Before: Judge Jean-François Cousin

Registry: Amman

Registrar: Laurie McNabb

ALI

v.

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

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Saber Daoud Ali (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 extend his services beyond the official retirement age for one year instead of two years.

Facts

2. Effective 19 September 1978, the Applicant was employed by the Agency on a temporary indefinite appointment, Grade 6, Step 1, as Teacher “D” in Amman Area.

3. After several transfers and promotions, effective 1 July 2012, the Applicant was appointed as Area Education Officer, Grade 17, South Amman Area. At the time relevant to the instant application, the Applicant occupied this post.

4. By letter dated 31 May 2017, the Applicant was notified that he would reach the age of retirement on 25 September 2017.

5. On 6 June 2017, the Applicant submitted a request to be retained in service after the age of retirement for a period of two years.

6. By letter dated 16 July 2017, the Human Resources Services Officer (“HRSO”) informed the Applicant that the Director of UNRWA Operations, Jordan (“DUO/J”) had approved the extension of his services for a period of one year.

7. By email to the HRSO dated 20 July 2017, the Applicant requested reconsideration of the DUO/J’s decision, noting that the Agency’s regulatory framework allows extensions for two years and that he met all the requirements.

8. By letter dated 6 September 2017, the DUO/J rejected the Applicant’s request for decision review and confirmed that the Applicant would be separated on 25 September 2018.
9. On 13 November 2017, the present application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). It was transmitted to the Respondent on the same date.

10. On 13 December 2017, the Respondent filed a “Motion for Extension of Time” to file his reply outside the 30-calendar day time limit set out in Article 6(1) of the Rules of Procedure of the Tribunal. The motion was transmitted to the Applicant on 14 December 2017.

11. By Order No. 185 (UNRWA/DT/2017) dated 24 December 2017, the Tribunal granted the Respondent’s request for an extension of time.

12. On 7 February 2018, the Respondent filed his reply. The reply was transmitted to the Applicant on 8 February 2018.

13. By Order No. 079 (UNRWA/DT/2018) dated 8 May 2018 (“Order No. 079”), the Respondent was ordered to inform the Tribunal about the exact reasons for extending the Applicant’s services beyond the official retirement age for one year instead of two years.

14. On 29 May 2018, the Respondent filed a motion for extension of time to comply with Order No. 079. The motion was transmitted to the Applicant on 30 May 2018.


16. On 19 June 2018, the Respondent filed a motion for further extension of time to comply with Order No. 079. The motion was transmitted to the Applicant on 20 June 2018.

17. On 20 June 2018, the Applicant objected to the Respondent’s motion. The Applicant’s objection was transmitted to the Respondent on the same date.

18. By Order No. 119 (UNRWA/DT/2018) dated 2 July 2018, the Tribunal granted the Respondent’s motion for further extension of time to comply with Order No. 079.
19. On 3 July 2018, the Respondent submitted his response to Order No. 079. This was transmitted to the Applicant on 4 July 2018.

**Applicant’s contentions**

20. The Applicant contends:

   i) He meets the requirements for extension of services beyond the official retirement age;

   ii) The Agency’s regulatory framework permits two years of extension beyond the official retirement age;

   iii) Some other staff members from the Education Programme at South Amman Area were recently extended for two years;

   iv) He performed very well during his whole career at the Agency and his performance and achievements should have been taken into consideration; and

   v) He is a victim of discrimination.

21. The Applicant requests the extension of his services for two years beyond the official retirement age.

**Respondent’s contentions**

22. The Respondent contends:

   i) The decision to extend the Applicant’s services for one year instead of two years was properly effected;

   ii) The extension of services beyond the retirement age is not automatic and can only be authorised in the interest of the Agency;

   iii) The Agency has broad discretionary authority in the application of the Agency’s regulatory framework. The jurisprudence of the United Nations Appeals Tribunal (“UNAT”) is clear. When an Applicant alleges that the
exercise of discretionary authority by the Agency was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularities or error of law, the burden of proving prejudice or improper motivation rests with the Applicant. In the case at hand, the Applicant has failed to sustain the burden of proof required;

iv) The DUO/J decided to offer the Applicant a one-year extension in order to afford the Agency more flexibility in its operational planning; and

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

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

Considerations

24. The Applicant contests the decision to extend his services beyond the official retirement age for one year instead of his request for two years. He alleges that he is a victim of discrimination as other staff members from the Education Programme at South Amman Area were recently extended for two years.

25. Area Staff Rule (“ASR”) 109.2 provides, in relevant parts, as follows:

NOTICE OF RETIREMENT

3. A staff member who is due to retire shall be given not less than 60 (sixty) calendar days’ written notice of his/her retirement. This notice shall specify the date on which the staff member is to be separated from Agency’s service, which shall not be earlier than his/her 60th birthday.

EXTENSION OF SERVICE

4. For extensions past the official age of retirement:

…

(B) Staff members reaching the official age of retirement on or after 1 January 2014, may request no later than sixty (60) calendar days after receiving the written notice of retirement referred to in paragraph 3 above, that he or she be retained in service to the Agency beyond attaining the official age of retirement for a cumulative period not to exceed two (2) years.
(C) In the event that a staff member does not seek an extension, or in other appropriate cases, the Director of Human Resources (upon the recommendation of the relevant Department Director) for headquarters staff, and Field Office Directors for field staff, are authorised to request the staff member to agree to an extension beyond the official age of retirement for a cumulative period not to exceed two (2) years, and to approve such a request, in the interest of the Agency. The Director of Human Resources and Field Office Directors shall approve the requests made under sub-paragraph (B) or (C), subject to the conditions set out in the relevant Personnel Directive A/9.

(D) Where the services of a staff member are retained beyond the official age of retirement, then such staff member shall be notified of the extended period of service, the date of its expiry, and any special conditions as authorised by the Director of Human Resources following the recommendation of the relevant Department Director for headquarters staff, and Field Office Directors for field staff.

(E) Further extensions of service beyond a staff member’s 62nd birthday shall not exceed one year, and may be authorized at the sole discretion of the Commissioner-General. The Commissioner-General retains the authority, in exceptional cases, to deny a request by a staff member to be retained in service beyond the official age of retirement.

26. ASR 109.2(4)(B) allows Field Office Directors to authorise and approve the extensions of field staff beyond the official retirement age. The Tribunal is well aware that such extensions are not a right. Rather, ASR 109.2 clearly identifies that retirement at the age of 60 is the general principle.

27. Furthermore, the Tribunal also notes that, in accordance with ASR 109.2(4)(E), “[t]he Commissioner-General retains the authority, in exceptional cases, to deny a request by a staff member to be retained in service beyond the official age of retirement (Emphasis added).” Accordingly, the Tribunal considers that the discretionary authority of the Commissioner-General not to grant an extension of service beyond the official retirement age is broad; however, this authority is not unfettered. The Tribunal is entitled to review whether the decision was arbitrary or tainted by bias and improper motives.

28. The UNAT held in its Judgment Abdullah 2014-UNAT-482, in paragraph 60, as follows:
60. [...] [A]s recognised by the UNRWA DT, managerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

29. By letter to the Directors of Field Offices and Heads of Field Human Resources Offices dated 9 February 2016, the Director of Human Resources (“DHR”) provided guidance on decisions for retention in service beyond the official retirement age. The letter provides, in relevant parts, as follows:

2. Under the current framework language, the Commissioner-General has the authority to reject a request for an extension beyond the normal retirement age in exceptional cases. By decision dated 20 January 2015, the Commissioner-General has delegated this discretion to the Director of Human Resources (DHR) for headquarters staff and Field Office Directors (FOD) for field staff.

3. Accordingly, the purpose of these guidelines is to promote consistency within the fields and across the Agency in respect of the rejection of extensions. The following is a non-exhaustive list of situations that may be considered “exceptional cases” for non-approval of requests for extension in service beyond the normal age of retirement under Staff Rule 109.2 para. 4 (E) second sentence. Please remember that this authority can only be applied in exceptional circumstances.

4. Exceptional circumstances may apply in cases of requests:

   (i) from an unqualified teacher or otherwise unqualified staff member;
   (ii) from teachers whose subject is no longer taught at UNRWA; schools;
   (iii) from staff members working in functions subject to review (i.e. through the Agency Resource Allocation Review process or through a reorganization);
   (iv) from staff members working in functions where surplus has been reasonably anticipated;
   (v) from staff members whose continuation in the post hinders internal succession plans or internal gender balance objectives;
   (vi) from staff members who have been on Special Leave without Pay for a relevant period of time directly prior to the request;
(vii) from staff members on administrative leave pending investigation.

30. In the present case, the Tribunal notes that, despite the Applicant’s several requests, he has never been informed by the Agency of the reasons for the decision not to grant him an extension of services for two years. In his reply to the Tribunal, the Respondent simply recalls the Agency’s regulatory framework and highlights that the burden for proving prejudice or improper motivation rests with the Applicant. In this respect, the Tribunal agrees with the Respondent that the Applicant failed to do so. However, as the Respondent did not articulate any factual reasons for rejecting the Applicant’s request, the Tribunal ordered the Respondent to provide these reasons to the Tribunal.

31. In his response, the Respondent notes as follows:

i) For operational efficiencies, Jordan Field Office (“JFO”) is moving towards merging the management of its programs in areas of its operations. In this regard, JFO now has in place an Area Health Officer who covers North and South Amman areas. With regard to Education Programme, JFO has in place an Area Education Officer in both North and South Amman areas. The Director of the Jordan Field Office (“DUO/J”) is currently considering adopting the same approach for the Education Programme.

ii) In light of the above consideration on the future of the post and the programme, the DUO/J decided to offer the Applicant a one-year extension in order to afford the Agency more flexibility in its operational planning.

32. The Tribunal notes that the reason provided by the Respondent is not part of the list of situations detailed by the DHR in his above-mentioned letter. It is clear that it is a non-exhaustive list, however, the Respondent’s vague response does not reveal any exceptional circumstances for the non-approval of the Applicant’s request.

33. Accordingly, the Tribunal cannot accept such response. Therefore, the Tribunal considers that the decision not to extend the Applicant’s services for two years beyond the official retirement age is illegal, as it is based on improper motives which have not been disclosed to the Tribunal.
34. In the view of all the foregoing, the Tribunal holds that the contested decision is hereby rescinded.

**Remedies**

35. Article 10(5) of the Tribunal’s Statute provides:

5. As part of its judgement, 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[.]

36. Furthermore, the UNAT held in its Judgment *Siri* 2016-UNAT-609, in paragraph 35, that “retirement age is a term of […] appointment and, as such, does not constitute ‘a case of appointment’”.

37. Accordingly, as a result of the rescission of the DUO/J’s decision to extend the Applicant’s services for one year instead of two years beyond the official retirement age, the Applicant is hereby entitled to expeditiously submit to the Agency a new request for the extension of his services for one more year beyond his current retirement date of 25 September 2018.
Conclusion

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

i) The decision not to extend the Applicant’s services for two years beyond the official retirement age is hereby rescinded.

(Signed)

Judge Jeans-François Cousin

Dated this 15th day of July 2018

Entered in the Register on this 15th day of July 2018

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman