UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/HQA/2011/047
Judgment No.: UNRWA/DT/2013/030
Date: 15 September 2013
Original: English

Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

EL MADHOUN

v.

COMMISSIONER GENERAL OF THE
UNITED NATIONS RELIEF AND WORKS
AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Lance Bartholomeusz
Introduction

1. This is an application by Mohammed El Madhoun (the "Applicant") against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the "Respondent"), not to pay him Travel Subsistence Allowance for the period of 4 to 27 January 2011.

Facts

2. On 1 September 2002, the Applicant entered the service of the Agency as an Analyst Programmer, Grade 4A, step 1, on a two-year fixed-term appointment in Gaza. His fixed-term appointment was extended several times.

3. On 1 July 2010, his appointment in Gaza was extended for the period of 1 September 2010 to 31 August 2013.

4. On 8 August 2010, the Applicant was promoted and offered the post of Systems Analyst, Grade 15, step 16, located at Headquarters Amman ("HQA"). The Applicant accepted the offer on 5 October 2010.

5. From 16 December 2010 to 31 December 2010, the Applicant was on annual leave in Gaza to assist his family in their relocation to Amman, and was expected to report to duty at HQA on 3 January 2011.

6. By email dated 3 January 2011, the Applicant sought advice from the Head, Area Personnel Section ("HAPS"), as he was still waiting for a Jordanian residency permit for himself and visas for his family, and his approved annual leave had expired on 31 December 2010.

7. By email dated 4 January 2011, the Human Resources Officer, HQA informed the Applicant to "... report to HQ Gaza duty station for the time being."

8. By email dated 11 January 2011, the Travel and Visa Officer transmitted to the Applicant his family entry visas to Jordan.
9. On 27 January 2011, the Applicant and his family travelled from Gaza to Amman.

10. By email dated 28 February 2011 to the Human Resources and Administration Officer, Enterprise Resource Planning ("HR&AO/ERP"), the Applicant requested the following:

As you are aware, I had to report to HQ Gaza from 4 to 27 January 2011.

In this regard, kindly advice [sic] on the budget code in order to prepare the travel authorization.

11. By email dated 28 February 2011, the HR&AO/ERP sent the following reply to the Applicant:

... As result of your decision to continue staying in Gaza pending the issuance of residency to your family, and in order to maximize your stay CBS agreed for you report to HQ Gaza on a temporarily basis [sic].

In circumstances where no payment is envisaged, in order to regularize the paperwork, we indicate No cost implication in the filed [sic] of Budget Code Number of the UNRWA Official Travel Request form. (emphasis in original)

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I am also copying this message to HAPS for his advice and recommendation.

12. By email dated 14 March 2011, the Applicant informed the HAPS of the following:

... Since I was assumed to report to HQ Amman on the 3rd of January 2011, I have sent an email asking for advice from personnel and travel and I was advised by Oic [sic] HAPS on 4th of January to report to HQ Gaza ... The Residency approval for me and the family as well as my national and UN passports were received on 11th of January and accordingly our travel was coordinated through Rafah on the 27th.
In this regard, I believe that I am entitled to TSA\(^1\) during the period from 4 to 27 January 2011.

13. By email dated 15 March 2011, the HAPS replied to the Applicant the following:

I am surprised to receive this message stating your entitlement to TSA for the period 4 – 27 January. In any case I will be happy to discuss if you are available tomorrow at 10.00 am.

14. The Applicant stated in his application that he was informed of the decision of the HAPS on 15 March 2011. According to the Applicant, on 16 March 2011, he discussed with the HAPS the issue of his alleged entitlement to TSA. The HAPS purportedly promised to reply to his request, but no answer was received by the Applicant.

15. By email dated 14 May 2011 to the Director of Human Resources, the Applicant requested review of the decision not to grant him TSA for the period of 4 to 27 January 2011. He stated *inter alia* the following:

... Since I have been requested to report to another duty station, I believe that I am entitled to TSA during this period.

I sent to our ERP/HR admin officer asking [sic] about the budget code and she forwarded my request for [sic] HAPS recommendation.

As per the below correspondence, I discussed this issue with HAPS and he promised to reply to my request, but no response has been received.

Accordingly, I am asking for your kind review and approval of my request for travel subsistence allowance in Gaza during the period from 4-27 January 2011.

16. On 16 June 2011, the Applicant filed his application with the UNRWA Dispute Tribunal (the “Tribunal”).

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\(^1\) TSA stands for Travel and Subsistence Allowance.
17. By letter dated 2 August 2011 to the Applicant, the Deputy Commissioner-General stated the following:

I refer to your submission of 2 June 2011, wherein you requested a review of the decision not to pay you TSA for the period of time when you reported to work in HQ Gaza following the expiration of your period of approved leave.

In undertaking this review, I have carefully considered whether, in reaching the contested decision, the Agency’s established Regulations, Rules, and procedures were followed. I also extensively reviewed all relevant documents, correspondence and facts, including your own submissions, and obtained clarifications from the Agency’s legal department on this matter.

My review has noted that you were on annual leave in Gaza from 16 December 2010 until 31 December 2010 to assist your family in their upcoming relocation to Amman. As your return to Amman was delayed while you and your family awaited approval from the Government of Jordan, upon the expiry of your period of approved annual leave, you were requested to report to duty in HQ Gaza. This decision was made for your benefit, so that you would not lose any periods of annual leave due to your absence from duty in HQ Amman.

Taking into account that you did not travel to Gaza on official Agency business, but instead on personal business and thus personally assumed the risk that your return to Amman could be delayed by the Government of Jordan, and that the Agency undertook steps (i.e. requesting you to work from HQ Gaza) so as to minimize the potential loss of additional days of annual leave from your balance, I concur with the original decision made by the Human Resources Department that TSA for the period of time you were in Gaza not to be payable.

The conclusions detailed above represent the Agency’s final decision in this matter. You have the right to appeal this decision and the Department of Human Resources is available to provide you with information on the next steps should you wish to do so.
18. On 16 May 2012, the Tribunal referred the case to mediation.

19. On 2 August 2012, the Tribunal was informed that this case was not settled by mediation.

20. On 22 February 2013, the Respondent filed his reply which was transmitted to the Applicant.

21. On 25 February 2013, the Applicant requested leave to file observations to the Respondent's reply.

22. On 26 February 2013, the Tribunal granted the Applicant's request.

23. On 5 March 2013, the Applicant filed his observations which were transmitted to the Respondent.

**Applicant's contentions**

24. Essentially, the Applicant claims that he was requested to report to HQ Gaza duty station and is, therefore, entitled to TSA during the period from 4 to 27 January 2011.

25. In his observations the Applicant claims that, since he was appointed to the post in HQA with retroactive effect on 1 December 2010, he is entitled to TSA for his stay in Gaza during the period from 4 to 27 January 2011.

26. The Applicant requests the Tribunal to order payment of TSA for the above period.

**Respondent's contentions**

27. The Respondent contends that no appealable decision has been presented.

28. The Respondent requests that the Tribunal dismiss the application.
Considerations

Preliminary Issue

29. As stated above, the Respondent filed his reply on 22 February 2013. In his reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings and to file a late reply.

30. Article 30 of the Rules of Procedure of the Tribunal gives the authority to the Tribunal to shorten or extend time limits fixed by the Rules or to waive any rule when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. The Tribunal finds that it would be in the interests of justice and appropriate for a fair and expeditious disposal of the case for the Tribunal to receive the full chronicle of the case from both parties in order to render a fair and comprehensive Judgment that would do justice to the parties and to the system of administration of justice in general. Therefore, the Tribunal extends the time limit under Article 6 and accepts the Respondent’s reply.

Main Issue

Is the Applicant contesting an administrative decision?

31. Area Staff Regulation 11.1 (A) provides in relevant part that:

(A) The UNRWA Dispute Tribunal shall, under conditions prescribed in its Statute and Rules of Procedure, which are set out in Staff Regulations 11.3 and 11.4, hear and render judgment on an application from a staff member:

(i) to appeal an administrative decision that is alleged to be in non-compliance with his or her terms of appointment or contract of employment, including all pertinent regulations and rules and all relevant administrative issuances;

2 The Tribunal notes the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: “The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review”.

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32. In accordance with Article 2, paragraph 1 (a), of the Tribunal’s Statute, the Tribunal has jurisdiction to hear and pass judgment on an application filed by an individual to appeal “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

33. According to the jurisprudence of the former United Nations Administrative Tribunal, an administrative decision:

... is 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 or 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. (Judgment No. 1157, Andronov (2003), quoted in Judgment No. 1213, Wyss (2004)).

34. In the case at bar, the Applicant contests the Agency’s refusal to pay him TSA for the period of 4 to 27 January 2011. The Respondent argues that this is not an administrative decision for the purpose of Area Staff Regulation 11.1(A)(i) as it did not affect the Applicant’s terms of appointment, and the Regulations and Rules governing such appointment.

35. In Ghatalia UNRWA/DT/2012/027, the Tribunal considered that there was no administrative decision because the non-payment of TSA, to which the Applicant was not entitled, did not affect his terms of appointment and did not have direct legal consequences on his rights and obligations. The Tribunal further stated that even presuming that the Applicant contested an administrative decision, his application had no merits and therefore must be rejected.

36. In the case at hand, the Tribunal departs from the above-mentioned reasoning since a review of whether or not an alleged decision of the Administration affects the terms of appointment of a staff member implies, in fact, a review of the merits of the case. In any event, the Tribunal notes that Ghatalia
UNRWA/DT/2012/027 was also rejected on the merits. In the case at hand, the Tribunal finds that the decision not to pay TSA to the Applicant for the period of 4 to 27 January 2011 when he reported to HQ Gaza is an administrative decision. The Tribunal thus turns to examine whether or not this administrative decision was lawful.

Is the contested decision lawful?

37. Area Staff Rule 107.1 provides for the payment of travel expenses, such as TSA, in the following circumstances:

(A) when he/she is required to travel on official Agency business;

(B) on change of official duty station as defined in rule 107.9;

(C) on temporary assignment as defined in rule 107.10;

(D) on local transfer when the payment of such expenses is authorised by the Commissioner-General under the provisions of rule 107.11.

38. Of equal relevance, Area Staff Rule 107.2 provides, with respect to authorisation for official travel:

1. Before official travel is undertaken, it shall be authorised in writing in accordance with established procedures. A staff member shall be personally responsible for ascertaining that he/she has the proper authorisation before commencing travel.

2. The term “official travel status” as used in these rules shall mean the status of a staff member who is travelling at a time and by a mode, route and standard of transportation authorised in advance in accordance with these rules.

39. Area Staff Rule 107.5 on TSA provides as follows:

1. When a staff member is authorised to travel at the Agency’s expense, except during travel by sea, he/she shall receive a travel subsistence allowance in accordance with the terms and conditions of these rules, and at the rates and in the conditions which the Commissioner-
General shall prescribe separately for staff members by grade level and by country.

40. Also relevant is Area Staff Rule 107.9 which provides, with regard to the payment of TSA on change of official duty station:

1. For the purposes of these rules, a change of official duty station shall take place when a staff member who has been appointed to serve in a particular country for an indefinite period or for a fixed period exceeding six months is transferred to a post in another country for an indefinite period or for a fixed period exceeding six months.

2. Where a staff member is required to change his/her official duty station, then subject to the provisions contained in paragraph 4 of this rule, he/she shall be paid Travel Subsistence Allowance at the rate set out in Schedule “A” under rule 107.5 (and applicable to the country of his/her new duty station), for himself/herself and at one half that rate in respect of his/her authorized dependants for whom travel expenses have been paid by the Agency, as defined in rule 107.13, for a period of 30 days immediately following the date on which he/she is required to report at his/her new duty station.

41. Area Staff Rule 107.10 on temporary assignment provides that:

1. For the purposes of these rules, a temporary assignment shall take place when a staff member is assigned to duties in a country other than the country of his/her duty station for a temporary period not exceeding three months, and during this period, is attached or loaned to the Agency’s office in the country of temporary assignment.

42. Area Staff Rule 107.11 on local transfer and local temporary duty provides as follows:

1. The transfer or reassignment of a staff member within one country or duty station, whether on a temporary or indefinite basis, shall not constitute a change of duty station or a temporary assignment for the purposes of these rules, and in particular, the provisions of rules 107.9 and 107.10 shall not apply to such cases.
43. The Tribunal notes that the Applicant erroneously refers to Area Staff Rule 107.5 with regard to TSA. Indeed, Area Staff Rule 107.5 is about TSA in the case of a staff member who is authorised to travel at the Agency's expense. The Applicant is reminded that he was not requested nor was he authorised to travel to Gaza in December 2010 on official duty; instead, he went to Gaza on annual leave.

44. The Tribunal is of the opinion that the decision not to pay TSA to the Applicant is correct because the Applicant did not satisfy any of the criteria under Area Staff Rule 107.1. Indeed:

   (a) the Agency did not require the Applicant to travel to Gaza on official business, he went there on annual leave;

   (b) there was no change of the Applicant's official duty station, his post was in HQA;

   (c) the Applicant was not on an assignment in Gaza;

   (d) the Applicant was not on local transfer.

45. Again, for the sake of clarity for the Applicant, the Tribunal would like to recall that the Applicant was not on official business travel to Gaza. The Applicant was on annual leave in Gaza from 16 December to 31 December 2010 to assist his family with their upcoming relocation to Amman, where the Applicant had accepted a post and a promotion a few months earlier. His return to Amman scheduled for 3 January 2011 was delayed as he had not yet received the Jordanian residency permit for himself and visas for his family. Indeed, the Applicant did not receive them until 11 January 2011. The Agency's request to the Applicant to report to the Gaza duty station while awaiting the necessary Jordanian travel documents, does not amount to a change of duty station, an assignment or a transfer for the purpose of qualifying him for payment of TSA under Area Staff Rule 107.1.

46. The Applicant is reminded that he personally assumed the risk, when going to Gaza on annual leave, that his return to Amman could be delayed by the Jordanian authorities which were issuing his residency permit and his family visas. As evidenced in the record, the Agency tried to minimise the Applicant's
potential loss of additional days of annual leave by giving him the opportunity to work from HQ Gaza until he could receive the necessary travel documents. As stated by the Deputy Commissioner-General in her reply to the Applicant’s request for decision review:

... This decision was made for your benefit, so that you would not lose periods of annual leave due to your absence from duty in HQ Amman.

47. Indeed, the Tribunal finds that the Respondent’s decision not to pay TSA to the Applicant for the period of 4 to 27 January 2011 when the Applicant reported to duty in HQ Gaza, was in conformity with relevant Area Staff Regulations and Rules, in particular with Area Staff Rules 107.1, 107.2 and 107.5, as the Applicant did not satisfy the criteria set out in these Rules for entitlement to TSA payment.

48. Looking at the record, the Tribunal notes that the Applicant has failed to identify, or submit evidence of, any non-observance of the terms of his employment or any breach of a Regulation or Rule. The Tribunal is of the belief that the Applicant was not entitled to any payment of TSA for the period from 4 to 27 January 2011 when the Applicant reported to work in Gaza. Therefore, the Tribunal finds that the decision is lawful as it is in compliance with the Applicant’s terms of appointment or contract of employment.
Conclusion

49. For the reasons provided above, the application is dismissed.

(Signed)

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Judge Bana Barazi

Dated this 15th day of September 2013

Entered in the Register on this 15th day of September 2013

(Signed)

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Laurie McNabb, Registrar, UNRWA DT, Amman