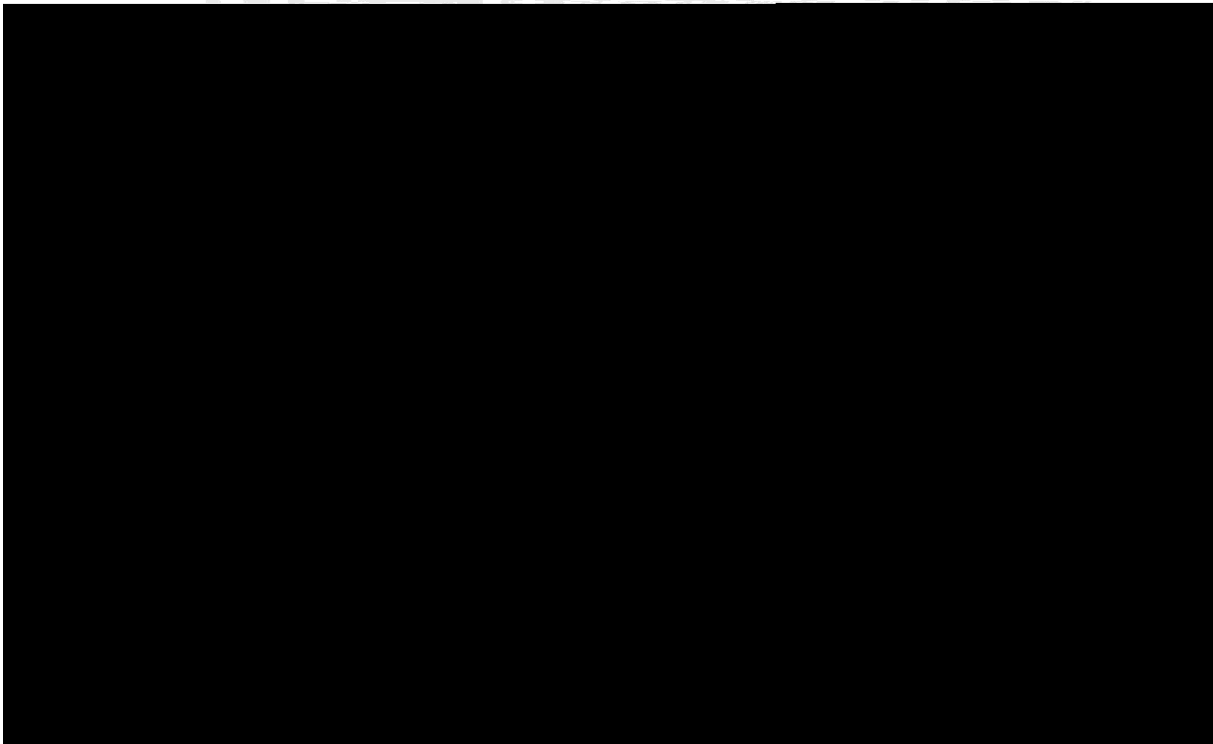


Judgment No. 2019-UNAT-927



JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/034, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal, and Agency, respectively) on 13 May 2018, in the case of *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Moeen Mohammad Salem Jafari filed the appeal on 13 January 2019. The Commissioner-General filed his answer on 18 March 2019.

Facts and Procedure

2. Mr. Jafari entered the service of UNRWA on 6 February 2006. At the time of the material events, he was an Area Loan Supervisor in the Agency.

3. By letter dated 1 December 2016, the Human Resources Services Officer (HRSO) informed Mr. Jafari of his impending retirement when he reached the age of sixty on 23 March 2017 and drew his attention to his related entitlements including retirement benefits, the Provident Fund benefits¹ and cash payment in lieu of accrued leave. The HRSO also mentioned the possibility for Mr. Jafari to extend his service beyond the age of sixty if he was interested, cautioning that such an extension was subject to medical fitness and a fully satisfactory performance rating for the last two performance evaluation cycles. A form titled “Request to be retained in service beyond attaining the official age of retirement” and a leaflet of frequently asked questions (FAQ) on the matter in Arabic were attached to the letter. According to the English translation that Mr. Jafari has provided to the Appeals Tribunal, the
er thereto as follows: “—If a staff member requests extension and they meet all of the requirements, are they entitled to extension of services? —Answer: Yes. If a staff member meets the requirements mentioned in the applicable policy, then they will be entitled to extension of services.”

4. In a letter dated 20 December 2016, the HRSO advised Mr. Jafari that the “validity of [his] post ha[d] been extended for a further period which [would] expire on 31 December 2017”.

¹

5. On 26 December 2016, Mr. Jafari completed and submitted the request for extension of his service, beyond his official retirement age of sixty, for a period of two years.

6. By letter dated 31 January 2017, the HRSO informed Mr. Jafari that the Director of UNRWA Operations, Jordan (DUO/J), did not approve his extension request and that his separation from the Agency on the basis of retirement would be effective 23 March 2017 on his 60th birthday.

7. On 1 March 2017, Mr. Jafari requested the DUO/J to reconsider the decision not to extend his service beyond retirement age.

8. The DUO/J responded by letter dated 21 March 2017, in which he confirmed the content of the HRSO's letter of 31 January 2017. He informed Mr. Jafari that the latter's request for reconsideration had been "thoroughly reviewed", and that the decision for his separation from the Agency on a retirement basis had been taken "in accordance with the provisions of Area Staff Rule 109.2" and "in the interest of the Agency". The DUO/J stressed that, while Mr. Jafari met the preconditions for extension of service beyond his retirement age, the negative decision had been taken, "as [his] continuation in the post hinder[ed] internal succession plans".

9. Mr. Jafari appealed the DUO/J's decision by first requesting decision review on 27 March 2017 and then filing an application with the UNRWA Dispute Tribunal on 24 July 2017.

10. In the impugned Judgment, the UNRWA DT determined that Mr. Jafari's application was timely filed, but it dismissed his application on the merits. In the UNRWA Dispute Tribunal's view, the relevant rules authorized the Agency to grant an extension of service beyond retirement age, but they did not entitle a staff member to such a right. In the present case, the UNRWA DT found that the Agency had properly exercised its discretion and

Submissions

Mr. Jafari's Appeal

12. The decision by the UNRWA Dispute Tribunal was “unfair and cruel”, in that it failed to take into account the rules of law or financial and social considerations, and moreover, it violated his right to a two-year extension of his service beyond retirement. The HRSO's letter and the FAQs attached to her letter mentioned that he had such a right if he fulfilled all three conditions, which he did. Mr. Jafari questions why the Agency sent a form for him to complete and involved him in the extension procedures, especially when it knew all along that the continuation of his service beyond retirement would hinder the succession plans, if an extension beyond retirement age was not a right, but an exception to the rules, as the UNRWA Dispute Tribunal indicated. The fact that the Agency sent him the form and asked him to complete it gave him hope and a lawful expectation that his service would be extended because he met all the conditions.

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(E) Further extensions of service beyond a staff member's 62nd birthday shall not exceed one year, and may be authorized at the sole discretion of the Commissioner-General. The Commissioner General retains the authority, in exceptional cases, to deny a request by a staff member to be retained in service beyond the official age of retirement.

Area Personnel Directive No. A/9/Rev. 10 (PD No. A/9/Rev. 10) on separation from service, states in relevant parts at paragraph 20:

20. A staff member shall be eligible for consideration for extension of his/her appointment beyond the official age of retirement upon the following preconditions:

[...]

b. For staff members reaching the official age of retirement on or after 1 January 2014:

i. Staff members seeking to be retained in service to the Agency beyond attaining the official age of retirement for a cumulative period not to exceed two (2) years must make a request, no later than sixty (60) calendar days after receiving the written notice of retirement referred to in paragraph 3 of Rule 109.2.

[...]

iii. The Director of Human Resources (upon the recommendation of the relevant Department Director) for Headquarters staff, and Field Office Directors for Field staff, shall approve requests made in accordance with paragraph 20(b)(i) and (ii), provided such requests meet the requirements set out in paragraphs 20(c) and (d) [...].

c. In all cases of extension of service, the staff member's performance must be rated as at least "fully meets expectations" or a grade of "3" in their last two performance evaluation cycles preceding the staff member's request for extension of service beyond the official age of retirement.

d. In all cases of extension of service, the staff member shall submit to a medical examination by a doctor nominated by the Agency and it shall be a condition of such extension that the Chief, Field Health Programme in the Fields or Director of Health in the case of Headquarters certifies that the staff member is cleared as medically fit to continue service beyond the official age of retirement.

[...].

26. Based on Mr. Jafari's submissions, the Appeals Tribunal discerns that what he claims is that the UNRWA DT erred on a matter of law in its consideration of the requirements for the extension of his service beyond the age of retirement. Specifically, he claims that he met all the conditions for extension of service beyond the retirement age as set forth in the letter of 1 December 2016 from the HRSO and the FAQ, since he submitted the extension request

within the prescribed time-limit and satisfied the performance requirements. This claim was rejected by the first instance Judge on the grounds that “[t]hese two conditions are the *minimum* that must be met before the Agency can give further *consideration* to the request for extension in light of what is in the best interest of the Agency”.³

27. Further, the UNRWA DT concluded that the Agency had no obligation to accept Mr. Jafari’s request for an extension of his service beyond the age of retirement, since the extension of service was not a right of a staff member but an exception to the normal rule of retirement at the age of 60 and lay within the discretionary authority of the Administration.⁴ Moreover, the UNRWA DT concluded that the Agency properly exercised its authority when it decided that it was not in its interest to extend Mr. Jafari’s service beyond retirement age.⁵

28. In the first place, we agree with the UNRWA DT that the above-quoted provisions of the existing regulatory framework did not establish an automatic right of the staff member to extension of his/her service beyond the age of retirement upon the submission of the pertinent application, even if he/she satisfies these two conditions. As expressly stipulated in law, on receipt of such a request, the Administration decides whether the staff member shall be eligible for consideration for extension of his/her service beyond the official age of retirement provided that the preconditions of the law are met. Undoubtedly, this decision falls within the discretionary authority of the Agency, which determines on such a request by balancing the aforesaid preconditions and its own interests.

29. However, for the reasons that follow, we do not share the UNRWA DT’s holding that the denial of the extension of Mr. Jafari’s service beyond the age of retirement was a valid exercise of the discretion of the Administration.

30. The Appeals Tribunal has held that, as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion.⁶

³ Impugned Judgment, para. 34 (italics in original).

⁴ *Ibid.*, paras. 33-34.

⁵ *Ibid.*, para. 33.

⁶ *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, para. 17; comp. *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para. 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.

31. The Appeals Tribunal recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.⁷

32. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and

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the Administration's decision of 21 March 2017 being an unlawful decision, which was inconsistent with Area Staff Rule 109.2.

40. The contested decision was accordingly wrong and invalid. The UNRWA DT hence erred in holding otherwise. Consequently, we order rescission of this decision, and, as it concerns termination, set an amount of compensation that the Commissioner-General may elect as an alternative to the rescission of the contested administrative decision pursuant to Article 9(1) (a) of the Appeals Tribunal Statute.

41. Having in mind that, in establishing the amount of in-lieu compensation, the Appeals Tribunal exercises discretion, and that the in-lieu compensation is not intended to compensate for all the possible harm suffered by the injured person, as this is the specific aim of the compensation set forth in Article 10(5)(b) of the UNRWA Dispute Tribunal Statute (compensation for harm),¹⁷ which will be the subject of appreciation below, as well as that an in-lieu compensation has to be assessed in the round which we deem to be fair and equitable, having regard to the number of imponderables,¹⁸ we set the in-lieu compensation in the amount of six months' net base salary.

Award of compensation

42. Article 9(1) (b) of the Statute of the Appeals Tribunal provides:

The Appeals Tribunal may only 3(sion2 Tw)874.6 (f) BT (lit) in pp 16748 51 if 507 ewy 496 h if-22.04lic-7.. Thn,

Judgment

44. The appeal is partly upheld and Judgment No. UNRWA/DT/2018/034 is hereby modified as follows.
45. The decision to deny Mr. Jafari's request for extension of his service beyond the official age of retirement is rescinded. The Commissioner-General may elect to pay in-lieu compensation in the amount of