



Judgment No. 2016-UNAT-626



Counsel for Mr. Masri:

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Counsel for Commissioner-General:

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JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2015/030, 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 an

... By letter dated 8 January 2014, the Applicant was informed about the extension of his fixed-term appointment for a period of three years.

... On 26 February 2014^[2], the Applicant requested review of the decision to abolish his post and to transfer him. [There is no evidence that the Agency responded to Mr. Masri's request for decision review.]

3. On 23 April 2014, Mr. Masri filed his application with the UNRWA Dispute Tribunal, contesting the decision to abolish his post an

did not present any argument to support this claim, and that the file showed that the Department of Human Resources had had meetings with Mr. Masri discussing his transfer with salary and grade protection, and Mr. Masri had accepted the offer.⁷ The UNRWA DT also rejected Mr. Masri's claim that the decision to place him on an OTI process was to ultimately terminate his appointment for non-satisfactory performance, noting that the OTI reports of 30 June and 14 July 2013 provided that Mr. Masri's performance had been improving, and the final OTI report of 28 July 2013 stated that his performance showed considerable improvement during the last 30 days.⁸

Submissions

Mr. Masri's Appeal

5. Mr. Masri submits that the UNRWA DT exceeded its jurisdiction and erred in procedure when the UNRWA DT Judge failed to declare his conflict of interest which arose by virtue of his professional relationship with the full-time Judge who took the decision now contested, and failed to recuse himself as required by Articles 22 and 23 of the UNRWA DT Rules of Procedure (UNRWA DT Rules). Judge Cousin's decision not to recuse himself patently violated the UNRWA DT Rules and the basic values of the United Nations. The Appellant, having been a staff member of the UNRWA DT, and having submitted his application to the same Tribunal, was subjected to a partial decision to his detriment due to personal frictions with the full-time Judge. The UNRWA DT's explanation that Mr. Masri's case could not be adjudicated in case of a self-recusal cannot stand. In the circumstances, Mr. Masri's due process rights were breached.

6. The UNRWA DT erred on a question of law and fact in deciding that there was no bias in the decision to abolish Mr. Masri's post. The UNRWA DT overlooked Mr. Masri's evidence which patently shows personal bias and procedural irregularities, and there is no doubt, having regard to the facts and timeline of the case, that the full-time Judge's decision to reclassify and to abolish Mr. Masri's post was motivated by personal bias and tainted by procedural irregularities. The partial and unprofessional conduct of the full-time Judge is prohibited under General Staff Circular No. 06/2010

⁷ *H* .., para. 39.

⁸ *H* .., para. 32.

(GSC No. 06/2010) entitled “Prohibition of Discrimination, Harassment - including Sexual Harassment - and Abuse of Power”.

7. The UNRWA DT erred on a question of law by holding that the transfer decision could not be considered to be unlawful. The transfer was effected in breach of Area Staff Personnel Directive A/9, paragraph 15.7, which provides that a “suitable post” means “a post in the same or similar occupation group”. Further, the post to which Mr. Masri was transferred did not reflect his competence and skills, thereby breaching Area Staff Regulation 4.3, which requires that due regard be paid to “securing the highest standards of efficiency, competence and integrity” in effecting, **ibid**, transfers. Lastly, while UNRWA Area Staff Regulation 1.2 states that “[s]taff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency”, the UNRWA DT in **M** held that “this discretionary authority is not unfettered and the Tribunal will not interfere with it unless the contested decision was arbitrary or capricious, motivated by prejudice or extraneous factors”.⁹ The Appeals Tribunal has equally recognised the Administration’s obligation to act in good faith. The UNRWA DT failed to have regard to justice or eth

The Commissioner-General's Answer

10. The UNRWA DT correctly adjudicated the matter. Despite being aware of the identity of the Judge assigned to the case, Mr. Masri never filed a request for his recusal, throughout the UNRWA DT proceedings, to UNRWA's Internal Justice Committee in accordance with Article 23(2) of the UNRWA DT Rules, incorporated via Area Staff Regulation 11.4. Rather, the Judge assigned to the case pre-emptively addressed the matter, in the Judgment, which seems to have put the matter into issue for Mr. Masri.

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legally effected for reclassification purposes insofar as the abolition decision respected Area Staff Personnel Directive A/9, and there was no bias in the decision. Although he bears the burden of proof in establishing his claims that the UNRWA DT erred, Mr. Masri has not established that it was unreasonable for the UNRWA DT to conclude that there was no evidence of bias in the decision to abolish his post. He merely disagrees with the UNRWA DT's conclusions. Insofar as Mr. Masri alleges improper motives on the part of the full-time Judge constituting harassment, the allegations of misconduct have not been investigated nor proven and thus cannot be established as fact.

14. The Appeals Tribunal should also reject Mr. Masri's claim that the UNRWA DT erred in finding his transfer was lawful as the arguments raised to support this claim on appeal, i.e. relating to the suitability of his skills to the new post or the validity of his acceptance, were not raised or argued in his application before the UNRWA DT. Since matters that are not raised before the UNRWA DT cannot be introduced for the first time on appeal, the Appeals Tribunal should find these arguments inadmissible. Should the Appeals Tribunal consider these arguments admissible, the Commissioner-General submits that these issues do not render the transfer unlawful, as Mr. Masri neither presented any evidence to demonstrate that the offered position was not commensurate with his skills and experience nor voiced any concern regarding this issue when consulted by the Human Resources Department, nor provided a sufficient basis to call into question the voluntariness of his acceptance.

15. The Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety, or, should it find that the UNRWA DT has erred, remand the case to the UNRWA DT for further findings of fact.

Considerations

16. The first issue for the Appeals Tribunal to determine is whether or not the UNRWA Dispute Tribunal Judge should have recused himself from the hearing of this case due to the fact that he had a professional relationship with the full-time Judge who made the contested decision.

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22. In order to apply the test there ought to have been an application by Mr. Masri for the UNRWA Internal Justice Committee to consider whether a fair-minded and informed observer would conclude that there is a real possibility of bias as a result of the professional relationship which the judges share.

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below has committed an error of fact or law warranting intervention by the Appeals Tribunal.”

28. While he disagrees with the UNRWA DT’s conclusions, Mr. Masri has to establish, on appeal, that it was unreasonable for the UNRWA DT to conclude that there was

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