



Judgment No. 2020-UNAT-1023



Counsel for Mr. Sirhan:

Self-represented

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Judgment No. 2020-UNAT-

6. On 3 May 2017, the Field Human Resources Officer, Jordan (FHRO/J) requested that a medical board be convened to evaluate Mr. Sirhan's fitness for continued service with the Agency in his current post or any other manual worker post. On 16 May 2017, the Deputy Chief, Field Health Programme (D/C/FHP) convened the M

9. On 21 November 2017, the Head, Field Human Resources Office, JFO (H/FHRO/J) informed Mr. Sirhan that, effective 11 December 2017, his service would be terminated on medical grounds, as no vacant post of Messenger was available in which to place him. Yet again the UNRWA DT Judgment under appeal does not record what happened to Mr. Sirhan, either as to his work or medical circumstances, during the period between early May 2017 when his first certificate for sick leave expired and when his service was terminated, a period of about seven months. It is unfortunate that the absence of these details as we have outlined in this and previous paragraphs has made decision of these appeals more difficult.

10. Mr. Sirhan challenged his termination by first requesting a decision review, but which was not responded to by UNRWA, and then applying to the UNRWA Dispute Tribunal.

11. In its Judgment No. UNRWA/DT/2019/026 dated 22 May 2019, the UNRWA Dispute Tribunal ordered rescission of the decision to terminate Mr. Sirhan's service on medical grounds or payment of USD 13,500 compensation to Mr. Sirhan if he was not to be reinstated. The UNRWA Dispute Tribunal considered that the Agency's decision to convene a medical board less than two months after Mr. Sirhan's service-incurred injury in order to examine his fitness for continued service was manifestly unreasonable. That was said to have been because the Agency had failed to give Mr. Sirhan an "adequate time for recovery",² in violation of Area Staff Rule 106.4. It noted that even the Medical Board did not specify that Mr. Sirhan could not or would not recover within a reasonable time. In the view of the UNRWA Dispute Tribunal, Mr. Sirhan's injury was a muscle strain and there was no evidence that he would never recover. Estimating that Mr. Sirhan had a 75 per cent chance of recovery and resumption of his duties, the UNRWA Dispute Tribunal set the monetary compensation as an alternative to rescission at 75 per cent of Mr. Sirhan's two-years' net base salary, or USD 13,500. However, for reasons of lack of evidential proof, the UNRWA Dispute Tribunal declined to award Mr. Sirhan any moral damages.

12. Both parties have appealed the UNRWA Dispute Tribunal Judgment to the United Nations Appeals Tribunal (the Appeals Tribunal or this Tribunal). Mr. Sirhan filed an appeal on 17 July 2019, to which the Commissioner-General filed his answer on 13 September 2019. The case was registered under Case No. 2019-1290. The

² Impugned Judgment, para. 50.

Commissioner-General filed an appeal on 19 July 2019. No answer to that appeal was received from Mr. Sirhan. The case was registered under Case No. 2019-1291.

Case No. 2019-1290

13. Mr. Sirhan

18. Mr. Sirhan requests that the

aware of the need to present evidence of harm suffered, he was given ample time and opportunity to do so, and he did make further submissions and adduce further evidence through several motions that he filed before the UNRWA Dispute Tribunal issued the impugned Judgment. The UNRWA Dispute Tribunal carefully reviewed the evidence on record and correctly concluded that Mr. Sirhan had failed to provide the required proof of harm in support of his request for moral damages.

24. Mr. Sirhan is seeking, for the first time on appeal, compensation for expenses incurred for treatment in hospitals and clinics as well as compensation in the form of a promotion to a higher-level position. These claims may not be introduced at this stage since they were not brought before the UNRWA Dispute Tribunal. Moreover, the relief that Mr. Sirhan is seeking in the form of a promotion falls outside the scope of relief that the UNRWA DT can award.

25.

Its review of the decision to refer Mr. Sirhan to the Medical Board as an administrative decision appears to depart from its previous jurisprudence that such a decision cannot be considered as an administrative decision.⁴

28. Second, the UNRWA DT erred in law in its interpretation of Area Staff Rule 106.4 as requiring the Agency to give staff members “adequate time for recovery”. Nothing in that staff rule requires the Agency to wait a particular period of time before it can refer a staff member to a medical board. The interpretation given by the UNRWA DT runs counter to the Area Staff Rules that allow the Agency to require staff to undergo medical examinations “at any time”⁵ or “at such time or times as the Commissioner-General may consider necessary”.⁶ The Agency refers staff members to a medical board precisely to assist it in exercising its discretionary decision-making authority. To require the Agency to undertake a *prima facie* medical evaluation prior to referring staff to a medical board is manifestly unreasonable and is inconsistent with the purpose of the medical board proceedings as set forth in the relevant Area Staff Rules and UNRWA’s Personnel Directive PD/A/6.⁷

29. Third, some of the findings of the UNRWA Dispute Tribunal regarding the reasonableness of the referral decision took into account irrelevant considerations such as the medical certificates that Mr. Sirhan had submitted only after the Medical Board’s proceedings.

30. Finally, the UNRWA Dispute Tribunal exceeded its competence in setting Mr. Sirhan’s chances of recovery and resumption of duty at 75 per cent. That determination was arbitrary and without basis, as the UNRWA Dispute Tribunal did not dispute the findings and conclusions of the Medical Board in Mr. Sirhan’s case.

31. The Commissioner-General requests that the Appeals Tribunal allow his appeal and reverse the impugned Judgment.

⁴ As the most recent example, the Commissioner-General cites *Fahjan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2018/028.

⁵ Area Staff Rule 106.2(9).

⁶ Area Staff Rule 104.4.

⁷ Personnel Directive PD/A/6/Amend. 72 titled “Medical Boards—authorities and procedures”, effective 1 September 1998.

3. The amount of compensation payable under this rule shall be the amount which would normally be payable in the circumstances of the case, but not necessarily in the form of a pension, under the workmen's compensation or labour law applicable in the Syrian Arab Republic provided that:

(A) Where such compensation includes the cost of medical or hospital treatment, such treatment or hospitalization shall be provided in Agency-operated or subsidised hospitals unless in exceptional circumstances the Agency authorises other arrangements;

(B) the Agency will continue an incapacitated staff member in full pay status for a period not exceeding six months from the date of the injury or illness or until he/she is declared able to return to work or is offered a settlement for permanent disability whichever is earlier. Such payment of salary and allowances shall be in lieu of the payments of salary or partial salary which are provided by law for the period. Should temporary incapacity extend beyond six months, compensation payments for such further period will be determined in accordance with the workmen's compensation or labour law applicable in accordance with article 1.4 (t)-3.4 (h) of the Staff Regulations and Rules.

11 November explaining its earlier conclusions. It found that Mr. Sirhan was suffering from lumbar disc disease, a lifelong condition which necessitated cessation of carrying heavy objects. We infer that the events of 28 March 2017 when Mr. Sirhan first experienced severe lower back pain either identified this chronic disease or precipitated it so that it was fair for UNRWA to assume that this was not merely an injury from which he would recover in a reasonable time. We can add that if Mr. Sirhan had lumbar disc disease it does not matter whether he could have recovered from a muscle strain.

45. The UNRWA DT did not consider the medical investigation and the recommendations of the Medical Board to be procedurally flawed or biased. The decision of the UNRWA DT not to follow the conclusion that Mr. Sirhan was “unfit for continued service with the Agency as Sanitation Labourer” was only based on medical documents submitted by M2.1 (n)04c00.001 Tc 0[1c(um)

48. Before notifying the decision to terminate Mr. Sirhan's appointment, the Agency affirmed that no such post was available. It appears that this statement was not challenged in the request for decision review or in the application filed with the UNRWA DT.

49. In addition, even if such an obligation exists for other categories of redundant staff members,⁹ "the Agency's regulatory framework does not create any obligation on the Agency to find an alternative post for a staff member who is found unfit to continue his/her service in his/her current post".¹⁰ The Tribunal which is only competent to review administrative decisions that are "alleged to be in non-compliance with (...) all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance"¹¹ is not competent to create an obligation to find the staff member a suitable placement.

50. We have been persuaded that the UNRWA DT's Judgment was erroneous and must be set aside. In these circumstances, it is strictly unnecessary for us to consider Mr. Sirhan's appeal which relates to the remedies awarded to him by the UNRWA DT, as our conclusions mean that he is not entitled to any remedies.

51. However, even if the UNRWA DT's Judgment had been affirmed on matters of liability, we would not have upheld one of the conclusions reached by it. That was its assessment of a 75 per cent chance of recovery and resumption of duty by Mr. Sirhan. We agree with the Commissioner-General that this assessment was made without evidence (indeed it was contrary to the findings of the Medical Board) and was arbitrary.

52. For the foregoing reasons, we dismiss Mr. Sirhan's appeal, allow the Commissioner-General's appeal and set aside the UNRWA DT's Judgment. Judge Colgan appends a dissenting opinion.

⁹ See UNRWA Area Staff Personnel Directive PD A/9/Rev. 10 titled "Separation from service", effective 23 June 2015, paras. 36-38 (d)7n1.12 05-0.-0 010c 0.001 Tw 0.24n 4MCID 24 BD (aBDC 5 -0 0 10.042.5Tw 1.361495Td

53. Mr. Sirhan's appeal registered under Case No. UNAT-2019-1290 is dismissed.
54. The Commissioner-General's appeal registered under Case No. UNAT-2019-1291 is granted and Judgement No. UNRWA/DT/2019/026 is set aside.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar

55. I agree with and adopt paragraphs 32-34 of the “Considerations” of the foregoing Judgment of the majority. The following is my dissenting Judgment.

56. I deal first with the Commissioner-General’s appeal and start by observing that, generally, cases of personal injuries incurred at work and the consequential questions of recovery, long-term prognosis and alternative duties raise notoriously difficult issues for decision. These cases involving Mr. Sirhan are no exception. Here the subtle, but nevertheless significant, issues include that the injury occurred in the performance of the employee’s work; that medical opinions as to cause, prognosis and underlying illness can and often do differ; that long-term prognosis can often not be predicted accurately until the worker’s state of health has settled; the role, if any, of treatment, including surgery to treat the injury and mitigate against a repetition; whether, and if so to what extent, employers should be obliged to accommodate an injured staff member in an alternative role; and how a termination of an injured employee’s employment should be undertaken by a good employer.

57. As always, it is necessary to start with the relevant rules, regulations and practices governing Mr. Sirhan’s situation. The UNRWA Staff Regulations and Rules for Area Staff (as Mr. Sirhan was) contain several references to medical examinations in the course of employment. First, Area Staf

time or times as he may consider necessary.” While the issues in this case do not include Mr.

Judgment No. 20

following an injury to convene a medical board. The UNRWA DT erred in law in basing substantively its decision on a misinterpretation of the Area Staff Rule.

70. That said, however, Rule 106.4 is instructive as to the reasonableness or rationality of the timing of the Agency's decision to convene a medical board. The Rule is an indication by UNRWA of the desirability of waiting for a reasonable period following a work-related injury (and particularly as in this case a muscle strain injury) before assessing the long-term consequences of that injury. Such an approach suggests that a hasty decision to commence a process that may remove the staff member from his or her job (the convening of a medical board) may be an unreasonable or irrational decision.

71. Next, and not unassociated with t

about or very shortly after the expiry of a first sick leave certificate barely a month after this accidental injury and apparently without any other medical information or input from the staff member, requires very careful scrutiny of the propriety of that decision to convene a medical board. For me, the reasonableness or rationality of that decision has not survived that scrutiny. UNRWA's power to convene a medical board was not shown by the Agency to the UNRWA DT to have been exercised rationally.

73. There is another element of the Agency's actions that was likewise in error in my assessment. That relates to its response to, and acceptance of, the Medical Board's recommendations. It will be remembered that the Board recommended that although in its assessment Mr. Sirhan was unable to resume his role as a sanitation labourer involved in heavy lifting, it said he would be fit for other tasks including as a messenger. It could not, and I would conclude did not, limit his abilities to that role alone; it was merely an example of work, perhaps associated with sanitation duties, for which it assessed he would be fit. I infer, strongly, that Mr. Sirhan's assessed unfitness for the labouring position related to the expectation of his ability to lift heavy weights. UNRWA's mandate in Jordan and elsewhere in the Middle East covers a wide range of unskilled societal occupations including, no doubt, some other than messengering, which do not require heavy weights to be lifted.

74. The Agency, however, misinterpreted the Board's recommendation to mean that the only other available position for Mr. Sirhan was as a messenger. It limited

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result of a workplace injury. Staff, in Mr. Sirhan's case of long-standing, should not just be cast aside without any further responsibility in such circumstances, at least unless there is, genuinely, no real possibility of their continued employment.

75. It is unclear to what extent, if any, the Commissioner-General adduced, or was required to adduce, evidence before the UNRWA DT of his efforts, if any, to ascertain the availability of other jobs and Mr. Sirhan's suitability for them. A good employer will Sirham.a.1 (r)r(m.9 (o T

Agency had reviewed its separation decision and the grounds for it, or, at the very least, responded to Mr. Sirhan explaining why it could not do so in time.

81. In these circumstances, on 31 January 2018, Mr. Sirhan applied to the UNRWA Dispute Tribunal for relief. Even then the Agency made no attempt to explain why, or even offer any expression of regret about, its failure or refusal to follow its own process. I deprecate that failure or omission to engage with the important issues about Mr. Sirhan's future. I express my concern that UNRWA acted in this way: it is not good faith in employment relations that the Agency should both set up a fair and objective review system, but then apparently ignore it arbitrarily.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar