FAHD

v.

COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Saleh Fahd (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”), not to grant him compensatory time off for his overtime work.

Facts

2. Effective 2 July 2001, the Applicant was employed by the Agency on a fixed-term appointment as a Medical Officer “B”, Level IV/A, Step 1, at the Tyre Area Duty Station in the Lebanon Field Office (“LFO”).

3. Effective 13 September 2010, the Applicant was appointed to the position of Hospitalization Medical Officer, Grade 16. Effective 1 January 2012, the Applicant’s appointment was converted to temporary indefinite appointment.

4. Effective 1 April 2014, the Applicant was appointed to the post of Field Disease Control Officer (“FDCO”), Grade 17, at the Health Department, LFO. This was the Applicant’s position at the material time of the present application.

5. By email to the Donor Relations and Projects Officer (“DR&PO”) dated 30 November 2015, the Deputy, Chief Field Health Programme (“D/CFHP”) noted that “an allowance which is equivalent to a maximum of 32 hours/month will as overtime would [sic] be paid for the extra work under Monaco Project”.

6. By email to the Chief, Field Health Programme (“C/FHP”) and Head, Field Human Resources Officer (“H/FHRO”) dated 29 August 2016, the Applicant requested to be granted compensatory time off (“CTO”).

7. By another email to the C/FHP dated 18 October 2016, the Applicant reiterated his request.

8. By email dated 19 October 2016, the H/FHRO acknowledged that the email dated 30 November 2015 from the D/CFHP could be regarded as a pre-approval for the Applicant’s request for CTO.
9. By email to the Administrative Officer, Health Department (“AO/HD”) dated 21 October 2016, the H/FHRO requested records of overtime (“OT”) which had been approved by the Applicant’s supervisor. By email dated 26 October 2016, the AO/HD noted that there was no record of OT of the Applicant. However, the AO/HD also noted that the Applicant had confirmed that for a year he worked at least one hour per day after normal working hours, which totalled 240 hours.

10. By email to the Deputy, Director of UNRWA Affairs, Lebanon (“D/DUA/L”) dated 28 October 2016, the AO/HD requested the approval to grant the Applicant a retroactive payment of OT or CTO for a total of 240 hours.

11. On 15 November 2016, the D/DUA/L approved the payment of 240 hours of OT.

12. By email dated 14 November 2016, the H/FHRO confirmed that the Health Department had confirmed that the Applicant had worked one hour per day for a year, totalling 240 hours of OT or 32 days of CTO.

13. By email to the Director of UNRWA Affairs, Lebanon (“DUA/L”) dated 28 November 2016, the Applicant requested to be granted CTO for his extra work.

14. By email dated 29 November 2016, the C/FHP informed the Applicant that the DUA/L had rejected his request for 240 hours of OT. This email did not mention any information regarding the Applicant’s request for CTO.

15. By another email to the DUA/L dated 15 December 2016, the Applicant reiterated his request to be granted CTO for his extra work.

16. By letter dated 28 December 2016 to the Applicant, the DUA/L noted as follows:

I reviewed your request for 240 hours of overtime for the period of May 2015 — April 2016. You indicated that during that time you worked 32 hours of overtime per month to manage the Monaco project. During my review, I was unable to sufficiently substantiate that this overtime was approved in advance, which is a requirement. In addition, I was unable to find convincing justification for the long delay to claim this overtime. Such retroactive claims and payments can be done only if the
necessary procedures and regulations have been followed and with detailed justification.

In the absence of the above requirements, I was unable to approve and forward your request to the Director of Human Resources for his final approval.

17. On 21 February 2017, the Applicant requested the review of the DUA/L’s decision.

18. On 28 March 2017, the present application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on 30 March 2017.

19. On 28 April 2017, the Respondent filed his reply. The reply was transmitted to the Applicant on 1 May 2017.

**Applicant’s contentions**

20. The Applicant contends:

i) He was promised verbally by the Health Department that he would be paid OT for his extra duties;

ii) He was informed verbally by the C/FHP that the D/DUA/L had approved his request;

iii) It is clear from email exchanges and the circumstances of the case that the payment of his extra work was, indeed, authorised in advance;

iv) The DUA/L cannot post facto reject his previously approved request and must respect the principle of good faith; and

v) The impugned decision is tainted by improper motives and flawed by procedural irregularities.

21. The Applicant requests the rescission of the contested decision.
Respondent’s contentions

22. The Respondent contends:

   i) The cancellation of the OT was lawful and reasonable in accordance with Area Staff Rule (“ASR”) 101.3 on Overtime, Compensatory Time-Off and Night Duty Premium Compensation (“ASR 101.3 on Overtime”);

   ii) In accordance with the regulatory framework, the Applicant, being at Grade 17, was only entitled to CTO and not OT;

   iii) The initial approval by the D/DUA/L of 15 November 2016 was issued prior to the Human Resources Department’s advice with respect to the interpretation of relevant provisions;

   iv) There is no evidence proffered that overtime was authorised in advance as contemplated in ASR 101.3(1);

   v) Pursuant to Area Personnel Directive No. A/Rev.1/Part III/Amend. 3, paragraph 3, “all credits of recognised compensatory time off not utilised within two calendar months of the accrued credit will be deemed to have lapsed.” As the Applicant started to run the Monaco Project in June 2014 and only requested CTO on 29 August 2016, his entitlement to CTO is deemed to have lapsed; and

   vi) The D/DUA/L’s decision was, indeed, unlawful. However, the United Nations Appeals Tribunal’s (“UNAT”) jurisprudence agrees with the correction of erroneous decisions by management.

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

Scope of the case

24. It is not contested by the Respondent that, on 15 November 2016, the D/DUA/L approved the payment of 240 hours of OT. The D/DUA/L cancelled this first decision after he was informed that his decision was unlawful.

25. Paragraph 5(C)(iii) of ASR 101.3 on Overtime is clear. Only CTO can be granted for a staff member between Grade 13 and 20. As the Applicant was at Grade 17, CTO was the only form of compensation that he could have received for overtime. Accordingly, it was lawful and necessary for the D/DUA/L to cancel his first decision approving the payment of 240 hours of OT to the Applicant. As held by the UNAT in Kulawat 2014-UNAT-428, para. 30, “judicial review of an administrative decision requires the Tribunal to examine whether the Administration reached its decision in a “reasonable and fair, legally and procedurally correct” manner.”

26. In the instant case, the Applicant does not contest the decision not to grant him OT. Rather, he contests the decision not to grant him CTO for his overtime in managing the Monaco Project. Therefore, the Tribunal will only review whether the Applicant is entitled to CTO.

Merits

27. Firstly, the Respondent claims that the Applicant cannot be granted CTO because the overtime he worked had never been authorised in advance as required by ASR 101.3 on Overtime, which provides:

   1. Staff members who are required to work for one-half hour or more in excess of a maximum number of hours established by the Commissioner-General in respect of specific posts, duties or duty stations, will be deemed to have worked overtime. Overtime will be authorized in advance and duly recorded in accordance with established procedures.

28. The Applicant submits that, since he started to manage the Monaco Project as of June 2014, he was promised verbally by the Health Department that he would be
paid OT for his extra duties. Nevertheless, the Applicant admits that he only requested CTO on 29 August 2016. In accordance with the aforementioned provision of ASR 101.3 on Overtime, the Tribunal has to first determine whether the said authorisation can be retroactively accorded. In this respect, the principle of good faith is crucial as both the staff member and the Agency must act accordingly.

29. In the present case, the Tribunal has no doubt that the Applicant has acted openly and transparently in managing the Monaco Project and that, since his engagement with the project, he thought he would be compensated for his extra work. The case file also clearly demonstrates that the Health Department was fully aware of the Applicant’s extra work. For example, on 30 November 2015, the D/CFHP noted that “an allowance which is equivalent to a maximum of 32 hours/month will as overtime would [sic] be paid for the extra work under Monaco Project”. Furthermore, after the Applicant’s request for CTO on 29 August 2016, by email dated 19 October 2016, the H/FHRO acknowledged that the email of 30 November 2015 could be regarded as a pre-approval for the Applicant’s request for CTO. Therefore, the Tribunal holds that, contrary to what is submitted by the Respondent, the Applicant received, at minimum, an implied approval of his extra work, especially, given the acknowledgment of the H/FHRO.

30. Secondly, the Respondent contends that paragraph 3 of Area Personnel Directive No. A/Rev.1/Part III/Amend. 3 provides that “all credits of recognised compensatory time off not utilised within two calendar months of the accrued credit will be deemed to have lapsed.” The application of this provision would hinder the entitlement of the Applicant to CTO as he started to manage the Monaco Project in June 2014 and only requested CTO on 29 August 2016. However, the Tribunal considers that the Applicant, in good faith, could not have imagined that he was not entitled to be compensated for his extra work, given the D/CFHP’s email of 30 November 2015. Accordingly, it is clear to the Tribunal that, because of this email, the Applicant did not consider requesting CTO before 29 August 2016.

31. Consequently, the Tribunal considers that the Applicant was misled by wrong information given by the Agency. Therefore, the Tribunal holds that the Applicant is entitled to be granted CTO for the extra work he performed during the period
from May 2015 to April 2016, for the non-contested base of one hour per day for a year. Accordingly, the Agency’s decision not to grant the Applicant CTO for the aforementioned period is annulled.

**Conclusion**

32. In view of the foregoing, the Tribunal DECIDES:

   The Agency’s decision not to grant the Applicant CTO for the period from May 2015 to April 2016, is hereby rescinded.

(Signed)

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Judge Jean-François Cousin

Dated this 5th day of February 2018

Entered in the Register on this 5th day of February 2018

(Signed)

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Laurie McNabb, Registrar, UNRWA DT, Amman