



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

Judgment No. 2016-UNAT-612

Dawas
(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 Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Deborah Thomas-Felix

Case No.: 2015-707

Date: 24 March 2016

Registrar: Weicheng Lin

Counsel for Mr. Dawas: Amer Abu-Khalaf/LOSA

Counsel for Commissioner-General: Lance Bartholomeusz

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2015/009, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 18 February 2015, in the case of *Dawas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. The Commissioner-General filed his appeal on 10 April 2015, and Mr. Dahoud Dawas filed his answer on 2 June 2015.¹

Facts and Procedure

2. The following facts are uncontested:²

... Effective 11 February 2007, [Mr. Dawas] was employed by the Agency on a fixed-term appointment as an Area Officer in Irbid, Grade 16. [...]

... Effective 1 April 2010, [Mr. Dawas] was promoted to the post of Chief, Area Office (“CAO”) for South Amman, Grade 20, with a probationary period of one year, due to expire on 31 March 2011.

... On 1 February 2011, the Agency appointed [a new person] to the post of [Director of UNRWA Operations, Jordan (“DUO/J”)].

... [On] 31 March 2011, [Mr. Dawas] was informed that his probationary period was extended for three months, until 30 June 2011.

... From 31 March 2011 to 30 June 2011, [Mr. Dawas] was placed on an Opportunity to Improve (“OTI”) process.

...

... By email dated 13 June 2011, [Mr. Dawas] was informed that the OTI process had been extended until 5 August 2011.

... On 14 June 2011, [Mr. Dawas] asked the DUO/J for one month of annual leave because of the tension and stress he felt. The DUO/J granted him one week indicating that given such short notice, it was not possible to grant [him] one month of leave. [...]

...

¹ On 10 August 2015, by way of Order No. 234 (2015), the Appeals Tribunal denied Mr. Dawas’ motion of 27 July 2015 seeking an extension of time to file a cross-appeal.

² Impugned Judgment, paras. 2-25.

... On 3 July 2011, [Mr. Dawas] was hospitalised and placed on sick leave from 3 July 2011 to 4 August 2011.

... On 31 July 2011, [Mr. Dawas]' OTI was extended until 5 September 2011.

... On 3 September 2011, [Mr. Dawas] was hospitalised again and placed on sick leave until 31 December 2011.

... By email dated 7 September 2011, [Mr. Dawas] requested separation on medical grounds.

... By email dated 8 September 2011, [Mr. Dawas] informed the DUO/J that while on sick leave and due to his health problems, he wanted to avoid discussions about work. On the same day, the DUO/J sent him a letter stating that "your probation/OTI as CAO would have led to a non-confirmation based on performance and we planned to review the final results with you and officially inform you of that decision during the meeting scheduled for 5 September". The letter was both sent by email and hand-delivered to [Mr. Dawas].

...

... [On] 18 October 2011, [Mr. Dawas] was informed that [a] Medical Board had declared him unfit to continue his services with the Agency, and that he would be terminated on medical grounds effective 17 January 2012.

... [Mr. Dawas] was on sick leave from 1 to 15 January 2012.

... On 14 January 2012, [Mr. Dawas] submitted to the Director of the Department of Internal Oversight Services ("D/DIOS") a complaint of discrimination, abuse of power and harassment against the DUO/J.

...

... On 15 October 2012, [Mr. Dawas] was interviewed by an investigator.

... On 27 August 2013, the Chief, Investigations Division, DIOS ("C/ID, DIOS"), ... met with [Mr. Dawas] to inform him of the outcome of the investigation, i.e. that his allegations were considered unsubstantiated.

... By email dated 23 September 2013, the C/ID, DIOS informed [Mr. Dawas] that the investigation was closed because the evidence obtained did not substantiate the reported misconduct.

... On 7 October 2013, [Mr. Dawas] requested review of the decision to close the investigation following his complaint of prohibited conduct against the DUO/J.

... The Agency did not respond to [Mr. Dawas]'s request for decision review.

3. On 23 January 2014, Mr. Dawas filed an application with the UNRWA Dispute Tribunal challenging the decision of the C/ID, DIOS, to close the investigation into his complaint of discrimination, abuse of power and harassment against the DUO/J on the basis that the reported misconduct was unsubstantiated, and requesting, among other things, financial compensation for damages, distress and the consequences of his hospitalization leading to his separation, as well as DIOS' delay in investigating his complaint.

4. On 7 December 2014, by Order No. 120 (UNRWA/DT/2014), the UNRWA DT ordered the Agency to produce *ex parte* DIOS' unredacted investigation report and a copy of the unredacted records of the interviews DIOS conducted in relation to Mr. Dawas' complaint. The Agency complied with the order on 11 December 2014.

5. On 31 December 2014, by Order No. 129 (UNRWA/DT/2014), the UNRWA DT ordered the Agency to produce *ex parte* several pages of the unredacted record of DIOS' interview of the DUO/J in relation to Mr. Dawas' complaint. The Agency complied with the order on 2 January 2015.

6. On 18 February 2015, the UNRWA Dispute Tribunal rendered its Judgment, upholding Mr. Dawas' application. The UNRWA DT found that although Mr. Dawas' UNRWA DT application complained of DIOS' decision to close its investigation into his complaint, Mr. Dawas really sought to contest the Commissioner-General's implicit decision to close the case and not to take any action in relation to his allegations against the DUO/J.³ Noting the Appeals Tribunal Judgment on *Messinger*,⁴ the UNRWA DT held that it was "entitled to review [Mr. Dawas'] complaint of discrimination, abuse of power and harassment against ... the DUO/J", and "to review the alleged facts and determine if they [were] established".⁵ After reviewing the facts, the UNRWA DT concluded that the DUO/J had abused her authority by improperly using her position to influence the Commissioner-General, and that her conduct vis-a-vis Mr. Dawas, i.e., sending him work-related e-mails and letters, as well as noting the calls or visits of UNRWA staff members convincing Mr. Dawas to retire on medical grounds during his sick leave, could be characterised as harassment.⁶ Accordingly, the UNRWA DT held that based

³ *Ibid.*, paras. 43-44.

⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

⁵ Impugned Judgment, para. 47.

⁶ *Ibid.*, paras. 67, 74-76.

on DIOS' incorrect recommendation to close the investigation into Mr. Dawas' harassment complaint, the Commissioner-General's decision not to take action on the harassment complaint was unlawful and must be rescinded.⁷

7. Noting that the Medical Board had declared Mr. Dawas unfit to continue his services with the Agency, and that Mr. Dawas did not contest this, the UNRWA DT declined to order Mr. Dawas' reinstatement to his post.⁸ The UNRWA DT also rejected Mr. Dawas' request to be compensated for material damages for abuse of power and harassment, noting he had not provided evidence that these caused his sickness or aggravated a pre-existing disease, and the difficulty in demonstrating a causal link between the abuse of power and harassment and his illness.⁹ The UNRWA DT nonetheless awarded Mr. Dawas USD 15,000 in moral damages for the distress and anxiety he had suffered following the abuse of power and harassment, which continued while he was on sick leave, and an additional USD 1,000 for the Agency's protracted delay in handling Mr. Dawas' harassment complaint.¹⁰ The UNRWA DT also referred the case to the Commissioner-General for possible action to enforce accountability.¹¹

Submissions

The Commissioner-General's Appeal

8. The UNRWA Dispute Tribunal exceeded its jurisdiction and erred on questions of law and procedure in usurping the Commissioner-General's discretionary authority and deciding that the DUO/J had abused her power and harassed Mr. Dawas. In doing so, the UNRWA DT also effectively circumvented standard procedures, including due process guarantees, and denied the DUO/J an opportunity to respond to the allegations before the UNRWA DT reached its adverse findings about the DUO/J's conduct.

9. The UNRWA DT exceeded its jurisdiction and erred on questions of law and procedure in conducting a *de novo* investigation into the allegation of harassment, contrary to the Appeals Tribunal's judgment in *Messinger*. Pursuant to UNRWA's General Staff Circular No. 06/2010 entitled "Prohibition of Discrimination, Harassment - including

⁷ *Ibid.*, para. 78.

⁸ *Ibid.*, para. 81.

⁹ *Ibid.*, paras. 82-83.

¹⁰ *Ibid.*, paras. 84-85.

¹¹ *Ibid.*, para. 86.

Sexual Harassment - and Abuse of Power”, paragraph 32, a complainant’s right of appeal to the UNRWA DT is limited to challenging the propriety of the procedure followed in respect of the allegations of prohibited conduct. Insofar as the UNRWA DT found that the DIOS investigation did not address Mr. Dawas’ allegation that he was harassed while on sick leave, it failed to defer to DIOS’ expertise and discretionary authority to characterize and investigate Mr. Dawas’ complaint. Alternatively, the UNRWA DT’s very own determination that Mr. Dawas’ harassment complaint had not been investigated by DIOS meant that it was not open for the UNRWA DT to conclude that there was harassment. The UNRWA DT accepted Mr. Dawas’ allegations at face value and, in doing so, exceeded its jurisdiction and committed an error of law.

10. The UNRWA DT erred on a question of law by finding that the DUO/J had abused her power and thus substituting its own conclusion for that of the Commissioner-General. While the role of the UNRWA DT was to determine whether there had been a proper investigation into the allegation of abuse of power, the UNRWA DT did not make any findings impugning the conduct of the investigators or the investigation process regarding the allegation of abuse of power, but rather disagreed with DIOS’ ultimate conclusion. The UNRWA DT concluded that the DUO/J had abused her power based on identified procedural irregularities in the evaluation of Mr. Dawas’ performance during the probationary period, i.e. the use of the OTI process, the failure to share a copy of meeting minutes with Mr. Dawas and the desire to avoid review by the Advisory Committee on Human Resources (ACHR). Yet it overlooked evidence of good faith by the DUO/J in connection with those perceived irregularities. By finding that the DUO/J’s actions indicated bad faith, the UNRWA DT failed to recognize or refer to the explanation by the Field Human Resources Officer that the only reason the DUO/J was trying to “get rid of [Mr. Dawas] was for performance”.

11. The UNRWA DT’s award of moral damages should be vacated. Firstly, there is no evidence that the Agency’s actions were malicious or high-handed and without due regard for Mr. Dawas’ legitimate concerns and feelings. The Agency afforded Mr. Dawas multiple extensions of his probationary period to allow him to improve his performance, rather than terminating his appointment immediately; absent the OTI process and pursuant to the applicable probation policy, the non-confirmation could have been made without providing ongoing feedback during the OTI process to address Mr. Dawas’

performance issues. Moreover, rather than terminating Mr. Dawas' appointment during the probationary period or not confirming it at the end of the probationary period, the Agency convened a Medical Board to evaluate Mr. Dawas' fitness and ultimately separated Mr. Dawas from the Agency based on medical grounds, thus granting him certain benefits to which he otherwise would not have been entitled. Secondly, pursuant to *Asariotis*,¹² there was no breach of Mr. Dawas' contractual or due process rights that would justify an award of moral damages. Mr. Dawas' right to have an investigation conducted into his allegation of prohibited conduct was respected when DIOS conducted an investigation in 2012 and 2013 and, with the exception of the inquiry into the harassment allegation, which the Agency disputes, the UNRWA DT has not impugned the propriety of that investigation. Thirdly, the UNRWA DT erred in awarding moral damages for anxiety and stress in the absence of a causal link between Mr. Dawas' health and the Agency's actions, as well as specific evidence supporting the award. The moral damages award also contradicts the reasoning underpinning the UNRWA DT's refusal to award material damages. Alternatively, the UNRWA DT's award of excessive moral damages should be reduced in quantum.

12. The Commissioner-General requests that this Tribunal vacate the impugned Judgment or, in the alternative, vacate the UNRWA DT's award of moral damages, or in the further alternative, reduce the quantum of moral damages.

Mr. Dawas' Answer

13. The UNRWA DT did not err in reviewing Mr. Dawas' abuse of authority and harassment complaint against the DUO/J and did not usurp the Commissioner-General's discretionary authority. While the Agency relies on *Messinger*, the former Administrative Tribunal in *Kumar* held that the Tribunal may substitute its judgment for that of the Secretary-General in the presence of evidence showing bias, prejudice, improper motivation or extraneous factors.¹³ Accordingly, it was the UNRWA DT's duty to review the evidence and determine whether the allegations of abuse of power and harassment were established and whether the Commissioner-General's decision not to take any action in relation to his allegations against the DUO/J was tainted by bias, prejudice, improper motivation or extraneous factors.

¹² *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

¹³ Citing former Administrative Tribunal Judgment No. 834, *Kumar* (1997).

14. The UNRWA DT was clear about its role and its jurisdiction, and it is incorrect to state that the UNRWA DT conducted a *de novo* investigation when it limited itself to simply reviewing the evidence at hand. This accorded with the Appeals Tribunal's jurisprudence in *Messinger*, which held that "for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment."¹⁴ The UNRWA DT examined the facts to determine whether the abuse of authority and harassment claims were substantiated, and found the claims to be substantiated. That was not a new investigation.

15. Insofar as the Agency claims that a complainant's right of appeal to the UNRWA DT is limited to challenging the propriety of the procedure followed in respect of allegations of prohibited conduct, the fact that the DIOS investigation report failed to address Mr. Dawas' specific harassment complaint shows serious procedural irregularities.

16. The UNRWA DT did not err on a question of law by substituting its own conclusion that the DUO/J had abused her power with that of the Commissioner-General. The UNRWA DT did not merely disagree with DIOS' conclusion, but uncovered several breaches of procedure and blatant evidence proving that there was abuse of power by the DUO/J. Relying on the Appeals Tribunal's jurisprudence in *Koda*, Mr. Dawas submits that the UNRWA DT correctly reviewed and challenged the evidence and facts included in DIOS' interviews and reached the conclusion that the DIOS report was fundamentally flawed.¹⁵ The UNRWA DT duly impugned the DIOS report, finding it flawed by procedural irregularities, and thus correctly reached a different conclusion.

17. While the Commissioner-General claims that the actions of the DUO/J – in relation to the OTI, not giving Mr. Dawas a copy of the records of the meetings he had with her, and the DUO/J's desire to avoid the ACHR – were in good faith, this is unproven and the Judgment confirmed otherwise. Each of the foregoing actions was contrary to the Agency policy and the UNRWA DT correctly concluded that they amounted to an abuse of authority. While the Agency selectively quotes from *Messinger* to support its argument that the UNRWA DT exceeded its role, that case equally provides that it was

¹⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 25.

¹⁵ *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, paras. 41-42.

for the UNRWA DT to assess if the contested facts actually qualified as an abuse of authority, and it was thus open to the UNRWA DT to find so.

18. The UNRWA DT did not err in awarding moral damages. The UNRWA DT correctly found that Mr. Dawas' contractual rights were breached and warranted compensation as per the criteria set out in *Asariotis*. Further, the Commissioner-General's challenge to the UNRWA DT's reasoning for awarding moral damages must be rejected, as it fails to distinguish between moral and material damages. The UNRWA DT correctly awarded compensation, having established that Mr. Dawas suffered damages. Further, the quantum of damages awarded is not excessive and should not be reduced.

19. Mr. Dawas requests that the Appeals Tribunal dismiss the present appeal.

Considerations

20. The Tribunal affirms the findings and conclusions in the Judgment under appeal about the illegality of the closure of the investigation into Mr. Dawas' complaint of discrimination, abuse of power and harassment, as the Agency found Mr. Dawas' allegations unsubstantiated and took no further action.

21. The UNRWA Dispute Tribunal very thoroughly conducted a judicial review of the administrative decision under challenge. It did not erroneously substitute itself for the Administration or conducted a *de novo* investigation as argued by the Commissioner-General. It examined the same facts and the investigation report, and came to the conclusion that several procedural and substantive irregularities, precisely indicated, vitiated the contested result of the proceedings.

22. We find that the evidence supports that finding. This Tribunal is satisfied with the detailed analysis of the totality of the evidence by the UNRWA Dispute Tribunal Judge and agrees with the well-reasoned conclusion reached.

23. As we held in *Mashhour*:¹⁶

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

In our view, the exercise the UNRWA DT undertook was not to conduct a fresh investigation into Mr. Dawas' allegation of harassment but to draw its own conclusions from the investigation report, which is a legitimate exercise.

24. Irregularities such as the failure to address the specific harassment complaint, several examples of abuse of power (particularly during the periods of sick leave and hospitalization of the staff member) including sending performance evaluation-related e-mails and attempting to force Mr. Dawas to retire for health reasons can be reasonably characterized as breaches of the Agency's policies and regulations, meriting a finding of abuse of power and harassment.

25. Despite the Agency's claims of good faith on the part of the DUO/J and its assistance in facilitating Mr. Dawas' separation on medical grounds rather than terminating his service due to performance, the sequence of facts as pointed out by the UNRWA Dispute Tribunal does not support these claims.

26. The requirements of Article 2(1) of the Appeals Tribunal Statute are not fulfilled since the impugned decision is not a manifestly unreasonable one due to an error of fact, law or procedure or an excess of jurisdiction or the failure to exercise it, as enumerated in Article 2(1)(a) to 2(1)(e).

27. Therefore, this Tribunal agrees with the rescission of the impugned administrative decision without an order for reinstatement in the present case, since the staff member has been declared unfit to work for health reasons.

¹⁶ *Mashhour v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-483, para. 45 (quoting *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-220, para. 41) and para. 46.

28. This Tribunal holds that the compensation awarded by the trial court is adequate given the circumstances of the case and the evidence produced about the moral harm and stress suffered by Mr. Dawas, particularly from April 2011 to October 2011 (i.e., performance- and work-related e-mails and letters) and the remarkable delay in the Agency's handling of his complaint (more than 21 months).

29. In conclusion, the appeal does not succeed.

Judgment

30. The appeal is dismissed in its entirety and the Judgment of the UNRWA Dispute Tribunal is affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Thomas-Felix

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar