



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

Judgment No. 2014-UNAT-449

**Thweib and Al Hasanat
(Respondents/Applicants)**

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Inés Weinberg de Roca
Judge Rosalyn Chapman

Case No.: 2013-518

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Respondents/Applicants: Amer Abu Khalaf and Ghada Yasin

Counsel for Appellant/Respondent: Lance Bartholomeusz

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (Commissioner-General and UNRWA or the Agency, respectively) against Judgment No. UNRWA/DT/2013/028, rendered by the UNRWA Dispute Tribunal (UNRWA DT) on 15 July 2013, in the case of *Thweib and Al Hasanat v. Commissioner-General of UNRWA*. The Commissioner-General submitted his appeal on 29 August 2013, and Ms. Maisa Thweib and Ms. Wisam Al Hasanat filed their answer on 29 October 2013.

Facts and Procedure

2. Prior to considering the case on its merits, the UNRWA DT addressed the participation of the Agency in the proceedings, and set out the following procedural elements:¹

... On 12 June 2012, Maisa Thweib submitted an application contesting the decision ... to place “a note of misconduct in [her] record”.

... The application was transmitted to the [Commissioner-General] on 13 June 2012.

... On 28 June 2012, Wisam Al Hasanat submitted an application contesting the decision ... to issue her a written censure and to suspend her from duty without pay for one week.

... The application was transmitted to the [Commissioner-General] on 2 July 2012.

... On 22 August 2012, Applicant Thweib filed a Motion requesting the [UNRWA Dispute] Tribunal to exclude the [Commissioner-General] from participating in the proceedings and from submitting a reply. The Motion was transmitted to the [Commissioner-General] on the same day by e-mail [indicating] that “[i]f the Judge determines that a reply is required you will be notified.”

... On 20 September 2012, Applicant Al Hasanat filed a Motion requesting the [UNRWA Dispute] Tribunal to exclude the [Commissioner-General] from participating in the proceedings and from submitting a reply. There was delay in dealing with this Motion.

¹ The following text is taken from Judgment No. UNRWA/DT/2013/028, paras. 1 – 10.

... By Orders No. 044 and 045 (UNRWA/DT/2013) dated 5 June 2013, [the UNRWA DT] ordered the [Commissioner-General] to file a response to both of the Applicants' motions by close of business on 19 June 2013.

... On 17 June 2013, the [Commissioner-General] filed his reply to Ms. Al Hasanat's motion and a cross motion requesting leave to participate in the proceedings and to file a reply.

... On 24 June 2013, after the deadline had expired, the [Commissioner-General] filed his reply to Ms. Thweib's motion, requesting leave to participate in the proceedings and to file a reply.

... Given the common issues of fact and law, by Order No. 063 (UNRWA/DT/2013) dated 8 July 2013 these two cases were subject to an order for combined proceedings. The [UNRWA DT] also ordered that the [Commissioner-General] shall not be entitled to take part in the proceedings and that leave is not granted to [him] to submit replies in these cases. The [UNRWA DT] noted that the judgment on the substantive merits of these claims would include, as a preliminary issue, the reasons for not granting leave to the [Commissioner-General] to participate in the proceedings.

3. In its decision, the UNRWA DT set out the following "preliminary issue":

... The [Commissioner-General] was fully aware of the grounds of these complaints when the applications were served on him on 13 June 2012 in Thweib and on 2 July 2012 in Al Hasanat. The grounds of complaint and the arguments in support thereof were in essence no different to those set out in the letters each applicant sent in response to the letter dated 15 December 2011 from Ms. Sandra Mitchell, former Director of UNRWA Operations, Jordan ("DUO/J").

... Furthermore, in their requests for decision review each of the Applicants repeated their factual and legal contentions. In the circumstances, the [Commissioner-General] had more than sufficient time to formulate defences, answers and explanations and to prepare the replies to both claims. There would have been no need for [him] to carry out extensive research or enquiry before submitting replies. Their excuse of lack of resources is devoid of substance.

4. On the issue of the Commissioner-General's participation in the case before the UNRWA DT, that Tribunal found, that his failure to comply with the time limits within which to submit his reply, as set out in Article 6(1) of the Statute of the UNRWA DT, was not excusable and that he was not entitled to participate in the proceedings.

5. The UNRWA Dispute Tribunal went on to review the merits of the case. However, for the purpose of this Judgment, it is not necessary to summarize the substantive findings.

6. Ultimately, the UNRWA Dispute Tribunal concluded that UNRWA breached Ms. Thweib and Ms. Al Hasanat's rights of due process and failed to establish the facts on which it premised its accusations, and findings, of misconduct. Given the severity of the charges against them, the UNRWA DT noted it was "cognizant of its responsibility to ensure that the Applicants are fully cleared of any charges against them, and, crucially, any adverse consequences that might arise from those charges, and that they are compensated for any distress caused by the accusations against them and the improper process followed by the Agency". Accordingly, the UNRWA DT *inter alia* rescinded the impugned decisions and ordered that all reference thereto be expunged from their official status files. In addition, it awarded Ms. Al Hasanat compensation equal to the salary loss she incurred during her one-week suspension without pay and moral damages of USD 6,000. In respect of Ms. Thweib, the UNRWA DT awarded USD 3,000 as moral damages.

Submissions

The Commissioner-General's Appeal

7. With respect to procedure, the Commissioner-General submits that the UNRWA DT erred in refusing to grant him leave to participate in the proceedings.

8. Insofar as the merits of the Judgment are concerned, he submits that the UNRWA DT erred in fact by finding that the factual basis of the sanctions was not reasonably established.

9. The Commissioner-General argues that the UNRWA DT imported additional due process requirements, then found rights deriving therefrom had been breached, and used the breach to vitiate findings of fact, each of which is an error of law.

10. He also argues that the UNRWA DT erred in law when it found that UNRWA could not consider participating in a sit-in or strike as misconduct, as it did not so provide in its regulatory framework.

11. Finally, the Commissioner-General maintains that no moral damages should have been awarded.

12. The Commissioner-General asks that the Judgment be set aside and the case be remanded to the UNRWA DT for a *de novo* hearing before a different Judge, with leave for him to participate in the proceedings and file his replies. That failing, he asks that the Judgment be set aside on the merits or, in the event that it is maintained, that the award of moral damages be vacated.

Ms. Thweib and Ms. Al-Hasanat's Answer

13. Ms. Thweib and Ms. Al-Hasanat submit that the UNRWA DT did not err when it refused to allow the Commissioner-General to participate in the proceedings. Its actions were in accordance with the Rules of Procedure. Had they been even one day late, their cases would have been dismissed as time-barred; as such, they contend that it is right and proper that the Commissioner-General is held to the same strict standard.

14. On the merits of the Judgment, they submit that the UNRWA DT did not err. Its evaluation of the appropriate due process protection to apply in the absence of adequate protection in the UNRWA internal legislation was based on the International Covenant on Economic, Social and Cultural Rights, as adopted by the General Assembly. Ms. Thweib and Ms. Al-Hasanat understood they were witnesses when they cooperated with the investigation and were never notified that they had become subjects of investigation. The UNRWA DT rightfully found this to be a breach of their rights.

15. Ms. Thweib and Ms. Al-Hasanat argue that the UNRWA DT did not err in fact or in law in finding that the facts on which they were sanctioned were not established. They did not breach any Agency regulations by participating in a peaceful two-hour sit-in, but in any event, their rights of due process were so violated by the fact they were not told they were subjects of the investigation and were not given the investigation report against them, that the procedure was inherently flawed.

16. They also argue that the UNRWA DT properly ordered moral damages.

17. Ms. Thweib and Ms. Al-Hasanat ask the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

18. As a “preliminary issue”, the UNRWA DT decided that the Commissioner-General had “failed to satisfy the Tribunal that his failure to comply with the mandatory requirement that his Reply must be submitted within 30 calendar days under Article 6(1) is excusable and that leave should be granted for [the Commissioner-General] to take part in the proceedings”. Thereupon, the UNRWA DT ruled that the Commissioner-General was not entitled to take part in the proceedings and went on to consider and determine the substantive merits of the claims, based solely on the evidence and submissions of the Applicants, without giving the Commissioner-General an opportunity to answer the case against him, notwithstanding that the facts and law were in dispute. The UNRWA DT allowed the claims of the Applicants and ordered the Commissioner-General to pay moral damages of USD 6,000 to Ms. Al Hasanat and USD 3,000 to Ms. Thweib.

19. Article 6(1) of the UNRWA DT Rules of Procedure (Rules) provides:

The Respondent’s reply shall be submitted within 30 calendar days from the date of receipt of the application by the Respondent in one signed original together with annexed documents, which may be electronically transmitted. The Respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings except with the leave of the Tribunal.

20. Article 14 of the Rules gives the UNRWA Dispute Tribunal the discretion to make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties.

21. Under Article 30 of the Rules, the UNRWA DT may shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require.

22. Before reaching its decision to exclude the Commissioner-General, the UNRWA DT considered at some length his long-standing failure to file replies within the time limits prescribed by the Rules. The UNRWA DT acknowledged that in the past it had “waived the time limit under Article 6(1) of the Rules of Procedure because it was in the interest of justice to do so given the difficulties faced by the Agency in dealing with a huge backlog of cases inherited from the former system of internal justice”.² However, the UNRWA DT in the

² Impugned Judgment, para. 19.

instant case refused to apply the previous policy relating to the backlog of appeals, holding that “[t]here is nothing in the explanations and arguments advanced by the [Commissioner-General] in these cases to distinguish them from the scores of other cases in which the [Commissioner-General] has been in default” and that “[a] request for an extension of time or a waiver of the time limits under Article 6 of the Rules of Procedure must contain an explanation as to why, in the particular case, the time limit of 30 days has been exceeded”.³

23. The discretion afforded the UNRWA DT under Article 14 is not one-sided; it refers to both parties. Nowhere in its Judgment did the UNRWA DT consider the impact on the fair trial rights of the Commissioner-General of refusing to allow him to participate in the proceedings. The UNRWA DT’s consideration of the right to due process was confined to the rights of the Applicants.

24. Deciding the cases only on the evidence and submissions of the Applicants without giving the Commissioner-General a chance to be heard has resulted, in our view, in a miscarriage of justice. Due process required that the Commissioner-General be given an opportunity to present his case. Whatever prejudice such a decision might have caused the Applicants could not compare in magnitude with the prejudice caused to the Commissioner-General by not allowing him to be heard.

25. The Appeals Tribunal finds that the UNRWA DT’s exclusion of the Commissioner-General from participating in the proceedings was a clear violation of due process such as to affect the decision of the case, which must result in the Judgment being annulled and the cases remanded for a hearing *de novo* before a different Judge.

26. It is thus not necessary to consider the other grounds of the appeal.

Judgment

27. The appeal is allowed in part. The Judgment of the UNRWA DT is set aside and the cases are remanded for hearing *de novo* before a different UNRWA DT Judge, with leave for the Commissioner-General to participate in the proceedings and file a reply in each case.

³ *Ibid.*, para. 24.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar