ABUSONDOUS

v.

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

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Ra’ad Abusondous (the “Applicant”) against the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), not to assign him as Acting P-5 Chief of Safety and Security Division, and not to pay him an Acting Appointment Allowance.

Facts

2. Effective 1 August 2010, the Applicant was appointed to the post of Assistant Head Safety and Security Officer (“AHSSO”) at the Administration Support Department, Security Section, Headquarters Amman (“HQA”), Grade 16. The post was reclassified to the post of Senior Safety and Security Officer (“S/SSO”), Grade 17, and effective 1 May 2014, the Applicant was upgraded to the post of S/SSO.

3. On 13 November 2015, the Applicant’s supervisor, the Chief of Safety and Security Division (“CSS”) left the Agency to take up another position. Prior to his departure, by email dated 9 November 2015, the CSS sent a memorandum to the Chief of the Human Resources Services Division, recommending the assignment of the Applicant as Acting CSS (“A/CSS”).

4. Effective 13 November 2015, the Applicant started performing the duties as A/CSS in accordance with his former supervisor’s request.

5. Following the departure of the CSS, the Commissioner-General re-organised the Agency’s structure with respect to security and safety matters. The position of Director, Department of Security and Risk Management (“D/DSRM”) was created. Subsequently, a recruitment process for a new Director was launched.

6. On 29 January 2016, the Director of Human Resources Department informed the Applicant of the decision not to assign him as A/CSS.

7. On 29 February 2016, the Applicant submitted to the Deputy Commissioner-General a request for decision review of the decision not to appoint him as A/CSS. He received no response.
8. On 5 June 2016, the Applicant filed his application with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on 6 June 2016.

9. The Respondent was unable to file a reply within the prescribed time-limits. By Order No. 053 (UNRWA/DT/2016) dated 24 July 2016, the Tribunal granted leave to the Respondent to participate in the proceedings and ordered the Respondent to submit his reply.

10. In August 2016, the new D/DSRM was appointed.

11. On 12 August 2016, the Respondent filed his reply. The reply was transmitted to the Applicant on 14 August 2016.

12. On 11 January 2017, the Applicant filed a motion for leave to submit supplementary evidence. The motion was transmitted to the Respondent on the same day.

13. By Order No. 017 (UNRWA/DT/2017) dated 22 January 2017, the Applicant’s motion was granted.

14. On 23 January 2017, the Applicant submitted supplementary evidence, which was transmitted to the Respondent on the same day.

15. By Order No. 037 (UNRWA/DT/2017) dated 6 March 2017, the Tribunal requested the Respondent to submit the Agency’s reasoning for the decision not to assign the Applicant as A/CSS.


17. By Order No. 044 (UNRWA/DT/2017) dated 22 March 2017, the Tribunal transmitted the response to the Applicant and granted him leave to submit comments on the response.

18. On the same day, the Applicant filed a motion for extension of time to respond to Order No. 044 (UNRWA/DT/2017).

19. By Order No. 046 (UNRWA/DT/2017) dated 23 March 2017, the Tribunal transmitted the motion to the Respondent and granted the Applicant’s motion.
20. On 2 April 2017, the Applicant submitted his response to Order No. 044 (UNRWA/DT/2017). The response was transmitted to the Respondent on the same day.

**Applicant’s contentions**

21. The Applicant contends:

   i) Prior to his departure on 13 November 2015, the CSS had asked him to assume leadership of the Safety and Security Division (“SSD”) until the vacant position was filled. No letter was issued appointing him as A/CSS; however, he was advised to perform his duties as Officer-in-Charge (“OiC”);

   ii) The Agency failed to pay him an Acting Appointment Allowance (“AAA”) from the date that he started to perform his duties as OiC until the date that they informed him that he will not be needed to act as OiC. He meets all the conditions provided by Area Staff Personnel Directive No. A/3 Rev.1/Amend.5 to be granted an AAA. The Agency was aware that he had been asked to act as OiC, and his contract stipulates that he must work as OiC in the absence of the CSS;

   iii) In addition to performing his normal duties, he had always been appointed as OiC in the absence of the CSS. Furthermore, he had always received the stipulated allowance when he was OiC;

   iv) It is stated in the S/SSO’s Terms of Reference that the S/SSO is to act as OiC during the absence of the CSS;

   v) Since the departure of the CSS, he has been acting as A/CSS. The failure to formally appoint an OiC is a risk for the Agency in the event of a serious safety or security incident;

   vi) He acted as OiC and was unexpectedly informed that he was not entitled to receive AAA for the period that he had worked as OiC; and

   vii) As S/SSO, he is the most senior SSD staff member in HQA. Therefore, this puts him in a good position to be temporarily appointed to the post and also to be considered for the post.
22. The Applicant requests:

   i) To be officially recognized as A/CSS or Head of the Security Function at HQA; and

   ii) To receive retroactive AAA for the period of time during which he has been acting as OiC.

**Respondent’s contentions**

23. The Respondent contends:

   i) The assignment of an Area staff member to an International Professional post is a discretionary decision, and the Director of the Human Resources Department, while exercising his discretion, decided not to assign the Applicant as A/CSS pending recruitment; 

   ii) Following the departure of the CSS, the Commissioner-General re-organised the structure of the Agency with regard to security and safety matters, and the position of D/DSRM was created. It was decided not to assign the Applicant to the post of CSS in an acting capacity since the Agency was not in a position to fill the post and meet the 120 days maximum time period set by paragraph 3 of Area Staff Circular No. A/04/2010. In fact, the new D/DSRM did not take up his position until August 2016; and 

   iii) The relief sought by the Applicant has no legal basis.

24. The Respondent requests the Tribunal to dismiss the application in its entirety.

**Considerations**

25. The Applicant contests the decision not to assign him as A/CSS and not to pay him an AAA.

26. It is not contested that, prior to his departure on 13 November 2015, the CSS had asked the Applicant to assume leadership of the SSD until the vacant position was filled. However,
in spite of this request, the Applicant was never appointed as A/CSS. The Applicant continued to perform duties as OiC until August 2016, when the new D/DSRM took up his position in the restructured department.

27. The Respondent acknowledges that, in the past, the Applicant had been appointed as OiC and was paid AAA during the CSS’s absences. However, the Respondent also submits that an appointment as OiC on an International post is a discretionary decision and not a right for a staff member.

28. Area Staff Circular No. A/04/2010 provides in relevant part:

As a normal part of their customary work and without additional compensation, staff members are expected from time to time to temporarily assume the duties and responsibilities of higher level posts. When an Area staff member is required to serve in a post in the International professional category, an Acting Appointment Allowance (AAA) may be paid when the staff member assumes higher duties and responsibilities according to the following arrangements:

1. Without prejudice to the principle that promotion shall be the normal means of recognizing increased responsibilities and demonstrated ability, an Area staff member temporarily assuming the duties and responsibilities of an International professional post for a period exceeding one month, may, in exceptional cases, be granted an AAA from the beginning of the second month of assignment in the International professional post.

2. The AAA is applicable regardless of whether an Area staff member is Acting in a vacant post or is Officer-in-Charge in a post during the absence of an incumbent.

3. Hiring Managers are expected to follow the maximum time period of 120 days to fill international vacancies pursuant to the International Staff Selection Policy. Accordingly, the assignment of an Area staff member to an International professional post should not normally exceed 120 days, except in cases when the incumbent is on SLWOP or other form of long-term absence.
4. The assignment of an Area staff member to an International professional post shall be approved by the Director of Human Resources for Headquarters staff, and Field Office Directors for field staff, on the recommendation of the relevant Department Head.

29. The Tribunal finds that the above provision does not provide a right to the Applicant to receive an AAA; however, the Tribunal also finds that the Applicant does have an expectation that the Agency will properly exercise its discretion to grant an AAA and will be fair in its dealings with him.

30. The Tribunal holds that each administrative decision, even a discretionary one, needs reasoning. In order to review whether the decision not to grant an AAA to the Applicant was not arbitrary, capricious, motivated by prejudice or extraneous factors or flawed by procedural irregularity or error of law, the Tribunal ordered the Respondent to submit the reasoning for the decision not to assign the Applicant as A/CSS. As stated by the United Nations Appeals Tribunal (“UNAT”) in Husseini 2016-UNAT-701, in paragraph 15:

> [...] discretionary powers which must be exercised reasonably, fairly and flexibly in accordance with their internal substantive legal requirements.

31. In response to Order No. 044 (UNRWA/DT/2017), the Respondent submitted that the justification for the decision not to appoint the Applicant as OiC and grant him an AAA was that the Agency would not be in a position to meet the 120 days maximum time period set by paragraph 3 of Area Staff Circular No. A/04/2010. In other words, it was anticipated that it would take longer than 120 days to fill the post of D/DSRM; thus, the appointment of the Applicant as OiC would have extended beyond the 120-day period. However, the Tribunal finds that this is not a reasonable ground for denying the Applicant an AAA, as the provision does not specifically preclude flexibility beyond the 120-day time period. The Area Staff Circular No. A/04/2010 indicates that it is expected that the hiring process will take 120 days and that the AAA should not normally exceed 120 days, however, it does not use words such as “must” or “shall”.

32. The Tribunal finds that it is regrettable that the Respondent does not clearly explain the reasoning of the contested decision in order to prevent the Tribunal from making
assumptions about the Agency’s real intent. The Respondent leaves the Tribunal guessing as to whether the Agency perhaps did not want to grant the Applicant an AAA for a protracted period of time in order to save money, as the new D/DSRM did not take up his position until August 2016. Assuming that there was such reasoning, it would not be automatically unlawful if there had been an Agency policy to this aim. However, the Agency did not submit anything to this effect. Consequently, as the Respondent failed to submit reasonable and fair grounds, the Tribunal holds that the contested decision was unlawful.

Compensation

33. As stated above, the refusal to grant an AAA was unlawful. This means that the Agency has to grant the Applicant the applicable AAA. In the case at hand, the Applicant assumed duties as OiC on 13 November 2015. The Applicant claims in his application - filed on 5 July 2016 - and the Respondent does not contest, that he continued assuming duties as OiC “until the present day”. According to Area Staff Circular No. A/04/2010, an Area staff member may be granted an AAA from the beginning of the second month of the assignment to an International professional post. Considering the evidence in the case file, the Tribunal holds that the Applicant is awarded the amount of the applicable AAA from the beginning of the second month he had been performing duties as OiC, until the new D/DSRM took up his position in the restructured department.
Conclusion

34. The Respondent is ordered to pay the Applicant as mentioned above, within 60 days of the date this Judgment becomes executable, during which period the US Prime Rate applicable on 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 payment.

35. All other requests are rejected.

(Signed)
Judge Jean-François Cousin
Dated this 4th day of June 2017

Entered in the Register on this 4th day of June 2017

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