



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-812

Abusondous
(Respondent/Applicant)

v.

Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East

(Appellant/Respondent)

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2017-1100
Date:	22 March 2018
Registrar:	Weicheng Lin

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

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2017/023, 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 4 June 2017, in the case of *Abusondous 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 3 August 2017, and Mr. Ra'ad Abusondous¹ filed his answer on 12 September 2017.

Facts and Procedure

2. The following facts are uncontested:²

... Effective 1 August 2010, the Applicant was appointed to the post of Assistant Head Safety and Security Officer ("AHSSO") at the Administration Support Department, Security Section, Headquarters Amman ("HQA"), Grade 16. The post was reclassified to the post of Senior Safety and Security Officer ("S/SSO"), Grade 17, and effective 1 May 2014, the Applicant was upgraded to the post of S/SSO.

... On 13 November 2015, the Applicant's supervisor, the Chief of Safety and Security Division ("CSS") left the Agency to take up another position. Prior to his departure, by email dated 9 November 2015, the CSS sent a memorandum to the Chief of the Human Resources Services Division, recommending the assignment of the Applicant as Acting CSS ("A/CSS").

... Effective 13 November 2015, the Applicant started performing the duties as A/CSS in accordance with his former supervisor's request.

... Following the departure of the CSS, the Commissioner-General re-organised the Agency's structure with respect to security and safety matters. The position of Director, Department of Security and Risk Management ("D/DSRM") was created. Subsequently, a recruitment process for a new Director was launched.

... On 29 January 2016, the Director of Human Resources Department [(D/HR)] informed the Applicant of the decision not to assign him as A/CSS.

... On 29 February 2016, the Applicant submitted to the Deputy Commissioner-General a request for decision review of the decision not to appoint him as A/CSS. He received no response.

¹ The Appeals Tribunal has adopted the spelling of his last name used by the UNRWA DT.

² Impugned Judgment, paras. 2-20.

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... On 5 June 2016, the Applicant filed his application with the UNRWA Dispute Tribunal (...) [against the decisions of (...) UNRWA (...), not to assign him as Acting P-5 Chief of Safety and Security Division, and not to pay him an Acting Appointment Allowance [(AAA)].]^[3] The application was transmitted to the Respondent on 6 June 2016.

... The Respondent was unable to file a reply within the prescribed time-limits. By Order No. 053 (UNRWA/DT/2016) dated 24 July 2016, the [UNRWA Dispute] Tribunal granted leave to the Respondent to participate in the proceedings and ordered the Respondent to submit his reply.

... In August 2016, the new D/DSRM was appointed.

... On 12 August 2016, the Respondent filed his reply. The reply was transmitted to the Applicant on 14 August 2016.

... On 11 January 2017, the Applicant filed a motion for leave to submit supplementary evidence. The motion was transmitted to the Respondent on the same day.

... By Order No. 017 (UNRWA/DT/2017) dated 22 January 2017, the Applicant's motion was granted.

... On 23 January 2017, the Applicant submitted supplementary evidence, which was transmitted to the Respondent on the same day.

... By Order No. 037 (UNRWA/DT/2017) dated 6 March 2017, the [UNRWA Dispute] Tribunal requested the Respondent to submit the Agency's reasoning for the decision not to assign the Applicant as A/CSS.

... On 20 March 2017, the Respondent submitted his response to Order No. 037 (UNRWA/DT/2017).

... By Order No. 044 (UNRWA/DT/2017) dated 22 March 2017, the [UNRWA Dispute] Tribunal transmitted the response to the Applicant and granted him leave to submit comments on the response.

... On the same day, the Applicant filed a motion for extension of time to respond to Order No. 044 (UNRWA/DT/2017).

... By Order No. 046 (UNRWA/DT/2017) dated 23 March 2017, the [UNRWA Dispute] Tribunal transmitted the motion to the Respondent and granted the Applicant's motion.

... On 2 April 2017, the Applicant submitted his response to Order No. 044 (UNRWA/DT/2017). The response was transmitted to the Respondent on the same day.

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

3. The UNRWA DT rendered its Judgment on 4 June 2017 finding that the Agency's refusal to grant AAA to Mr. Abusondous was unlawful. It found that while the applicable Area Staff Circular No. A/04/2010 (ASC No. A/04/2010) did not provide a right to Mr. Abusondous to receive an AAA, he did have an expectation that the Agency would "properly exercise its discretion to grant an AAA and [would] be fair in its dealings with him".⁴ The Agency's justification of the decision not to appoint Mr. Abusondous as Officer-in-Charge (OiC) and grant him an AAA, namely that the Agency would not have been in a position to meet the 120-day maximum time period to fill the vacancy set by paragraph 3 of ASC No. A/04/2010 was not a reasonable ground for the denial as the provision does not specifically preclude flexibility beyond the 120-day time limit. The UNRWA DT found that although there could possibly have been reasonable and fair grounds for UNRWA's decision, the Agency had failed to clearly explain the reasoning and provide such grounds. By way of remedy, the UNRWA DT awarded payment of "the applicable AAA from the beginning of the second month [Mr. Abusondous] had been performing duties as OiC, until the new D/DSRM took up his position in the restructured department"⁵ and rejected all other requests.

Submissions

The Commissioner-General's Appeal

4. The Commissioner-General submits that the UNRWA DT erred on a question of law and fact in concluding that the decision not to assign Mr. Abusondous as A/CSS and not to pay him an AAA was unlawful. The UNRWA DT confused the terms "Acting", which applies vis-à-vis a vacant post, and "OiC", which applies in case of absence of the incumbent on the post, and mistakenly described Mr. Abusondous as OiC. It also disregarded that the roles of "Acting" (as well as "OiC") are not *de facto* roles but are entrusted onto staff members following a set procedure and upon approval of the D/HR. The UNRWA DT thus erred in finding that Mr. Abusondous "assumed duties as OiC" as he was never assigned such a role and the e-mail from the departing CSS supporting his assignment was merely recommendatory in that respect. Moreover, the reasons advanced for not assigning Mr. Abusondous, namely that the Agency would be unable to meet the 120-day time limit, is reasonable, particularly since the applicable provision contains no exceptions for "Acting" staff members. The UNRWA DT misconstrued the difference between "OiC" and "Acting" and consequently misunderstood the relevant exceptions

⁴ *Ibid.*, para. 29.

⁵ *Ibid.*, para. 33.

to each role. As a consequence, the UNRWA DT also erred in its determination on the issue of non-payment of an AAA. An expectation that the Agency would properly exercise its discretion to grant an AAA as enunciated in the Appeals Tribunal's case law would only have arisen if Mr. Abusondous had actually been assigned to the post as envisaged in paragraphs 3 and 4 of ASC No. A/04/2010.

5. The Commissioner-General further asserts that the UNRWA DT exceeded its competence by substituting its own decision for that of the Commissioner-General. In the absence of a formal assignment to an international post and without the D/HR's approval of payment of an AAA on confirmation from the Department Head that Mr. Abusondous performed his duties to a fully satisfactory standard as required by paragraph 5 of ASC No. A/04/2010, the UNRWA DT in effect substituted its decision for that of the Commissioner-General and basically conducted a "merit-based review". Even assuming, *arguendo*, that the decision was unlawful, the UNRWA DT had the option of awarding compensation pursuant to Article 10(5) of the UNRWA DT Statute but instead chose to substitute its own decision for that of the Commissioner-General.

6. Based on the foregoing, the Commissioner-General requests the Appeals Tribunal to allow the appeal and vacate the impugned Judgment.

Mr. Abusondous' Answer

7. Mr. Abusondous submits that the UNRWA DT did not err on a question of law and fact in concluding that the decision not to assign him as A/CSSD and not to pay him an AAA was unlawful. The Commissioner-General is incorrect in asserting that the UNRWA DT confused the terms "Acting" and "OIC" and fails to provide evidence that there is a difference between those terms. In fact, Mr. Abusondous was assigned to lead the section by his direct supervisor, the then-Director of Administration, and the D/HR congratulated him on his assignment. The D/HR, as decision-maker in his case, did not weigh all the relevant considerations and the Agency "ignored [its] responsibility to give due regard to his interests and concerns".

8. Moreover, Mr. Abusondous argues that the UNRWA DT did not exceed its competence by substituting its own decision for that of the Commissioner-General when it ordered payment of an AAA. The UNRWA DT merely ordered payment of "compensation for [Mr. Abusondous'] work while he was leading the section (...) and not to issue him any kind of letter by

[Human Resources]” and the UNRWA DT’s order thus fell within the its statutory competence under Article 10(5) of the UNRWA DT Statute.

9. In light of the foregoing, Mr. Abusondous requests that the Appeals Tribunal affirm the UNRWA DT Judgment and dismiss the appeal in its entirety.

Considerations

10. In this case, the main issue is whether the UNRWA DT erred on a question of law and/or fact resulting in a manifestly unreasonable decision when it concluded that the decision not to assign Mr. Abusondous as A/CSS and not to pay him an AAA was unlawful.

11. In *Husseini*,⁶ the Appeals Tribunal stated, *inter alia*, as follows:

... (...) While circulars may be lower in the contractual hierarchy to the staff regulations and directives, they are of equal standing as legal instruments potentially introducing or establishing implied terms of the contract. In nature and in practical terms they are employment policy guidelines and thus differ from provisions that might be regarded strictly as terms or conditions of employment agreed *ab initio*. Both the [Area Staff Circular (ASC)] and [Area Personnel Directive (APD)] bestow discretion on the Agency to pay an AAA. Thus clause 1 of the ASC provides that the staff member “may, in exceptional cases, be granted an AAA” and clause 2.1 of the APD states that “an [AAA] may be authorized for a staff member”. The issuances thus bestow discretionary powers which must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements. A staff member thus has no contractual right to receive an AAA. He or she, however, does have an expectation that the Agency will exercise its discretion to grant an AAA properly.

12. Moreover, we wish to emphasise that when the UNRWA DT is examining the validity of the Commissioner-General’s exercise of discretion in administrative matters, the Dispute Tribunal is tasked to examine whether the exercise of such discretion is legal, rational, reasonable and procedurally correct, among other things, so that it does not lend to unfairness, unlawfulness or arbitrariness.⁷

⁶ *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.

⁷ *Karseboom v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-601, para. 43, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40 and 42.

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13. We agree with the UNRWA DT's findings that while ASC No. A/04/2010 did not provide a right to Mr. Abusondous to receive an AAA, he did have an expectation that the Agency would "properly exercise its discretion to grant an AAA and [would] be fair in its dealings with him".⁸

14. The UNRWA DT reasoned that the Agency's justification of the decision not to appoint Mr. Abusondous as OiC and not to grant him an AAA, namely that the Agency would not have been in a position to meet the 120-day maximum time period to fill the vacancy set by paragraph 3 of ASC No. A/04/2010, was not a reasonable ground for the denial as the provision does not specifically preclude flexibility beyond the 120-day time limit.

15. The UNRWA DT also found that although there could possibly have been reasonable and fair grounds for UNRWA's decision, the Agency had failed to clearly explain its reasoning and provide such grounds.

16. We find no fault with this reasoning; we concur and uphold the findings of the UNRWA DT.

⁸ Impugned Judgment, para. 29.

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Judgment

17. The appeal is dismissed and Judgment No. UNRWA/DT/2017/023 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

(Signed)

(Signed)

Judge Thomas-Felix,
Presiding

Judge Raikos

Judge Knierim

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar