



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

Judgment No. 2018-UNAT-856

Abu Malluh *et al.*
(Respondents/Applicants)

v.

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

JUDGMENT

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| Before: | Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Deborah Thomas-Felix |
| Case No.: | 2018-1146 |
| Date: | 29 June 2018 |
| Registrar: | Weicheng Lin |

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| Counsel for Abu Malluh <i>et al.</i> : | Amer Abu-Khalaf, LOSA |
| Counsel for Commissioner-General: | Rachel Evers |

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2017/041, 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 29 November 2017, in the case of *Abu Malluh et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. The Commissioner-General filed the appeal on 31 January 2018,¹ and Mr. Ra'ed Abu Malluh, Mr. Ra'fat Shlash, Mr. Khaled ZamZam, and Mr. Ra'ad Hussein (*Abu Malluh et al.*) filed their joint answer on 21 March 2018.

Facts and Procedure

2. The following facts are uncontested:²

Applicant Abu Malluh

... Applicant Ra'ed Abu Malluh began working for the Agency in 2000 as a daily [-]paid [employee] on an intermittent basis. On 5 December 2007, the Chief, Compensation & Management Services Division, Headquarters Amman ("CCMSD") sent to the Head, Area Staff Personnel Section, a Post Description ("PD") for the post of Messenger A, Grade 2. The Director of Human Resources ("DHR") signed the PD on 5 December 2007.

... On 2 June 2009, [Mr. Abu Malluh] signed the PD for Messenger A, Grade 2. In a letter dated 1 June 2009, to [Mr. Abu Malluh], a Human Resources Officer ("HRO") states, in relevant part,

In reference to your application for the post of Messenger Porter, Grade 02, I am pleased to inform you that you have been selected for the post [. . .]. The effective date of your appointment will be 01 June 2009.

... [Mr. Abu Malluh] signed this letter on 2 June 2009, and at the bottom of the letter appear the typed name of [Mr. Abu Malluh] and post title Messenger Porter underneath his name.

¹ By Order No. 307 (2018) dated 5 February 2018, the Appeals Tribunal granted the Commissioner-General's motion for waiver of time limit to file an appeal on the basis that strike action at the UNRWA Field Office constituted exceptional circumstances.

² Impugned Judgment, paras. 2-36, 49-53, 59 and 61-62.

... A Letter of Appointment (“LoA”) states that the duration of the fixed-term appointment was 1 June 2009 to 31 May 2012, for the post title Messenger Porter at Grade 2, Step 1. The LoA was signed by the HRO on 1 June 2009 and by [Mr. Abu Malluh] on 2 June 2009.

... On 20 May 2012, [Mr. Abu Malluh] was sent a letter by the HRO informing him that his fixed-term appointment was extended for another three years ending on 31 May 2015. The letter states: “Please note that this extension will be with no change to the terms and conditions stipulated in your letter of appointment, which was signed by you on 2 June 2009”. At the bottom of the letter appear the typed name of [Mr. Abu Malluh] and post title Messenger Porter underneath his name.

... In a letter dated 24 March 2015, [Mr. Abu Malluh]’s contract was extended for another three years – to 31 May 2018. The letter refers to the LoA which he had signed on 2 June 2009. Abu Malluh signed this letter on 2 April 2015, adding a handwritten notation on the letter:

I commenced my employment with UNRWA in 2009 as a Messenger A. In 2014 I discovered that my title was changed Messenger/Porter without my knowledge or even notifying me by [Human Resources]. This is a clear and explicit violation of the employment contract I signed in 2009.

Taking into consideration that the tasks assigned to me by Head Administrative and General Services in May 2014 are inconsistent with the post description (Attached) (Messenger/Porter). I am committed to the tasks assigned to me by the Head of the Division provided that the post description shall be reviewed as part of the Department restructuring as she promised and confirmed. This review should reflect the actual tasks I perform and shall be consistent with similar posts in other [United Nations] agencies.

Applicant Hussein

... In a letter dated 1 February 2001, Applicant Ra’ad Hussein was appointed to the post of Messenger on a fixed-term appointment of two years. [Mr. Hussein] signed the letter in 2001, although the specific date is unclear. In the LoA, which [Mr. Hussein] signed on 4 February 2001, the post title is Messenger, Level 1A, Step 1.

... By letter dated 9 January 2003, a Personnel Officer informed [Mr. Hussein] that his appointment was extended for a two-year fixed-term ending on 31 January 2005. [Mr. Hussein] signed the letter on the same date, and at the bottom of the letter appear the typed name of [Mr. Hussein] and post title Messenger Porter underneath his name. The letter references the terms and conditions stipulated in the LoA which he had signed on 4 February 2001.

... A LoA shows that, effective 1 August 2004, [Mr. Hussein] was offered a fixed-term appointment as Messenger Porter, Grade 2, until 31 January 2005. The LoA, which [Mr. Hussein] signed on 2 August 2004, further informed [Mr. Hussein] that his appointment was changing from category Z to X.

... By letter dated 13 February 2005, a Personnel Officer informed [Mr. Hussein] of the following:

With reference to Travel & Transport Officer, [Headquarters (HQ)] (A) letter TTO/128/2005 dated 9 January 2005, I am pleased to inform you that it has been decided to extend your fixed[-]term appointment with the Agency for three years ending on 31.01.2008.

Please note that this extension will be with no change to the terms and conditions stipulated in the letter of appointment, which was signed by you on 01.08.2004.

[...]

... [Mr. Hussein] signed the letter on 16 February 2005, and at the bottom of the letter appear the typed name of Mr. Hussein] and post title Messenger Porter underneath his name.

... The PD for the post of Messenger A, Grade 2, referred to in paragraph 2 above, was signed by [Mr. Hussein] on 9 December 2007.

... By letter dated 11 January 2011, a HRO informed [Mr. Hussein] that his fixed-term appointment with the Agency was extended for another three years ending on 31 January 2014. The letter, which [Mr. Hussein] signed on 17 January 2011, refers to the LoA which he had signed on 1 February 2001. At the bottom of the letter appear the typed name of [Mr. Hussein] and post title Messenger Porter underneath his name.

... By letter dated 27 December 2011, a HRO informed [Mr. Hussein] that, due to his ten years of qualifying service, as of 1 January 2012, his appointment was converted from category X to A – a Temporary Indefinite Appointment. At the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name.

... The LoA converting [Mr. Zamzam]'s appointment from category X to A indicates that the effective date of the appointment is 1 January 2012 and the post title is Messenger Porter, Grade 2. [Mr. Zamzam] signed the LoA on an unknown date in January 2012.

Applicant Zamzam

... In a letter dated 13 April 2000, Applicant Khaled Zamzam was offered a fixed-term two[-]year appointment to the post of Messenger Porter, Level 1A, effective 1 May 2000. [Mr. Zamzam] signed the letter on 7 May 2000, and at the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name. The LoA, which [Mr. Zamzam] also signed on 7 May 2000,

indicates the post title Messenger Porter, Level 1A, Step 2. In addition, on 7 May 2000, [Mr. Zamzam] signed an Area Staff PD for Messenger, Grade 2.

... By letter dated 17 March 2002, a Personnel Officer informed [Mr. Zamzam] that his appointment was extended for two years ending on 30 April 2004. This letter refers to the 13 April 2000 letter, and at the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name.

... By letter dated 11 May 2004, a Personnel Officer informed [Mr. Zamzam]:

With reference to Travel & Transport Officer, HQ (A) letter TTO/128/2004 dated 11 May 2004, I am pleased to inform you that it has been decided to extend your fixed[-]term appointment with the Agency for two years ending on 30 April 2006.

Please note that this extension will be with no change to the terms and conditions stipulated in the letter of appointment, which was signed by you on 07.05.2000.

[...].

[Mr. Zamzam] signed this letter on 12 May 2004, and at the bottom of the letter appear the typed name of th[Mr. Zamzam] and post title Messenger Porter underneath his name.

... A LoA converting [Mr. Zamzam]'s appointment from category Z to X indicates that [Mr. Zamzam]'s post title is Messenger Porter. The duration of the appointment was 1 August 2004 to 30 April 2006. [Mr. Zamzam] signed this LoA on 8 August 2004.

... By letter dated 4 May 2006, a Personnel Officer informed [Mr. Zamzam] that his fixed-term appointment was extended for another three years until 30 April 2009. The letter, which [Mr. Zamzam] signed on 7 May 2006, refers to the LoA that [Mr. Zamzam] had signed on 7 May 2000, and at the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name.

... On 9 December 2007, [Mr. Zamzam] signed the PD for Messenger A, Grade 2 referred to in paragraph 2 above.

... By letter dated 25 February 2009, a HRO informed [Mr. Zamzam] that his contract was extended again until the end of 30 April 2012. This letter, which [Mr. Zamzam] signed on 3 March 2009, refers to the terms and conditions outlined in the letter signed by [Mr. Zamzam] on 7 May 2000, and at the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name.

... By letter dated 27 December 2011, [Mr. Zamzam] was informed that his fixed-term appointment was converted from category X category to A – a Temporary Indefinite Appointment. At the bottom of the letter appear the typed name of [Mr. Zamzam] and post title Messenger Porter underneath his name.

Applicant Shlash

... By letter dated 2 April 2008 from an Acting Personnel Officer, Applicant Ra'fat Shlash was informed that his application for the post of Messenger A, Grade 2 was successful and he was appointed to this post effective 1 April 2008. [Mr. Shlash] signed this letter on 6 April 2008, and at the bottom of the letter appear the typed name of [Mr. Shlash] and post title Messenger A underneath his name.

... In his LoA, which he signed, the duration of the contract was from 1 April 2008 to 31 March 2011. The post title indicated in the LoA was Messenger, Grade 2.

... By letter dated 3 March 2011, a HRO informed [Mr. Shlash] that his appointment was extended until 31 March 2014. The letter, which [Mr. Shlash] signed on 13 March 2011, refers to the LoA which he signed on 1 April 2008, and at the bottom of the letter appear the typed name of [Mr. Shlash] and post title Messenger Porter underneath his name.

... By letter dated 3 March 2014, an Acting/HRO informed [Mr. Shlash] that his contract was extended for another three-year period until 31 March 2017. The letter, which was signed by [Mr. Shlash] on 10 March 2014, refers to the LoA signed by [Mr. Shlash] on 1 April 2008, and at the bottom of the letter appear the typed name of [Mr. Shlash] post title Messenger Porter underneath his name.

Situation of the Applicants

... At some point during the employment of the Applicants, additional duties that were not stated in the PD of Messenger A were assigned to them by their direct supervisor. They were threatened with suspension by their supervisor unless they performed these duties. The Applicants were frustrated with this situation, which went on for several years.

... In 2014, the Applicants discussed the situation with the Director of Administrative Support ("DAS"). He referred them to the Head, Administration and General Services Section ("HAGSS").

... On 11 June 2014, the HAGSS met with the Applicants. By email addressed to the DAS and dated the same day, she memorialised her meeting with the Applicants. The email indicates that, during this meeting, the Applicants' concerns were discussed, and they were provided with a copy of the PD for Messenger Porter. They were also informed that a request would be sent to Human Resources for the revision of their PD.

... By email to Area Staff Union ("ASU") members dated 23 September 2014, the HAGSS memorialised a second meeting, which had taken place on 3 August 2014 with the Applicants, as well as with the ASU members. The email provides a table outlining in detail the issues raised by the Applicants, the actions taken, and the results obtained, *inter alia*, the extra duties of the Applicants were removed. The HAGSS informed the participants to the meeting that the [Human Resources Department (HRD)] had provided confirmation that all 4 posts were Messenger Porter as per the PD issued

in 1979, adding that this PD required modification so as to reflect the current responsibilities of mail room staff.

... The Applicants, together with the ASU members, consulted several officials in the HRD and checked their personnel files. The HRD officials gave them conflicting explanations.

... Finally, by separate emails dated 4 March 2015, the HRO, Entitlements confirmed to the Applicants that their respective post title was Messenger Porter and regretted “any misunderstandings that previous conflicting communications may have caused.”

... On 14 April 2015, the Applicants separately requested review of the decision dated 4 March 2015.

... On 23 July 2015, the Applicants filed separate applications with the UNRWA Dispute Tribunal (...) [contesting the decisions of the [Agency] (...) to qualify their respective posts as Messenger Porter instead of Messenger A].^[3] (...)

...

... On 29 February 2016, the [UNRWA Dispute] Tribunal issued its consolidated Judgment No. UNRWA/DT/2016/008. Given the similarity of the four applications, the [UNRWA Dispute] Tribunal considered that consolidating the applications would serve judicial economy and consistency without changing or affecting the rights of each party. The [UNRWA Dispute] Tribunal thus decided to join the cases. The [UNRWA Dispute] Tribunal then held that the applications were not receivable and dismissed them.

... On 20 April 2016, the Applicants filed an appeal to the (...) Appeals Tribunal (...) on the receivability issue.

... On 28 October 2016, the [Appeals Tribunal] issued *Abu Malluh et al.* 2016-UNAT-690, vacating the [UNWRA Dispute] Tribunal’s Judgment No. UNRWA/DT/2016/008 and remanding the case “for adjudication on the merits, after receiving a reply on the merits from the Commissioner-General”.

... By Order No. 021 (UNRWA/DT/2017) dated 24 January 2017, the [UNRWA Dispute] Tribunal ordered the Respondent to submit his consolidated reply on the merits of the four applications on or before the close of business 1 March 2017. (...)

... On 1 March 2017, the Respondent submitted his consolidated reply to the [UNRWA Dispute] Tribunal. (...)

...

^[3] *Ibid.*, para. 1.

... By Order No. 072 (UNRWA/DT/2017) (“Order No. 072”) dated 11 June 2017, the [UNRWA Dispute] Tribunal requested the Respondent to answer several questions and to produce several documents, as well as it requested the Applicants to answer several questions.

...

... On 13 July 2017, the Applicants submitted their response to Order No. 072. (...)

... On 4 August 2017, the Respondent submitted his response to Order No. 072. (...)

3. The UNRWA DT issued its Judgment on 29 November 2017 granting the applications in part. It considered that Abu Malluh *et al.* had the contractual status of Messenger Porters and it did not find any merit in their assertion that they had believed to be Messengers A. The UNRWA DT further found that while Abu Malluh *et al.*'s contracts contained the item “performs such other duties as may be assigned”, the tasks they had been asked to perform were not included in that description and fell “outside the realm of their regular duties” and Abu Malluh *et al.* were thus “taken advantage of”.⁴ The UNRWA DT noted that Abu Malluh *et al.* were “partly to blame for their situation dragging on for several years”⁵ as it was quickly rectified by the HAGSS following their complaint.

4. This quick reaction, however, amounted to a “clear admission on the part of the Agency that the [assigned] duties [had] not [been] appropriate for Messenger Porters”.⁶ The UNRWA DT considered that if Abu Malluh *et al.*'s request to requalify their posts was intended for them to have fewer duties, their demand had already been granted in 2014 when the extra duties were removed and it recalled that both posts had the same grade level and thus the same salary. The UNRWA DT concluded that there was “no basis under the Agency’s regulatory framework to award damages”.⁷ However, it awarded a special allowance under paragraph 4.1 of UNRWA Area Staff Personnel Directive No. A/3/Rev.1/Part XI/Amend.5 (Special Allowances) (PD No. A/3/Rev.1/Part XI/Amend.5), which it calculated at 20 Jordanian Dinar (JOD)⁸ per day each starting on 14 April 2014, i.e. one year prior to Abu Malluh *et al.*'s written request as envisaged in UNRWA Area Staff Rule 103.5(B), up to the end of September 2014 when the extra duties were removed. While the UNRWA Dispute Tribunal declined to award compensation for alleged psychological pressure or

⁴ *Ibid.*, para. 79.

⁵ *Ibid.*, para. 76.

⁶ *Ibid.*, para. 79.

⁷ *Ibid.*, para. 83.

⁸ 1 JOD = 1.41 USD as of 10 July 2018.

stress for lack of evidence, it awarded moral damages in the amount of USD 1,000 each for the “mishandling, including confusion in the post titles, contracts and renewal letters of [Abu Malluh *et al.*], and conflicting information from the Agency”.⁹

Submissions

The Commissioner-General’s Appeal

5. The Commissioner-General submits that the UNRWA DT erred on a question of law and fact resulting in a manifestly unreasonable decision when it awarded the allowances for extra duties and moral damages. Notwithstanding its unequivocal assertion that there was no legal basis under the Agency’s regulatory framework to award damages, the UNRWA DT proceeded to award an allowance for extra duties. Paragraph 4.1 of PD No. A/3/Rev.1/Part XI/Amend.5 was not an appropriate basis for the award as staff members have no contractual right to receive such a discretionary allowance and there was no evidence on the record showing that the assigned tasks had been outside the Respondents’ normal post duties or that they had been carried out outside of normal hours of duty. The UNRWA DT further erred in awarding the allowance starting from 14 April 2014 as it mistakenly interpreted the request for decision review of Abu Malluh *et al.* dated 14 April 2015 as a claim for retroactive payment as envisaged in UNRWA Area Staff Rule 103.5(B). Moreover, “[h]aving found that the Respondents contractually were Messenger Porters, the award of an allowance is manifestly unreasonable considering the Respondents’ pleas: financial compensation for the whole period worked as Messenger Porters”.

6. The UNRWA DT also erred in awarding moral damages after concluding in unequivocal terms that moral damages would not be granted. The “mishandling and confusion” in Abu Malluh *et al.*’s job titles did not constitute a breach of their substantive entitlements, in particular as the two PDs awarded Abu Malluh *et al.* the same remuneration, and thus did not constitute a fundamental breach which may in itself give rise to an award of damages as pronounced by the Appeals Tribunal in *Asariotis*.¹⁰ Moreover, there is no basis for awarding compensation under the second prong of the *Asariotis* jurisprudence as the UNRWA DT

⁹ *Ibid.*, para. 96.

¹⁰ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

has correctly found that Abu Malluh *et al.* had failed to provide material evidence of their alleged distress.

7. The Commissioner-General asserts that the UNRWA DT exceeded its competence by substituting its own decision for that of the Agency. The UNRWA DT had the option of awarding compensation under Article 10(5) of its Statute or directing the appropriate Agency officials to determine the amounts payable pursuant to the regulatory framework. Instead, it proceeded to calculate the discretionary allowance itself, which in this case, amounted to conducting a merit-based review.

8. In light of the foregoing, the Commissioner-General requests that the Appeals Tribunal grant the appeal and vacate the UNRWA DT Judgment.

Abu Malluh *et al.*'s Answer

9. Abu Malluh *et al.* submit that the UNRWA DT had jurisdiction to award the allowances for extra duties and moral damages and, therefore, neither exceeded its competence nor erred in ordering the Agency to pay allowances for extra duties and compensation for damages encountered by Abu Malluh *et al.* The UNRWA DT was cognisant of the applicable legal framework and relevant jurisprudence. Abu Malluh *et al.* assert that the UNRWA DT's finding that they had performed additional tasks outside the realm of their regular or "other" duties as foreseen in their PDs and its finding of mismanagement and negligence in handling their files have not been challenged by the Commissioner-General and justify upholding the award of special allowances and moral damages. In particular, the Commissioner-General's inability to provide the requested information in accordance with Order No. 72 is a "clear confirmation" of the mishandling of Abu Malluh *et al.*'s files.

10. Moreover, Abu Malluh *et al.* argue that the Commissioner-General has failed to prove that there has been no legal basis to award damages. The UNRWA DT correctly based its award of moral damages on a finding of a "fundamental breach" which in and of itself gives rise to such an award pursuant to the Appeals Tribunal jurisprudence in *Asariotis*.¹¹

¹¹ *Ibid.*

11. Finally, Abu Malluh *et al.* submit that the Commissioner-General “once again failed to meet time limitations” and that there was not sufficient reason for submitting the motion for extension of the time limit to file an appeal, considering, in particular, the strict approach to the observance of time limits by the Commissioner-General promulgated by the Appeals Tribunal in *Dibs*.¹²

12. Based on the foregoing, Mr. Abu Malluh *et al.* request that the Appeals Tribunal dismiss the appeal.

Considerations

13. The issue under appeal is whether the UNRWA DT erred in law or fact resulting in a manifestly unreasonable decision when it awarded special allowances to Abu Malluh *et al.* for extra duties performed during the period of 14 April to 30 September 2014 and compensation for moral damages.

Allowance for extra duties

14. The UNRWA DT found that certain duties performed in this period were outside the scope of Abu Malluh *et al.*'s contracts. The UNRWA DT relied on paragraph 4.1 of PD No. A/3/Rev. 1/Part XI/Amend.5 to award a special allowance for extra duties, calculating it at JOD 20.00 per day.

15. There is no contention about the UNRWA DT's finding that Abu Malluh *et al.* hold the posts of Messenger Porter.¹³ Nor is it contested that the extra duties were removed in 2014 by the HAGSS, following Abu Malluh *et al.*'s complaint.

16. What is in dispute is whether under UNRWA's legal framework there were grounds for awarding such an allowance for extra duties and whether it fell within the UNRWA DT's competence to make such an award.

¹² *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Order No. 296 (2017), para. 5.

¹³ Impugned Judgment, para. 34, which refers to the contested administrative decision.

17. The applicable law on this matter is as follows:

PD No. A/3/Rev.1/Part XI/Amend.5:

1. PURPOSE

The purpose of this part of the directive is to establish discretionary allowances, to set out the conditions governing payment of such allowances, and to establish the authorities for approving such allowances.

...

4. ADDITIONAL ASSIGNMENT ALLOWANCE (SPECIAL DUTIES)

4.1 Area staff members may be required to carry out assignments clearly unrelated to their normal post duties and outside of normal hours of duty. In such cases an allowance for these assignments may be paid for specified periods.

4.2 The amount of such an allowance shall be determined by the Director of Human Resources in coordination with the Director of Finance.

4.3. Requests for approval of such allowances to be paid shall be made as provided in Paragraph 3.4. above. [Paragraph 3.4 states as follows: Requests for approval of such allowances to be paid shall be made to the Director of Human Resources by Heads of Departments in Headquarters and by Field Office Directors in Fields who may, however, delegate this duty to Field Human Resource Officers.]

UNRWA Area Staff Rule 103.5 (as of 1 June 2010):

RETROACTIVITY OF PAYMENTS

A staff member who has not received an allowance, grant or other payment to which he/she is entitled shall not receive retroactively such allowance, grant or payment unless he/she has made a written claim therefor:

(A) In the case of the cancellation or modification of the rule governing eligibility, within three months following the date of such cancellation or modification; or

(B) in every other case, within one year following the date on which he/she would have been entitled to the initial payment.

18. The Commissioner-General claims that the first provision cited above does not allow the UNRWA DT to award such an allowance, as it falls within the discretionary authority of the Administration to award special allowances under paragraph 4.1 of PD No. A/3/Rev.1/Part XI/Amend.5. He claims, moreover, that there is no evidence that the duties performed by Abu Malluh *et al.* were outside the scope of their contracts or carried out outside their normal hours of work. The Commissioner-General further contests the date fixed by the UNRWA DT as *dies a quo* of the allowance for the purposes of UNRWA Area Staff Rule 103.5(B), asserting that the request for decision review by Abu Malluh *et al.* cannot be considered as a request for retroactive payment.

19. This Tribunal will therefore first address the issue of whether the UNRWA DT exceeded its competence by substituting its own decision for that of the Commissioner-General in awarding the special allowance.

20. It is settled in our jurisprudence that the aforementioned provisions bestow discretionary powers on the Agency to pay the special allowances set forth in this instrument and that this discretion must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements.¹⁴ A staff member thus has no right to receive an allowance for special and/or extra duties. He or she has only an expectation that the Agency will exercise its discretion to grant it appropriately. In terms of the provisions cited above, the competent authority to exercise this discretion is the UNRWA Director of Human Resources in coordination with the Director of Finance.

21. Accordingly, there is no room for the UNRWA DT to substitute its decision for that of the Agency, unless the Agency's decision was unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate.¹⁵ As we stated in *Sanwidi*, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review:¹⁶

... (...) Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

22. In light of our jurisprudence, what is important in deciding the present case is to assess whether there was an unreasonable or disproportionate exercise of the Agency's discretion.

23. In the present case, there is no allegation on Abu Malluh *et al.*'s part of an unreasonable or disproportionate exercise of the Agency's discretion and we do not find any indication to this effect. The UNWRA DT correctly found that Abu *Malluh et al.* had not

¹⁴ *Husseini v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-701, para. 15.

¹⁵ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

¹⁶ *Ibid.*

brought the issue of their post titles to light with the DAS until June 2014 and that they first submitted a written claim for review of the confirmation of their post title on 14 April 2014.¹⁷ It is implied in these findings that Abu Malluh *et al.* have never requested payment of a special allowance pursuant to paragraphs 4.3 and 3.4 of PD No. A/3/ Rev.1/Part XI/Amend. 5 and the Agency was under no obligation to award it on its own initiative. It follows that the presumption of regularity of the decision not to pay the special allowance has not been rebutted, the conclusion being that the Agency correctly exercised its discretion, albeit not in Abu Malluh *et al.*'s favour.

24. Hence, the special allowances were awarded by the UNRWA DT as a resort to compensate for the extra duties performed outside the scope of Abu Malluh *et al.*'s job descriptions after it determined that there was "no basis under the Agency's regulatory framework to award damages".¹⁸ In so doing, the UNRWA DT erred in law, by substituting the possibility for the Agency to assess the substance of the case by its own merit-based assessment.

25. For these reasons, we find that the UNRWA DT erred in law and exceeded its jurisdiction. Accordingly, the Commissioner-General's appeal succeeds in this regard.

Compensation for moral damages

26. Regarding the compensation for moral damages, first we take note that, unlike Article 10(5) of the UNDT Statute, the UNRWA DT Statute has not been amended to include the requirement for harm to be "supported by evidence". Article 10 of the UNRWA DT Statute provides:

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

...

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

...

7. The Dispute Tribunal shall not award exemplary or punitive damages.

¹⁷ Impugned Judgment, para. 83.

¹⁸ *Ibid.*, para. 83.

27. Second, as mentioned above, the UNRWA DT declined to award compensation for alleged psychological pressure or stress due to lack of evidence. However, it found that there was a fundamental breach of Abu Malluh *et al.*'s contracts resulting from mishandling, including confusion in titles of posts, contracts and renewal letters, and conflicting information from the Agency. The UNRWA DT awarded compensation for moral damages therefor.

28. In his appeal, the Commissioner-General does not challenge the proposition that a fundamental breach could in itself lead to an award of compensation for damages, as settled in our jurisprudence in *Asariotis*¹⁹—partially superseded in *Kallon*²⁰ following the amendment of Article 10(5) of the UNDT Statute cited above. The jurisprudence applied in *Kallon*, however, is not pertinent in the present case, since no such amendment has been made to the UNRWA DT Statute. Consequently, we recall our previous jurisprudence stated in *Asariotis* and *Eissa*²¹, according to which a fundamental breach may of itself give rise to an award of moral damages and this “does not require evidence of harm or a finding of harm”.²² This assessment should be made on a case by case basis.

29. It is the considered view of this Tribunal that the circumstances in the present case did not qualify for the UNRWA DT to invoke its statutory jurisdiction to award damages for moral injury. The fact that Abu Malluh *et al.* were provided with confusing statements regarding their post titles by Agency officials between September 2014 and March 2015 cannot be construed as a fundamental breach of Abu Malluh *et al.*'s rights meriting, as such, an award of moral damages under the *Asariotis* jurisprudence. While the Administration's delay and lack of diligence in handling their requests is certainly lamentable, there was no breach of their substantive contractual entitlements, given the identical grade level and salary of both PDs, nor can it be said that their procedural entitlements were fundamentally breached. Cases in which the Appeals Tribunal has affirmed awards of moral damages on account of a “fundamental breach” involved findings or allegations such as “numerous substantive and procedural

¹⁹ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

²⁰ *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742. See also *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-714; *Ademagic et al. v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-684.

²¹ *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 30.

²² *Ibid.*

irregularities”²³, “reckless abuse of power”²⁴, “deliberate manipulation of the Organization’s processes”,²⁵ or significant violations of pertinent provisions with regard to highly consequential decisions such as termination and transfer to other posts. The ultimately inconsequential “anomalies” found in the case at hand do not reach this level of severity. Considering that Article 10(7) of the UNRWA DT Statute prohibits awards of punitive damages, the focus should not be placed on the Administration’s behaviour, albeit possibly “appall[ing]”,²⁶ but rather on the impact on the respective staff member’s rights.

30. The UNRWA DT therefore also erred in law when it awarded compensation for moral damages in the present case.

²³ *Ibid.*, para. 31.

²⁴ *Hersh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-433-Corr.1, paras. 3 and 42.

²⁵ *Ibid.*

²⁶ Impugned Judgment, para. 94.

Judgment

31. The appeal is granted and Judgment No. UNRWA/DT/2017/041 is vacated.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Thomas-Felix

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar