



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

Judgment No. 2019-UNAT-971

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

JUDGMENT

Before: Judge Kanwaldeep Sandhu, Presiding
Judge Sabine Knierim
Judge John Raymond Murphy

Case No.: 2019-1272

Date: 25 October 2019

Registrar: Weicheng Lin

Counsel for Mr. Al-Refaea: Self-represented

Counsel for Commissioner-General: Michael Schoiswohl

JUDGE KANWALDEEP SANDHU, PRESIDING.

Introduction

1. Mr. Adnan Salah Al-Refaea¹ (the “Appellant”) appeals the 25 April 2019 decision of the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “UNRWA Dispute Tribunal”). The UNRWA Dispute Tribunal dismissed the Appellant’s application to review the decision of United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA” or the “Agency”) to transfer him to the post of Clerk “B” at Talbieh Preparatory Boys School, Jordan Field Office, as a result of the abolition of his post.

2. The Appellant also seeks “moral damages”, reinstatement to his previous post or a post close to his residence, “better compensation for his service injury” and compensation for transportation costs. The Commissioner-General asks for dismissal of the appeal.

Statutory Mandate

3. Article 2(1) of the Special Agreement between the United Nations and UNWRA dated 11 December 2009 (the “Special Agreement”) provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal of the UNRWA Dispute Tribunal’s judgment in which it is asserted that the UNRWA Dispute Tribunal:

- a) Exceeded its jurisdiction or competence;
- b) Failed to exercise jurisdiction vested in it;
- c) Erred on a question of law;
- d) Committed an error of procedure, such as to affect the decision of the case; or
- e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Issue

4. The Appellant does not clearly identify the alleged errors committed by the UNRWA Dispute Tribunal as required by Article 2(1) of the Special Agreement. The question is whether this failure to identify means the appeal is defective. If not, the issue before us must be

¹ The Appellant’s family name in English will be spelled throughout this Judgment as Al-Refaea as set forth in his appeal. However, it is noted that his name was spelled as “Al Refae” in the impugned Judgment.

whether the UNRWA Dispute Tribunal erred on any question of jurisdiction, procedure, law or fact when it dismissed the Appellant's application.

Facts and Procedure

5. As of 1 March 2008, the Appellant joined the Agency on a fixed-term appointment, Grade 7, Step 1, as a Mechanic with the Procurement and Logistics Department (PLD), Jordan Field Office (JFO).

6. On 2 February 2012, the Appellant's appointment was terminated on medical grounds. He filed an application with the UNRWA Dispute Tribunal in which he made claims against UNRWA associated with the termination of his appointment and his service-incurred injury.

7. As a result of a settlement agreement of the Appellant's injury claim, the Appellant and the Agency agreed to the Appellant's re-appointment in an alternative post with grade protection as Clerk A, Grade 7, Step 4 in the Field Procurement and Logistics Department of JFO on several conditions including that he irrevocably withdraw his application before the UNRWA Dispute Tribunal. The agreement was also subject to a condition of confidentiality. On 21 March 2013, the Appellant signed the written settlement agreement (the "settlement agreement").

8. Effective 1 May 2013, the Appellant was re-appointed by the Agency on a fixed-term appointment, Grade 7, Step 4, as Clerk "A" with the PLD/JFO. The position was located close to the Appellant's residence.

9. As a result of the restructuring at the PLD, the Appellant's post (along with others) was abolished, and he was declared provisionally redundant as of 11 September 2017. He was informed of this decision on 13 September 2017.

10. Thereafter, the Agency identified posts of Clerk "B", Assistant Librarian and Administrative Assistant as suitable positions commensurate with the qualifications and experience of 13 staff members, including the Appellant. These staff members were assessed for the above-mentioned posts by an interview panel. The Interview Panel recommended the Appellant as the fourth selected candidate to fill one of the posts of Clerk "B". The Director of

UNRWA Operations, JFO (the “DUO/J”) approved the Interview Panel’s recommendations on 23 October 2017.

11. On 1 November 2017, the Appellant submitted a request for review of the decision to declare him provisionally redundant in his post as Clerk “A” at the Grade 7 level, of which he was informed on 13 September 2017.

12. By letter to the Appellant dated 7 November 2017, the DUO/J proposed to transfer him to the post of Clerk “B” at the Grade 6 level at Talbieh Preparatory Boys School, JFO (Talbieh School), with grade and step protection. Talbieh School is situated some 70 kilometers away from the Appellant’s residence. On 12 November 2017, the Appellant formally accepted the transfer offer in writing.

13. In a letter dated 4 December 2017, the Deputy Commissioner-General advised the Appellant in response to his request for decision review, that since he had accepted the offer of the post of Clerk “B” at the Grade 6 level at Talbieh School with grade and step protection, there was no decision for further review.

14. On 4 January 2018, the Appellant submitted a request for review of the decision to transfer him to the post of Clerk “B” at Talbieh School due to his unhappiness with the distance of the school from his residence. On 24 January 2018, the Appellant filed an application with the UNRWA Dispute Tribunal against the decision to transfer him to Talbieh School.

15. In Judgment No. UNRWA/DT/2019/022, the UNRWA Dispute Tribunal dismissed the Appellant’s application on the merits and determined that he had failed to prove that the contested decision had been taken arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law. Regarding the Appellant’s contention that he had not been properly informed about the restructuring of the PLD, the UNRWA Dispute Tribunal noted there was no requirement compelling the Agency to associate every staff member to the restructuring process of a department. Regarding the Appellant’s claim that the DUO/J had promised that all staff members would be offered alternative posts close to their residence, the UNRWA Dispute Tribunal held the promise would only mean that the Agency would make all good faith efforts to find the most suitable posts. The UNRWA Dispute Tribunal found the Appellant had failed to provide any evidence that the Agency had promised him that he would be able to retain his post for the

rest of his employment with the Agency. Lastly, regarding the Appellant's claim that he should have been offered a similar vacant post in the Al Mareekh area closer to his residence, the UNRWA Dispute Tribunal held that the process of placing provisionally redundant staff members had been conducted in a transparent manner in accordance with the provisions of Area Staff Personnel Directive A/9/Rev. 10 (the "Directive").²

Submissions

The Appellant's Submissions

16. The Appellant submits that, while he did not object to the post that he was transferred to, his objection is to the fact that the workplace for his new post is far away from where he lives and is not suitable considering his health condition and service-incurred disability. He says to get to the workplace is a waste of time and money. The monthly transportation expense of approximately USD 154 is a burden on him considering his monthly salary at USD 776. He also says the long distance does not fit with his health condition and disability.

17. He complains that he was not adequately kept informed of the restructuring plan like other employees. He also says that a promise was made by the DUO/J in a meeting that all staff members would be offered alternative posts close to their residence. He argues that it is a "misconception" to say that the promise by the DUO/J was not binding on the Agency. Also, he submits that the Agency had an obligation to provide his employment close to his residence as was "agreed" pursuant to the settlement agreement.

18. The Appellant also says that when he was chosen to be a clerk as a result of the restructuring, he was offered a post in three areas with the Al Talybiah camp being the closest to his residence, this in spite of a post that was available in Al Mareekh that is close to his residence. He was informed that another employee was offered and accepted that post.

19. The Appellant requests that the Appeals Tribunal award him an unspecified amount of compensation for his moral and psychological damages resulting from the restructuring process, and from the work injury leading to disability, order his transfer to another job near his residence and suitable to his health and disability, and award him USD 2,000

² Area Staff Personnel Directive No. A/9/Rev.10 titled "Separation from service" effective 23 June 2015.

representing the transportation cost from his residence to and from Talbieh School from 17 December 2017 to 10 June 2019.

The Commissioner-General's Answer

20. The Commissioner-General submits that the Appellant's appeal is not well founded on any of the grounds set forth in Article 2 of the Special Agreement. The Appellant has failed to demonstrate in what respect the UNRWA Dispute Tribunal exceeded or failed to exercise its jurisdiction, erred on a question of law, committed an error in procedure or erred on a question of fact resulting in a manifestly unreasonable decision. He does not criticize the UNRWA Dispute Tribunal's reasons for dismissing his application. He restates the facts of his case, repeats the arguments that he raised before the UNRWA Dispute Tribunal, and is in effect rearguing his case before the Appeals Tribunal. The Commissioner-General argues that the appeal is therefore defective, and this is a sufficient basis for the Appeals Tribunal to dismiss the present appeal.

21. The UNRWA Dispute Tribunal did not err as a matter of law and in procedure. Its Judgment comports with the Agency's regulatory framework and the applicable jurisprudence of the Appeals Tribunal.

22. The Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

Is the Appeal Defective in Failing to Allege Errors by the UNRWA Dispute Tribunal as Required by Article 2(1) of the Special Agreement?

23. The Appellant is clearly not satisfied with the long commute of his current job. However, in an appeal to the Appeals Tribunal, it is insufficient for an appellant to re-argue his case or to repeat arguments made before the UNRWA Dispute Tribunal without asserting what errors of jurisdiction, procedure, law or fact were made by the UNRWA Dispute Tribunal. This is essentially what the Appellant attempts to do in this appeal.

24. Article 2(1) of the Special Agreement provides that the Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNRWA Dispute Tribunal in certain listed circumstances. An appellant must identify the specific errors made by the Dispute Tribunal in its judgment. The reason for this is that the “appeals procedure is of a corrective nature and is therefore not an opportunity for a party to simply reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the UNRWA DT. More is required. The appellant must demonstrate that the UNRWA DT has committed an error of fact or law warranting intervention by this Tribunal.”³

25. Here, the Appellant fails to identify the alleged errors and his appeal is defective for that reason. However, the Appeals Tribunal has previously recognized that if an appellant is not legally represented, as is the case here, some latitude may be allowed in the interests of justice.⁴ Therefore, although the Appellant has not clearly formulated his grounds of appeal, the central issue we will consider in the appeal is whether the UNRWA Dispute Tribunal erred in finding that the Agency properly exercised its discretion when it transferred the Appellant. The Appellant has the burden of proving the UNRWA Dispute Tribunal committed these defects.⁵

Did the UNRWA Dispute Tribunal commit the Errors Enumerated under Article 2(1)?

26. For the reasons that follow, we find the Dispute Tribunal did not err in jurisdiction, procedure, law or in fact in dismissing the Appellant’s application. The starting point for the Appeals Tribunal’s review of a judgment is to determine the appropriate standard of review.

27. In *Sanwidi*, the Appeals Tribunal reviewed the possible, applicable standards of review. It stated that “...unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative

³ *Madi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-853, para. 21, citing, *inter alia*, *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30. See also *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

⁴ *Madi*, *supra*.

⁵ *Ilic*, *supra*. See also *Hassan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-504.

discretion”.⁶ For errors on questions of fact, Article 2(1) provides that the standard of review is whether the errors of fact result “in a manifestly unreasonable decision”.

28. We find there is no basis for an error in jurisdiction or procedure; the Appellant has not asserted there was a failure in due process, procedural fairness, or a lack of jurisdiction by the UNRWA Dispute Tribunal.

29. We also find the UNRWA Dispute Tribunal committed no errors on questions of law or fact in its Judgment. The UNRWA Dispute Tribunal considered all the evidence and submissions made by the parties and made its findings of fact based on that evidence and on a correct interpretation of the applicable legal principles.

30. There are no findings of fact that resulted in a “manifestly unreasonable decision”. This standard implies a decision that is more than just “unreasonable” but one that does not accord with the evidence such that the evidence reasonably viewed is incapable of supporting the tribunal’s findings in all of the circumstances. This may occur in circumstances where the first instance tribunal exercised its discretion unjudicially by taking into account irrelevant or extraneous considerations or failed to take into account relevant considerations, which did not occur here.

31. If there is an allegation that the judgment does not accord with the law or if it misstates a legal test, the Appeals Tribunal will review the judgment on the basis of whether the Dispute Tribunal correctly applied the law and legal principles. We find that the UNRWA Dispute Tribunal correctly applied the principles set out by the Appeals Tribunal in *Lemonnier*, which held that the Secretary-General has “broad discretion” in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1.12. However, the Secretary-General’s “discretion is not unfettered and is subject to judicial review”.⁷

32. The first instance tribunal’s role in reviewing an administrative decision regarding an appointment or selection is to examine: “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 38.

⁷ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 30 (internal footnotes omitted), with references.

and adequate consideration”.⁸ The role of the first instance tribunal is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”.⁹

33. In conducting this review, the Appeals Tribunal has previously explained that the starting point for a judicial review is a presumption that official acts have been regularly performed, “[b]ut this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that he was denied a fair chance of promotion.”¹⁰ The same analysis applies to questions of transfers.

34. In the present case, the Appellant’s post was abolished due to restructuring and his transfer complied with the Agency’s obligation to find a suitable placement for displaced officials as required by the Directive. The UNRWA Dispute Tribunal reviewed the appropriate procedures in situations of redundancy as set out in the Directive and reasonably held the procedures were followed. The new post accepted by the Appellant was at the staff member’s grade, the responsibilities corresponded to his grade, the functions to be performed were commensurate with his competence and skills, and he had substantial experience in the field. As such, the Agency followed the procedures and requirements of the Directive. There is no evidence that the Appellant’s application for the posts was not given full and fair consideration.

35. The UNRWA Dispute Tribunal reviewed the process for placement of redundant staff members and held it was conducted by the Agency in a transparent manner and in accordance with the Directive. The Agency has the discretion in selecting candidates after an appropriate posting and selection process and there is no evidence the discretion was exercised inappropriately, or the decision was arbitrary or capricious. As has been stated previously by the Appeals Tribunal, it is not the function of the Dispute Tribunal to substitute

⁸ See *Ibid.*, para. 31.

⁹ *Ibid.*, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

¹⁰ *Ibid.*, para. 32, citing *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 5.

its own decision for that of the Administration or Agency. As we stated in the seminal case of *Sanwidi*:¹¹

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal 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 Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

36. We uphold the findings of the UNRWA Dispute Tribunal and find that the Appellant has not met the burden of proving that the decision to transfer him to the post of Clerk "B" at Taibieh School after the abolition of his post was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or an error of law.¹²

37. The Agency held meetings with affected staff in order to provide them with information about the process and made reasonable efforts to locate suitable posts commensurate with the redundant staff's and the Appellant's qualifications and experience as required by the Directive. There is no evidence of an arbitrary or capricious process nor is there evidence the Appellant's resulting transfer was motivated by an improper purpose. The UNRWA Dispute Tribunal found the procedures were followed and there was no evidence that the Directive, Regulations and Rules were not applied in a fair, transparent and non-discriminatory manner.

38. As for the Appellant's argument that there was a "promise" provided to staff to be close to their residence or that there was a violation of the settlement agreement, the UNRWA Dispute Tribunal reasonably held that there was no obligation on the Agency to associate every staff member in a restructuring process to their location of choice or to ensure that the Appellant would retain his post for the rest of his employment with the Agency. The 2012 agreement did not oblige the Agency to keep him as Clerk A, Grade 7 within the PLD

¹¹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

¹² See also *Ayoub v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-749, para. 14.

indefinitely but for the purposes of resolving his claims against the Agency associated with his termination and service incurred injury.

39. Further, the Appellant was offered the transfer by the Agency and he accepted that offer. There is no evidence that the Appellant was under any duress or undue influence at the time of his acceptance of that offer. The Agency acted and relied upon that acceptance by placing the Appellant and the other candidates in their posts and proceeded with the restructuring on that basis. The Appellant is now trying to overturn the agreed transfer after accepting the offer. In these circumstances, it would be inequitable to allow the Appellant to go back on his acceptance and representation in a manner that would be detrimental to the Agency.

40. Given the circumstances and evidence, we find the UNRWA Dispute Tribunal's findings did not result in a manifestly unreasonable decision.

41. In addition, there is no basis for the Appellant's request for damages or compensation for a service-incurred injury which was already settled by way of the settlement agreement. Nor is there a basis for compensation for transportation costs from his residence to his workplace as we have no evidence that he is entitled to this compensation under the terms of his employment. We also find that the Appellant is not entitled to moral and psychological damages as claimed on the basis that our decision that the UNRWA Dispute Tribunal did not err in dismissing the Appellant's application precludes awarding compensation. "[C]ompensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair."¹³ Since no illegality was found in this case, there can be no justification for compensation.

¹³ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33 and citations therein.

Judgment

42. The appeal is dismissed and Judgment No. UNRWA/DT/2019/022 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Murphy

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar