



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

Judgment No. 2021-UNAT-1124

Rami Othman
(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 Kanwaldeep Sandhu, Presiding
Judge Graeme Colgan
Judge John Raymond Murphy

Case No.: 2020-1442

Date: 25 June 2021

Registrar: Weicheng Lin

Counsel for Mr. Othman: Amer Abu-Khalaf, LOSA

Counsel for Commissioner-General: Rachel Evers

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The staff member in question, a former Senior Planning and Reporting Officer (the “Applicant”) with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA” or the “Agency”), had contested the Agency’s decision to deny his application for exceptional voluntary separation or “EVS” (the “Contested Decision”).
2. In Judgment No. UNRWA/DT/2020/037 (the “Judgment”), the UNRWA Dispute Tribunal (or “UNRWA DT”) rescinded the Contested Decision and awarded the Applicant an amount equivalent to his standard retirement benefits from 30 November 2018 less any separation benefit already paid following his resignation. The Agency appeals.
3. For reasons set out below, we dismiss the appeal.

Facts and Procedure

4. The Applicant joined the Agency on 15 July 2004 as Analyst Programmer, Grade 4A, on a fixed-term appointment (“FTA”) at Headquarters, Amman (HQA).
5. Following his request, the Agency granted the Applicant a Special Leave Without Pay (SLWOP) for six months, commencing on 1 July 2012 to allow him to work for another United Nations agency while maintaining his status as an UNRWA staff member. After several extensions of his SLWOP, on 31 July 2014, the Applicant was offered the post of Senior Financial Planning and Reporting Officer, Grade 18, at HQA. This was his last post at the Agency.
6. At the Applicant’s request, the Agency again granted him an SLWOP for one year, commencing on 1 December 2016, which was further extended until 30 November 2018. In a letter dated 31 October 2017 to the Applicant, the Human Resources Officer clarified the conditions for his SLWOP, namely the Applicant would be placed on SLWOP without “a lien to any post”, but with “a general right of return to UNRWA”, and “w[ould] not automatically be placed back on [his] post ... at the end of the approved SLWOP period”. If he should wish to return, he would be considered against available vacancies as any other internal applicant. The Agency would initiate actions to separate him from service, upon the expiry of his SLWOP, if no further extension to his SLWOP was requested and approved.

7. On 11 September 2018, the Agency circulated Area Staff Circular No. A/6/2018 on “Exceptional Voluntary Separation – All fields and HQs” (“ASC A/6/2018”). EVS was offered to area staff members holding an indefinite or FTA appointment, who may want to separate from the Agency in 2018 with the end of service benefits. Any area staff member may apply for EVS if s/he had at least 10 years of qualifying service, with at least 90 calendar days remaining on her or his contract as of the date of the EVS application. Paragraph 8 of ASC A/6/2018 lists six categories of staff members in descending order of priority for consideration if they should apply for an EVS. At that time, the Applicant was on a temporary indefinite appointment and otherwise met these criteria.

8. On 12 September 2018, the Applicant submitted a request for EVS as a staff member on SLWOP without a lien to his post.

9. On 31 October 2018, he submitted a request for the extension of his SLWOP until 30 November 2019.

10. On 7 November 2018, the Human Resources Services Officer (Entitlements) (“HRSO”) informed the Applicant that his request for the extension of his SLWOP to 30 November 2019 had been denied and that he should return to the post of Senior Planning and Reporting Officer before 30 November 2018.

11. On 25 November 2018, the Applicant requested review of the Agency’s decision not to grant his EVS request. By e-mail to the HRSO dated 29 November 2018, he indicated he had been verbally informed that his EVS application had been denied, and therefore he had tendered his resignation. He subsequently stated that he did so to “avoid any additional penalties or consequences result[ing] from post abandonment or absence from work”.

12. On 12 December 2018, the Agency accepted the resignation, effective 30 November 2018.

13. According to the Applicant, his post had been left vacant since December 2016, and it was not filled even after he had resigned.

14. At the UNRWA Dispute Tribunal, the Agency confirmed that in 2018, it received 26 applications for EVS from HQA staff members, of which 14 were approved and 12 were denied. All applications from staff members on SLWOP without liens, including the Applicant’s, were denied.

15. On 28 January 2019, the Applicant contested the decision to deny his EVS request to the UNRWA DT. The UNRWA DT ruled in his favour. It found that the Agency had failed to observe its own regulatory framework as set forth in Area Staff Rule (“ASR”) 109.15 and ASC A/6/2018, because being on SLWOP was not mentioned as a basis to deny an EVS application or as a reason to deprioritize certain EVS applications. The UNRWA Dispute Tribunal also rejected the Agency’s assertions that the Applicant’s post was considered as essential for the delivery of services to the Palestine refugees, and that any decision to grant EVS to a staff member was conditional upon the abolition of that staff member’s post, but the relevant department did not want to lose that post. The UNRWA DT noted that the Applicant did not occupy any UNRWA post while on SLWOP, and that again ASC A/6/2018 did not mention the abolishment of a staff member’s post as a condition for granting an EVS application. Having determined that the Agency had failed to act lawfully, reasonably, and fairly in its dealings with the Applicant, the UNRWA DT ordered rescission of the contested decision, payment of material damages equivalent to his standard retirement benefits minus any separation benefit already paid to him because of his separation upon resignation, with the total amount not to exceed his two years’ net base salary. However, the UNRWA DT declined to grant his request for moral damages, as it concluded that he had not provided any proof of harm.

16. The Commissioner-General appealed the UNRWA DT decision to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 31 August 2020. The Applicant filed an answer on 7 October 2020.

The Commissioner-General’s Appeal

17. The Commissioner-General requests the Appeals Tribunal vacate the Judgment as the UNRWA DT erred on a question of law and fact, resulting in a manifestly unreasonable decision when it held that the Contested Decision was unlawful.

18. The Commissioner-General submits that the UNRWA DT erred in its interpretation and considerations of UNRWA’s regulatory framework on EVS. As set forth in Area Staff Rule 109.15(1), the primary consideration is whether the granting of an EVS application will be in the financial interest of the Agency. The application of the criteria for an EVS is triggered only after the application is deemed to be in the financial interest of the Agency.

19. In this case, the denial of the EVS was predicated on the fact that the post was considered essential and that to grant EVS was conditional on the abolishment of the post. The Commissioner-General submits that to condition the granting of EVS on the abolition of the requesting staff member's post is not only reasonable but also lawful. With a view to the limited resources of the Agency, granting an EVS to a staff member on SLWOP would go against the Agency's financial interests as it would not entail any savings for the Agency in contrast to granting an EVS to a staff member receiving a salary from the Agency. Therefore, not prioritizing staff members on SLWOP during an EVS exercise was reasonable and accords with ASR 109.15(1).

20. The Commissioner-General further submits that the UNRWA DT erred in finding that ASC A/6/2018 did not mention abolition of a staff member's post as a condition for granting an EVS. ASR 109.15(3) bestows authority on the Director of Human Resources (DHR) to further define conditions and procedures concerning EVS, and the DHR did define that staff members on SLWOP and on posts considered essential for delivery of service to the Palestine refugees were not to be prioritized for the EVS exercise. As the UNRWA DT recognized, the Agency has categorically denied the EVS applications submitted by those two categories of staff.

The Applicant's Answer

21. The Applicant maintains that on appeal the Commissioner-General repeats the same arguments that were used before the UNRWA Dispute Tribunal regarding the financial interest and limited resources of the Agency and the essentiality of his post but failed to provide any evidence to prove his arguments and his generic reasonings.

22. The Applicant submits that the UNRWA DT did not err in finding that there was no mention of SLWOP or abolition of a staff member's post as a condition for granting an EVS application in any of the relevant Area Staff Rules and administrative issuances.

23. He also submits that the criteria, priorities, and timing for EVS were communicated to the staff by the Agency through the issuance of ASC A/6/2018. There were no other communications or circulars issued by the DHR about any further defined conditions and procedures for EVS, especially in relation to SLWOP and abolition of post.

24. The Applicant states the Commissioner-General has misrepresented the content of paragraph 48 of the Judgment by stating the UNRWA DT recognized in that paragraph that the Agency had categorically denied EVS applications from both the staff members on SLWOP without a lien on their posts and the staff members whose posts were considered essential. Paragraph 48 did not refer to staff whose posts were considered essential.

25. Finally, the Applicant states that he has provided evidence to prove that the Agency had treated staff members in an inconsistent manner in respect of their EVS applications.¹

Considerations

26. The Commissioner-General submits the UNRWA DT erred on a question of law in its interpretation and considerations of ASC A/6/2018, ASR 109.15 and Personnel Directive A/9. Further, the Commissioner-General says the UNRWA DT erred on a question of fact that resulted in a manifestly unreasonable decision.

27. We disagree with the Applicant's implication that the appeal is defective by repeating the same arguments regarding the financial interest and the limited resources of the Agency and the essentiality of his post that were before the UNRWA DT. As the Commissioner-General has identified the alleged errors of law and facts further to Article 2 of the Appeals Tribunal Statute and in making its submissions on the alleged errors, the Commissioner-General would have to revisit the arguments and evidence that were before the UNRWA DT. Therefore, we find this appeal is valid.

Legal Framework

28. The applicable legal or regulatory framework regarding the eligibility and authority to grant EVS is as follows:

¹ In his observations dated 25 March 2019 on the Commissioner-General's reply before the UNRWA DT, the Applicant alleged that certain UNRWA staff members were in a similar situation as his but had been treated differently in that either their SLWOPs were extended or their services were terminated. But he stated that he did not have the relevant documents and materials in his possession to prove his arguments, and requested that the UNRWA DT order the Agency to produce such documents. In a subsequent motion filed on 4 November 2019, the Applicant provided the UNRWA DT with supplementary evidence showing that the Agency had allowed, in August 2019, the service of Mr. H.A.A. to be terminated, entitling the latter to the end-of-service benefits. Mr. H.A.A. was also on SLWOP without a lien on his post.

Area Staff Rule 109.15

EXCEPTIONAL VOLUNTARY SEPARATION

1. The Commissioner-General may authorize a staff member's Exceptional Voluntary Separation (EVS), where the Commissioner-General deems it is in the financial interests of the Agency to do so.
2. EVS is not an entitlement but may be approved in exceptional circumstances. The Commissioner-General will authorize periods during which staff members may apply for EVS. The Commissioner-General will also establish the criteria, priorities, and timing to be applied in reviewing and making determinations on applications for EVS and these will be communicated to staff in writing by the Director of Human Resources.
3. The Director of Human Resources has the authority to approve or reject applications for EVS. Decisions on applications for EVS shall be made in coordination with Headquarters and/or Field Office Directors, as applicable. The authority to further define the conditions and procedures concerning EVS is also delegated to the Director of Human Resources.

Area Staff Circular No. A/6/2018

Subject: Exceptional Voluntary Separation – All fields and HQs

Criteria

8. Eligible EVS applications will be considered in the following order of priority:
 - a. Staff who occupy posts not involved in the direct delivery of services to Palestine Refugees including administrative and support posts;
 - b. Staff who occupy posts in the Education Programme, such as teachers (including those who lack the educational qualifications or professional experience required for such posts);
 - c. Staff who qualify for EVR under Area Staff Rule 109.2(8), i.e. between the age of 55 and 60; or between the age of 45 and 60 if he/she has at least 10 years of qualifying service; or if he/she has completed 20 years of qualifying service;
 - d. The priority for considering and approving eligible EVS applications will be based on the order they are received by the Agency; on the applicant's length of service beyond the minimum requirement of ten years per paragraph 6(a) above; the interest of the Agency, the financial situation of the Agency, and operational requirements in the Field Offices/Headquarters[;]
 - e. Consideration and approval of eligible EVS applications is subject to availability of funds.

Submission and Evaluation of EVS Applications

...

12. Eligibility and priority determinations will be made in accordance with this Circular. The Director of Human Resources has the authority and full discretion to approve or reject applications for EVS, in accordance with Staff Rule 109.15, Personnel Directive A/9, and this Circular. Decisions on applications for EVS shall be made in coordination with Headquarters Directors, the Executive Office, and/or Field Office Directors, as applicable.

Area Staff Personnel Directive A/9/Rev. 10 (23 June 2015)

Subject: Separation from service

Exceptional Voluntary Separation (Staff Rule 109.15)

45. Exceptional Voluntary Separation (EVS) is not an entitlement but may be approved in exceptional circumstances. The Commissioner-General will authorize periods during which staff members may apply for EVS.
46. An eligible staff member may apply for EVS under Staff Rule 109.15. The Director of Human Resources has the authority to approve or reject applications for EVS, in accordance with Staff Rule 109.15 and this Personnel Directive. Decisions on applications for EVS shall be made in coordination with Headquarters and/or Field Office Directors, as applicable.

Merits of Appeal

29. In its Judgment, the UNRWA DT recognized that the Agency had the authority and discretion to approve or reject applications for EVS but that the discretion was not unfettered.

30. Generally, the Agency must exercise its discretion in making administrative decisions reasonably and properly, and considering all relevant considerations. A “harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.”² It is not the role of the Tribunal to consider the correctness of the choice made by the Agency amongst the various courses of action open to it nor to substitute its own decision for that of the Administration.

² *Mohamed El Madhoun v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1029, para. 46, quoting *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para. 36.

31. In the present case, the UNRWA DT held that the Agency failed to observe its own regulatory framework and therefore, the Agency, in exercising its discretion, failed to act lawfully, reasonably, and fairly. We find the UNRWA DT did not err in reaching this conclusion.

32. The UNRWA DT reviewed the regulatory framework that clearly set out the applicable provisions and criteria and correctly found the Agency failed to follow that framework.

33. Area Staff Rule 109.15 does indicate that EVS is not an entitlement. However, it also explicitly provides, in paragraph 2: “The Commissioner-General *will also establish the criteria, priorities and timing* to be applied in reviewing and making determinations on applications for EVS and these *will be communicated to staff in writing* by the Director of Human Resources.”³ Therefore, the UNRWA DT correctly concluded that the regulatory framework was clear that Agency’s authority to approve or reject EVS applications must be in accordance with the regulatory framework. The Commissioner-General established the criteria and priorities in writing in ASC A/6/2018 which is part of the regulatory framework. That framework (including ASC A/6/2018) does not state that not being on SLWOP or the essential nature of the post or the abolishment of the post are criteria for receiving EVS or to be used as factors in prioritizing EVS applications.

34. Personnel Directive A/9/Rev. 10 states: “The Director of Human Resources has the authority to approve or reject applications for EVS, *in accordance with Staff Rule 109.15 and this Personnel Directive.*” It does not give the Director an unfettered authority but explicitly requires the authority be in accordance with Area Staff Rule 109.15 and Personnel Directive A/9/Rev.10. There is no evidence that not being on SLWOP was communicated to staff in writing as a criterion for EVS as required by this Personnel Directive and Area Staff Rule 109.15. Therefore, it was not an error of law or misinterpretation of the relevant legal provisions for the UNRWA DT to find that the Agency had failed to observe its own regulatory framework.

35. The Commissioner-General submits the primary consideration of the applicable provision on granting EVS is whether the application for EVS is deemed to be in the financial interest of the Agency as set out in ASR 109.15(1), which triggers the application of the rest of the criteria. Therefore, in his opinion, the UNRWA DT erred in law in failing to recognize

³ Emphases added.

this and the clear provisions of ASR 109.15(3) that bestows the DHR with authority to define “further” (beyond ASC A/6/2018) the conditions and procedures concerning EVS.

36. However, there was no evidence that this was the reason for the denial of the Applicant’s EVS. The evidence is that certain individuals received EVS (those not on SLWOP) but the reason that this was for financial reasons or budgetary constraints is not evident. By evoking a generic reason in rejecting the EVS, i.e., lack of funds and/or budgetary constraints, without adducing any evidence, the Agency failed to provide sufficiently clear, precise, and intelligible reasoning and therefore, did not act lawfully, reasonably, and fairly.⁴

37. As stated previously, the discretion of the Commissioner-General to reject a request for these benefits is not unfettered. The Agency must exercise its discretion reasonably and properly, considering all relevant considerations and ignoring irrelevant considerations.⁵ In this instance, the Agency took into account considerations (not being on SLWOP, etc.) contrary to the relevant regulatory provisions.

38. We find the UNRWA DT properly held the Contested Decision was unlawful.

⁴ See *Mohamed El Madhoun*, *supra* note 2, para. 48.

⁵ See *Ibid.*, para. 45.

Judgment

39. We affirm Judgment No. UNRWA/DT/2020/037 and dismiss the appeal.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 13th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar