



Judgment No. 2015-l

Before

CaseN

Date:

Registr

Counsel for Ms. S

Counsel for Comr

JUDGE INÉS WEINBERG DE ROCA, PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) against Judgment No. UNRWA/DT/2014/036, rendered by the Dispute Tribunal of UNRWA (UNRWA DT or UNRWA Dispute Tribunal) on 22 October 2014 in the case of *Salem v. Commissioner-General of UNRWA*. The Commissioner-General appealed on 19 December 2014, and Ms. Amal Salem answered on 13 February 2015. On 4 March 2015, she filed a cross-appeal, which the Commissioner-General answered on 11 May 2015.

Facts and Procedure

2. The facts as found by the UNRWA Dispute Tribunal read as follows:¹

... Effective 17 August 2008, the Applicant was employed by the Agency as Area Officer, Zarqa Area, Jordan, at Grade 16 on a fixed-term appointment.

... Effective 1 April 2010, the Applicant was promoted to the post of [Chief Area Officer (CAO)], Zarqa Area, at Grade 20 with a probationary period of one-year, due to expire on 31 March 2011.

... On 1 February 2011, a new [Director of UNRWA Operations, Jordan (DUO/J)], [...] was appointed.

... On 31 March 2011, the Applicant was informed that her probationary period would be extended for three months until 30 June 2011.

... On 28 April 2011, the DUO/J and the Field, Human Resources Officer, Jordan ("FHRO/J") met with the Applicant to discuss the details of an Opportunity to Improve ("OTI") working plan.

... On 3 May 2011, the DUO/J sent to the Applicant an OTI working plan for the period from 31 March 2011 to 30 June 2011.

... By letter dated 25 May 2011 to the DUO/J, the Applicant disputed the period of the OTI working plan alleging that it did not cover 90 days.

... By email dated 13 June 2011, the Human Resources Career Management Officer, Jordan ("HRCMO/J") informed the Applicant that the OTI period would be extended until 5 August 2011.

¹ Impugned Judgment, paras. 3-18.

3. From February 2012 to April 2014, Ms. Salem filed three applications with the UNRWA Dispute Tribunal against three decisions, namely:

(a) the decision not to confirm her appointment after a probationary period as CAO/Zarqa Area and to separate her from service upon the expiry of her appointment on 16 September 2011;

(b) the decision of the Acting Chief, Investigations Division, DIOS not to investigate her complaint of discrimination and abuse of power against the DUO/J; and

(c) the decision to follow the DIOS' recommendation and to close the case in relation to Ms. Salem's complaint of discrimination and abuse of power against the DUO/J.

4. In Judgment No. UNRWA/DT/2014/036 now under appeal, the UNRWA DT reviewed Ms. Salem's three applications. It concluded that Ms. Salem's application against the decision not to investigate her complaint was rendered moot by the subsequent decision to conduct an investigation. The UNRWA DT found evidence of serious irregularities in relation to the lack of notification in writing of the grounds for the extension and the non-confirmation of Ms. Salem's probationary appointment; the incorrect application of the OTI process to Ms. Salem; and the failure to consult the Advisory Committee on Human Resources (ACHR). It concluded that the decision in relation to the non-confirmation of Ms. Salem's probationary appointment and her separation from service "was tainted by several procedural irregularities and by abuse of power, and as such, it must be rescinded"² Regarding the Commissioner-General's decision to follow the DIOS' recommendation and close the case, the UNRWA DT found that, contrary to the DIOS' conclusion, "there [was] convincing evidence in the case file that the DUO/J's decision not to confirm [Ms. Salem's] appointment as CAO was tainted by abuse of power", in the form of allowing her appointment to expire without consulting the ACHR and writing a memorandum to the Commissioner-General and the Deputy Commissioner-General in order to "get [them] on [her] side" concerning Ms. Salem's appointment.³ The UNRWA Dispute Tribunal concluded that Ms. Salem was a victim of abuse of power. It ordered the rescission of the Commissioner-General's decision to close the case, as it was based on the erroneous conclusion of the DIOS.

² *Ibid.*, para. 126.

³ *Ibid.*, paras. 124 and 123.

5. As remedy, the UNRWA DT awarded Ms. Salem moral damages in the amount of USD 16,000. It decided not to award her any material damages as an alternative to rescission and reinstatement as she had failed to substantiate her claim in this regard.

Submissions

The Commissioner-General's Appeal

6. The UNRWA Dispute Tribunal exceeded its jurisdiction and erred in law and procedure in deciding that the DUO/J had abused her power. The UNRWA DT should not have supplanted the DIOS' conclusion, which was implicitly accepted by the Commissioner-General, where the propriety of the investigation had not been impugned. Absent abuse of power or any evidence of impropriety in the decision-making process, the decision not to confirm Ms. Salem's appointment should not have been disturbed.

7. The UNRWA DT's finding that the DUO/J had abused her power, without according the DUO/J the due process rights to which she would otherwise have been entitled, prejudiced the DUO/J's rights as a third party.

8. The UNRWA DT exceeded its jurisdiction and erred in law and procedure in conducting a *de novo* investigation into Ms. Salem's allegations of discrimination and abuse of power and substituting its conclusion for that of the DIOS. It did not make any findings impugning the investigators or the investigation. While disagreeing with the DIOS' conclusions, the UNRWA DT overlooked the evidence on which the DIOS had relied in reaching its reasonable conclusion. The UNRWA DT should have deferred to the investigators and the Commissioner-General as the finders of fact when the line between poor management and abuse of power is easily blurred, as the UNRWA DT so conceded.

9. The UNRWA DT erred in law by awarding Ms. Salem USD 16,000 as moral damages, an excessive amount of compensation that should be either vacated or reduced. The UNRWA DT failed to explain the causal link between Ms. Salem's poor health and her separation from service or her conditions of employment, and Ms. Salem did not present any medical opinion establishing such a link. There was equally no evidence of psychological harm, as the medical documents that Ms. Salem had submitted to the UNRWA DT were not from medical specialists with expertise in psychological or psychiatric matters.

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Considerations

21. The DUO/J informed Ms. Salem that following the expiration of her probationary period, her appointment as CAO would not be confirmed. However, she was offered a post at

26. The UNRWA DT disagreed with the DIOS' conclusion and held that abuse of power had been established. It also held that the intention to avoid the ACHR was a deliberate abuse of power by the DUO/J.

27. The UNRWA DT noted that Ms. Salem was not informed in writing about the grounds for the decision of 31 March 2011 to extend, and not confirm, her probationary appointment, and that Ms. Salem did not receive a copy of the notes of the record of the meetings between her and the DUO/J.

28. The UNRWA DT concluded that during the probationary period Ms. Salem held a fixed-term appointment which could have been subject to an extension. Pursuant to Organization Directive No. 20 issued by the Commissioner-General on 29 June 2009, the non-extension of her fixed-term appointment upon the expiry of her probationary period should have been submitted to the ACHR for its recommendation to the Commissioner-General.

29. It is not the role of the UNRWA Dispute Tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the Administration.⁵

30. The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance.⁶

31. Appointments shall be subject to the satisfactory completion of not less than one month's probationary service.⁷

32. Organization Directive No. 20 establishes, among others, ACHR's responsibility to make recommendations to the Commissioner-General on proposals from the Director of Human Resources regarding managed reassignment of international staff members, proposals regarding non-extension of fixed-term appointments for international staff and for

⁵ See *Benchebbak v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-438, para. 19, citing *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

⁶ UNRWA Personnel Directive A/4/Part VII/Rev.7, taken from the Impugned Judgment, para. 84.

⁷ UNRWA Area Staff Regulation 4.2.

the area staff at Grade 18 and above and any other human-resource related matters as

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Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Thomas-Felix

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar