
ADMINISTRATIVE TRIBUNAL

Judgement No. 866

Case No. 944: KHAWAM

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Hubert Thierry, President; Ms. Deborah Taylor
Ashford; Mr. Julio Barboza;

Whereas, on 17 September 1996, George Khawam, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA or the Agency, filed an application requesting the Tribunal:

- "(a) To rescind the decision of 23 October 1995 by the Officer-in-Charge, Department of Administration and Human Resources that the repatriation grant upon the Applicant's separation from UNRWA will not be paid at that time (...);
- (b) To order the Commissioner-General to pay the Applicant the repatriation grant in the amount of US\$23,594.- within two weeks after the Tribunal's decision;
- (c) To order the Commissioner-General to pay the Applicant interest at the rate of 12%, or at such higher rate as the Tribunal may determine, computed as of the date of the Applicant's submission of documentary evidence of his relocation to Damascus, i.e. 17 July 1995 (...) until the date [on which] payment of the repatriation grant is received by the Applicant;

- (d) To order the Commissioner-General to pay the Applicant damages in the amount of US\$3,000.- for the extraordinary and unjustified delays in having the Applicant's request decided and his appeal considered by the Joint Appeals Board;
- (e) To quash the Commissioner-General's decision to refer the Applicant's case back to another Appeals Board for review (...) and to order the Commissioner-General to pay damages in the amount of US\$3,000.- or such other amount as the Tribunal may determine for interfering with the independence of the Joint Appeals Board;
- (f) To order the Commissioner-General to pay the Applicant the amount of US\$20,000.- or such higher amount as the Tribunal may determine, for moral injury suffered as a result of patent discrimination of the Applicant and thus of grave violation of a fundamental principle of employment of staff of the Organizations of the United Nations Common System;
- (g) To order the Commissioner-General to award the Applicant costs for the preparation and submission of his appeal in the amount of US\$8,500.- (United States Dollars eight thousand, five hundred)."

Whereas the Respondent filed his answer on 19 November 1996;

Whereas, on 16 December 1996, the Applicant submitted an amplification of his original application, containing pleas which read as follows:

- "(a) In the event that the Tribunal considers that it should also deal with the decision of the Commissioner-General of 4 November 1996, the Applicant petitions the Tribunal to rescind equally this decision and to order the Commissioner-General to pay the Applicant the amounts as specified in paragraphs II (b), (c), (d), (e) and (f) of his application.
- (b) The Applicant also petitions the Tribunal to award him additional costs in the amount of US\$1,000.- (United States dollars one thousand), making a total of US\$9,500.- (United States dollars nine thousand, five hundred)."

Whereas the Applicant filed written observations on 10 January 1997;

Whereas, on 19 May 1997, the Respondent submitted comments on the Applicant's written observations;

Whereas, on 9 July 1997, the Applicant submitted observations on the Respondent's comments of 19 May 1997;

Whereas, on 11 November 1997, the Tribunal requested the Applicant's counsel to provide it with certain information, which he did, on 14 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 5 October 1988, on a temporary indefinite appointment as an Area staff member, as an Assistant Data Processing Training Officer, at the grade 13, step I level, at UNRWA Headquarters, Vienna, with a probationary period of one year. On 11 September 1989, the Applicant's appointment with the Agency was confirmed. On 10 December 1990, the Applicant's post was reclassified to Training Officer (PC [Personal Computer] Applications), at the grade 15 level. With effect from 1 January 1993, the Applicant was transferred to the post of Systems Analyst/Trainer. On 27 October 1994, the Director of Administration and Human Resources wrote to the Applicant, declaring him provisionally redundant with effect from 1 November 1994, in accordance with the provisions of paragraph 14 of personnel directive A/9. The Applicant separated from the Agency's service by reason of redundancy on 12 July 1995.

On 4 July 1995, the Applicant wrote to the Director of Administration and Human Resources, requesting that his services be terminated with effect from 12 July 1995, "as [the Applicant] was

not offered a suitable placement as provided for under the provisions of paragraph 14.4 of personnel directive A/9." In a

reply dated 6 July 1995, the Chief, Personnel Services Division, informed the Applicant that his request for separation with effect from 12 July 1995 had been approved and, further, that he was "entitled to a repatriation grant in accordance with the provisions of Rule 29 of the Annex."

The Applicant separated from service on 12 July 1995 and flew to Damascus, Syria the following day. On 17 July 1995, the Applicant submitted to the Deputy Chief, Personnel Services Division, a request for the repatriation grant, accompanied by a certificate from a notary public confirming his residence in Damascus, a deed of ownership of his house in Damascus and his one-way air ticket to Damascus. On the Applicant's routing slip requesting payment of the repatriation grant were written the words "Chief, Acc'ts, Approved for payment."

On 20 July 1995, the United Nations Office in Vienna (UNOV) wrote to the Applicant, offering him an appointment as a Computer Systems Assistant, with effect from 27 July 1995 until 31 December 1995. The Applicant accepted this offer on the following day.

On 7 August 1995, the Applicant wrote to the Director of Administration and Human Resources, inquiring why payment of his repatriation grant had not been effected. He enquired again on 5 September 1995. In a reply dated 6 September 1995, the Director of Administration and Human Resources informed the Applicant that "the matter is being dealt with on a priority basis." The Applicant sent further letters seeking immediate payment of the repatriation grant on 11 and 26 September and on 16 October 1995. In his letter of 16 October 1995, the Applicant referred to the payment of the repatriation grant to "a staff member, in identical circumstance[s] to [his]."

On 23 October 1995, the Officer-in-Charge, Department of Administration and Human Resources, advised the Applicant that "the

repatriation grant requested by you will not be paid at this time,

since the evidence you have presented of relocation to Damascus is considered inconclusive." On 6 November 1995, the Applicant wrote to the Director of Administration and Human Resources, seeking a review, under area staff rule 111.3, of the decision not to pay him the repatriation grant. To this letter, the Applicant annexed certificates from a Notary Public in Damascus, attesting to the residence of the Applicant's dependants in that city, as well as a certificate from the Syndicate of Engineering, dated 15 August 1995, stating that the Applicant was practicing that trade in Damascus.

In a reply dated 14 November 1995, the Director of Administration and Human Resources confirmed to the Applicant his former view that the Applicant had produced insufficient evidence to justify payment of the repatriation grant.

On 11 December 1995, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (AJAB). The AJAB adopted its report on 19 May 1996. Its evaluation, judgement and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGEMENT

...

c. The Board noted the Administration's contention that 'the decision of the Administration was ... inherently a matter of managerial discretion' and resolved that while the Administration has 'managerial discretion' to evaluate the evidence presented to it by the Appellant and to determine whether it is conclusive for the purposes of Rule 29(8) of the Annex to the Area Staff Rules, its discretion is not an unlimited one.

The Appellant submitted documentary evidence that he had relocated to Damascus, i.e., away from the country of the last duty station, thus, in the opinion of the Board, fulfilling the requirement of the said Rule.

This evidence was initially accepted by the Administration as is clear from the note of the Deputy Chief,

Personnel Services Division on the Routing Slip submitted to him by the Appellant on 17 July 1995.

The Administration later changed its position and considered the evidence presented by the Appellant inconclusive **without specifying what further evidence** [was] required.

d. The Board noted that there is nothing in the rules that binds the staff member to reside away from the country of his last duty station **for a specific period of time** in order to qualify for payment of the repatriation grant.

Furthermore, the offer of employment with UNOV was made after the Appellant's separation from the Agency's service, his repatriation to Damascus and submission of [his] claim for payment of the repatriation grant. The Appellant's application for employment outside the Agency has no relevance to payment of his repatriation grant, particularly [since] the official offer of employment was made after his separation from the Agency's service and his repatriation to Damascus.

e. The Board here noted the Appellant's contention that 'It is known that the Administration required much less documentation than I had presented to authorize payment of the repatriation grant to other staff members. I am aware of one case where a former staff member signed a contract with another UN Agency before separation from UNRWA and [the] repatriation grant was paid. It can safely be assumed that [the] repatriation grant was paid in a number of cases where:

(1) Staff members retired in Vienna;

(2) Staff members accepted employment with another organization in Vienna (or even UNRWA), either before leaving UNRWA or shortly afterwards'.

The Administration did not deny the above contention, stating that 'A thorough review of Agency records has not revealed any other case where the bona fides of the former staff member's intention to relocate have been questioned', and further added that 'the fact that the Administration may or may not have accepted similar documentation in the past does not in any way create a precedent for payment of the grant on the basis of the documentation submitted by the

Appellant'.

The Board is of the opinion that Agency practice in similar cases should be complied with to ensure consistency in the administrative decisions and the conformity of those decisions with applicable rules.

IV. RECOMMENDATION

23. In view of the foregoing, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed, and that the Appellant be paid the repatriation grant."

On 24 June 1996, the Commissioner-General transmitted to the Applicant a copy of the AJAB's report and informed him as follows:

"I enclose a copy of the Area Staff Joint Appeals Board's report of 19 May 1996, addressing your appeal against the Administration's decision to withhold payment of your repatriation grant on your separation from the Agency.

Regrettably, the Board in your case was improperly constituted, as one of the Board members, Mr. ..., had lobbied senior administrative officials on your behalf and thus had a patent conflict of interest. Although this matter was brought to the attention of the Board's Chairman, he inexplicably failed to disqualify Mr. ... from the Board. As you will appreciate, under these circumstances I cannot accept the conclusions and recommendations of the report. However, in view of your right to have your case reviewed by a Joint Appeals Board, I have decided to refer your case back for review by a properly constituted Board.

By copy of this letter, I am instructing the Secretary, Area Staff Joint Appeals Board to arrange for the review of your case at the earliest possible time."

On 22 September 1996, the Secretary, AJAB, informed the Applicant of the composition of the new Board, to which no objection was received. The Board adopted its report on 30 September 1996. Its evaluation, judgement and recommendation read, in part, as

follows:

"III. EVALUATION AND JUDGEMENT

...

The Appellant submitted documentary evidence that he had relocated to Damascus, i.e., away from the country of the

last duty station, thus in the opinion of the Board, fulfilling the requirements of the said rule.

This evidence was initially accepted by the Administration as is clear from the note of the Deputy Chief, Personnel Services Division on the Routing Slip submitted to him by the Appellant on 17 July 1995.

5. The Administration later changed its position and considered the evidence by the Appellant inconclusive. The Administration based its position on the fact that the Appellant was offered a short term appointment with the United Nations Office in Vienna on 20 July 1995, which he accepted with effect from 27 July 1995.

6. The Board noted that there is nothing in the rules that binds the staff member to reside away from the country of his last duty station for a specific period of time, or not to accept another job in order to qualify for payment of the repatriation grant.

7. The Board here noted the Appellant's contention that 'It is known that the Administration required much less documentation than I had presented to authorize to payment of the repatriation grant to other staff members. I am aware of one case where a former staff member signed a contract with another United Nations Agency before separation from UNRWA and repatriation grant was paid. It can safely be assumed that repatriation grant was paid in a number of cases where:

a. Staff members retired in Vienna;

b. Staff members accepted employment with another organization in Vienna (or even UNRWA), either before leaving UNRWA or shortly afterwards.'

The Administration did not deny the above contention, stating that 'A thorough review of Agency records has not revealed any other case where the intentions of the former staff member to relocate have been questioned'.

8. The Board also notes that by paying the repatriation grant to the Appellant, the Administration may be right from an ethical point of view, and since the Administration did not present any evidence to its allegations, it will remain a mere point of view.

IV. RECOMMENDATION

23. In view of the foregoing, and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed, and that the Appellant be paid the repatriation grant."

On 4 November 1996, the Commissioner-General transmitted to the Applicant a copy of the new AJAB report and informed him as follows:

"I enclose a copy of the report of the Area Staff Joint Appeals Board, submitted to me under cover of a memorandum dated 30 September 1996, on your appeal. You will note that the Board was of the opinion that the evidence which you had submitted to the Administration in support of your claim for a repatriation grant was sufficient to prove that you had established residence in a country other than Austria. The Board noted that the Administration did not deny that repatriation grants had been paid to other former staff members following the submission of evidence similar to that provided by you and was also of the opinion that the Administration's contentions were unsupported by evidence. The Board recommended that you be paid the repatriation grant.

I have carefully reviewed the Board's report and noted its conclusions. A staff member bears the onus of proving that he or she has relocated to another country: the Administration bears no onus of proof. What evidence of relocation that will be sufficient under the rules may vary depending on the facts of each case. The evidence produced by you was equivocal and therefore insufficient to prove relocation to Syria, particularly in the light of the circumstances of your appointment at UNOV. Accordingly, your appeal is dismissed. I point out, however, that provided you relocate to a country outside of Austria within two years of the date of your separation, the repatriation grant will be paid to you.

..."

On 17 September 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is entitled to be paid the repatriation grant since he has fulfilled the obligation to show that he has relocated to a country outside his duty station. The Respondent has not indicated why the documents submitted by the Applicant were considered inconclusive or insufficient.

2. Former staff members of UNRWA in Vienna who are similarly situated have been paid repatriation grants. Indeed, some staff members were paid repatriation grants and then returned to Vienna for work or retirement shortly after relocation.

Whereas the Respondent's principal contentions are:

1. The application is not receivable because it does not relate to a final decision of the Respondent.

2. The Applicant is not entitled to a repatriation grant because he has not produced sufficient evidence of relocation.

The Tribunal, having deliberated from 10 to 26 November 1997, now pronounces the following judgement:

I. The Tribunal has considered the procedure instituted by the Applicant before the Advisory Joint Appeals Board (AJAB). Questions relating to the potential conflict of interest of a member of the first panel were raised, resulting in the establishment of a second panel of the AJAB. The second panel's recommendations were the same as those of the first panel. Without entering into the merits of the procedural flaws that may have marred the recommendations of the

first panel, the Tribunal wishes to emphasize that such issues should be dealt with at the time they arise, so as to obviate the need for additional time and expense.

II. The Applicant, a Syrian national who had been working in Vienna, applied for the repatriation grant on his return to Syria. In support of his application, he produced the Deed of Ownership for his house in Damascus and a certificate from a Notary Public that he was residing in that city. Subsequently, the Applicant produced a certificate from the syndicate of Engineers, stating that he was practicing as an engineer in Damascus.

III. The Tribunal finds that the determination of this case turns on the sufficiency of the documentary evidence the Applicant has presented to substantiate his claim, as well as an analysis of the concept of repatriation. The Tribunal notes that the applicable rule is staff rule 29, Rev. 2, Amendment 18, which provides in paragraph 4 that:

"[e]vidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station."

Normally, evidence of relocation is assessed and then accepted; the repatriation grant is paid and, thereafter, the Agency does not usually monitor the movements of the recipient of the grant.

IV. The Tribunal recalls the special circumstances that existed in this case: the Applicant was residing in Vienna and had obtained a fixed-term contract to continue working with the United Nations Office in Vienna (UNOV). The Tribunal views as very significant the fact that the Agency had definitively ascertained the Applicant's acceptance of a position with UNOV before it reached a decision not to award him the repatriation grant. This was the primary reason for which the Agency found the documentary evidence submitted by the

Applicant to be "inconclusive". The Tribunal also notes that the procedure for payment of the repatriation grant, which the Applicant initiated by means of a routing slip, was not completed.

V. The Applicant travelled to Damascus, where he stayed for only a few days before returning to Vienna to take up his new post. The Tribunal finds that such a short stay does not entitle him to the repatriation grant. An essential requirement for that grant is the residence of the recipient in his or her home country or in another country "other than that of [his or her] last duty station." The Applicant's last duty station was Vienna, where he was obviously intending to remain. The argument that the Staff Regulations and Rules do not specify a period of residence necessary to comply with the residence requirement does not mean that the period the Applicant spent in Damascus was sufficient. The Tribunal holds that the reasonableness standard must apply in this case. It finds that a period of a few days could not, by any means, be considered reasonably sufficient. The Tribunal considers it important that the Agency did not deny the Applicant the repatriation grant, but merely postponed payment of the grant until it could be satisfied that his repatriation was real.

VI. The Tribunal does not find that the Administration's conduct toward the Applicant revealed any discrimination against him. If other employees were erroneously given repatriation grants, the fact that the law was correctly applied in the Applicant's case does not constitute discrimination. Moreover, the Applicant has produced no evidence to show that the circumstances of those who obtained repatriation grants were the same as his own, i.e., that the Agency knew or should have known that they were going to remain in Vienna.

VII. For the foregoing reasons, the Tribunal rejects the application in its entirety, including the Applicant's request for costs.

(Signatures)

Hubert THIERRY
President

Deborah Taylor ASHFORD
Member

Julio BARBOZA
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary