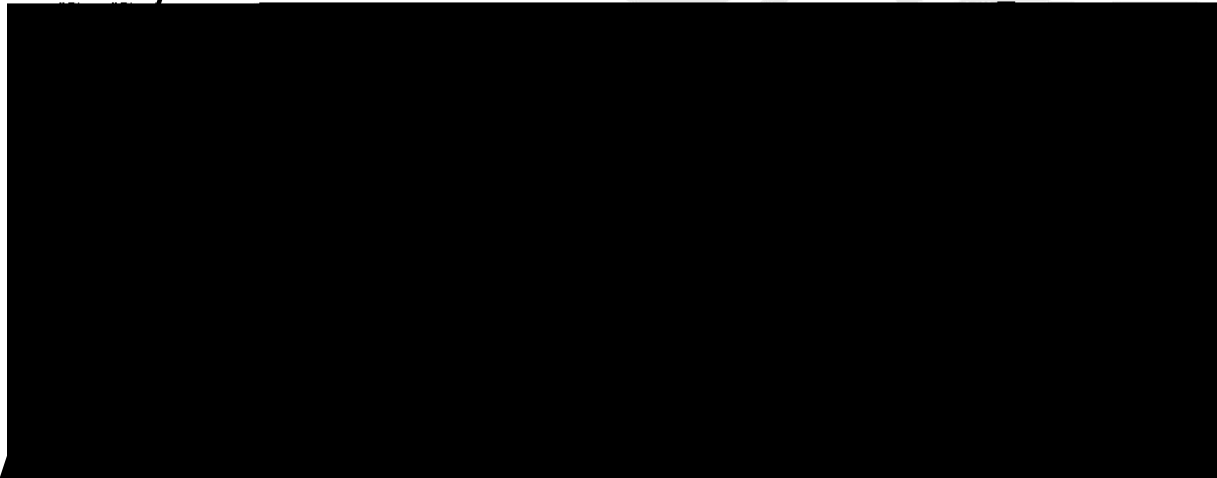




UNITED

Judgment No. 2015-UNAT-528



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Anna Segall

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23. On 13 August 2012, the UNRWA DT issued Order No. 031 (2012) denying Ms. Rantisi's Request for Interim Measures seeking suspension of the decision to transfer her

special leave with pay upon conclusion of the investigation report, the UNRWA DT noted that there were no provisions for the unilateral imposition of special leave by the Agency once the disciplinary investigation was concluded.

29. The UNRWA DT found that placement of Ms. Rantisi on special leave with pay after the conclusion of the investigation report constituted a disciplinary sanction disguised as an “administrative” measure.

30. The UNRWA DT considered that the DUO/J’s letter of 7 December 2011, which stated that Ms. Rantisi’s actions constituted serious misconduct warranting disciplinary measures up to and including summary dismissal, constituted threatening and intimidating language which was wholly unjustified and unsupported by the investigation’s findings.

31. The UNRWA DT also considered that there was a fundamental breach of due process when the Agency failed to provide Ms. Rantisi with sufficient particulars of the evidence against her or an opportunity to present her arguments against the decision to transfer her due to the DUO/J’s loss of trust in her. While noting the investigation’s conclusion that involvement in the protest was a breach of Area Staff Regulations 1.1 and 1.4 and recognizing the Agency’s right to hold Ms. Rantisi to a higher standard given her seniority, the UNRWA DT found the Agency’s response to be “disproportionate, vindictive and procedurally flawed”.

32. The UNRWA DT held that the appropriate remedy was the rescission of the decision to deprive Ms. Rantisi of her post as C/FRSSP/J. It also rescinded the decision to issue a letter of censure and to suspend Ms. Rantisi for one week without pay.

Retaliation

33. The UNRWA DT dismissed the claim of retaliation as it did not find a causal connection between Ms. Rantisi’s complaint of harassment against the former FHRO/J and

also provide the Agency with the option of compensation in lieu of rescission given that there is no Grade 20 post to which either Ms. Rantisi or her successor could be transferred. The UNRWA DT held that, in light of paragraph 5(a) of Article 10 of its Statute, it had no power to order the option of compensation in lieu of rescission given that this was not a case involving appointment, promotion or termination. Accordingly, the rescission order remained undisturbed.

35. The UNRWA DT granted Ms. Rantisi an award for moral damages in the amount of USD 40,000, taking into account the statements of Ms. Rantisi and her therapist as to her level of anxiety and stress, the “grossly unfair, high-handed and arbitrary treatment by senior managers” and the damage to Ms. Rantisi’s reputation due to the unsubstantiated allegations.

Submissions

The Commissioner-General’s Appeal

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given by Ms. Rantisi and her therapist. There is no reference to any documentary evidence to support the award of moral damages in the Judgment.

Ms. Rantisi's Answer

38. The UNRWA DT correctly ordered reinstatement as the only effective remedy for the violation of her rights. The Commissioner-General raises for the first time in his appeal the issue of harm to a third party.

39. The UNRWA DT correctly determined that she suffered a high degree of moral damages justifying an award at the top end of the current scale of awards. As noted by the UNRWA DT, such amount was in line with other judgments of this Tribunal and the United Nations Dispute Tribunal where there was a significant degree of non-pecuniary harm.

Considerations

40. On 30 September 2013, the UNRWA DT issued its Judgment on the Merits of the present case and, in part, the Judgment read as follows:

The decision to issue a letter of written censure and to suspend the Applicant for one week without pay is rescinded. The Applicant is entitled to be compensated for the loss of salary during suspension. The decision to transfer the Applicant to a new post is rescinded.¹

41. On 13 March 2014, the UNRWA DT issued the Judgment on Remedies in which, inter alia, it confirmed the foregoing orders. Further, all records of the suspension were to be similarly expunged from Ms. Rantisi's file. The Judgment on Remedies also awarded Ms. Rantisi USD 40,000 for moral damages.

42. The Commissioner-General appeals, in part, the remedies ordered by the UNRWA DT, specifically the order rescinding the decision to transfer Ms. Rantisi and the moral damages award.

43. He asserts:

- (i) that the UNRWA DT erred in law by unduly fettering its discretion to award compensation in lieu of specific performance; and

¹ Judgment No. UNRWA/DT/2013/033, para. 142.

- (ii) that the UNRWA DT erroneously assessed moral damages at USD 40,000.

The alleged fettering of the UNRWA DT's discretion

44. In the context of affirming its order rescinding the decision to transfer Ms. Rantisi, the UNRWA DT stated:

The Applicant has been consistent throughout these proceedings in asserting that she was unlawfully removed from her position as C/FRSSP/J. Her unchallenged evidence was that she had 25 years of unblemished service and was totally committed to her work for which she has the relevant expertise and proven track record. She stated that the Agency moved to fill her post as soon as possible "to close the door for me". She noted that she tried to freeze the recruitment process by filing a request to the Tribunal to suspend the appointment of another staff member to her post until her case before the Tribunal had been resolved but her request was rejected. The Applicant was clear that no amount of money could compensate her for the loss of her

suitable grade 20 posts to which either Ms. Rantisi or her successor to the post of C/FRSSP/J could be deployed.

47. The Commissioner-General's argument was addressed by the UNRWA DT as follows:

[...] Counsel for the Respondent submitted that given the difficulty the Respondent faced with there being no suitable Grade 20 posts to which either the Applicant or her successor could be deployed, the Tribunal should use its power under paragraph 5(a) of Article 10 of the Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to rescission [sic] of the contested administrative decision. [Counsel]'s submission is not consistent with the facts found and the strict interpretation of the statutory provision to reould u4er3pretatrst,-20 311(l)(th018 -1.497 T)0.4 7464.8(1

53. The UNRWA DT therefore has the statutory discretion to order remedies under sub-paragraph (5)(a) or (5)(b) of Article 10 or both, so that, for example, the compensation referred to in sub-paragraph (5)(b) can represent an additional remedy to rescission/specific performance (or mandatory compensation in lieu thereof where the issue relates to appointment, promotion or termination) ordered pursuant to sub-paragraph (5)(a). Yet again, compensation under Article 10(5)(b) can constitute the independent sole remedy where the UNRWA DT decides rescission or specific performance of a contested administrative decision is not appropriate or merited. Equally, rescission or specific performance can constitute the sole remedy awarded save the mandatory requirement to set an alternative compensation under Article 10(5)(a). The decision on remedy is quintessentially a matter for the first instance Tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing Statute.

54. The UNRWA DT's discretion under Article 10(5)(a) is constrained by the mandatory requirement to set an amount of compensation (no greater than that provided for in Article 10(5)(b)) as an alternative to an order rescinding a decision on appointment, promotion or termination.

55. Among the findings of the UNRWA DT in the present case, which are not disputed by the Commissioner-General, was that Ms. Rantisi was unlawfully transferred from her post. The UNRWA DT rescinded this unlawful decision, a remedy available under its Statute.

56. In its Judgment on Remedies, the UNRWA Dispute Tribunal quite properly rejected any suggestion that because the transfer was found by the Tribunal to constitute a disguised disciplinary measure the matter could be considered in the context of the appointment, promotion or termination situation provided for in Article 10(5)(a).

57. The Commissioner-General does not take issue with the refusal to categorise the transfer as a measure to which the mandatory provision in Article 10(5)(a) applies; rather, he argues that even absent the situation where a rescinded decision concerns appointment, promotion or termination, the UNRWA DT has a residual discretion under Article 10(5)(a) to

specify an alternative of compensation to specific performance depending on the circumstances of each case.

58. We note that in *Kaddoura*, the staff member contended that the United Nations Dispute Tribunal erred by rescinding the original decision on her reassignment without

would be impossible, or when one of those options would affect the rights of third parties.⁸

60. This paragraph does not assist the Commissioner-General's argument since it is concerned with decisions on appointment, promotion and termination.

61. It is clear that the UNRWA DT's decision to rescind Ms. Rantisi's transfer was a remedy arrived at in the exercise of its discretion under Article 10(5) after a careful consideration of all the facts. Had the UNRWA DT considered compensation an effective remedy, the matter could have been dealt with wholly under Article 10(5)(b) of the Statute. The UNRWA DT chose not to go down that route in the circumstances of this case.

62. In *Cohen*, the Appeals Tribunal has upheld the right to "fair and equitable damages" as "an element of the right to an effective remedy".⁹ In as much as fair and equitable damages are an element of an effective remedy, so too must be the entitlement to have an unlawful administrative decision rescinded or to have a particular obligation performed. The UNRWA DT here saw fit to exercise its discretion such that Ms. Rantisi could be reinstated to the position she held prior to the unlawful transfer. The first instance Tribunal is the body best placed to decide on the appropriate remedy. As already set out, it found Ms. Rantisi's transfer unlawful and unjustified. In arriving at its decision to affirm the rescission order made in the Judgment on the Merits, it is clear from the Judgment on Remedies that the UNRWA DT took cognisance of the Commissioner-General's submission that Ms. Rantisi's successor was performing satisfactorily in the post. Moreover, it took note of the nature of his contract and the scarcity of grade 20 posts within the Agency to which the post incumbent could be deployed. Ms. Rantisi's plea to be reinstated is evident from the contents of paragraph 15 of the Judgment on Remedies, already quoted. A reading of paragraphs 15 and 16 of said Judgment shows that the UNRWA DT weighed the respective positions of Ms. Rantisi and the post incumbent before affirming the order to rescind. That weighing exercise was a matter entirely for the first instance Tribunal.

63. Ultimately, it stated that "the Statute empowers the Tribunal to order the rescission of the contested administrative decision. The Tribunal has done so in paragraph 142 of Judgment No. [UNRWA/DT/2013/033]. There is no reason to depart from that order."¹⁰

⁸ *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149, para. 48.

⁹ *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

¹⁰ Judgment on Remedies, para. 18.

Absent any error of law or manifestly unreasonable factual findings, which are not evident here, the Appeals Tribunal will not interfere with the discretion vested in the UNRWA DT to decide on remedy.

64. In his submissions to this Tribunal, the Commissioner-General argues that Ms. Rantisi's reinstatement would be extremely difficult "as the relationship between the parties has irretrievably broken down". Having

... The Applicant was entitled under GSC No 06/2010 to have her complaint of harassment addressed promptly and fairly. The Agency failed to do so. [...]

The Tribunal finds that there was a fundamental breach of due process when the Agency failed to provide the Applicant with sufficient particulars of evidence against her so as to enable her to mount a proper defence. [...]

The Tribunal finds that the Applicant was removed from her post as Chief without according her elementary due process rights. Dressing this up as an administrative measure is a cynical manipulation of the relevant policy and rules on special leave and those regarding administrative measures in the interests of the Agency. [...]

The decision to impose disciplinary measures was taken in breach of due process and cannot stand. The Tribunal also finds that the transfer of the Applicant to a new post was a disguised disciplinary measure.¹²

69. The UNRWA DT had the benefit of Ms. Rantisi's oral testimony and that of her licenced therapist about the effect on Ms. Rantisi of the impugned administrative decisions. It summarised Ms. Rantisi's evidence at paragraph 30 of the Judgment on Remedies.

70. The first instance Tribunal also had the benefit of a report from Ms. Rantisi's therapist together with a further medical report which outlined Ms. Rantisi's difficulties, her medical diagnosis and the treatment she underwent.¹³ While there is no reference to the medical reports in the Judgment on Remedies, from the transcript annexed to Ms. Rantisi's Answer, it is clear that the UNRWA DT was aware of them. The Appeals Tribunal has no reason to believe other than that the medical reports referred to by the UNRWA DT in the course of the hearing are the reports annexed to Ms. Rantisi's submissions to this Tribunal.

71. We have said in *Solanki* that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".¹⁴

72. Having regard to all of the matters of which the UNRWA DT was apprised, both in the course of the hearing on the merits and on remedies, and taking particular regard of the

73. Accordingly, the Commissioner-General's appeal is dismissed.

Judgment

74. The appeal is dismissed and Judgment No. UNRWA/DT/2014/005 is upheld.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Thomas-Felix

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar