



Administrative Tribunal

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LIMITED

AT/DEC/1028
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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1028

Case No. 1107: ZAIED

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis;
Ms. Brigitte Stern;

Whereas, on 3 May 1999, Khalied Ali Zaied, a staff member of the United Nations,
filed an application that did not fulfil all the formal requirements of article 7 of the Rules of
the Tribunal;

Whereas, on 10 November 1999, the Applicant, after making the necessary
corrections, again filed an Application containing pleas which read as follows:

"II Pleas

4. On 11 February 1999, the United Nations Joint Appeals Board forwarded its
unanimous report ..., to the Secretary-General (...). In its submission, the Board
unanimously recommended the payment of the Daily Subsistence Allowance at the
Amman, Jordan, rate consistent with the relevant administrative issuances, [to] me
for the period of 1 December 1995 to 31 May 1997. (...)

5. As outlined in paragraph 4 of Information Circular ST/IC/88/10 of 1 March
1988 on the subject of Administration of Internal Appeals and Disciplinary Systems:
Transfer of Responsibilities and Reform Programme, 'the practice has recently been
established whereby unanimous reports of the JABs are accepted by the

Secretary-General provided that, in the opinion of the Secretary-General, they do not impinge on major questions of law or principle. In those instances where he decides not to accept the report of the Board, he sets out the reasons for its rejection'. (...)

6. Pursuant to [s]taff [r]ule 111.2 (q), since '... The Secretary-General has not made a decision upon the report within a period of one month after the date on which the report was submitted to him, (...) and as provided for in paragraph (b) of article 7 of the Statute of the Tribunal, **I hereby respectfully request the Tribunal to order the Respondent to carry out the unanimous report of the Board.**"

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2000 and periodically thereafter until 30 June 2001;

Whereas the Respondent filed his Answer on 15 June 2001;

Whereas the Applicant filed Written Observations on 1 August 2001;

Whereas, on 28 September 2001 the Respondent submitted an additional communication;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations as an Assistant Recruitment Officer, Office of Personnel Services, on a short-term appointment at the P-1 level on 20 January 1974. On 1 January 1976, the Applicant was given a permanent appointment. On 1 October 1979, he was transferred to the United Nations Development Organization (UNIDO) in Vienna. Effective 1 April 1990, he was assigned to the Economic and Social Commission for Western Asia (ESCWA) in Baghdad, Iraq, for an initial period of three years, during which he was promoted to Chief, Personnel Services, at the P-5 level.

On 9 May 1993, the Applicant wrote to the Director of Personnel, Office of Human Resources Management (OHRM), informing her of his desire to return to Vienna upon completion of his assignment with ESCWA. In her reply of 9 August 1993, she advised him that since no post had been blocked for him in Vienna, the Organization would attempt to find a suitable post for him by the time his assignment with ESCWA ended; however, it was unable to guarantee it.

Subsequently, the Applicant was on mission detail from 26 September 1993 until 1 October 1995, when he returned to ESCWA, Amman, Jordan.

On 28 May 1994, while on assignment with the United Nations Mission in South Africa, the Applicant requested approval for split shipment of his personal effects to his home country. His request was approved on 18 July 1994. The travel authorization document stated "split shipment of household goods and personal effects upon end of assignment to ESCWA".

On 24 August 1995, the Executive Secretary, ESCWA, wrote to the Assistant-Secretary-General, OHRM, regarding the Applicant's return to ESCWA "upon end of his detailment to MINURSO". He expressed his surprise at this, having previously been informed by the Acting Chief, Personnel, ESCWA, that the Applicant's assignment with ESCWA had ended. He referred in particular to the authorization for the split shipment, adding that ESCWA had only "continued to payroll [the Applicant] while on mission, for convenience purposes".

In his reply of 8 September 1995, the Assistant-Secretary-General, OHRM, indeed confirmed that the Applicant's assignment with ESCWA had ended in September 1993, but requested ESCWA's continued assistance in accommodating the Applicant until the end of December 1995. The Executive Secretary, ESCWA, agreed to this on 25 September 1995 and subsequently agreed to further short-term extensions from 20 December 1995 until 7 May 1997.

On 1 December 1996, the Applicant wrote to the Chief, Personnel Section, ESCWA, informing him that he had been on temporary assignments with ESCWA since 1 October 1995 and that therefore he was entitled to receive daily subsistence allowance (DSA).

On 21 January 1997, a Human Resources Officer, Operational Services Division, OHRM, informed the Chief, Personnel Section, ESCWA, "[the Applicant] remains a staff member stationed at ESCWA ... [I]t has been determined that while [the Applicant] would be eligible for an installation grant at ESCWA, he would not be eligible for DSA during his stay there ..." This was conveyed to the Applicant on 18 February 1997.

On 3 April 1997, the Applicant was informed by the Chief, Personnel Section, ESCWA, that since neither he nor his dependants were installed with ESCWA, he was not entitled to receive education grant for his children.

On 13 April 1997, the Applicant requested the Secretary-General for a review of the decision not to pay him DSA.

On 7 May 1997, ESCWA authorized retroactive payment of assignment grant, effective 1 October 1995.

On 15 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 11 February 1999. Its conclusions and recommendations read as follows:

"...

16. The Panel agreed that the crucial point to be resolved was the nature of Appellant's assignment to ESCWA as from 1 October 1995. [The Assistant Secretary-General's, OHRM,] letter of 8 September 1995 (...) clearly states that Appellant's earlier assignment to ESCWA had ended in September 1993 and requested that he be accommodated by ESCWA for the period 1 October 1995 through 31 December 1995. A confidential memorandum dated 4 October 1995 (...) from [the] Deputy Director to the Assistant Secretary-General, also states: '... ESCWA has, at our request, agreed to accommodate [Appellant] temporarily against a vacant P-5 through *31 December 1995*.' (emphasis in original) The personnel action issued in response to this request carries the remark 'Temporary Assignment through 31 December 1995.' It is clear that Appellant was assigned to Amman for less than one year. Subsequent personnel actions also refer to 'temporary assignment.'

17. The Panel accepted Respondent's argument that Staff Rule 103.7 (d) (ii) was relevant, but could not understand why Respondent, having cited the rule, had failed to read it correctly. The rule reads:

'When a staff member is assigned to a duty station for less than one year, the Secretary-General shall decide *at that time* whether to apply the post adjustment applicable to the duty station and, to pay an assignment grant under rule [107.20] ... or, in lieu of the above, to authorize appropriate subsistence payment. (Emphasis added)'

As no decision was made at the time of the initial assignment, ST/AI/143 (subsequent revisions and amendments) apply and Appellant was entitled to DSA. The issuance of a personnel action in May 1997 authorizing payment of assignment grant effective 1 October 1995 was, in the view of the Panel, not in keeping with either the letter or the spirit of staff rule 103.7 (d) (ii).

18. The Panel concluded that Appellant should have been paid DSA as from 1 October 1995. Given the terms of Staff Rule 103.15 on retroactivity of payments, the date on which Appellant laid claim to payment of DSA is relevant. The earliest memorandum from him on this subject attached to his appeal is dated 20 February 1997. However, a memorandum dated 12 December 1996 from [the Chief, Personnel Services, ESCWA] to OHRM at Headquarters refers to an earlier memorandum from Appellant requesting payment of DSA, and [the Chief, Personnel Services, ESCWA] memorandum of 18 February 1997 forwarding Headquarters' ruling to Appellant sets

the date of Appellant's request as 1 December 1996. The Panel decided, therefore, under the terms of Staff Rule 103.15, Appellant was entitled to payment of DSA as from 1 December 1995.

Recommendation

19. The Panel unanimously recommends that Appellant be paid DSA, at the Amman rate, consistent with the relevant administrative issuances, from 1 December 1995 to 31 May 1997.

20. The Panel makes no other recommendation with respect to this appeal."

On 19 July 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

" ...

The Secretary-General does not agree with the Board's conclusion above. He considers that no provision in Staff Rule 103.7 (d) (ii), or in administrative instruction ST/A1/143 which was referred to by the Board, supports the Board's conclusion that, if a decision is not taken 'at the time of the initial assignment' concerning which allowances are payable, then DSA is payable. The Secretary-General cannot, therefore, accept the Board's recommendation that you be paid DSA for 29 months in addition to the assignment grant that you received and the post adjustment that you never stopped receiving.

The Secretary-General observes that, technically, you were not entitled to either a DSA or an assignment grant, as you never stopped receiving the applicable post adjustment from ESCWA when you were serving on special missions, as well as after your return to ESCWA in October 1995 and ESCWA remained, technically, your duty station. However, in view of the particular circumstances of your return to ESCWA, it was decided to pay you an assignment grant. The timing of the payment of that grant does not give rise to a right for you to receive DSA as well. The Secretary-General has therefore decided to take no further action on your appeal.

..."

On 10 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Secretary-General should implement the unanimous recommendation of the JAB, especially in light of ST/IC/88/10.
2. In accordance with staff rule 103.7 (d) (ii), the decision whether to pay assignment grant or DSA should have been made at the time of the temporary assignment, in 1995, and not retroactively, in 1997.

Whereas the Respondent's principal contentions are:

1. Staff rule 103.7 (d) (ii) is not applicable in this case.
2. In accordance with staff rule 101.6, there was no change of duty station, regardless of correspondence stating the contrary.
3. The approval of the Applicant's request to exercise split shipment of personal effects to his home country does not provide grounds for the Applicant to be entitled to payment of DSA.
4. The payment of an assignment grant, effective October 1995, does not amount to recognition that the Applicant, with hindsight, should have been paid DSA.
5. The Respondent is not bound by the unanimous recommendation of the JAB.

The Tribunal, having deliberated from 5 to 21 November 2001, now pronounces the following Judgement:

I. The Applicant joined the United Nations on 20 January 1974 as an Assistant Recruitment Officer, Office of Personnel Services, at the P-1 level, on a three-month short-term contract. After several extensions, effective 1 January 1976, his appointment became permanent. On 1 October 1979, the Applicant was transferred to UNIDO in Vienna.

In March 1990, OHRM informed the Applicant that authorization had been given for his assignment to ESCWA, initially for three years. That same letter stated that, in the absence of a suitable post at the P-4 level, no post could be earmarked for his possible return

but that OHRM would "share responsibility for [his] placement at the conclusion of [his] assignment".

On 9 May 1993, the Applicant expressed in writing his wish to return to Vienna at the completion of his three-year assignment, i.e. in September 1993. Pending efforts to find a suitable post for him in Vienna by the time his assignment with ESCWA came to an end, he was given various assignments: effective 26 September 1993, he was given a temporary assignment to the United Nations Transitional Authority in Cambodia; effective 13 February 1994, he was detailed to the United Nations Observer Mission in South Africa; and, from 1 September 1994 to 30 September 1995, he was assigned to the United Nations Mission for the Referendum in Western Sahara.

According to the Respondent, during all this time the Applicant was on the payroll of ESCWA and his duty station remained Amman, Jordan. On 1 October 1995, the Applicant returned to ESCWA after the Executive Secretary, ESCWA, agreed to accommodate him temporarily by using a vacant P-5 post while OHRM undertook to find further placement for him. The Applicant received a number of short-term extensions of his appointment at ESCWA until 5 December 1997. During the entire period, he received payment of post adjustment at the Amman, Jordan, rate.

On 1 December 1996, as no other placement had been found for the Applicant, he wrote a letter to the Chief, Personnel Section, ESCWA, in which he stated that he had been on "temporary assignment" with ESCWA since 1 October 1995 and claimed that he was entitled to DSA, due to the temporary nature of his assignment. The Applicant noted that he had shipped his household effects from ESCWA to his home country, Libya, on 28 May 1994.

By memorandum dated 18 February 1997, the Applicant was informed that OHRM had decided that, although he was eligible for an installation grant at ESCWA - he was not eligible for payment of DSA. On 7 May 1997, ESCWA issued a personnel action form authorizing payment of an installation grant, retroactive to 1 October 1995.

On 15 July 1997, the Applicant lodged an appeal with the JAB. The latter unanimously adopted its report and recommended that "under staff rule 103.15, [he] was entitled to payment of DSA as from 1 December 1995". On 19 July 1999, the Under-Secretary-General for Management informed the Applicant that the Secretary-General did not

agree with the JAB's conclusions and recommendations. According to the Under-Secretary-General, as the Applicant never stopped receiving the post adjustment for Amman, Jordan, even when he was sent on his various special missions, and received an installation grant when he returned to ESCWA in October 1995, the Secretary-General could not accept that the Applicant be paid DSA in addition thereto.

II. The Tribunal finds that the file contains contradictory evidence regarding the true status of the Applicant in regard to ESCWA after completion of his initial three-year period. On one hand, the Respondent states that, since the Applicant never stopped receiving Amman, Jordan, post adjustment when he was serving on special missions he continued to be a staff member of ESCWA, although the exchange of letters between Headquarters and ESCWA indicates that the Applicant's status vis-à-vis ESCWA was less than ideal. On the other hand, according to the letter of the Assistant Secretary-General, OHRM, dated 8 September 1995, the Applicant was not considered to be a staff member of ESCWA by 18 July 1994. In fact, in that letter it was stated: "I confirm that the [Applicant's] assignment to ESCWA ended in September 1993". It has to be added that, in another letter dated 19 July 1999, the Under-Secretary-General for Management declared: "ESCWA remained, *technically* your duty station" (emphasis added); also that the travel authorization dated 18 July 1994 is for "split shipment of household goods and personal effects *upon end of assignment to ESCWA*" (emphasis added).

III. Thus, the Tribunal finds that the legal question to be answered is whether upon his return to ESCWA, the Applicant was entitled to be paid an installation grant for return to his duty station, or DSA for an assignment of less than one year duration.

The Tribunal notes that when the Applicant returned to ESCWA, it was only on a temporary basis, pending his new placement elsewhere. Therefore, as he received only short-term extensions of his contract, he was prevented from building a normal life in Amman, unlike staff members who are assigned for longer periods of time. Moreover, in light of the above-mentioned letters and evidence, the Tribunal finds that the Applicant's previous assignment at ESCWA ended in September 1993 and, despite the fact that he returned to

Amman in October 1995 for a total period exceeding one year, he came under the provisions of staff rule 103.7 (d) (ii), and was entitled to payment of DSA. In addition, the fact that the Respondent paid the Applicant an installation grant in May 1997, retroactive to October 1995, is not proof that the Applicant was merely returning to his duty station, Amman.

At the same time, the Tribunal notes that no one may simultaneously receive a post adjustment, an installation grant and DSA: a staff member may receive either post adjustment and, upon return to a duty station, an installation grant; or, if he is on assignment, he is entitled to DSA. The Tribunal notes that the payment of an installation grant was only ordered after the Applicant raised the issue with the Administration.

In the circumstances, the Tribunal finds that the Applicant should be paid DSA for the period 1 December 1995 to 31 May 1997, but that the entire amount of post adjustment he was paid during this period, as well as the installation grant he received, should be deducted from the award.

IV. In view of the foregoing, the Tribunal:

(i) Orders the Respondent to pay the Applicant, as compensation, the applicable DSA for the period 1 October 1995 to 31 May 1997, less the post adjustment which was paid to him for the same period of time and the installation grant he received on 1 October 1995.

(ii) Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Spyridon FLOGAITIS
Member

Brigitte STERN
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary