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

EL MADHOUN

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:
Michael Schoiswohl (A/DLA)
Introduction

1. These are two applications by Mohammed El Madhoun (“Applicant”) against the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (“Respondent”), 1) not to select him for the post of Analyst Programmer, Grade 14 at the Headquarters, Amman; and 2) to terminate his appointment in the interest of the Agency.

2. As the two above-mentioned applications have been filed by the same Applicant and both are related to the Applicant’s terms and conditions of appointment, in the interest of judicial economy, the UNRWA Dispute Tribunal (“Tribunal”) has decided to consolidate the applications and adjudicate them in a single Judgment.

Facts

3. Effective 1 September 2002, the Applicant was employed by the Agency as Analyst Programmer on a fixed-term appointment, Grade 4A, Step 1, at Headquarters, Gaza (“HQG”).

4. Effective 1 December 2010, the Applicant was transferred on promotion to the post of System Analyst, at Headquarters, Amman (“HQA”), Grade 15, Step 16. Effective 1 July 2012, the Applicant was promoted to the post of Functional Expert, Grade 16, Step 17.

5. Following the Applicant’s request, the Agency granted the Applicant Special Leave Without Pay (“SLWOP”) for one year, commencing on 23 September 2012. After further extensions of his SLWOP, the Applicant resumed his duties on 22 January 2014.

6. Following the Applicant’s request, the Agency again granted the Applicant SLWOP for one year, commencing on 13 May 2014. The Applicant’s SLWOP was further extended several times, lastly until 15 July 2018.
7. During his period of SLWOP, on 6 December 2016, the Applicant submitted a request for Early Voluntary Retirement (“EVR”). On 19 December 2016, the Human Resources Services Officer (Entitlements) (“HRSO”) informed the Applicant that his request for EVR would not be considered, as the allocated budget for EVR for 2016 had been exhausted.

8. On 16 February 2017, the Applicant again submitted a request for EVR. The HRSO informed the Applicant that “due to the Agency’s financial constraints the priority was given to humanitarian cases” and that his request had not been approved.

9. On 30 March 2017, the Applicant submitted another request for EVR. On 20 April 2017, the HRSO informed the Applicant that “no EVR approvals [would] take place for HQA during 2017 as the allocated funds were fully utilized in accordance with the EVR strategy for 2017.”

10. On 19 September 2017, the Applicant submitted a fourth request for EVR. The Respondent indicated in its reply that the Applicant’s request had not been considered due to lack of funds.

11. On 8 January 2018, the Agency published, internally and externally, a vacancy announcement for a new post of Analyst Programmer, Grade 14, HQA (“AP/HQA”).

12. The Agency received 359 applications for the post. Twenty-six candidates, including the Applicant, were shortlisted and invited for a written test. Three candidates, including the Applicant, were invited for a personal interview. The Interview Panel unanimously recommended one candidate for the post. The Applicant and the other candidate were found not suitable.

13. On 22 March 2018, the Officer-in-Charge, Information Management Department (“OiC/IMD”) approved the Interview Panel’s recommendation that the successful candidate be appointed to the post of AP/HQA.
14. On 2 May 2018, the Applicant’s SLWOP, which was to expire on 15 July 2018, was further extended until the end of the recruitment process for the post of AP/HQA or for 90 days, whichever date was earlier.


16. The Applicant was informed of the outcome of the recruitment process on 28 August 2018.

17. By letter to the Applicant dated 3 September 2018, the Chief, Human Resources, Operational Services Division (“C/HR/OSD”) informed the Applicant of the decision to terminate his services in the interest of the Agency. Accordingly, the Applicant was separated from the Agency, as of the close of business on 28 August 2018.

18. By email to the C/HR/OSD dated 5 September 2018, the Applicant requested the withdrawal of his notice of termination in accordance with paragraphs 8 and 9 of Area Staff Rule 109.2 and submitted a new request for EVR. By the same email, the Applicant also submitted a request for Exceptional Voluntary Separation (“EVS”).

19. By email to the Applicant dated 11 September 2018, on behalf of the C/HR/OSD, the HRSO informed the Applicant that “granting [his] EVR [was] not possible” because of budgetary constraints. Regarding the Applicant’s request for EVS, the HRSO noted that “EVS applications [were] only being considered for West Bank and Jordan Field Offices. HQ staff [were] not included, noting that [the Applicant’s] separation date was 28 August 2018”.

21. On 24 September 2018, the Applicant requested review of the decision not to select him for the post of Analyst Programmer, Grade 14, at HQA and the decision to terminate his appointment in the interest of the Agency.

22. On 13 November 2018, the Applicant submitted his first application to the Tribunal challenging the decision to terminate his appointment in the interest of the Agency. This first application was registered under Case No. UNRWA/DT/HQA/2018/200 (“2018/200”). The application was transmitted to the Respondent on 14 November 2018.

23. On 15 November 2018, the Applicant filed another application with the Tribunal contesting the decision not to select him for the post of AP/HQA. This second application was registered under Case No. UNRWA/DT/HQA/2018/201 (“2018/201”) and transmitted to the Respondent on the same day.

24. On 14 December 2018, the Respondent filed his reply in Case No. 2018/200 (“Reply No. 1”). This was transmitted to the Applicant on 16 December 2018.

25. On 15 December 2018, the Respondent filed his reply in Case No. 2018/201 (“Reply No. 2”). This was transmitted to the Applicant on 16 December 2018.

26. On 15 January 2019, the Applicant filed motions for leave to submit observations and supplementary evidence on the Respondent’s Reply No. 1 and Reply No. 2. The motions were transmitted to the Respondent on 16 January 2019.

27. On 17 and 23 January 2019, the Respondent respectively objected to the Applicant’s motions for leave to file observations and supplementary evidence on the Respondent’s Reply No. 1 and Reply No. 2. The Respondent’s submissions were transmitted to the Applicant respectively on 20 and 24 January 2019.

28. By Orders No. 018 and No. 019 (UNRWA/DT/2019) dated 27 January 2018, the Applicant’s motions were granted.

29. On 3 February 2019, the Applicant submitted his observations on the Respondent’s Reply No. 2. The Applicant’s submission was transmitted to the
Respondent on the same day. The Applicant did not submit observations on the Respondent’s Reply No. 1.

Applicant’s contentions

Case No. UNRWA/DT/HQA/2018/200

30. The Applicant contends:

   i) He is eligible for EVR in accordance with Area Staff Rule 109.2, paragraph 8;

   ii) Area Staff Rule 109.2, paragraph 9 has not been properly observed by the Agency. His notice of termination was not withdrawn despite the fact that he was eligible for EVR; and

   iii) The Agency did not comply with ASC No. A/5/2018 and ASC No. A/6/2018 by denying his request for EVS.

31. The Applicant requests:

   i) The withdrawal of the notice of termination in accordance with paragraph 9 of Area Staff Rule 109.2, and to be paid his retirement benefits accordingly.

Case No. UNRWA/DT/HQA/2018/201

32. The Applicant contends:

   i) The Interview Panel was not informed about his specific situation;

   ii) He was provided with incorrect information about the outcome of the selection process;

   iii) Paragraphs 8.5 and 8.6 of Area Personnel Directive No. PD/A/4/PartII/Rev.6 (“PD/A/4/Rev.6”) have been properly observed by the Agency; and
iv) The Agency declined to answer his questions with respect to the outcome of the selection process.

33. The Applicant requests:

i) To be appointed to the post of AP/HQA or to be compensated for his loss of income.

Respondent's contentions

Case No. UNRWA/DT/HQA/2018/200

34. The Respondent contends:

i) The decision to terminate the Applicant’s appointment in the interest of the Agency was properly effected;

ii) Given the fact that the Applicant had applied for vacant posts in the Agency during his SLWOP and had not been successful, it was reasonable and fair to terminate his services in the interest of the Agency;

iii) EVR is not an unconditional right and its approval is subject to a financial limit established in the form of an annual cap by the Commissioner-General;

iv) The applications for EVR should be positively assessed first and/or granted before the provisions of Area Staff Rule 109.2 (9) come into play; and

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

35. The Respondent requests the Tribunal to dismiss Case No. 2018/200 in its entirety.

Case No. UNRWA/DT/HQA/2018/201

i) The selection process for the post of AP/HQA was properly effected, and the Applicant’s candidacy was given full and fair consideration;
ii) The Interview Panel unanimously agreed not to recommend the Applicant for appointment to the post and concluded that he did not meet the requirements of the post;

iii) The Applicant failed to sustain the burden of proof required to establish that the non-selection decision was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or error of law;

iv) The Applicant failed to provide any concrete evidence with respect to his allegation that he was provided with false information;

v) The Applicant’s questions regarding the outcome of the selection process fall outside the scope of feedback that can be provided to candidates;

vi) The Applicant’s reliance on PD/A/4/Rev.6 is erroneous as this Personnel Directive was superseded by Area Personnel Directive No. PD/A/4/PartII/Rev.7, effective 1 July 2009 (“PD/A/4/Rev.7”); and

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

36. The Respondent requests the Tribunal to dismiss Case No. 2018/201 in its entirety.

Considerations

Merits

Decision not to select the Applicant for the post of AP/HQA

37. In Case No. 2018/201, the Applicant contests the decision not to select him for the post of AP/HQA. It is clear from the Recruitment Report that the Applicant did not meet the requirements of the competency on “ability to plan, prioritize and organize own work” nor the requirements of the competency on “technology awareness”. In addition, the Applicant only partially met the requirements of the three remaining competencies. Therefore, the Interview Panel unanimously
concluded that the Applicant did not meet the requirements of the post and unanimously agreed to recommended the selected candidate who fully met or exceeded the requirements of all the competencies required for the post.

38. Accordingly, the Tribunal holds that the OiC/IMD properly exercised her discretionary authority by following the recommendation of the Panel. In this respect, it is not the function of the Tribunal to substitute its own decision for that of the Agency. As the United Nation Appeals Tribunal (the “UNAT”) stated in Sanwidi 2010-UNAT-084, paragraph 40:

> When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

39. The only contention raised by the Applicant is that the Interview Panel had not been informed about his administrative situation and that he should have been accorded priority over the other candidates for the post. At the outset, the Tribunal notes that, as correctly submitted by the Respondent, the Applicant’s reliance on PD/A/4/Rev.6 is erroneous as it was superseded by PD/A/4/Rev.7, effective 1 July 2009. With respect to the priorities, paragraph 66 of PD/A/4/Rev.7 provides as follows:

> The paramount consideration for selection will be the necessity to secure the highest standards of efficiency, competence, and integrity. Where multiple candidates are equally qualified preference for selection should normally be given to internal candidates, Palestine refugees, and candidates of the under-represented gender.

40. Accordingly, it is clear that the paramount consideration for selection is to secure the highest standards of efficiency, competence, and integrity and that
preference may be given to certain candidates only in the event of equally qualified candidates.

41. It follows from the foregoing that the Applicant has failed to sustain the burden of proof required to establish that the decision not to select him for the post of AP/HQA was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or error of law. Therefore, the application 2018/201 is dismissed.

Decision to terminate the Applicant’s appointment in the interest of the Agency

42. In Case No. 2018/200, the Applicant contests the decision to terminate his appointment in the interest of the Agency. It is not contested by the Applicant that his last SLWOP was further extended until the end of the recruitment process for the post of AP/HQA and that it would not be further extended. Following the outcome of the recruitment process, on 3 September 2018, the Agency proceeded with the termination of the Applicant’s appointment in the interest of the Agency, effective 28 August 2018, the date on which the Applicant was informed about the outcome of the recruitment process.

43. By email to the C/HR/OSD dated 5 September 2018, the Applicant requested the withdrawal of his notice of termination in accordance with paragraphs 8 and 9 of Area Staff Rule 109.2 and the approval of his requests for EVR or EVS.

44. Paragraphs 8 and 9 of Area Staff Rule 109.2 read as follows:

8. A staff member may leave the Agency’s service by early voluntary retirement (EVR):

(A) (i) On or after his/her 50th birthday, if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above; or

(A) (ii) After his/her sixtieth (60th) birthday, if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above, for staff members whose service has been extended beyond the official age of retirement upon a staff member's request under sub-paragraphs 4 (B) or (C) of this Rule.
(B) On or after he/she has completed 25 years of qualifying service, as defined under paragraph 6 above; or

(C) On or after his/her 45th birthday and before his/her 50th birthday if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above;

(D) After he/she has completed between 20 and 24 years of qualifying service, as defined under paragraph 6 above.

9. A staff member who is eligible for early voluntary retirement under paragraph 8 of this rule, and who, during the period of such eligibility, receives a notice of termination of his/her appointment under staff regulation 9.1 (other than on grounds of health; i.e., incapacitation for further service with the Agency), may at his/her written request leave the Agency's service by early voluntary retirement under the provisions of paragraph 8 on the date established for the termination of his/her appointment, and the notice of termination of his/her appointment shall accordingly be withdrawn.

45. By email to the Applicant dated 11 September 2018, on behalf of the C/HR/OSD, the HRSO informed the Applicant as follows:

On behalf of Chief Human Resources Operational Services Division

Dear Mohamed,

Please note that your request has been thoroughly reviewed. Regarding your inquiry on EVR, please note that although you are eligible for EVR, EVR is not an unconditional right. Therefore, the Agency may decline such a request.

Currently and over the last two years, the Agency has not been accepting EVR applications due to budgetary constraints and thus granting you EVR is not possible (emphasis in original). [.

46. The HRSO further noted in the same email that “EVS applications [were] only being considered for West Bank and Jordan Field Offices. [Headquarters] staff [were] not included, noting that [the Applicant’s] separation date was 28 August 2019.”

47. It is clear from the case record that the Applicant had submitted several requests for EVR before his last request dated 5 September 2018. The Tribunal notes that all of the Applicant’s requests for EVR, including the last one, were
rejected for budgetary constraints. The Applicant has only contested before the Tribunal the rejection of his last request, and accordingly, the Tribunal will only review the Agency’s decision with respect to this last request.

48. In this respect, the Tribunal considers that the Respondent’s assertion about budgetary constraints being the reason for rejecting the Applicant’s last request for EVR is contradicted by the information available in the case file. In fact, on 27 August 2018, the Agency circulated ASC No. A/5/2018 and offered, with limited funds available, area staff members from the Jordan and West Bank Field Offices the opportunity for EVS. Later, on 11 September 2018, by ASC No. A/6/2018, the Agency extended this opportunity for EVS to all Field Offices and HQs. In terms of the financial implications of an EVS, Area Staff Rule 109.15 paragraph 5, provides as follows:

5. Where a staff member’s application for EVS is approved, the Agency shall pay an EVS benefit equivalent to the amount that would be payable to a staff member if he/she were granted Early Voluntary Retirement pursuant to Area Staff Rule 109.2(5) and other issuances related to the computation of Early Voluntary Retirement benefits.

49. Accordingly, it is clear that the financial implications for the Agency of an application for EVS and EVR are identical for a given staff member. Therefore, it follows that the Respondent’s argument that budgetary constraints had a bearing on requests for EVR is not supported by the evidence and, therefore, is without merit.

50. The Tribunal now must consider whether the above-quoted paragraphs 8 and 9 of Area Staff Rule 109.2 entitle the Applicant to have his notice of termination withdrawn. The Respondent does not contest the Applicant’s eligibility for EVR in accordance with paragraph 8 of Area Staff Rule 109.2. However, the Respondent argues that the Applicant’s entitlement to EVR is not an unconditional right and that a notice of termination would be withdrawn only after an application for EVR had been positively assessed. The Respondent concludes that, as the Applicant’s EVR was not granted for lack of funds, there was no basis for withdrawing the Applicant’s notice of termination.
51. The Tribunal does not agree with the Respondent’s arguments and considers that such an interpretation of Area Staff Rule 109.2 is erroneous. It is clear that, once a staff member is eligible for EVR in accordance with paragraph 8, paragraph 9 of this provision comes into play and its text is clear: “the notice of termination […] shall […] be withdrawn”. Accordingly, the Tribunal holds that a staff member has a right to have his/her notice of termination withdrawn when he/she is eligible for EVR. The Tribunal also underlines that, as previously confirmed by the UNAT in Madi 2018-UNAT-853, paragraph 27, this right is not an unconditional right as long as the Agency acts lawfully, reasonably and fairly in rejecting staff members’ EVR requests on valid grounds.

52. Furthermore, the UNAT recently held in Jafari 2019-UNAT-927, paragraph 36, that a “harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.”

53. In view of all the foregoing, the Tribunal concludes that, by evoking a generic reason in rejecting the Applicant’s EVR request, namely, the lack of funds and/or budgetary constraints, without adducing any evidence, the Agency failed to provide sufficiently clear, precise, and intelligible reasoning and did not act lawfully, reasonably and fairly. Therefore, the decision to terminate the Applicant’s appointment in the interest of the Agency was illegal and must be rescinded.

Remedies

Compensation in lieu of rescission

54. 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[.]

55. Accordingly, as the rescinded decision concerns termination, the Tribunal must determine an amount of compensation that the Agency may elect to pay as an alternative to the rescission of the contested decision. The Tribunals recalls that an award under Article 10(5)(a) of its Statute is alternative compensation in lieu of rescission. It is not an award of moral damages (Elayyan 2018-UNAT-887, paragraphs 30-31).

56. Furthermore, with respect to the amount of compensation in lieu of rescission, the UNAT held in Mihai 2017-UNAT-724, paragraph 19, that it should be an economic equivalent for the loss of a favourable administrative decision as follows:

19. The Appeals Tribunal’s discretion is constrained by the mandatory requirement in Article 9(1)(a) of the Statute to set an amount of compensation as an alternative to an order rescinding a decision concerning appointment, promotion or termination. In case of such an order, the Tribunal must set an amount of in-lieu compensation that the Secretary-General may elect to pay instead [Verschuur 2011-UNAT-149, para. 48]. Compensation in lieu of rescission under Article 9(1)(a) of the Statute shall be an economic equivalent for the loss of a favourable administrative decision; [Warren 2010-UNAT-059, para. 10] accordingly, the Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings [Cohen 2011-UNAT-131, paras. 18 and 22].

57. In the present case, the second sentence of paragraph 9 of Area Staff Rule 109.2 provides as follows:

    Early voluntary retirement may not be substituted for any other mode of separation. The early voluntary retirement benefit of a staff member who requests early voluntary retirement under the provisions of paragraph 8 shall be calculated in accordance with paragraph 5 of this rule.

58. Accordingly, had the Applicant been separated from the Agency by EVR, his standard retirement benefits would have been calculated as of 28 August 2018, in accordance with paragraph 5 of Area Staff Rule 109.2. However, the Applicant’s appointment was terminated in the interest of the Agency and he received a termination indemnity in accordance with paragraph 3(B) of Area Staff Rule 109.9,
calculated as of 28 August 2018. Therefore, in the present case, the Tribunal holds that it is appropriate to determine the alternative compensation as the difference between the amount of the Applicant’s standard retirement benefits calculated in accordance with paragraph 5 of Area Staff Rule 109.2 and the amount he already received as termination indemnity in accordance with paragraph 3(B) of Area Staff Rule 109.9.

Compensation for harm

59. 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:

[…] 

(b) Compensation for harm supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

60. The UNAT held in Sirhan 2018-UNAT-860, paragraph 20, that “[t]he Dispute Tribunal is not competent to award compensation […] without a previous claim for such damage and compensation. If no request for such compensation is made, the Dispute Tribunal lacks jurisdiction to award this kind of compensation sua sponte.” In addition, the Tribunal may not award compensation for harm in the absence of actual prejudice, and any alleged harm suffered by the Applicant must be supported by evidence (Oummih 2015-UNAT-518, paragraph 41; Featherstone 2016-UNAT-683, paragraph 50). In the present case, the Tribunal notes that the Applicant did not request compensation for moral damages. Therefore, the Tribunal holds that it is not competent to award the Applicant any compensation for moral damages.
Conclusion

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

i) Case No. 2018/201 is hereby dismissed;

ii) The decision to terminate the Applicant’s appointment in the interest of the Agency is hereby rescinded;

iii) Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision to terminate the Applicant’s appointment in the interest of the Agency, he shall pay the Applicant the amount equivalent to the difference between the amount of the Applicant’s standard retirement benefits calculated in accordance with paragraph 5 of Area Staff Rule 109.2 and the amount he already received as termination indemnity in accordance with paragraph 3(B) of Area Staff Rule 109.9; and

iv) The above-described sum is to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate, applicable as of 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 the payment.

________________________________________

Judge Jean-François Cousin

Dated this 15\textsuperscript{th} day of October 2019

Entered in the Register on this 15\textsuperscript{th} day of October 2019

________________________________________

Laurie McNabb, Registrar, UNRWA DT, Amman