Before: Judge Jean-François Cousin
Registry: Amman
Registrar: Laurie McNabb

HAMAD et al.

v.

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

JUDGMENT

Counsel for Applicants: Amer Abu-Khalaf (LOSA)

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

1. Five individual applications have been filed by Adel Hamad, Maher El Malakh, Wisam Abu Mandil, Basma Hijazi and Akram El Madhoun (“Applicants”) contesting the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (“Respondent”), to reclassify their fixed-term appointments from full-time to part-time, effective 1 October 2018.

Facts

2. The Applicants are all staff members employed by the Agency under three-year fixed-term appointments (“FTAs”) 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, Applicants Adel Hamad, Maher El Malakh and Akram El Madhoun received a letter, signed by the DUO/G, informing them that their posts would be abolished. While Applicant Akram El Madhoun was offered a new fixed-term appointment on a part-time basis, Applicants Adel Hamad and Maher El Malakh were only informed that they would be considered for new part-time posts.

8. On 25 July 2018, Applicants Wisam Abu Mandil and Basma Hijazi were informed that their appointments would not be extended beyond 31 August 2018, due to a lack of funding. While Applicant Wisam Abu Mandil was offered a new fixed-term appointment on a part-time basis, Applicant Basma Hijazi was only informed that she would be considered for new part-time posts.


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

11. By letters from the Head, Field Human Resources Office (“H/FHRO”) dated 21 October 2018, the Applicants’ FTAs were reclassified from full-time to part-time and extended until 31 December 2018, effective 1 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. Between 27 November 2018 and 4 December 2018, the Applicants filed their applications with the UNRWA Dispute Tribunal (“Tribunal”).

14. Between 16 and 19 December 2018, the applications were transmitted to the Respondent.
15. By letters from the Officer-in-Charge, H/FHRO dated 31 December 2018, the Applicants’ part-time FTAs were extended until 30 June 2019.

16. On 8 January 2019, the Respondent filed a motion for suspension of proceedings in several cases, including the present applications. 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.

17. 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.

18. 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.

19. 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 on 13 February 2019.


21. On 22 March 2019, the Respondent filed his motion for consolidation. The motion was transmitted to the Applicants on 24 March 2019.

22. By Order No. 083 (UNRWA/DT/2019) dated 14 April 2019, the Tribunal granted the Respondent’s motion for consolidation.

23. 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.
24. On 15 May 2019, the Respondent filed his consolidated reply. The reply was transmitted to the Applicants on the same day.

25. 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.

26. 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.

27. 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.

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

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

30. 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.


32. 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

33. 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.

34. 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

35. 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.

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

Consolidation

37. 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

38. 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.

39. 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[.]

40. 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

41. 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 are receivable.

Scope of the cases and contested decisions

42. 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.

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

44. By letters dated 25 July 2018, the Applicants were individually notified of a first administrative decision. Applicants Adel Hamad, Maher El Malakh and Akram El Madhoun were informed that their posts would be abolished. While Applicant Akram El Madhoun was offered a new fixed-term appointment on a part-time basis, Applicants Adel Hamad and Maher El Malakh were only informed that they would be considered for new part-time posts.
45. With respect to Applicants Wisam Abu Mandil and Basma Hijazi, they were informed that their appointments would not be extended beyond 31 August 2018. While Applicant Wisam Abu Mandil was offered a new fixed-term appointment on a part-time basis, the Applicant Basma Hijazi was only informed that she would be considered for new part-time posts.

46. 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”.

47. 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 an extension of your Fixed-Term Appointment effective 01 October 2018 until 31 December 2018 and reclassification of your category from full-time to part-time effective 01 October 2018 without any break in service.

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.

48. 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 FTAs on a part-time basis of 50
per cent. In this respect, the Tribunal further notes that the 25 July 2018 letters to Applicants Wisam Abu Mandil and Basma Hijazi were erroneous, in that their letters indicated that their FTAs would not be renewed or extended beyond 31 August 2018, despite the fact that their FTAs were to expire, respectively, on 30 June 2019 and 31 July 2019.

49. The second administrative decisions, dated 21 October 2018, concern the reclassification of the Applicants’ FTAs. 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.

50. 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.

51. 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.

52. 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 FTAs from full-time to part-time, effective 1 October 2018.
53. 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**

54. 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).

55. 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 FTAs from full-time to part-time from the period of 1 October 2018 to 1 May 2019.

56. 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.

57. 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.

58. 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.

59. 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 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.

60. 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.

61. 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).

62. 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 FTAs, albeit on a part-time basis, and later, by announcing their reinstatement to full-time employment, effective as early as 1 May 2019.

63. Lastly, with respect to the Applicants’ argument about the violation of their acquired rights, the UNAT held in Lloret Alcañiz 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).

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

65. 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

66. 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

67. 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