



Judgment No. 2015-UNAT-587



Counsel for Mr. Faraj:

Anais Paré-Chouinard

Counsel for Commissioner-General:

Lance Bartholomeusz

JUDGE SOPHIA ADINYIRA, PRESIDING.

2.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2014/034, 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 or Agency, respectively) on 16 October 2014 in the case of Faaj v CO to

Refugees in the Near East. Mr. Mohammad Faraj filed his appeal on 2 December 2014 and the Commissioner-General answered on 9 February 2015.

Facts and Procedure

2. The following facts are not contested by the parties:¹

... [On] 25 June 2009, the DUO/WB informed the WPO in [Mr. Faraj]'s team of her transfer from her post in RSSD to a position of Social Worker in another duty station.

... [On] 25 June 2009, the WPO sent a letter of resignation to [Mr. Faraj].

... [On] 1 July 2009, in response to [Mr. Faraj]'s letters of 22 and 24 June, the DUO/WB expressed her concerns about [his] failure to reflect her guidance on how to solve "the very serious management issues" which she had highlighted to him, and asked to discuss those issues with him once again.

... On 3 July 2009, [Mr. Faraj] submitted a "Recovery Plan" to the DUO/WB.

... [On] 24 July 2009 [...], the DUO/WB [e-mailed Mr. Faraj and] listed the points agreed upon in order to restore the confidence between them, as well as between [Mr. Faraj] and his senior team.

... [On] 31 July 2009, [Mr. Faraj] responded to the DUO/WB highlighting his achievements.

... Following a meeting between [Mr. Faraj] and the DUO/WB on 12 August 2009, the DUO/WB handed [Mr. Faraj] a letter on 14 August 2009, [...] stating:

This letter is to confirm our understanding of August 12 that in your interests and in the interests of the Agency, your contract with UNRWA will terminate effective October 31, 2009. You have explained to me your desire to pursue other interests.

[This letter provides you with two months' notice from September 1, 2009. [...] The Personnel Division will provide you with a list of your separation entitlements that include [...] any other entitlements, such as indemnities, appropriate.]

... [On] 17 August 2009 [...], [Mr. Faraj] complained [to the Director of Human Resources] about the decision to terminate his contract, and threats made by the DUO/WB and the D/DUO/WB.

... By letter dated 22 October 2009, the DUO/WB responded to [Mr. Faraj]'s request for review of the decision, confirming the decision to terminate his employment in the interest of the Agency, and advising him about the time limits to follow in order to file an appeal.

... By memorandum dated 1 November 2009 to the DUO/WB, [Mr. Faraj] again requested a review of the contested decision.

... By letter dated 22 December 2009, the DUO/WB responded to [Mr. Faraj] [...]:

I take this opportunity to reiterate once again that your separation was mutually agreed by the two of us following numerous discussions in the preceding months; as the Agency has kept to the terms of our agreement, I cannot agree with your contention that the decision was unfair or unjust in any way.

... By memorandum dated 27 December 2009 to the DUO/WB, [Mr. Faraj] denied having agreed to be separated, and accused the DUO/WB of threatening him to accept his termination.

... By memoranda dated 5 and 13 January 2010, [Mr. Faraj] submitted his appeal to the Joint Appeals Board ("JAB"). On 24 January 2010, he completed his appeal to the JAB [which was subsequently transferred to the UNRWA Dispute Tribunal].

... [...]

... On 27 June 2012, the [UNRWA Dispute] Tribunal in Faaj [Judgment No.] UNRWA/DT/2012/028, dismissed the application as not receivable. This Judgment was appealed before the [Appeals Tribunal].

... In Faaj [Judgment No.] 2013-UNAT-331, dated 21 June 2013, the [Appeals Tribunal] vacated the above Judgment, holding that the application was receivable. The case was remanded to [the UNRWA Dispute] Tribunal for a decision on the merits.

... [...]

... On 4 September 2014, [Mr. Faraj] filed a motion to submit new evidence and amend his application to seek additional remedies.

... By Order No. 94 (UNRWA/DT/2014) dated 18 September 2014, the [UNRWA Dispute] Tribunal granted the request and ordered [Mr. Faraj] to submit forthwith the new evidence and amend his application to seek additional remedies.

... On 30 September 2014, [Mr. Faraj] complied with Order No. 94 (UNRWA/DT/2014).

3. On 23 November 2014, the UNRWA Dispute Tribunal rendered its Judgment. The UNRWA DT found that the first premise underpinning the termination letter of 14 August 2009, namely the conclusion of the DUO/WB that Mr. Faraj had agreed to resign at their meeting of 12 August 2009, was not supported by the facts, as there was no evidence that Mr. Faraj wanted to resign. Further, having regard to Mr. Faraj's prior performance evaluations, there was no justification for the decision to terminate Mr. Faraj's appointment in the interests of the Agency, pursuant to UNRWA Area Staff Regulation 9.1. The UNRWA DT thus concluded that the contested decision was illegal and ordered its rescission.

4. Pursuant to Article 10(5) of the UNRWA DT Statute, as an alternative to reinstatement, the UNRWA Dispute Tribunal awarded Mr. Faraj USD 18,500 in compensation for material damages (being the sum Mr. Faraj would have received in net base salaries for an additional two years with UNRWA, totalling nearly USD 44,000, minus the monies he received in the same period from other employers, being USD 25,500), finding that the award also compensated Mr. Faraj for damages for alleged lost opportunities in the same period. The UNRWA DT also awarded Mr. Faraj USD 5,000 for moral damages for anxiety and stress and the injustice caused by the unlawful termination.

Submissions

Mr. Faraj's Appeal

5. The UNRWA Dispute Tribunal erred on a matte

other prospective employers concerning Mr. Faraj's performance while with the Agency, evidence of which was before the UNRWA DT.

7. The UNRWA Dispute Tribunal erred when it failed to include entitlements in the awarded compensation and based its calculation solely on his net base salary, contrary to the Appeals Tribunal's decision in *CO* .³ Had Mr. Faraj continued with the Agency, he would have received his salary and all of the associated entitlements which he calculates would amount to USD 98,576. Although Mr. Faraj had submitted a calculation updated to 2014 to the UNRWA Dispute Tribunal, the UNRWA DT failed to award him his associated entitlements.

8. The UNRWA DT's compensation in lieu award was not proportional to the rescission of the contested administrative decision. While Mr. Faraj had hoped to be reinstated or placed in a similar post with the Agency, the UNRWA DT's inadequate compensation award created no incentive for the Agency to consider doing either. The award was thus contrary to the Appeals Tribunal's decision in *CO* , which held that the option given to the Administration to pay compensation in lieu of specific performance should not render ineffective the right to an effective remedy.⁴

9. In awarding moral damages, the UNRWA DT failed to closely consider Mr. Faraj's supporting documentation which demonstrated that after his termination he was diagnosed with post-traumatic stress disorder, took anti-depressant medication for approximately one year and visited a psychologist for over two years, and described the consequences that his termination had had on his social and professional status in his community. The UNRWA DT thus "minimized the subjectivity of [his] case". The UNRWA DT's assessment of moral damages should also have taken into consideration that the significant delay in addressing his case, caused by circumstances beyond Mr. Faraj's control, added to the psychological harm he suffered. The Appeals Tribunal in *Mmaab* held that "there may be cases that take longer to be heard by the UNDT, which may provide a reason justifying compensation beyond the two-year limit".⁵

³ Citing *CO*

Nat , Judgment No. 2011-UNAT-131.

⁴ Citing *CO*

⁵ Citing *Mmaab v Secretary General* *CO*

, Judgment No. 2010-UNAT-092.

16. The UNRWA DT did not err on a matter of law when it did not include entitlements in its awarded compensation as Mr. Faraj never made a concrete plea for compensation for loss of earnings.⁷ Mr. Faraj's reliance on CO is misplaced since that decision is distinguishable in that there was a claim and a specific award for loss of earnings in that matter. Alternatively, the termination indemnity paid to Mr. Faraj when his contract was terminated, which the UNRWA DT did not deduct from the compensatory damages it awarded, more than offset the entitlements which Mr. Faraj claims the UNRWA DT failed to take into account.

17. Mr. Faraj's claim that the compensation awarded was not proportional to the rescission of the contested administrative decision is also without merit in view of the large discretion afforded to the Dispute Tribunal in matters related to compensation. Mr. Faraj has failed to establish that the UNRWA DT made any errors warranting a review of the Judgment to increase the award of compensation for pecuniary and non-pecuniary damages.

18. Lastly, the ground of appeal relating to moral damages is not well founded on

Matral damages

22. Mr. Faraj submits that the UNRWA DT erred on a matter of law when it combined its awards for compensation in lieu of reinstatement, compensation for loss of earnings and compensation for loss of opportunities. Mr. Faraj complains further that the UNRWA DT's compensation award was not proportional to the rescission of the contested administrative decision and that the UNRWA DT's inadequate compensation award created no incentive for the Agency to consider either reinstating him or placing him in a similar post with the Agency.

23. Article 10(5) of the UNRWA DT Statute provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

- (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
- (b) Compensation, which shall normally not exceed the equivalent of two years' net base

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38. While Mr. Faraj describes the award as “paltry” compared to other awards for non-pecuniary damages by the Appeals Tribunal, we reiterate that the assessment of compensation is done on a case-by-case basis and according to the discretion of each Tribunal.¹⁷

39. Overall, we find that the UNRWA DT did not commit any error of law in its assessment of the compensation award for material and moral damages which were fair and reasonable, and

