



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

Judgment No. 2020-UNAT-1046

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2019-1331
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Mr. Al Ashhab:	Arar Issa Batarseh
Counsel for Commissioner-General:	Not represented

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Mr. Jafar Mohammad Hekmat Al Ashhab (the Appellant), a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA and Agency, respectively), contested before the UNRWA Dispute Tribunal (UNRWA DT or Tribunal) the termination of his Limited Duration Contract (LDC) for poor performance. The UNRWA Dispute Tribunal decided that the Agency had acted in accordance with the regulatory framework and had established an adequate basis for the decision to terminate the Appellant's appointment. We partially grant the appeal. We find that, although no performance evaluation process was legally required for termination, an appropriate procedure should have been followed. In the present case, the appointment was terminated without prior notice of the poor performance and without adequate notice of the consequences thereof. The termination decision is rescinded and reinstatement is ordered, with an in-lieu compensation of two months' net base salary.

Facts and Procedure

2. Effective 9 July 2017, Mr. Jafar Mohammad Hekmat Al Ashhab (Appellant) was appointed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East on a Limited Duration Contract (LDC) as Emergency Project Officer, Band F, for the duration of six months, within the Emergency Coordination Unit (ECU) at the Jordan Field Office (JFO).

3. On 16 August 2017, the Appellant was requested to revisit the narrative of a draft progress report that he had submitted, as the report contained obvious inconsistencies and was copied, in large part, from a 2016 report without addressing adjustments for the year 2017.

4. By e-mail of 20 September 2017 to various staff members, the Emergency Coordinator indicated that she had tried to engage the Appellant in more field work in order for him to gain a better understanding of the services that the ECU provided. She complained about the Appellant's work, in particular about his weak reporting skills and that his tasks had to be re-assigned to other staff members because the Appellant's work could not be relied on.

5. By e-mail of 4 October 2017, the UNRWA Donor Relations Officer indicated to the UNRWA External Relations and Communications Department that despite regular coaching of the Appellant, his performance was less than satisfactory.

6. By e-mail of 9 October 2017, the Emergency Coordinator complained to the Appellant about the delays in his submission of the monthly reports for July and August 2017.

7. By e-mail of 19 October 2017, the Appellant's supervisor informed the Appellant that for the past three weeks he had failed to provide information that was easily accessible.

8. By letter dated 6 November 2017, the Director of UNRWA Operations, Jordan (DUO/J) notified the Appellant of the termination of his appointment, effective 20 November 2017.

9. On 22 December 2017, the Appellant submitted a request for review of the decision to terminate his appointment.

10. On 10 April 2018, the Appellant filed an application with the UNRWA Dispute Tribunal. He alleged that he had performed his tasks perfectly, his contract had been terminated before its expiry and without justification, and he had not been given any warnings or reprimand before he was terminated. The Appellant requested compensation for "material, moral, psychological and medical harm" caused by the alleged arbitrary termination of his appointment.

11. In Judgment No. UNRWA/DT/2019/038 of 5 August 2019, the UNRWA DT dismissed Mr. Al Ashhab's application. The UNRWA Dispute Tribunal noted that given the coaching and additional support the Appellant had received from the Agency, the Appellant could not claim that he had not been aware of his inadequate performance. The UNRWA Dispute Tribunal found that the Agency had acted pursuant to the Agency's regulatory framework and had established an adequate basis for the decision to terminate the Appellant's appointment.

12. Mr. Al Ashhab appealed the UNRWA DT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal). The Appellant wrote to the Registry on 4 November 2019 to file his appeal. He was advised to file it in the e-Filing portal. Due to technical problems, he was granted an extension to re-file his appeal.

13. A copy of the appeal brief (in Arabic) was transmitted to the Agency on 25 November 2019. The Commissioner-General did not file an answer.

14. By e-mail dated 23 June 2020, the Appeals Tribunal Registry invited the Appellant and the Respondent to inform the Appeals Tribunal whether there was a policy or other administrative document governing the performance review process of staff members appointed to an LDC.

15. By e-mail dated 24 June 2020, the Respondent indicated that there was no policy or other administrative document governing the performance review process of staff members appointed to an LDC and that the inquiry however, resulted in a form that was not referenced or attached to any policy instrument nor did it appear on the UNRWA intranet and there was no uniformity across the Agency on the use of the form. The form was transmitted by e-mail to the Registry on 25 June 2020.

16. By e-mail dated 6 July 2020, the Registry instructed the Respondent to provide the Appeals Tribunal with a copy of Personnel Directive (PD) I/112.6/15 and invited the parties to file submissions with respect to this PD as well as the Performance Evaluation Report Form for staff appointed against LDCs.

17. The Appellant did not file additional submission and the Respondent filed his submission on 14 September 2020.

Submissions

Mr. Al Ashhab's Appeal

18. The Appellant requests that his appeal be deemed receivable because it was submitted timely.

19. The UNRWA Dispute Tribunal erred in deciding that the termination was lawful. The contract was terminated prior to its expiry without acceptable legal justification and without any reason being given, implying a clear violation of the terms of the contract and the provisions of the law. UNRWA did not issue any written or verbal warnings, reprimands or disciplinary sanctions. On the contrary, UNRWA sent letters thanking and congratulating the Appellant for having fully met his professional obligations.

20. The UNRWA Dispute Tribunal erred in relying solely on the evidence submitted by UNRWA, without giving any reasons or justification for accepting one set of evidence and dismissing the other. The Appellant alleges that he responded to all the evidence and letters submitted by UNRWA in an attempt to show the Appellant's shortcomings including his responses, which demonstrate that he followed his direct supervisor's instructions to the letter and that UNRWA was prejudiced against him and showed bad faith in order to portray him as the party at fault, something that was always contrary to the truth and the facts.

21. The Appellant asks that the UNRWA DT Judgment be rescinded and claims compensation. With regard to the compensation, the Appellant states that his LDC was a renewable contract of up to four years. He adds that UNRWA still needs the Appellant's position and has a budget allocated to it for another four years. The Appellant could therefore assume that he would remain in his position for at least four years, especially since he was ranked first in the examination of candidates for the position and never received any warning, reprimand or disciplinary action during his time with the Agency. Accordingly, the Appellant seeks compensation for the unlawful termination of his contract in the amount of at least four years' additional salary.

22. The Appellant also submits that the UNRWA Dispute Tribunal erred in failing, in the course of the trial, to send the Appellant or his representative any letters, submissions or requests in Arabic, even though Arabic was the language used for the proceedings in that case.

The Commissioner-General's Answer

23. The Commissioner-General did not file an answer to the appeal.

24. In his submission regarding PD I/112.6/15 as well as the Performance Evaluation Report Form for staff appointed against LDCs, the Commissioner-General alleges that the PD is not applicable to this case as it is applicable to professional and general service categories of international staff.

Considerations

Receivability of the Appeal

25. On 5 August 2019, the Appellant received the English text of Judgment No. UNRWA/DT/2019/038. He asked the UNRWA Dispute Tribunal to provide him with a copy of the Judgment in Arabic. According to the Appellant, the Arabic copy of the Judgment was received on 8 September 2019.

26. On 4 November 2019, the Appellant's representative wrote to the Appeals Tribunal Registry to file his appeal. He was advised to file it in the e-Filing portal. He made numerous attempts to submit the appeal, but all those attempts were unsuccessful owing to a technical fault in the e-filing system of the Appeals Tribunal. The Appellant's representative therefore wrote directly to the Appeals Tribunal Registry on 4 November 2019 to inform it of the fault and to ask for the time limit to be extended.

27. On 8 November 2019, the Appellant received an e-mail from the technical support unit of the Office of Administration of Justice acknowledging that there was a technical fault in the system. On the same date, he received an e-mail from the Registry stating that he would be granted three additional working days to submit an appeal. On 12 November 2019, the Appellant's representative was able to submit the appeal with the assistance of the technical support unit and the Appeals Tribunal Registry.

28. The appeal is receivable.

Translation from English to Arabic

29. The Appellant claims that the UNRWA DT failed to send him or his representative any letters, submissions or requests in Arabic, even though Arabic was the language used for the proceedings in that case.

30. The Appeals Tribunal decided in *Abu Fardeh*:¹

The fundamental right of the staff member to a full participation in the justice proceedings requires that he has an opportunity to receive a translation, not only of the Reply of the Respondent, but also of the Comments that, at a later stage of the proceedings, the Respondent could issue, especially if these comments contain rebuttal of the staff member's allegations.

31. In the present case, the Appellant alleges a violation of his right to receive a translation of all documents exchanged during the proceedings before the UNRWA DT, but does not establish any damages and does not seek any relief on this issue. We cannot grant the appeal on the basis of the alleged procedural failure.

Merits

32. The Appellant was appointed on an LDC for a period of six months. The proffered reason for terminating his appointment was his poor performance. He contests that his performance was poor and claims that he was never informed of any shortcomings nor did he receive any warnings or reprimands from the Agency.

33. The Area Staff Regulations state:

IX. SEPARATION FROM SERVICE

REGULATION 9.1

The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

REGULATION 9.2

Staff members may resign from the Agency upon giving the Commissioner-General the notice required under the terms of their appointment.

REGULATION 9.3

(A) A staff member whose temporary appointment is to be terminated shall be given not less than 14 days' written notice of such termination or such notice as may otherwise be stipulated in his/her letter of appointment.

¹ *Tayseer Salah Salameh Abu Fardeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1011, para. 53.

(B) In lieu of the notice period, the Commissioner-General may authorise compensation calculated on the basis of salary and allowances which the staff member would have received had the date of termination been at the end of the notice period.

REGULATION 9.4.

The Commissioner-General shall establish a scheme for the payment of indemnities, provident fund benefits or other cash benefits to staff members who are separated under Chapter IX of the present staff regulations after completion of not less than six months' service with the Agency, subject to such conditions and definitions relating to eligibility as shall be determined by the Commissioner-General and prescribed in the staff rules.

34. In the present case, the Appellant was appointed on an LDC for a period of six months. In accordance with Regulation 9.1. of the Area Staff Regulations, the Commissioner-General was entitled to terminate the contract in the interest of the Agency before its expiration date.

Is a performance evaluation required before termination?

35. In response to an e-mail from the Registry dated 23 June 2020, the Agency referred to a form called "Performance Evaluation Report for Staff appointed against Limited Duration Contracts" (the Form). By e-mail dated 24 June 2020, the Agency sent this document to the Registry.

36. In his additional submission, the Commissioner-General confirms the previous statement by the UNRWA Human Resources Department that this form is not referenced or attached to any policy instrument nor does it appear on the UNRWA intranet and there is no uniformity across the UNRWA field operations on the use of the form.

37. In the absence of any determination and publication by the Commissioner-General or another official with delegated authority, we find that the "form" does not constitute a Personnel Directive, which could be binding on UNRWA.

38. The parties were also directed to file additional submissions regarding PD I/112.6/15. The purpose of this PD was to introduce a system of performance evaluation reports to replace the previous system of periodic reports. Section 2 confirms, however, that it is

applicable only to International staff personnel and not to Area staff members. As the Appellant was an Area staff member, the PD is not applicable in this case.

39. We conclude that in the present case, no performance evaluation process was legally required for the termination of the Appellant's LDC.

Was the decision to terminate the appointment lawful?

40. Although the Commissioner-General has broad discretion to terminate an LDC in the interest of the Agency before its expiration date, the Agency must act in good faith and its decision must not be arbitrary or motivated by factors inconsistent with proper administration.

41. In the present case, the UNRWA DT referred to various e-mails sent to the Appellant himself regarding his performance. For instance, in an e-mail dated 16 August 2017, the Appellant was requested to revisit the narrative of a draft progress report that he had submitted, as the report contained obvious inconsistencies and was copied, in large part, from a 2016 report without addressing adjustments for the year 2017. In an e-mail dated 9 October 2017, the Emergency Coordinator complained to the Appellant about delays in submitting the monthly reports for July and August 2017. By e-mail of 19 October 2017, the Appellant's supervisor informed the Appellant that for the past three weeks he had failed to provide information that was easily accessible. It is undisputed that the Administration raised questions regarding Mr. Al Ashhab's work performance. It does not mean that the termination was lawful.

42. The Appeals Tribunal has consistently held:²

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.

43. Even when the staff member is appointed to an LDC, there is an expectation that proper procedure before termination should be followed, namely, the staff member should be formally and clearly advised of his poor performance, what he needs to do to rectify it, and the consequences of not rectifying it. In the case at hand, the contract was terminated without prior notification of the poor performance and adequate notice of the consequences of it. The Agency failed to indicate that the contract would be terminated

² *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

before its expiration date if the staff member did not improve his performance. Although the Staff Regulations and Rules do not provide for a performance evaluation process, the lack of fair warning renders the decision to terminate unlawful.

Consequences

44. We conclude that the UNRWA DT erred in deciding that the Agency had established an adequate basis for the decision to terminate the Appellant's appointment.

45. The Appellant's termination is therefore unlawful. In terms of Article 9 of the Appeals Tribunal Statute, the decision must be rescinded, the Appellant must be reinstated and an amount of in-lieu compensation must be set.

46. The Appellant had no legitimate expectancy of renewal of his limited duration contract and provides no evidence of moral or material damages. His claim for compensation is dismissed.

Judgment

47. The appeal is partially granted:
- the decision to terminate the LDC is rescinded, the Agency is ordered to reinstate Mr. Al Ashhab on similar terms and conditions of employment; as an alternative to the order of reinstatement, the Agency may elect to pay an amount of compensation equal to two months' net base salary;
 - the appeal is dismissed in all other respects.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 2nd day of December 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar