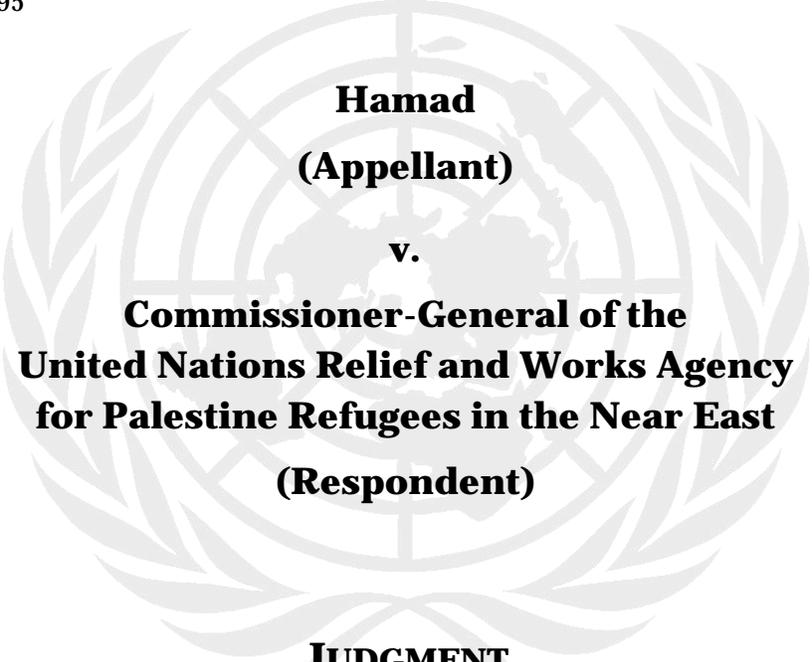




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2012-295



**Hamad
(Appellant)**
v.
**Commissioner-General of the
United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent)**

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Mary Faherty Judge Sophia Adinyira
Judgment No.:	2012-UNAT-269
Date:	1 November 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: W. Thomas Markushewski

JUDGE RICHARD LUSSICK, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Samira Mahmoud Hamad (the Appellant) against Judgment No. UNRWA/DT/2011/013, rendered on 2 November 2011 by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT and UNRWA, respectively) in Amman, Jordan. The Appellant appealed on 22 December 2011. The Commissioner-General of UNRWA answered on 19 March 2012.

Synopsis

2. Ms. Hamad contests the decision of the UNRWA DT that there was no appealable administrative decision. The UNRWA DT found that the Provident Fund Secretariat (the Secretariat), in calculating the interest applicable to her payout from the Provident Fund, was merely complying with the provisions of Area Staff Rule 106.1.16(D)(i) and (ii), which action did not amount to an administrative decision. The Appeals Tribunal dismisses the appeal and affirms the Judgment of the UNRWA DT.

Facts and Procedure

3. The Appellant joined UNRWA on 4 November 1967 as an elementary school teacher in Syria. Effective 30 September 1999, she was separated from service on early retirement.

4. On 7 October 1999, the Appellant requested that payment of the balance of her Provident Fund account be deferred for ten years.¹

5. On 3 December 2008, the UNRWA Commissioner-General declared the special interest rate for the month of November 2008 to be -18.49%.

6. On 21 December 2008, the Appellant requested withdrawal of the balance of her Provident Fund account. Her account was officially closed as of 30 November 2008. The -18.49% interest rate in effect for the month of November 2008 was applied to calculate the balance of

¹ The Provident Fund is a scheme established by the UNRWA Commissioner-General for the purpose of providing benefits to eligible UNRWA staff members upon their separation.

her Provident Fund account. Cheques were made available to her on 22 December 2008. According to the Appellant, she collected the cheques on 4 January 2009.

7. On 18 January 2009, the UNRWA Commissioner-General declared the special interest rate for the month of December to be -15.18%.

8. On 29 January 2009, the Appellant requested review of the decision to apply the -18.49% interest rate to the balance of her Provident Fund account upon withdrawal. She requested that the December rate be applied instead and that she be paid the difference between the interest rates for the months of December and November 2008.

9. By email dated 3 February 2009, the Field Finance Officer informed the Appellant: “[W]e can not pay this compensation because the compensation was calculated properly at the correct monthly rate prevailing in December 08 i.e. the rate of the previous month November 08.” He continued that “the Provident Fund rates are always calculated monthly and not daily as your letter suggests would be possible. I can understand your disappointment with this decision. However please understand that the Provident Fund has to apply its rules consistently with all staff.”

10. On 15 March 2009, the Appellant requested administrative review of the decision to apply the November 2008 interest rate to the balance of her Provident Fund account. She requested compensation in the amount of approximately USD 4,000 for the difference between the December and November 2008 interest rates.

11. After the Appellant was informed that her request could not be accommodated, she appealed to the UNRWA Area Staff Joint Appeals Board on 1 April 2009. Her case was subsequently transferred to the UNRWA DT after the latter came into operation on 1 June 2010.

12. In Judgment No. UNRWA/DT/2011/013, the UNRWA DT dismissed Ms. Hamad’s application on the ground that there was no appealable administrative decision. In the view of the UNRWA DT, “the manner by which the Provident Fund Secretariat calculated the balance of separating participants” such as Ms. Hamad “does not constitute an administrative decision as defined by Area Staff Regulation 11.1 and...it does not fall within the scope of its jurisdiction as an administrative decision alleging the non-observance of the Applicant’s terms of appointment”. The UNRWA DT determined that the interest rate of -18.49% was correctly applied to the settlement of the Appellant’s Provident Fund account.

Submissions

Ms. Hamad's Appeal

13. The Appellant maintains that the UNRWA DT erred in law by basing its decision on Area Staff Rule 106.1.16 (D)(i) and (ii), when it should have applied Area Staff Rule 106.1.5 (B)(i)-(iv), so that the withdrawal could be made as of the end of the month of December 2008.

14. Ms. Hamad also maintains that, according to Section D(3) of the Administrative Rules of the United Nations Joint Staff Pension Fund (UNJSPF), the period of 21 days in December 2008 should have been calculated up to 31 December 2008. Ms. Hamad was of the opinion that the rules of UNRWA, being an agency of the United Nations, cannot contradict the UNJSPF rules.

15. The Appellant requests that the Appeals Tribunal order UNRWA to compensate her for the difference between the December and November 2008 interest rates for the withdrawal of her Provident Fund account.

UNRWA's Answer

16. The Commissioner-General of UNRWA submits that the UNRWA DT Judgment is consistent with the jurisprudence of the Appeals Tribunal that neither regulatory decisions nor decisions that do not infringe on a staff member's terms of appointment are appealable administrative decisions. The Commissioner-General points out that his decision to declare monthly the interest rate to be applied to the Provident Fund, including with respect to a withdrawing participant's account, is a decision of "general application" and has no effect on the withdrawing participant's terms of appointment.

17. The Commissioner-General also notes that the Appellant did not refer to the regulations and rules of the UNJSPF in her application to the UNRWA DT and only now seeks to introduce them on appeal. In any event, the Commissioner-General maintains that the UNJSPF rules are not applicable to the Appellant. Her conditions of service are governed exclusively by UNRWA's Area Staff Regulations, Rules and administrative issuances.

Considerations

18. The Appellant contends that the UNRWA DT erred in basing its decision on former Area Staff Rule 106.1.16(D)(i) and (ii) instead of applying Area Staff Rule 106.1.5(B)(i) to (iv).

19. Specifically, the Appellant relies on Area Staff Rule 106.1.5(B)(iv) which states that: “Accrual of interest on credits will continue till the end of the deferral period and all remaining credits shall be withdrawn from the Provident Fund at that time.” The Appeals Tribunal finds that this rule was not relevant to the issue before the UNRWA DT since it did not concern the interest rate applicable at the end of the deferral period.

20. The UNRWA DT considered that the relevant provision was former Area Staff Rule 106.1, paragraph 16, which was applied by the Agency in calculating the interest applicable to the Appellant's payout from the Provident Fund. Former Area Staff Rule 106.1.16 provides:

(D) The Commissioner-General shall also declare and cause to be published each month a special interest rate to be applied to the accounts of separating participants in the manner described below:-

(i) In declaring this special interest rate each month, the Commissioner-General shall take account of the investment performance of the Provident Fund assets as reflected in the reports by the Global Custodian and the estimated results of the Provident Fund Humanitarian Repayable Withdrawals scheme, for the period between the first day of the year immediately following the year covered by the last declared interest rate under (A) above, up to but not including the month in which the special interest rate is declared; he/she shall also take account of the requirements of paragraph 19 of this rule.

(ii) The last published special interest rate shall be applied to a separating participant's account for the period between the first day of the year immediately following the year covered by the last declared interest rate under (A) above, up to and including the month immediately preceding payment.

(E) The interest rates referred to above may be positive, nil, or negative, depending on the assessment of investment performance.

21. This was clearly the correct rule to apply in calculating the interest applicable to the Appellant's payout, and the UNRWA DT did not err in this regard.

22. The Appellant further contends that the Administrative Rules of the United Nations Joint Staff Pension Fund apply to her situation. This was not an argument which the UNRWA DT was able to consider, since it is raised for the first time in this Appeal. Nonetheless, the Appeals Tribunal finds that this argument has no merit. The UNRWA DT noted in its decision that, upon submitting her application requesting deferral of the payment of the balance of her

Provident Fund account for ten years, the Appellant agreed that, during the deferral period: “All sums in my account shall be held in accordance with the Area Staff Rules as may be amended from time to time, in the very same manner as for active staff members, including ploughback of any exchange rate movements and interest.” Moreover, the Appellant has not demonstrated how the UNRWA DT erred in finding that

the Applicant’s terms and conditions of employment are governed solely and exclusively by the Agency’s Area Staff Regulations and Rules and other relevant issuances as amended by the Agency, including those relating to the Provident Fund and payments upon withdrawal and the applicable interest rates (emphasis in original).

23. The UNRWA DT considered that the main issue before it was whether or not there was an appealable administrative decision. The UNRWA DT decided that the manner in which the Secretariat calculated the Provident Fund balance of separating participants did not constitute an administrative decision alleging the non-observance of the Appellant’s terms of appointment and was, therefore, not within its jurisdiction. The Appeals Tribunal finds that this decision is correct. An administrative decision is

a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry legal consequences.²

24. The actions of the Secretariat clearly do not fall within this definition. The Secretariat applied the only applicable interest rate in existence when the Appellant submitted her application to withdraw the balance of her Provident Fund account. In doing so, it was merely complying with the provisions of Area Staff Rule 106.1.16(D)(i) and (ii). The Appellant was treated no differently than any other separating participant under this Staff Rule. She was not discriminated against or treated unequally. This was not a unilateral decision taken by the UNRWA Administration in a precise individual case but was of general application to separating participants. The Appellant has not established any failure by the Agency to pay her a sum to which she was entitled as required by law, nor has she pointed to any wrongful exercise of power

² Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003) V.

or omissions or refusals to act in accordance with the law, nor to any violation of the law infringing her rights. On the facts, the loss she complains of was not caused by any action of the Secretariat, but rather by the poor investment performance of the Provident Fund.

25. For the foregoing reasons, the Appeals Tribunal holds that there was no appealable administrative decision.

Judgment

26. This appeal is dismissed and the Judgment of the UNRWA DT is affirmed.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Adinyira

Entered in the Register on this 18th day of January 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar