



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Abu Malluh et al .

(Appellants)

v.

Commissioner-General

JUDGE MARTHA HALFELD , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Messrs. Raed Abu Malluh, Ra'fat Shlash, Khaled ZamZam, and Ra'ad Hussein (Abu Malluh *et al.*) of Judgment No. UNRWA/DT/2016/008, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or Dispute Tribunal and UNRWA or Agency, respectively) in Amman on 29 February 2016, in the case of *Abu Malluh et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees [in the Near East]*. Abu Malluh *et al.* filed their appeal on 20 April 2016, and the Commissioner-General of UNRWA filed his answer on 17 June 2016.

Facts and Procedure

2. The UNRWA Dispute Tribunal found the applications of Abu Malluh *et al.* not receivable on the ground that they did not comply with the time limit to submit a request for decision review of the contested decisions. In their applications, Abu Malluh *et al.* contested the decisions “to qualify their respective posts as Messenger Porter instead of Messenger ‘A’”.

3. The following facts are taken from the UNRWA DT Judgment: ²

... Effective 1 June 2009, Applicant Abu Malluh joined the Agency, on a three-year fixed-term appointment as Messenger Porter at Grade 2, in Headquarters, Amman (“HQA”). On 20 May 2012, his appointment was extended until 31 May 2015 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was indicated as Messenger Porter. On 24 March 2015, Applicant Abu Malluh’s appointment was further extended until 31 May 2018 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was indicated as Messenger Porter.

... Effective 1 April 2008, Applicant Shlash joined the Agency, on a three-year fixed-term appointment as Messenger “A” at Grade 2, in HQA. On 3 March 2011, his appointment was extended until 31 March 2014 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was noted as Messenger Porter. On 3 March 2014, Applicant Shlash’s appointment was extended until 31 March 2017 with no change to the terms and conditions stipulated in his initial letter of appointment. The Applicant’s post was indicated as Messenger Porter.

¹ Impugned Judgment, para. 1.

² *Ibid.*, paras. 2-24.

... Effective 1 April 2000, Applicant ZamZam joined the Agency on a two-year fixed-term appointment as Messenger Porter, Level 1A, Step 2 in HQA. On 17 March 2002, his appointment was extended until 30 April 2004. His post was noted as Messenger Porter. On 11 May 2004, his appointment was extended until 30 April 2006 with no change to the terms and conditions stipulated in his initial letter of appointment. Effective 1 August 2004, Applicant ZamZam's appointment was converted from "Z" to "X" category expiring on 30 April 2006 with the post title of Messenger Porter at Grade 2. On 4 May 2006, his appointment was extended until 30 April 2009 with no change to the terms and conditions stipulated in his initial letter of appointment. On 25 February 2009, his appointment was further extended until 30 April 2012 with no change to the terms and conditions stipulated in his initial letter

... By email dated 11 June 2014 to the DAS, the Head, Administration and General Services Section (“HAGSS”) memorialized a meeting she had with the Applicants. During the meeting, the Applicants’ concerns were discussed and they

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Abu Malluh *et al.* with a copy of the Post Description for Messenger Porter, and told them that a request would be sent to the HRD to revise their Post Descriptions. During a meeting on 3 August 2014, the HAGSS told Abu Malluh *et al.* that the HRD had confirmed that all posts were Messenger Porter posts. Later, on 23 September 2014, the HAGSS sent an e-mail which memorialized the discussions during the meeting on 3 August 2014. She sent the e-mail to

conflicting and misleading information to Abu Malluh *et al.*, and demonstrates that a final decision on their post titles was only taken on 4 March 2015.

9. Abu Malluh *et al.* were diligent in seeking clarification from the HRD regarding their job functions, and acted in good faith at all times. They submitted their requests for decision review within the 60-day time limit, on 14 April 2015. Further, Abu Malluh *et al.* contend that the Agency knew they were not native English speakers and did not provide an official translator during their meetings.

10. Abu Malluh *et al.* argue that the UNRWA Dispute Tribunal erred by “adopting the respondent’s reply without properly assessing the case on its merits and evidence provided”. The UNRWA DT did not take into account their arguments or the evidence that they submitted concerning the date of the final decision. In particular, the Tribunal adopted the Respondent’s reply in making its findings concerning the meeting on 21 May 2014. Further, Abu Malluh *et al.* contend that there are a number of examples of the UNRWA Dispute Tribunal “acting in favo[u]r of the Respondents with no proper assessment of the cases”. They refer to a number of Appeals Tribunal Judgments and pending appeals before the Appeals Tribunal.

11. Finally, Abu Malluh *et al.* submit that the UNRWA Dispute Tribunal erred on a matter of fact and law in deciding that their applications were not receivable. Their cases ought to have been heard on the merits, in the interests of justice.

12. Abu Malluh *et al.* request the Appeals Tribunal to reverse the UNRWA DT Judgment and remand the case for adjudication on the merits, or to award them compensation for the damage that they suffered as a result of carrying out duties that were not part of their job functions.

The Commissioner-General’s Answer

13. As a preliminary issue, the Commissioner-General argues that Abu Malluh *et al.* have annexed evidence to their appeal that was not part of the case record before the UNRWA Dispute Tribunal (annex 2 to the appeal). They have not requested leave from the Appeals Tribunal to adduce additional evidence. The affidavit contained in annex 2 to the appeal is dated after the issuance of the UNRWA DT Judgment. The e-mail correspondence contained in annex 2 to the appeal was the subject of motions for leave to file supplementary

evidence, which were dismissed

Considerations

19. The Appellants are currently employed on fixed-term contracts by UNRWA in Amman and are represented by its Legal Office, Staff Assistance in this appeal.

Preliminary issue: Is annex 2 to the appeal admissible (affidavit from Staff Union representative signed after the UNRWA DT Judgment was issued on 29 February 2016 and e-mail correspondence dated October and November 2014)?

20. Articles 2(5) and 8(1) of the Appeals Tribunal Statute state, respectively, as follows:

Article 2

...

5. In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. Where this is not the case, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, it shall remand the case to the Dispute Tribunal. The evidence under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal.

...

Article 8

1. The Appeals Tribunal may order production of documents or such other evidence as it deems necessary, subject to article 2 of the present statute.

21. Article 10(1) of the Appeals Tribunal Rules of Procedure provides:

A party may seek to submit to the Appeals Tribunal, with an appeal or an answer, documentary evidence, including written testimony, in addition to that contained in the written record. In exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party. On its own volition, the Tribunal may order the production of evidence if it is in the interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

22. The affidavit sworn by the representative of the ASU is not admissible. Apart from the fact that it was signed on 17 April 2016, after the UNRWA DT Judgment was rendered in February 2016, it was not available to the Commissioner-General, who therefore did not have an opportunity to submit his comments on the affidavit or adduce evidence in response before the Judgment was rendered. Furthermore, the Appellants did not provide sufficient arguments to establish that the tardy presentation of the affidavit nevertheless constituted exceptional circumstances.

23. Regarding the e-mail correspondence dated October and November 2014, as stated above, the Appeals Tribunal is not allowed to permit evidence “if it was known to the party seeking to submit the evidence” and it “should have been presented to the Dispute Tribunal”, which has the primary role of evaluating evidence as the first instance tribunal.

24. In the present case, however, on 11 February 2016, Abu Malluh *et al.* filed motions before the UNRWA Dispute Tribunal “to submit supplementary evidence in support of their claim that following the meeting on 3 August 2014 and the HAGSS e-mail of 23 September 2014”, there were other discussions and communications between the ASU and the Agency in order to get a final answer regarding their post title.⁴

25. The UNRWA Dispute Tribunal denied the motions in its Judgment. Therefore, this matter will be dealt with below.

Did the UNRWA DT err in procedur-~~s~~y-phowever, on

Messenger-Porter and they were provided with the relevant post descriptions. However, Abu Malluh *et al.* only requested review of the contested decisions on 14 April 2015.

27. In their submissions filed on 11 February 2016, Abu Malluh *et al.* argued that the final decision was only taken on 4 March 2015 and, therefore, their request for decision review was submitted within the 60-day time limit. Abu Malluh *et al.* stated that, following the e-mail of 23 September 2014, there were follow-up meetings and an ongoing exchange of e-mails from October 2014 to March 2015 between representatives of the ASU and the Agency regarding the applicable post descriptions.

28. Also on 11 February 2016, Abu Malluh *et al.* filed a separate motion in which they requested leave from the UNRWA Dispute Tribunal to admit into evidence the e-mail correspondence dated from October 2014 to March 2015 referred to in their submissions. However, Abu Malluh *et al.* did not annex the additional evidence to their motions.

29. In its Judgment, the UNRWA Dispute Tribunal rejected the motion to admit additional evidence as it considered that “the evidence the Applicants request to submit would have *no impact on its decision* concerning the receivability of their applications”.⁵

30. However, the UNRWA Dispute Tribunal went on to assess the contents of the additional evidence based solely on the submissions filed by Abu Malluh *et al.* and without admitting the documents into evidence. The UNRWA Dispute Tribunal not only mentioned the rejected evidence as “several follow-up meetings were conducted and some emails were exchanged between the ASU representatives and the HRD in relation to their post titles”, but also stated that it had “reviewed the evidence” (which had previously been refused) and found that “the separate emails sent by the HRO to [Abu Malluh *et al.*] on 4 March 2015 clarifying that their respective post titles were Messenger Porter” were “a mere confirmation of the original decision of 3 August 2014”.⁶

31. It follows from the above that Abu Malluh *et al.* raised before the UNRWA Dispute Tribunal all of their arguments regarding receivability that they ought to have raised, and that the purpose of seeking to adduce the additional evidence was to respond to the issue of receivability that had been raised specifically by the UNRWA Dispute Tribunal.

⁵ *Ibid.*, para. 31 (emphasis added).

⁶ *Ibid.*, paras. 45 and 46.

32. Regarding case management by the Dispute Tribunal and motions to adduce additional evidence, the Appeals Tribunal held in *Staedtler*:⁷

... Our jurisprudence clearly indicates that the Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases and that the UNDT has a broad discretion to determine the admissibility of, and the weight to be attached to, any evidence as the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before him or her.

... The Appellant has failed to demonstrate how the UNDT erred in procedure. He has not demonstrated which documents were not produced or how such documents would have led to different findings of fact and changed the outcome of his case. Therefore, the Appellant has not established any procedural errors warranting the reversal of the Judgment.

33. In *Wu*, the Appeals Tribunal held:⁸

... Case management issues, including the question of whether to call a certain person to testify, thus remain within the discretion of the UNDT and do not merit a reversal except in clear cases of denial of due process of law affecting the right to produce evidence.

34. Abu Malluh *et al.* have thus acted with due diligence in the proceedings before the UNRWA Dispute Tribunal and have demonstrated how the additional documents that they sought to admit into evidence would have led

Did the UNRWA DT err by finding the application not receivable on the ground that Abu Malluh et al. did not meet the 60-day time limit to submit their requests for decision review? In particular,

- a) *Did the UNRWA DT err in fact or law by finding that the final contested decision (i.e. to qualify the posts as Messenger Porter instead of Messenger "A") was taken on 3 August 2014 (alternatively, on 23 September 2014)?*
- b) *Was the e-mail dated 23 September 2014 an "administrative decision"?*
- c) *Or was the final decision only taken on 4 March 2015?*

37. In *Kazazi*, we recalled that:⁹

... [T]he key characteristic of an administrative decision subject to judicial review is that the decision must 'produce[] direct legal consequences' affecting a staff member's terms and conditions of appointment". Further, "[t]he date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine."

38. Also in *Kazazi*, we stated that:¹⁰

... [T]he Appeals Tribunal has consistently held that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather the time starts to run from the date on which the original decision was made. For this reason, a staff member cannot reset the time for management review by asking for a confirmation of an administrative decision that has been communicated to him earlier. Neither can a staff member unilaterally determine the date of an administrative decision.

39. The e-mail dated 23 September 2014 could not be perceived as a clear and definitive administrative decision. First, the e-mail is simply a report, albeit well written, of the meetings with the "list of main concerns raised during both meetings and an update on actions taken and outcome reached". The e-mail noted that the issue of unfair treatment of mail teams between agencies was a "[w]ork in progress". With respect to the

⁹ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 28 (internal quotes omitted), quoting *Rabee v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-296, citing *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273.

¹⁰ *Ibid.*, para. 31 (internal footnotes omitted).

Messenger-Porter post description, the e-mail noted that it “was issued in 1979 and it should be updated to reflect the current duties performed ... and have a more generic description of tasks expected from this group of workers”.

40. Secondly, this e-mail shows that the concerns of Abu Malluh *et al.* were considered and addressed (and some of them even resolved), but there was still work to do on the part of the Agency. Therefore, we consider that there were not enough objective elements arising from the e-mail to enable both parties to accurately identify that correspondence as a final decision, particularly considering that the e-mail was addressed to the ASU and not Abu Malluh *et al.* themselves.

41. Thirdly, because it is clear from the e-mail correspondence dated October and November 2014 that, after the e-mail dated 23 September 2014, the issue of which of the two post descriptions (Messenger “A” or Messenger-Porter) was valid continued to be discussed by the ASU and the HRD. This correspondence began on 28 October 2014 and was clarified step by step, until the e-mail of 2 March 2015, which acknowledged the need to review the Messenger-Porter post description as part of the General Services Section restructuring. Abu Malluh *et al.* were obviously aware of this exchange of correspondence,

some time and a comprehensive review of the past correspondences and actions was in order". The e-mail also reiterated "the need to review the responsibilities of the post in a comprehensive manner" and stated that, "[t]aking into account the nature of the services provided by the AGSS in respect of managing the mail and pouch, the function will remain Messenger-Porter, whereas the detailed description of duties will be part of the AGSS restructuring review".

45. The e-mail of 2 March 2015 also acknowledged the "concerns with regards to the conflicting documents that were issued on more than one occasion to the staff members in question ... In some communications the staff members were referred to as Messenger 'A' and in others they were referred to as 'MessengerPorter'. Area Personnel Section regrets any misunderstandings the conflicting messages may have caused. A correspondence confirming their post titles will be sent to them in due time."

46. This correspondence reveals that neither Abu Malluh *et al.*, nor the ASU were trying to obtain a reconsideration of a decision regarding their post descriptions, but that the situation was unclear and there was a reasonable expectation that the Agency could reverse its initial position set out in the e-mail of 23 September 2014. A review of all the e-mail

