



UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES

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**Tabari**  
**(Appellant)**

**v.**

**Commissioner General of the  
United Nations Relief and Works Agency  
for Palestine Refugees  
(Respondent)**

**JUDGMENT**

**[No. 2010-UNAT-030]**

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Before:	Judge Kamaljit Singh Garewal, Presiding Judge Rose Boyko Judge Luis María Simón
Case No.:	2010-035
Date:	30 March 2010
Registrar:	Weicheng Lin

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Counsel for Appellant: Self-Represented

Counsel for Respondent: W. Thomas Markushewski

**JUDGE KAMALJIT SINGH GAREWAL**, Presiding.

**Synopsis**

1. The Appellant, Diab Khalil El Tabari (Tabari), claims that an anomaly has occurred in fixing the rate of his Special Occupation Allowance (SOA) (Phase II). UNRWA was asked to remove the anomaly but took no decision. Not taking a decision is also an administrative decision challengeable before the United Nations Appeals Tribunal.

**Background**

2. Tabari is employed as an UNRWA Administrative Officer, Education Programme, Lebanon. He holds a grade 14 post. He joined UNRWA on 1 June 1989 on a temporary indefinite appointment. Tabari's grievance concerns an anomaly which arose in fixing the enhanced SOA payable to him.

3. UNRWA launched an Agency-wide comprehensive study in December 2004 to compensate staff for the difference between the UNRWA pay and pays for comparable positions in the external market. In April 2005, SOA Phase I was made applicable to posts in grade 17 to 20, with effect from 1 June 2005. Later in February 2006, SOA Phase II was announced for posts at grades 12 to 16, with retroactive effect from 1 January 2006.

4. However, on 16 March 2006 the implementation of SOA Phase II was postponed by the UNRWA Commissioner-General to address some anomalies, and an Internal Review Panel was established. Based on that panel's report and deliberations with the Staff Unions, the UNRWA Commissioner-General on 21 June 2006 announced that "the Management Committee agreed to adopt 100% of the SOA package proposed by the panel with effect from 1 July 2006".

5. While acknowledging that some of the staff might be disappointed that contrary to what they had hoped and what had previously been indicated, the payments would take effect from 1 July and not retroactively from 1 January 2006, the Commissioner- General stated:

The reality is that our funding constraints are so severe that we had to make a choice between retroactive payments and 100% payments; we could not have both. If we were to insist on making payments retroactive, it would have been

possible to pay only 50% or 75% of the package proposed by the panel. In the long run staff will be better off with a decision that sacrifices retroactivity in order to secure – for the rest of this year and subsequent years – 100% of the SOA payments proposed by the panel.

6. On 19 December 2006, Tabari asked Director, UNRWA Affairs, Lebanon, to rectify anomalies of the SOA rate, which had arisen in the case of Administrative Officers. When he failed to get the desired rectification, Tabari filed an appeal with the UNRWA Joint Appeals Board (JAB) on 19 February 2007.

7. The JAB's split recommendation (2-1) was issued in a report dated 30 October 2008. The majority concluded that

the methodology for the computation of the Special Occupational Allowances (SOA) does not constitute a decision by the Respondent in which it did not observe any term of the Appellant's appointment. Neither does it fall in the category of a disciplinary measure for the purposes of Area Staff Regulation 11.1(A).

The minority, on the other hand, felt that

... the issue of Special Occupational Allowance was an administrative issue which conferred a right to the appellant and was therefore appealable within the purview of Area Staff Regulation 11.1(A).

8. Tabari's appeal before the JAB was declared to be not receivable and was rejected in its entirety. The JAB majority recommendation was approved by the Commissioner-General on 22 December 2008. Tabari received this decision on 17 February 2009. Thereafter Tabari filed the present appeal.

### **Submissions**

#### **Tabari's Appeal**

9. According to Tabari, he was placed in the same category as Area Officers and Vehicle Control Officers in the original calculation of SOA Phase II. After the review, Area Officers and Vehicle Control Officers were removed from the group, the former being moved to the Personnel Division and the latter to the Procurement & Logistics Department. This left him in the original category. Tabari has reproduced two tables in support of his appeal, the first showing all three posts grouped together and the second one showing only the post of Administrative Officer, which he is occupying. This anomaly has not been addressed so far.

10. Furthermore, Tabari made reference to Shehadeh's case before the JAB which also related to payment of SOA Phase II. This appeal was received by the JAB and was indeed allowed on the same day Tabari's appeal was dismissed. According to Tabari there was no difference in the subject-matter of the two appeals. Therefore, his appeal was also receivable on a parity of reasoning.

11. Tabari seeks payment of the SOA at 51.31% retroactively from 1 January 2006, compensation in the amount of USD 10,000 for moral damages, and an order for continued payment of SOA Phase II.

#### **UNRWA's Answer**

12. UNRWA objects to the hearing of the appeal, alleging that it is time-barred by 63 days. Alternatively, if the appeal is found to be timely, it argues that Tabari's appeal was not receivable, because the formulation of SOAs or the methodology of calculating or paying the SOAs does not constitute an administrative decision, and hence cannot be challenged either before the JAB or this Tribunal.

#### **Considerations**

13. While dealing with the question of receivability we examined the exact movement of the appeal to determine if there were exceptional circumstances to justify the delay. The chronology of events is like this: Tabari received the Commissioner-General's decision on 17 February 2009. He had 90 days within which to lodge his appeal as per Article 7(4) of the Statute of the former United Nations Administrative Tribunal. The appeal was lodged on 27 April 2009, well within the time limit. On 14 May 2009 the Executive Secretary of the former Administrative Tribunal returned the appeal to Tabari, advising him that his appeal did not fulfill the formal requirements. Tabari was advised to file an amended appeal by 30 June 2009, but resubmitted his appeal on 21 July 2009.

14. We examined the dossier of the appeal to track the movement of the papers relating to the appeal, in order to find out if Tabari had failed to file the appeal within the time granted. We could not find anything in the dossier which would show the date on which Tabari's appeal was returned to him or received by him for re-filing.

15. It may be recalled that the General Assembly decided in A/RES/ 63/253 of 17 March 2009 (paragraph 42) that the United Nations Administrative Tribunal shall cease

to accept new cases after 1 July 2009. Therefore, the question arises as to whether an appeal which was returned for re-filing by 30 June 2009 but was re-filed on 21 July 2009 could be received by the former United Nations Administrative Tribunal on a date after it had ceased to accept new cases.

16. We are of the view that there are exceptional circumstances in this case which require that the time limit be waived. These include our inability to determine when the papers were actually returned to Tabari for compliance with certain formalities and the period allowed for re-filing; the period falling within the period of transition may have placed Tabari in a peculiar situation of not knowing where to file the appeal. We, therefore, condone the delay in filing the appeal and hold that it is not time barred. We decide this *suo moto* under article 7(1) of our Statute, without any written request from Tabari, as the circumstances were transitional and, therefore, exceptional.

17. UNRWA's submission that there is no administrative decision in this case cannot be accepted because not taking a decision is also a decision. We do not have the benefit of the views of either JAB or the Commissioner-General on Tabari's plea regarding the anomaly. This type of failure to decide is a bit disconcerting, and has denied Tabari a certain component of his total take home pay. Pay includes net base pay and all admissible allowances. Denial of pay is a violation of the principle of "equal pay for equal work" which is a right granted under Article 23(2) of the Universal Declaration of Human Rights, which stipulates: "Everyone, without any discrimination, has the right to equal pay for equal work."

18. The denial of full allowance is also a violation of the terms of employment. Therefore, the failure to address Tabari's complaint regarding an anomaly in calculation of the SOA Phase II compensation is a failure to decide. This is also a decision. According to judgment no.1157 *Andronov* (2003) rendered by the former 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 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. They are not necessarily written... These unwritten decisions are commonly referred to,

within administrative law systems, as *implied* administrative decisions (emphasis in the original).

19. The JAB showed inconsistency in its treatment of the cases of Tabari and Shehadeh. Both cases were decided on the same day by the same panel. But in Tabari's case there was a split verdict, the majority view being that there was no administrative decision that Tabari could appeal.

20. We find considerable merit in this appeal. There was definitely an anomalous situation which Tabari raised with the Internal Review Panel for consideration, but no action was taken to address the anomaly. Tabari has successfully demonstrated to us the manner in which the anomaly had arisen. Originally three posts were grouped together; later two posts were taken out of the group leaving only Tabari's post. The result was bound to be different. In the present case it appeared to favour Tabari. UNRWA had an opportunity to rebut Tabari's contentions, but failed to plea that Tabari was not discriminated against during the fixing of the appropriate level of SOA Phase II.

21. UNRWA's argument seems to be that Tabari had tried to "create" an appealable decision by asking for a benefit that was not provided in the relevant Staff Regulations and Rules, and complained when his request was denied. According to UNRWA no right existed to receive the SOA, or to revise its calculation or the methodology of its calculation. It is true that no staff member can ask for the payment of a particular allowance at a particular rate. It is the management's right to fix the pay and allowances. It is expected of a responsible management that this is done without discrimination so as to uphold the principle of "equal pay for equal work". In the present case discrimination is being alleged in the shape of an anomaly. This has not been rebutted by UNRWA. This discrimination should be corrected by removing the anomaly.

22. Tabari raised three pleas before this Court:

1. He be paid the suitable remuneration of SOA 51.31% retroactive from 1 January 2006;
2. He be compensated for moral damages sustained by the long wait and rejection of his appeal by the Commissioner-General; and
3. He continue to receive SOA Phase II at its appropriate level after the decision of this appeal.

23. UNRWA seemed to be content with its pleading that the appeal was not receivable because there was no administrative decision which could be challenged. We have held that not taking a decision is also a decision. Since UNRWA altogether failed to rebut or contradict Tabari's claim for payment of SOA Phase II from 1 January 2006, we accordingly accept the appeal in this regard. There is no legal basis to deny the payment due to Tabari. The appeal deserves to be partly allowed. Tabari shall be granted reliefs 1 and 3 mentioned above. Relief 2 is declined as Tabari has not established the grounds to claim moral damages. He is being awarded financial compensation with retroactive effect and mere delay in receiving the appropriate allowance would not cause any moral damage.

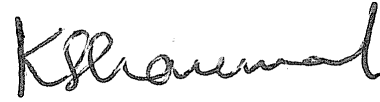
**Judgment**

24. This Court orders that Tabari shall be paid Special Occupation Allowance Phase II at 51.31% retroactively from 1 January 2006. Arrears of the allowance shall be paid to him within two months from the date of the issuance of this Judgment, and Tabari shall henceforth continue to receive the appropriate level allowance.

**THE UNITED NATIONS APPEALS TRIBUNAL**

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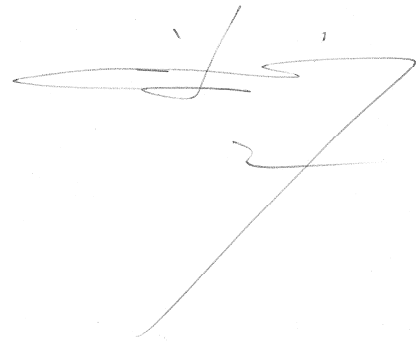
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Judge Garewal, Presiding



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Judge Boyko



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Judge Simón

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



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Weicheng Lin, Registrar, UNAT