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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/064

Judgment No.: UNDT/2020/017

Date: 31 January 2020

Original: English

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**Before:** Judge Eleanor Donaldson-Honeywell

**Registry:** New York

**Registrar:**





17. On 2 June 2017, the Applicant requested a management evaluation to contest the decision to reduce his mobility allowance entitlement. He also asked for two years of interest for a delay of the payment of his mobility allowance.

18. In June and October 2017, the Administration recovered what it considered the overpayment of mobility allowance entitlement. According to the Respondent, one final recovery was yet to be made. According to the management evaluation decision, the contested mobility allowance entitlement amounts to USD26,512.38.

### **Considerations**

#### *The applicable legal framework and the issues of the case*

19. The Applicant contests the calculation of his mobility allowance entitlement as well as the delay in the calculation and payment of his mobility allowance. The

(ii) Are on an assignment of one year or more and are installed at the new duty station; and

(iii) Have served for five consecutive years in the United Nations common system of salaries and allowances.

## **Section 2**

### **Mobility allowance**

#### *Qualifying service*

2.1 To qualify for payment of the mobility allowance, a staff member must have five year

staff rule 3.13(a) by August 2013. The issue is rather the number of assignments eligible for mobility allowance.

23. It is also undisputed that Tripoli from 9 August 2008 to 20 August 2011 (about three years) counts as an assignment for the calculation of his mobility allowance, as decided by the Tribunal.

28. Under the jurisprudence of the Appeals Tribunal, the delay in the completion of certain procedures in itself is not an administrative decision subject to judicial review. In *Auda* 2017-UNAT-786, at para. 30, citing *Birya* 2015-UNAT-562, the request could constitute an implied administrative decision and be contested, the alleged delay in reaching only be challenged in the context of an appeal after the conclusion of the entire process

29. Since the Applicant requested a management evaluation to contest the delay in the context of his challenge allowance entitlement, which was filed timely, his challenge to the alleged delay is receivable and subject to judicial review.

30. In light of the above, the Tribunal will have to determine:

- a. Whether the Applicant is entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013;
- b. Whether there was the delay in the calculation and payment of the mobility allowance, and if so, what remedies the Applicant is entitled to.

*Whether the Applicant is entitled to mobility allowance for his assignment with UNSMIL in Tripoli from 1 April 2012 to 30 June 2013*

31. The main issue in the present case is the interpretation of staff rule 3.13 and ST/AI/2011/6 what constitutes an assignment for the purpose of the determination of mobility allowance entitlement and whether the assignment in question meets such definition.

32. Staff rule 3.13(a) provides that a staff member who holds a fixed-term or continuing appointment and has served for five consecutive years with the Organization, may be paid mobility allowance when he or she is on an assignment



of one year or more and is installed at the new duty station . Staff rule 3.13(b) further provides that the amount of the mobility allowance shall be determined by,

33. Section 2.5 of

investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

37. This interpretation of the meaning of an assignment in this case is further supported by staff rule 4.8.

because it creates a fiction that he did not leave Tripoli since 2008, when in reality he left Tripoli and moved to Cairo in 2011, and moved back to Tripoli in 2012. The Applicant argues that this ignores the reason for the existence of the mobility rules, which is to recognize [redacted] ve from one duty station to another. The Applicant further argues [redacted] would have been different if he moved to any duty station other than Tripoli. The Applicant argues that under the general legal principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus*, which means that where the law does not distinguish, neither should we distinguish, the Administration cannot make such distinction when such differentiation is not explicitly mentioned in the applicable legal framework.

42. Although this primary submission was fully argued by the Applicant, he appeared to have put forward an alternate argument perhaps to cover the possibility that the Tribunal would uphold the Respondent [redacted] n of the relevant legal framework. His secondary submission therefore was that the period of his duty in Cairo from 21 August 2011 to 31 March 2012

44. This statement however fails to reflect the literal meaning of the applicable legal framework. On a literal reading of sec. 2.5(a) of ST/AI/2011/6, the one-year definition of an assignment is for the purpose of counting assignments under sec. 2 of ST/AI/2011/6. There is nothing in the wording of sec. 2.5(a) that prescribes for ruling out of the count of one-year assignments that were preceded by an assignment that lasted less than a year. Accor

48. There is no similar clause in the legal framework for mobility allowance entitlement that treats staff members differently when one returns to a place at which he or she was previously stationed as opposed to someone who goes to a place at which he or she was not previously stationed. As the Appeals Tribunal stated in *Faust* 2016-UNAT-695, where the law does not distinguish, neither should we distinguish.

49. The case of *Yazaki* cited by the Respondent is distinguishable from the instant matter as it turned on a now abolished Administrative Instruction (ST/AI/2007/1) under which the counting of assignments was less generous. The case also arose from different circumstances. There, the issue was whether service on mission detail counted separately. Unlike ST/AI/2007/1, which applied in the *Yazaki* case, the relevant Administrative Instruction to the instant case contains no restrictions regarding assignment count for service on mission detail. In *anyways*, the issue of the issue being determined in this case.

50. ~~More importantly~~, ST/AI/2011/6, which is applicable in this case, contains no restriction on counting an assi

*The delay in the calculation and payment of mobility allowance*

53. The Applicant argues that it took two years to process his claim for mobility allowance despite his regular follow-ups, and the compensation should correspond to



d. If payment of the above amounts set forth in (b) and (c) is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

*(Signed)*

Judge Eleanor Donaldson-Honeywell

Dated this 31<sup>st</sup> day of January 2020

Entered in the Register on this 31<sup>st</sup> day of January 2020

*(Signed)*

Nerea Suero Fontecha, Registrar, New York