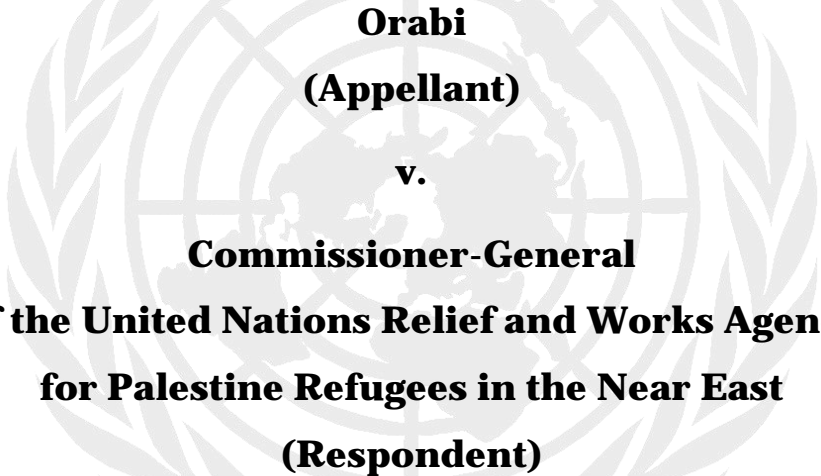




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2018-UNAT-884



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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Murphy Judge Deborah Thomas-Felix
Case No.:	2018-1177
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Mr. Orabi:	Amer Abu-Khalaf, LOSA
Counsel for Commissioner-General:	Rachel Evers

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/026, 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 22 April 2018, in the case of *Orabi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Orabi Ahmad Orabi filed the appeal on 10 May 2018, and the Commissioner-General filed his answer on 13 July 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... On 8 August 2014, the Applicant was employed by the Agency on a fixed-term appointment as Health Centre Clerk, Grade 7, Step 1, at Wavel Camp Health Centre, Beqaa Area, Lebanon Field Office (“LFO”).

... On 28 September 2016, the Applicant submitted a request for transfer to the post of Clerk “B” in the North Lebanon Area.

... By letter to the Applicant dated 28 September 2016, the Human Resources Service Officer (“HRSO”) informed the Applicant that his request would be considered, together with other applicants’ requests, once such post became available.

... By email to the Deputy Director of UNRWA Affairs, Lebanon (“D/DUA/L”) dated 14 March 2017, the Applicant questioned why his request for transfer had not yet been considered. On 15 March 2017, the Chief, Field Health Programme (“C/FHP”) responded to the Applicant that “the seniority for transfer purposes is determined based on the entry of duty (“EOD”) date of the continuous fixed-term appointment with UNRWA.”

... By email to the C/FHP dated 15 March 2017, the Applicant questioned why he had not been informed that another staff member had been transferred to the post to which he had requested to be transferred. The C/FHP forwarded the Applicant’s email to the Head, Field Human Resources Office (“H/FHRO”) on the same day.

... By email dated 16 March 2017, the H/FHRO responded to the Applicant that, in the case of a transfer, only the transferred staff member is informed about his or her new conditions of service.

... On 15 March 2017, the Applicant sought the review of the decision not to transfer him to the post of Clerk “B” in the North Lebanon Area.

¹ Impugned Judgment, paras. 2-9.

... By letter dated 1 May 2017, the Director of UNRWA Affairs, Lebanon (“DUA/L”) affirmed the impugned decision. [The letter specified that the long-standing practice for transfer approvals applied by the LFO was to determine the “more senior staff” by the EOD date of the staff member and in Mr. Orabi’s case, Mr. Orabi’s colleague’s EOD date determined her priority for the transfer she and Mr. Orabi had requested. It further stated that before REACH² introduced the term “seniority” on the pay slip, the Service Computation Date (SCD) was used as contained in PD A/4 Part VI, Paragraph 3C, iii; that REACH merges the SCD and EOD date in one date only, but that this had not replaced the EOD as the determining factor among competing transfer requests.]

3. On 30 May 2017, Mr. Orabi filed an application with the UNRWA Dispute Tribunal and on 29 June 2017, the Commissioner-General filed his reply. By Order No. 010 (UNRWA/DT/2018) dated 16 January 2018, the UNRWA Dispute Tribunal ordered the Commissioner-General to produce the letter of appointment and the transfer request of the staff member who was, in fact, transferred to the post of Clerk “B” in the North Lebanon Area. On 9 February 2018, the Commissioner-General filed the requested documents. These were transmitted to Mr. Orabi on 11 February 2018.

4. On 22 April 2018, the UNRWA DT issued its Judgment. The UNRWA DT noted that Mr. Orabi and the transferred staff member had both submitted transfer requests for personal and humanitarian reasons. The Agency decided to grant the transfer request of the transferred staff member because of her seniority, her EOD date being 1 August 2014 and Mr. Orabi’s EOD date being 8 August 2014. The UNRWA DT rejected Mr. Orabi’s claim that his seniority had been miscalculated because his services as daily-paid worker had not been taken into account. The UNRWA DT also rejected Mr. Orabi’s claim that it had been verbally confirmed to him that he would be transferred to the post in question in the absence of any evidence proffered to support his claim. In this regard, the UNRWA DT held that Mr. Orabi admitted that he had never received any official confirmation in writing of his transfer to the post in question. The UNRWA DT concluded that the Agency had correctly applied Field Technical Instruction 01/2016 (Lateral Transfers Initiated at the Request of Staff, Lebanon Field Office) (FTI 01/2016) and dismissed Mr. Orabi’s application.

² REACH is an electronic software used by UNRWA.

Submissions

Mr. Orabi's Appeal

5. The UNRWA DT erred in fact and law by dismissing Mr. Orabi's application and deciding that the Agency correctly applied the provisions of FTI 01/2016 to decide not to transfer him to the post of Clerk "B" in the North Lebanon Area.

6. The UNRWA DT erred in fact and law by failing to assess the evidence of abuse of power in the process of the transfer and procedural irregularities. Under paragraph 12 of FTI 01/2016, the Agency has an obligation to contact all staff members who made a transfer request in respect of the same post to determine whether they still wish to transfer to the post in question. Mr. Orabi's right to be informed of the developments regarding his transfer request has been infringed since he learned about the other staff member's transfer only after the transfer had already taken place. The decision to transfer another staff member should therefore be vacated and Mr. Orabi should receive compensation for the Agency's mistake.

7. The UNRWA DT erred in accepting the Commissioner-General's contention, without any supporting evidence, that it is the practice in the LFO to determine priority for transfer purposes based on the EOD date. FTI 01/2016 neither establishes that seniority shall be determined by the EOD date of staff members, nor does it exclude years of experience as daily paid workers. Moreover, Mr. Orabi has been performing tasks identical to those of the position in question before 8 August 2014 (his EOD date). The Agency itself confirmed Mr. Orabi's seniority in his February 2017 payslip ("Seniority: 4 years and 6 months"). The UNRWA DT therefore erred by dismissing his application and ignoring the evidence of abuse of power. The severe breach of transfer procedures has led to Mr. Orabi's loss of opportunity and has affected his health as proven by the medical records attached to his application to the UNRWA DT.

8. The UNRWA DT failed to assess evidence relating to actions taken by the Agency that made Mr. Orabi believe that his transfer request had been accepted, including personal messages and organizing a welcome party at the new duty station. In these circumstances, in particular, he should have been informed of the developments regarding his transfer request. Finally, the UNRWA DT failed to consider the evidence he proffered regarding his humanitarian and personal reasons for the transfer request, which are more compelling than those of the transferred candidate.

9. Mr. Orabi requests that the Appeals Tribunal reverse the UNRWA DT Judgment and award compensation for lost opportunity and related expenses as well as psychological damage.

The Commissioner-General's Answer

10. The UNRWA DT did not err in law or fact by dismissing Mr. Orabi's application. As to Mr. Orabi's contention that the UNRWA DT failed to address the alleged breach of his right to be informed of developments regarding his transfer request, this issue was not raised before the UNRWA DT and therefore the UNRWA DT did not err in not addressing it. To the extent that Mr. Orabi may be contending that he was not informed of the outcome of his transfer request, this is also a new element that was not properly before the UNRWA DT, as it was only mentioned in the summary of facts, but not presented as a ground for contesting the administrative decision. In any event, the record shows that he was given the decision, albeit at his request.

11. The UNRWA DT also did not err in accepting the Commissioner-General's contention that seniority of a staff member must be calculated from the date on which he or she is appointed as a staff member and that services as a daily-paid worker cannot be taken into account. While FTI 01/2016 does not define the criteria for determining seniority, in the present case, the UNRWA DT accepted the Agency's practice to take into account the date of EOD of the staff member. Under the Appeals Tribunal's jurisprudence, judicial review of an administrative decision requires a tribunal to examine whether the Administration reached its decision in a reasonable and fair and legally and procedurally correct manner. The practice of determining seniority based on the EOD date is reasonable and fair. Mr. Orabi's reference to his seniority as reflected in his payslip is of no avail as the SCD is different from the EOD.

12. The UNRWA DT did not err in fact or law in its assessment of the evidence of abuse of power. Contrary to Mr. Orabi's contention, the UNRWA DT considered Mr. Orabi's allegation that the Agency's actions had led him to believe that his transfer request had been accepted and correctly found that no evidence had been submitted in that regard. Mr. Orabi has not demonstrated how the UNRWA DT erred in its conclusion. The UNRWA DT also did not err in not considering evidence of Mr. Orabi's humanitarian and personal reasons for his transfer request. It is not the UNRWA DT's role to consider the merits of the transfer request *de novo*. Rather, the UNRWA DT determines whether the decision is legal, rational, procedurally correct and proportionate. The UNRWA DT correctly upheld the Agency's practice to determine seniority based on the EOD date and concluded that the decision was reasonable and fair.

13. Finally, since Mr. Orabi has failed to show any reversible error by the UNRWA DT, there is no legal basis for the remedies he seeks. With specific reference to compensation for moral damages, Mr. Orabi has not presented any evidence supporting such award. The Commissioner-General requests that the Appeals Tribunal reject the appeal in its entirety.

Considerations

14. The crux of this appeal is whether the UNRWA DT erred in its finding that the Agency correctly applied the provisions of FTI 01/2016 to decide not to transfer Mr. Orabi to the post of Clerk “B” in the North Lebanon Area.

15. The applicable law on this matter is as follows. UNRWA Area Staff Regulation 4.3 stipulates that: “Due regard shall be paid in the appointment, transfer and promotion of staff to the necessity for securing the highest standards of efficiency, competence and integrity.”

16. FTI 01/2016 is reproduced below:³

Purpose

1. The purpose of these Field Technical Instructions (FTI) is to define the process and standards for which lateral transfers may be requested, declined or granted in the Lebanon Field.

Application & Authority for Employee Transfer Requests

2. The filling of posts by transfer of existing staff represents an exception to the general principle that posts shall be filled through a competitive process. For this reason, transfers require approval of the Field Human Resources Officer (Grades 1-10 only), the Field Office Director (Grades 11–17), and the Director of Human Resources (in respect of Grade 18 and above).

3. This Field Technical Instruction applies to transfers from one post to another similar post at the same grade. Transfers above the requesting employee’s grade level will not be considered in this FTI. Transfers below the requesting employee’s grade level may be considered with a salary protection by Field Director, taking into consideration, this is in the best interest of the Agency.

4. Nothing in this Instruction limits the Field Director's authority to initiate and implement the transfer of staff in the best interest of the Agency. Transfers upon requests will be placed on GF posts in the following priority order:

³ Emphases in original.

- a. Full time staff in regular fixed[-]term GF funded posts;
- b. Part time staff in regular fixed term GF funded posts;
- c. GF roster staff members on project-funded full posts;
- d. GF roster staff members on project[-]funded part time posts;
- e. Persons engaged as LDC, temporary assistants and casual laborers are not eligible for transfers;
- f. Transfer requests of staff in grade 2 are governed by Staff Circular No 13/2012 dated 2012. [sic]

Responsibilities of those involved

5. The term Department, refers to each Programme Department in the Field Office.
6. The Receiving Department refers to the Department that will, if a transfer request is approved, receive the relevant staff member.
7. The Transferring Department refers to the Department from where a staff member will be transferred if a transfer request is granted.

Procedures for Requesting & Documenting Employee Transfers

8. A staff member may submit to the Field Human Resources Officer a request for a transfer. Using the Transfer Request Form, the staff member must state in his/her submission:
 - a. The details of the transfer (the post currently held by the staff member, and the post or posts to which the staff member wishes to be transferred).
 - b. The reasons for the transfer.
 - c. The request should be in the attached form (Annex A) to this Instruction.
9. The Field Human Resources Officer shall consider if the request meets the following criteria:
 - a. The requesting staff member has presented one or more compelling humanitarian or personal reasons for the transfer; priority in this case goes to the more senior staff. In case of two or more staff members with the same seniority, performance evaluation will be the decisive element; otherwise an interview by the Head of Department will be done to determine selection.
 - b. The requesting staff member has been in his/her current post for at least one year and his/her performance is either at “fully meets expectations” or “best performance” standard according to his/her last periodic performance report.

10. If the Field Human Resources Officer considers that the request meets the above criteria, the Field Human Resources Officer shall record the request on a "Transfer Register". The Field Human Resources Officer shall inform the staff member that his/her request has been received and will be considered further if and when the post to which the staff member has requested to be transferred becomes vacant.

11. If the Field Human Resources Officer considers that the established criteria in paragraph 9 have been met and that the request warrants immediate action, the Field Human Resources Officer shall consult with the Chief of the Receiving Department and the Chief of the Transferring Department. Following this consultation, the Field Human Resources Officer may, depending on the grade level of the requesting employee (refer to paragraph 2 above), approve the request or make a recommendation to the Field Office Director that the request be granted.

12. If the Field Human Resources Officer considers that the criteria in paragraph 9 have not been met, s/he shall deny the request or, depending on the grade level (refer to paragraph 2 above), forward the request to the Field Office Director with a recommendation that the request be denied. If a decision is made to deny a transfer request, the Field Human Resources Officer shall communicate the decision to the staff member along with reasons for the decision.

Consideration for Registered Transfer Requests

13. Before any action is taken to fill a post, the Field Human Resources Officer shall refer to the Transfer Register to determine whether one or more Transfer Requests have been made in respect of this post.

14. In the event there are one or more transfer requests on the Transfer Register in respect of the same post, the Field Human Resources Officer shall contact the staff member/s in question to determine whether they still wish to transfer to the post in question. If the requesting staff members confirm their requests, the Field Human Resources Officer shall discuss with the Hiring Department whether one or more of the persons on the Transfer Register would be suitable for the position.

15. Following the discussion with the Hiring Department, the Field Human Resources Officer may for grades 1-10:

- a. Approve the request of the applicant according to seniority as stated in paragraph 9.a;
- b. Decide to make an exception to normal recruitment procedures to determine which of the applicants should be allowed to transfer, including a possible interview, without going through the complete recruitment procedure; no advertisement, or
- c. Decide not to appoint any staff member directly to the post and opt, instead, for normal recruitment procedures.

d. Final decision to be conveyed to the Director for his/her final endorsement.

16. Where the registered transfer requests are for posts from grade 11 to 17, the Field Human Resources Officer shall make a recommendation to the Field Office Director on the most appropriate action to take.

17. In the event that a decision is made not to directly appoint a staff member to a post to which he/she has submitted a Transfer Request, the Field Human Resources shall inform the staff member concerned of the decision and the reasons for the decision. In normal circumstances the staff member's Transfer Request shall remain on the Transfer Register.

18. A transfer request shall be removed from the Transfer Register in the event:

- a. The request is approved in accordance with this policy;
- b. The staff member is appointed to a job of a different post grade[;]
- c. The staff member is separated from the Agency; or
- d. The staff member asks that the request be removed from the Transfer Register.

19. A transfer request that is recorded on the Transfer Register shall not expire with the lapse of time.

Internal Coordination of Employee Transfers

20. If a decision is made to accept a transfer request under this FTI, the Field Human Resources Officer shall communicate the decision to the staff member, to the Chief of the Department(s) concerned, and to the staff member's supervisor.

21. The date of transfer shall be coordinated with the Chief of the Receiving Department, the staff member's supervisor and the staff member. In doing so, the Field Human Resources Officer shall try to ensure a minimum disruption to operations.

22. The Field Human Resources Officer shall take all necessary administrative actions to implement the transfer request.

17. UNRWA Area Staff Regulation 4.3 together with FTI 01/2016 provide the basis for the lateral transfer of staff within the Agency. These two instruments empower the Agency to transfer staff and to fill posts by means of transfer of current staff members as an exception to the general principle that posts shall be filled through a competitive selection process.

18. Mr. Orabi takes issue with the UNRWA DT's application of FTI 01/2016 and conclusions. In support of his contention that the UNRWA DT has failed to correctly apply this instrument, he advances, initially, two main grounds of appeal: i) that the UNRWA DT

erred by overlooking the procedural irregularity in view of the provisions of paragraph 14 (Mr. Orabi mistakenly refers to the provisions of paragraph 12) of FTI 01/2016 providing for his right to be informed of the developments regarding his transfer request, and ii) that the UNRWA DT erred in accepting the Commissioner-General's contention, without any supporting evidence, that it is the practice of the LFO to determine priority for transfer purposes based on the EOD date.

19. We recall the Appeals Tribunal's jurisprudence confirming the Administration's discretion to appoint, transfer and promote staff. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion in matters such as staff transfers.⁴

20. Nevertheless, an administrative decision not to appoint, promote or transfer can be challenged on the grounds that the Administration has not acted fairly, justly or transparently.⁵ The staff member has the burden of proving such factors played a role in the administrative decision.⁶

21. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the case of the above mentioned decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance Judge can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the 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 Dispute Tribunal to substitute its own decision for that of the Administration.⁷ As we stated in

⁴ *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.

⁵ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 26; *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32, citing *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201 and *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153.

⁶ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 32; *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021.

⁷ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 27; *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 40; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

Sanwidi, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review:⁸

... (...) 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 the case at bar, Mr. Orabi submits, firstly, that under FTI 01/2016, the Agency has an obligation to contact all staff members who made a transfer request in respect of the same post to determine whether they still wish to transfer to the post in question. Accordingly, Mr. Orabi contends that his right to be informed of the developments regarding his transfer request has been infringed since he learned about the other staff member's transfer only after the transfer had already taken place. However, this issue was not raised before the UNRWA DT and thus cannot be introduced for the first time on appeal for consideration by the Appeals Tribunal. We find that Mr. Orabi's appeal in this regard is not receivable.⁹

23. Turning to Mr. Orabi's second ground of appeal—that the UNRWA DT erred in accepting the Commissioner-General's contention, without any supporting evidence, that it is the practice of the LFO to determine priority for transfer purposes based on the EOD date—we note that this claim is based on three distinct reasons: the first being that FTI 01/2016 neither establishes that seniority shall be determined by the EOD date of staff members, nor does it exclude years of experience as daily paid workers; the second being that he has been performing tasks identical to those of the position in question before 8 August 2014 (his EOD date); and the third being that the Agency itself confirmed his seniority in his February 2017 payslip ("Seniority: 4 years and 6 months").

⁸ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 42.

⁹ *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 44; *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, para. 38; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 25; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-221, para. 61.

24. In the course of its Judgment, the UNRWA DT found as follows:¹⁰

... Both the Applicant and the transferred staff member submitted requests for transfer for personal and humanitarian reasons. The Agency decided to grant the request of the transferred staff member because of her seniority. In determining seniority among staff members, the practice at the LFO is to take into account the date of EOD of the staff member. The LFO determined that the Applicant's EOD was 8 August 2014, and the EOD of the transferred staff member was 1 August 2014.

... The Applicant claims that his seniority was miscalculated as his services as a daily-paid worker were not taken into account. In this regard, the Tribunal agrees with the Respondent that the seniority of a staff member must be calculated from the date on which he/she is appointed as a staff member and that his/her services as daily-paid worker cannot be taken in[to] account.

25. In the present case, as discussed and set out above, the applicable instruments bestow on the Agency the discretion in deciding on matters of transfer of staff members. Moreover, FTI 01/2016 sets out the criteria to be considered by the Agency in cases of transfer request by more than one staff member, who present one or more compelling humanitarian or personal reason for the transfer, by stipulating that priority in this case goes to the more senior staff.

26. While it is true that FTI 01/2016 does not explicitly establish that seniority shall be determined by the EOD date of staff members, under the aforementioned legal and factual circumstances, it was not unreasonable or unfair on the part of the Agency to determine the seniority based on the EOD date. On the contrary, by applying the objective seniority criterion of EOD date, the Agency, in exercising its discretionary authority to determine transfer requests in the event there are one or more transfer requests on the Transfer Register in respect of the same post, adheres to the principles of equality, objectivity and transparency in dealing with the transfer issues and comports with our jurisprudence on the exercise of discretion in administrative matters. Moreover, Mr. Orabi has not alleged that the exercise of the Agency's discretion in this respect was unreasonable or unfair and we do not find any indication to this effect.

27. In the same vein, we are satisfied with the UNRWA DT's ruling that Mr. Orabi's service as a daily-paid worker of the Agency could not be considered in the computation of his seniority and the same applied to his alleged performance of tasks identical to those of the position in question before 8 August 2014 (his EOD date). Concomitantly, we do not find merit in

¹⁰ Impugned Judgment, paras. 20 and 21.

Mr. Orabi's argument that his seniority is reflected in his February 2017 payslip ("Seniority: 4 years and 6 months"), since the SCD in it is different from the EOD date. Specifically, paragraph 3 of Area Personnel Directive No. A/4/Part VI/Rev.6 of 23 June 2015 distinguishes between the SCD and the EOD date with respect to recognition of prior daily-paid service: while the EOD date is the date of area staff staffing table appointment, the SCD is the commencement date of the continuous daily-paid service being recognized.

28. Further, we agree with, and uphold, the finding of the UNRWA DT that there is no evidence on record in the instant case to support the allegations made by Mr. Orabi relating to actions by the Agency that made him believe that his transfer request had been accepted, including personal messages and organizing a welcome party at the new duty station.

29. Lastly, Mr. Orabi submits that the UNRWA DT failed to consider the evidence he proffered regarding his humanitarian and personal reasons for the transfer request, which he contends are more compelling than those of the transferred candidate.

30. With respect to this ground of appeal, we agree, on principle, with the Commissioner-General that it is not within the remit of the UNRWA DT—or this Tribunal—to pronounce on the validity of the exercise of the Agency's discretion in deciding on the merits of the transfer request *de novo*, unless there is evidence that the discretion was exercised arbitrarily or unlawfully, which is not the case here.

31. However, in his application to the UNRWA DT, Mr. Orabi had raised the argument that he had submitted to the Administration a set of major humanitarian and personal reasons to support his transfer request, which were more compelling than those of the transferred candidate. In that request, he had explained that the working conditions in Beqaa were extremely dangerous because of the location, weather conditions and driving circumstances. Moreover, his family consisted of seven members with one child enrolled at university and another finishing the 12th grade at that time. Mr. Orabi himself was from El Bared, where he had lost his house during the war and had not received a replacement. The transferred staff member, on the other hand, was single and working in a safer area than him. None of these reasons had been taken into consideration by the Administration.

32. This is quite a distinct issue which should have been dealt with by the UNRWA DT. Indeed, the plain language of paragraphs 1, 4 and 9(a) of FTI 01/2016 makes it clear that the discretionary power of the Field Human Resources Officer to determine transfer requests is always exercised in the best interest of the Agency and by considering whether the transfer request meets, *inter alia*, the criterion that the requesting staff member has presented one or more compelling humanitarian or personal reasons for the transfer. Therefore, in the event there are one or more transfer requests on the Transfer Register in respect of the same post, the Agency, in exercising its discretionary authority to determine the transfer requests, does not stand alone by the seniority criterion but it is under an obligation to assess, in compliance with the foregoing legal instrument, the existence of such compelling humanitarian or personal reasons for the transfer, presented by the requesting staff members, and balance the conflicting interests in the best interest of the Agency. Otherwise, there is no legal exercise of the Administration's discretion.

33. This does not mean that the Administration is compelled to give preference to the staff member presenting the more compelling humanitarian or personal reasons for the transfer request. Rather, it must arrive at a reasonable, fair and rational decision, after having balanced all of the aforesaid interests, and provide a reasoned and sound basis for its final decision.

34. In the present case, the Appeals Tribunal holds that the UNRWA DT did not give careful and fair consideration to Mr. Orabi's above mentioned argument that a staff member with less compelling humanitarian reasons had been transferred to the post in question without any balancing of the opposing interests. In fact, the UNRWA DT did not embark on an analysis of Mr. Orabi's said argument. Effectively, Mr. Orabi's argument appears to have been rejected under cover of paragraph 20 of the impugned UNRWA DT Judgment which rejected in a generic manner his challenge to the impugned administrative decision in this regard. The first instance Judge did not even make a separate passing reference to this aspect of Mr. Orabi's claim in this paragraph or elsewhere. He just noted that "[b]oth the Applicant and the transferred staff member submitted requests for transfer for personal and humanitarian reasons. The Agency decided to grant the request of the transferred staff member because of her seniority."

35. However, the complaint made by Mr. Orabi on this issue required factual findings in order to ascertain whether the claim was meritorious or not. As this was not done, we are remanding this discrete issue to the UNRWA DT, pursuant to Article 2(e) and (4)(b) of our Statute.

Judgment

36. The appeal is upheld, UNRWA DT Judgment No. UNRWA/DT/2018/026 is vacated and the discrete issue of whether the Administration, in exercising its discretionary authority to determine the transfer requests, fulfilled its obligation to balance, in compliance with the foregoing legal instrument and in the best interest of the Agency, along with the seniority criterion, the conflicting interests arising from the compelling humanitarian or personal reasons for the transfer, presented by the requesting staff members, and provided a reasoned and sound basis of its final choice, is hereby remanded to the UNRWA DT for consideration.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar