



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/027

Judgment No.: UNDT/2010/057

Date: 7 April 2010

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

IANELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Katya Melliush

Counsel for respondent:
James Provenzano

Background

1. The Applicant was employed by the United Nations Office for Project Services (UNOPS) Middle East Office (MEO) as Head of Operations from October 2004, initially on the terms of a Special Services Agreement (SSA) and later on a Consultancy Agreement (CA). On 23 November 2007, the Applicant commenced on a 100-Series Fixed-Term appointment at the same duty station and with the same organisation.

2. By way of the present Application, the Applicant challenges UNOPS' decision not to pay him the assignment grant and other entitlements afforded to internationally recruited staff members under the former 100-Series of the Staff Rules.

Procedural History and Legal Issues

3. The present Application was filed before the Joint Appeals Board (JAB) on 15 September 2008. The Respondent's Reply was filed on 24 November 2008, following which the Applicant filed Observations on the Respondent's Reply on 10 March 2009.

4. On 1 July 2009, this appeal was transferred to the United Nations Dispute Tribunal in accordance with the provisions of section IV, paragraph 44 of United Nations General Assembly Resolution 63/253 and section 2 of ST/SGB/2009/11 on Transitional Measures Related to the Introduction of the New System of Administration of Justice.

5. On 9 July 2009, the United Nations Dispute Tribunal (UNDT) sitting in New York issued a Notice for a Directions Hearing, which hearing was held on 16 July 2009. It was noted at the Directions Hearing that the instant matter is

fundamentally documentary. On 22 July 2009, a Change of Venue Order was issued transferring this case from New York to Nairobi.

6. On 1 December 2009, the UNDT sitting in Nairobi wrote to the Parties in the present case advising them that a Status Conference had been scheduled for 21 December 2009 for case management purposes. Parties were also asked to file their list of legal issues for determination by 15 December 2009.

7. On 15 December 2009, the Applicant submitted:

that the outstanding legal issue in the instant case concerns the determination whether or not Applicant, when recruited under the (former) 100 Series of the Staff Rules on 23 November 2007, was eligible to the entitlements payable upon initial appointment for internationally recruited staff members, i.e. relocation grant and assignment grant, considering that he was recruited from the area within commuting distance of the duty-station having been serving with the same United Nations Office (UNOPS), internationally recruited, under a Special Service Agreement and Consultant Agreement consecutively for a period of three years.

8. On the same day, Counsel for the Respondent informed the Tribunal of their agreement that the legal issue in the instant matter is as formulated by the Applicant.

9. At the status conference of 21 December 2009, the Tribunal decided that this case is capable of being decided on the basis of the written submissions alone. The Applicant and the Respondent concurred with the position taken by the Tribunal, and the proceedings were adjourned for Judgment.

10. On 29 January 2010, the Tribunal issued an order for further and better particulars in accordance with the provision of Article 18 (2) of the UNDT Rules of Procedure.¹ The Parties were directed to provide the Tribunal with clear schedule of :

- i. start and end-dates for each of the Applicant's appointments (SSA and CA) between October 2004 and November 2007;*
- ii. whether travel entitlements attached for each of the appointments;*
- iii. whether the travel entitlements were exercised or waived, with dates for the same; and*
- iv. The amount(s) paid to the Applicant by way of assignment and/or relocation grants at each appointment.*

Submissions

11. I have reviewed the submissions of the Parties carefully. The filings before the court, particularly on the part of the Respondent, are voluminous and largely repetitive. I will therefore concentrate on the submissions of the Parties only in so far as it relates to the legal issues before me.

The Applicant's Case

12. The Applicant's case is that when the CA position was abolished by UNOPS, he applied for the fixed-term post created in its stead. Following the competitive recruitment process undertaken for that post, he was appointed at the P4 level under the 100 Series of Staff Rules as Chief of Programme Development Unit for MEO. His letter of appointment stated Dubai as the place of recruitment and Rome, Italy as the place of home leave and permanent residential address. The Applicant raised

¹ Article 18(2): The Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide information, which appears to the Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

concerns as to his place of recruitment prior to commencing service on the fixed-term appointment on 23 November 2007.

13. The recruitment for the instant post was being handled by UNDP in Copenhagen, in line with UNOPS' operational arrangements, but his concerns were ignored by UNOPS.

14. On 4 March 2008, the Applicant wrote to the Assistant Secretary-General (ASG) for the Office of Human Resources Management (OHRM) requesting policy guidance. The Applicant's memo to OHRM was labelled confidential because he had concerns of possible retaliation. His concerns were based on a precedent event involving his wife's continued recruitment with the same organization.

15. OHRM referred the matter back to UNOPS, attaching the Applicant's memo. On 21 May 2007, the Applicant wrote a follow-up memo to OHRM and was informed that the matter had been referred to UNOPS. UNOPS responded to the Applicant stating that he is not eligible for the entitlements based on his settled nature in the country of the post

16. The Applicant was made to understand that he was not entitled to the grants because he did not travel to his home country at the end of the CA, and therefore travel back to Dubai from there. The Applicant maintains that despite having sought guidance on the policy relating to these entitlements, he was never given the opportunity to return to his home country at the end of his CA which travel he was entitled to under the terms of his CA.

17. When the Applicant sought advice on whether travelling back to his place of permanent residence, and from there back to Dubai, at the Organisation's expense would render him eligible for the entitlements, he was told it would not. On the basis of this advice he opted to remain in Dubai although he was entitled to travel home at the organisation's expense.

18. The Applicant believes that UNOPS is intent on “artificially deprive[ing him]” of these entitlements. UNOPS had in October 2007, attempted to have his fixed-term appointment commence retroactively on 1 October 2007, which is before the Applicant had enquired into his eligibility for these entitlements if he travelled home at the end of his CA.

19. The Applicant contends that the Respondent’s claim that he was “settled” at the duty station neglects the fact that his presence at the duty station was solely for the purposes of his employment by UNOPS as a “consultant on mission”, and not as a staff-member. As non-staff contracts are temporary in nature and do not provide the facility necessary to relocate a household, or indeed personal effects, from the home country, the Applicant cannot be said to have been “settled” in Dubai. The Applicant was never engaged for more than 11 consecutive months, so that the Organisation’s obligation to relocate a staff member was never triggered. Indeed, the Applicant was required to take a one month mandatory break-in-service after 11 consecutive months of service specifically so that the obligation to relocate did not attach.

The Respondent’s Submissions

20. The Respondent’s principal objection to the Applicant’s claim rests on the contention that the Appellant is not entitled to the assignment and/or relocation grants because he had been working and otherwise living in the duty station (Dubai, UAE) for the three years immediately prior to his appointment on 23 November 2007 under the 100 series of the UN Staff Rules, and already had a household there.

21. The Respondent maintains that the position taken by UNOPS is entirely consistent with the relevant staff rules and indeed its own policies. The Tribunal’s attention is accordingly directed to the following provisions of UNOPS’ policies and the staff rules:

i) On International Recruitment (Staff Rule 104.7):

- (a) *Staff members other than those regarded under rule 104.6 as having been locally recruited shall be considered as having been internationally recruited. The allowances and benefits in general available to internationally recruited staff members include: payment of travel expenses upon initial appointment and on separation for themselves and their spouses and dependent children, removal of household effects, non-resident's allowance, home leave, education grant and repatriation grant.*
- (b) *Members of the Field Service and staff members recruited specifically for mission service shall not be eligible for non-resident's allowance or removal of household effects.*
- (c) *A staff member who has changed his or her residential status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his or her nationality may lose entitlement to non-resident's allowance, home leave, education grant, repatriation grant and payment of travel expenses upon separation for the staff member and his or her spouse and dependent children and removal of household effects, based upon place of home leave, if the Secretary-General considers that the continuation of such entitlement would be contrary to the purposes for which the allowance or benefit was created. Conditions governing entitlement to international benefits in the light of residential status are shown in appendix B to these Rules applicable to the duty station.*

Appendix B Conditions governing acquisition of entitlement to benefits of international recruitment provides:

Pursuant to rule 104.7:

- (i) *If a staff member in permanent residence status takes up non immigrant status in the country of his or her duty station, the staff member shall thereupon be granted entitlement to such of the allowances and benefits stipulated in rule 104.7 to which he or she is otherwise entitled and the staff member shall begin to accrue service credit for such allowances*

and benefits from the date on which he or she acquires non immigrant status.

- (ii) (Cancelled)

ii) On the Assignment Grant:

- *The assignment grant shall not be paid to a staff member recruited from the area within commuting distance of the duty station unless he or she demonstrates that it was necessary to change accommodation as a direct consequence of the appointment, for instance after moving out of a house formerly provided by his or her Government. Other accommodation changes within the area of commuting distance, and promotion or conversion to the Professional category at the same duty station, shall not give rise to payment of the grant;²*
- *The purpose of the assignment grant is to provide staff members with a reasonable cash amount for relocation on initial appointment, assignment or transfer to a duty station. It is the total compensation payable by the Organization for costs incurred by the staff member and his/her family members as a result of an appointment, assignment or transfer involving relocation, as well as any pre-departure expenses that the staff member may incur as a result;³*
- *The Secretary-General may, in appropriate cases, authorize payment of all or part of the assignment grant where the United Nations has not been required to pay travel expenses upon the appointment of a staff member regarded as internationally recruited under rule 104.7.⁴*

iii) On the Relocation Grant:

- *governed under the 100 and 200 Series of the United Nations (UN) Staff Rules, the relocation grant option is open to all internationally-recruited*

² Paragraph 1.5 of ST/AI/2000/7 dated 11 December 2000 (titled “Assignment grant”), promulgated for the purposes of “implementing the provisions of staff rule 107.20 and 203.10”, and applied at UNOPS pursuant to official UNOPS decision.

³ Paragraph 1.1 of ST/AI/2000/17 of 11 December 2000.

⁴ Staff Rule 107.20 (i).

*staff members whose appointment, reassignment/transfer or separation necessitates the relocation of household of an extended period of time, which is normally at least one year.*⁵

- *The relocation grant option applies to movements involving a change in country upon: a) initial appointment; b) reassignment/transfer; and c) separation from service.*⁶
- *The relocation grant option does not apply to movements within countries. In these cases, staff members retain their rights to unaccompanied shipments.*⁷
- *The normal costs of packing, crating and lift vans, cartage, unpacking and uncrating shall be reimbursed for the unaccompanied shipments authorized under this rule, except for shipments under subparagraph (g) (i) below, for which the cost of cartage only shall be paid. Costs for the servicing, dismantling, installing or special packing of personal effects and household goods shall not be reimbursed. Storage and demurrage charges shall not be reimbursed unless, in the opinion of the Secretary-General, they are directly incidental to the transportation of the consignment.*⁸

On travel on appointment or assignment for one year or longer, on transfer to another duty station or on separation from service of a staff member appointed for one year or longer, charges for the shipment of personal effects and household goods by the most economical means may be reimbursed up to a maximum of:

- (i) *1,000 kilograms or 6.23 cubic metres for the staff member;*
- (ii) *500 kilograms or 3.11 cubic metres for the first family member; and*
- (iii) *300 kilograms or 1.87 cubic metres for each additional family member*

*authorized to travel at the expense of the Organization.*⁹

⁵ Paragraph 6 of UNOPS/AI/2003/4 dated 30 May 2003.

⁶ Paragraph 9 of UNOPS/AI/2003/4 dated 30 May 2003.

⁷ Paragraph 10 of UNOPS/AI/2003/4 dated 30 May 2003.

⁸ UN Staff Rule 107.21(e).

⁹ UN Staff Rule 107.21(i). *See also* ST/IC/2006/60.

22. The Respondent further submits that it is clear from Staff Rule 107.20 that not all such newly-appointed staff members are automatically paid assignment grants, since Staff Rule 107.20(i) specifically contemplates some staff “regarded as internationally recruited” who do not automatically receive assignment grant.

23. In respect of the relocation grant, the Respondent takes the position that a person who has been living in the duty station for three years has no need to transport 1,000 kilograms of personal effects and household goods from his home country. It is contended that the UNOPS Relocation Grant policy is the *only* instrument conferring relocation grant entitlements on UNOPS staff so that unless the Appellant demonstrates that one of the provisions of the UNOPS Relocation Grant policy confers upon him/her the right to a relocation grant, the Appellant has no right to a relocation grant.¹⁰

24. The Respondent argues that the fact of the Applicant having lived and worked in Dubai for the three years immediately prior to his appointment under the 100 series Staff Rules for a post at the said duty station can only mean that:

- (i) the Applicant was “recruited from” Dubai (for the purposes of the 100 series appointment that came into effect on 23 November 2007);
- (ii) the Applicant must have had a “household” in Dubai at the time of his appointment under the 100 series of the Staff Rules so that the relocation of his household to Dubai was unnecessary. The Respondent submits that indeed the Applicant *has* been in the duty station for one whole year without having been paid a relocation grant (November 2007-November 2008); the foregoing is further supported by the fact that the Appellant has been working as a 100 series staff member for a year now (i.e. November 2007-November 2008) even though no relocation grant has been paid to

¹⁰ The genesis of relocation grants is set out in paragraph 5 of the UNOPS Relocation Grant policy: “The RLG is a lump sum payment for which an eligible staff member can opt as an alternative to his/her existing unaccompanied shipment entitlement.”

- the Appellant, and it is difficult to “*imagine that a person can work full-time for three years in Dubai without establishing a household*” there;
- (iii) there has been no “*movement involving a change in country*” and, instead, the movement (if any at all) would be a “*movement within a country.*”

25. In response to the Applicant’s contention that he was not properly advised of his entitlements (in that, his travel to and from Rome was not the major issue; rather it was his “settled” nature in Dubai), the Respondent directs the Tribunal to the following correspondence:

Given that your place of recruitment for this appointment is Dubai and as such there is no travel to duty station held at the organization’s expense (for this appointment), you are, however, not entitled to pre-departure, shipment and settling expenses such as monetized appointment travel, relocation grant, assignment grant lump sum and DSA.

If you, for instance, refer to the rules of these entitlements such as that of assignment grant 107.20, you will find that this entitlement is only granted in connection with appointment related travel to the duty station upon recruitment paid at the organization’s expense.¹¹

And in a subsequent email:

The entitlements are applied to internationally recruited staff members, who are recruited from outside of the duty station of the post that they had been appointed to and who undertake authorized official travel involving relocation. As such these entitlements are not applicable to your current recruitment since you had already been residing at the duty station for a number of years as per our understanding and you had been recruited from Dubai (note also that your P.1 1 indicates your present address as Dubai).¹²

Deliberations

26. I now come to review the documentary evidence, relevant legislation and the written submissions of the Parties. I will do so by posing questions which I consider critical to arriving at a just determination of the issues raised and argued.

¹¹ See e-mail from BES’ Ms. Bocardo to the Appellant dated 13 November 2007.

¹² See e-mail from BES’ Ms. Bocardo to the Appellant dated 22 November 2007.

27. The Applicant contests UNOPS' decision not to pay him certain emoluments related to assignment and relocation expenses. The applicant's entitlement to these payments depends primarily upon whether he was locally or internationally recruited and whether the Respondent is correct in his assertion that not only was the Applicant locally recruited, but he was also "*settled*" at the duty station having lived and worked there since 2004.

The Assignment Grant

28. ST/AI/2000/17 clearly sets out the purpose of the assignment grant. It is a sum of money:

*intended to provide staff with a reasonable amount of cash at the beginning of an assignment for costs incurred as a result of the appointment or assignment and is based on the assumption that the main expenses of installation are incurred at the outset of an assignment.*¹³

29. It is, in my reading, a grant designed to facilitate a staff member's settling-in at a new duty station. The start-up costs of being in a new place are numerous and often entail expenses larger than that associated with day-to-day living; temporary accommodation, transport and deposits on a tenancy agreement and utilities are but some of these costs.

30. Where a staff member "*travels at United Nations expense to a duty station for an assignment expected to be of at least one year's duration,*" the Organisation is obliged to pay him/her an assignment grant subject to the conditions stipulated in Staff Rule 107.20 read together with ST/AI/2000/17. It is an entitlement that ordinarily envisages movement from one place to another, but may also be paid where no travel has been undertaken.¹⁴

¹³ Section 1.1 ST/AI/2000/17.

¹⁴ See Staff Rule 107.20 (i).

31. Rule 107.20 clearly envisages a situation in which a newly recruited staff member from an area “*within commuting distance of the duty station*” would be entitled to an assignment grant where he had been “*settled*” in the duty station perhaps by a former employer who due to the new recruitment would no longer take responsibility for such things as his accommodation. He would be given the assignment grant to “*resettle*” himself, as it were. By the same token, a newly recruited staff member who had previously worked for the Organisation for a period of time as a consultant and most likely living in make-shift, unsettled or temporary accommodation would be entitled to the grant so that he can now properly settle himself as a staff member. In my judgement, it is only a resident national of the country in which the duty station is, or a permanent resident of the same, who can rightly be assumed to have established a household there and thus not entitled to the grant. In the final analysis, I find that Rule 107.20(i) read together with Section 1.5 of ST/AI/2000/17 appropriately cover situations in which the grant is payable even if the staff was “*recruited within commuting distance*” and there was no “*travel upon [...] appointment*”.

The Relocation Grant

32. Staff Rule 107.21 (i) governs a staff member’s entitlement to ‘*unaccompanied shipment*’ of personal effects and household goods. It is available to staff members on “*travel on appointment or assignment for one year or longer, on transfer to another duty station, or on separation from service.*”

33. The relocation grant or ‘*lump sum option for unaccompanied shipments*’ is a lump sum payment for which an eligible staff member can opt as an alternative to his/her existing unaccompanied shipment entitlement. It is a significant entitlement paid to a staff member who is to be or has been employed for one year or more. The purpose of this entitlement is fairly obvious. It is a grant appropriately designed to enable or assist a staff member to bear the costs associated with the relocation, as it were, of his or her personal effects and household goods. It is paid upon appointment,

assignment or transfer or upon separation from service.¹⁵ The use of this grant is left entirely up to the discretion of the staff member, and the Organisation requires no proof on how the grant was utilised.¹⁶

Who is entitled to these grants?

34. The next question must then be who is entitled to these grants? Staff Rule 104.7, read together with ST/AI/2000/17 and ST/AI/2006/5, provides that staff members who are '*internationally recruited*' for a period of one year or more are eligible for both the assignment and relocation grants, which leads me naturally to ask who is an '*internationally recruited*' staff member?

35. I have carefully considered the provisions of Staff Rules 104.6 and 104.7 which purport to provide a definition of a staff member who is '*internationally recruited*.' Rule 104.7 states simply that staff members who are not regarded as having been '*locally recruited*' under the terms of Rule 104.6 are '*internationally recruited*.'

36. Rule 104.6 in turn refers me to Appendix B of the Staff Rules. Annex B refers to staff members in the '*Trades and Crafts*' and '*General Service*' categories as being normally considered as '*locally recruited*' subject to the listed exceptions, none of which is relevant for our present purposes. The next provision in the Annex, which the Respondent has also referred me to, contains what is called '*conditions governing acquisition of entitlement to benefits of international recruitment*,' which conditions must be applied when interpreting Rule 104.7. I will not cite the provision here, given that it appears earlier on in this Judgement.

37. My reading of the Rules and the attendant Annex is that, for the purposes of the facts before me, one is appropriately considered '*internationally recruited*' unless

¹⁵ Section 11.3 ST/AI/2006/5.

¹⁶ Section 11.5 ST/AI/2006/5.

one has taken up permanent residence status in the country of the duty station. The Rules go so far as to provide that the benefits of international recruitment will attach if one renounces permanent residence for a ‘non-immigrant status.’

38. It is not difficult to understand why contracts for less than a year carry a distinctly different set of entitlements from those of a year or longer. The arrangements one is likely to make when undertaking a move for a period of twelve months or more are considerably different and arguably more involved. The Rules correctly envisage this difference and accommodate it. The logic of the Rules in respect of these grants, and the administrative issuances drafted to implement the Rules, is easily discernible. The Rules have clearly envisaged a situation in which a staff member is recruited for a period of less than one year, which appointment is subsequently extended to one year or more at the same duty station. Where an extension is so effected, the Rules provide for the staff member to receive the balance of what would have been paid had the initial appointment been for one year or longer.¹⁷

39. The concept of permanent residence or residence or being ‘*settled*’ does not therefore depend on how long a staff member has been in the country of his or her duty station. The Applicant was a resident of the United Arab Emirates only because he was employed by UNOPS. He moved to Dubai due to the exigencies of work to fulfil the terms of those contracts; and he stayed for the same reason. The Respondent’s submissions do not contradict these facts. The Applicant was employed on a series of short contracts which kept him in the country for periods longer than any one of those contracts foresaw. In spite of the fact that he had been in Dubai for a cumulative period of three years at the time of his appointment under the 100 Series, it did not necessarily follow that he ‘*must have had a household.*’ It is certainly not within the contemplation of the relevant Staff Rules and administrative issuances cited and discussed above to speculate on such a possibility. It is for good reason that

¹⁷ See Staff Rule 107.20 and 107.21(h); Section 6 ST/AI/2000/17; ST/AI/2006/5

staff members who are adjudged to be entitled to the relocation grant and who indeed receive the said grant are not called to account for the manner of its expenditure. Whether they import 1,000 kilograms or more or less or in fact nothing at all of their personal effects is effectively ignored by the Organisation.

Conclusion

40. It is clear from the submissions of the Parties that the Applicant would not be in Dubai but for his employment with UNOPS. His place of home leave and repatriation is Rome, Italy. Indeed he was entitled to travel to Rome at the end of the contract immediately preceding his fixed-term appointment, but did not exercise that entitlement. The Respondent's advice to the Applicant when this was queried was that these entitlements do not apply to him given that he was recruited 'from Dubai' and attach only when one travels to the duty station ('appointment related travel').

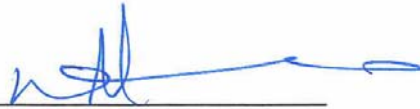
41. Now imagine a situation in which the Applicant had travelled back to Rome at the end of his consultancy, and waited there to be brought back to Dubai under the terms of his fixed-term appointment. Taken to its logical conclusion, this would have entailed '***appointment related travel***' at the Organisation's expense both from and to Dubai. Given that the Applicant sought specific advice on whether his travel to Rome would make a difference to his entitlement on recruitment, and subsequently waived that entitlement, it appears that travel itself would have served no useful purpose other than to satisfy an administrator's literal reading and application of the rules in question; the effect of such a narrow reading of the rules would have been both absurd and unnecessarily costly. In my judgement, the Respondent's advice to the Applicant and his submission to the Tribunal on the same are clearly misconceived.

42. Having found the Applicant to have satisfied the criteria for being '***internationally recruited***,' and on the facts presented to the Tribunal, I am satisfied that the Applicant's situation falls squarely within the ambit of an 'appropriate case' as foreseen in Rule 107.20 (i).

43. I note that in responding to the Respondent's submissions, the Applicant goes into some detail alleging retaliation against his wife. The Applicant's pleadings and the Respondent's reply to the same, touch on the issue in a manner best described as cursory. When I directed the Parties to file their list of legal issues, the instant dispute was framed on the assignment and relocation grants. I therefore do not consider the issue of retaliation to be properly before me and therefore make no finding on it.

44. There is one final issue that I feel I must touch upon, and I do this with some regret. This is the issue of the unfortunate tone and tenor of the Respondent's submissions. While I appreciate that the Respondent's pleadings were made in the format of the old system of internal justice, I take this opportunity to remind Parties, and in this case, the Respondent particularly, to conduct themselves in a manner befitting their respective roles. Personalised accusations, casting aspersions on character and emotive language have no place within the realm of judicial proceedings and Parties are encouraged to ensure that their submissions to the court are careful, considered and tempered.

45. Having carefully considered the issues at hand, as set out by the Parties in this case, I find in favour of the Applicant. The Respondent is ordered to pay the Applicant his assignment and relocation grants, at the rate established for a staff member who is at the duty station with his spouse, including interest at the rate of eight (8) percent per annum from the date the payments fell due.



Judge Izuako

Dated this 7th day of April 2010

Entered in the Register on this 7th day of April 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi