



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

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Judgment No. 2015-UNAT-589

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

**JUDGMENT**

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Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Deborah Thomas-Felix
Case No.:	2014-686
Date:	30 October 2015
Registrar:	Weicheng Lin

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Counsel for Ms. Salem:	Amer Abu-Khalaf/LOSA/UNRWA
Counsel for Commissioner-General:	Lance Bartholomeusz

**JUDGE INÉS WEINBERG DE ROCA, 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/2014/036, rendered by the Dispute Tribunal of UNRWA (UNRWA DT or UNRWA Dispute Tribunal) on 22 October 2014 in the case of *Salem v. Commissioner-General of UNRWA*. The Commissioner-General appealed on 19 December 2014, and Ms. Amal Salem answered on 13 February 2015. On 4 March 2015, she filed a cross-appeal, which the Commissioner-General answered on 11 May 2015.

**Facts and Procedure**

2. The facts as found by the UNRWA Dispute Tribunal read as follows:<sup>1</sup>

... Effective 17 August 2008, the Applicant was employed by the Agency as Area Officer, Zarqa Area, Jordan, at Grade 16 on a fixed-term appointment.

... Effective 1 April 2010, the Applicant was promoted to the post of [Chief Area Officer (CAO)], Zarqa Area, at Grade 20 with a probationary period of one-year, due to expire on 31 March 2011.

... On 1 February 2011, a new [Director of UNRWA Operations, Jordan (DUO/J)], [ ... ] was appointed.

... On 31 March 2011, the Applicant was informed that her probationary period would be extended for three months until 30 June 2011.

... On 28 April 2011, the DUO/J and the Field, Human Resources Officer, Jordan ("FHRO/J") met with the Applicant to discuss the details of an Opportunity to Improve ("OTI") working plan.

... On 3 May 2011, the DUO/J sent to the Applicant an OTI working plan for the period from 31 March 2011 to 30 June 2011.

... By letter dated 25 May 2011 to the DUO/J, the Applicant disputed the period of the OTI working plan alleging that it did not cover 90 days.

... By email dated 13 June 2011, the Human Resources Career Management Officer, Jordan ("HRCMO/J") informed the Applicant that the OTI period would be extended until 5 August 2011.

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<sup>1</sup> Impugned Judgment, paras. 3-18.

... On 23 June 2011, a mid-term review meeting took place between the DUO/J, the FHRO/J, the HRCMO/J and the Applicant. Upon the DUO/J's request, the Applicant submitted a mid-term OTI report to the DUO/J on 27 June 2011. On 30 June 2011, another mid-term review meeting took place.

... By a letter dated 31 July 2011, the Applicant was informed that her probationary period would be extended until 5 September 2011. The same day, another letter was sent to the Applicant informing her of the extension of her probationary period until 16 September 2011.

... On 5 September 2011, the DUO/J informed the Applicant that, following the probationary period, her appointment as CAO would not be confirmed. However, the DUO/J offered the Applicant a post in the [Jordan Field Office's (JFO)] Project Office at her previous Grade 16 with additional 10 steps. By letter dated 8 September 2011, the Applicant refused the offer.

... By letter dated 14 September 2011, the DUO/J advised the Applicant that her contract would expire on 16 September 2011. The Applicant was separated from the Agency upon the expiry of her appointment.

... By email dated 16 September 2011, the Applicant submitted to the Director, [Department of Internal Oversight Services ("D/DIOS")] a complaint of discrimination and abuse of power against the DUO/J.

... On 26 September 2011, the Acting Chief, Investigations Division, DIOS, informed the Applicant that her complaint of discrimination and abuse of power against the DUO/J would not be subject to an investigation.

... On 30 October 2011, the Applicant requested review of the decision not to confirm her in the CAO post.

... By letter dated 30 October 2011, the Applicant requested the Commissioner-General to suspend the implementation of the decision to separate her from the Agency pending the outcome of the decision review.

... By letter dated 22 November 2011, the Director of Human Resources informed the Applicant that the decision to separate her from the Agency would not be suspended.

... On 23 November 2011, the Applicant requested review of the decision of the Acting Chief, Investigations Division, DIOS, not to investigate her complaint of discrimination and abuse of power against the DUO/J.

3. From February 2012 to April 2014, Ms. Salem filed three applications with the UNRWA Dispute Tribunal against three decisions, namely:

(a) the decision not to confirm her appointment after a probationary period as CAO/Zarqa Area and to separate her from service upon the expiry of her appointment on 16 September 2011;

(b) the decision of the Acting Chief, Investigations Division, DIOS not to investigate her complaint of discrimination and abuse of power against the DUO/J; and

(c) the decision to follow the DIOS' recommendation and to close the case in relation to Ms. Salem's complaint of discrimination and abuse of power against the DUO/J.

4. In Judgment No. UNRWA/DT/2014/036 now under appeal, the UNRWA DT reviewed Ms. Salem's three applications. It concluded that Ms. Salem's application against the decision not to investigate her complaint was rendered moot by the subsequent decision to conduct an investigation. The UNRWA DT found evidence of serious irregularities in relation to the lack of notification in writing of the grounds for the extension and the non-confirmation of Ms. Salem's probationary appointment; the incorrect application of the OTI process to Ms. Salem; and the failure to consult the Advisory Committee on Human Resources (ACHR). It concluded that the decision in relation to the non-confirmation of Ms. Salem's probationary appointment and her separation from service "was tainted by several procedural irregularities and by abuse of power, and as such, it must be rescinded".<sup>2</sup> Regarding the Commissioner-General's decision to follow the DIOS' recommendation and close the case, the UNRWA DT found that, contrary to the DIOS' conclusion, "there [was] convincing evidence in the case file that the DUO/J's decision not to confirm [Ms. Salem's] appointment as CAO was tainted by abuse of power", in the form of allowing her appointment to expire without consulting the ACHR and writing a memorandum to the Commissioner-General and the Deputy Commissioner-General in order to "get [them] on [her] side" concerning Ms. Salem's appointment.<sup>3</sup> The UNRWA Dispute Tribunal concluded that Ms. Salem was a victim of abuse of power. It ordered the rescission of the Commissioner-General's decision to close the case, as it was based on the erroneous conclusion of the DIOS.

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<sup>2</sup> *Ibid.*, para. 126.

<sup>3</sup> *Ibid.*, paras. 124 and 123.

5. As remedy, the UNRWA DT awarded Ms. Salem moral damages in the amount of USD 16,000. It decided not to award her any material damages as an alternative to rescission and reinstatement as she had failed to substantiate her claim in this regard.

### **Submissions**

#### **The Commissioner-General's Appeal**

6. The UNRWA Dispute Tribunal exceeded its jurisdiction and erred in law and procedure in deciding that the DUO/J had abused her power. The UNRWA DT should not have supplanted the DIOS' conclusion, which was implicitly accepted by the Commissioner-General, where the propriety of the investigation had not been impugned. Absent abuse of power or any evidence of impropriety in the decision-making process, the decision not to confirm Ms. Salem's appointment should not have been disturbed.

7. The UNRWA DT's finding that the DUO/J had abused her power, without according the DUO/J the due process rights to which she would otherwise have been entitled, prejudiced the DUO/J's rights as a third party.

8. The UNRWA DT exceeded its jurisdiction and erred in law and procedure in conducting a *de novo* investigation into Ms. Salem's allegations of discrimination and abuse of power and substituting its conclusion for that of the DIOS. It did not make any findings impugning the investigators or the investigation. While disagreeing with the DIOS' conclusions, the UNRWA DT overlooked the evidence on which the DIOS had relied in reaching its reasonable conclusion. The UNRWA DT should have deferred to the investigators and the Commissioner-General as the finders of fact when the line between poor management and abuse of power is easily blurred, as the UNRWA DT so conceded.

9. The UNRWA DT erred in law by awarding Ms. Salem USD 16,000 as moral damages, an excessive amount of compensation that should be either vacated or reduced. The UNRWA DT failed to explain the causal link between Ms. Salem's poor health and her separation from service or her conditions of employment, and Ms. Salem did not present any medical opinion establishing such a link. There was equally no evidence of psychological harm, as the medical documents that Ms. Salem had submitted to the UNRWA DT were not from medical specialists with expertise in psychological or psychiatric matters.

10. If the Appeals Tribunal finds that the present case merits moral damages, the Commissioner-General requests that the Appeals Tribunal reduce the quantum ordered by the UNRWA Dispute Tribunal on the basis that: there is no evidence that the Agency's actions were malicious, highhanded or without due regard to Ms. Salem's legitimate concerns and feelings; the decision to apply the OTI procedure to Ms. Salem's case was taken in good faith and in her interest; UNRWA offered Ms. Salem alternative employment within the Agency with pay protection and in a post that highlighted her strength; and DIOS retracted its decision not to investigate Ms. Salem's complaint of discrimination and abuse of power and undertook a thorough investigation in reasonable time.

11. The Commissioner-General requests that the Appeals Tribunal set aside the UNRWA DT Judgment.

**Ms. Salem's Answer**

12. The UNRWA Dispute Tribunal has jurisdiction to review facts and determine whether they were established. The UNRWA DT had to look into the available evidence in order to determine whether the decision not to confirm Ms. Salem's appointment and to separate her from service was tainted by procedural irregularities, abuse of power, bias, prejudice, improper motivations or extraneous factors. The UNRWA DT did not conduct a *de novo* investigation; it simply reviewed the evidence at hand. The UNRWA DT did not err in deciding that the DUO/J had abused her power.

13. The UNRWA Dispute Tribunal did not err in awarding moral damages. There were important breaches of procedure on the part of the DUO/J. Ms. Salem suffered damages as a result of those procedural irregularities and a series of arbitrary decisions. She refused the offer to place her on a post of Project Officer because it was not offered in good faith, and she believed that she deserved to be reinstated to her CAO post.

14. Ms. Salem requests that the Appeals Tribunal dismiss the present appeal in its entirety.

**Ms. Salem's Cross-appeal**

15. The UNRWA Dispute Tribunal erred in law in ordering monetary compensation rather than reinstatement. The evidence before that Tribunal supported the conclusion that she suffered material damages as a result of the contested decision. It was a contradiction for the

UNRWA DT to order the rescission of the two unlawful decisions but to refuse to order reinstatement. Ms. Salem made it clear, with evidence, to the UNRWA DT that she had not worked or received remuneration after her separation from service with the Agency.

16. The UNRWA Dispute Tribunal erred in fact by refusing to award Ms. Salem material damages. She was entitled to such damages in the form of lost salaries and related adjustments and entitlements.

17. Ms. Salem requests that the Appeals Tribunal review the remedies awarded by the UNRWA DT.

### **The Agency's Answer to the Cross-appeal**

18. The Dispute Tribunal did not err in not awarding compensation in lieu of rescission. It had the statutory discretion to order remedies under Article 10(5)(a) of the Statute of the UNRWA DT (Statute) or Article 10(5)(b), or both. In the present case, the UNRWA DT confined itself to the remedy under Article 10(5)(a), namely, rescission and consequently reinstatement. It did not err when it used Ms. Salem's material damages or lack thereof as the reference point for setting the quantum of compensation in lieu of rescission.

19. The UNRWA Dispute Tribunal did not err by finding that Ms. Salem had not suffered material damages. However, it erred in procedure in relying on her statement made at its hearing of 23 September 2014, because the UNRWA DT Judge failed to swear her in as a witness, as required by Article 12(3) of the Rules of Procedure of the UNRWA DT. Consequently, the UNRWA DT could only rely on Ms. Salem's response of 2 October 2014, which is not sufficiently clear to establish what, if any, material damages she had suffered. In this connection, the Commissioner-General states that, but for her refusal of the Agency's offer to work on another UNRWA post at her previous Grade 16 level with additional 10 steps, Ms. Salem would have continued to be gainfully employed by UNRWA with pay protection.

20. The Commissioner-General requests that the Appeals Tribunal reject all of Ms. Salem's pleas and dismiss her cross-appeal in its entirety.

**Considerations**

21. The DUO/J informed Ms. Salem that following the expiration of her probationary period, her appointment as CAO would not be confirmed. However, she was offered a post at her previous Grade 16 level with additional 10 steps on 5 September 2011. Ms. Salem refused the offer on 8 September 2011 and, on 16 September 2011, the date of the expiry of her contract, Ms. Salem submitted to the Director of DIOS a complaint of discrimination and abuse of power against the DUO/J.

22. Ms. Salem claims that the decision to extend her probationary period was biased and discriminatory.

23. In the impugned Judgment, the UNRWA DT rescinded the decision of the Commissioner-General to close the case in relation to Ms. Salem's complaint of discrimination and abuse of power.

24. As noted by the UNRWA Dispute Tribunal, abuse of power<sup>4</sup>

is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his/her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of power may also include conduct that creates a hostile or offensive work environment which includes, but [...] is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of power.

25. In the instant case, Ms. Salem was informed on 31 March 2011, upon the expiration of the probationary appointment that her probationary period would be extended for an additional three months. At the end of the extended period, she was not confirmed on her new post but was offered a post at her prior Grade 16 level with additional 10 steps.

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<sup>4</sup> Taken from the Impugned Judgment, para. 111, citing UNRWA's General Services Circular No. 06/2010 on "Prohibition of Discrimination, Harassment - including Sexual Harassment - and Abuse of Power", para. 6.



26. The UNRWA DT disagreed with the DIOS' conclusion and held that abuse of power had been established. It also held that the intention to avoid the ACHR was a deliberate abuse of power by the DUO/J.

27. The UNRWA DT noted that Ms. Salem was not informed in writing about the grounds for the decision of 31 March 2011 to extend, and not confirm, her probationary appointment, and that Ms. Salem did not receive a copy of the notes of the record of the meetings between her and the DUO/J.

28. The UNRWA DT concluded that during the probationary period Ms. Salem held a fixed-term appointment which could have been subject to an extension. Pursuant to Organization Directive No. 20 issued by the Commissioner-General on 29 June 2009, the non-extension of her fixed-term appointment upon the expiry of her probationary period should have been submitted to the ACHR for its recommendation to the Commissioner-General.

29. It is not the role of the UNRWA Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the Administration.<sup>5</sup>

30. The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance.<sup>6</sup>

31. Appointments shall be subject to the satisfactory completion of not less than one month's probationary service.<sup>7</sup>

32. Organization Directive No. 20 establishes, among others, ACHR's responsibility to make recommendations to the Commissioner-General on proposals from the Director of Human Resources regarding managed reassignment of international staff members, proposals regarding non-extension of fixed-term appointments for international staff and for

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<sup>5</sup> See *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-438, para. 19, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

<sup>6</sup> UNRWA Personnel Directive A/4/Part VII/Rev.7, taken from the Impugned Judgment, para. 84.

<sup>7</sup> UNRWA Area Staff Regulation 4.2.

the area staff at Grade 18 and above and any other human-resource related matters as deemed appropriate by the Commissioner-General or the Director of Human Resources.<sup>8</sup>

33. We affirm that there have been procedural irregularities and that the probationary period should have ended on 31 March 2011. The Appeals Tribunal nevertheless does not consider that the irregularities amount to an abuse of power.

34. Consequently, we vacate the UNRWA DT's order to rescind the Commissioner-General's decision to follow the DIOS' recommendation and to close the case in relation to Ms. Salem's complaint of discrimination and abuse of power. We, however, do not rescind the contested administrative decision to separate her from service, or order her reinstatement or an amount of compensation that the Agency may elect to pay as an alternative to the rescission of the contested administrative decision, or specific performance.<sup>9</sup>

35. The UNRWA DT awarded Ms. Salem moral damages due to the irregularities. We have consistently held that not every breach will give rise to an award of moral damages and whether a breach will give rise to such an award will necessarily depend on the nature of the evidence put before the UNRWA Dispute Tribunal.<sup>10</sup>

36. This Tribunal has also held that a staff member should be compensated for real and incurred expenses and such claims should be directly related to the damages resulting from a breach of his or her contractual rights.<sup>11</sup>

37. The UNRWA DT awarded Ms. Salem moral damages mainly on the basis of its finding that she was a victim of abuse of power. Absent abuse of power, the compensation for moral damages should be vacated.

### **Judgment**

38. The appeal is granted, the cross-appeal is rejected, and the UNRWA DT Judgment is vacated in its entirety.

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<sup>8</sup> Organization Directive No. 20, para. 5.

<sup>9</sup> See Article 9(1)(a) of the Appeals Tribunal Statute.

<sup>10</sup> See *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, paras. 36-39 and cites therein.

<sup>11</sup> *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 39.

Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2015 in New York, United States.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 18<sup>th</sup> day of December 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar