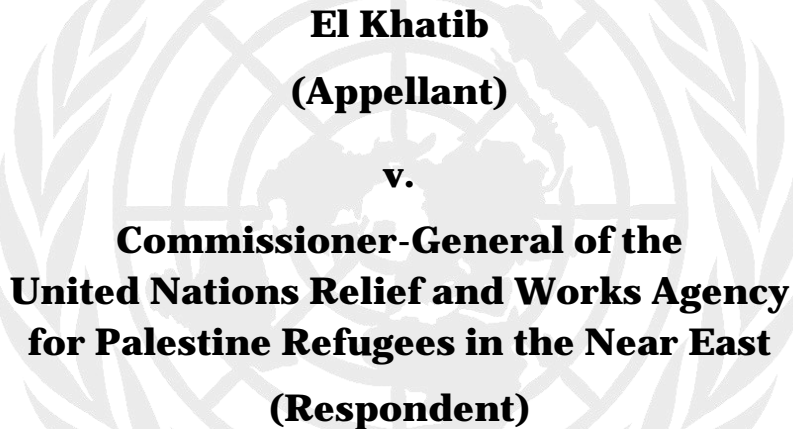




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-139



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

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Luis María Simón
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-142

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: W. Thomas Markushewski

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Yahya Ramadan El Khatib (El Khatib) was denied timely salary increments, denied timely completion of performance evaluation reports, and also denied his post which was abolished due to the restructuring of the Engineering & Construction Services Department (ECSD) of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) in Gaza. The UNRWA Area Staff Joint Appeals Board (UNWRA JAB) found that he had not been conscientiously and fairly treated. The decision of the UNRWA Commissioner-General rejecting the UNWRA JAB's findings is hereby set aside and El Khatib is awarded three months' net base salary as compensation.

Facts and Procedure

2. El Khatib joined UNRWA in Gaza in August 1981 as an Engineer at Grade 14 level. By 1 January 2001 he was at Grade 17 level as Deputy Field Engineering and Construction Services Officer (D/FECSO), Gaza. In the Performance Evaluation Report (PER) covering the period from January 2001 to June 2002, El Khatib's supervisor, Field Engineering and Construction Services Officer (FECSO), Gaza, rated El Khatib's performance as "A (Outstanding)" in one category of competency, "B (Very good)" in nine categories of competency and "C (Satisfactory)" in the remaining four categories of competency. FECSO made additional comments: "S/M [staff member] needs to apply himself more to his role and duties as a 'Deputy' and to take care not to over exceed his authority."

3. Following the appointment of a new FECSO, Gaza, the relationship between El Khatib and his new supervisor became "increasingly acrimonious". In the PER covering the six-month period from July 2002 to December 2002, the new FECSO rated El Khatib's performance as "B" in three categories of competence and "C" in the remaining eleven categories of competence, with an overall rating of "C" and the following comments: "I would encourage the S/M to increase his efforts to improve the work environment vis-à-vis inter-working relations between the senior and support staff." El Khatib was not happy with the ratings given. Discussion and correspondence ensued, resulting in a "partially revised" PER, which took into account El Khatib's points.

It is not clear whether El Khatib's PER which is attached to UNRWA's answer as Annex 5 is the final version. The PER reflects that the new FECSO completed his portion of El Khatib's PER, for the period from June to December 2002, on 7 March 2004, and the Director of UNRWA Operations, Gaza (DUO/G), the head of the headquarters department, and El Khatib signed it on 30 April, 23 May, and 4 July 2004, respectively.

4. The relationship between El Khatib and the new FECSO failed to improve, in spite of the efforts by DUO/G. In a memo dated 6 April 2005 to El Khatib, DUO/G noted El Khatib's specific deficiencies in performance, recalled the reprimand that the new FECSO had given El Khatib, and warned El Khatib of the initiation of disciplinary action against him if he failed to show "consistent improvement in the near future".

5. In order to upgrade the capacity of ECSD in Gaza to meet the demands of increases in magnitude and complexity of construction activities in Gaza, UNRWA initiated the restructuring of that department in March 2005. The restructuring affected El Khatib, in that his post at Grade 17 level (D/FECSO) was abolished and in its place two posts were created, one at Grade 18 level, Head Construction and Maintenance Division (HCMD), and the other at Grade 17 level, Head Administration and Management Support Division (HAMD). The reorganization became effective as of 1 October 2005. El Khatib was transferred to the newly created HAMD post at Grade 17 level within ECSD.

6. On 13 October 2005, the new HCMD at Grade 18 level was advertised. El Khatib applied, was short-listed and interviewed. But according to the Respondent, the new post HCMD has never been filled. Moreover, no one has been designated as "Acting HCMD", due to UNRWA's austerity measures.

7. Also according to UNRWA, El Khatib's subsequent PERs were completed on 29 November 2006 for the period 1 January 2003 to 1 January 2004, on 29 November 2006 for the period 1 January 2004 to 1 January 2005, and on 7 February 2007 for the period 1 January 2005 to 1 January 2006.

8. Again according to UNRWA, El Khatib was paid annual salary increments for 2004 and 2005 on 13 December 2006 and those for 2006 on 27 February 2007. It is not clear why El Khatib was not paid the annual increment during the year in which it fell due. According to El Khatib, the annual increments were not paid to him because his

supervisor, FECSO, deliberately failed to complete his PER. UNRWA, on the other hand, has not provided any explanation for the delays in the payment of the annual increments.

9. In November 2005, El Khatib filed an appeal with the UNRWA JAB against the abolition of his D/FECSO post and the delay in the payment of his annual salary increments.

10. El Khatib retired from UNRWA on 30 June 2007.

11. The UNRWA JAB did not review this case until 19 August 2008. In its report dated 28 January 2009, the UNRWA JAB found that “pursuant to the decision on restructuring, [El Khatib] was not treated conscientiously and fairly”. It recommended that El Khatib be granted an allowance at Grade 18 level from the date of the upgrading of the post until the date of his retirement on 30 June 2007. As for the issue of annual salary increments, the UNRWA JAB determined that there had been “tremendous delay in the resolution of this issue” and recommended that UNRWA extend an apology to El Khatib for “this inordinate delay”.

12. Having not received a decision from the UNRWA Commissioner-General on the recommendations of the UNRWA JAB, El Khatib filed an application with the former Administrative Tribunal on 10 August 2009. It was subsequently re-routed to the Registry of this Court. The case was put on hold pending the conclusion of an agreement between the United Nations and UNRWA regarding appeals filed by UNRWA staff members.

13. On 11 December 2009, the UNRWA Commissioner-General took a decision on El Khatib’s appeal in light of the report of the UNRWA JAB. She rejected the recommendations of the UNRWA JAB and dismissed El Khatib’s appeal. The UNRWA Commissioner-General maintained that El Khatib had been “fairly and conscientiously” considered for suitable employment after his post was abolished, as he had been short-listed and interviewed, and was subsequently transferred to a post HAMD within the same department at the same grade, and that his non-selection for the new post HCMD at Grade 18 level did not constitute unfairness or lack of conscientiousness.

14. A Special Agreement dated 11 December 2009 was concluded between the United Nations and the UNRWA Commissioner-General (Agreement) by which UNRWA

accepted the terms of the jurisdiction of the Appeals Tribunal pursuant to Article 2(10) of the Statute of the Appeals Tribunal. Under Article 2(7) of the Agreement, “[a]s a transitional measure and pursuant to paragraph 50 of General Assembly resolution 63/253 appeals by UNRWA staff members following a Joint Appeals Board report shall be receivable by the United Nations Appeals Tribunal if the final decision on the appeal was taken by the Commissioner General on or after 1 July 2009”.

15. The Registry of the Appeals Tribunal was advised by UNRWA to keep El Khatib’s case on hold until UNRWA implemented the Agreement into the UNRWA’s Staff Regulations and Rules. In September 2010, the UNRWA Administration informed El Khatib and the Registry that El Khatib could avail himself of the Agreement to appeal the Commissioner-General’s decision to the Appeals Tribunal within 90 calendar days.

16. On 3 December 2010, the Registry forwarded El Khatib’s appeal dated 10 August 2009 to UNRWA, which filed its answer on 19 January 2011.

Submissions

El Khatib’s Appeal

17. The decision to eliminate his post caused serious injury to him. It prevented him from becoming the Officer-in-Charge of the ECSD, Gaza. It affected his reputation in the private business after he left UNRWA.

18. There was no obvious technical justification for abolishing his post and creating another one. The job description for the new post HCMD was almost identical to that of his post. The fact that the new post was not filled shows that there was no need to eliminate his post and create another one. No other engineering department in other fields (Jordan, Syria, Lebanon and West Bank) eliminated the Deputy FECSO position. Only Gaza was singled out. It is El Khatib’s belief that the real purpose behind the decision was to hire a specific person for the job.

19. The four-year delay in paying him his annual salary increments created in the minds of others that he was weak in his work.

20. El Khatib requests that this Court award him the following remedies: i) allowances from the time of the new post until his retirement; ii) apology in writing and its dissemination throughout UNRWA; and iii) compensation in the amount of USD 500,000 for the injuries caused by the mistreatment.

UNRWA's Answer

21. It is within the broad discretionary authority of the UNRWA Commissioner-General to create and abolish posts within UNRWA. In El Khatib's case, such discretionary authority was not exercised arbitrarily, motivated by prejudice or other extraneous factors, or tainted by any procedural irregularities. The abolition of El Khatib's post and the creation of two new posts was part of a comprehensive plan to restructure ECSD, Gaza, and to address concerns about the department's ability to meet the demands of increased magnitude and complexity of construction activities in Gaza. The restructuring involved hiring additional senior qualified staff to handle technical and administrative issues and establishing a more streamlined structure and was not informed by improper motives or prejudice. El Khatib has not produced any evidence in that regard.

22. El Khatib was considered fairly for suitable employment within UNRWA when his post was abolished. He was indeed transferred to a post at the same grade within the same department.

23. The issue of non-payment of annual salary increment is moot as El Khatib has been paid all outstanding annual increments. While he claims that the delay in payment has caused injury to his reputation in the eyes of others and in the private business, El Khatib has failed to provide any evidence to substantiate his claim or the quantum of injury. Under the jurisprudence of the Appeals Tribunal, compensation is not payable absent any harm resulting from a delay.¹

¹ *James v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-009; *Sina v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-094.

Considerations

24. El Khatib joined UNRWA in 1981 as an Engineer (Grade 14), worked satisfactorily and rose to become Deputy FECSO at Grade 17 by 1 January 2001. FECSO, Gaza, was his supervisor. There is a background of some remarks regarding his performance in El Khatib's PERs from January 2001 onwards, reported by the respective FECSOs.

25. In his PER covering the period from January 2001 to June 2002, El Khatib was rated overall as good, with FECSO noting the unevenness in El Khatib's dealings with subordinates and the difficulty that El Khatib had in adopting the secondary role of Deputy FECSO. In his PER covering the period from July 2002 to December 2002, El Khatib's performance was rated as generally satisfactory though FECSO noted with concern El Khatib's tendency to "over delegate" and the tense working environment around El Khatib.

26. The subsequent PERs were delayed: the reports covering the periods from 1 January 2003 to 1 January 2004 and from 1 January 2004 to 1 January 2005 were not completed until 29 November 2006, and the report for 1 January 2005 to 1 January 2006 was not completed until 7 February 2007.

27. Some acrimony had been in the air between El Khatib and his superiors, as detailed in UNRWA's reply, mostly through exchange of letters. On 6 May 2004, El Khatib was issued a letter of reprimand for not following instructions, obstructing works, unprofessional, de-motivating and offensive behaviour towards staff and lastly for refusing to explain and provide justification for his behavior.

28. El Khatib's annual salary increments for 2004, 2005 and 2006 were withheld. Increments for 2004 and 2005 were not paid until 13 December 2006 and those for 2006 were not paid until 27 February 2007. It is important to note that the withholding of annual performance reports and salary increments showed a pattern.

29. When all this was happening to El Khatib, ECSD was restructured on 1 October 2005. El Khatib's post of Deputy FECSO was abolished. Two new posts, HCMD at Grade 18 and HAMD at Grade 17, were created. As a result, El Khatib was transferred to the new HAMD post in the same grade as his earlier post.

30. The HCMD post was advertised, El Khatib applied, was shortlisted for interview, but no one was selected. The post remained vacant at least until El Khatib's retirement on 30 June 2007.

31. El Khatib filed an appeal before the UNRWA JAB. The UNRWA JAB recommended that the Agency pay compensation and apologize to El Khatib on the basis of its finding that "pursuant to the decision on restructuring, [El Khatib] was not treated conscientiously and fairly". This recommendation was rejected by the UNRWA Commissioner-General on 11 December 2009.

32. The question before us is whether the UNRWA Commissioner-General's decision to reject El Khatib's appeal is sustainable. Generally speaking this Tribunal would be extremely reluctant to interfere with the discretion exercised by the UNRWA Commissioner-General, but in this particular case there are several circumstances in favour of El Khatib.

33. Delays in completing annual performance reports and delays in paying annual salary increments are neither minor nor insignificant. These are coupled with the denial of the HCMD post. Appointment to a Grade 18 post would have meant a promotion to someone who had worked for 24 years, including five years as Deputy FECSO. El Khatib was due to retire in two years. Although El Khatib had no right to be appointed to the higher level post and his only right was to be fairly considered, yet for someone due to retire in a couple of years the denial of promotion could be hugely disappointing. It is particularly disheartening for El Khatib that the advertised post was never filled and remained vacant until he retired.

34. It is obvious that the restructuring meant removing El Khatib from the position of Deputy FESCO and posting him at the same level to HAMD – from construction to management. Can El Khatib be blamed for thinking that the restructuring was designed to harm him? In addition, he was denied the timely payment of salary increments and the timely completion of performance reports.

35. We hold that the Commissioner-General of UNRWA has full power to reorganize and restructure the various posts under her, in order to improve the engineering and construction services. But in this case although restructuring was never really accomplished, El Khatib was indeed not treated conscientiously and fairly. At least with this part of JAB's report there can be no dispute. As El Khatib was treated shabbily, he deserves compensation.

36. We are constrained to overrule the UNRWA Commissioner-General and decide that El Khatib should be paid compensation of three months' net base salary.

Judgment

37. We grant this appeal in part and order that El Khatib be paid three months' net base salary as compensation.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Simón

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar