



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-459

**Hamayel
(Respondent/Applicant)**
v.
**Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Appellant/Respondent)**

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Rosalyn Chapman
Judge Luis María Simón

Case No.: 2013-528

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Mr. Hamayel: Ghada Yasin (Legal Officer, Staff Assistance)

Counsel for Commissioner-General: Lance Bartholomeusz

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) against Judgment No. UNRWA/DT/2013/029, rendered by the UNRWA Dispute Tribunal (UNRWA DT) on 7 August 2013 in the case of *Hamayel v. Commissioner-General of UNRWA*. The Commissioner-General appealed on 4 October 2013 and Mr. Mahmoud Ahmad Hamayel answered on 14 November 2013.

Facts and Procedure

2. The facts established by the UNRWA Dispute Tribunal in this case read as follows:¹

... On 24 March 1992 the Applicant commenced employment with the Agency on a fixed-term appointment as a Guard, grade 2, step 1, at the Agency's [West Bank Field Office (WBFO)]. The Applicant's contract was extended a number of times. With effect from 6 September 1999 he was temporarily appointed Acting Security Supervisor and on 1 December 2000 he was promoted to the post of Security Supervisor, grade 5, step 8.

... In an action slip dated 21 July 2009, the Field Administration Officer, West Bank ("FAO/WB") asked the Officer-in-Charge, Administrative Services Department who would manage the Applicant's duties in his absence and whether the Applicant's post should be advertised. It would appear that the query was submitted with knowledge of the Applicant's intention to submit a request for leave. The FAO/WB was advised by return note dated 22 July 2009 to advertise the post for one year.

... On 5 August 2009, the Applicant signed a leave application requesting 57 days of annual leave from 1 September 2009 to 23 November 2009 and one year [Special Leave without Pay (SLWOP)] from 24 November 2009 to 23 November 2010. The request was approved and the Applicant duly took up an appointment at the United Nations Population Fund. It was understood at the time that at the end of his first year of SLWOP he would be returning to his post of Security Supervisor at WBFO.

... However, shortly before he was due to return the Applicant was interested in requesting a second year of SLWOP. By e-mail dated 2 November 2010 he wrote to Mr. Valentino Bandak, his supervisor, seeking approval to extend his SLWOP for another year and noting:

I changed my mind after I heard that the rules of UNRWA work allowed me to extend my leave for another one year ...

¹ The following facts are taken from Judgment No. UNRWA/DT/2013/029, paragraphs 2 – 23 (internal citation omitted).

... Mr. Bandak responded on the same day advising the Applicant that he would be recommending the extension and advised him to address a formal letter to the principal supervisor, Mr. Maurice Savage.

... On 4 November 2010, the Applicant submitted a leave application requesting a further year of SLWOP from 24 November 2010 to 24 November 2011.

... In the section of the application marked "recommendation of immediate supervisor" a hand written note has been added reading "see attached". The [UNRWA Dispute] Tribunal observed at the hearing that the attachment referred to has not been provided to the Tribunal. Mr. Maurice Savage signed the application to indicate his approval of the request in the section marked "recommendation of principal supervisor". His approval is dated 10 November 2010.

... A handwritten note at the bottom left of the leave application form reads "OK FHRO But Post not held For the Second Year". The note is not dated. At the hearing Ms. Karine Traonvouez, who was, at the time, the Field Human Resources Officer, West Bank ("FHRO/WB"), confirmed that the signature next to this note was hers and that she had written and signed the note indicating that although the post had been held for the Applicant while he was away for the first year it would not be held open for him at the end of the second year when he returned from SLWOP.

... The leave application was approved by Ms. Barbara Shenstone, former Director of UNRWA Operations, West Bank ("DUO/WB"), with a signature dated 19 November 2010. Ms. Traonvouez confirmed that she would have written her note after 10 November, when Mr. Savage signed the application, and before Ms. Shenstone gave her approval on 19 November. Ms. Traonvouez also confirmed that she did not inform the Applicant of her decision that the post would not be held for him if he took a second year of SLWOP. She had no knowledge that any person had conveyed this decision to the Applicant. When asked at the hearing why the Applicant was not told that his post would not be held, Ms. Traonvouez said she could not remember, but conceded that he should have been told as part of "the system". When asked whose job it was to tell him, Ms. Traonvouez suggested that it was the job of the staff member giving the final approval to communicate this condition to the Applicant. It was not, in her opinion, her responsibility.

...

... The Applicant's second year of SLWOP commenced on 24 November 2010. By memorandum dated 24 October 2011, the Applicant informed Mr. Savage and Mr. Bandak that he would return to his post as Security Supervisor at the WBFO on 25 November 2011, following the expiration of the second year of his SLWOP. The memorandum was copied to Personnel Affairs.

... On 25 November 2011 the Applicant returned to work at the Agency. He was not reinstated into his former post but employed against a vacant post because the post he had occupied prior to taking SLWOP had been filled by a new staff member on a three year fixed-term contract.

... By e-mail dated 25 November 2011, Mr. Savage wrote to a number of staff members, including Ms. Traonvouez, advising that the Applicant had returned to work that day and seeking advice as to how to proceed. Mr. Savage stated:

I am unsure of what the HR/Legal provisions are regarding this situation and seek your guidance please, and will employ [the Applicant] against one of my vacant posts (ISLO) if this is feasible until I am advised of options available.

... On 4 December 2011, Mr. Savage sent an internal briefing note to the Deputy Director of UNRWA Operations, West Bank through Ms. Traonvouez recommending that the Applicant resume his previous employment in the post of Security Supervisor and that his replacement be offered a promotion to the post of Clerk B. The internal briefing note included a handwritten note signed by Ms. Traonvouez reading "OK with this proposal". At the hearing Ms. Traonvouez stated that the post of Clerk B, grade 6 was never offered to the Applicant's replacement in writing because she was not comfortable forcing anyone to transfer to a post they didn't want to take.

... By letter dated 5 January 2012 and addressed to the Director and Deputy Director of UNRWA Operations, West Bank, the Chairperson of the Area Staff Union, West Bank, and others, the Applicant contested the decision not to place him in his previous post of Security Supervisor. He stated:

... during the two-year leave I have not been informed by any side and by any way from the administration nor the recruitment department that I will lose my job if I extended the leave.

...

On the date of this letter, I had completed 40 days since the return while I have not received any reply from any side about my status ...

I uphold my right in my original post.

... By letter dated 11 May 2012, Ms. Traonvouez advised the Applicant that his post of Security Supervisor had been filled during his second year of SLWOP. The letter also set out the following offer and ultimatum:

In accordance with the staff Rules and Regulations, you are hereby offered the new position of Security Guard Supervisor to be stationed in Shufat Camp. The post is similar Grade and duties to your current position.

...

Should you choose to decline this offer, you will be declared redundant in accordance with the Staff Rules and Regulation [emphasis added].

... On 21 May 2012, the Applicant sought administrative review of the decision not to reinstate him to his original post and to transfer him to Shufat Camp. He stated:

They denied my right in returning to my original post as I do not know that I will lose my job if I extended the leave without pay for another year. No one informed me with this, as I assumed that it is my right to return to my original post after the end of the second leave without pay. I performed my post in a faithful and devoted way for more than ten years. If I knew that I will lose my job, I would not request an extension of the leave for another year.

...

...I did not violate the rules and regulations when I requested an extension of the leave without pay for the second year. I followed since the beginning all the legal methods to acquire the aforementioned leave. I tried previously through unofficial ways, written messages and the continuous questions to notify the administration with my right to return to my previous post.

I also think that my transfer to another post will be a financial, physical and logistical liability; therefore, I request the decision to be reconsidered.

...

... By letter dated 4 July 2012, Mr. Felipe Sanchez, the DUO/WB, informed the Applicant that he had reviewed the administrative decision and concluded that the Agency had followed proper procedures in transferring him. He ended the letter by endorsing the proposal in Ms Traonvouez' letter of 11 May 2012. The Applicant was advised that if another post at the same level became available at the WBFO, he would be offered that post.

...

... On 28 August 2012, in the absence of an informal resolution, the Applicant filed an application to the [UNRWA Dispute] Tribunal contesting both the decision not to reinstate him to his post as Security Supervisor, WBFO and the decision that if he declined the offer of a transfer to Shufat Camp he would be declared redundant.

3. The UNRWA DT considered whether the Agency had acted lawfully and fairly when it failed to inform Mr. Hamayel that his post would not be held for him if he took a second year of SLWOP and when it advertised his post of Security Supervisor without notifying or consulting with Mr. Hamayel and appointed a new staff member in that post on a three-year fixed-term contract. While the UNRWA DT recognized the broad discretion that the Agency enjoyed in assigning its employee to different functions without obtaining the advance consent of the staff member concerned, it believed that there was a responsibility on the part of the employer to both consult with the staff member concerned and give due regard to his or her interests and

concerns. In the present case, the UNRWA DT found that the failure to inform Mr. Hamayel of the significant professional and personal consequences of extending his SLWOP for a second year “was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at it. The decision was perverse and irrational and cannot be upheld by the Tribunal.”

4. Regarding the issue as to whether the Agency exceeded its power when it issued Mr. Hamayel with an ultimatum of either accepting a transfer to Shufat Camp or being made redundant, the UNRWA DT noted that the Agency had conceded that there was no legal basis for such an action and found that “not only that sending [Mr. Hamayel] such an ultimatum was unlawful but that the threat of loss of employment was wholly unjustified and caused [him] much anxiety and distress”, though the Agency did not follow through with the ultimatum.

5. As remedy, the UNRWA DT ordered the rescission of the decision to transfer Mr. Hamayel to Shufat Camp, his reinstatement in the post of Security Supervisor upon the expiration of the three-year fixed-term appointment of his replacement, pending which Mr. Hamayel was to be offered the next suitable and comparable post in WBFO. Moreover, the UNRWA DT ordered payment of USD 5,000 to Mr. Hamayel “for moral damages, anxiety and stress”.

Submissions

The Commissioner-General’s Appeal

6. The UNRWA DT erred on a question of law in finding against the Agency for not informing Mr. Hamayel of the consequences of extending his SLWOP for a second year and in concluding that the failure to inform Mr. Hamayel vitiated the resulting decision to transfer him to Shufat Camp. In the view of the Commissioner-General, the decision was not unlawful or unreasonable as the Agency acted in accordance with the requirements of the applicable policy, in the absence of an explicit provision obliging notification, and in the absence of an Agency practice at the time that Mr. Hamayel requested and was granted a second year of SLWOP. The Commissioner-General submits that the decision to transfer Mr. Hamayel to another similar post (at the same grade, with the same responsibilities and the same salary) was lawful and fell within his discretionary power.

7. The UNRWA DT erred in awarding moral damages to Mr. Hamayel. In the view of the Commissioner-General, there was no breach of the procedural due process entitlements. Even if there was a breach, for the sake of argument, such breach was not of a fundamental nature. Moreover, Mr. Hamayel did not produce any evidence by way of medical, psychological or other report of the alleged stress or anxiety caused to him which can be directly linked or reasonably attributed to the alleged breach. The evidence provided by Mr. Hamayel was merely his own untested submissions and his testimony at the hearing. He did not provide specific evidence to support the award of moral damages apart from proving that he had diabetes.

8. The Commissioner-General requests that the UNRWA DT Judgment be set aside, or in the alternative, that, should the Appeals Tribunal uphold the Judgment on the merits, the award of moral damages be vacated.

Mr. Hamayel's Answer

9. The UNRWA DT did not err in law by finding that the Agency's failure to inform him of the consequences of extending his SLWOP for a second year was perverse and irrational. The UNRWA DT considered the relevant regulations, rules, directives and jurisprudence and reasoned that the Agency was logically and morally obligated to act in good faith and consult with Mr. Hamayel before taking the impugned decision. In this connection, Mr. Hamayel stresses that the Agency's argument about whether he had a lien on his post was irrelevant because he never argued that he had a lien on his post. Mr. Hamayel also takes issue with the Agency's argument about the non-existence of rules or practice that obliged it to inform him of the consequence of extending his SLWOP for a second year. Mr. Hamayel stresses that the Agency had an obligation to act in good faith and consult with him about the decision taken, and that the Agency should not rely on the absence of directives to make poorly informed decisions. In this connection, Mr. Hamayel notes that the Administration in the WBFO has changed its practice to conform with that of the UNRWA headquarters by keeping staff fully informed in writing of the consequences to their posts when taking special leave.

10. The UNRWA DT did not err when it awarded moral damages to Mr. Hamayel. The UNRWA DT considered Mr. Hamayel's testimony at the hearing about the stress and anxiety that he suffered upon learning of the filling of his post for three years without the Agency informing or consulting with him, the stress and anxiety that he suffered due to the uncertainty since his return from SLWOP and the stress and anxiety that he suffered from the 11 May 2012 letter of

ultimatum. Mr. Hamayel maintains that the UNRWA DT was at liberty to believe his submissions and find them credible. On the other hand, Mr. Hamayel notes that while he submitted evidence of his ailments, the UNRWA DT did not consider those documents to support the judgment for damages.

11. Mr. Hamayel requests that the Appeals Tribunal uphold the Judgment and dismiss the appeal in its entirety.

Considerations

12. The Commissioner-General of UNRWA appeals on the grounds that the UNRWA DT erred in law by:

- a. Finding that the UNRWA Administration's decision not to inform Mr. Hamayel that his post would not be held for him during his second year of SLWOP was arbitrary and unreasonable, thereby vitiating UNRWA's decision to transfer Mr. Hamayel to Shufat Camp; and
- b. Awarding moral damages.

Appeal on merits

13. Area Staff Personnel Directive No. A/5/Rev.5, in effect at the material time, did not make any specific provision regarding the placement of a staff member on return from a second year of SLWOP with another organization.

14. In this context, the FHRO/WB decided, two weeks before Mr. Hamayel began his second year of SLWOP, not to hold his UNRWA post for his return and to recruit a replacement. The FHRO/WB did not inform Mr. Hamayel of the decision prior to communicating the approval of the second year of SLWOP to him.

15. The Commissioner-General submits that the decision was not unlawful or unreasonable as the Agency acted in accordance with the requirements of the applicable policy, in the absence of an explicit provision requiring notification, and in the absence of an Agency practice at the time that Mr. Hamayel requested and was granted a second year of SLWOP.

16. The Commissioner-General also submits that the decision to transfer Mr. Hamayel to another similar post (at the same grade, with the same responsibilities and the same salary) was lawful and fell within his discretionary power.

17. The Appeals Tribunal recalls its jurisprudence that the discretionary power of the Administration is not unfettered.² The Commissioner-General has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee is implied in every contract of employment. And both parties must act reasonably and in good faith.

18. In the present case, though there was no explicit provision in Area Staff Regulation 1.2 requiring notification, it was both logical and reasonable to expect the UNRWA Administration to inform Mr. Hamayel that taking a second year of SLWOP would cause him to lose his post. Even though Mr. Hamayel had no lien on his post, the UNRWA Administration should have paid due regard to the interests of Mr. Hamayel and informed him when his post was advertised.

19. We affirm the UNRWA DT's decision that the lapses on the part of the UNRWA Administration were arbitrary and unreasonable.

20. The appeal accordingly fails on the merits.

Moral damages

21. Before the UNRWA DT, Mr. Hamayel sought two years' compensation for psychological and moral damage and the suffering and stress that "were the major reason behind [his] diabetes and the high blood pressure".

22. Although Mr. Hamayel "produced evidence that he ha[d] diabetes", the UNRWA DT found it "unsafe ... to conclude on the basis of the evidence before it that the condition was either caused or aggravated by the stress which he undoubtedly suffered by the way he has been treated".

² *Pérez-Soto v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-329; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121; *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

23. Despite this finding the UNRWA DT went on to award moral damages of USD 5,000 to Mr. Hamayel as compensation “for the stress and anxiety caused by the Agency’s poor planning and decision making”.

24. The Commissioner-General submits that Mr. Hamayel did not suffer any material or moral damages as he continued to receive his salary of a Guard Supervisor working on a specific project for the Security Section in WBFO. The decision to transfer Mr. Hamayel to another post was not implemented pending the UNRWA DT Judgment.

25. It is not in every case of a violation that compensation ought to be awarded. This Tribunal in some instances has declined to award moral damages where it found the decision in favor of an applicant sufficient to give vindication or satisfaction to the person.³

26. We find the orders of the UNRWA DT to rescind the decision to transfer Mr. Hamayel to Shufat Camp and to reinstate him in his former post upon the expiration of the three-year fixed term contract of his replacement are sufficient to give Mr. Hamayel satisfaction.

27. We accordingly uphold the Commissioner-General’s appeal against moral damages. The award of USD 5,000 compensation for moral damages is hereby set aside.

Judgment

28. The appeal succeeds in part. The UNDT Judgment is affirmed subject to the setting aside of the award of USD 5,000 compensation for moral damages.

³ *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar