



Judgment No. 2018-UNAT-814



... On 17 May 2016, [Mr. Abu Lehia] submitted another medical report, recommending an extension of his sick leave for the period from 18 May 2016 to 7 June 2016. Ultimately, [Mr. Abu Lehia] did not undergo either a cardiac catheterisation nor an open-heart surgery.

... On 22 June 2016, [Mr. Abu Lehia] resumed his duties in Gaza. At some point after his return, he was informed that his absence for the period from 21 March 2016 to 7 June 2016 would be considered as annual leave.

... On 10 July 2016, [Mr. Abu Lehia's] request for the extension of his service beyond the age of retirement was approved and his appointment was extended until 30 June 2018.

... On 31 July 2016, [Mr. Abu Lehia] submitted a request for review of the decision to consider his absence from 21 March 2016 to 7 June 2016, to be annual leave instead of sick leave.

... On 31 August 2016, the Director of UNRWA Operations, Gaza ("DUO/G") affirmed the decision.

... On 31 October 2016, the [...] application was filed with the UNRWA Dispute Tribunal. The application was transmitted to the Respondent on 10 November 2016.

3. On 14 June 2017, the UNRWA DT issued its Judgment wherein it held that while the C/FHP had managerial discretion to grant sick leave, such discretion was not unfettered and the UNRWA DT was entitled to review whether the decision was arbitrary or tainted by bias and improper motive. In reviewing the decision, the UNRWA DT found that Mr. Abu Lehia did not provide medical evidence to support his claim for sick leave for the period of 21 March to

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bed rest beforehand. Furthermore, negative test results supporting the certificate provided a contradictory indication that no catheterization or open-heart surgery was necessary, rendering the C/FHP's decision to deny sick leave reasonable.

7. The Commissioner-General argues that Mr. Abu Lehia did not allege, or provide evidence of, any ill-intent by the C/FHP. The C/FHP's decision was not arbitrary, biased, or improperly motivated. Lastly, the Commissioner-General challenges the UNRWA DT's assumption that Mr. Abu Lehia's sick leave would have been granted had he been in Gaza and not Jordan. The absence of various medical treatments in Gaza, due to the humanitarian situation there, is not an excuse to blindly accept medical reports.

Mr. Abu Lehia's Answer

8. Mr. Abu Lehia requests that the Commissioner-General's appeal be dismissed in its entirety. He argues that the UNRWA DT has the jurisdiction to review facts and did not err in finding that the denial of Mr. Abu Lehia's sick leave requests was manifestly unreasonable. He argues there is no doubt about the credibility of the medical reports provided by accredited institutions. The UNRWA DT did not substitute its own medical opinion, but rather assessed the evidence per its authority. If the Agency had doubt, it should have sought an independent medical opinion; instead, the report was issued by UNRWA medical staff, which is biased and accountable to the C/FHP. Mr. Abu Lehia's back pain diagnosis is indeed plausible as the Commissioner-General failed to consider his age and overall health factors. If the Agency required a supporting medical examination it should have requested one for its review. Area Staff Rule 106.2(7) leaves it optional stating that a "staff member may be required at any time to submit a medical certificate as to his/her condition or to undergo an examination by a medical practitioner".

9. Mr. Abu Lehia further refutes the ille Ab7nal s[ort

Considerations

10. In this appeal, the Commissioner-General challenges the UNRWA DT's findings relating to the period of 28 March to 7 June 2016, namely the Agency's decision to consider Mr. Abu Lehia's absence from duty as annual leave instead of as sick leave was unlawful.

11. The applicable law on this matter is as follows:

UNRWA Area Staff Rule 106(2) provides:

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comments he/she has on the application in section 3 of the form or by accompanying letter, including any request for replacement staff.

(B) Medical certificates

When medical certificates are required to support sick leave applications, as prescribed in paragraphs 6, 7 and 8 of Rule 106.21 the staff member applying for sick leave will take all steps available to him/her in the circumstances to ensure that a proper medical certificate reaches the Agency as soon as possible. In so doing, he/she may either obtain a medical certificate from his/her attending doctor and send it to the relevant Human Resources Office, or request his/her doctor to do so or he/she may arrange for the required certificate to be sent under confidential cover to Director of Health at Headquarters or to Chief, Field Health Programme in the Fields as the case may be.

(C) Consultation and Liaison with the Health Programme

[...] Field Human Resources Officers in the Fields are responsible for ensuring that the following action is taken where necessary:

- (i) that sick leave applications, when required under paragraphs 6, 7 and 8 of Rule 106.2, are supported by adequate medical certificates;
- (ii) that all cases of doubt regarding the adequacy of such certificates are referred [...] to the Chief, Field Health Programme for Fields for recommendation, and that the staff member is adequately advised of any further steps that he/she may be required to take in order to meet the requirements of the Rule.
- iii) that medical certificates or reports of a confidential nature are transmitted to the Director of Health for Headquarters or Chief, Field Health Programme for the Fields for filing under confidential cover, and that they are substituted on the personnel file of the staff member by appropriate recommendations from the Health Progteesqg

and fact, in that it was not plausible for Mr. Abu Lehia to have this ailment in addition to his cardiac issues and that the produced certificate from the said Arab Medical Center was not supported by reference to any examination. The Commissioner-General further argues that in the absence of any examination or follow-up treatment on back pain, the Agency's decision to reject Mr. Abu Lehia's sick leave request was reasonable.

13. These assertions by the Commissioner-General are unpersuasive. Pursuant to Area Staff Rule 106.2(7) and (9) combined with Area Personnel Directive No. A/6/Part II/Amend.2, paras. 3(B) and 3(C)(i), in order for a staff member to be granted sick leave for a period of more than three consecutive working days, he or she is required, as a first step, when applying for sick leave, to produce to the Agency a medical certificate from a duly qualified medical practitioner, to the effect that he or she is unable to perform his or her duties and stating the nature of the illness, and the probable duration of the incapacity. In addition to these provisions, the Appeals Tribunal notes that under UNRWA Staff Rule 106.2(9), for the purpose of determining whether or not to grant the staff member sick leave, the Agency may, at any time, as a second step, request a staff member to either "submit a medical certificate as to his or her condition or to undergo an examination by a medical practitioner nominated by the Director of Health". Under said Area Staff Rule and Area Personnel Directive No A/6/Part II/Amend.2, para. 3(C)(ii), cases of doubt regarding the adequacy of such certificates produced by the staff member are referred to the Appeals Tribunal.

sick leave. Additionally, the Commissioner-General argues that this certificate was not supported by any examination (no reference to X-Ray, CT or MRI examination) or any follow-up on Mr. Abu Lehia's condition.

16. First, we agree with the Commissioner-General that the above-quoted provisions of the existing regulatory framework do not establish an automatic right of the staff member to sick leave upon the submission of the pertinent application and the production to the Agency of a medical certificate from a duly qualified medical practitioner. As expressly stipulated in law, on receipt of such certificate, the Commissioner-General shall decide whether sick leave should be granted.

17. The Appeals Tribunal, however, recalls its jurisprudence that the discretionary power of the Administration is not unfettered.³ The Commissioner-General has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee is implied in every contract of employment. Both parties must act reasonably and in good faith.⁴

18. In the present case, by producing to the Agency the aforementioned medical reports, as not disputed, by qualified medical practitioners, certifying his incapacity to perform his duties during the specific time periods (28 March to 3 April 2016, 4 April to 17 May 2016, and 18 May 2016 to 7 June 2016) and stating the nature of his illness, Mr. Abu Lehia met the first step of conditions to be granted sick leave. While the Commissioner-General asserts that these certificates are not enough, per the evaluation by professional UNRWA medical staff, and were not supported by any examination or any follow-up on this condition, it does not result from the documentary evidence on file that the Agency requested, at any time, Mr. Abu Lehia to undergo an examination by a medical practitioner nominated by the Director of Health, or that the latter

³ Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East Judgment No. 2017-UNAT-798, para. 24; Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2017-UNAT-790, para. 40, citing Hamayel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2014-UNAT-459, para. 17, citing Pérez-Soto v. Secretary-General of the United Nations, Judgment No. 2013-UNAT-329; Bertucci v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-121 and Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2010-UNAT-021.

⁴ Ibid.

was adequately advised of any further steps he should have taken in order to meet the requirements of the law. This was correctly noted by the UNRWA DT.⁵

19. Further, the Commissioner-General claims that the adequacy of the medical reports was evaluated by professional UNRWA medical staff and, by finding otherwise, the UNRWA DT substituted its own unqualified medical opinion for the medically qualified opinion of the C/FHP, therefore exceeding its competence. Specifically as relates to the sick leave period of 4 April through 17 May 2016, the medical report submitted recommended “full bed rest” prior to a possible cardiac catheterization. The UNRWA DT qualified this certificate as “fully adequate and amply credible”⁶. The UNRWA DT found that the medical certificate recommending sick leave for the period of 18 May until 7 June 2016, “cannot be seriously contested by the Agency. This three-week rest was necessary for a be

conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Commissioner-General.⁸

21. The decisions not to grant Mr. Abu Lehia sick leave for the specific time periods (28 March to 3 April 2016, 4 April to 17 May 2016, and 18 May 2016 to 7 June 2016) are not reasonable, given the specific factual circumstances of the case at hand, as correctly found by the UNRWA DT. The Appeals Tribunal shares the view of the UNRWA DT that these decisions were not a valid exercise of the Agency's discretion.

22. In conclusion, the Appeals Tribunal affirms the UNRWA DT's findings and conclusions about illegality. The UNRWA DT conducted a thorough judicial review of the administrative decision under challenge. Despite the wrong phraseology ("fully adequate and amply credible" etc.)⁹ used in the Judgment, the UNRWA DT was not engaged in making medical findings, which it was not competent to do.¹⁰ It did not erroneously substitute itself for the Administration as argued by the Commissioner-General. It simply examined the facts and their interpretation led to the correct conclusion that the decision-maker had not exercised his discretionary power properly.

23. Additionally, we recall that the findings of fact made by the UNRWA DT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal's Statute when there is an error of fact resulting in a manifestly unreasonable decision. This is not the case here.

24. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the UNRWA DT made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal's Statute. An appellant has the burden of satisfying the Appeals Tribunal that

⁸ Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East Judgment No. 2017-UNAT-798, para. 24; Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2017-UNAT-790, para. 26, citing Muwambi v. Secretary-General of the United Nations, Judgment No. 2017-UNAT-780, para. 28; Said v. Secretary-General of the United Nations, Judgment No. 2015-UNAT-500, para. 40; and Sanwidi v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-084, para. 40.

⁹ Impugned Judgment, para. 33.

¹⁰ See, Karseboom v. Secretary-General of the United Nations, Judgment No. 2015-UNAT-601, paras. 36 and 38.

