



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

Judgment No. 2020-UNAT-1029

**Mohamed El Madhoun
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2019-1340
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. El Madhoun: Amer Abu Khalaf, LOSA

Counsel for Commissioner-General: Rachel Evers

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Mr. Mohamed El Madhoun commenced his career with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA” or “Agency”) in 2002. Starting in 2016, Mr. El Madhoun submitted several requests for early voluntary retirement (“EVR”). In 2018, he also applied for exceptional voluntary separation (“EVS”) in response to an area staff circular (“ASC”) issued by the Agency. All his requests, be they for EVR or EVS, were rejected by the Agency on the grounds of lack of funds or budgetary constraints, and consequently he was separated from service. Mr. El Madhoun contested *inter alia* the decision to terminate his appointment in the interest of the Agency before the UNRWA Dispute Tribunal (“UNRWA DT”). In a judgment now under appeal, the UNRWA DT declared the termination decision illegal and ordered its rescission or payment of an in-lieu compensation. The UNRWA DT also determined that the Agency had failed to adduce any evidence in support of its generic reasoning that Mr. El Madhoun’s requests for EVR or EVS had been rejected due to lack of funds and/or budgetary constraints. The Commissioner-General appeals the UNRWA DT Judgment to the United Nations Appeals Tribunal (“Appeals Tribunal”). For reasons set out below, we affirm the UNRWA DT decision.

Facts and Procedure

2. Effective 1 September 2002, Mr. El Madhoun was employed by the Agency as Analyst Programmer on a fixed-term appointment, Grade 4A, Step 1, at Headquarters, Gaza (“HQG”).
3. Effective 1 December 2010, Mr. El Madhoun was transferred on promotion to the post of System Analyst, at Headquarters, Amman (“HQA”), Grade 15, Step 16. Effective 1 July 2012, he was promoted to the post of Functional Expert, Grade 16, Step 17.
4. The Agency granted Mr. El Madhoun Special Leave Without Pay (“SLWOP”) for one year at the latter’s request, commencing on 23 September 2012. After further extensions of his SLWOP, Mr. El Madhoun resumed his duties on 22 January 2014.
5. The Agency again granted Mr. El Madhoun SLWOP for one year at the latter’s request, commencing on 13 May 2014. His SLWOP was further extended several times, lastly until 15 July 2018.

6. During his period of SLWOP, on 6 December 2016, Mr. El Madhoun submitted a request for EVR. On 19 December 2016, the Human Resources Services Officer (Entitlements) (“HRSO”) informed Mr. El Madhoun that his request for EVR would not be considered, as the allocated budget for EVR for 2016 had been exhausted.

7. On 16 February 2017, Mr. El Madhoun again submitted a request for EVR. The HRSO informed Mr. El Madhoun that “due to the Agency’s financial constraints the priority was given to humanitarian cases” and that his request had not been approved.

8. On 30 March 2017, Mr. El Madhoun submitted another request for EVR. On 20 April 2017, the HRSO informed him that “no EVR approvals [would] take place for HQA during 2017 as the allocated funds were fully utilized in accordance with the EVR strategy for 2017”.

9. On 19 September 2017, Mr. El Madhoun submitted a fourth request for EVR. The Agency indicated that his request had not been considered due to lack of funds.

10. On 8 January 2018, the Agency published, internally and externally, a vacancy announcement for a new post of Analyst Programmer, Grade 14, HQA (“AP/HQA”).

11. The Agency received 359 applications for the post. Twenty-six candidates, including Mr. El Madhoun, were shortlisted and invited for a written test. Three candidates, including Mr. El Madhoun, were invited for a personal interview. The Interview Panel unanimously recommended one candidate for the post. Mr. El Madhoun and the other candidate were found not suitable.

12. On 22 March 2018, the Officer-in-Charge, Information Management Department (“OiC/IMD”) approved the Interview Panel’s recommendation that the successful candidate be appointed to the post of AP/HQA.

13. On 2 May 2018, Mr. El Madhoun’s SLWOP, which was to expire on 15 July 2018, was further extended until the end of the recruitment process for the post of AP/HQA or for 90 days, whichever date was earlier.

14. On 27 August 2018, the Agency circulated ASC No. A/5/2018 on “Exceptional Voluntary Separation – Jordan and West Bank Fields”.

15. Mr. El Madhoun was informed of the outcome of the recruitment process for the post of AP/HQA on 28 August 2018.

16. By letter dated 3 September 2018, the Chief, Human Resources, Operational Services Division (“C/HR/OSD”) informed Mr. El Madhoun of the decision to terminate his services in the interest of the Agency. Accordingly, Mr. El Madhoun was separated from the Agency, retroactively as of 28 August 2018.

17. By e-mail to the C/HR/OSD dated 5 September 2018, Mr. El Madhoun requested the withdrawal of his notice of termination in accordance with paragraphs 8 and 9 of Area Staff Rule 109.2 and submitted a new request for EVR. By the same e-mail, he also submitted a request for EVS.

18. By e-mail dated 11 September 2018, on behalf of the C/HR/OSD, the HRSO informed Mr. El Madhoun as follows:

Dear Mohamed,

Please note that your request has been thoroughly reviewed. Regarding your inquiry on EVR, please note that, although you are eligible for EVR, EVR is not an unconditional right. Therefore, the Agency may decline such a request. Currently and over the last two years, the Agency has not been accepting EVR applications due to budgetary constraints and thus granting you EVR is not possible.

19. On 11 September 2018, the Agency circulated ASC No. A/6/2018 on “Exceptional Voluntary Separation – All fields and HQs”.

20. On 24 September 2018, Mr. El Madhoun requested review of the decision not to select him for the post of AP/HQA and the decision to terminate his appointment in the interest of the Agency.

21. On 13 November 2018, Mr. El Madhoun submitted his first application to the UNRWA Dispute Tribunal challenging the decision to terminate his appointment in the interest of the Agency. On 15 November 2018, he filed another application with the UNRWA Dispute Tribunal contesting the decision not to select him for the post of AP/HQA.

22. In Judgment No. UNRWA/DT/2019/059, the UNRWA Dispute Tribunal dismissed Mr. El Madhoun's application challenging the decision not to select him for the post of AP/HQA, but it ordered the decision to terminate Mr. El Madhoun's appointment in the interest of the Agency to be rescinded. The UNRWA DT found that:

- (a) the Agency's assertion that budgetary constraints were the reason for rejecting Mr. El Madhoun's last request for EVR was contradicted by the fact that the financial implications for the Agency of an application for EVS or EVR were identical for a given staff member and that there were funds available for EVS; and
- (b) a staff member had a right to have his/her notice of termination withdrawn when he/she became eligible for EVR and even if this right was not unconditional, the Agency failed to provide sufficiently clear, precise, and intelligible reasoning and did not act lawfully, reasonably and fairly in its decision to terminate Mr. El Madhoun's appointment in the interest of the Agency.

23. The UNRWA DT added that, should the Agency elect to pay financial compensation instead of effectively rescinding the decision to terminate Mr. El Madhoun's appointment in the interest of the Agency, it shall pay Mr. El Madhoun the amount equivalent to the difference between the amount of Mr. El Madhoun's standard retirement benefits calculated in accordance with paragraph 5 of Area Staff Rule 109.2 and the amount he had already received as termination indemnity in accordance with paragraph 3(B) of Area Staff Rule 109.9.

24. The Commissioner-General filed an appeal on 13 December 2019, and Mr. El Madhoun filed his answer on 6 February 2020.

Submissions

The Commissioner-General's Appeal

25. First, the Commissioner-General rejects that EVR and EVS have the same financial impact and states that the argument that budgetary constraints had a bearing on requests for EVR is supported by evidence. The Agency recalls the jurisprudence that "when judging the validity of the Secretary-General's exercise of discretion in administrative matters, the

Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate” and maintains that it was not reasonable to conclude that because funds were available for one type of modality of separation (EVS), they were similarly available for other types of separation (EVR).

26. The conclusion of the UNRWA DT that the argument of the Agency that budgetary constraints had a bearing on requests for EVR was not supported by evidence is patently erroneous. It overlooked that ASC No. A/6/2018 on “Exceptional Voluntary Separation – All fields and HQs” dated 11 September 2018 clearly indicated the limited availability of funds and ASPD A/9/Rev.10 stated (at paragraph 16) that “[t]he approval of EVR applications is subject to a financial limit established in the form of an annual cap by the Commissioner-General”. In addition, the reasoning of the UNRWA DT does not comport with the Appeals Tribunal’s approach deferring to the discretionary authority of the Commissioner-General in fiscal and budgetary matters. Finally, since Judgment No. UNRWA DT/2019/044 issued on 9 September 2019,¹ the UNRWA Dispute Tribunal knew the facts in relation to the Agency’s lack of funds. They are of public notoriety and need no evidence in support. Consequently, it would have been reasonable for the UNRWA Dispute Tribunal to conclude that lack of funds was a lawful basis for the decision not to grant an EVR to Mr. El Madhoun.

27. EVR or EVS are not interchangeable. EVS is an exceptional separation modality authorised by the Agency where it is deemed to be in its financial interests to do so. EVR, on the other hand, is a standing separation modality that may be granted at the discretion of the Agency when staff members meet the criteria to retire, and Area Staff Rule 109.2(9) states that “[e]arly voluntary retirement may not be substituted for any other mode of separation”. Furthermore, the Agency’s regulatory framework requires separate financial resources to be made available for EVR and EVS. Once exhausted, there is no regulatory requirement for the Agency to allocate additional Programme Budget funding to fulfill the remaining EVS applications not covered under the dedicated funding. This clearly counters the suggestion that the financial implications for Mr. El Madhoun were the same and that any financial

¹ *Abu Ata et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2019/044. In that Judgment, the UNRWA Dispute Tribunal dismissed Abu Ata *et al.*’ applications against the decision to reclassify their temporary indefinite appointments from full-time to part-time. In Judgment No. 2020-UNAT-1016, the Appeals Tribunal affirmed the UNRWA DT’s decision.

resources available to separate staff in accordance with EVR should be made available to separate staff in accordance with EVS.

28. Second, the Commissioner-General argues that the UNRWA DT erred in its interpretation of Area Staff Rule 109.2(9) by concluding that “a staff member has a right to have his/her notice of termination withdrawn when he/she is eligible for EVR”.² This interpretation deprived the Agency of the discretion, under Area Staff Rule 109.2 and ASPD A/9/Rev.10, to determine whether a person who may meet the criteria for EVR could be granted such a separation modality taking into consideration the annual financial limitations placed on the Agency in regards to EVR. In this regard, rejecting a request to withdraw a notice of termination on the grounds that the correlating EVR application would not succeed due to a lack of funding was lawful, reasonable and fair in the circumstances, particularly where such a modality of separation required specific dedicated funding in order to be utilised.

29. To the extent that the UNRWA DT's interpretation of Area Staff Rule 109.2(9) was influenced by the use of the word “shall”, the Commissioner-General submits that this is an instance where “shall” should be construed as “may”.³ The rationale for this proposition is that a narrow interpretation of “shall” removes the intended discretionary power of management to first consider whether the staff member meets all the requirements for EVR and, most importantly, to then consider whether the budgetary constraints permit or prevent the granting of EVR. In the view of the Commissioner-General, the expression “the notice of termination shall accordingly be withdrawn” becomes mandatory after management has considered whether the staff member meets all the requirements for EVR and whether the budgetary constraints permit or prevent the granting of EVR.

30. Finally, and at any rate, the Commissioner-General adds, *ex abundate cautella*, that Mr. El Madhoun separated from service on 28 August 2018 and his request for EVR was submitted on 5 September 2018, rendering the withdrawal of the notice of termination envisaged in Area Staff Rule 109.2(9) nugatory.

² Impugned Judgment, para. 51.

³ The first paragraph of Area Staff Rule 109.2(9) states that “A staff member who is eligible for early voluntary retirement ... may at his/her written request leave the Agency's service by early voluntary retirement ... and the notice of termination of his/her appointment shall accordingly be withdrawn.”

31. The Agency requests that the Appeals Tribunal vacate the UNRWA DT Judgment in relation to its rescission of the decision to terminate Mr. El Madhoun's appointment in the interest of the Agency.

Mr. El Madhoun's Answer

32. First, the UNRWA DT did not err in concluding that EVR and EVS had same financial implications for the Agency. Both are under Area Staff Rule Chapter IX which deals with "Separation from Service", the end result being that a staff member, upon requesting either EVR or EVS, departs from the Agency before the stipulated time with certain benefits, if he/she is considered eligible. In the present case, Mr. El Madhoun was eligible to apply not only for EVR, but also for EVS, pursuant to ASC No. A/5/2018 dated 27 August 2018 followed by ASC No. A/6/2018 which clearly refers in its title to "All Fields and HQs" and makes ASC No. A/5/2018 applicable to all staff members in the West bank and Jordan.

33. The Agency's argument that "Early Voluntary Retirement (EVR) may not be substituted for any other mode of separation" contradicts paragraphs 7(c) of ASC No. A/5/2018 and paragraph 8(c) of ASC No. A/6/2018, which contain the identical language: "Eligible EVS applications will be considered in the following order of priority: ... c. Staff who qualify for EVR under Area Staff Rule 109.2(8)". In such a case, EVS could substitute EVR which confirms that they are identical and interchangeable. In addition, while the Commissioner-General submits that ASPD/9/Rev.10 read together with ASC No. A/6/2018 clearly establishes that the Agency's regulatory framework requires separate financial resources available for EVR and EVS, a careful perusal of his submissions shows that he did not reference any specific paragraphs, and the documents mentioned above make no assertion of separate financial resources.

34. The Commissioner-General did not prove to the UNRWA DT that there were no funds available. He had the onus to prove his case with sufficient substantial evidence and cannot claim that the UNRWA DT was aware of the Agency's lack of funds and did not need evidence to substantiate this fact. The importance of substantial evidence in administrative cases cannot be overlooked. In *Jafari*,⁴ the Appeals Tribunal decided that a "harmful administrative decision must be fully and adequately motivated. The reason must be sufficiently clear,

⁴ *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para. 36.

precise and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.”

35. The Agency violated Area Staff Rule 109.2(8) in declining Mr. El Madhoun’s request for EVR and ignoring his humanitarian condition. Mr. El Madhoun was eligible for EVR as he had served the Agency for over ten years, and for the withdrawal of the notice of termination in accordance with Area Staff Rule 109.2(9).

36. In conclusion, Mr. El Madhoun requests the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

37. On 3 September 2018, the Agency proceeded with the termination of Mr. El Madhoun’s appointment in the interest of the Agency, effective retroactively as of 28 August 2018. By e-mail to the C/HR/OSD dated 5 September 2018, Mr. El Madhoun requested the withdrawal of his notice of termination in accordance with paragraphs 8 and 9 of Area Staff Rule 109.2 and the approval of his requests for EVR or EVS. By e-mail dated 11 September 2018, the Agency confirmed that, although Mr. El Madhoun was eligible for EVR, granting EVR was not possible because “currently and over the last two years, the Agency [had] not been accepting EVR applications due to budgetary constraints”.

38. The UNRWA DT rescinded the decision to terminate Mr. El Madhoun’s appointment in the interest of the Agency and ordered, if the Agency wished to pay financial compensation instead of effectively rescinding the contested decision, an in-lieu compensation equivalent to the difference between the amount of Mr. El Madhoun’s standard retirement benefits calculated in accordance with paragraph 5 of Area Staff Rule 109.2 and the amount he had already received as termination indemnity in accordance with paragraph 3(B) of Area Staff Rule 109.9.

39. The Agency lodged an appeal arguing that EVR is not an unconditional right and the UNRWA DT ignored the Commissioner-General’s discretion to reject EVR on financial grounds and his discretionary authority not to withdraw the notice of termination.

Legal framework

40. With regard to the eligibility for EVR and the withdrawal of the notice of termination, paragraphs 8 and 9 of the Area Staff Rule 109.2 titled “Early voluntary retirement” state:

8. A staff member may leave the Agency's service by early voluntary retirement (EVR):

(i) On or after his/her 50th birthday, if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above; or

(A) ii) After his/her sixtieth (60th) birthday, if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above, for staff members whose service has been extended beyond the official age of retirement upon a staff member's request under sub-paragraphs 4(B) or (C) of this Rule.

(B) On or after he/she has completed 25 years of qualifying service, as defined under paragraph 6 above; or

(C) On or after his/her 45th birthday and before his/her 50th birthday if he/she has at least 10 years of qualifying service, as defined under paragraph 6 above;

(D) After he/she has completed between 20 and 24 years of qualifying service, as defined under paragraph 6 above.

9. A staff member who is eligible for early voluntary retirement under paragraph 8 of this rule, and who, during the period of such eligibility, receives a notice of termination of his/her appointment under staff regulation 9.1 (other than on grounds of health; i.e., incapacitation for further service with the Agency), may at his/her written request leave the Agency's service by early voluntary retirement under the provisions of paragraph 8 on the date established for the termination of his/her appointment, and the notice of termination of his/her appointment shall accordingly be withdrawn. Early voluntary retirement may not be substituted for any other mode of separation. The early voluntary retirement benefit of a staff member who requests early voluntary retirement under the provisions of paragraph 8 shall be calculated in accordance with paragraph 5 of this rule.

41. It is undisputed that Mr. El Madhoun was eligible for the EVR: at the time of his request, he was after his 45th birthday and before his 50th birthday and had more than 10 years of qualifying service.

Did the UNRWA DT err in deciding that the argument that budgetary constraints had a bearing on requests for EVR was not supported by evidence?

42. The Commissioner-General contends that the UNRWA DT ignored that budgetary constraints had a bearing on requests for EVR and underestimated his discretionary authority.

43. The Area Staff Regulations and Area Staff Rules do not specify that the EVR requests are subject to budgetary constraints. This does not mean that EVR is an unconditional right and budgetary constraints cannot have a bearing on such requests. The ASPD A/9/Rev.10 states, in paragraph 16, that "[t]he approval of EVR applications is subject to a financial limit established in the form of an annual cap by the Commissioner-General".

44. In *Madi*,⁵ the Appeals Tribunal decided:

... The UNRWA DT held correctly that while Mr. Madi was eligible to be considered for EVR in terms of UNRWA Area Staff Rule 109.2, he did not enjoy an unconditional right to EVR. It held further that the Agency had duly considered and evaluated Mr. Madi's request against the criteria set out in the UNRWA Area Staff Rules and other relevant administrative issuances. Its conclusion that the Agency acted lawfully, reasonably and fairly in rejecting the request for EVR on grounds of its budgetary constraints is unassailable. It deferred appropriately to the discretionary authority of the Commissioner-General in fiscal and budgetary matters and made no appealable error.

45. The discretion of the Commissioner-General to reject a request for EVR on grounds of budgetary constraints is not unfettered. The Agency must use its discretion reasonably and properly, taking into account all relevant considerations.

46. In *Jafari*,⁶ the Appeals Tribunal decided that a "harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful."

⁵ *Madi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT853, para. 27.

⁶ *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-927, para. 35.

47. In the present case, the UNRWA Dispute Tribunal found that the Commissioner-General's assertion about budgetary constraints being the reason for rejecting Mr. El Madhoun's last request for EVR was contradicted by the information available in the case file. In fact, on 27 August 2018, the Agency circulated ASC No. A/5/2018 and offered, with limited funds available, area staff members from the Jordan and West Bank Field Offices the opportunity for EVS. Later, on 11 September 2018, by ASC No. A/6/2018, the Agency extended this opportunity for EVS to all Field Offices and HQs. We agree with the UNRWA DT. Although EVR and EVS were not equivalent and interchangeable, the announcement that funds were available for EVS reinforced the Agency's onus to prove that there were no funds available for EVR and ruled out that budgetary constraints could be considered as a fact of "public notoriety", which required no evidence in support.

48. The Commissioner-General does not provide evidence that the financial limit for EVR, established in the form of an annual cap by the Commissioner-General, was exceeded and consequently granting EVR was not possible due to budgetary constraints. We find that the UNRWA Dispute Tribunal correctly concluded that, by evoking a generic reason in rejecting Mr. El Madhoun's EVR request, namely, the lack of funds and/or budgetary constraints, without adducing any evidence, the Agency had failed to provide sufficiently clear, precise, and intelligible reasoning and had not acted lawfully, reasonably and fairly.

Did the UNRWA DT err in law in deciding that the notice of termination had to be withdrawn?

49. Area staff Rules 109.2(9) states:⁷

A staff member who is eligible for early voluntary retirement under paragraph 8 of this rule, and who, during the period of such eligibility, receives a notice of termination of his/her appointment under staff regulation 9.1 (other than on grounds of health; i.e., incapacitation for further service with the Agency), may at his/her written request leave the Agency's service by early voluntary retirement under the provisions of paragraph 8 on the date established for the termination of his/her appointment, and the notice of termination of his/her appointment shall accordingly be withdrawn.

⁷ *Emphasis added.*

50. We agree with the UNRWA DT that, once a staff member is eligible for EVR in accordance with paragraph 8, paragraph 9 of Area Staff Rule 109.2 comes into play and its text is clear. In the present case, Mr. El Madhoun was eligible for EVR and it is not established that budgetary constraints were a ground for rejecting his EVR request or for not withdrawing the notice of termination of his appointment in accordance with paragraph 9.

51. The UNRWA DT, therefore, did not err in granting partially the application, and the appeal must be dismissed.

Judgment

52. The appeal is dismissed and Judgement No. UNRWA/DT/2019/059 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Halfeld
Bournemouth, United Kingdom

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 29th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar