



Judgment No. 2016-UNAT-627

Counsel for Mr. El Rush:

Ali A. Abuwarda

Counsel for Commissioner-General:

Lance Bartholomeusz

JUDGE SOPHIA ADINYIRA , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2013/021 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 29 May 2013, in the case of *El Rush v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Having received the Arabic translation of the UNRWA DT Judgment on 20 May 2015, Mr. Mirzeq Salman El Rush filed his appeal on 4 July 2015, and the Commissioner-General filed his answer on 14 September 2015.

Facts and Procedure

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

... On 1 September 2001, the Applicant was appointed as an English Teacher under a fixed-term appointment [with the Agency] at level 6B, step 01, in Beit Lahya Elementary Boys School, in Gaza.

... By letter dated 16 November 2009, the Deputy Director of UNRWA Operations in Gaza (“D/DUO/G”) informed the Applicant that an internal investigation had been conducted, revealing a history of disciplinary and administrative actions taken against the Applicant, including a week’s suspension without pay in 2007 and multiple transfers. The D/DUO/G indicated in his letter that opportunities to improve his performance had been provided to the Applicant, but to no avail. The D/DUO/G pointed out [...] the Applicant’s failings, which included, late arrival for class, abusing sick leave, continuing to use corporal punishment, exhibiting unprofessional attitude towards supervisors and the Education Programme in general. The D/DUO/G also noted that in spite of repeated warnings to the Applicant about his performance, the Applicant had been willfully incompetent and negligent in his duties as a teacher. Finally, the D/DUO/G gave the Applicant seven days from the receipt of the letter to rebut the allegations of misconduct against him.

... In two letters dated 22 November 2009, the Applicant stated that he had not used corporal punishment against students and challenged the Agency to provide medical reports to prove it. The Applicant also raised doubts about the unsubstantiated complaints of corporal punishment against him by the students’ parents and challenged the allegation that he sleeps in his classroom wondering how he could sleep when students are climbing on the tables and making noise. Lastly, the Applicant rejected the testimonies given by teachers against him to the commission

¹ Impugned Judgment, paras. 2-15.

which visited the school on 3 October 2009, as well as the low pass rate of his students relative to other similarly situated classes.

... By letter dated 19 January 2010, the Director of UNRWA Operations/Gaza ("DUO/G") informed the Applicant of the Agency's decision to terminate his employment [as a teacher with UNRWA] effective 19 January 2010 for willful incompetence and negligence in his duties.

... By letter dated 28 January 2010, the Applicant requested the DUO/G to review the Agency's decision to terminate his employment, as he is "the only supporter for [his] family especially in the light of current economical [sic] situation in Gaza Strip and difficulties to find another job", requesting the Agency to find "other solution except separation from service".

[On 4 February 2010, the Officer-in-Charge of UNRWA Operations, Gaza, replied to the Applicant's decision review request, acknowledging the Applicant's difficulty, but affirming the decision to terminate the Applicant's appointment as the evidence showed that he had failed in his duties as a teacher. The Officer-in-Charge further explained that the Applicant had 30 days from the date of receipt of the letter to submit an appeal to the Joint Appeals Board. Mr. El Rush's appeal form claims that he never received this letter.

It transpires from a letter of 31 January 2011 from the D/DUO/G to the Applicant, that, after the Applicant's contract as a teacher had been terminated in January 2010, the Applicant had been offered the opportunity to work as a Sanitation Labourer. This contract was terminated effective 12 April 2010, when the Applicant failed to report for duty. The same letter advised the Applicant that he had 60 days from the date of receipt of that letter to request decision review by the DUO/G].

... On 30 March 2011, the UNRWA Dispute Tribunal [...] received a Statement of Appeal from the Applicant dated 24 March 2011, contesting the Agency's decision [of 19 January 2010] to terminate his contract as a Teacher.

... By letter dated 13 April 2011, the [UNRWA DT] Registrar requested the Applicant to submit an application with supporting documents.

... By letter dated 26 June 2011, the [UNRWA DT] Registrar confirmed to the Applicant the receipt of his application dated 8 May 2011.

... By email dated 28 June 2011, the [UNRWA DT] Registry transmitted the application to the Agency.

... On 15 August 2012, the [UNRWA Dispute] Tribunal received a supplemental submission from the Applicant dated 9 August 2012. The Judge accepted the supplemental submissions in light of the fact that the Applicant's case was not scheduled for review in the near future.

... On 28 February 2013, the Respondent filed his reply.

6. The UNRWA DT erred in failing to order the Commissioner-General to provide documents relating to Mr. El Rush's case, specifically the investigation file of 3 October 2009, which concluded that the Administration had committed errors of law and fact. Mr. El Rush now requests this Tribunal to order the Commissioner-General to produce these documents.

7. The UNRWA DT also erred by "straying from the topic at hand" by discussing his abuse of sick leave and his attitude towards his supervisors when it had no proof in this regard.

The Commissioner-General's Answer

8. Mr. El Rush has not identified which of the five grounds of appeal set out in Article 2(1) of the Appeals Tribunal Statute forms the legal basis of his appeal. Nonetheless, the UNRWA DT did not err in law when it found that his application was not receivable *ratione temporis* as it was time-barred.

9. Insofar as Mr. El Rush contends that the UNRWA DT erred in calculating the applicable time limits, the UNRWA DT correctly determined that the date of the contested decision was 19 January 2010, when Mr. El Rush was first notified of the termination of his contract for the position he held as a teacher. Mr. El Rush's contention that time began to run for him to file his UNRWA DT application only as of 31 January 2011 is untenable and legally flawed. The UNRWA DT Judgment is hereby confirmed.

10. The UNRWA DT also correctly identified and applied the applicable law, namely the former Area Staff Rule, as the Administration's dealings with staff are governed by the Organization's internal law and not national labor laws. Thus, Mr. El Rush's argument that the UNRWA DT erred by not applying the Palestinian Labor Law No. 7 (2000) is irrelevant.

11. Mr. El Rush's claim that the UNRWA DT erred in not examining the facts merely challenges the UNRWA DT's approach of first considering the issue of receivability. The UNRWA DT's approach accorded with the Appeals Tribunal's established jurisprudence which recognizes the UNRWA DT's right to first determine matters of receivability.⁴

12. The Commissioner-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Preliminary matters - request for an oral hearing and request for production of documents

13. Mr. El Rush requests that the Appeals Tribunal hold an oral hearing, at which he can present witnesses to substantiate his claims, because the case is "fatal" for him. The Appeals Tribunal denies the request, finding there is no need for further clarification of the issues pursuant to Article 8(3) of the Appeals Tribunal Statute and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules).

Merits of Mr. El Rush's appeal

14. Mr. El Rush submits that the UNRWA DT erred in law by not applying the applicable legislation, namely, the Palestinian Labour Law No. 7 (2000), to his case. This submission is misconceived as it is the internal laws of the Organization that govern staff matters and not national law, unless the Organization adopts such national law as part of its internal laws.⁵

⁴ Citing *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 28, and *Christensen v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-335, para. 20.

⁵ See *Wang v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-454, para. 32. (concerning the application of national laws in selection processes).

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18. In accordance with our jurisprudence, once a clear decision to terminate Mr. El Rush's appointment was made and communicated to him on 19 January 2010, time began to run for him to initiate the appeal process set out in former Area Staff Rule 111.3⁷.

19. As the UNRWA Dispute Tribunal correctly noted at paragraphs 21 and 22 of its Judgment, the facts show that Mr. El Rush complied with sub-paragraphs (1) and (2) of former UNRWA Area Staff Rule 111.3, in that he submitted a request for review of the decision of 19 January 2010 to terminate his employment as a teacher with UNRWA, within 30 days, i.e., by virtue of letter dated 28 January 2010.

20. Thereafter, however, Mr. El Rush claims he did not receive the Agency's response of 4 February 2010. In those circumstances, sub-paragraph (3)(B) applied, that is, "if no reply has been received from the latter within thirty days of the date of the staff member's letter", sub-paragraph (3)(B) required Mr. El Rush to submit his appeal to the former Joint Appeals Board "within the next thirty days". As Mr. El Rush had requested decision review on 28 January 2010, and claimed to receive no response within the ensuing 30 days, he should have filed

23. Further, in the absence of a request for waiver of the filing time limits, the

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar