ABU MALLUH et al.

v.

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

JUDGMENT

Counsel for Applicants:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. Ra’ed Ahmad Hasan Abu Malluh, Ra’fa Mahmoud Shlash, Khaled Moh’d Zamzam and Ra’ad Fawzi Yousef Hussein (the “Applicants”) appeal 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 qualify their respective posts as Messenger Porter instead of Messenger “A”.

Facts

2. Effective 1 June 2009, Applicant Abu Malluh joined the Agency, on a three-year fixed-term appointment as Messenger Porter at Grade 2, in Headquarters, Amman (“HQA”). On 20 May 2012, his appointment was extended until 31 May 2015 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was indicated as Messenger Porter. On 24 March 2015, Applicant Abu Malluh’s appointment was further extended until 31 May 2018 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was indicated as Messenger Porter.

3. Effective 1 April 2008, Applicant Shlash joined the Agency, on a three-year fixed-term appointment as Messenger “A” at Grade 2, in HQA. On 3 March 2011, his appointment was extended until 31 March 2014 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was noted as Messenger Porter. On 3 March 2014, Applicant Shlash’s appointment was extended until 31 March 2017 with no change to the terms and conditions stipulated in his initial letter of appointment. The Applicant’s post was indicated as Messenger Porter.

4. Effective 1 April 2000, Applicant Zamzam joined the Agency on a two-year fixed-term appointment as Messenger Porter, Level 1A, Step 2 in HQA. On 17 March 2002, his appointment was extended until 30 April 2004. His post was noted as Messenger Porter. On 11 May 2004, his appointment was extended until
30 April 2006 with no change to the terms and conditions stipulated in his initial letter of appointment. Effective 1 August 2004, Applicant Zamzam’s appointment was converted from “Z” to “X” category expiring on 30 April 2006 with the post title of Messenger Porter at Grade 2. On 4 May 2006, his appointment was extended until 30 April 2009 with no change to the terms and conditions stipulated in his initial letter of appointment. On 25 February 2009, his appointment was further extended until 30 April 2012 with no change to the terms and conditions stipulated in his initial letter of appointment. Effective 1 January 2012, Applicant Zamzam’s appointment was converted from “X” to “A” category, that is, a Temporary Indefinite appointment. His post was noted as Messenger-Porter.

5. Effective 1 February 2001, Applicant Hussein joined the Agency, on a two-year fixed-term appointment as Messenger at Grade 1, in HQA. On 9 January 2003, his appointment was extended until 31 January 2005 with no change to the terms and conditions stipulated in his initial letter of appointment. His post was noted as Messenger Porter. Effective 1 August 2004, Applicant Hussein’s appointment was converted from “Z” to “X” category expiring on 31 January 2005 with the post title of Messenger Porter. On 13 February 2005, his appointment was extended until 31 January 2008 with no change to the terms and conditions stipulated in his letter of appointment which he signed on 1 August 2004. His post was noted as Messenger Porter. On 6 January 2008, Applicant Hussein’s appointment was extended until 31 January 2011 with no change to the terms and conditions stipulated in his letter of appointment which he signed on 1 August 2004. His post was noted as Messenger “A”. On 11 January 2011, his appointment was extended until 31 January 2014 with no change to the terms and conditions stipulated in his initial letter of appointment which he signed on 1 February 2001. His post was described as Messenger “A”. Effective 1 January 2012, Applicant Hussein’s appointment was converted from “X” to “A” category that is, a Temporary Indefinite appointment. His post was noted as Messenger Porter.

7. By a joint memorandum dated 21 May 2014 to the Director, Administrative Support Department (“DAS”), the Applicants requested compensation for “psychological and physical fatigue” as a result of performing functions outside of their job descriptions.

8. By email dated 11 June 2014 to the DAS, the Head, Administration and General Services Section (“HAGSS”) memorialized a meeting she had with the Applicants. During the meeting, the Applicants’ concerns were discussed and they were provided with a copy of the PD for Messenger-Porter.

9. By email to the Area Staff Union (“ASU”) dated 23 September 2014, the HAGSS memorialized a second meeting she had with the Applicants and the ASU representatives on 3 August 2014. The HAGSS explained the actions taken and the results since the meeting of 11 June 2014. She informed them inter alia that “HRD [had] provided confirmation that all 4 posts [were] ‘Messenger-Porter’”. The Applicants, with the exception of Applicant Hussein, were copied on the email.

10. By separate emails dated 4 March 2015, the Human Resources Officer (Entitlements) (“HRO”) confirmed to the Applicants that their respective post titles were Messenger Porter.

11. On 14 April 2015, the Applicants separately requested review of the decision dated 4 March 2015.

12. On 23 July 2015, the Applicants filed separate applications with the UNRWA Dispute Tribunal (the “Tribunal”). Applicant Abu Malluh’s application was registered under case number UNRWA/DT/HQA/2015/054. Applicant Shlash’s application was registered under case number
UNRWA/DT/HQA/2015/055. Applicant Zamzam’s application was registered under case number UNRWA/DT/HQA/2015/056. Applicant Hussein’s application was registered under case number UNRWA/DT/HQA/2015/057. The Tribunal transmitted the applications to the Respondent on 26 July 2015.

13. On 20 August 2015, the Respondent filed a joint motion in relation to the Applicants’ cases requesting an extension of time to file his replies. The Tribunal transmitted the motion to the Applicants on 23 August 2015.

14. By Order No. 101 (UNRWA/DT/2015) dated 13 September 2015, the Tribunal granted the Respondent’s request for an extension of time to file his replies.

15. On 13 October 2015, the Respondent filed separate replies to the applications addressing only the issue of receivability. The Tribunal transmitted the replies to the Applicants on the same day except for the reply in relation to Applicant Hussein’s case which was transmitted on 14 October 2015.


17. On 19 November 2015, the Respondent complied with Order Nos. 116, 117 and 119 and submitted the requested Arabic translations of the replies. The translations were transmitted to the respective Applicants on the same day.

18. On 27 November 2015, the Respondent complied with Order No. 122 and submitted the requested Arabic translation of the reply. The translation was transmitted to Applicant Hussein on the same day.
19. On 15 December 2015, the Applicants filed separate motions requesting the Tribunal to order the Respondent to submit his replies on the substantive merits. The motions were transmitted to the Respondent on 16 December 2015.

20. On 18 December 2015, the Respondent filed separate responses to the motions filed by Applicants Abu Malluh and Zamzam requesting the Tribunal to consider the receivability arguments first. The responses were transmitted to the respective Applicants on 20 December 2015.

21. On 21 December 2015, the Respondent filed separate responses to the motions filed by Applicants Shlash and Hussein requesting the Tribunal to consider the receivability arguments first. The responses were transmitted to the respective Applicants on the same day.

22. By Orders Nos. 004 (UNRWA/DT/2016) (“Order No. 004”), 005 (UNRWA/DT/2016) (“Order No. 005”), 006 (UNRWA/DT/2016) (“Order No. 006”) and 007 (UNRWA/DT/2016) (“Order No. 007”), the Applicants’ motions requesting the Respondent to submit his replies on the merits were denied. The Tribunal ordered the parties to provide comments on the receivability issues raised by the Tribunal in its Orders.

23. On 11 February 2016, the Applicants provided separate comments in relation to the Tribunal’s Orders Nos. 004, 005, 006 and 007. The Applicants also filed separate motions to submit supplementary evidence. Their submissions were transmitted to the Respondent.

24. On 11 February 2016, the Respondent provided separate comments in relation to the Tribunal’s Orders No. 004, 005, 006 and 007. His submissions were transmitted to the respective Applicants.

**Applicants’ contentions**

25. The Applicants contend:
i) On 1 June 2009, the Applicant Abu Malluh was appointed as Messenger “A” although he received a letter from the Human Resources Department (“HRD”) mentioning that his post was Messenger Porter. The last extension of his appointment on 24 March 2015 was incorrect as his post was considered as Messenger Porter;

ii) On 1 April 2008, Applicant Shlash was appointed as Messenger “A”. The last extension of his appointment on 3 March 2014 was incorrect as his post was considered as Messenger Porter;

iii) On 1 May 2000, Applicant Zamzam was appointed as Messenger Porter. However, he signed the job description of Messenger;

iv) On 1 February 2001, Applicant Hussein was appointed as Messenger;

v) Without notifying them, the Respondent changed their post title, thus changed the employment contract signed between each of them and the Respondent as well as changing the terms of appointment because the terms of appointment for Messenger A are not the same as Messenger Porter;

vi) The post of Messenger Porter includes additional tasks such as loading and unloading several items (office furniture, luggage of passenger, heavy boxes, etc.) which have caused the Applicants to “suffer injustice and exploitation”;

vii) The change of their post title is a violation of their rights and a breach of their employment contract;

viii) The Respondent’s action is against UNRWA Regulations and Rules and was an arbitrary and detrimental decision against them;

ix) The arbitrary change led to pressure, tension and an increase in their daily work; and
xi) What the Respondent has done violates item 8 of the Applicants’ employment contract terms.

26. The Applicants request:

i) To change their respective post title from Messenger Porter to Messenger “A”; and

ii) To be granted compensation for the time that they worked as Messenger Porters and for the psychological damages sustained by them due to changing their respective contracts without notifying them.

Respondent’s contentions

27. The Respondent contends:

In relation to Applicants Abu Malluh, Zamzam and Hussein:

i) The applications are not receivable because no appealable discretionary decisions have been presented. Applicants Abu Malluh, Zamzam and Hussein have not established a breach of the terms of their appointments or the denial of some right thereunder or the breach of some regulation or rule affecting them as staff members;

ii) The impugned decisions (emails dated 4 March 2015) reiterate the posts of Applicants Abu Malluh and Zamzam as Messenger Porter as reflected in their letters of appointment and subsequent extensions of appointments. In the case of Applicant Hussein, it reiterates his post as Messenger Porter as reflected in his “operative” letter of appointment;

iii) Applicant Hussein was initially appointed as “Messenger Level 1A” and subsequent letters of extension describe his post title either as Messenger “A” or Messenger Porter. However, the operative letter of appointment is dated 22 December 2011 which supersedes and cancels
previous letters of appointment. This letter of appointment describes his post title as Messenger Porter;

iv) The fact that in 2009 Applicant Abu Malluh acknowledged receipt of the PD for the post of Messenger “A” does not amount to a change of his post title as the operative contract between Applicant Abu Malluh and the Agency is dated 1 June 2009 and his post title is described as Messenger Porter;

v) The fact that in 2007 Applicant Zamzam acknowledged receipt of the PD for the post of Messenger does not amount to a change of his post title as the operative contract between him and the Agency is dated 22 December 2011 and his post title is described as Messenger Porter; and

vi) The fact that in 2007 Applicant Hussein acknowledged receipt of the PD for the post of Messenger does not amount to change of his post title as the operative contract between him and the Agency is dated 22 December 2011 and his post title is described as Messenger Porter.

In relation to Applicant Shlash:

i) His initial letter of appointment erroneously describes his post title as Messenger. However, the subsequent letters of extension of his appointment correctly describe his post title as Messenger Porter;

ii) On 13 March 2011, when Applicant Shlash accepted the offer of extension of his contract until 31 March 2014, he was aware that his post title was described as Messenger Porter. Accordingly, he had until 12 May 2011 to file a request for decision review but he did not file such request until 14 April 2015, a delay of over 2 years after the deadline;

iii) The letter dated 4 March 2015 to Applicant Shlash in relation to his post title is merely a reiteration of the Respondent’s position reflected
in the letters of extension of appointment. It is not a new decision for purposes of computing the period within which to seek decision review;

iv) Applicant Shlash asserts in his application that he performed functions outside of his PD until the end of December 2014. Therefore, he had until 2 March 2015 to request decision review but he did not seek decision review until 14 April 2015, a delay of over one month; and

v) As Applicant Shlash failed to file a timely request for decision review, his application must be rejected as not receivable.

28. The Respondent requests the Tribunal to dismiss the applications as not receivable. Should the Tribunal consider the applications to be receivable, the Respondent requests leave to make further submissions on the merits.

Considerations

Preliminary issue

- Consolidation of cases

29. The Tribunal notes that the applications are very similar, all citing the date of the impugned decision as 4 March 2015, asserting essentially the same claims and seeking similar relief, distinguished only by the name, date and signature of the individual Applicant. Given such similarity, the Tribunal considers that consolidating the applications will serve judicial economy and consistency without changing or affecting the rights of each party. The Tribunal has thus decided to join the cases.

- Applicants’ pending motions

30. On 11 February 2016, the Applicants filed separate motions to submit supplementary evidence in support of their claim that following the meeting on 3 August 2014 and the HAGSS email of 23 September 2014, there were other
discussions and communications between the ASU and the Agency in order to get a final answer regarding their post title.

31. Article 14 of the Tribunal’s Rules of Procedure provides that “[t]he Tribunal may, at any time, either on an application of a party or of its own initiative make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties”. The Tribunal reviewed the evidence contained in the case files as well as the parties’ comments in relation to the receivability issues raised by the Tribunal. The Tribunal finds that the evidence the Applicants request to submit would have no impact on its decision concerning the receivability of their applications. The Applicants’ motions are therefore denied.

Receivability

32. In their applications, the Applicants contest the decisions to qualify their respective post titles as Messenger Porter instead of Messenger “A”. They essentially claim that the terms of appointment for Messenger “A” are not the same as Messenger Porter and that the latter includes additional tasks such as loading and unloading boxes of various items sent by pouch.

33. The Applicants identified the contested decisions as the HRO emails of 4 March 2015 clarifying that their respective posts were Messenger Porter. They requested review of the contested decision on 14 April 2015. However, prior to 4 March 2015, the Agency had already taken several actions in relation to the Applicants’ posts. Therefore, the Tribunal should identify when the final decision was actually made.

34. 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 for decision review in a timely manner.
35. Area 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.

* * *

3. A staff member shall submit a request for 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).

36. Article 8 of the Statute of the Tribunal provides that:

1. An application shall be receivable if:

* * *

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

* * *

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).

37. The former United Nations Administrative Tribunal has ruled in its Judgment No. 1157, *Andronov* (2003), paragraphs V and VI, that:

[A]n “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 … They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities.

* * *
As stated in previous jurisprudence, the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant. Staff rule 111.2 (a) indicates, procedurally, the point in time from which the counting towards the deadline begins for initiating an appeal process. However, if a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision (emphasis added).

38. The United Nations Appeals Tribunal ("UNAT") has consistently held that the various statutory time limits have to be strictly enforced (Mezoui 2010-UNAT-043; Samuel Thambiah 2013-UNAT-385; Al-Mulla 2013-UNAT-394) and that the mere confirmation of an original decision does “not have the effect of suspending, or restarting, the time limits for initiating formal proceedings” (Cremades 2012-UNAT-271; Sethia 2010-UNAT-079).

39. The evidence shows that by a joint memorandum dated 21 May 2014 to the DAS, the Applicants requested compensation for “psychological and physical fatigue” as a result of performing functions outside of their job descriptions. In response to their request, the HAGSS had a meeting with the Applicants on 11 June 2014 to discuss their concerns. During the meeting, the HAGSS provided them with a copy of the PD for Messenger Porter and informed them that a request would be sent to the HRD requesting the revision of the relevant PD.

40. By email to the ASU dated 23 September 2014, the HAGSS memorialized a second meeting she had with the Applicants and the ASU representatives on 3 August 2014. During this meeting, the HAGSS explained the actions taken and the results since the meeting of 11 June 2014 and informed them that “HRD [had] provided confirmation that all 4 posts [were] ‘Messenger-Porter’”.

41. By separate Orders No. 004, 005, 006 and 007, the Tribunal requested the parties to provide comments on the receivability of the applications taking into account the Applicants’ request in their memorandum dated 21 May 2014, the two meetings of 11 June 2014 and 3 August 2014 in response to the Applicants’
request and the HAGSS’ email dated 23 September 2014. The parties provided their separate responses to the Orders on 11 February 2016.

42. The Respondent claims that as the Applicants were provided with a copy of the PD for the Messenger Porter post on 11 June 2014, they were aware by that date that the Agency had confirmed the posts they encumbered as Messenger Porter. The Tribunal notes, however, that during the meeting of 11 June 2014, the HAGSS informed them that a request would be sent to the HRD requesting the revision of the relevant PD. The evidence shows that it was only during the meeting of 3 August 2014 that they were actually informed that the HRD had provided confirmation that all posts were Messenger Porter. The Tribunal notes that in their submissions, none of the Applicants denied being present in the meeting dated 3 August 2014 or challenged being verbally informed about the contested decision during that meeting.

43. Having said the above, the Tribunal notes that the HAGSS memorialized the content of the meeting of 3 August 2014 in an email to the ASU dated 23 September 2014 in which the Applicants, except for Applicant Hussein, were included. In his submissions, Applicant Hussein did not claim that he was not present in the meeting of 3 August 2014 or that he was not aware of the contested decision. The evidence shows that his counsel was actually included in the email dated 23 September 2014.

44. The Tribunal finds that while the Applicants were not notified in writing about the contested decision until 23 September 2014, it remains that they were verbally informed of the decision during the meeting of 3 August 2014. In any event, even if the Tribunal considered the email of 23 September 2014 as the contested decision, their request for decision review dated 14 April 2015 would be time-barred as they should have submitted their request no later than 22 November 2014 in order to comply with the 60-day deadline as per Area Staff Rule 111.2.
45. The Applicants claim that the information given to them during the meeting of 3 August 2014 was not a final decision as several follow-up meetings were conducted and some emails were exchanged between the ASU representatives and the HRD in relation to their post titles. They claim that a final decision was only made by the Agency on “5 March 2015” (the correct date of the HRO email is 4 March 2015).

46. The Tribunal reviewed the evidence and finds that the separate emails sent by the HRO to the Applicants on 4 March 2015 clarifying that their respective post titles were Messenger Porter are a mere confirmation of the original decision of 3 August 2014. The Tribunal recalls that the confirmative decisions do not have the effect of restarting the time limits for initiating formal proceedings. Therefore, the Tribunal determines that the date of the contested decision is 3 August 2014. The Applicants should thus have submitted their request for decision review no later than 2 October 2014 in order to comply with the 60-day deadline as per Area Staff Rule 111.2. The Applicants’ request for decision review dated 14 April 2015 is hence clearly time-barred.

47. The Tribunal therefore determines that since the Applicants failed to comply with the time limits set forth in former Area Staff Rule 111.2, and given that it does not have jurisdiction to waive the deadline for administrative review, the applications are not receivable.
Conclusion

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

The applications are dismissed.

_________________ (Signed)_________________
Judge Jean-François Cousin
Dated this 29th day of February 2016

Entered in the Register on this 29th day of February 2016

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