The entitlement to a hardship allowance is determined according to the location where the individual is based.

80. The facts show that the Applicant was physically located in Baghdad from 10 – 19 November 2012. At the end of November 2012, the Administration paid the Applicant his salary and entitlements as a Baghdad-based staff member even though had been moved to Kuwait on 19 November 2012. The additional payment was subsequently recovered.

81. The UNAMI SRSG had determined in November 2012 that the audit team should be relocated in Kuwait. This determination notwithstanding, the UNAMI Administration deemed it fit and proper to issue a memorandum on 14 February 2013 under the hands of Mr. Jen Kristensen, Officer in Charge, Chief of Staff, addressed to Mr. Raja Arumugham, acting Chief of Mission Support, through Ms. Padma Nandkumar, Chief Administrative Services, and copied to Ms. Jacinta Muhoho, Chief Human Resources Unit, indicating that the duty station of the Applicant should be changed from Baghdad to Kuwait with effect from 1 March 2013.

82. There is no doubt that someone in the Administration was negligent in the handling of the Applicant's matter and the Tribunal considers it appropriate to draw the attention of the Secretary-General to see to it that officers dealing with the funds of the Organization exercise more care in the managing of such funds.

83. The Tribunal will endorse what it stated in *Ten Have* UNDT/2015/007:

⁶ Replaced in succession by ST/IC/2014; ST/IC/2014/17 and ST/IC/2015/3.

Although one would normally expect a staff member to peruse his/her pay slip to check whether the entitlements mentioned therein are correct, one should also be realistic and ask how many staff members actually do this. Primarily, it is the responsibility of the Respondent to ensure that overpayments are not made through error, inadvertence or negligence. These repeated lapses place both the Organization and staff members in an invidious position and is not cost effective for proper administration or good governance.

84. The confusion, mistake, negligence or oversight of top officials of UNAMI referred to above should not however unjustly benefit the Applicant. He was only entitled to the DSA and/or hardship allowances for the days he actually spent in Baghdad, which is classified as category E for purposes of hardship allowances and other entitlements as provided by ST/IC/2013/23. The Applicant cannot be entitled to what is not due to him in law.

85. The Tribunal finds that the reversal of the 14 February 2013 decision to change the Applicant's duty station from Baghdad to Kuwait, effective 1 March 2013 did not violate the Applicant's rights.

Judgment

86. The Application is dismissed in its entirety.

(Signed)

Judge Vinod Boolell

Dated this 22nd day of October 2015

Entered in the Register on this 22nd day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi