FARAJ

v.

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

JUDGMENT

Counsel for Applicant:
Anaïs Paré-Chouinard (LOSA)

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. This is an application by Mohammad Yousef Faraj (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his appointment in the interest of the Agency.

2. On 27 June 2012, in Faraj UNRWA/DT/2012/028, this Tribunal dismissed the application as not receivable. The Judgment was appealed before the United Nations Appeals Tribunal ("UNAT"), and by Judgment Faraj 2013-UNAT-331, the decision of the Tribunal was vacated as the UNAT decided that the application was receivable. Subsequently, the case was remanded to the Tribunal for a decision on the merits.

Facts

3. Effective 26 March 1990, the Applicant was employed by the Agency as a Welfare Worker at Doura in the Hebron Area, West Bank. After having served as a Social Worker in the Hebron Area between October 1993 and March 1996, the Applicant was transferred, effective 1 April 1996, to the post of Relieving Health Centre Clerk at the Health Department of the Agency.

4. On 1 November 2005, the Applicant accepted a Fixed-Term Appointment for the post of Chief, Field Relief and Social Services ("CFRSS"), based in Jerusalem.

5. On 4 January 2009, the Applicant’s appointment was extended for a period of three years, until 31 October 2011.

6. On 20 May 2009, the Applicant wrote to the Commissioner-General complaining about harassment by the Deputy Director UNRWA Operations, West Bank ("D/DUO/WB").

7. On 22 June 2009, the Applicant sent to the Director of UNRWA Operations, West Bank ("DUO/WB") a note in which he pointed out his disagreement with
her proposals with respect to the management of his staff, and furthermore he suggested two options for solving an issue concerning a Women's Programme Officer ("WPO") working in his team.

8. By e-mail dated 22 June 2009 addressed to the Applicant, the DUO/WB inquired about the Applicant's plans to deal with the management of his staff, urging him to address the situation in order to restore trust between him and his senior team.

9. By memorandum dated 24 June 2009 to the DUO/WB, the Applicant submitted a plan to improve management of the Relief and Social Services Department ("RSSD"). By memorandum dated 28 June 2009 to the DUO/WB, the Applicant outlined suggestions to restore his leadership and help improve management within the Department.

10. By letter dated 25 June 2009, the DUO/WB informed the WPO in the Applicant's team of her transfer from her post in RSSD to a position of Social Worker in another duty station.

11. By letter dated 25 June 2009, the WPO sent a letter of resignation to the Applicant.

12. By e-mail dated 1 July 2009, in response to the Applicant's letters of 22 and 24 June, the DUO/WB expressed her concerns about the Applicant's failure to reflect her guidance on how to solve "the very serious management issues" which she had highlighted to him, and asked to discuss those issues with him once again.

13. On 3 July 2009, the Applicant submitted a "Recovery Plan" to the DUO/WB.

14. By e-mail dated 24 July 2009 to the Applicant, the DUO/WB listed the points agreed upon in order to restore the confidence between them, as well as between the Applicant and his senior team.

15. By e-mail dated 31 July 2009, the Applicant responded to the DUO/WB highlighting his achievements.
16. Following a meeting between the Applicant and the DUO/WB on 12 August 2009, the DUO/WB handed the Applicant a letter on 14 August 2009, informing him that his contract would be terminated effective 31 October 2009, stating:

   This letter is to confirm our understanding of August 12 that in your interests and in the interests of the Agency, your contract with UNRWA will terminate effective October 31, 2009. You have explained to me your desire to pursue other interests.

17. By e-mail (undated) addressed to the Deputy Commissioner-General, the Applicant sought his support for a fair treatment by the DUO/WB and her Deputy Director.

18. By memorandum dated 17 August 2009 to the Director of Human Resources, the Applicant complained about the decision to terminate his contract, and threats made by the DUO/WB and the D/DUO/WB.

19. By e-mail dated 18 August 2009 to the DUO/WB, the Applicant expressed his disagreement with the termination letter of 14 August 2009 and requested a review of the decision.

20. By memorandum dated 5 September 2009 to the Commissioner-General and to the Deputy Commissioner-General, the Applicant requested a) suspension of the decision to terminate his employment, b) suspension of the hiring for the post he occupied, and c) a formal investigation into the threats he received from the DUO/WB on 12 and 14 August, and from the D/DUO/WB on 29 August 2009.

21. By memorandum dated 9 September 2009 to the Acting Director of UNRWA Operations, West Bank, the Applicant requested to review the decision to terminate his employment in the interest of the Agency.

22. By memorandum dated 19 October 2009, the Applicant reiterated his request to review the decision to terminate his employment to the Acting Director of UNRWA Operations, West Bank.

23. By letter dated 22 October 2009, the DUO/WB responded to the Applicant’s request for review of the decision, confirming the decision to terminate his
employment in the interest of the Agency, and advising him about the time limits to follow in order to file an appeal.

24. By memorandum dated 1 November 2009 to the DUO/WB, the Applicant again requested a review of the contested decision.

25. By letter dated 22 December 2009, the DUO/WB responded to the Applicant’s letter of 1 November 2009, saying that his termination in the interest of the Agency had been agreed by him in a meeting with her in which he expressed interest in pursuing other career and personal avenues. In her letter, the DUO/WB stated, *inter alia*, the following:

   I take this opportunity to reiterate once again that your separation was mutually agreed by the two of us following numerous discussions in the preceding months; as the Agency has kept to the terms of our agreement, I cannot agree with your contention that the decision was unfair or unjust in any way.

26. By memorandum dated 27 December 2009 to the DUO/WB, the Applicant denied having agreed to be separated, and accused the DUO/WB of threatening him to accept his termination.

27. By memoranda dated 5 and 13 January 2010, the Applicant submitted his appeal to the Joint Appeals Board (“JAB”). On 24 January 2010, he completed his appeal to the JAB.

28. On 20 May 2012, the Respondent submitted his reply to the Tribunal.

29. On 28 May 2012, the Respondent submitted to the Tribunal a corrigendum to the Respondent’s reply.

30. On 3 June 2012, the Applicant submitted his observations on the Respondent’s reply and corrigendum to the Tribunal.

31. On 27 June 2012, the Tribunal in *Faraj* UNRWA/DT/2012/028, dismissed the application as not receivable. This Judgment was appealed before the UNAT.
32. In *Faraj* 2013-UNAT-331, dated 21 June 2013, the UNAT vacated the above Judgment, holding that the application was receivable. The case was remanded to this Tribunal for a decision on the merits.

33. On 8 October 2013, the Tribunal issued Order No. 99 (UNRWA/DT/2013) ordering the Respondent to produce the Applicant’s Performance Evaluation Reports (“PER”) for the years 2006, 2007 and 2008.

34. On 14 October 2013, the Tribunal issued Order No. 102 (UNRWA/DT/2013) ordering the Respondent to produce the Applicant’s PER for the period January-November 2007.

35. On 3 December 2013, The Tribunal issued Order No. 116 (UNRWA/DT/2013), ordering the Respondent to produce the record of the Field Personnel Officer the Respondent referred to in an email dated 28 October 2013, in response to Order No. 102 (UNRWA/DT/2013).

36. On 8 April 2014, the Tribunal issued Order No. 45 (UNRWA/DT/2014), ordering the Applicant to file a brief submission accounting for any and all salaries he had received following his separation from the Agency on 31 October 2009 until the date of the Order.

37. On 9 April 2014, the Tribunal issued Order No. 46 (UNRWA/DT/2014), ordering the Respondent to file a reply on the merits within two weeks of receipt of the Applicant’s filing of the brief submission.

38. On 15 April 2014, the Applicant complied with abovementioned Order No. 45 (UNRWA/DT/2014).

39. On 13 May 2014, the Respondent submitted a reply on the merits.

40. On 4 September 2014, the Applicant filed a motion to submit new evidence and amend his application to seek additional remedies.

41. By Order No. 94 (UNRWA/DT/2014) dated 18 September 2014, the Tribunal granted the request and ordered the Applicant to submit forthwith the new evidence and amend his application to seek additional remedies.
42. On 30 September 2014, the Applicant complied with Order No. 94 (UNRWA/DT/2014).

Applicant's contentions

43. The Applicant contends that:

(i) Until 19 June 2009, he did a “great” job and he was appraised higher than 4/5 in 2006, 2007 and 2008. On 19 June 2009, the Director of Relief and Social Services Department (“DRSSD”) gave a long speech about his outstanding performance;

(ii) The decision was based on “biased judgments” and “circumstantial evidences [sic]”;

(iii) The DUO/WB accused him of several shortcomings in his work only two months before he was given a letter of termination, thus according him no chance for improvement of his performance;

(iv) His PERs for the last three years were close to 5, and the last one was in December 2008. None of his PERs included a written comment for improvement on a specific practice either by the DUO/WB or the DRSSD;

(v) His termination was the result of a disagreement between him and the DUO/WB about the case of the WPO accused of perceived misconduct;

(vi) He was threatened by the DUO/WB and provoked to resign. He never said that he would resign nor that his intention was to pursue other interests;

(vii) The abrupt manner in which his contract was terminated caused damage to his personal and professional reputation. While he was in Jordan for training, the DUO informed senior staff of his office that he left the Agency and his Deputy was appointed as Officer-in-Charge.

44. The Applicant requests:

(i) Reinstatement in his post, at least for 6-12 months;

(ii) Compensation for the two years remaining on his contract;

(iii) Compensation for damages to personal and social status caused by the decision and rapid termination;

(iv) Compensation for all jobs he lost due to an unfair recommendation of the DUO;
(v) Compensation for the psychological harm resulting from the circumstances of the termination of the contract, and a fair letter of recommendation based on his performance of over four years.

**Respondent’s contentions**

45. The Respondent contends that:

(i) The termination of the Applicant’s employment was properly effected as Area Staff Regulation 9.1 gives the Commissioner-General the authority to terminate the appointment of any staff member in the interest of Agency. Pursuant to Area Staff Personnel Directive A9, paragraph 4.1, this authority has been delegated to the Field Office Directors;

(ii) The jurisprudence of the UNAT accords the Agency broad discretionary authority in the application of the Agency’s Staff Regulations, Rules and Directives;

(iii) The jurisprudence of the former United Nations Administrative Tribunal confirms the elementary and basic principle that commitments, whether made by the Administration or by staff members, should be honoured;

(iv) The record shows that, by about June 2009, the DUO/WB had serious concerns about the Applicant’s management of his staff. Despite the Agency’s efforts to help him to restore the confidence between the Applicant and his senior managers, there was lack of progress;

(v) The termination was not the result of a disagreement between him and the DUO/WB on management of a senior staff member; rather the decision was an inevitable conclusion considering the serious managerial shortcomings of the Applicant;

(vi) The Applicant’s claims of duress are not supported by evidence although he has the burden of proof;

(vii) The Agency has expended efforts for the improvement of the Applicant;

(viii) The remedies sought by the Applicant have no legal basis. There is no evidence of reputational damage;

(ix) There is no evidence that he has lost job opportunities, even if he submitted an email from the DRSSD declining to recommend the Applicant for a post in the private sector. There is no evidence that the Applicant would have been appointed to the post;

(x) There is no basis for the consideration of loss of income beyond the period of his contract because he was on a fixed-term contract with no expectation of renewal.
46. The Respondent requests the Tribunal to reject the Applicant’s pleas and to dismiss the application in its entirety.

Considerations

47. The contested decision is the decision dated 14 August 2009, by which the DUO/WB confirmed to the Applicant that in his interests, and in the interests of the Agency, his contract was to terminate effective 31 October 2009. The Applicant contests the premises of the decision. He submits that he never agreed to resign; and he submits that the disagreement between him and the DUO/WB about the case of the WPO did not justify the termination of his contract in the interests of the Agency.

The legality of the impugned decision

a. The Applicant’s interests

48. The first premise is that the decision had been taken in the interests of the Applicant. If the Agency has discretionary power to terminate the appointment of a staff member, in the present case, the Applicant submits that the first premise was not supported by facts. It is clear for the Tribunal that only the staff member can decide what his interests are. While the impugned decision refers to “our understanding of August 12”, there is no evidence of this understanding found in the case file.

49. The Applicant admits that he and the DUO/WB discussed the terms and conditions of a termination during a meeting on 12 August 2009, but he maintains that the contested decision did not reflect what had been discussed.

50. The DUO/WB however, after the meeting on 12 August 2009, concluded that the Applicant had accepted to resign, prompting her to finalise the contested decision which was given to the Applicant on 14 August 2014. Soon after this, on 18 August 2009, the Applicant sent an email to the DUO/WB contesting this decision.

51. The Tribunal now is confronted with the issue of the evidence of the alleged resignation. The view of the Tribunal is very clear in such matters. When the
reality of a resignation is challenged by the staff member, the evidence of such a significant decision can only be in a written document or at least in an unequivocal testimony. Even assuming that the Applicant, during the meeting on 12 August 2009, would have orally agreed to resign, this supposed resignation was never confirmed in writing. Contrary to that, after the Applicant received the impugned decision, he contested it and requested a review of the decision. So the DUO/WB had erred when, without clear action from the Applicant, such as a written resignation, she concluded that the Applicant had agreed to resign. Therefore, the Tribunal decides that the first premise of the contested decision is not supported by the facts.

52. When an administrative decision is based on two premises and the Tribunal has considered one of the two is not supported by facts, before stating that the decision is unlawful, the Tribunal must also consider the second premise, and whether the decision-maker would have taken the same decision solely on the basis of the second premise.

b. The interests of the Agency

53. In the present case, the second premise is that the Applicant’s termination was in the interests of the Agency.

54. Area Staff Regulation 9.1 provides that:

The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

55. Area Staff Regulation 9.3 provides that:

(A) A staff member whose temporary appointment is to be terminated shall be given not less than 14 days' written notice of such termination or such notice as may otherwise be stipulated in his/her letter of appointment.

(B) In lieu of the notice period, the Commissioner-General may authorise compensation calculated on the basis of salary and allowances which the staff member would have received had the date of termination been at the end of the notice period.
56. Area Staff Rule 109.1 provides that:

1. Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member’s probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

2. Staff members shall continue to perform their duties during the period of notice of termination, unless they are on authorized leave of absence, or have been released by the Commissioner-General from such duties.

57. Following these Regulations and this Rule, the Commissioner-General, or one who has the delegated authority, may terminate the Applicant’s appointment in the interests of the Agency. The UNAT has acknowledged on numerous occasions the wide discretionary power of the Commissioner-General in the management of staff members, and in assessing what is in the interests of the Agency.

58. Nevertheless, in such case where the Applicant contests the reasons for his termination, the Tribunal must consider whether or not the decision-maker made a manifest error. The case file shows, and the Respondent admits, that the date of 22 June 2009 was the first time that the DUO/WB indicated clearly in an email to the Applicant that she was not satisfied with his work and was not satisfied with the way he managed his staff.

59. The contested decision of termination was dated 14 August 2009, which means only a few weeks after the Applicant was informed of his First Reporting Officer’s concerns. The issue the Tribunal must consider is: why was there such an urgency to separate the Applicant from the Agency? Was it not possible to allow the Applicant more time to improve his management? Were the Agency’s interests so particularly threatened by the Applicant’s presence in the Agency?

60. In the case at bar, the Applicant had been employed by the Agency since 1990. The Tribunal considers the termination of his appointment to be a significant matter for both the staff member and the Agency. Therefore, the Tribunal has to consider the exact facts of the case.
61. By several orders, the Tribunal requested the Respondent to produce the Applicant’s PERs for 2006, 2007 and 2008. The Respondent produced only the PERs for the year 2006 and for the period of November 2007 to November 2008. No PER could be produced for the period of January 2007 to November 2007. The PER for 2006, signed by the DUO/WB in charge at the time, described the Applicant’s performance as “a very good performance”. The report for the period November 2007 to November 2008 was signed on December 2008 by the DUO/WB who took the contested decision of 14 August 2009. Again, the Applicant’s performance was described as “a very good performance”. For the specific categories of: work relationship, effectiveness in supervision, planning and organization of work, skill in producing a solution and ability to negotiate, the Applicant received the letter B, which means “very good”. The DUO/WB added in her comments: “Keep working ad [sic] further developing professional management style among staff - so they are supported to be both professional and accountable; continue to contribute to senior management teams of WBFO”.

62. After November 2008 and until 22 June 2009, there is no document in the file which could establish that the Applicant’s supervisor was not satisfied with his work. The Applicant submits that his termination was the result of a disagreement between him and the DUO/WB about the case of a WPO within the RSSD. In support of this, the Applicant produced with his application two memoranda addressed to the DUO/WB, dated 22 and 24 June 2009. In these letters, he pointed out his disagreement with the proposals of the DUO/WB to deal with the management of his staff, and how he particularly refused to terminate the contract of the WPO. In response on 1 July 2009, the DUO/WB pointed out that the Applicant’s letters did not reflect her guidance or instructions on how to solve the very serious management issues in the RSSD. At the end of this letter she indicated that these matters were serious and continued to reflect badly on his management of the Department as a whole.

63. Moreover, the Tribunal considers that, contrary to the Applicant’s allegation, the DUO/WB did not only reproach his refusal to terminate a staff member, but there were several other management issues the DUO/WB was not satisfied with. For the Tribunal it is clear that, since the last evaluation of the
Applicant's performance in 2008, the DUO/WB had changed her mind about his performance. Now the Tribunal must determine if the Agency's interests required the termination of the Applicant without according him an opportunity to improve in the area of management.

64. By aforementioned memorandum dated 24 June 2009 to the DUO/WB, the Applicant had submitted a plan to improve the management of his Department. By memorandum dated 28 June 2009 to the DUO/WB, the Applicant outlined suggestions to restore his leadership and help improve management within the Department. On 1 July 2009, the DUO/WB expressed that the submitted plan was not what she expected. By a new memorandum sent to the DUO/WB on 3 July 2009, the Applicant clarified his strategy in a "Recovery Plan". By e-mail dated 24 July 2009 to the Applicant, the DUO/WB listed the points agreed upon in order to restore the confidence between them, as well as between the Applicant and his senior team. By e-mail dated 31 July 2009, the Applicant responded to the DUO/WB, highlighting his achievements.

65. Only two weeks after the Applicant's email, i.e. on 14 August 2009, the DUO/WB informed the Applicant that his contract was to terminate effective 31 October 2009.

66. The Respondent does not explain in his reply why there was a mandatory and urgent reason to terminate the Applicant's appointment. The Respondent did not provide evidence that the Agency's interests required the Applicant's appointment be terminated urgently because of poor management. Moreover, the Tribunal is of the opinion that the Applicant's alleged poor management should have been addressed in his PER, and a genuine chance for improvement should have been given. In the present case, given the good PERs of the Applicant in 2006 and 2008, and only some issues noted over a few months during 2009, the Tribunal concludes that the decision to terminate in the interests of the Agency cannot be justified.

67. The Tribunal considers that a) there is no evidence that the Applicant wanted to resign in his own interests, and b) there is no justification for the decision to terminate the Applicant's appointment in the interests of the Agency.
The Tribunal concludes that the contested decision was illegal and should be rescinded as the two premises fundamental to the contested decision are not supported by the facts.

68. Article 10, paragraph 5, of the Statute of the Tribunal provides as follows:

As part of its judgment, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

Compensation

Material damages

69. The rescission of the decision to terminate the appointment of the Applicant means that he should be reinstated in the post.

70. As an alternative to reinstatement, pursuant to Article 10, paragraph 5, of the Statute of the Tribunal, the Tribunal shall also set an amount of compensation that the Respondent may elect to pay.

71. For the calculation of compensation, the Tribunal reiterates that normally only loss of net base salaries during a maximum of two years can be compensated. In the present case, the Applicant’s fixed-term contract ended on November 2011. Based on the grade and step of the Applicant, the Tribunal considers that, after the Applicant’s termination until November 2011, the Applicant would have received net base salaries in the amount of nearly USD44,000.
72. The Applicant clarified that, during the period until November 2011, he received from other employers USD25,500. In setting the amount of compensation, the Tribunal finds that these earnings are to be deducted from the two years net base salaries. As a result, compensation for material damages is set at the sum of USD18,500. If the Applicant claims that he must be compensated for lost job opportunities due to the refusal to recommend him for a job, these material damages compensate the Applicant for the alleged lost opportunities.

*Moral damages*

73. The Applicant claims compensation for damage to his personal and social status and submits a document supporting this request. The Applicant seeks also compensation for psychological harm and submits, as supporting documents, a medical report and medical prescriptions.

74. Having considered the evidence the Applicant submitted, the Tribunal finds that there is no doubt that any staff member who, like the Applicant, is terminated on a short notice after having worked nearly twenty years for the Agency, would suffer from anxiety and stress, and would experience a great feeling of injustice. All things considered, the Tribunal finds for moral damages, the Applicant will receive from the Agency the sum of USD5,000.

**Conclusion**

75. In view of the foregoing, the Tribunal hereby DECIDES:

76. The contested decision is hereby rescinded.

77. As an alternative to reinstatement, the Respondent may elect to pay the Applicant the sum of US18,500 as material damages.

78. The Respondent is further ordered to pay the Applicant the sum of USD5,000 as moral damages.

79. The above sums are to be paid within 60 days of the date of this Judgment becomes executable during which period the US Prime Rate applicable as at that
date, shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of the payment.

Judge Jean-François Cousin
Dated this 16th day of October 2014

Entered in the Register on this 16th day of October 2014

Laurie McNabb, Registrar, UNRWA DT, Amman