



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

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Judgment No. 2016-UNAT-626

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

**JUDGMENT**

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**Before:** Judge Deborah Thomas-Felix, Presiding  
Judge Rosalyn Chapman  
Judge Inés Weinberg de Roca

**Case No.:** 2015-732

**Date:** 24 March 2016

**Registrar:** Weicheng Lin

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**Counsel for Mr. Masri:** Amer Abu-Khalaf/LOSA

**Counsel for Commissioner-General:** Lance Bartholomeusz

**JUDGE DEBORAH THOMAS-FELIX, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2015/030, 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 UNRWA or Agency, respectively) on 21 May 2015, in the case of *Masri v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Fuad Salim Masri filed his appeal on 1 July 2015, and the Commissioner-General filed his answer on 4 September 2015.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... Effective 19 February 2012, the Applicant joined [the UNRWA DT] as an Assistant Translator/Interpreter, Grade 15 [...] on a fixed-term appointment expiring on 31 December 2012. The appointment was subject to a probationary period of 6 months.

... [On] 14 October 2012, the Applicant was informed that his appointment had been confirmed [and o]n 31 December 2012, the Applicant's appointment was extended for another period of one year ending on 31 December 2013.

... By email sent to the Applicant on 3 February 2013, the full-time Judge of the [UNRWA Dispute] Tribunal [brought to Mr. Masri's attention the deficient translations and errors in his work. The Judge] reiterated what she had told him [...] verbally [in a meeting held the same day]: that the Applicant should pay more attention to his work and improve on the quality of his translations.

[On 7 February 2013, the full-time Judge sent an e-mail to the Chief, Compensation and Management Services Division (C/CMSD) agreeing with his suggestions to finalize the job description for the post of Assistant Translator/Interpreter at Grade 16 level.]

... On 14 February 2013, the [C/CMSD] sent an Inter-Office Memorandum ("IOM") to the Director of the Department of Human Resources concerning the updating and reclassifying of the post of Assistant Translator/Interpreter at the Tribunal. [The C/CMSD notes: "[t]he post description of Assistant Translator/Interpreter has been updated and finalized in coordination with the Judge [...]. A number of outdated responsibilities have been omitted while others

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<sup>1</sup> Impugned Judgment, paras. 2-18.

have been added and/or modified to better reflect the current functions of the post”.]

...

... On 21 February 2013, the post of Translator at the Tribunal, Grade 16, was advertised. One hundred and seventy-four candidates, including the Applicant, applied for the post.

... On 11 March 2013, a “Performance Improvement Discussion (“PID”) meeting” took place between the Applicant and his first and second supervisor, respectively, the Registrar and the full-time Judge.

... On 2 April 2013, the Applicant, together with other shortlisted candidates, was subjected to a test for the post of Translator at the Tribunal, Grade 16. The test was anonymous and the candidates were given numbers. The Applicant did not pass the test.

... On 8 May 2013, a new PID meeting took place with the Applicant. This meeting constituted the end of the informal Opportunity to improve (“OTI”) process and a formal OTI process was established to start on 28 May 2013, for a period of two months.

... On 16 June 2013, the Registrar, in a formal OTI report, informed the Applicant that the OTI process could be shortened if he failed to improve.

... By email dated 20 June 2013, the Applicant submitted to the Director of the Department of Human Resources a complaint for abuse of power and harassment, and a request for decision review of the decision to place him under an OTI process, inclusive of the statement that the OTI process could be shortened if he failed to improve.

... The OTI reports of 30 June 2013 and 14 July 2013 indicated that the Applicant’s performance had been improving.

... On 18 July 2013, the Deputy Commissioner-General responded to the Applicant’s request for decision review stating that the decision to initiate the OTI process was made in full accordance with the Agency’s Staff Regulations and Rules and other administrative issuances.

... The final OTI report dated 28 July 2013[] stated that the Applicant’s performance showed considerable improvement in the last 30 days.

... By letter dated 28 November 2013, the Human Resources Officer informed the Applicant of the decision that, effective 1 December 2013, the post of Assistant Translator/Interpreter at Grade 15 would be abolished. Furthermore, he was offered a transfer to the post of Governance Officer Education Department, Grade 14, with salary protection at Grade 15. The Applicant accepted the transfer offer.

... Effective 5 January 2014, the selected candidate was appointed at the Tribunal as Translator, Grade 16.

... By letter dated 8 January 2014, the Applicant was informed about the extension of his fixed-term appointment for a period of three years.

... On 26 February 2014<sup>[2]</sup>, the Applicant requested review of the decision to abolish his post and to transfer him. [There is no evidence that the Agency responded to Mr. Masri's request for decision review.]

3. On 23 April 2014, Mr. Masri filed his application with the UNRWA Dispute Tribunal, contesting the decision to abolish his post and transfer him to the Education Department, which he claimed was based on personal bias by the full-time UNRWA DT Judge, who wanted to terminate his contract. He also submitted that the UNRWA Administration had violated the Area Staff Regulations and Rules in the conduct of the OTI, the creation of a new translator post and the abolition of his post. By way of remedy, Mr. Masri requested the UNRWA DT to cancel the transfer decision and order his reinstatement to the UNRWA DT, as well as compensation for moral and reputational damage.

4. On 21 May 2015, the UNRWA Dispute Tribunal rendered its Judgment, rejecting Mr. Masri's application. At the outset, the Judge assigned to the case noted that while he would ordinarily have recused himself from considering the case as he knew the full-time Judge responsible for the contested decision, it was not in the interest of justice to do so as it would mean that Mr. Masri's case could not be adjudicated by the UNRWA DT or any other court, which would constitute a denial of justice. Accordingly, he decided he would adjudicate the matter. On the application's merits, the UNRWA DT found that there was no bias in the decision to abolish Mr. Masri's post as it was a decision taken only in the interest of the UNRWA DT,<sup>3</sup> notably to meet the UNRWA DT's need to recruit a translator with more seniority, responsibilities and competencies than Mr. Masri.<sup>4</sup> By corollary, the recruitment of a translator at a higher level, Grade 16, automatically meant that Mr. Masri's post at the Grade 15 level had to be abolished.<sup>5</sup> The UNRWA DT further noted that, in any event, Mr. Masri's appointment expired on 31 December 2013, and he was not entitled to a renewal.<sup>6</sup> The UNRWA DT also rejected Mr. Masri's claim that the decision to transfer him to the Education Department was unlawful, noting that he

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<sup>2</sup> While the UNRWA DT Judgment states that Mr. Masri submitted his request for decision review on 26 February 2014, Mr. Masri's response of 26 February 2015 to Order No. 009 (UNRWA/DT/2015) shows that it was timely submitted on 26 December 2013.

<sup>3</sup> *Ibid.*, para. 37.

<sup>4</sup> *Ibid.*, para. 36.

<sup>5</sup> *Ibid.*, para. 36.

<sup>6</sup> *Ibid.*, para. 34.

did not present any argument to support this claim, and that the file showed that the Department of Human Resources had had meetings with Mr. Masri discussing his transfer with salary and grade protection, and Mr. Masri had accepted the offer.<sup>7</sup> The UNRWA DT also rejected Mr. Masri's claim that the decision to place him on an OTI process was to ultimately terminate his appointment for non-satisfactory performance, noting that the OTI reports of 30 June and 14 July 2013 provided that Mr. Masri's performance had been improving, and the final OTI report of 28 July 2013 stated that his performance showed considerable improvement during the last 30 days.<sup>8</sup>

### **Submissions**

#### **Mr. Masri's Appeal**

5. Mr. Masri submits that the UNRWA DT exceeded its jurisdiction and erred in procedure when the UNRWA DT Judge failed to declare his conflict of interest which arose by virtue of his professional relationship with the full-time Judge who took the decision now contested, and failed to recuse himself as required by Articles 22 and 23 of the UNRWA DT Rules of Procedure (UNRWA DT Rules). Judge Cousin's decision not to recuse himself patently violated the UNRWA DT Rules and the basic values of the United Nations. The Appellant, having been a staff member of the UNRWA DT, and having submitted his application to the same Tribunal, was subjected to a partial decision to his detriment due to personal frictions with the full-time Judge. The UNRWA DT's explanation that Mr. Masri's case could not be adjudicated in case of a self-recusal cannot stand. In the circumstances, Mr. Masri's due process rights were breached.

6. The UNRWA DT erred on a question of law and fact in deciding that there was no bias in the decision to abolish Mr. Masri's post. The UNRWA DT overlooked Mr. Masri's evidence which patently shows personal bias and procedural irregularities, and there is no doubt, having regard to the facts and timeline of the case, that the full-time Judge's decision to reclassify and to abolish Mr. Masri's post was motivated by personal bias and tainted by procedural irregularities. The partial and unprofessional conduct of the full-time Judge is prohibited under General Staff Circular No. 06/2010

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<sup>7</sup> *Ibid.*, para. 39.

<sup>8</sup> *Ibid.*, para. 32.

(GSC No. 06/2010) entitled “Prohibition of Discrimination, Harassment - including Sexual Harassment - and Abuse of Power”.

7. The UNRWA DT erred on a question of law by holding that the transfer decision could not be considered to be unlawful. The transfer was effected in breach of Area Staff Personnel Directive A/9, paragraph 15.7, which provides that a “suitable post” means “a post in the same or similar occupation group”. Further, the post to which Mr. Masri was transferred did not reflect his competence and skills, thereby breaching Area Staff Regulation 4.3, which requires that due regard be paid to “securing the highest standards of efficiency, competence and integrity” in effecting, *inter alia*, transfers. Lastly, while UNRWA Area Staff Regulation 1.2 states that “[s]taff members are subject to the authority of the Commissioner-General and to assignment by him to any of the activities or offices of the Agency”, the UNRWA DT in *Abdullah* held that “this discretionary authority is not unfettered and the Tribunal will not interfere with it unless the contested decision was arbitrary or capricious, motivated by prejudice or extraneous factors”.<sup>9</sup> The Appeals Tribunal has equally recognised the Administration’s obligation to act in good faith. The UNRWA DT failed to have regard to the foregoing rulings.

8. The Agency exceeded and abused its power when it gave Mr. Masri an ultimatum with two days’ notice to either accept the proposed transfer or lose his job. Citing the UNRWA DT in *Hamayel*, the Appellant submits that the ultimatum was unlawful and the threat of loss of employment was unjustified.<sup>10</sup> The limited time given to “accept” the transfer offer clearly undermined the validity of Mr. Masri’s acceptance.

9. Mr. Masri requests the Appeals Tribunal to “void” the UNRWA DT Judgment by reason of Judge Cousin’s failure to recuse himself. Should the Judgement stand, Mr. Masri requests the Appeals Tribunal to rescind the decision to transfer him to the Education Department and reinstate him in his previous post as Assistant Translator/Interpreter with the UNRWA DT.

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<sup>9</sup> *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2013/037/Corr.01, para. 66. This judgment was vacated in part by the Appeals Tribunal in Judgment No. 2014-UNAT-482.

<sup>10</sup> *Hamayel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2013/029, para. 53. In Judgment No. 2014-UNAT-459, the Appeals Tribunal affirmed the UNRWA DT Judgment, but set aside its award of USD 5,000 for moral damages.

**The Commissioner-General's Answer**

10. The UNRWA DT correctly adjudicated the matter. Despite being aware of the identity of the Judge assigned to the case, Mr. Masri never filed a request for his recusal, throughout the UNRWA DT proceedings, to UNRWA's Internal Justice Committee in accordance with Article 23(2) of the UNRWA DT Rules, incorporated via Area Staff Regulation 11.4. Rather, the Judge assigned to the case pre-emptively addressed the matter, in the Judgment, which seems to have put the matter into issue for Mr. Masri.

11. Notwithstanding, the Judge assigned to the case correctly declined to recuse himself because doing otherwise would, citing *Campos*,<sup>11</sup> amount to an impermissible denial of justice for Mr. Masri as his application could not be adjudicated by the UNRWA DT or any other court given that Area Staff Regulation 11.2 explicitly provides that "[t]he United Nations Dispute Tribunal shall not hear or render judgement on applications from [UNRWA] staff members". Accordingly, the UNRWA DT was the only court with authority to adjudicate Mr. Masri's application at the first instance. Mr. Masri did not present any evidence to demonstrate that a denial of justice could have been avoided had the Judge assigned to the case recused himself.

12. Alternatively, Mr. Masri has not raised any new facts that were not known, or ought to have been known, to him at the time of his UNRWA DT application and has failed to demonstrate that the working relationship between the two Judges in question affected the outcome of the case such as to warrant voiding the Judgment. Rather, Mr. Masri alleges the entire Judgment was "partial" simply because the presiding Judge did not rule in his favour.

13. Mr. Masri's submissions in relation to his argument that the UNRWA DT erred on a question of law effectively repeat his case before the UNRWA DT by arguing that alleged incorrect statements or errors during the OTI process demonstrate that the full-time Judge was intent on terminating his contract. On the errors of fact, Mr. Masri merely recalls the evidence he submitted to the UNRWA DT to argue that there were sufficient facts on the record to evidence bias against him and, to this end, merely reargues the merits of his case. To the contrary, the UNRWA DT did not err in either regard. The UNRWA DT correctly concluded that the decision to abolish Mr. Masri's post was

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<sup>11</sup> *Campos v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/05. This judgment was affirmed by the Appeals Tribunal in Judgment No. 2010-UNAT-001.

legally effected for reclassification purposes insofar as the abolition decision respected Area Staff Personnel Directive A/9, and there was no bias in the decision. Although he bears the burden of proof in establishing his claims that the UNRWA DT erred, Mr. Masri has not established that it was unreasonable for the UNRWA DT to conclude that there was no evidence of bias in the decision to abolish his post. He merely disagrees with the UNRWA DT's conclusions. Insofar as Mr. Masri alleges improper motives on the part of the full-time Judge constituting harassment, the allegations of misconduct have not been investigated nor proven and thus cannot be established as fact.

14. The Appeals Tribunal should also reject Mr. Masri's claim that the UNRWA DT erred in finding his transfer was lawful as the arguments raised to support this claim on appeal, i.e. relating to the suitability of his skills to the new post or the validity of his acceptance, were not raised or argued in his application before the UNRWA DT. Since matters that are not raised before the UNRWA DT cannot be introduced for the first time on appeal, the Appeals Tribunal should find these arguments inadmissible. Should the Appeals Tribunal consider these arguments admissible, the Commissioner-General submits that these issues do not render the transfer unlawful, as Mr. Masri neither presented any evidence to demonstrate that the offered position was not commensurate with his skills and experience nor voiced any concern regarding this issue when consulted by the Human Resources Department, nor provided a sufficient basis to call into question the voluntariness of his acceptance.

15. The Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety, or, should it find that the UNRWA DT has erred, remand the case to the UNRWA DT for further findings of fact.

### **Considerations**

16. The first issue for the Appeals Tribunal to determine is whether or not the UNRWA Dispute Tribunal Judge should have recused himself from the hearing of this case due to the fact that he had a professional relationship with the full-time Judge who made the contested decision.



17. Article 4(7) of the UNRWA DT Statute provides *inter alia* that “[a] party may request recusal on the basis that the judge has, or appears to have, a conflict of interest. Where a party requests such recusal, the decision shall be taken by the UNRWA Internal Justice Committee.”

18. During pendency of his application before the UNRWA Dispute Tribunal, Mr. Masri did not request recusal; rather, it was the learned Judge who disclosed, in his Judgment, that he knew the full-time Judge responsible for the contested decision and noted that while he would ordinarily have recused himself from considering the case it was not in the interest of justice for him to do so as it would mean that Mr. Masri’s case could not be adjudicated by the UNRWA DT or any other court and this would constitute a denial of justice. Area Staff Regulation 11.2 explicitly provides that “[t]he United Nations Dispute Tribunal shall not hear or render judgement on applications from [UNRWA] staff members”.

19. We note also that, effective 1 July 2009, a two-tier formal system of administration of justice was established for UNRWA staff members. The first tier of this system provides for present and former UNRWA staff members to challenge the contested administrative decisions by filing the respective applications before the UNRWA Dispute Tribunal. The second tier provides for the appeal of an adverse judgment to the Appeals Tribunal. The effect of this two-tier system is that the UNRWA DT is the only court, at the first instance, with authority to adjudicate upon Mr. Masri’s application, as the UNRWA Dispute Tribunal rightly pointed out.

20. Mr. Masri submits to the Appeals Tribunal that the UNRWA DT exceeded its jurisdiction and erred in procedure when the Judge assigned to the case failed to declare his conflict of interest which arose by virtue of his professional relationship with the full-time Judge. The question of bias or conflict of interest was only raised as an issue on appeal; Mr. Masri made no application for the recusal of the Judge assigned to the case in accordance with the provisions of Article 4(7) of the UNRWA DT Statute.

21. The test for determining whether or not a judge is biased is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge is biased.

22. In order to apply the test there ought to have been an application by Mr. Masri for the UNRWA Internal Justice Committee to consider whether a fair-minded and informed observer would conclude that there is a real possibility of bias as a result of the professional relationship which the judges share.

23. It is expected in the normal course of things that Judges, like other professionals, will know each other. The fact that persons share a professional relationship is not sufficient, on the face of it, to prove that there is a conflict of interest or bias.

24. Indeed, judicial independence, integrity, open-mindedness and professionalism are among the main characteristics of a judge. Therefore, any claim of bias against a judge must be supported by some form of evidence.

25. We note, however, that Mr. Masri made no application to the UNRWA Internal Justice Committee on the issue of recusal; we therefore will not permit the issue to be raised for the first time on appeal.<sup>12</sup>

*Did Mr. Masri discharge his burden of proving error in the UNRWA DT's reasoning or is he rearguing the merits of the case?*

26. The burden of satisfying the Appeals Tribunal that the Judgment rendered by the UNRWA Dispute Tribunal is defective is on the appellant, Mr. Masri.

27. In *Al-Moued*, the Appeals Tribunal reiterated that:<sup>13</sup>

It is apparent that [the Appellant] is not aware of his onus as an appellant. He is not correct in thinking that a person bringing an appeal does not have any onus of establishing that the Tribunal below erred in its decision and that an appeal is an opportunity to present the same arguments for decision by a higher Tribunal. That is a totally misconceived notion of the nature of an appeal.

... [T]he consistent jurisprudence of the Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case: "A party cannot merely repeat on appeal arguments that did not succeed in the lower court. Rather, he or she must demonstrate that the court

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<sup>12</sup> *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049, para. 13.

<sup>13</sup> *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458, paras. 18 and 23 (internal citation omitted). See also *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097 and *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-096.

below has committed an error of fact or law warranting intervention by the Appeals Tribunal.”

28. While he disagrees with the UNRWA DT’s conclusions, Mr. Masri has to establish, on appeal, that it was unreasonable for the UNRWA DT to conclude that there was no evidence of bias in the decision to abolish his post. Mr. Masri has failed to do so, in that he has not produced evidence to establish that there are any errors of law, fact or procedure to support his case for a reversal of the UNRWA DT Judgment.

29. The UNRWA DT found that there was no bias in the decision to abolish Mr. Masri’s post as it was a decision taken in the interest of the UNRWA DT, notably to meet that Tribunal’s need to recruit a translator with more seniority, responsibilities and competencies than Mr. Masri.

30. We also wish to note that it is within the remit of management to organize its processes to lend to a more efficient and effective operation of its departments. We agree with the finding of the UNRWA DT that the decision to abolish Mr. Masri’s post was legally effected for reclassification purposes, and there was no bias in the decision.

31. After a careful consideration of all of the evidence and submissions, we find no fault with the reasoning of the UNRWA DT.

### **Judgment**

32. The appeal is dismissed and the Judgment of the UNRWA Dispute Tribunal is affirmed.

Original and Authoritative Version: English

Dated this 24<sup>th</sup> day of March 2016 in New York, United States.

*(Signed)*

Judge Thomas-Felix,  
Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 13<sup>th</sup> day of May 2016 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar