ANABTAWI

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall (DLA)
Introduction

1. This is an application by Marwan Anabtawi (the “Applicant”) contesting the calculation of his sick leave by the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”).

Facts

2. Effective 21 March 1981, the Applicant entered the service of the Agency as a Trades Instructor, grade 9, at the Damascus Vocational Trade Centre (the “VTC”), on a temporary assistance basis, in Damascus, Syria.

3. On 1 June 1981, the Applicant’s appointment was converted to a temporary indefinite appointment against the same post. At the time of the material facts, the Applicant was employed as a Senior Vocational Training Instructor Mechanics, grade 12.

4. On 22 February 1994, the Applicant had a surgical intervention on his lower back.

5. On 28 May 2001, the Applicant wrote to the Field Personnel Officer requesting that a medical board be convened in order to consider his injury as service-incurred and to determine whether he was entitled to a disability benefit.

6. Following several exchanges and by way of two appeals to the Joint Appeals Board on 22 December 2008 and on 7 April 2009, the Applicant sought to have the Agency convene a medical board to determine whether he was entitled to a disability benefit on account of his alleged service-incurred injury.

7. By letter dated 8 December 2010, the Human Resource Services Officer, Syria (the “HRSO/S”) notified the Applicant of the conclusion of the Medical Board:

This is to inform you that the Medical Board, which examined you on 01 November 2010, has concluded that
you are “unfit for further services with the Agency”. Therefore it has been decided to terminate your services for Health Reasons under the provisions of Area Staff Rule 109.7.

In the circumstances, you are placed on sick leave status as from 10 December 2010 until you exhaust all your sick leave accruals i.e. till 13 July 2011, at which date your services will be terminated for Health Reasons. However, if you wish to have your services terminated at an earlier date, waiving thereby your balance of sick leave accruals, please complete the attached form and return to this office.

A Personnel Action Form will be issued in due course to establish your separation and authorize payment of your termination benefits and other emoluments. In order that these benefits may not be withheld, I advise you to have the attached clearance certificate form duly filled out and signed by your supervisors and other officials concerned as indicated on the form and submit the same to the Personnel Office immediately following the date of your separation.

Attached also are two forms (in Arabic and English) to be duly filled out and signed by you and two witnesses concerning payment and/or deferral of payment of your Provident Fund benefits and other emoluments. These forms should be submitted to Personnel Office together with the clearance certificate form, immediately after the date of separation. If you do not complete and submit the said forms as required, your Provident Fund benefits and other emolument will be withdrawn from the Fund and will not be able thereafter to deposit them in the Fund. (emphasis in the original)

8. By memorandum dated 19 September 2011 to the Human Resources Services Officer, Syria the Applicant wrote:

I was referred to a medical board. My appointment was terminated for health reasons on 8/12/2010. The sick leave was considered to have started on 10/12/2010 to 13/7/2011. Pursuant to Article 106/2 [sic] of the UNRWA Rules, sick leave is calculated on the basis of working days. Working days started from 10/12/2010 until the end of the first semester of the school year (2010/2011) and they are 14 working days. Working days for the second semester of the school year (2010-2011) are 84 days. So, the total number of working days since the beginning of the sick leave, according to termination decision, equals 98 days. The school year ended on 2/6/2011 and the new school year
started on 11/9/2011. Please note that mid-term and summer vacations are not working days. Accordingly, I kindly request you to calculate the sick leave as normal working days according to my balance.

9. By letter dated 25 September 2011, the HRSO/S responded to the Applicant’s above memorandum as follows:

I refer to your letter of 19 September 2011 requesting recalculation of your sick leave and summer vacation, having reviewed your case, please note the following:

1-You were terminated during summer vacation on 13/7/2011.

- The period from the beginning of the summer vacation and till 13/7/2011 was paid as sick leave.

- The period from 14/7/2011 to 10/9/2011 was paid to you with your terminated benefits.

- So you were paid the entire summer vacation.

2-In accordance with personal [sic] directive A/5/Rev.4 paragraph 103.1 and 103.2 regarding the treatment of summer vacation for teaching staff

- Teaching staff shall take their annual leave during school vacation period.

- Any part of a vacation period in excess of these entitlements teaching staff may required [sic] to work in connection with special courses, preparation of curricula, correction of examination papers, registration of students and other related duties.

As mentioned above it is clear that summer vacation is considered as working days and not additional entitlements to teacher and the calculation of the sick leave and summer vacation is correct.

10. By memorandum dated 2 October 2011 to the Director of UNRWA Affairs, Syria (the “DUA/S”), the Applicant wrote:

I submitted a request to the Administration Officer [sic] and to Human Resources Officer for recalculation of the sick leave pursuant to termination letter dated 8/12/2010. I received a reply from Human Resources Officer which confirmed in the last part of the letter that summer vacation is considered as working days and
not additional entitlements. It did not mention the mid-term vacation. Accordingly, I would like to refer to what was mentioned in the letter by Human Resources Officer:

-"["]Teaching staff shall take their annual leave during summer [sic] school vacation period ["]. But this does not mean that summer vacation is actual working days. It rather means that teachers are not allowed to have the leave during the school year.

-I have not been asked to join special courses during the mid-term or summer vacations for the past two years. In case a teacher is required to join or attend a special course for several days or weeks, this does not mean all the summer vacation is considered working days. If it was, then how do teachers, whose resignation takes effect in the end of the school year, get the salary of three months? Sometimes, teachers are requested to attend a workshop during the school year on Saturdays. Are Saturdays actual working days?!

-As for preparing the curricula, this is not the duty of the teachers because it is done by competent and dedicated committees assigned by the Syrian Ministry of Education. In the Agency's sixty-year history, there's been no teacher assigned by the Agency to prepare curricula for the Ministry of Education. Also, the names of specialized teachers who prepare curricula are mentioned in the textbooks.

-As for the correction of examination papers, this duty is done during the school year and not during the summer vacation because delivering the certificates to students is done on the last day of the school year. This means that all administrative tasks assigned to teachers, including the correction process, must be done before giving the certificates to students.

-Students' registration, and the related tasks, is the job of the head teacher and his/her deputy and not the job of the teachers. The records are kept by the head teacher and his/her deputy.

-As for what was mentioned in the enclosed letter regarding article 105/1[sic], please note that this article has nothing to do with the mid-term or summer vacations. This article concerns the employees who are not teachers. I would like to mention that the number of working hours is 37.5 a week while the quota of the elementary school teachers is 23 classes. This means that the work of teachers is different
from that of other employees. If there was a similarity in terms of vacations, then the working hours would be the same.

Finally, I would like to say that the mid-term and summer vacations are resting days for teachers and students and not actual working days although there are some activities or courses during them. If a course is conducted, only course days are considered as working days and not the whole mid-term or summer vacation.

Hence, I kindly ask you to consider the sick leave as actual working days according to my balance of sick leaves.

11. By an undated letter received on 24 December 2011 through the official mail of the Agency, the DUA/S responded to the Applicant:

I am writing to you in connection with your communication dated 2 October 2011 to the Agency objecting against the letter of Human Resources Services Officer to you dated 25 September 2011 and requesting to recalculate your sick leave entitlements.

The Agency has thoroughly reviewed the case and I have to advise you that there is nothing to add to what has been communicated to you in the above mentioned letter.

12. On 27 February 2012, the Applicant filed his application with the UNRWA Dispute Tribunal (the “Tribunal”).

13. On 30 April 2013, the Respondent filed his reply.

**Applicant’s contentions**

14. The Applicant contends that:

   (i) his sick leave was not properly calculated;

   (ii) the decision regarding his sick leave violates Area Staff Rule 106.2.

15. The Applicant requests that:

   (i) his sick leave be considered as actual working days;

   (ii) two months’ salary be paid to him.
Respondent's contentions

16. The Respondent essentially contends that the application is not receivable and is time-barred.

17. The Respondent requests that the Tribunal dismiss the application.

Considerations

Preliminary Issue

18. As stated earlier, the Respondent filed his reply on 30 April 2013. In his reply to the application, the Respondent requested leave from the Tribunal to take part in the proceedings and to file a late reply.

19. Pursuant to Article 30 of the Rules, the Tribunal has the authority to shorten or extend a time limit fixed by the Rules or waive any rule\(^1\) when the interests of justice so require, and under Article 14 of the Rules, the Judge may make any order to give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties.

20. Although not condoning the Respondent's failure to file a motion to extend the time to file his reply before the 30-day deadline expired, nevertheless the Tribunal fails to see how justice would be served if the Tribunal were to render its Judgment on the merits of the case without having the submissions of both parties. The United Nations Appeals Tribunal in Bertucci 2011-UNAT-121 noted that the principle of respect for the right to a defence and the right to an effective remedy before a judge is recognised by Article 8 of the Universal Declaration of Human Rights. Implicit in this recognition is the point that a Tribunal should exercise its discretion with caution when it comes to excluding a party from participating in the proceedings, even when the Tribunal may have the authority to do so. The Tribunal finds that it would be in the interests of justice

\(^{1}\) The Tribunal notes the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: "The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review".
and appropriate for a fair and expeditious disposal of the case for the Tribunal to receive the full chronicle of the case from both parties in order to render a fair and comprehensive Judgment that would do justice to the parties and to the system of administration of justice in general rather than exclude a party from participating in the proceedings on a procedural basis.

21. Moreover, since its inception, the Tribunal has been working through a large backlog of cases, and reviewing and deciding cases, one case at a time, generally with few exceptions, in chronological order of the date of the filing. The Applicant’s case has not come up for review until the present, and therefore, the Applicant has suffered no prejudice due to the late filing of the reply.

Main Issue

Is the application receivable?

22. According to Article 5 of its Rules of Procedure, the Tribunal may determine, on its own initiative, that summary judgment is appropriate. This may happen when there is no dispute as to the material facts and judgment is restricted to a matter of law. The crucial question in this case – whether the application is receivable – is such a matter of law.

23. Article 2, paragraph 1, in conjunction with Article 8 of the Tribunal’s Statute confers jurisdiction on the Tribunal to hear applications appealing administrative decisions. An application is only receivable, _inter alia_, when a staff member has previously submitted the impugned administrative decision to decision review in a timely manner.

24. In the case at bar, Arca Staff Rule 111.2 provides:

1. A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent regulations and rules and all relevant administrative issuances pursuant to Staff Regulation 11.1(A), shall, as a first step, submit a written request for a decision review:
(A)[1] In the case of staff members of Field Offices, to the UNRWA Field Office Director in charge of the Field Office...

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3. A staff member shall submit a request for a decision review within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. (emphasis added)

25. Also relevant to this case is Article 8 of the Statute of the Tribunal which provides that

1. An application shall be receivable if:

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c) An applicant has previously submitted the contested administrative decision for decision review...

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3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend, waive or extend the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review. (emphasis added)

26. The evidence in the file indicates that the Applicant was first notified by a letter from the HRSO/S on 8 December 2010 of the conclusion of the Medical Board and of the termination of his services for health reasons. The letter also mentioned the calculation of the Applicant’s sick leave. On 19 September 2011, the Applicant requested the HRSO/S to reconsider the calculation of his sick leave. The HRSO/S responded to the Applicant confirming the Agency’s decision on the calculation of his sick leave. On 2 October 2011, the Applicant again requested reconsideration of the calculation of his sick leave, this time addressing his request to the DUA/S and noting that he had “submitted a request to the Administration Officer and to Human Resources Officer [sic] for recalculation of the sick leave pursuant to termination letter dated 8/12/2010”. (emphasis added)
27. It is clear as per the Applicant's own words above that the decision he is seeking to appeal is the decision dated 8 December 2010. However, in his application the Applicant contends that he received notice of this decision on 24 December 2011. Clearly the Applicant erred, for how could he seek review on 2 October 2011 of a decision he received notice thereof on 24 December 2011?

28. The Tribunal would like to remind the Applicant that he had stated in clear terms in his letter of 19 September 2011 to the HRSO/S that he was aware that the recalculation of his sick leave was pursuant to his termination letter dated 8 December 2010. As per Area Staff Rule 111.2, the Applicant should have filed his request for decision review within 60 calendar days, i.e. no later than 6 February 2011. Whether the Tribunal takes into consideration the date of the Applicant's letter - 19 September 2011 - to the HRSO/S requesting reconsideration of the calculation of his sick leave or the date of the Applicant's letter to the DUA/S - 2 October 2011- reiterating the same request, the Applicant requested a review 8 months too late in the first instance and 9 months too late in the second instance. The Applicant's request for administrative review is therefore clearly time-barred.

29. Given the above, the issue then is whether the Tribunal has authority to suspend or waive the deadline for administrative review.

30. The Tribunal has consistently and repeatedly held that decision review is an essential element of the recourse procedure and must be complied with. The requirement under Article 8 of the Statute of the Tribunal must be strictly construed. While the former Joint Appeals Board had the authority to waive time limits in exceptional circumstances, under the current system the Tribunal's Statute expressly forbids waiving deadlines for decision review per Article 8, paragraph 3, which will be quoted again for the sake of clarity for the Applicant:

   The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review.

31. The Tribunal refers to the jurisprudence of the United Nations Appeals Tribunal in Ajdini et al. 2011-UNAT-108:
This issue [authority to waive the deadline for administrative review] should now be considered as settled because the Appeals Tribunal in Costa, and other judgments such as Mezoui, Samardzic, and Trajanovska has consistently held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review.

32. The Tribunal therefore determines that since the Applicant failed to comply with the time limits set forth in Area Staff Rule 111.2, and given that it does not have jurisdiction to waive the deadline for administrative review, the application is not receivable ratione temporis.

Conclusion

33. Given all the above, the application is dismissed in its entirety.

Judge Bana Barazi
Dated this 18th day of May 2014

Entered in the Register on this 18th day of May 2014

Laurie McNabb, Registrar, UNRWA DT, Amman