



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

Judgment No. 2014-UNAT-482

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

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Richard Lussick Judge Luis María Simón
Case No.:	2014-556
Date:	17 October 2014
Registrar:	Weicheng Lin

Counsel for Mr. Abdullah:	Self-represented
Counsel for Commissioner-General:	Anna Segall

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal has before it an appeal filed by Mr. Mohammad Mustafa Abdullah against Judgment No. UNRWA/DT/2013/037/Corr.01, 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, respectively) on 22 October 2013 in the case of *Abdullah v. Commissioner-General of UNRWA*. Mr. Abdullah appealed on 6 January 2014 and the Commissioner-General of UNRWA (Commissioner-General) answered on 18 April 2014.

Facts

2. The following facts are taken from the UNRWA DT Judgment:¹

... On 17 September 1992 the Applicant commenced employment with the Respondent as a Teacher at Grade 6, Step 1 in the Irbid area, Jordan. At the material time, the Applicant was employed as a Teacher, Grade 10, Step 12, at Irbid Town Preparatory Boys School (“ITPB School”). The Applicant is currently employed as a Teacher at Grade 10, Step 13 at Husn Camp Preparatory Boys School No. 1 (“HCPB School”).

... By memorandum dated 27 August 2011, the Head Teacher (“HT”) at ITPB School filed a complaint with the Chief Area Office, Irbid (“CAO/I”) against the Applicant concerning incidents that had allegedly taken place on 23 and 24 August 2011. The HT alleged that, after a meeting with teaching staff (including the Applicant) on 23 August 2011 about leave and the allocation of classes amongst Arabic teachers at ITPB School, the Applicant hit the table in disagreement. The HT also alleged that the Applicant refused the lighter workload of 25 periods which had been offered to him and claimed he needed more leave because he worked very hard.

... On 5 September 2011, the Applicant, the Area Education Officer, Irbid (“AEO/I”) and the CAO/I met in the CAO/I’s office to discuss the HT’s complaint. The complaint was read to the Applicant who denied its contents orally. When the Applicant was asked to put his reply in writing, he refused and said he would do it at home.

¹ Impugned Judgment, paras. 2-17 (internal footnotes omitted).

... By letter to the Director of UNRWA Operations, Jordan (“DUO/J”) dated 7 September 2011, the Applicant raised concerns regarding the neutrality and accuracy of the “*verbal investigation*” procedures into the HT’s complaint. The alleged “*verbal investigation*” was the meeting [of 5 September 2011].

... By email dated 7 September 2011, the CAO/I wrote to the Legal Counsel of UNRWA – Jordan (“Legal Counsel”) explaining that he and the AEO/I, after speaking with the Applicant on 5 September 2011, established a Fact Finding Committee (“FFC”) to look into the HT’s complaint. On 7 September 2011, the FFC met with a number of teachers and statements were taken. The FFC was composed of two area staff members. The CAO/I closed his letter by recommending that the Agency establish “a board of investigation” to address the HT’s complaint and, pending the results of the investigation, to transfer the Applicant to a vacant post at Waqqas School.

... On 8 September 2011, Legal Counsel replied to the CAO/I explaining that, based on the FFC’s interviews, misconduct had not taken place concluding:

“It is our belief that rather than a matter to be investigated, this is a matter that is under your discretionary authority as the manager to handle ... If you feel that it is best to transfer a staff member to secure “the highest standards of efficiency, competency and integrity” pursuant to Area Staff Regulation 4.3, it is within your managerial discretion to determine if this situation merits a transfer based upon those considerations.”

... By memorandum dated 12 September 2011, the CAO/I informed the Applicant as follows:

“As you are fully aware [sic], a written complaint was received from your supervisor on 27.8.2011, in which he stated that your attitude and behavior towards him during the meeting which was attended by all teachers of the school held on 23.8.2011 was subject of criticism.

The subject complaint indicates clearly that the relationship between you and the HT of the school has been negatively affected and thus would adversely affect [sic] the performance level expected from you.

In compliance with Area Staff Regulation No. 4.3 which states “Due regards [sic] shall be paid in the appointments, transfer and promotion of staff to the necessity for security [sic] the highest standards of efficiency, competency and integrity”, given the unhealthy work relation resulted from the above incident and the high potential conflict in the school. It has been decided to transfer you from your present post to the only nearest vacancy post available at Husn Camp Prep B/School No. 1 (post No. 52381/1101), as of Tuesday 13.9.2011.

I hope this transfer will be in the interest of your work.”

... By letter to the DUO/J dated 20 September 2011, the Applicant objected to the decision to transfer him to HCPB School, stating:

“The action taken against me on 12 September 2011 is [an] arbitrary action. This arbitrary decision is only based on allegations of the head teacher against me, and implicates that there is a conflict with the head teacher in a way that affected [sic] my performance. This implication is baseless, unfair and prejudiced. The truth is that my legitimate conflict with the head teacher is about the justice and transparency of distributing the classes’ quota ...

My legal rights were breached during the stages of the immature investigation, I did not have the chance [illegible] to provide my written statement and issuing statements that are serious, I was also denied from a transparent investigation based on [illegible].”

... On 10 October 2011, the Applicant submitted to the DUO/J a request for administrative review concerning the decision to transfer him to HCPB School.

... By letter dated 12 October 2011, the DUO/J responded to the Applicant as follows:

“Having thoroughly reviewed your complaints and concerns addressed in the said letters, I would like to point out the following in response thereto:

- With respect to your transfer, it has been brought to my attention that there is a conflict between you and the Head Teachers of your former school; Irbid Town Preparatory Boys School. This conflict has created an unhealthy atmosphere at the school and has detracted from the learning environment at the school. Therefore, it is apparent that the decision to transfer you was taken in the interest of the Agency and it is pursuant to Area Staff Regulations No. 1.2 and 4.3 to avoid any further escalation of the conflict between you and the Head Teacher.
- Due regard was paid to do the transfer within Irbid Area in order to avoid you any hardship as a result of that.
- As for your request to establish a board of inquiry to look into your case with your former Head Teacher, our Legal office thoroughly reviewed your request in the light of your statement, the Head Teacher’s statement and other witness’s [sic] statements and concluded that the board would not yield any further evidence.

Based on the above, I maintain that the decision of your transfer was in the line of the Agency’s Regulations and Rules and should stand.”

... By letter to the CAO/I dated 17 October 2011, the Applicant inquired about the nature of the transfer, specifically whether it was “technical, administrative, or disciplinary”. He also inquired about the length of time that he was expected to spend at the new school and whether he would be eligible to be considered for reassignment to ITPB School in the future.

... By letter dated 20 October 2011, the CAO/I responded to the Applicant, referring him to his letter dated 12 October 2011 and stating that “fairness, consistency and transparency” would guide any future decision regarding a request by the Applicant for transfer to ITPB School.

... On 22 November 2011, the Agency agreed to an official mediation.

... According to an email from Mediation Services, a mediation attempt took place between the Applicant and the Respondent on 18 December 2011. It was not successful.

... On 12 March 2012, the Applicant filed his application with the UNRWA DT.

... On 12 October 2012, the Respondent submitted its reply.

Procedural history before the UNRWA Dispute Tribunal

3. By Order of 24 May 2012, the UNRWA DT denied Mr. Abdullah’s request for an expedited consideration of his case. On 15 July 2012, Mr. Abdullah filed a Motion requesting that the Tribunal preclude the Respondent from participating in the proceedings.²

4. On 18 October 2012, Mr. Abdullah requested leave to file observations on the Commissioner-General’s reply. He was given until 23 October 2012 to file his observations and this leave was extended, at Mr. Abdullah’s request, on two occasions. Also on 18 October 2012, the UNRWA DT inquired of the Commissioner-General if there had been an investigation and requested that if so, it be provided with an *ex parte* copy by 19 October 2012. The Commissioner-General advised the Tribunal that no investigation had taken place but that the FFC had taken statements, which had been duly provided to the Tribunal, *ex parte*. Mr. Abdullah was advised in writing on 23 October 2012 that there was no investigation report.

² This Motion was dealt with in the course of the final Judgment rendered by the UNRWA DT (para. 38).

5. On 22 October 2012 Mr. Abdullah requested the UNRWA DT to translate the Commissioner-General's reply from English into Arabic and further requested "a translation of the investigation file", including witness statements taken by the FCC. The UNRWA DT understood the request as Mr. Abdullah seeking that the witness statements (which were all in Arabic) be translated into English.

6. On 23 October 2012, the UNRWA DT declined Mr. Abdullah's request for a translation of the Commissioner-General's reply. However, on the same date, the documents pertaining to the interviews and statements of witnesses (which were in Arabic) were disclosed to Mr. Abdullah, with the names of witnesses and staff members redacted for privacy considerations.

7. By Order dated 29 May 2013, Mr. Abdullah was provided with the minutes (in Arabic) of the meetings held by the HT on 23 and 24 August 2011.

8. On 5 June 2013, Mr. Abdullah filed his observations on the Commissioner-General's reply and the UNRWA DT provided a courtesy copy of its translation into English of Mr. Abdullah's observations to the parties on 2 July 2013.

9. On 25 July 2013, following a request from Mr. Abdullah dated 9 June 2013, the UNRWA DT transmitted courtesy copies to the parties of its English translation of the HT's complaint and the 7 September 2011 interviews of witnesses which had been conducted by the FCC. On 31 July 2013, the parties were furnished with courtesy copies of the UNRWA DT's translation into English of the minutes of the meetings of 23 and 24 August 2011. On 1 August 2013, Mr. Abdullah filed his observations on the Tribunal's English translations of the witness statements.

The UNRWA DT Judgment

10. The UNRWA DT dismissed Mr. Abdullah's claims, finding that the Commissioner-General's decision to transfer him to another school was not a disciplinary measure. In the UNRWA DT's opinion, the Commissioner-General "acted in the interest of the Agency, which serves the school and its students, by transferring [Mr. Abdullah] to another school",³ and Mr. Abdullah "wrongly interpreted or wrongly assumed that the

³ Impugned Judgment, para. 61.

transfer was a disciplinary measure for misconduct”.⁴ Furthermore, the UNRWA DT found that “[t]he record indicates that the transfer did not affect [Mr. Abdullah]’s contractual rights, conditions of employment or salary”.⁵ The UNRWA DT also dismissed Mr. Abdullah’s further claims that the transfer was motivated by bias and tainted by irregularities, finding that Mr. Abdullah “failed to submit any evidence, beyond mere statements, that the [Commissioner General]’s decision to transfer him to another school in the same Irbid area at the same level and with no pecuniary loss was tainted by bias, motivated by extraneous factors, or was flawed by procedural irregularity or error of law”.⁶

11. Moreover, the UNRWA DT held that Mr. Abdullah failed to prove his claim that he suffered stress or incurred financial expense as a result of his transfer such as would merit an award of compensation.

Submissions

Mr. Abdullah’s Appeal

Errors of procedure

12. Mr. Abdullah submits that the UNRWA DT committed errors of procedure in:

(i) allowing the Commissioner General to take part in the proceedings even though he had filed his reply outside of the prescribed time limit. Mr. Abdullah contends that the failure of the Commissioner-General to comply with the relevant time limits took place at the initiative of the UNRWA DT, “under its oversight and in its full view”. He requests that the Appeals Tribunal find that the Commissioner-General’s delay in replying to his application, and the legitimizing of that course of action “amount[ed] to justice delayed and, hence, justice denied”;

(ii) refusing to provide Mr. Abdullah with an Arabic translation of the Commissioner-General’s reply (which was in English). Mr. Abdullah maintains that this refusal undermined his legal position as enshrined in Article 6 of the Universal Declaration of Human Rights.⁷ He requests the Appeals Tribunal to find that

⁴ *Ibid.*

⁵ Impugned Judgment, para. 62.

⁶ Impugned Judgment, para. 68.

⁷ “Everyone has the right to recognition everywhere as a person before the law.”

the denial of a translation infringed the principle of equal opportunity and equality before the law, guaranteed by Article 7 of the Universal Declaration of Human Rights. He argues that Article 11 of the Universal Declaration of Human Rights contains “an implicit statement that translation is one of the necessary guarantees of the individual in court”. He further invokes the provisions of Article 14, paragraph 3(f) of the International Covenant on Civil and Political Rights;

(iii) keeping confidential the names of witnesses and staff members. Mr. Abdullah contends that this procedure infringed his rights; and

(iv) failing to hold an oral hearing. Mr. Abdullah submits that a hearing would have been appropriate in order to determine and define which issues deserved further attention in his case and he maintains that the failure to hold a hearing impaired the ability of the UNRWA DT to address issues of real or perceived conflict of interest between certain individuals. He contends that a hearing was necessary and essential in order to exercise transparency and would have enabled the UNRWA DT to ensure that the principle of accountability prevailed. The UNRWA DT’s failure in this regard was exacerbated by a failure to address those issues on the basis of the documents.

Errors on questions of fact

13. Mr. Abdullah submits that the UNRWA DT erred in establishing certain facts in a manner that was “irrational and illogical”. The claimed factual errors are:

(i) the UNRWA DT minimized the claims set out in the HT’s complaint;

(ii) the UNRWA DT minimized the contents of an e-mail dated 7 September 2011 from the Area Officer to Legal Counsel;

(iii) the UNRWA DT failed to raise or address an important fact of the case, namely, the meeting between Mr. Abdullah and the Education Officer and the CAO/I in the latter’s office. The UNRWA DT erred in fact (and in law) when it considered that meeting to be informal, in circumstances where a formal written complaint was in place since 27 August 2011. He requests that the Appeals Tribunal find that: an investigation as contemplated by General Staff Circular No. 06/2010 on the Prohibition of Discrimination, Harassment – Including Sexual Harassment – and Abuse of Power (the

Circular) did take place; that that investigation was not properly conducted; and that there was as failure on the part of the Commissioner-General to inform Mr. Abdullah of the outcome of the investigation. Mr. Abdullah submits that he was only informed of a measure taken on the basis of the HT's complaint, and not on the basis of the outcome of the investigation. Moreover, he contends that the UNRWA DT erred in failing to find that the reference to "facts" in correspondence from the Area Officer to the Education Officer on 5 September 2011 amounted to procedural violations, prejudice and abuse of power, in circumstances where the "facts" at that time were mere claims and allegations; and

(iv) the UNRWA DT erred in fact in its determination that the relationship between Mr. Abdullah and the HT was "tense". He submits that the Tribunal's finding in this regard was based on an inaccurate translation of the contents of his letter of 20 September 2011 to the Director of UNRWA Operations. Mr. Abdullah's views on issues of leave and allocation of work, while differing from those of the HT, did not constitute a legitimate reason to transfer him. The transfer amounted to an arbitrary interference with his privacy and family, an attack upon his honour and reputation, contrary to the safeguards provided in Article 12 of the Universal Declaration of Human Rights.

The UNRWA DT'S failure to exercise its jurisdiction

14. Mr. Abdullah submits that the UNRWA DT failed to exercise the jurisdiction vested in it pursuant to Article 11 of its Statute⁸ in:

- (i) failing to direct the Commissioner-General to correct the internal record in circumstances where the UNRWA DT found that the Commissioner-General has erroneously translated an Arabic term;
- (ii) failing to direct that the Commissioner-General correct its internal record and remove comments about Mr. Abdullah's performance following the UNRWA DT's finding that those comments were speculation which was inappropriate and unsubstantiated;
- (iii) failing to address the Commissioner-General's flagrant violation of Mr. Abdullah's rights under Staff Rule 111.2, paragraph 5; and

⁸ Mr. Abdullah erroneously refers to Article 14 of the UNRWA DT Statute. It is presumed that he purports to rely on Article 11(4) of the Statute.

(iv) declining to award compensation. Mr. Abdullah submits that there was no requirement for him to submit medical evidence, in light of the fact that he had incurred moral damages and that his reputation had been damaged. Further, the UNRWA DT erred in not compensating him for the expenses associated with his transfer.

Errors on questions of law

15. Mr. Abdullah contends that the UNRWA DT erred in law in:

(i) not recognizing the guide of the Department of Internal Oversight Services (DIOS) to conducting misconduct investigations as a relevant administrative issuance; and

(ii) finding that Mr. Abdullah's transfer was not a disciplinary measure, a finding which Mr. Abdullah says is contradicted by the UNRWA DT's finding at paragraph 58 of its Judgment.

The UNRWA DT's actions in excess of its jurisdiction

16. Mr. Abdullah argues that the UNRWA DT exceeded its jurisdiction in:

(i) determining, essentially, that the relationship between Mr. Abdullah and the HT was untenable; and

(ii) negating Mr. Abdullah's complaint concerning his transfer by finding that Mr. Abdullah had previously applied for the position of head teacher in schools outside of the Irbid area. He submits that there is no basis for the comparison made by the UNRWA DT because the positions Mr. Abdullah applied for would have provided him with financial and other benefits, whereas the transfer imposed upon him brought him professional disgrace.

The Commissioner-General's Answer

The claimed errors of procedure

17. The Commissioner-General submits that the UNRWA DT properly exercised its discretion in admitting the reply in accordance with the jurisprudence of the Appeals Tribunal.

18. There is no obligation on the UNRWA DT to provide Mr. Abdullah with an Arabic translation of the Respondent's reply. Moreover, the failure to provide such a translation was not prejudicial to him since he filed observations on that reply which were duly considered by the UNRWA DT in the course of its Judgment.

19. Furthermore, the imposition by the UNRWA DT of confidentiality regarding the names of witnesses and staff members, at the Commissioner-General's request, was within that Tribunal's discretion pursuant to Article 13 of its Rules of Procedure. The Commissioner-General further submits that the UNRWA DT properly exercised its discretion in declining to hold an oral hearing.

Alleged errors of fact

20. With regard to the UNRWA DT designation of the meeting of 5 September 2011 as informal, the Commissioner-General submits that Mr. Abdullah has not met the standard required by the Appeals Tribunal for it to render the UNRWA DT's decision manifestly unreasonable. In any event (irrespective of the status of the meeting), the Commissioner-General concluded that there was no misconduct on the part of Mr. Abdullah.

21. Similarly, Mr. Abdullah had not put forward any argument to suggest that the UNRWA DT's finding that the relationship between him and the HT was tense led to a manifestly unreasonable decision. The available documentary records made it reasonable for the UNRWA DT to infer that the relationship between Mr. Abdullah and the Head Teacher was tense. In this regard, reliance is placed on Mr. Abdullah's letter to the Executive Director of 20 September 2011.

The alleged failure to exercise jurisdiction

22. With regard to Mr. Abdullah's complaint that the UNRWA DT should have changed the wording of the contested decision, the Commissioner-General argues that the UNRWA DT is not clothed with jurisdiction to substitute or make amendments to impugned administrative decisions. Rather, the limit of its jurisdiction is set out in Article 10(5) of its Statute.

23. The UNRWA DT properly declined to order compensation for Mr. Abdullah as he had not submitted evidence of moral damage or financial harm. In this regard, the UNRWA DT properly applied the guidelines outlined in the Appeals Tribunal jurisprudence. Furthermore, Mr. Abdullah made no claim regarding the cost of his commute before the UNRWA DT.

Alleged errors of law

24. The UNRWA DT did not err in law in determining that the DIOS guide on best practice in conducting investigations did not form part of Mr. Abdullah's contract as the guidelines did not have the legal authority of a staff regulation, rule or other administrative issuance. The UNRWA DT correctly referenced the legal framework relating to misconduct and correctly concluded that Mr. Abdullah's transfer was not a disciplinary measure. Moreover, the Tribunal correctly concluded that the transfer was not impugned by any abuse of discretion or misuse of authority.

The alleged excess of jurisdiction

25. The inferences made by the UNRWA DT, having appraised the evidence, and the consequent legal and factual reasoning arrived at by that Tribunal fell entirely within its competence and jurisdiction.

Summary

26. The Commissioner-General requests the Appeals Tribunal to reject each of Mr. Abdullah's pleas and to dismiss his appeal in its entirety.

Considerations

27. Mr. Abdullah requested an oral hearing, but the Appeals Tribunal declined the request being satisfied that the issues for deliberations in the appeal are sufficiently set out in the parties' submissions.

28. Mr. Abdullah raises several grounds of appeal, namely, the UNRWA DT committed errors of procedure; erred on questions of fact; failed to exercise the jurisdiction vested in it; acted in excess of jurisdiction; and erred on questions of law.

*Claimed errors of procedure on the part of the UNRWA DT**(i) The admission of the Commissioner-General's reply*

29. The issue to be determined by the Appeals Tribunal is whether the UNRWA DT erred in allowing the Commissioner-General to participate in the proceedings even though his reply was filed more than six months after the due date. Mr. Abdullah submits that granting the Commissioner-General permission to participate amounted to “justice denied” to him.

30. In *Chahrour*, we stated: “It is now settled that the Dispute Tribunal may, under its Rules, permit the Respondent to file a tardy reply and to participate in the proceedings. In the past, this Tribunal has urged the UNRWA DT to act transparently when it allows such participation.”⁹

31. In the present case, Mr. Abdullah’s request to preclude the Commissioner-General from participating in the proceedings was addressed by the UNRWA DT in the course of its Judgment. Noting that there was no specific provision in Article 6 of the Rules of Procedure for an applicant to request a ruling precluding participation by a respondent, and, with reference to the powers of the UNRWA DT itself pursuant to articles 14 and 30 of its Rules of Procedure, the UNRWA DT stated:¹⁰

Although not condoning the Respondent’s failure to file a motion to extend the time to file his reply before the 30-day deadline expired, nevertheless the Tribunal fails to see how justice would be served if the Tribunal were to render its Judgment on the merits of the case without having the submissions of both parties, or if it were to argue only procedural issues. The United Nations Appeals Tribunal [...] in *Bertucci* 2011-UNAT-121 noted that the principle of respect for the right to a defence and the right to an effective remedy before a judge is recognised by Article 8 of the Universal Declaration of Human Rights. Implicit in this recognition is the point that a Tribunal should exercise its discretion with caution when it comes to excluding a party from participating in the proceedings, even when the Tribunal may have the authority to do so. The Tribunal finds that it would be in the interests of justice and appropriate for a fair and expeditious disposal of the case for the Tribunal to receive the full chronicle of the case from both parties in order to render a fair and comprehensive

⁹ *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 37, quoting *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-321.

¹⁰ Impugned Judgment, para. 42.

Judgment that would do justice to the parties and to the system of administration of justice in general rather than exclude a party on a procedural basis.

32. We are satisfied that the approach outlined above correctly reflects the considerations which the UNRWA DT must take account of when exercising its discretion to admit a late reply. Furthermore, in this regard, we have stated: “[T]he UNRWA DT has, in principle, the discretion to accept UNRWA’s late reply in circumstances where UNRWA has not filed a motion seeking leave to do so and without *proprio motu* ordering UNRWA to file a reply”.¹¹

33. The arguments put forward by Mr. Abdullah do not persuade us that the UNRWA DT committed any error in allowing the late reply, particularly in circumstances where within six days of the filing of the reply, Mr. Abdullah sought leave to file observations on the reply. The observations were ultimately filed on 5 June 2013 and addressed in detail matters relied on by the Commissioner-General in response to Mr. Abdullah’s application. Thus, in the absence of persuasive evidence of prejudice, we find no merit in this ground of appeal.

(ii) The UNRWA DT’s failure to translate the reply into Arabic

34. Mr. Abdullah submits that pursuant to the request made by him, the UNRWA DT should have provided him with an Arabic translation of the Commissioner-General’s reply. In support of this argument, he cites Article 11 of the Universal Declaration of Human Rights and Article 14, paragraph 3(f) of the International Covenant on Civil and Political Rights as conferring on him the entitlement to the requested translation.

35. The provisions relied on by Mr. Abdullah, however, relate to the rights of an accused person in criminal matters and, as such, have no application to the present appeal.

36. On the particular facts of this case, the Appeals Tribunal finds that no prejudice was suffered by Mr. Abdullah by the UNRWA DT declining to translate the reply into Arabic. We so find in circumstances where, as already referred to, almost immediately Mr. Abdullah requested leave to file his observations, a course which indicates to the Appeals Tribunal that at that point in time Mr. Abdullah had sufficient understanding of the contents of the reply to wish to make substantive observations thereon, which he ultimately did. His observations

¹¹ *Chaaban v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-363, para. 18.

were duly considered by the UNRWA DT, as reflected in paragraphs 45 to 51, 56 and 57 of its Judgment.

37. There is, however, one matter on which we wish to comment. Mr. Abdullah observes that the Commissioner-General's reply, submitted on 12 October 2012, came within thirty days after the UNRWA DT provided the parties with an English translation of Mr. Abdullah's application, which was filed in Arabic. Mr. Abdullah suggests that this was more than a coincidence in time, and that, in effect, the Commissioner-General was awaiting the UNRWA DT's English translation of his application before filing his reply. He argues that the Commissioner-General was afforded "special treatment" by the UNRWA DT.

38. The Commissioner-General gave his reasons for the tardiness of his reply¹² and the Appeals Tribunal accepts that it was in this context that the UNRWA DT exercised its discretion to extend the time. Therefore, the Appeals Tribunal does not find any persuasive evidence that the Commissioner-General was biding his time until an English translation of Mr. Abdullah's application was provided by the UNRWA DT. That being said, as a matter of general principle, it is incumbent on the UNRWA DT in circumstances akin to the present case to put itself on inquiry, in the context of exercising its discretion to admit a late reply, as to whether there is any evidence to link the Commissioner-General's tardiness to measures being adopted by the UNRWA DT for its own internal use. At all relevant times, it is incumbent on the UNRWA DT to ensure, in the interest of due process and transparency, even-handedness in its treatment of the parties.

(iii) The confidentiality issue

39. Having reviewed the parties' submissions on this issue, the Appeals Tribunal finds no merit in Mr. Abdullah's argument. We are not persuaded that either the imposition of confidentiality by the UNRWA DT or its failure to lift the confidentiality order it made impacted on Mr. Abdullah's due process entitlement, in all the circumstances of this case.

¹² In support of his request to participate in the proceedings, the Commissioner-General adduced the backlog of cases carried over from the former internal justice system as well as the fact that due to lack of funding, the Department of Legal Affairs disposes of only one legal officer assigned to staffing matters.

(iv) The failure to hold an oral hearing

40. Mr. Abdullah contends that the absence of an oral hearing and the UNRWA DT's failure to call witnesses infringed his due process rights. We are not so persuaded. Article 11(1) of the Rules of Procedure of the UNRWA DT provides that "[t]he Judge hearing a case may hold oral hearings".

41. The record in this case indicates that the UNRWA DT gave due consideration to the request for an oral hearing. In particular, the Tribunal, at paragraph 70 of its Judgment, set out its rationale for exercising its discretion against an oral hearing. Mr. Abdullah has not adduced grounds to show that this discretion was exercised in such manner as to affect the outcome of the case, as required by Article 2(1)(c) of the Appeals Tribunal's Statute.

The claimed excess of jurisdiction

42. The Appeals Tribunal finds merit in one of Mr. Abdullah's arguments under this head. We hold that the factual matrix which was for adjudication by the UNRWA DT did not permit of the finding, set out in footnote 13 of its Judgment, that Mr. Abdullah had "an unhealthy working relationship with other colleagues". We are fortified in our conclusion in this regard by the contents of the CAO/I's letter of 12 September 2011 (setting out the reasons for the transfer) which makes no reference to Mr. Abdullah's relationship with his fellow teachers.

43. Accordingly, the UNRWA DT exceeded its jurisdiction in making the finding it did.

The claimed errors of fact and law and failure to exercise jurisdiction

44. Mr. Abdullah contends that the UNRWA DT made errors of fact, erred in law and failed to exercise its jurisdiction in:

- a) determining that the decision to transfer him was not a disciplinary measure; and
- b) determining that the decision to transfer was properly made, pursuant to the relevant statutory provisions.

45. It is common case that the circumstances which gave rise to the application before the UNRWA DT, and the appeal before this Tribunal, emanated from the written complaint filed by the HT on 27 August 2011. The complaint was put to Mr. Abdullah verbally on

5 September 2011 and he denied its content. Following the complaint, an FFC was established and by 7 September 2011, this committee had taken statements from a number of witnesses. The establishment of the FFC evidences an intention to commence an investigation.

46. By e-mail dated 7 September 2011, the CAO/I recommended to UNRWA that it establish “a board of investigation” to address the HT’s complaint and, pending the outcome of the investigation, that Mr. Abdullah be transferred to a neighboring school.

47. Mr. Abdullah argues that the UNRWA DT erred in fact and law when it concluded that the meeting between the CAO/I and the Area Education Officer and Mr. Abdullah on 5 September 2011 was an informal meeting. We agree with Mr. Abdullah and are inclined to the view that the meeting was not the informal mechanism contemplated by paragraph 16 of the Circular.

48. Whether or not the 5 September 2011 meeting was formal or informal is to a great extent moot, in light of the procedures which the CAO/I adopted following the exchange of correspondence between him and UNRWA’s Legal Counsel on 7 and 8 September 2011 respectively.

49. Whatever the legal status of the fact-finding exercise and enquiry which was conducted between 27 August 2011 and 8 September 2011, it is clear from the legal advice provided to the CAO/I on 8 September 2011 that misconduct on the part of Mr. Abdullah had not occurred.

50. The effect of the legal advice was that the nascent investigation was not the appropriate mechanism to deal with the issues of contention that had arisen between the HT and Mr. Abdullah.

51. In the course of his submission to the Appeals Tribunal, Mr. Abdullah cites numerous breaches of General Staff Circular No. 06/2010 concerning the afore-mentioned investigation, initiated following the HT’s complaint. Whatever the merit of Mr. Abdullah’s grievances in this regard, at the end of the day, the nascent investigation, insofar as it may have purported to investigate alleged misconduct, was quite properly halted and from 8 September 2011, Mr. Abdullah was not the subject of a process which could lead to him being charged with a disciplinary offence or, if proven, result in a disciplinary sanction, as

provided for in Area Staff Regulation 10.2. Consequently, Mr. Abdullah's grievance with the process which took place between 27 August 2011 and 8 September 2011 is rendered moot. In so far as the UNRWA DT concluded likewise, it did not err in law or fact.

52. It is the case, however, that the initiation of the HT's complaint had consequences for Mr. Abdullah, namely, his transfer to another school.

53. On the issue of the transfer, the UNRWA DT opined: "The Respondent does not claim that the Applicant has committed any misconduct, any willful or irresponsible conduct, or that he has willfully failed to perform assigned duties or to carry out specific instructions, for which a disciplinary measure would have been imposed. Instead the transfer was done under Area Staff Regulation 4.3."¹³

54. UNRWA's authority to transfer staff was, in the UNRWA DT's opinion, to be found in the United Nations Secretariat Administrative Instruction on Staff Selection System (ST/AI/2010/3) which states in Section 2.5:

Head of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

55. The UNRWA DT went on to conclude that it was within the "managerial discretion" of the CAO/I to determine if Mr. Abdullah should be transferred and the Tribunal concluded that he was properly transferred. The UNRWA DT's underlying reasoning is to be found at paragraph 67 of its Judgment.

56. Having regard to the overall circumstances of this case, the core issue for this Tribunal to determine is whether the UNWRA DT erred in law or fact in finding that the CAO/I's discretion was properly exercised.

57. Mr. Abdullah takes issue with the UNRWA DT's conclusion that the relationship between him and the HT was "tense". Having regard to the scope of the material available to the UNRWA DT, including Mr. Abdullah's correspondence of 20 September 2011 and the admissions contained therein, we do not find that the UNRWA DT erred manifestly in

¹³ Impugned Judgment, para. 57.

reaching its conclusion on the nature of the relationship between Mr. Abdullah and the school principal.

58. This relationship was the starting point for the CAO/I's exercise of discretion. Area Staff Regulation 1.2 provides:

Staff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency in or outside the area of its operations. The Commissioner-General may establish special conditions of service for staff members assigned to any of the activities or offices of the Agency outside its area of operations. Staff members are responsible to the Commissioner-General in the exercise of their functions. The whole time of [sic] staff members shall be at the disposal of the Commissioner-General, who will establish a normal working week.

Area Staff Regulation 4.3 stipulates as follows: "Due regard shall be paid in the appointment, transfer and promotion of staff to the necessity for securing the highest standards of efficiency, competence and integrity."

59. As a matter of general principle, in exercising its judicial review, the UNRWA DT will not lightly interfere with the exercise of managerial discretion in matters such as staff transfers. In *Kamunyi*, the Appeals Tribunal has stated: "[I]t is within the Administration's discretion to reassign a staff member to a different post at the same level and [...] such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member."¹⁴

60. However, as recognised by the UNRWA DT, managerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

61. While the Appeals Tribunal is satisfied to uphold the UNRWA DT's finding that Mr. Abdullah's allegation of bias was not substantiated, we find, however, that the UNRWA DT erred in law and made a manifest error of fact in determining that the transfer was free of infirmity.

¹⁴ *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194, para. 3. See also *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 58.

62. The infirmity which attached to the decision to transfer Mr. Abdullah was touched upon by the UNRWA DT in the course of its Judgment when it stated:

The Tribunal would like to further discuss the CAO/I's 12 September 2011 letter as it contains an ambiguous reference to the Applicant's performance. The letter states that the negative relationship between the Applicant and the HT "would adversely affect the performance level expected from you". The CAO/I appears to be speculating that the dispute may affect the Applicant's performance in the future. The Tribunal finds the CAO/I's reference to the Applicant's future performance inappropriate and unsubstantiated. The transfer was based on the Applicant's failure to sustain a good working relationship with the HT, not his performance. The Tribunal finds that it is unfair to presume that the Applicant's performance would be affected by any possible conflict as there is no record that the Applicant's performance was suffering.¹⁵

63. Thus, the UNRWA DT clearly recognized that the CAO/I imported into his decision an element of pre-judgment about Mr. Abdullah's future performance. As of 12 September 2011, no question arose concerning his performance as a teacher, the focus being solely on the extent of the dispute between him and the HT on policy matters and teaching assignments.

64. While the acknowledged dispute between Mr. Abdullah and the HT was a legitimate factor which the CAO/I could have regard to in exercising his discretion to transfer Mr. Abdullah, it is the considered view of the Appeals Tribunal that a transfer that was otherwise within the CAO/I's discretionary remit having regard to Area Staff Regulations 1.2 and 4.3, was tainted by this pre-judgment such that it took on the hallmarks of a disguised disciplinary sanction. The UNRWA DT erred in not so finding when considering whether Mr. Abdullah suffered moral injury as a result of the transfer.

65. Therefore, applying our jurisprudence in *Asariotis*,¹⁶ we find that the pre-judgment concerning Mr. Abdullah's future performance as a teacher was a breach of his terms and conditions of employment sufficient, of itself, to merit an award of moral damages. Having regard to all the circumstances of this case, we are of the view that the harm caused to Mr. Abdullah can be rectified by a compensatory award.

¹⁵ Impugned Judgment, para. 58.

¹⁶ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

66. Mr. Abdullah takes issue with the failure of the UNRWA DT to amend or rewrite the contested decision. Such a remedy is not within the statutory remit of either the UNRWA DT or this Tribunal. However, to afford Mr. Abdullah satisfaction for the unfounded comments concerning his performance extant on his personnel file, the Appeals Tribunal directs the remedy set out below.

67. By way of moral damages, we award Mr. Abdullah three months' net base salary for the moral injury sustained. Furthermore, as the contested decision forms part of Mr. Abdullah's personnel file, in light of our findings above, and to give solace to Mr. Abdullah, we hereby direct that a copy of this Judgment be placed on his file to negate the adverse implication concerning Mr. Abdullah's future performance inherent in the CAO/I's letter of 12 September 2011.

68. Mr. Abdullah seeks compensation for pecuniary damages for financial loss he says he incurred as a result of the transfer. Mr. Abdullah did not adduce evidence of such loss before the UNRWA DT. Consequently, his appeal on this ground is dismissed.

69. Mr. Abdullah's appeal against the Judgment of the UNRWA DT succeeds to the extent set out above. All other pleas are rejected.

Judgment

70. The Judgment of the UNRWA DT is vacated in part. Mr. Abdullah is awarded compensation in the amount of three months' net base salary. Payment is to be effected within 60 days of the date of this Judgment. Interest will accrue on the compensation award from the date of this Judgment at the current US Prime rate until payment is made. If not paid within 60 days, an additional five per cent shall be added to the US Prime rate until the date of payment.

71. A copy of this Judgment is to be placed in Mr. Abdullah's personnel file within two weeks of the issuance of the Judgment.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Simón

Entered in the Register on this 23rd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar