



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

Judgment No. 2016-UNAT-643

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Rosalyn Chapman
Judge Inés Weinberg de Roca

Case No.: 2015-852

Date: 24 March 2016

Registrar: Weicheng Lin

Counsel for Mr. Harb: Amer Abu-Khalaf, Staff Legal Assistance

Counsel for Commissioner-General: Lance Bartholomeusz

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNRWA/DT/2015/043, 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 30 July 2015, in the case of *Harb v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees*. On 15 September 2015, Mr. Mohammad Harb filed an appeal and on 16 November 2015, the Commissioner-General of UNRWA filed his answer.

Facts and Procedure

2. On 1 July 1995, Mr. Harb entered the service of the Agency as an Audio Visual Production Assistant, Grade 12, Step 1 in the Education Department, Headquarters, Amman (ED/HQA). His post description was grouped in Occupational Classification Code (OCC) 01 (Education Specialists) with a corresponding Special Occupation Allowance (SOA) of 15 per cent.

3. On 4 May 1999, Mr. Harb was promoted to the post of General Education Specialist, Audio Visual Media, Grade 15 in the ED/HQA. The post was later upgraded to Institute of Education Specialist Audio Media, Grade 16. As a result, Mr. Harb was promoted to Grade 16, Step 7 effective 1 January 2008.

4. By letter dated 28 November 2011, the Human Resources Officer (HRO) informed Mr. Harb that effective 1 December 2011, his appointment would be reclassified as Audio Visual Media and Multimedia Advisor (AVM Advisor), Grade 16, with no change to his current grade and step. The post description for the post of AVM Advisor was grouped under OCC 01.

5. By Interoffice Memorandum to the Director of Human Resources (DHR) dated 9 February 2013, the Chief, Compensation and Management Services Division (C/CMSD) recommended that the post of AVM Advisor change from OCC 01 to OCC 66 (Audio Visual Services). On 11 March 2014, the DHR approved the grouping of AVM Advisors in OCC 66.

6. On 27 April 2014, Mr. Harb wrote to his supervisor, the Head, Partnerships, Communication and ICT Unit (HPC/ICT Unit) to express his surprise that he had not been retroactively granted the SOA at the rate of OCC 66, effective December 2011 and

requested that he contact the Human Resources Department for rectification of the issue. That same day, the HPC/ICT Unit wrote to the Chief, Human Resources Services Division (CHRSD) stating that it was not fair to pay the new SOA only as of April 2014, as Mr. Harb had been performing the same duties since December 2011.

7. By e-mail dated 30 April 2014 to the HPC/ICT Unit, the CHRSD reaffirmed the new SOA rate would take effect on 1 April 2014.

8. On 12 May 2014, Mr. Harb filed a request for decision review and on 11 June 2014, the Deputy Commissioner-General (DCG) upheld the CHRSD's decision.

9. On 25 June 2014, Mr. Harb filed an application with the UNRWA DT challenging the decision not to pay him SOA at the rate of OCC 66 from 1 December 2011.

10. On 30 July 2015, the UNRWA DT issued Judgment No. UNRWA/DT/2015/043, dismissing the application as not receivable. It stated "the SOA was created as a management strategy to offer more competitive salaries in order to attract or retain staff members who could otherwise be lured away by more lucrative offers. The Commissioner-General has discretionary authority in approving and removing this allowance based on the Agency's needs and the current market."¹ The decision to grant or deny payment of an SOA does not affect the terms of the appointment or contract of employment of a staff member as defined in Article 2(1)(a) of the UNRWA DT Statute and is therefore not subject to judicial review. The UNRWA DT noted that the same applied with respect to a decision to retroactively grant an SOA.

11. On 15 September 2015, Mr. Harb appealed and on 16 November 2015, the Commissioner-General answered.

Submissions

Mr. Harb's Appeal

12. The UNRWA DT failed to exercise jurisdiction vested in it by not considering within the scope of its jurisdiction the decision not to retroactively pay Mr. Harb SOA at OCC 66. Mr. Harb contends the UNRWA DT misunderstood the nature of the decision he challenged.

¹ Impugned Judgment, para. 29.

The decision was not whether or not Mr. Harb was entitled to the SOA. The Agency acknowledged that he was entitled to the SOA according to his responsibilities and duties. The decision he challenged in his application was the refusal to retroactively pay him the SOA at the correct rate of OCC 66 from the date of the post description rather than from the date of the rectification of the mistake in the job description.

13. The UNRWA DT erred in law by violating UNRWA's provisions of retroactivity of payments. There is no mention of retroactivity of payments in the UNRWA DT Judgment.

14. Mr. Harb requests that the Appeals Tribunal vacate the UNRWA DT Judgment as it failed to exercise its jurisdiction. In the alternative, should the Judgment stand, Mr. Harb requests to be retroactively granted payment of SOA at the OCC 66 rate from the date of the signature of the post description on 1 December 2011.

The Commissioner-General's Answer

15. The UNRWA DT did not fail to exercise its jurisdiction by not considering within the scope of its jurisdiction the decision not to retroactively pay the SOA at OCC 66, an issue which goes to the merits of the application. The non-payment of SOA at the new rate and retroactively (prior to the approval on 11 March 2014) is not an administrative decision affecting Mr. Harb's terms of appointment or contract of employment.

16. The UNRWA DT did not err on a question of law by violating the UNRWA provisions of retroactivity of payments. Area Staff Rule 103.5 on Retroactivity of Payments does not in itself create an entitlement for purposes of appeal. For one to successfully invoke the rule, one should be entitled to the "allowance" in the first place. In the instant case, the entitlement took effect on 1 April 2014. There was therefore no breach of the retroactivity provisions as contended by Mr. Harb.

17. In light of the foregoing, the remedies sought by Mr. Harb have no legal basis. Moreover, if the impugned Judgment stands, then there is no basis to retroactively grant the payment of SOA at the OCC 66 rate.

18. The Commissioner-General requests the Appeals Tribunal to dismiss the appeal in its entirety and to affirm the UNRWA DT's conclusion that Mr. Harb's application was not receivable. Should the Appeals Tribunal consider the application receivable, the

Commissioner-General requests that the Judgment be remanded to the UNRWA DT for a consideration of the merits of the case.

Considerations

19. The issue in this appeal is whether the UNRWA Dispute Tribunal was correct in finding that the Administration's decision not to award Mr. Harb the SOA at OCC 66 retrospectively from 1 December 2011 was not an administrative decision subject to judicial review.

20. Article 2 of the UNRWA Dispute Tribunal's Statute provides that the UNRWA Dispute Tribunal "shall be competent to hear and pass judgement on an application filed by an individual ... against... (a) ... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". It also establishes that "[t]he terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

21. Thus, in order to decide whether a staff member's application is receivable, the UNRWA Dispute Tribunal must consider whether there has been an administrative decision which affects that staff member's contract of employment or terms of appointment.

22. In the present case, the UNRWA Dispute Tribunal decided that the impugned decision was not a contestable administrative decision.

23. Mr. Harb claims that the UNRWA Dispute Tribunal failed to exercise its jurisdiction because it misunderstood what he was challenging. He submits that the decision he was challenging was the Agency's refusal to pay him the higher SOA to which he was entitled, at the rate of OCC 66, from 1 December 2011 "rather than from the date of the rectification of the mistake in the job description". According to Mr. Harb, the issue to be decided "is not whether [he] was entitled or not to the SOA, but the refusal of its retroactive payment corresponding to the correct OCC 66 from the date of the signature of his post description inasmuch his tasks and work remained the same during the two years and [a] half the Agency lasted to rectify its mistake".

24. We find that there is merit in Mr. Harb's argument. His case before the UNRWA Dispute Tribunal was that the Agency had wrongly refused to pay him the higher SOA retrospective to 1 December 2011 even though he had been performing the same duties since that date. His claim involves a quite substantial difference in pay, given that the SOA for an OCC 1 is 15 per cent, whereas the SOA for an OCC 66 is 38.15 per cent.²

25. What constitutes an appealable administrative decision has been the subject of jurisprudence by the former Administrative Tribunal and by the Appeals Tribunal.³ In *Andronov*, the former Administrative Tribunal stated:⁴

... There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that 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.

26. In the seminal case of *Andati-Amwayi*, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows:⁵

... What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

... In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

² Mr. Harb's application to the UNRWA Dispute Tribunal, para.2.

³ See *Reid v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-563, para. 32 citing Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

⁴ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

⁵ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, paras. 17 to 19.

... What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

27. In short, as held by this Tribunal in *Lee*,⁶ the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment; the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

28. We find that the Dispute Tribunal erred when it failed to consider that Mr. Harb was contesting a specific decision denying him a retrospective payment of the higher SOA. Accordingly, we find that the UNRWA Dispute Tribunal erred in law in deciding that Mr. Harb failed to identify an administrative decision capable of being brought within the scope of judicial review. The Agency's refusal of a retrospective payment of the higher SOA was an administrative decision which clearly and unequivocally impacted on Mr. Harb's terms and conditions of appointment.

29. We hold that Mr. Harb's application before the UNRWA Dispute Tribunal was receivable.

30. The appeal therefore succeeds.

Judgment

31. The appeal is allowed. Judgment No. UNRWA/DT/2015/043 is set aside and the case is remanded to the UNRWA Dispute Tribunal for a consideration of the merits before a different judge.

⁶ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49.

Original and Authoritative Version: English

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

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Weinberg de Roca

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

(Signed)

Weicheng Lin, Registrar