UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/JFO/2009/05
Judgment No.: UNRWA/DT/2012/019
Date: 26 March 2012
Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

BARMAWI

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
W. Thomas Markushewski
Introduction

1. This is an application by Khalaf Barmawi (the “Applicant”) against the non-payment by the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), of a termination indemnity upon the expiration of his fixed-term appointment.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (the “JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB has been submitted to the Commissioner-General.

Facts

4. On 20 November 1967 or around this date the Applicant was employed with the Agency. Following a series of transfers and promotions, the Applicant opted for early voluntary retirement effective 20 June 1999. At the time of his resignation, he was Deputy Field Personnel Officer, Jordan.

5. On 1 July 2000, the Applicant was re-appointed as Deputy Field Personnel Officer, Jordan, on a Fixed-Term Appointment. On 1 November 2001, he was promoted to the post of Field Personnel Officer.

6. On 1 August 2004, staff members holding category “Z” appointments were converted to category “X”.

1 Documentation regarding the Applicant’s initial appointment with the Agency on 20 November 1967 is not included in his Official Status File, however, internal memoranda reference this date as the start of his employment with UNRWA.
7. By e-mail dated 3 February 2005, the Applicant received confirmation that pursuant to the restoration of steps for staff members previously holding “Z” appointments, his appointment would be converted from grade 16, step 5, to grade 16, step 7, effective 1 February 2005.

8. By letter dated 19 June 2006, the Field Administration Officer, Jordan (“FAO/J”) provided the Applicant with one year’s advance written notice of his impending retirement on grounds of age and indicated that his last day of service would be on 31 July 2007.

9. Pursuant to the recommendation of the Human Resources Committee at its meeting on 6 July 2007, the Commissioner-General approved the extension of the Applicant’s contract for two months beyond his retirement date, i.e. until 30 September 2007 for the below reasons:

   To fill the post of Field Personnel Officer, grade 17, JFO ... initially on double occupancy during a period between 15 July 2007 and 30 September 2007…

10. By letter dated 26 August 2007, the Officer-in-Charge UNRWA Operations, Jordan reminded the Applicant that his Fixed-Term Appointment would expire on 30 September 2007.

11. By letter dated 24 October 2007, the Applicant, citing Area Staff Circular No. A/04/2007 and Area Staff Rule 109.9, asked the Director of UNRWA Operations, Jordan why no termination indemnity was paid to him “despite the fact that [his] separation from service was solely taken by the Agency in its interest.”

12. By letter dated 31 October 2007, the FAO/J advised the Applicant that:

   Regrettably the circular you are referring to is still not being applied. We are waiting for the updated Area Staff Rules as per your recommendation.

13. By letter dated 19 March 2009, the Applicant was informed by the Deputy Field Administration Officer & Acting, Field Personnel Officer, Jordan that he was not entitled to a termination indemnity for essentially the following reasons: (i) the applicable Area Staff Regulations and Rules and the relevant Personnel Directive
stipulate that a staff member shall not be retained in service after reaching the age of 60; and (ii) the Applicant’s Letter of Appointment was made subject to the provisions of Area Staff Regulations and Rules which clearly state that termination indemnity would be paid to a staff member who is less than 60 years of age and will not be payable to the staff who is separated on the expiry date of his/her Letter of Appointment, specifically, Staff Rules 109.9 and 109.11.

14. By letter dated 23 March 2009, the Applicant requested the Secretary of the JAB to reconsider the decision not to pay him a termination indemnity.

15. By letter dated 24 March 2009, the Officer-in-Charge JAB Secretariat requested the Applicant to complete an appeal form together with the required documentation.

16. On 2 April 2009, the Applicant submitted a completed appeal form to the JAB.

Applicant’s contentions

17. The Applicant contends that:

   (i) he is entitled to a termination indemnity pursuant to Area Staff Rule 109.9, i.e. “the practice that was enforced before the introduction of Retirement Benefits”, and Area Staff Circular No. A/04/2007 which applied the Area Staff Rules for payment of termination indemnities to staff with fixed-term appointments;

   (ii) prior to the introduction of the payment of retirement benefits, the Agency paid termination indemnities to staff approaching the age of retirement;

   (iii) he was terminated in the interest of the Agency.

The Applicant requests the Tribunal to order the Respondent to pay him a termination indemnity in accordance with Area Staff Rule 109.9.

Respondent’s contentions

18. The Respondent submits essentially that the Applicant failed to request administrative review of the contested decision, and that no appealable administrative decision has been presented.
Considerations

Main Issues

Is there a contested administrative decision?

19. Former Area Staff Regulation 11.1(A), in force at the time of the facts, provides that:

The Commissioner-General shall establish a Joint Appeals Board with staff participation to advise him in case of any appeal by a staff member against an administrative decision alleging the non-observance of his or her terms of appointment, including all pertinent regulations and rules, or against disciplinary action.

20. In accordance with Article 2 (a) of the UNRWA Dispute Tribunal Statute, the Tribunal has jurisdiction to hear and pass judgment on an application filed by an individual to appeal an “administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

21. According to the jurisprudence of the former United Nations Administrative Tribunal (“UN Administrative Tribunal”), an administrative decision:

… is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Judgment No. 1157, Andronov (2003), quoted in Judgment No. 1213, Wyss (2004)).

22. In light of the foregoing, the Tribunal is of the opinion that an administrative decision can only be considered as such if *inter alia* it has direct legal consequences on a staff member’s rights and obligations. In the case at bar, the Applicant contends that he is entitled to a termination indemnity pursuant to Area Staff Rule
109.9 and Area Staff Circular No. A/04/2007, as “he was terminated in the interest of the Agency”.

23. Looking at the issue of retirement on grounds of age, the Tribunal would like to cite Area Staff Rule 109.2 which provides that:

1. A staff member with a temporary – indefinite appointment is retired on grounds of age when the Agency requires him/her to leave Agency employment on account of his/her age, as provided hereunder.

2. A staff member shall not be retained in active service after having reached the age of 60 years unless, in the interests of the Agency, an extension of his/her age limit is authorized under the provisions of paragraph 4 below.

NOTICE OF RETIREMENT

3. A staff member who is due to retire shall be given not less than 30 calendar days’ written notice of his/her retirement. This notice shall specify the date on which the staff member is to be separated from Agency’s service, which shall not be earlier than his/her 60th birthday.

EXTENSION OF SERVICE

4. Where the services of a staff member are retained beyond his/her 60th birthday, then such staff member shall be notified of the extended period of service (which shall not be more than one year), the date of its expiry, and any special conditions as authorized by the Director of Human Resources for headquarters staff, and Field Office Directors for field staff. …

24. As for the expiration of fixed-term appointments, Area Staff Rule 109.5 provides that:

1. A fixed-term appointment shall expire without prior notice on the expiration date specified in the letter of appointment.

2. A staff member holding a fixed-term appointment shall automatically be separated from Agency service on the expiration date of that appointment, unless he/she has been reappointed or otherwise separated prior to that date.
25. With regard to the payment of a termination indemnity to staff members holding temporary – indefinite appointments, Area Staff Rule 109.9 provides the following:

1. A staff member shall become eligible upon separation to receive a termination indemnity under the provisions of this rule provided that:

   (A) His/her temporary indefinite appointment has been terminated under staff regulation 9.1 in the interests of the Agency;

   (B) he/she has completed not less than one year of qualifying service as defined hereunder;

   (C) he/she is less than 60 years of age;

   (D) he/she is not precluded from receiving a termination indemnity by paragraph 2 of this rule.

2. No termination indemnity shall be payable under this rule where:

   * * *

   (B) the staff member’s service with the Agency ceases for any reason other than that stated in paragraph 1(A) of this rule or when his/her appointment is terminated on the stated ground that he/she is for reasons of health incapacitated for further service with the Agency as specified in staff rule 109.7.

26. Area Staff Circular No. A/04/2007 on Equalizing Termination Indemnity between A and X category staff provides:

2. The conditions presently applied to staff members with a temporary indefinite appointment as per Area Staff Rule 109.9, Area Personnel Directive A/9 and any other related Area staff references are now extended to staff members with fixed-term appointments with effect from 1 January 2007.

As a result of the above Area Staff Circular, Area Staff Rule 109.9 regarding the payment of a termination indemnity to staff members holding temporary indefinite appointment, with effect on 1 January 2007, this provision became applicable to staff members holding fixed term appointments (like the Applicant), if that staff member met the prescribed criteria set out in the Rule.
27. Looking at the record, the Tribunal notes that the Applicant has failed to identify any non-observance of the terms of his employment or any breach of a Regulation or a Rule.

28. Indeed, the Tribunal finds that the decision not to pay the Applicant a termination indemnity was in complete conformity with Area Staff Rule 109.9, paragraph 1, as the Applicant did not satisfy the criteria set out in this Rule for entitlement to a termination indemnity as the Applicant’s appointment was not terminated under Area Staff Regulation 9.1 in the interest of the Agency, but rather the Applicant’s service with the Agency ceased upon the expiry of the Applicant’s fixed-term appointment. While the Agency may have confused the issue by continually citing the reason for the Applicant’s ineligibility of the termination indemnity as the fact that he was over 60 years of age, it is not the crux of the issue at hand. Regardless of the Applicant separating from the Agency under the age of 60, Area Staff Rule 109.9 does not apply to staff members who are separated from the Agency at the natural expiry of their Letters of Appointment. Accordingly, the Tribunal fails to see on which legal or regulatory basis the Applicant claims that he was terminated in the interest of the Agency under Area Staff Regulation 9.1.

29. The Applicant is reminded that one does not “create” an appealable administrative decision by asking for a benefit that is not provided for in the relevant Staff Regulations and Rules and then complaining when it is denied. Rather, an appealable administrative decision arises in the application of the Staff Regulations and Rules and no such Regulation or Rule entitled the Applicant to a termination indemnity upon retirement from the Agency. The Tribunal is of the belief that the non-payment of a termination indemnity to which the Applicant was not entitled did not affect the Applicant’s terms of appointment, and therefore the Tribunal finds that no discretionary administrative decision has been presented for the purposes of an appeal.

30. In light of the foregoing, the Tribunal finds that the application is not receivable.

---

2 The Tribunal would like to note that the Agency’s two month extension of the Applicant in July 2007, i.e. allowing him to work two months past his 60th birthday, in no way precluded the Applicant from receiving any sort of termination indemnity under Staff Rule 109.9.
Did the Applicant request administrative review of the alleged contested administrative decision?

31. Even presuming that the Applicant contested an administrative decision, it nevertheless remains that his application is not receivable because he did not request administrative review of the alleged contested decision.

32. Former Area Staff Rule 111.3, which was in effect at the time of the facts, provides that:

   1. A staff member who wishes to appeal under the terms of staff regulation 11.1, shall as a first step, address a letter to the Agency’s administration requesting that the administrative decision concerned, or the disciplinary action, be reviewed, and setting out his/her reasons for this request.

This Rule also sets out other procedural requirements, including time limits.

33. The United Nations Appeals Tribunal in its jurisprudence has stated in Ajdini et al 2011-UNAT-108 that:

   An application is only receivable when a staff member has previously submitted the impugned administrative decision for management evaluation and the application is filed within the specified deadlines.

34. The United Nations Appeals Tribunal has also affirmed that the United Nations Dispute Tribunal does not have jurisdiction *ratione materiae* over complaints that were not the subject of an administrative review or management evaluation, Crichlow 2010-UNAT-035, and that this preliminary step must be exhausted before the jurisdiction of the United Nations Dispute Tribunal can be invoked, Planas 2010-UNAT-049.

35. Looking at the evidence in the file, the Tribunal notes that the Applicant has not requested at any time administrative review of the alleged contested decision as required under former Area Staff Rule 111.3 prior to launching an appeal before the JAB.
Conclusion

36. Considering that it has no jurisdiction to waive the requirement of a prior request for administrative review, the Tribunal finds that the application is not receivable.

37. For the reasons provided above, the application is dismissed.

(Signed)
Judge Bana Barazi
Dated this 26th day of March 2012

Entered in the Register on this 26th day of March 2012

(Signed)
Laurie McNabb, Registrar, UNRWA DT, Amman