



UNRWA DISPUTE TRIBUNAL

Case No.: DT/ JFO/2008/10
Judgment No.: UNRWA DT/2011/005
Date: 3 August 2011
Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

ABU AWAD

v.

COMMISSIONER GENERAL
OF THE UNITED NATIONS RELIEF AND
WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Dr. Omar Fahmi Shaheen

Counsel for Respondent:
W. Thomas Markushewski

Introduction

1. This is an application by Kamal Abu Awad (“the Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (“the Respondent”), not to consider his prior service as part of the required ten years of service for eligibility for retirement benefits.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (the “JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of a Joint Appeals Board has been submitted to the Commissioner-General.

Facts

4. Effective 21 May 1991, the Applicant was employed by UNRWA as a Medical Officer.

5. By letter dated 24 November 1998, he submitted his resignation effective 26 December 1998. The Agency subsequently paid him all entitlements due, including separation payments, in the amount of USD\$ 56,352.03. At his request, he was also issued a Certificate of Service.

6. Effective 29 July 2001, the Applicant was re-employed by reappointment with the Agency as a Medical Officer on a fixed-term (i.e. Category “Z”) contract.

7. By letter dated 1 August 2004, the Applicant was converted from “Z” to “X” Category.

8. By letter dated 31 October 2007, the Field Personnel Officer, Jordan informed the Applicant that he will reach the age of 60 on 10 December 2008 and that accordingly, his fixed-term appointment would expire on 31 December 2008.

9. By letter dated 18 August 2008, the Applicant requested that his past years of service with the Agency from 1991 to 1998 be considered as part of the ten years of work experience required in order to be eligible for separation benefits.

10. By letter dated 16 September 2008, the Applicant was informed by the Acting Director of UNRWA Operations, Jordan that his request could not be granted because he had less than ten years of qualifying service, more specifically that his re-employment on 21 July 2001 was made on the basis of reappointment.

11. By letter dated 12 October 2008, the Applicant submitted an appeal to the JAB.

12. On 31 December 2008, the Applicant retired from the Agency which subsequently paid him all entitlements due, including separation payments, in the amount of USD\$ 22,956.33.

Applicant’s submissions

13. The Applicant submits:

- (i) the application of UNRWA’s Regulations and Rules which determined his entitlements when he was separated from service on 31 December 2008 is

unfair to him and the distinction between temporary indefinite and fixed-term appointments constitutes discrimination; and

- (ii) amendments to the Agency's Regulations and Rules violate the terms of the contract that he signed in 2001 when he was reappointed.

14. The Applicant requests the Tribunal to order the Respondent to pay him the "standard retirement benefit" which was given to area staff members prior to the entry into force of Area Staff Circular No. A/03/2008 on 21 January 2008.

Respondent's submissions

15. The Respondent submits that there exists no appealable decision of the Agency to be reviewed by the Tribunal, in other words there is no discretionary administrative decision alleging the non-observance of the Applicant's terms of appointment.

16. The Respondent requests that the Tribunal dismiss the application as not receivable.

Considerations

17. It is important to start by looking at the legal principles in this matter. Area Staff Personnel Directive A/4 Rev. 5 ("PD A/4") with respect to the re-employment of Area Staff provides that:

- 1.1 **Re-employment** means the entry into the Agency's employment of a person who formerly had been employed by the Agency in one of the established manning table Categories (A, X, or P) or their earlier equivalents. ... Re-employment may take two forms: re-employment by reinstatement, and re-employment by re-appointment.

1.4 **Reappointment** means re-employment of a former staff member **without restoration of the staff member's previous qualifying service** (emphasis added). The staff member is not required to repay to the Agency the separation payments which he/she received at the time of his/her earlier separation and both his/her entry on duty date and his/her service computation date are the same as the date of his/her reappointment.

18. As for the difference between reinstatement and reappointment, PD A/4 gives the following definitions:

2.1 **Reinstatement:** When a former staff member has been unemployed by the Agency for an interval of twelve months or less, his/her re-employment must be by reinstatement.

2.2 **Reappointment:** When a former staff member has been unemployed by the Agency for an interval of more than 12 months his re-employment may, at his/her option, be either by reinstatement or by reappointment.

19. The Tribunal is also reminded of the Respondent's following preoccupation:

3.2 **Re-employment following resignation.** It is incumbent upon the Agency to control the possible abuse of resignation as a means of obtaining premature access to Provident Fund or other separation payments. Although these are normally payable upon separation at any stage of an employee's working life, they are primarily intended as end-of-career benefits, and the Agency has a moral responsibility to retain their character as such.

20. The Tribunal notes that the Applicant's letter of appointment dated 29 July 2001 indicated the following with respect to his re-employment by reappointment on a fixed-term contract:

This appointment is subject to the provisions of the staff regulations and of the 1999 Area Staff Rules applicable to Area staff members appointed on or after 1 January 2000, and to changes which may be made to such regulations and rules from time to time (emphasis added).

21. The 1999 Area Staff Rules, which were applicable to Category “Z” fixed-term appointments, did not include provision for a termination indemnity upon retirement or for retirement benefits. Indeed, Area Staff Rule 30.8 precluded the payment of termination indemnity to staff members separated on the expiration date specified in their letter of appointment or on their 60th birthday.

22. The 1999 Area Staff Rules were abolished on 1 August 2004 and replaced with the existing Staff Rules applicable to Category “A” (i.e. temporary - indefinite) appointments and Category “X” (i.e. fixed-term) contracts, and the Applicant’s contract was accordingly converted from “Z” to “X” category. However, just as the 1999 Area Staff Rules, the Area Staff Rules applicable to Category “X” fixed-term contracts in effect at the time of the Applicant’s retirement contained no provision for a termination indemnity upon retirement or for retirement benefits.

23. Accordingly, whether looking to the Rules in effect at the time of the Applicant’s retirement or to the 1999 Area Staff Rules, the Tribunal finds that the Applicant received what he was due under the Area Staff Rules applicable to his Category “X” fixed-term appointment.

24. The Tribunal finds that the Respondent’s administrative decision was in observance of the terms of the Applicant’s appointment.

25. When he was reappointed in 2001, the Applicant held a fixed-term contract (Category “Z”), which as noted above was then converted and subsequently not extended when it expired on 31 December 2008 because he had reached the mandatory retirement age of 60 on 10 December 2008. More specifically, the Applicant had seven years, five months and eleven days of qualifying service. Not having the required ten years of qualifying service, consequently the Applicant did not satisfy the eligibility criteria for receiving retirement benefits as set out in Area Staff Circular No. A/03/2008. He is erroneously relying on the provisions of Area Staff Circular No. A/03/2008 intended to

equalize retirement benefits between Category “A” and long-serving Category “X” staff because it stipulates clearly “ ... **provided they have 10 years of service at the date of retirement**” (emphasis added).

26. The tribunal finds that the Respondent’s administrative decision did not breach the Applicant’s terms of appointment.

27. Furthermore, the Applicant is seeking an “exception to the application” of the Area Staff Regulations and Rules and requesting that his prior service be considered for purposes of calculating qualifying service. He should be reminded that upon reappointment, more than two years after he had resigned from UNRWA, PDA/4, para. 1.4, clearly indicated that “reappointment means reemployment of a former staff member without restoration of the staff member’s previous qualifying service” and that Applicant’s previous work with UNRWA was not “qualifying service” which is defined in Area Staff Rule 109.2, para. 6, as “the total period of continuous employment by the Agency.”

28. The Applicant does not “create” an appealable administrative decision by asking for a benefit that is not provided for in the relevant Staff Regulations and Rules and then complaining when it is denied.

29. The Applicant’s years of work with UNRWA from 1991 to 1998 are not considered as qualifying service for the purpose of determining retirement benefits pursuant to the relevant Area Staff Regulations and Rules, and Directives, as well as Staff Circular No. A/03/2008. The Tribunal finds that the non-payment of retirement benefits which were not otherwise due did not affect the Applicant’s terms of appointment, and that no discretionary administrative decision was made by the Respondent for purposes of an appeal.

30. As for the Applicant’s submission that the distinction between temporary indefinite and fixed-term appointments constitutes discrimination, the distinction is not

the proper subject matter for an application since it does not relate to the terms and conditions of the Applicant's appointment, or to the failure to adhere to them by the Respondent. Therefore, the Tribunal will not look into the matter.

31. The Applicant has failed to challenge a discretionary administrative decision regarding the non-observance of his terms of appointment.

Status Conference

32. On 14 July 2011, the Tribunal held a status conference, specifically to ask the parties if they have any new relevant evidence to submit in this case.

The Applicant's representative contended the following:

- any staff member has the right to separation benefits after completing six months of service with UNRWA, as per Area Staff Regulation 9.4;
- Area Staff Rule 109.2 creates a contradiction between the Regulations and the Rules;
- amendments (i.e. Area Staff Circular No. A/03/2008) have made things worse by introducing ten years for all and depriving a large number of staff members of separation benefits;
- amendments constitute unilateral change of the terms of appointment for a large number of employees without their consent and is prohibited by international law governing contracts;
- UNRWA is violating "section 23.2 of the Universal Declaration of Human Rights and International Labour Organization ("ILO") convention c. 100 and c. 26, international laws being above state laws";
- it would have been preferable to abolish Category "X" and stay with Category "A".

33. The Respondent objected to any new element added at this stage and contended that labour relations are governed exclusively by Staff Regulations and Rules and other

relevant issuances, and that no evidence of a discretionary administrative decision alleging non-observance of the Applicant's terms of appointment has been presented to the Tribunal by the Applicant.

34. The Tribunal would like to remind the Applicant that his rights to separation benefits are governed by Area Staff Rule 109.2 and by Area Staff Circular No. A/03/2008. The Applicant has failed to provide evidence as to the contradiction he alleges Area Staff Rule 109.2 creates between the Regulations and the Rules. He should also be reminded that amendments are the privilege of the employer, i.e. UNRWA, and that the fixed-term contract (reappointment) he signed in 2001 clearly stipulated that it was subject to amendments from time to time. There is no evidence in the file that the Applicant was coerced into signing this letter.

35. Finally, although the Applicant's challenge under the ILO convention or the Universal Declaration of Human Rights does not constitute relevant new evidence in the file as it had not been raised by the Applicant at the time of his application, the Tribunal would like to point out to the Applicant, for clarification purposes, that the terms and conditions of his appointment are governed solely and exclusively by the Area Staff Regulations and Rules and other relevant issuances as amended by the Agency and not by the ILO convention or by the Universal Declaration of Human Rights. Furthermore, the Applicant has failed to establish how the ILO convention or the Universal Declaration of Human Rights constitute evidence that the Respondent's administrative decision breached the terms and conditions of his appointment.

