ABU ATA et al.

v.

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

JUDGMENT

Self-Represented:
Maher Abu Ata

Counsel for all other Applicants:
Amer Abu Khalaf (LOSA)

Counsel for Respondent:
Michael Schoiswohl (A/DLA)
Introduction

Facts

2. The Applicants are all staff members employed by the Agency under temporary indefinite appointments (“TIAs”) in the Gaza Field Office (“GFO”).

3. In a statement to staff members on 17 January 2018, the Commissioner-General (“CG”) announced that the Government of the United States was limiting its contribution to the Agency to 60 million USD in 2018, compared to its contribution of more than 350 million USD in 2017.

4. In a letter to all staff members in the GFO dated 6 March 2018, the Director of UNRWA Operations, Gaza (“DUO/G”) highlighted the financial difficulties the Agency was facing due to the sudden decrease in contributions to the Agency, specifically noting that “[t]he huge reduction in funding […] that was expected in 2018 for both our Programme Budget and Emergency Appeals by UNRWA’s largest donor, the [United States of America], plunged the Agency into a dramatic and sudden existential crisis”.

5. Due to the Agency’s financial crisis, in an interoffice memorandum dated 4 July 2018, the Deputy Commissioner-General (“D/CG”) recommended to the CG that the CG authorise an increase of 548 part-time posts for the GFO, the redeployment of 280 staff members, and the separation of 113 staff members. The CG approved the D/CG’s recommendation on 5 July 2018.

6. In an update to staff members on 7 July 2018 about the impact of the financial crisis, the CG described the aforementioned measures that the Agency was taking to better address the challenges of the funding cut.

7. On 25 July 2018, all the Applicants received a letter, signed by the DUO/G, informing them that their posts would be abolished. In these letters, some of the Applicants were offered new TIAs on a part-time basis, while other Applicants were only informed that they would be considered for new part-time posts.
8. The majority of the Applicants submitted requests for decision review in either August or September 2018.

9. Following an agreement reached on 1 September 2018, between the DUO/G and Local Staff Union (“LSU”) in Gaza, the Applicants’ TIAs were extended on a full-time basis until the end of September 2018.

10. By letters from the Head, Field Human Resources Office (“H/FHRO”) dated 21 October 2018, the Applicants’ TIAs were reclassified from full-time to part-time effective 1 October 2018, including those Applicants who, in the 25 July 2018 letters, had not been offered new part-time posts.

11. On 21 October 2018, Applicant Abu Ata filed his application with the UNRWA Dispute Tribunal (“Tribunal”). This application was transmitted to the Respondent on 22 October 2018.

12. By letters from the H/FHRO dated 5 November 2018, the Applicants were provided with further clarifications with respect to the reclassification of their appointments from full-time to part-time.

13. On 13 November 2018, Applicant Abu Ata filed a motion requesting the suspension of the reclassification his appointment. Applicant Abu Ata’s motion was transmitted to the Respondent on 14 November 2018. The Respondent filed his response to this motion on 22 November 2018.

14. On 21 November 2018, the Respondent filed his reply to Applicant Abu Ata’s application, addressing only the issue of receivability. This was transmitted to Applicant Abu Ata on 28 November 2018.

15. By Order No. 217 (UNRWA/DT/2018) dated 25 November 2018, the Tribunal denied Applicant Abu Ata’s motion for suspension of action. The Respondent’s response to the motion was transmitted to Applicant Abu Ata, along with this Order.
16. Between 28 November 2018 and 17 December 2018, the remaining Applicants filed their applications with the Tribunal.

17. Between 9 and 19 December 2018, these applications were transmitted to the Respondent.

18. On 8 January 2019, the Respondent filed a motion for suspension of proceedings in several cases, including the present applications, except the application of Applicant Abu Ata. In the motion, the Respondent requested that the cases be suspended in order to give him additional time to review the applications and file a motion to consolidate common applications. The motion was transmitted to the Applicants on 9 January 2019.

19. On 9 January 2019, Counsel for the Applicants filed an objection to the Respondent’s motion for suspension of proceedings. This was transmitted to the Respondent on the same day.

20. By Order No. 013 (UNRWA/DT/2019) dated 13 January 2019, the Tribunal denied the Respondent’s motion for suspension of the proceedings and granted the Respondent a 30-day extension of time to submit a motion for consolidation.

21. On 12 February 2019, the Respondent filed a motion for further extension of time to submit his motion for consolidation. This was transmitted to the Applicants, except Applicant Abu Ata, on 13 February 2019.


23. By Judgment Abu Ata UNRWA/DT/2019/014 dated 14 March 2019, the Tribunal decided that the Applicant Abu Ata’s application was receivable.

24. By Order No. 053 (UNRWA/DT/2019) dated 14 March 2019, the Tribunal ordered the Respondent to include in his motion for consolidation the application registered under Case No. UNRWA/DT/GFO/2018/192 (“Abu Ata”).
25. On 22 March 2019, the Respondent filed his motion for consolidation of several cases, including the present applications (“motion for consolidation”). The motion for consolidation was transmitted to the Applicants on 24 March 2019, but not to Applicant Abu Ata by oversight.


27. On 15 April 2019, the Respondent’s motion for consolidation and Order No. 083 were transmitted to Applicant Abu Ata.

28. In a statement on 1 May 2019, the CG announced a decision to reinstate 500 part-time staff members in the GFO to full-time employment from 1 May to 31 December 2019.

29. On 15 May 2019, the Respondent filed his consolidated reply. The consolidated reply was transmitted to the Applicants on the same day.

30. On 22 May 2019, Applicant Abu Ata filed a motion to file observations on the Respondent’s consolidated reply. Applicant Abu Ata’s motion was transmitted to the Respondent on the same day.


32. On 29 May 2019, the Respondent filed a motion for an extension of time to translate his consolidated reply. The motion was transmitted to the Applicants on 30 May 2019.

33. On 3 June 2019, Applicant Abu Ata submitted his observations on the Respondent’s consolidated reply. Applicant Abu Ata’s submission was transmitted to the Respondent on 4 June 2019.
34. By Order No. 116 (UNRWA/DT/2019) dated 10 June 2019, the Tribunal granted the Respondent’s motion for an extension of time to translate his consolidated reply.

35. On 28 June 2019, Counsel for the other Applicants filed a motion to file observations on the Respondent’s reply and supplementary evidence. The motion was transmitted to the Respondent on 30 June 2019.

36. By Order No. 132 (UNRWA/DT/2019) dated 1 July 2019, the Tribunal granted the motion.

37. On 4 July 2019, Counsel for the other Applicants submitted observations on the Respondent’s consolidated reply and supplementary evidence. These submissions were transmitted to the Respondent on the same day.

38. On 1 August 2019, the Respondent filed a motion for further extension of time to translate his consolidated reply. The motion was transmitted to the Applicants on the same day.


40. On 19 August 2019, the Respondent filed the Arabic translation of his consolidated reply. The translation was transmitted to the Applicants on the same day.

Applicants’ contentions

41. The Applicants contend:

   i) The abolition of their posts was effected in violation of the Agency’s Rules and Regulations, especially, Area Staff Regulation 4.1 and paragraphs 3.1 and 3.2 of Area Staff Personnel Directive No. A/4/Rev.7/PartI effective 1 February 1993;
ii) The Agency’s regulatory framework was not observed with respect to the rules and regulations on redundancy, articulated in paragraphs 33-44 of Area Staff Personnel Directive No. A/9/Rev.10, effective 23 June 2015 (“PD A/9/Rev.10”);

iii) The Applicants were not notified of the period of provisional redundancy;

iv) The Agency may not unilaterally change the Applicants’ terms or conditions of appointment; and

v) Staff members’ salaries are their acquired rights and, accordingly, their salaries may not be reduced by reclassifying their full-time appointments to part-time appointments.

42. The Applicants request:

i) Rescission of the contested decisions;

ii) To be reinstated to full-time employment; and

iii) Compensation for all financial losses such as salaries and entitlements resulting from the contested decisions.

**Respondent’s contentions**

43. The Respondent contends:

i) The decisions that are the subject of the applications were superseded by a subsequent administrative action, which renders the applications not maintainable before the Tribunal;

ii) The impugned decisions were properly effected; they were rendered necessary as a result of the withholding of the Government of the United States’ funding, beginning in 2018;
iii) The CG has the authority to downsize the Agency’s services in accordance with the resources available to him to carry out those services;

iv) The Agency has broad discretion to reorganise its operations and departments to meet changing needs and economic realities;

v) The Applicants were transferred to equivalent posts at the same grade in accordance with the Agency’s regulatory framework;

vi) There is no illegality in changes to the Applicants’ Letters of Appointment even with respect to elements such as salary and category of appointment;

vii) The Applicants’ reliance on the principle of “acquired rights” is misconceived; and

viii) The relief sought by the Applicants has no legal basis.

44. The Respondent requests the Tribunal to dismiss the applications in their entirety.

**Considerations**

**Consolidation**

45. Having considered the applications and having noted the common questions of law and fact, the Tribunal considers that it would be appropriate to consolidate the present applications and issue only one Judgment. The present consolidation supersedes previous consolidations ordered by this Tribunal.

**Receivability**

**Respondent’s argument about subsequent administrative action**

46. The Respondent contends that the decisions to reduce the Applicants’ posts by 50 per cent through reclassification were superseded by the CG’s statement dated
1 May 2019, announcing the reinstatement of 500 part-time staff members to full-time employment in the GFO. The Tribunal does not agree with this contention.

47. The CG indicated in his announcement as follows:

Today, I am pleased to announce a series of measures that will positively impact Palestine refugees and staff. These actions are the result of close coordination between field teams, headquarters departments and the Executive Office and I wish to thank the colleagues involved in their preparation.

In May:

[…]

- we will reinstate some 500 community mental-health workers and other part-time staff in Gaza, to full-time employment from 1 May to 31 December. This is a special measure to respond to the critical consequences that years of blockade and conflict are having, mainly on boys and girls in Gaza, with 68% of children suffering from either depression, sleep irregularities, anxiety and other forms of trauma[.]

48. The United Nations Appeals Tribunal’s (“UNAT”) jurisprudence is clear about what constitutes an administrative decision (Nouinou 2019-UNAT-902, paragraph 35). It is clear that the CG’s message was simply an announcement of forthcoming administrative decisions and was not, in itself, an administrative decision. The CG’s message was not of individual application and did not carry direct legal consequences; nor did it supersede previous administrative decisions with respect to the Applicants. Therefore, the Tribunal holds that this contention of the Respondent is without merit.

Applicants’ requests for decision review

49. The Respondent claims that some of the applications are not receivable on the basis that the Applicants failed to submit timely requests for decision review. After reviewing the parties’ submissions, including requests for decision review annexed to the applications, the Tribunal concludes that the applications of Nabila El Hawajir, Rasem Shamiya, Muna Qasem, Najah Abu Shawish, Shirin Mousa,
Niveen El Masri, Mustafa El-Mudalal, Mohammad Safi, Nabil Abu Warda and Alaa Husain are not receivable either because they failed to establish that they had submitted a timely decision review request or because their requests for decision review are not dated. All the rest of the applications are receivable.

50. With respect to the application of Maher Abu Ata, the Tribunal also recalls its previous Judgment on receivability, Abu Ata UNRWA/DT/2019/014 dated 14 March 2019, where it concluded that his application was receivable.

51. With respect to the following discussion on the merits of the applications, reference to “the Applicants” applies to those Applicants whose applications are receivable.

Scope of the cases and contested decisions

52. With respect to the identification of the contested decision, the UNAT held in Massabni 2012-UNAT-238, as follows:

26. […] [T]he authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

53. In the present cases, due to the subsequent administrative decisions taken with respect to the extensions and the reclassification of the Applicants’ TIAs, the actual contested decisions must be clarified in accordance with the aforementioned UNAT jurisprudence.

54. By letters dated 25 July 2018, the Applicants were individually notified of a first administrative decision. The letters read, in relevant parts, as follows:

I regret to inform you that, for the reasons explained above, your post on a full-time basis will be abolished. This letter serves as notice of “provisional redundancy” effective the date of this letter, in accordance with Area Personnel Directive A/9/Rev.10. In line with the Agency’s obligation to make reasonable efforts to find a suitable placement for you as well as programme needs,
you are hereby offered a new post on an indefinite appointment at a part-time basis of 50%. Your grade will remain unchanged.

[…]

If you accept this offer, you will be transferred effective 1 September 2018.

55. For the Applicants who were not offered new TIAs on a part-time basis, the 25 July 2018 letters were slightly different and read, in relevant parts, as follows:

I regret to inform you that, for the reasons explained above, your post on a full-time basis will be abolished. This letter serves as notice of “provisional redundancy” effective the date of this letter, in accordance with Area Personnel Directive A/9/Rev.10.

New structures and positions will present some limited opportunities for existing staff, including part-time contracts. In the review and organizational design exercise, new positions are being established. In your case, unless you tell me otherwise, you will be considered for new part time positions of (Area Mental Health and Psychosocial Support (MHPSS) Supervisor in Health or Education Mental Health and Psychosocial Support (MHPSS) Specialist in Education) at Grade 13.

If you are offered and accept a new position, you will be transferred effective 1 September 2018.

56. However, following an agreement reached on 1 September 2018, between the DUO/G and LSU, and as a result of financial contributions from the LSU’s Social Security Fund, the Applicants’ appointments were extended on a full-time basis until the end of September 2018. The memorandum of the agreement indicated that: “[i]t must be understood that failure to mobilise additional resources on a significant scale would[.] on October 1[,] lead to implementation of the individual letters shared on July 25, i.e. moving 510 full time to part time contracts and 68 separations”.

57. As a result of the failure to mobilise additional resources for the period after September 2018, the Applicants were individually notified, by letters dated 21 October 2018, of a second administrative decision. These letters read, in relevant part, as follows:
With reference to [the] Director’s letter dated 25 July 2018 and because of the continuing financial crisis and shortfall in funding for the Emergency Appeal, you are hereby notified of reclassification of your category from full-time to part-time without any break in service.

The reclassification is effective from 1 October 2018 and does not change your contractual status as an Area staff member with Indefinite Appointment Category “A”.

This reclassification is temporary due to the financial crisis as mentioned above, and, is subject to the provisions of the Agency’s Staff Regulations, Rules, Personnel Directives and related issuances applicable to Area staff members on part-time service, including Area Staff Rule 103.8 paragraph 3 and the same may be amended from time to time (emphasis in original).

58. The Tribunal notes that the first administrative decisions, dated 25 July 2018, concern the Applicants being declared provisionally redundant and offered, or informed of the possibility of being offered, new TIAs on a part-time basis of 50 per cent. The second administrative decisions, dated 21 October 2018, concern the reclassification of the Applicants’ TIAs. Accordingly, the Tribunal holds that the second administrative decisions superseded and replaced the first decisions because, rather than transfer the Applicants to their new part-time posts, the Applicants’ appointments were reclassified from full-time to part-time.

59. The Applicants did not request review of the administrative decisions dated 21 October 2018. However, it is clear that when the Applicants requested review of the administrative decisions dated 25 July 2018, they were, in fact, contesting the reduction of their posts by 50 per cent. This consequence was not changed following the administrative decisions dated 21 October 2018.

60. In a similar situation, the UNAT held, in Kallon 2017-UNAT-742, as follows:

50. [...] Mr. Kallon is right to say that the Secretary-General’s submission, were it to be accepted, would lead to anomalous and unacceptable results by authorizing the Secretary-General to remove a dispute from the jurisdiction of the UNDT through the simple expedient of delaying a management evaluation, then taking a fresh decision upholding the original decision, and thus
compelling the applicant to commence legal proceedings afresh in relation to the same action. The injustice of such a course is not something with which the office of the Secretary-General ought to be aligned.

61. In light of this jurisprudence, taking new decisions, which essentially uphold prior decisions and carry the same consequences, thus compelling the Applicants to commence legal proceedings again in relation to the same contested issues, is not something with which the Agency “ought to be aligned”. Consequently, the Tribunal concludes that the Applicants actually contest the reclassification of their TIAs from full-time to part-time, effective 1 October 2018.

62. Assuming *arguendo* that the Applicants also contest the Agency’s decisions to abolish their posts, these decisions are not reviewable decisions as, on their own, they had no direct impact on the Applicants’ terms of appointments. They merely constituted acts leading to the reclassification of the Applicants’ TIAs (*Nouinou 2019-UNAT-902*, paragraphs 34 - 38).

**Merits**

63. The jurisprudence of the UNAT is consistently clear with respect to restructuring exercises within the Organization. The Agency has the power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff (*Loeber 2018-UNAT-844*, paragraph 18). However, even in a restructuring exercise, as with any administrative decision, the Agency has the duty to act fairly, justly, and transparently in dealing with staff members (*Loeber 2018-UNAT-844*, paragraph 18).

64. Accordingly, the crux of the matter in the present cases is whether the Agency, in implementing a temporary measure due to the financial crisis and shortfall in funding for the Emergency Appeal (“EA”), acted fairly, justly, and transparently with the Applicants in the reclassification of their TIAs from full-time to part-time from the period of 1 October 2018 to 1 May 2019.
65. It is clear from the case files that the reclassification of the Applicants’ appointments was related solely to the financial crisis that the Agency was facing. This fact is not contested by the Applicants. In the words of the DUO/G:

The huge reduction in funding of almost US$ 300 million of more than US$ 350 million that was expected in 2018 for both our Programme Budget and Emergency Appeals by UNRWA’s largest donor, the USA, plunged the Agency into a dramatic and sudden existential crisis.

66. The donor charts available on the Agency’s public website demonstrate clearly how the budget of the EA for the GFO and West Bank Field Office (“WBFO”) was affected in 2018. In 2017, the Government of the United States provided 95 million USD of the 138 million USD in total pledges to the EA for the GFO and WBFO. However, in 2018, total pledges to the EA for the GFO and WBFO decreased to 103 million USD with no pledges from the Government of the United States.

67. The financial difficulties related to the EA funding were communicated transparently to all staff members in the CG’s email dated 7 July 2017. The CG noted the necessity for some internal measures as follows:

We are engaging donors very actively but we need to be crystal clear about the necessity for some internal measures in order to limit the threats to our core services to Palestine refugees.

The US funding cut is directly impacting our emergency interventions and we ran out of EA funding for the occupied Palestinian territory at the end of June. […]

You can be certain that we will continue to fundraise for these activities but currently, we need to take some difficult measures that prioritize refugees with the most critical needs. This is our humanitarian responsibility.

Emergency interventions in the West Bank are, proportionately, the most heavily impacted because they have been supported almost entirely by the US for years, and those resources are no longer available in 2018.

[...]
In Gaza, poverty and unemployment rates are at very high levels, and almost a million refugees – more than 50 percent of the population – depend on food aid from UNRWA. Food assistance is an absolute humanitarian necessity and a priority. We are therefore taking all measures possible to protect this vital assistance, including advancing program budget funds. To successfully do so, we have to adjust some other interventions.

One of them is our community mental health program. We are determined to alleviate the impact on refugees who rely on our mental health services. We are looking at ways to preserve at least a part of that intervention. Our job creation – cash for work – intervention in Gaza will also need to be scaled down further, as funds are no longer available to continue it at the current level.

Transitional shelter cash assistance is also being reviewed. The scheduled payment at the end of July 2018 will proceed. Further payments would require additional, dedicated resources.

68. In a subsequent update dated 16 August 2018, about the internal measures to address the financial crisis, the CG informed all staff members as follows:

Specifically, we still need $217 M, which includes $123 M for our Program Budget activities and $94 M for our Emergency Appeals. This is a lot of money.

This critical gap forced us to take painful measures of reduction in our Emergency Services in the West Bank and Gaza. These were Agency-wide decisions, taken because we have run out of funding for Emergency Programs in these two fields.

I fully recognize the dramatic impact these measures have had on staff members who lost their jobs and others for whom part time arrangements were necessary. In particular in Gaza, where unemployment rates are extremely high and alternatives very difficult to find, I truly regret that we had no choice under the circumstances, and no other solutions could be found. I understand that affected colleagues felt a need to express deep frustration and anger.

It was however necessary to take certain steps in order to protect vital UNRWA services benefitting Palestine refugees. For example the Agency managed to preserve the food distributions for 1 Million people in Gaza. This remains a key priority and
that we have been able to maintain the intervention after an immense loss of income is a very big achievement.

Today, I wish to announce my decision to open UNRWA schools for 526,000 students in the West Bank, including East Jerusalem, Gaza, Jordan, Lebanon and Syria. This is another major priority. It reflects UNRWA’s deep commitment to protecting the dignity of Palestine refugees, the core of its service delivery and its mandate.

69. Consequently, in the Tribunal’s view, the rationale behind the temporary reclassification of the Applicants’ appointments is clear from the CG’s messages to staff members and from public information with respect to the significant decrease in funding from certain donors. As a result, it was within the Agency’s discretionary authority to restructure some or all of its departments or units, including abolishing posts, creating new posts, and redeploying staff. It is clear from the CG’s messages that the decrease in funding significantly affected the Agency’s EA for the GFO and WBFO insofar as the CG decided to take some internal measures with respect to the Agency’s community mental health programme and cash for work programme in Gaza in order to protect vital food assistance to a million refugees.

70. As consistently held by the UNAT:

When judging the validity of the Administration’s exercise of discretion in administrative matters, [...] the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. It may consider whether relevant matters were ignored and irrelevant matters considered, and examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration (Yasin 2019-UNAT-915, paragraph 44).

71. In view of the UNAT’s consistent jurisprudence, the Tribunal holds that the CG’s decisions were reasonable. This Tribunal is not endowed with the capacity to review the correctness of the CG’s choice among the various courses of action that may have been available to him. The Tribunal cannot substitute its own decision
for that of the Agency. In addition, the Tribunal considers that the Agency, in addressing the challenges of the financial crisis, acted fairly, justly, and transparently in dealing with the Applicants. The Tribunal also holds that the Agency acted in good faith and in accordance with its obligations under PD A/9/Rev.10 by offering the Applicants new TIAs, albeit on a part-time basis, and later, by announcing their reinstatement to full-time employment, effective as early as 1 May 2019.

72. Lastly, with respect to the Applicants’ argument about the violation of their acquired rights, the UNAT held in Lloret Alcàñiz et al. 2018-UNAT-840, as follows:

90. [...] An “acquired” right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to future increases or pose a legal bar to a reduction in salary (emphasis in original).

73. Therefore, the Applicants’ claim about their acquired rights is without merit.

74. In conclusion, given the fact that the Applicants failed to sustain the burden of proof required to establish that the reclassification decisions were exercised arbitrarily or capriciously, were motivated by prejudice or other extraneous factors, or were flawed by procedural irregularity or error of law, the applications are hereby dismissed.

Remedies

75. As the applications are dismissed, the Applicants are not entitled to receive any material or moral compensation for any harm that they allegedly suffered.
Conclusion

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

The applications are dismissed.

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Judge Jean-François Cousin
Dated this 9th day of September 2019

Entered in the Register on this 9th day of September 2019

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Laurie McNabb, Registrar, UNRWA DT, Amman