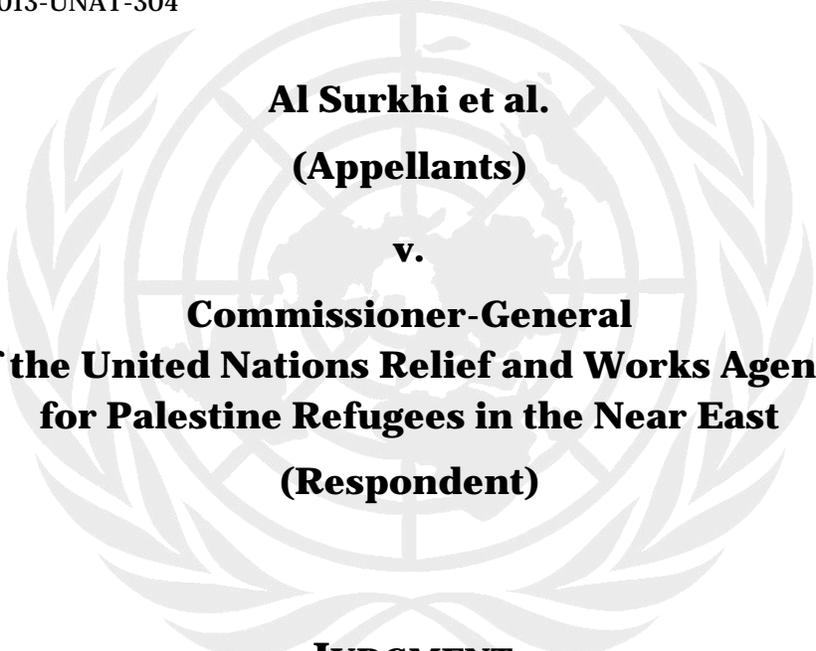




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-304



**Al Surkhi et al.
(Appellants)**
v.
**Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Sophia Adinyira

Case No.: 2012-336

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Appellants: Hala Abu-Hijleh and Ghada A. Yasin

Counsel for Respondent: Anna Segall

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Maha Mohammed Al Surkhi and 11 others (Al Surhki et al.) against Judgment No. UNRWA/DT/2012/022, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT and UNRWA or Agency, respectively) on 26 April 2012. Al Surkhi et al. appealed on 25 June 2012, and the Commissioner-General of UNRWA answered on 17 September 2012.

Facts and Procedure

2. On 12 and 13 May 2009, the UNRWA Area Staff Unions (Unions) organized a two-day strike at the UNRWA headquarters and the Jordan Field Office. The strike ended on 13 May 2009, but on 14 May 2009, several staff members who participated in the strike failed to report to work.

3. On 13 May 2009, the Agency and the Unions reached an agreement to end the strike. They also agreed to conduct discussions to address the issue of salaries for the days not worked, i.e., 12-13 May 2009 for all striking staff and 14 May 2009 for some of them.

4. On 23 July 2009, the Director of Human Resources issued Area Staff Circular No. 06/2009 (Circular) as follows:

In response to the recent strike action – which resulted in the closure of UNRWA offices and installations for three days (**12 to 14 May inclusive**) – the following action will be taken based on the principle of no pay for days not worked.

12 and 13 May: 50% of staff absence will be covered by a payroll deduction from the next payroll; 50% will be recovered from annual leave.

14 May 2009: Payroll deduction will be made for all staff who were absent from work on that day (1 work day).¹

According to the Appellants, the deductions were not taken from their August 2009 payroll as provided in the Circular. Instead they were taken from their September 2009 payroll.

5. Between 30 September 2009 and 23 November 2009, the Appellants submitted identical but separate memoranda to the Director of Human Resources, requesting review of the decision to make salary deduction in respect of the strike days. Between 12 November 2009 and

¹ Emphasis in original.

16 December 2009, they filed identical but separate appeals to the Area Staff Joint Appeals Board (AJAB) against the aforementioned decision.²

6. More than a year later, in March 2011, the Agency effected re-payment of the salary deductions for the days on which the staff members went on strike.

7. On 5 April 2012, the Agency filed a reply with the UNRWA DT, which was established effective 1 June 2010 to replace the AJAB and to which the present case was transferred.

8. In Judgment No. UNRWA/DT/2012/022, the UNRWA DT rejected the applications from Al Surkhi et al. as time-barred. It was a summary judgment on “a matter of law”. The UNRWA DT noted that the contested decision was taken on 23 July 2009 when the Circular was issued and that, Al Surkhi et al. should have requested review by 23 August 2009, “irrespective of the date on which the salary deduction was actually made” and “irrespective of whether or not the Respondent complied with the time limits”. But they did so only between 30 September 2009 and 23 November 2009. The UNRWA DT considered that informal negotiations in which Al Surkhi et al. were involved did not provide a valid excuse for not complying with deadlines. Finally, the UNRWA DT opined that, in any event, Al Surkhi et al.’s applications became moot because the Agency had reimbursed them the sums deducted from their salaries corresponding to the two days on which they were on strike.

Submissions

Al Surkhi et al.’s Appeal

9. The Appellants insist that, contrary to the conclusion of the UNRWA DT, the Circular did not constitute an administrative decision within the meaning of former Area Staff Rule 111.3, under which a staff member must request review within 30 days from the date on which he or she received written notification of the decision. In their view, the Circular was an administrative issuance of general application; it did not affect the terms of the Appellants’ appointments until it was implemented individually, i.e., until their payrolls were deducted in September 2009.

² This information is taken from the Judgment under appeal. However, according to Al Surkhi et al., they filed requests for administrative review between 30 September 2009 and 4 October 2009, and their appeals to the AJAB were submitted between 12 November 2009 and 25 November 2009.

10. The Appellants argue that they had no way of knowing when and if the Circular would be implemented. Contrary to the Circular, the deductions were not taken “from the next payroll”, i.e., August 2009, but from the September 2009 payroll. Moreover, the fact that the Circular employed the term “compensation proposal” shows that it was not an administrative decision.

11. The Appellants maintain that their requests for review were filed timely. In September 2009, the Agency effected deductions from the Appellants’ payrolls. Between 30 September 2009 and 4 October 2009, Al Surkhi et al. filed requests for review, well within the 30-day time limit. By the end of October 2009, when they did not receive a reply to their review requests, they had another 30 days to submit their appeals with the AJAB. This they did between 12 and 25 November 2009, again well within the time limits.

12. The Appellants submit that the UNRWA DT erred in procedure by allowing the Agency to be part of the proceedings, resulting in a manifestly unfair decision. They note that the Agency filed its reply two years and two months past the deadline, and that there is no record showing that the Agency ever requested leave from the AJAB or UNRWA DT to be allowed to take part in the proceedings as required by Article 6 of the UNRWA DT Rules of Procedure.

13. The Appellants also submit that the UNRWA DT erred in procedure when it relied on the Respondent’s arguments in deciding on the issue of receivability. The Appellants further submit that the UNRWA DT erred as a matter of law when it rejected observations made by those Appellants who did not seek leave to submit observations.

14. The Appellants request that this Tribunal find that the UNRWA DT’s Summary Judgment was incorrectly entered and award them compensation for emotional stress.

Commissioner-General’s Answer

15. The Commissioner-General submits that the UNRWA DT properly considered the “observations to the Respondent’s reply” as emanating only from those Appellants who had in fact requested leave from the UNRWA DT to submit such observations.

16. The Commissioner-General also submits that the delay in filing the Agency’s reply is an irrelevant consideration in determining whether the Appellants complied with the time limits. It should be noted that the Agency filed its reply in accordance with the schedule for submission of replies by the Agency fixed by the UNRWA DT.

17. The Commissioner-General further submits that the UNRWA DT was bound to consider the issue of receivability of the appeal *proprio motu* with or without the Respondent's reply and that the Appellants have failed to demonstrate how consideration of the Respondent's reply on the issue of receivability affected the decision in the present case. The UNRWA DT did not err when it entered a summary judgment as it was restricted to a matter of law.

18. The Commissioner-General maintains that the Judgment was free of error as a matter of law. The Judgment is consistent with the jurisprudence of the former Administrative Tribunal that once it is clear that a decision has been made, the time for initiating the appeals process begins to run.

19. The Commissioner-General rejects the Appellants' claim for compensation for emotional stress. In his view, there is no basis for the claim as the deducted sums have been reimbursed to the Appellants and the Appellants have not provided any evidence to substantiate their claims.

Considerations

The claimed errors of law on the part of the UNWRA DT

20. The issue for consideration is whether the UNWRA DT was correct in law in its determination that the applications were not receivable by reason of Al Surkhi et al.'s failure to comply with the time limits set forth in former Area Staff Rule 111.3.

21. In the course of its Judgment the UNWRA DT found the contested decision, in respect of which the Appellants sought administrative review, to have been made on 23 July 2009. Under the provisions of former Area Staff Rule 111.3(2), the Appellants had thirty days to seek administrative review of the decision. However, the process of seeking administrative review did not commence until 30 September 2009, almost six weeks after the operative date as found by the UNWRA DT, namely 23 August 2009.

22. In the course of their submissions to this Tribunal, the Appellants contend that no administrative decision capable of forming the basis of a request for administrative review took place until the Agency deducted their pay, a process, the Appellants argue, which commenced in September 2009.

23. As a matter of logic, if the administrative decision was indeed made in the course of September 2009, then the request for administrative review made, according to the Appellants, between 30 September and 4 October 2009 would be in time.

24. Therefore, the question is whether the administrative decision was made and communicated on 23 July 2009 when the Circular was issued or whether it took effect when the deductions were made from the Appellants' pay in September 2009.

25. The Appellants challenge the status of the Circular as an instrument capable of being an administrative decision personal to them on the basis that it was a "General Staff Circular" and they claim that "[the Circular] can be likened to administrative issuances in the United Nations in that they are rules, policies or procedures intended for general application".

26. The former Administrative Tribunal held in *Andronov* as follows:

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that 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 direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions.³

27. The Circular provided as follows:

In response to the recent strike action – which resulted in the closure of UNRWA offices and installations for three days (**12 to 14 May inclusive**) – the following action will be taken based on the principle of no pay for days not worked.

12 and 13 May: 50% of staff absence will be covered by a payroll deduction from the next payroll; 50% will be recovered from annual leave.

³ Former Administrative Tribunal Judgment No. 1157 (2003).

14 May 2009: Payroll deduction will be made for all staff who were absent from work on that day (1 work day).

Staff members who prefer to work the extra day instead of using annual leave may submit a proposal to this effect through their supervisor and Department Director. Once the compensation proposal is implemented, the annual leave day will be returned to the staff member's leave balance.

28. It is the considered view of this Tribunal that, applying the test set out in *Andronov*, the Circular contained therein all the necessary components referred to in *Andronov* to give rise to legal consequences for the striking staff. More particularly, it contained information which affected the rights of the staff members in question, given that it was being clearly communicated to the relevant staff members that deductions were going to be made from their salaries. Therefore, vis-à-vis the striking staff members it had individual application.

29. We are thus satisfied that the UNWRA DT committed no legal error when it decided that the relevant administrative decision for the purpose of former Area Staff Rule 111.3 was the decision communicated by way of the Circular. We are also satisfied that the UNWRA DT correctly determined the *terminus a quo* as 23 July 2009 for the purposes of computing the time for requesting administrative review. The appeal on this issue is thus dismissed.

30. Furthermore, we uphold the UNWRA DT's determination as to the limits of its jurisdiction as set out in Article 8(3) of its Statute. Article 8(3) provides as follows:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend, waive or extend the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review.

31. Therefore, while the former Area Staff Rules provided the AJAB with the authority to waive time limits for administrative review in exceptional circumstances, no such discretion is vested in the UNWRA DT. This has been consistently affirmed in the jurisprudence of the Appeals Tribunal:

This issue should now be considered as settled because the Appeals Tribunal in *Costa*, and other judgments such as *Mezoui*, *Samardzic*, and *Trajanovska* has consistently

held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review.⁴

32. By reason of all of the foregoing, the UNWRA DT correctly determined that the Appellants' claims were not receivable.

The Appellants' submission that the UNWRA DT committed an error of procedure when it allowed the Respondent to be part of the proceedings

33. The Appellants maintain that the UNWRA DT erred procedurally when it permitted the Respondent to participate in the proceedings and to submit a late reply, in the absence of any written order to that effect by the UNRWA DT.

34. The Appellants submitted their applications between 12 November 2009 and 16 December 2009. The Respondent's reply was therefore due by 15 January 2010 but was only submitted on 5 April 2012. The Appellants thus assert that the UNWRA DT committed an error of procedure when it relied on the Respondent's reply when determining the issue of receivability.

35. Whether or not the UNWRA DT erred procedurally in admitting the Respondent's reply, in the absence of an Order to that effect, such error does not, of itself, vitiate the UNWRA DT's decision that the applications were not receivable *ratione temporis*.

36. We uphold the UNWRA DT's own observation set out at paragraph 22 of its Judgment as follows:

Furthermore, the Tribunal wishes to point out that irrespective of whether or not the Respondent complied with the time limits as set forth in former Area Staff Rule[...] 111.3, the record shows that the Applicants did not pursue their claim with due diligence as they did not request review of the contested decision within the mandatory time limits.

37. At paragraph 34 of their submission to the Appeals Tribunal, the Appellants maintain that the UNWRA DT failed to address the Respondent's tardiness although it had indicated that it would do so.

⁴ *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108, para. 27 (internal citations omitted).

38. Notwithstanding the Appellants' submission on the above issue they have not demonstrated to this Tribunal how the UNWRA DT's consideration of their applications was prejudiced by reason of the Respondent's participation in the proceedings, albeit that the Agency's participation arose on foot of a reply filed some two years and two months past the deadline provided for in former Area Staff Rule 111.3.

39. The issue of receivability is a question of law and as the UNWRA DT itself noted at paragraph 17 of its Judgment, "the crucial question" was whether the applications were receivable. Irrespective of whether or not the Respondent participated in the proceedings, the issue of receivability had to be determined by the UNWRA DT as a matter of law. This ground of appeal is thus dismissed.

The Appellants' submission that the UNWRA DT erred in law when it restricted the observations to the Respondent's reply to those Appellants who had requested leave to file such observations

40. The Appellants take issue with the procedure adopted by the UNWRA DT in the above regard. Only three of the Applicants before the UNWRA DT sought leave to file observations on the Respondent's reply. There is no suggestion that the UNWRA DT failed to consider such observations. We can identify no error of law or procedure in the approach adopted by the UNWRA DT in deciding to accept the observations as only being made by those who had sought leave and rejecting the observations in respect of the Applicants who did not seek leave. No prejudice could have been occasioned to those Applicants who had not sought leave. That having been said, we are quite satisfied that had any legal principle of general application been identified by the UNWRA DT from the observations it did receive, such legal principles would have been applied in the context of all the Applicants, where relevant. We find no merit in this ground of appeal and we dismiss it accordingly.

Judgment

41. The Appellants' appeal is dismissed in its entirety and the Judgment of the UNWRA DT is affirmed.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar