BEQAI

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. Toufiq Beqai (the “Applicant”) appealed 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 extend his fixed-term appointment.

2. The Applicant’s appeal to the UNRWA Joint Appeals Board (the “JAB”) was dated 24 May 2010 and date stamped as having been received on 1 June 2010. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the JAB was abolished as of 1 July 2009. With effect from 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 JAB on the date of its abolition, including this application, were transferred to the Tribunal. The Tribunal did not become fully operational until 1 June 2011, when a judge was first appointed. The administrative difficulties and delay in establishing the Tribunal, and the need to manage the huge backlog of cases in an orderly manner, are factors to be taken into account in deciding whether it would be in the interests of justice to grant the Respondent an extension of time to file a reply and to take part in the proceedings in this case.

3. The Respondent filed his Reply on 27 September 2012, which was transmitted to the Applicant on 2 October 2012.

4. The Tribunal considers that this case is suitable for a determination on the documents.

Facts

5. On 1 February 2007 the Applicant commenced employment with the Respondent on a fixed-term appointment (half-post) as a Dental Surgeon, grade 14.

6. Following a series of extensions, the Applicant was notified by letter from the Field Personnel Officer, Lebanon (“FPO/L”) dated 2 March 2010 that the half-
time post of Dental Surgeon that he was currently occupying had been extended until 31 May 2010 and that:

If the post is not extended beyond this date, the incumbent of the post will return to his original post at B/Hammoud Health Centre and your services with the Agency will terminate [emphasis added].

7. This letter is not regarded by the Tribunal as constituting notification of the non-extension of the Applicant’s fixed-term appointment because it was contingent upon the question whether the incumbent’s post would be extended. However, the following letter dated 21 April 2010 does constitute notification.

8. By letter to the Applicant dated 21 April 2010 the Deputy Director of UNRWA Affairs, Lebanon (“DDUA/L”) confirmed that the Applicant’s appointment would expire on 31 May 2010. Reference was made to three letters to the Applicant from the FPO/L, dated 20 July 2007, 2 September 2009, and 2 March 2010. The letters indicated that the original occupier of the Applicant’s post had been temporarily transferred to another post at a Mobile Dental Clinic. The continuation of the Mobile Dental Clinic project was contingent on the availability of project funding. Of particular relevance to the Applicant’s contention that he was unaware of the fact that the renewal of his fixed-term appointment was contingent upon continued project funding for the Mobile Dental Unit is the following paragraph:

The issue at hand is your contractual status. In a letter dated 2 September 2009, the Field Personnel Officer wrote the following to you:

“Please note that the half-time post you are currently occupy[ing] at B/Hammond Health Centre and your duty is at NLA is subject to the extension of the post of [another doctor] at Mobile Dental Clinic (EU Education Project Post), which is limited to fund availability. The funds are available until December 2009. In case the post at Mobile Dental Clinic (EU Education Project) was not extended, [the other doctor] will return to his original post at B/Hammoud Health Centre and your services will be ended at the Agency. Accordingly, your contract was extended until 31 December 2009.”
You are encouraged to apply for UNRWA vacancy advertised on 31 August 2009.”

You did not apply for the advertisement.

9. The DDUA/L also confirmed to the Applicant that:

Your appointment was extended a number of times, most recently until 31 May 2010 at which time the incumbent in the post (currently working on the EU project) will need to return to the post you currently occupy.

10. By email to the DDUA/L dated 26 April 2010, the wife of the Applicant wrote:

Thank you, for your letter but Dr Biqae did not informed that he is on a project, also how could be two DS got fixed term appointment in Baddawiand Mina Health centers although [sic] they are after him in the Rooster [sic].

Thank you for your effort, realy [sic] thank you but we are not satisfied.

11. This email reveals a fundamental misconception on the part of the Applicant. It is apparent from the extract of the letter from the FPO/L dated 2 September 2009 quoted by the DDUA/L that the Applicant has mistakenly interpreted the reference to project funding as implying that the post he was occupying was part of a project. Rather, the quoted correspondence states that the temporary post occupied by the incumbent is subject to project funding, which in turn will determine whether or not the Applicant will receive an extension to his fixed-term appointment.

12. Although the email to the DDUA/L dated 26 April 2010 written on behalf of the Applicant does not explicitly refer to it being a request for administrative review it is clearly a request that was intended to serve the underlying purpose of former Area Staff Rule 111.3 and is reasonably construed as a request for administrative review. It was treated as such as is evident by emails dated 29 and 30 April from the DDUA/L.

13. By email to the Applicant’s wife dated 29 April 2010 the DDUA/L stated that the Applicant had been informed that his post was not a “GF” post and that he
had been given two opportunities to apply for new rosters but chose not to do so. The DDUA/L concluded by stating:

…I will, however, go through his file once again to confirm the above understanding….I will get back to you shortly.

14. By email to the Applicant’s wife dated 30 April 2010, the DDUA/L set out the following explanation:

When [the incumbent of the post] was offered a position to work in a full-time post funded by a project, his half time post became vacant. Your husband was offered the position. [The incumbent] retained the right to return to his post when the project funding ended.

In March 2007, a new Dental Surgeon roster recruitment exercise was carried out. Your husband was invited to the technical test because he was on a temporary post and because his roster would soon expire. Your husband declined the offer to sit the technical test. He was, accordingly, not placed on the March 2007 roster and the May 2006 roster expired.

15. On 1 June 2010 a Human Resources Officer (Appeals and Grievances) date stamped an appeal to the JAB dated 24 May 2010.

16. The Applicant separated from the Agency on 31 May 2010. By letter from the Field Human Resources Officer dated the same day the Applicant was advised:

As you are aware, your fixed term appointment is due to expire today. This is a consequence of the suspension of the Mobile Dental Unit project, for Beirut and the North, which will result in the return of those regular staff who were assigned to the project effective 1 June 2010.

17. The Applicant responded to the Field Human Resources Officer with a written annotation at the bottom of the letter in Arabic, which included the following statements:

I received your correspondence dated 5 June 2010, and I completely reject what is mentioned in it because it violates the rules and regulations.
I am a confirmed employee according to the rules (half post). During the previous years, several attempts to terminate me unfairly and aggressively from my job were made but all these attempts came to failure.

Now, and by using a new method, a new malicious heresy was used to legalize and justify the termination, which is [the Mobile Dental Unit Project].

I was not informed and I did not receive any document during the previous years, show that I work in project.

I have the right of getting a confirmed full time post in Al Baddawi Clinic starting from 8 May 2007.

I sent all the necessary documents that prove my right in this post to the [Field Director] and I insist on this right.

I ask you to reconsider your decision for the sake of justice.

18. By letter to the Applicant dated 2 June 2010, the Officer-in-Charge (“OiC”) of the JAB Secretariat acknowledged receipt of the Applicant’s appeal, stating that it was received on 2 June 2010. By Inter Office Memorandum from the OiC of the JAB Secretariat to the Director of Human Resources dated 2 June 2010, the Application was transmitted to the Respondent.

19. On 28 March 2011, the Applicant resubmitted his appeal on the Tribunal’s new application form.

20. By email dated 23 February 2012, the Tribunal transmitted both the original and the resubmitted appeals to the Respondent with translations.

21. On 31 July 2012 a Case Management Discussion was held.

22. On 27 September 2012, the Tribunal received the Respondent’s Reply to the Application and on 2 October 2012 the Reply was transmitted to the Applicant.

23. On 5 October 2012, without requesting leave, the Applicant resubmitted documents already on the case file with new annotations. In the interests of judicial efficiency, the Tribunal accepted the observations into evidence and has considered the additional material in deciding this case.

**Applicant’s contentions**

25. The Applicant contends that:

   (i) When a full time Dental Surgeon post became available he asked the Senior Dental Surgeon for the post. The Applicant states that he was asked for money but refused. “CFHP and SDS made everything upside down after I refused to pay money.”

   (ii) He received a letter stating that he was on a project that would end on 31 May 2010, “without knowing how it becomes a project”.

26. The Applicant requests that the Tribunal order the Agency to provide him with a fixed-term full time appointment. He also requests “all my rights I lost from the previous period.”

**Respondent’s contentions**

27. The Respondent contends that the application is not receivable because the Applicant requested administrative review “on 5 June 2010, over two months late and subsequent to filing his appeal.”

28. The Respondent requests that the Tribunal dismiss the Application, rejecting each and all of the Applicant’s pleas and denying the Application in its entirety. Should the Tribunal consider the Application to be receivable, the Respondent requests leave to make further submissions on the substantive merits of the case.

**Considerations**

29. The Tribunal takes note that notwithstanding the request for leave to make further submissions on the merits of the claim the Respondent has provided sufficient evidence, arguments and submissions relating to the merits of the issues in contention. Should leave be granted to the Respondent to take part in these proceedings it does not appear that there is any further evidence or submissions
that could reasonably be expected of the Respondent to enable the Tribunal to
determine the merits of the claim.

First preliminary issue: Respondent’s request for leave to take part in
proceedings and to submit a reply

30. In a detailed submission the Respondent acknowledged that it failed to
comply with the time limit for filing a reply in compliance with Article 6(1) of the
Tribunal’s Rules of Procedure. The detailed grounds include the following
submissions of substance:

(i) Article 30 of the Rules of Procedure of the Tribunal provides that:

Subject to the Statute of the Dispute Tribunal, including in
particular articles 8.3 and 8.4, the Judge hearing a case may
shorten or extend a time limit fixed by these Rules or waive any
rule when the interests of justice so require.

(ii) On case management, Article 14 of the Rules of Procedure of the
Tribunal provides that:

The Tribunal may, at any time, either on application of a party
or of its own initiative make any order or give any direction
which appears to the judge to be appropriate for a fair and
expeditious disposal of the case and to do justice to the parties.

(iii) The Respondent requests leave to take part in the proceedings and
submits that its failure to comply with the 30 day time limit set out
in Article 6(1) of the Rules of Procedure of the Tribunal is because
the Agency has insufficient resources to respond to the backlog of
appeals from the Joint Appeals Board, which accumulated prior to
and pending the establishment of the UNRWA Dispute Tribunal on 1
June 2010, and the backlog of applications to the Tribunal which
continues to accumulate since its establishment.

31. Having considered the grounds upon which the Respondent seeks leave of
the Tribunal to take part in proceedings and having regard to the requirements of
justice, including consideration of the Respondent’s grounds resisting the claim in
this case, the Tribunal orders that leave be granted.
Second preliminary issue: receivability

32. The issue of receivability is to be considered in two distinctly separate phases. The first question is whether the Applicant sent a letter requesting a review of the decision within 30 days of receipt of notification. If he did, the second question is whether he filed his claim within 30 days of receipt of the reply to his request for administrative review or 60 days if there was no reply. If the time limit for filing the substantive claim was not met should the Tribunal exercise discretion to waive this time limit?

33. The relevant legal and administrative framework for receivability is set out below.

34. Former Area Staff Rule 111.3, in effect at the material time provided:

1. A staff member who wishes to appeal under the terms of staff regulation 11.1, shall as a first step, address a letter to the Agency’s administration requesting that the administrative decision concerned, or the disciplinary action, be reviewed, and setting out his/her reasons for this request.

2. This letter shall be sent within thirty days from the date on which the staff member receives written notification of the decision in question, and shall be addressed:

   *       *       *

   (B) in the case of staff members of Field Offices, to the UNRWA Field Office Director in charge of the Field Office.

3. A staff member who wishes to appeal under the terms of staff regulation 11.1, after having sent a letter to the Agency’s administration in accordance with the foregoing provisions of this rule, shall submit a written appeal, specifying his/her allegations, to the Secretary of the Joint Appeals Board within the following time limits:

   *       *       *

   (B) in the case of staff members of Field Offices, within thirty days from the date of the receipt of a reply from the UNRWA Field Office Director, or, if no reply has been received from the latter within thirty
days of the date of the staff member’s letter, then within the next thirty days.

4. An appeal shall not be receivable by the Joint Appeals Board unless the above time limits have been met, provided that the Board may waive those time limits in exceptional circumstances.

35. Given the factual findings in paragraphs 7 and 8 above it is clear that the request for decision review was made within the 30 day time limit.

36. The Applicant’s appeal to the JAB is dated 24 May 2010 but is date stamped as having been received on 1 June 2010. Under the former system of internal justice the Applicant was required to file his appeal within 30 days of receipt of the email response dated 30 April 2010 from the DDUA/L to the request for administrative review. For the appeal to be filed in time it had to be received by the JAB secretariat no later than 30 May 2010.

37. There are two rebuttable presumptions both affecting the issue of receivability. Since the appeal is dated 24 May it may be assumed that it would have been sent, and received, within a matter of 2 or 3 days, in which case it would have been ruled in time. However, the date of receipt could be presumed to be indicated by the date stamp of 1 June 2010. In the absence of any evidence as to the administrative arrangements within the JAB secretariat for recording the dates of receipt, and noting the discrepancy between the date of the date stamp and the date of receipt referred to in the letter of the OiC of the JAB secretariat to the Applicant dated 2 June 2010, it would be unsafe to rely on the date stamp as evidence of the date that the appeal was actually received. In coming to this conclusion the Tribunal has also borne in mind the fact that 1 June 2010 was the date when the new system was established and that the JAB itself had not been sitting since it was abolished as of 1 July 2009. Whilst there is no reason to suppose that the date stamp did not accurately reflect the date of receipt, there is equally no reason to suppose or infer that the Applicant did not send the appeal to the JAB when he signed it. The Applicant’s conduct at that time in relation to pursuing his rights indicates a degree of diligence, assisted by his wife, to lead the Tribunal to conclude that there would be every reason to suppose that the appeal was lodged very shortly after it was signed. The Tribunal has taken cognisance of
the facts and circumstances of this particular case including the nature of the transitional arrangements being introduced at the material time and the question whether it would be proportionate to convene a hearing to determine the exact date of service of the appeal and/or the administrative arrangements for receiving and date stamping appeals. In all the circumstances, the Tribunal find that this claim is receivable and will proceed to consider its substantive merits.

**Main issue: non-extension of fixed-term appointment**

38. Former Area Staff Rule 109.5, in effect at the relevant time, provided:

   1. A fixed-term appointment shall expire without prior notice on the expiration date specified in the letter of appointment.

   2. A staff member holding a fixed-term appointment shall automatically be separated from Agency service on the expiration date of that appointment, unless he/she has been reappointed or otherwise separated prior to that date.

39. The United Nations Appeals Tribunal has also recognised that separation as a result of a fixed-term appointment takes place automatically, without prior notice, on the expiration date specified in the letter of appointment, *Kounoin*, 2011-UNAT-119, and that a fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment, *Jennings*, 2011-UNAT-184.

40. In *Ahmed*, 2011-UNAT-153, the United Nations Appeals Tribunal stated:

   We concur with the former Administrative Tribunal which held that, unless the Administration has made an “express promise … that gives a staff member an expectancy that his or her appointment will be extended”, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member’s fixed-term appointment is not unlawful.

41. In this case the Applicant was appointed on a series of fixed-term contracts while the incumbent was working on a project (see paragraph 8). This would also explain the letter to the Applicant dated 2 March 2010 (see paragraph 6). The Applicant is mistaken in his belief that the Respondent was asserting for the first
time when his contract was not renewed, that his fixed-term appointment was project funded. It was the incumbent’s placement in the project that was the issue.

42. The Respondent has given a cogent explanation and reason for the non-extension of the Applicant’s fixed-term appointment. The burden of proving that the grounds for non-renewal were unlawful is on the staff member contesting the decision not to renew his or her contract, *Jennings*, 2011-UNAT-184.

**Allegation of request for bribe**

43. The Applicant alleges that he was asked for money in return for receiving a full time Dental Surgeon post and that when he did not pay the money his position was targeted. At the Case Management Discussion, the Applicant was reminded that the burden was on him to prove his allegations and that it was a difficult burden. Although the Applicant has since then engaged in correspondence with the Tribunal and supplied additional material, he has not provided a shred of evidence to support this very serious allegation.

44. The Tribunal takes into account that this is an extremely serious allegation that, if proven to be true, would be capable of casting serious doubt on the reasons for non-renewal of the Applicant’s contract or failure to offer him an alternative post. At the same time, the Tribunal must factor into the equation the difficulty that a person accused of soliciting a bribe faces when there is no corroborative evidence or witness who could assist the Tribunal in determining the issue. The making of a bold assertion and/or allegation unsupported by any direct or even circumstantial evidence is unacceptable.
45. The Judgment of the Tribunal is as follows:

(a) The Application is receivable;

(b) The Respondent is granted leave to take part in these proceedings;

(c) The Respondent’s reply dated 27 September 2012 is accepted as a reply to both the receivability and the merits of the claim;

(d) The application is dismissed in its entirety.

Signed

Judge Goolam Meeran

Dated this 25th day of April 2013

Entered in the Register on this 25th day of April 2013

Signed

Laurie McNabb, Registrar, UNRWA DT, Amman