



Judgment No. 2018-UNAT-884

Counsel for Mr. Orabi:

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9. Mr. Orabi requests that the Appeals Tribunal reverse the UNRWA DT Judgment and award compensation for lost opportunity and related expenses as well as psychological damage.

The Commissioner-General's Answer

10. The UNRWA DT did not err in law or fact by dismissing Mr. Orabi's application. As to Mr. Orabi's contention that the UNRWA DT failed to address the alleged breach of his right to be informed of developments regarding his transfer request, this issue was not raised before the UNRWA DT and therefore the UNRWA DT did not err in not addressing it. To the extent that Mr. Orabi may be contending that he was not informed of the outcome of his transfer request, this is also a new element that was not properly before the UNRWA DT, as it was only mentioned in the summary of facts, but not presented as a gr

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- a. Full time staff in regular fixed[-]term GF funded posts;
- b. Part time staff in regular fixed term GF funded posts;
- c. GF roster staff members on project-funded full posts;
- d. GF roster staff members on project[-]funded part time posts;
- e. Persons engaged as LDC, temporary assistants and casual laborers are not eligible for transfers;
- f. Transfer requests of staff in grade 2 are governed by Staff Circular No 13/2012 dated 2012. [sic]

Responsibilities of those involved

5. The term Department, refers to each Programme Department in the Field Office.
6. The Receiving Department refers to the Department that will, if a transfer request is approved, receive the relevant staff member.
7. The Transferring Department refers to the Department from where a staff member will be transferred if a transfer request is granted.

Procedures for Requesting & Documenting Employee Transfers

8. A staff member may submit to the Field Human Resources Officer a request for a transfer. Using the Transfer Request Form, the staff member must state in his/her submission:
 - a. The details of the transfer (the post currently held by the staff member, and the post or posts to which the staff member wishes to be transferred).
 - b. The reasons for the transfer.
 - c. The request should be in the attached form (Annex A) to this Instruction.
9. The Field Human Resources Officer shall consider if the request meets the following criteria:
 - a. The requesting staff member has presented one or more compelling humanitarian or personal reasons for the transfer; priority in this case goes to the more senior staff. In case of two or more staff members with the same seniority, performance evaluation will be the decisive element; otherwise an interview by the Head of Department will be done to determine selection.
 - b. The requesting staff member has been in his/her current post for at least one year and his/her performance is either at "fully meets expectations" or "best performance" standard according to his/her last periodic performance report.

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erred by overlooking the procedural irregularity in view of the provisions of paragraph 14 (Mr. Orabi mistakenly refers to the provisions of paragraph 12) of FTI 01/2016 providing for his right to be informed of the developments regarding his transfer request, and ii) that the UNRWA DT erred in accepting the Commissioner-General's contention, without any supporting evidence, that it is the practice of the LFO to determine priority for transfer purposes based on the EOD date.

19. We recall the Appeals Tribunal's jurisprudence confirming the Administration's discretion to appoint, transfer and promote staff. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion in matters such as staff transfers.⁴

20. Nevertheless, an administrative decision not to appoint, promote or transfer can be challenged on the grounds that the Administration has not acted fairly, justly or transparently.⁵ The staff member has the burden of proving such factors played a role in the administrative decision.⁶

21. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the case of the above mentioned decision, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance Judge can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the 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 Dispute Tribunal to substitute its own decision for that of the Administration.⁷ As we stated in

⁴ *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.

⁵ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 26;

Sanwidi, when the Dispute Tribunal (and the Appeals Tribunal) conducts a judicial review, it does not engage in a merit-based review⁸

24. In the course of its Judgment, the UNRWA DT found as follows:¹⁰

... Both the Applicant and the transferred staff member submitted requests for transfer for personal and humanitarian reasons. The Agency decided to grant the request of the transferred staff member because of her seniority. In determining seniority among staff members, the practice at the LFO is to take into account the date of EOD of the staff member. The LFO determined that the Applicant's EOD was 8 August 2014, and the EOD of the transferred staff member was 1 August 2014.

... The Applicant claims that his seniority was miscalculated as his services as a daily-paid worker were not taken into account. In this regard, the Tribunal agrees with the Respondent that the seniority of a staff member must be calculated from the date on which he/she is appointed as a staff member and that his/her services as daily-paid worker cannot be taken in[to] account.

25. In the present case, as discussed and set out above, the applicable instruments bestow on the Agency the discretion in deciding on matters of transfer of staff members. Moreover, FTI 01/2016 sets out the criteria to be considered by the Agency in cases of transfer request by more than one staff member, who present one or more compelling humanitarian or personal reason for the transfer, by stipulating that priority in this case goes to the more senior staff.

26. While it is true that FTI 01/2016 does not explicitly establish that seniority shall be determined by the EOD date of staff members, under the aforementioned legal and factual circumstances, it was not unreasonable or unfair on the part of the Agency to determine the seniority based on the EOD date. On the contrary, by applying the objective seniority criterion of EOD date, the Agency, in exercising its discretionary authority to determine transfer requests in the event there are one or more transfer reques

Mr. Orabi's argument that his seniority is reflected in his February 2017 payslip ("Seniority: 4 years and 6 months"), since the SCD in it is different from the EOD date. Specifically, paragraph 3 of Area Personnel Directive No. A/4/P art VI/Rev.6 of 23 June 2015 distinguishes between the SCD and the EOD date with respect to recognition of prior daily-paid service: while the EOD date is the date of area staff staffing table appointment, the SCD is the commencement date of the continuous daily-paid service being recognized.

28. Further, we agree with, and uphold, the finding of the UNRWA DT that there is no evidence on record in the instant case to support the allegations made by Mr. Orabi relating to actions by the Agency that made him believe that his transfer request had been accepted, including personal messages and organizing 4inuo.2(and0824 aysr)]Ti-3.v24 aysSewo.29NS

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36. The appeal is upheld, UNRWA DT Judgment No. UNRWA/DT/2018/026 is vacated and the discrete issue of whether the Administration, in exercising its discretionary authority to determine the transfer requests, fulfilled its obligation to balance, in compliance with the foregoing legal instrument and in the best interest of the Agency, along with the seniority criterion, the conflicting interests arising from the compelling humanitarian or personal reasons for the transfer, presented by the requesting staff members, and provided a reasoned and sound basis of its final choice, is hereby remanded to the UNRWA DT for consideration.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar