

Translated from French

UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Asaad
(Appellant)

v.

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

JUDGMENT
[No. 2010-UNAT-021]

Before:	Judge Jean Courtial, Presiding Judge Sophia Adinyira Judge Kamaljit Singh Garewal
Case No.:	2010-026
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant:	Diab Tabari
Counsel for Respondent:	W. Thomas Markushewski

Judge Jean Courtial, Presiding Judge

Synopsis

1. Mr. Ommer Asaad submitted an application contesting the decision of 22 May 2008 of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA, “the Agency”) upholding, contrary to the recommendation of the Joint Appeals Board, the previous decision of 20 June 2003 to terminate his probationary appointment as Area Officer for North Lebanon. In his application, he also requests that the Agency be ordered to offer him an officer-level job and to pay him \$14,400 in compensation for loss of earnings resulting from his demotion from the position of Area Officer to that of Head Teacher of a school and \$12,000 in compensation for the harm caused to him by the delay in the Agency’s consideration of his appeal against its administrative decision. The Tribunal considers that the appellant has provided proof of the erroneous, inconsistent or fallacious nature of the contested decision. It rescinds the decision and sets compensation at an amount equivalent to six months’ salary at grade 14, which the respondent may elect to pay as an alternative to the specific performance arising from the rescission. It also orders the Agency to pay the appellant compensation in two amounts set out in this judgment, the first for loss of earnings resulting from his demotion and the second for the harm he suffered because of the delay in considering of his appeal.

Facts and procedure

2. Mr. Asaad was recruited by the Agency as Area Officer for North Lebanon (grade 14) on 20 January 2003 for a period of two years, including a probationary period of one year. By letter dated 20 June 2003, his supervisor informed him that his performance was not up to the standard expected of an area officer and that, consequently, his appointment would be terminated on 30 June 2003 in accordance with the Staff Rules and clauses in the letter of appointment provided to him on 3 February 2003. By letter dated 25 June 2003, he was offered the post of Head Teacher of a school from 1 July 2003. He accepted this offer.

3. The appellant, however, submitted an appeal to the Agency’s Joint Appeals Board. The Board, in its report of 21 February 2008 to the Commissioner-General, found that the Administration had not given specific reasons for terminating Mr. Asaad’s probationary appointment. It stated that it had not found any evidence in the appellant’s file which led it to conclude that the appellant’s performance was deficient. The Board concluded that the decision taken with regard to the appellant was too severe and recommended that the Commissioner-General should review it. That recommendation was not accepted. By letter dated 22 May 2008, the Commissioner-General upheld the decision to terminate the appellant’s probationary appointment as Area Officer because of serious deficiencies in the performance of his duties, which he had not remedied even though they had been brought to his attention in a timely manner by his superiors. The Commissioner-General considered that those deficiencies adversely affected the efficiency and effectiveness of the Agency’s functions in Lebanon.

4. Mr. Asaad submitted an application to the former United Nations Administrative Tribunal contesting the Commissioner-General’s decision and requesting that the Agency should be ordered to offer him an officer-level job and to

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pay him \$14,400 in compensation for loss of earnings resulting from his demotion from the position of Area Officer to that of Head Teacher of a school, and \$12,000 in compensation for the harm caused to him by the delay in the Agency's consideration of his appeal against its administrative decision. Since the Administrative Tribunal did not have time to rule on the appeal before it was abolished on 31 December 2009, the application was transferred to the Appeals Tribunal in accordance with General Assembly resolution 63/253 of 17 March 2009.

Submissions**Appellant**

5. The appellant claims that his rights were not respected. He states that he was not informed in a timely manner of the deficiencies or errors of which his superiors accused him. No note dated 1 May 2003 was sent to him on that date. The way in which he handled the case relating to the conduct of a security officer was not mentioned during the meeting with the Director of UNRWA Affairs, Lebanon, that took place on 1 May 2003. The Director raised the subject of his unsatisfactory performance only once in his presence, on 17 June 2003.

6. The appellant argues that it has not been established that he carried out the acts attributed to him. It has not been established that he asked the popular committees to limit the number of participants at the meeting which he organized. He also claims that the motivation for the decision to terminate his appointment is characterized by contradictions. On the one hand, the Director stated, by letter dated 17 June 2003, that the appellant's courtesy visit to the Minister for Foreign Affairs was a basic reason for the decision to terminate his appointment, but on the other hand he assured the appellant in his letter of 26 June 2003 that the visit had nothing to do with that decision.

7. Lastly, according to the appellant, the Administration's delay in convening the Joint Appeals Board to rule on his appeal constitutes a breach of his rights and caused him a loss of income and moral damage.

Respondent

8. The respondent argues that the appellant's contentions regarding the review of his performance and its unsatisfactory nature are invalid because the evaluation of a staff member's performance during the probationary period is not a matter for the Joint Appeals Board or the Tribunal. The only question which may be submitted for consideration by the Tribunal is whether the decision was arbitrary, motivated by prejudice, flawed by procedural irregularity or errors of fact or law, or inconsistent with proper administration. The burden of proof in that regard lies with the appellant. In referring only to the alleged arbitrary nature of the contested decision, the appellant has not provided such proof. On the contrary, the documents in the file indicate that the decision was based on numerous substantial deficiencies in the performance of the appellant, whose superiors lost confidence in him.

Considerations

9. The decision to terminate the appellant's appointment as Area Officer took effect while he was on probation. According to the 1999 Personnel Manual, chapter IX, the purpose of probation is to evaluate the overall performance and potential of

a staff member in the job to which he/she is appointed. This purpose was set out in the letter of appointment sent to the staff member, which included a clause stating that his appointment would be confirmed subject to satisfactory work performance during the probationary period.

10. The Staff Rules applicable to staff members on probation provide that the Administration has broad discretionary authority to terminate the appointments of such staff during the probationary period. They provide that a probationary appointment may be terminated without advance notice at any time. They also provide that, in the case of an appeal by a staff member against a decision based on his or her professional shortcomings, the Joint Appeals Board shall not assess the staff member's performance but shall consider only whether the contested decision was motivated by prejudice towards the staff member or some other extraneous factor. The burden of proving improper motivation lies with the staff member contesting the decision.

11. Nonetheless, as the former United Nations Administrative Tribunal ruled on many occasions, the Administration's discretionary authority is not unfettered. The jurisprudence of the former Tribunal provides that the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration (see, for example, Judgement No. 952, *Hamad* (2000)). We would add that its decisions must not be based on erroneous, fallacious or improper motivation.

12. In its report on the case, the Joint Appeals Board found no evidence in Mr. Asaad's file that he had been made aware of the reasons for the dissatisfaction with his performance mentioned in the note of 1 May 2003. With regard to his handling of the case of the security officer, the Board noted that Mr. Asaad's version of the facts was not controverted by the Agency and that the criticism of him on that point was baseless. The Board also noted the inconsistency highlighted by the appellant with regard to his courtesy visit to the Minister for Foreign Affairs. Having studied Mr. Asaad's file and heard the Agency Administration, the Board noted in its report that the decision taken with regard to the appellant was based not on specific facts but on generalized reasons. It questioned the real reasons for the decision, for which it found no real justification in the file reviewed.

13. The appellant relies on the Board's report for his contention that the reasons given by the Agency do not justify the contested decision. The respondent has not provided us with evidence that refutes this contention. We therefore consider that the appellant has proved the erroneous, inconsistent or fallacious nature of the reasons for the decision to terminate his probationary appointment.

14. It follows from the above that the appellant has grounds for requesting rescission of the Commissioner-General's decision of 22 May 2008 to uphold the decision to terminate his probationary appointment as Area Officer for North Lebanon from 30 June 2003.

15. However, article 9, paragraph 1, of the statute of the Appeals Tribunal provides that, where the administrative decision concerns termination, the Tribunal shall set an amount of compensation that the respondent may elect to pay as an alternative to the specific performance resulting from the rescission. In the circumstances, we set the compensation that the respondent may elect to pay as an alternative to specific

performance at an amount equivalent to six months' salary at grade 14, which was the salary grade held by the appellant as Area Officer for North Lebanon.

16. The appellant also has grounds for requesting compensation for loss of earnings resulting from his demotion from the position of Area Officer for North Lebanon, grade 14, to that of Head Teacher of a school, grade 8. We therefore order the Agency to pay compensation equivalent to the difference between the two salaries for the period from 1 July 2003 to 20 January 2004, the date on which the probationary appointment as Area Officer for North Lebanon should have ended in the normal course of events and on which a decision, which we cannot prejudge, should have been taken on the appellant's professional competence.

17. Lastly, we note that almost five years elapsed between 21 July 2003, the date on which the appellant submitted his appeal to the Joint Appeals Board, and 22 May 2008, the date on which the Commissioner-General made a final decision on the appeal. Even taking into account the particular difficulties associated with the geographical and political situation in which the Agency operates, this delay in the consideration of the appeal violated the appellant's right of recourse. The Tribunal considers that, in the circumstances, compensation equivalent to one month's salary at grade 14 is an equitable remedy for the harm suffered by the appellant in this regard.

Judgment

18. The decision of 22 May 2008 of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East upholding the decision to terminate the appellant's probationary appointment as Area Officer for North Lebanon from 30 June 2003 is rescinded.

19. As an alternative to the reinstatement of the appellant to the position of area officer for a probationary period or to an equivalent position as a result of the rescission of the decision, the respondent may elect to pay the appellant compensation equivalent to six months' salary at grade 14.

20. The Agency shall pay the appellant compensation equivalent to the difference between the salary which he received as Head Teacher of a school (grade 8) and the salary which he should have received as Area Officer for Lebanon North (grade 14) for the period from 1 July 2003 to 20 January 2004 and also compensation equivalent to one month's salary at grade 14.

(Signed) Judge Courtial
Presiding

(Signed) Judge Adinyira

(Signed) Judge Garewal

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: French

Entered in the Register on this 26th day of April 2010
in New York, United States.

(Signed) Weicheng Lin, Registrar, UNAT