UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1023

Mohammed Hamdan Sirhan
(Appellant/Respondent)

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Sabine Knierim Judge Jean-François Neven
Case Nos.:	2019-1290 & 2019-1291
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Sirhan:	Self-represented
Counsel for Commissioner-General:	Michael Schoiswohl

JUDGE GRAEME COLGAN, PRESIDING.

1. This case arose from the decision by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency) to terminate the service of Mr. Mohammed Hamdan Sirhan on medical grounds. The UNRWA Dispute Tribunal (UNRWA DT) found that the Agency's decision to convene a medical board "less than two months" after Mr. Sirhan's service-incurred injury in order to evaluate his fitness for continued service was manifestly unreasonable. It ordered rescission of the contested decision or payment of USD 13,500 as in-lieu compensation. Both parties have appealed against the UNRWA Dispute Tribunal's Judgment. For the reasons set out below and by a majority (Judge Colgan dissenting), Mr. Sirhan's appeal is dismissed, the Commissioner-General's appeal is allowed, and the Judgment of the UNRWA Dispute Tribunal is set aside.

Facts and Procedure

2. Effective 9 August 2001, Mr. Sirhan joined the Agency on a fixed-term, monthly-paid appointment as a Sanitation Labourer at the Jarash Camp, Jordan Field Office (JFO).

3. After having completed 10 years of qualifying service with the Agency, Mr. Sirhan's appointment was converted to a "temporary indefinite appointment", effective 1 January 2012.

4. For reasons that are irrelevant to this matter now for decision, on 26 August 2012, Mr. Sirhan was transferred to the Baqaa Camp, JFO, effective 1 September 2012.

5. On 28 March 2017, while trying to lift a heavy garbage container, Mr. Sirhan experienced severe low back pain. He was taken first to an UNRWA clinic and then to a hospital in Jarash where he received first aid and had an LSS X-Ray examination. A private orthopedist (apparently provided by the Agency) diagnosed muscle strain and recommended one-month's sick leave for him. Mr. Sirhan took that leave, apparently with the Agency's agreement. There is no indication from the judgment appealed against whether there was any further medical certification from the same orthopedist or any other professional expert, or whether, and if so when, this was conveyed to the Agency.

6. On 3 May 2017, the Field Human Resources Officer, Jordan (FHRO/J) requested that a medical board be convened to evaluate Mr. Sirhan's fitness for continued service with the Agency in his current post or any other manual worker post. On 16 May 2017, the Deputy Chief, Field Health Programme (D/C/FHP) convened the Medical Board consisting of three medical practitioners (two heads of Medical Centres and one Medical Officer). The Medical Board met at the Jarash Health center on 24 May 2017 to examine Mr. Sirhan.

7. On 28 September 2017, the Medical Board concluded that Mr. Sirhan was unfit for continued service with the Agency as a Sanitation Labourer, but he was fit to work as a Messenger. The Medical Board also concluded that paragraph 7 of Area Staff Rule 109.7 which provides for payment of a supplemental benefit to a staff member suffering from a total and permanent disability due to service-incurred injury was not applicable to Mr. Sirhan's situation.[1] On the same day (28 September 2017), the C/FHP concurred with the Medical Board's conclusion, and, on 9 October 2017, the Director of UNRWA Operations, JFO (DUO/J) concluded that Mr. Sirhan was medically unfit for continued service with the Agency as a Sanitation Labourer, but he was fit to work as a Messenger.

8. On 11 November 2017, the Medical Board issued an addendum to "further explain" its 28 September 2017 findings and conclusions. It read in part:

> **Diagnosis**: Mr. Sirhan has lumbar disc disease as evidenced by the medical history, examination, radiological investigations and medical reports.
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> **Prognosis**: Lumbar disc disease is a lifelong condition. Patient should continue to avoid carrying heavy objects even if some cases may or may not improve by surgical treatment.
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> **Analysis**: [D]ue to his current condition, [t]he patient should not carry heavy objects, bend, stand or push heavy objects, therefore he cannot work as [a] sanitation laborer, a job that requires pushing a garbage kart or lift[ing] heavy objects, also he cannot work as school attendant or door keeper cleaner, as both functions require lifting or pushing heavy objects, furniture, bending etc. [T]herefore[,] the medical board concluded that he is unfit to work in his current post as [a] sanitation laborer. However, he is fit to work as a messenger.

[1] Paragraph 7 of Area Staff Rule 109.7 reads: "Where the injury or illness of a staff member has resulted in total and permanent disability of such a nature that the staff member is obliged to depend, for his/her essential personal needs, on the attendance of another person, either constantly or occasionally, and such attendance entails expense, the staff member shall receive a supplemental benefit representing the difference between the death benefit which would have been payable in the case of death under rule 109.8 and the standard disability benefit under this rule."

9. On 21 November 2017, the Head, Field Human Resources Office, JFO (H/FHRO/J) informed Mr. Sirhan that, effective 11 December 2017, his service would be terminated on medical grounds, as no vacant post of Messenger was available in which to place him. Yet again the UNRWA DT Judgment under appeal does not record what happened to Mr. Sirhan, either as to his work or medical circumstances, during the period between early May 2017 when his first certificate for sick leave expired and when his service was terminated, a period of about seven months. It is unfortunate that the absence of these details as we have outlined in this and previous paragraphs has made decision of these appeals more difficult.

10. Mr. Sirhan challenged his termination by first requesting a decision review, but which was not responded to by UNRWA, and then applying to the UNRWA Dispute Tribunal.

11. In its Judgment No. UNRWA/DT/2019/026 dated 22 May 2019, the UNRWA Dispute Tribunal ordered rescission of the decision to terminate Mr. Sirhan's service on medical grounds or payment of USD 13,500 compensation to Mr. Sirhan if he was not to be reinstated. The UNRWA Dispute Tribunal considered that the Agency's decision to convene a medical board less than two months after Mr. Sirhan's service-incurred injury in order to examine his fitness for continued service was manifestly unreasonable. That was said to have been because the Agency had failed to give Mr. Sirhan an "adequate time for recovery",[2] in violation of Area Staff Rule 106.4. It noted that even the Medical Board did not specify that Mr. Sirhan could not or would not recover within a reasonable time. In the view of the UNRWA Dispute Tribunal, Mr. Sirhan's injury was a muscle strain and there was no evidence that he would never recover. Estimating that Mr. Sirhan had a 75 per cent chance of recovery and resumption of his duties, the UNRWA Dispute Tribunal set the monetary compensation as an alternative to rescission at 75 per cent of Mr. Sirhan's two-years' net base salary, or USD 13,500. However, for reasons of lack of evidential proof, the UNRWA Dispute Tribunal declined to award Mr. Sirhan any moral damages.

12. Both parties have appealed the UNRWA Dispute Tribunal Judgment to the United Nations Appeals Tribunal (the Appeals Tribunal or this Tribunal). Mr. Sirhan filed an appeal on 17 July 2019, to which the Commissioner-General filed his answer on 13 September 2019. The case was registered under Case No. 2019-1290. The

[2] Impugned Judgment, para. 50.

Commissioner-General filed an appeal on 19 July 2019. No answer to that appeal was received from Mr. Sirhan. The case was registered under Case No. 2019-1291.

Submissions

Case No. 2019-1290

Mr. Sirhan's Appeal

13. Mr. Sirhan's grounds of his appeal are essentially against the remedies allowed him by the UNRWA Dispute Tribunal. First, he says that the UNRWA DT erred in fact and in law in ordering the payment of USD 13,500 as an alternative to the rescission of the contested decision. To effectively rescind the contested decision, the UNRWA DT ought to have ordered his reinstatement and awarded him financial compensation equal to all of the wages that had been denied him as a result of the termination decision.

14. Next, the UNRWA DT erred in setting the in-lieu compensation at 75 per cent of Mr. Sirhan's two-years' net base salary. He should be paid a larger sum that would be appropriate and commensurate with his 18 years of service as a sanitation labourer for the Agency, considering that he was 45 years of age when his service was terminated, he is a Palestinian refugee living in Jordan without a national identification number and he has no other sources of income to support his family of 11 members.

15. The UNRWA DT erred by failing to order that Mr. Sirhan be paid all his salary, benefits and entitlements including access to a health insurance policy.

16. The UNRWA DT erred in disregarding the fact that the termination had deprived Mr. Sirhan of an opportunity to be promoted to a higher-level position, for example of sanitation supervisor. The Agency issued a notice of vacancy in that role in January 2019. Mr. Sirhan meets all the criteria for that position. However, his application was rejected on the ground that the position was restricted to internal applicants.

17. The UNRWA DT erred in not awarding Mr. Sirhan any moral damages for the psychological harm in the form of social, practical, health and family related damage that he suffered, despite the medical evidence and names of witnesses that he had provided. It failed to give Mr. Sirhan sufficient time to present his evidence.

18. Mr. Sirhan requests that the Appeals Tribunal affirm the UNRWA Dispute Tribunal's decision to rescind the contested decision. He also requests that this Tribunal order his reinstatement, payment to him of all the wages and entitlements from the date of his termination from service to the date of his return to work as well as unspecified compensation for the loss of his health insurance policy, the opportunity for promotion and moral damages. He further requests that the Appeals Tribunal order that he be paid a monthly salary until the age of retirement if it were to insist on affixing an in-lieu compensation.

The Commissioner-General's Answer

19. The following are the Respondent's grounds opposing Mr. Sirhan's appeal. As a preliminary matter, the Commissioner-General refers to the various medical reports and written statements made after the date of the impugned Judgment, which Mr. Sirhan annexes to his appeal. He submits that the Appeals Tribunal should disregard all this new evidence, as it did not grant leave for Mr. Sirhan to submit it.

20. The UNRWA DT did not err by fixing an amount of compensation that the Agency may elect to pay as an alternative to rescission of the contested decision, in compliance with a mandatory requirement set forth in Article 10(5)(a) of the UNRWA Dispute Tribunal Statute.

21. Mr. Sirhan's plea for an increased quantum of the in-lieu compensation is not receivable. The in-lieu compensation is not intended to compensate for all the possible harm suffered by the injured person, and there is more than one methodology by which the trial court can assess damages. As Mr. Sirhan has not challenged the principled approach applied by the UNRWA Dispute Tribunal, there is no basis to consider an enhanced award of compensation in lieu of rescission.

22. It is clear from the record that the UNRWA Dispute Tribunal considered Mr. Sirhan's plea for payment of salaries, entitlements and receivables, but it arrived at a different conclusion. The UNRWA DT therefore did not fail to exercise its jurisdiction in this regard, nor did it err by not ordering the Agency to pay such compensation.

23. The UNRWA Dispute Tribunal did not err by not awarding Mr. Sirhan any compensation for moral damages. Contrary to his assertion that the UNRWA Dispute Tribunal had not given him sufficient time to present his evidence, Mr. Sirhan was

aware of the need to present evidence of harm suffered, he was given ample time and opportunity to do so, and he did make further submissions and adduce further evidence through several motions that he filed before the UNRWA Dispute Tribunal issued the impugned Judgment. The UNRWA Dispute Tribunal carefully reviewed the evidence on record and correctly concluded that Mr. Sirhan had failed to provide the required proof of harm in support of his request for moral damages.

24. Mr. Sirhan is seeking, for the first time on appeal, compensation for expenses incurred for treatment in hospitals and clinics as well as compensation in the form of a promotion to a higher-level position. These claims may not be introduced at this stage since they were not brought before the UNRWA Dispute Tribunal. Moreover, the relief that Mr. Sirhan is seeking in the form of a promotion falls outside the scope of relief that the UNRWA DT can award.

25. The Commissioner-General requests that the Appeals Tribunal dismiss Mr. Sirhan's appeal in its entirety.

Case No. 2019-1291

The Commissioner-General's Appeal

26. The following are the Commissioner-General's grounds of appeal. As a preliminary matter, he requests that the Appeals Tribunal consolidate the present case and the case of *Abu Fardeh*,[3] as the two judgments under appeal are "nearly identical in their considerations and conclusions, both in the legal issues considered and in the outcome". In *Abu Fardeh*, the Commissioner-General is also the Appellant, and he says he has presented the same grounds as those presented in the present appeal. The consolidation would therefore be appropriate for the fair and expeditious management of the case and to do justice to the parties.

27. On the merits, the Commissioner-General submits that the UNRWA DT exceeded its competence and erred in fact and law by rescinding the contested decision to terminate Mr. Sirhan's service on medical grounds. First, the UNRWA Dispute Tribunal provided no reasons for departing from its previous decision on the issue of referral to a medical board.

[3] The Appeals Tribunal Case Nos. 2019-1283 and 2019-1285, in which both parties appeal UNRWA Dispute Tribunal Judgment No. UNRWA/DT/2019/023 (*Abu Fardeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*) dated 7 May 2019.

Its review of the decision to refer Mr. Sirhan to the Medical Board as an administrative decision appears to depart from its previous jurisprudence that such a decision cannot be considered as an administrative decision.[4]

28. Second, the UNRWA DT erred in law in its interpretation of Area Staff Rule 106.4 as requiring the Agency to give staff members "adequate time for recovery". Nothing in that staff rule requires the Agency to wait a particular period of time before it can refer a staff member to a medical board. The interpretation given by the UNRWA DT runs counter to the Area Staff Rules that allow the Agency to require staff to undergo medical examinations "at any time"[5] or "at such time or times as the Commissioner-General may consider necessary".[6] The Agency refers staff members to a medical board precisely to assist it in exercising its discretionary decision-making authority. To require the Agency to undertake a *prima facie* medical evaluation prior to referring staff to a medical board is manifestly unreasonable and is inconsistent with the purpose of the medical board proceedings as set forth in the relevant Area Staff Rules and UNRWA's Personnel Directive PD/A/6.[7]

29. Third, some of the findings of the UNRWA Dispute Tribunal regarding the reasonableness of the referral decision took into account irrelevant considerations such as the medical certificates that Mr. Sirhan had submitted only after the Medical Board's proceedings.

30. Finally, the UNRWA Dispute Tribunal exceeded its competence in setting Mr. Sirhan's chances of recovery and resumption of duty at 75 per cent. That determination was arbitrary and without basis, as the UNRWA Dispute Tribunal did not dispute the findings and conclusions of the Medical Board in Mr. Sirhan's case.

31. The Commissioner-General requests that the Appeals Tribunal allow his appeal and reverse the impugned Judgment.

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[4] As the most recent example, the Commissioner-General cites *Fahjan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2018/028.
[5] Area Staff Rule 106.2(9).
[6] Area Staff Rule 104.4.
[7] Personnel Directive PD/A/6/Amend. 72 titled "Medical Boards–authorities and procedures", effective 1 September 1998.

Considerations

32. We deal first with the Commissioner-General's application for the consolidation of this case with an appeal or appeals from the UNRWA DT's *Abu Fardeh* Judgment dated 7 May 2019. It was decided not to consolidate these two cases, because they concerned two different staff members with different medical and procedural circumstances; however, the cases have been decided simultaneously and by the same panel of the Appeals Tribunal Judges.

33. Next, we address the evidence that Mr. Sirhan wishes us to consider in support of his appeal but which, the Commissioner-General submits, was not before the UNRWA Dispute Tribunal and for which no leave to admit has been granted by this Tribunal. This consists of material relating to an application Mr. Sirhan made on 20 January 2019 to the Agency for appointment as a sanitation supervisor and includes, in particular, the Agency's response dated 22 January 2019. At that date, Mr. Sirhan had filed his application with the UNRWA DT and, as its judgment shows, he was engaging actively in interlocutory motions before that Tribunal. Indeed, these activities continued for several months after January 2019 before the Tribunal delivered its judgment in May 2019. So, while Mr. Sirhan must have been aware of this material, he failed, or chose not, to present it to the UNRWA Dispute Tribunal in support of his case. In these circumstances, he cannot now advance it for the first time on appeal, we decline leave to admit it, and we have had no regard to it.

34. Turning to the substantive appeals, it is logical to deal first with the Commissioner-General's appeal against the UNRWA Dispute Tribunal's Judgment on liability because if it is entirely successful, then questions of remedy for Mr. Sirhan will not arise for re-consideration. We will, nevertheless, address Mr. Sirhan's appeal subsequently.

35. The foregoing paragraphs are the judgment of all of us. The following paragraphs up to and including paragraph 54 are the judgment of the majority of us, Judges Knierim and Neven.

36. We find that the UNRWA DT exceeded its competence and erred in fact and law by rescinding the decision to terminate Mr. Sirhan's service on medical grounds. For reasons we articulate in our contemporaneous judgment in *Abu Fardeh*,[8] we accept that UNRWA's

[8] *Abu Fardeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1011.

decision to appoint, and take into account the report of, a medical board is able to be examined as part of the assessment of its justification in terminating Mr. Sirhan's service.

37. Firstly, we consider that Mr. Sirhan has not shown the existence of grounds to conclude that the Agency was not entitled to appoint the Medical Board as it did.

38. Area Staff Rules 104.4 (Medical examinations) and 106.2(9) (Sick leave) state:

> - Staff members may be required to undergo medical examinations at such time or times as the Commissioner-General may consider necessary.
>
> - A staff member may be required at any time to submit a medical certificate as to his/her condition or to undergo an examination by a medical practitioner nominated by the Director of Health.

39. Those provisions confer on UNRWA a very broad discretion to require a staff member to undergo a medical examination as it did with Mr. Sirhan. While it is not unfettered, it has not been shown that UNRWA exercised that discretion improperly. Mr. Sirhan had suffered from an injury and had been off work for a period of more than a month and his prognosis was uncertain. He was given an opportunity to provide his own medical input to the Board but did not do so. The Medical Board took time (some five months) to have Mr. Sirhan examined and to reach its conclusions about his disability and prognosis. In the present case, the decision to convene a Medical Board more than one month after Mr. Sirhan's service-incurred injury in order to examine his fitness for continued service with the Agency was reasonable.

40. Secondly, we find that the UNRWA DT erred in law in interpreting the Area Staff Rules as requiring the Agency to provide injured staff members adequate time for recovery before deciding to appoint a medical board to consider that staff member's future employment.

41. Such an implicit interpretation is contrary to the several express powers in those Rules allowing the Commissioner-General to require staff to undergo medical examinations at any time the Commissioner-General may consider it necessary (see above) and, contrary to what was decided by UNRWA DT, it has no basis in the Area Staff Rule 106.4 (Compensation for death, injury or illness attributable to service) which states:

> **AMOUNT OF COMPENSATION PAYABLE**
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> 3. The amount of compensation payable under this rule shall be the amount which would normally be payable in the circumstances of the case, but not necessarily in the form of a pension, under the workmen's compensation or labour law applicable in the Syrian Arab Republic provided that:
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> > (A) Where such compensation includes the cost of medical or hospital treatment, such treatment or ☐ospitalization shall be provided in Agency-operated or subsidised hospitals unless in exceptional circumstances the Agency authorises other arrangements;
> >
> > (B) the Agency will continue an incapacitated staff member in full pay status for a period not exceeding six months from the date of the injury or illness or until he/she is declared able to return to work or is offered a settlement for permanent disability whichever is earlier. Such payment of salary and allowances shall be in lieu of the payments of salary or partial salary which are provided by law for the period. Should temporary incapacity extend beyond six months, compensation payments for such further period will be determined in accordance with the workmen's compensation or labour law applicable in accordance with this rule.
>
> 4. All payments of salary or related emoluments whether they are based on workmen's compensation or labour laws or are pursuant to sub-paragraph (B) of paragraph 3 of this rule are considered compensation.

42. Area Staff Rule 106.4 only aims to protect and properly compensate the staff members who sustain a service-incurred injury. It cannot be interpreted as requiring the Agency to give the staff members in such situation "an adequate time for recovery" before considering whether separation on medical grounds could be justified. It also means that this provision does not require the Administration to provide for an adequate time for recovery before convening a Medical Board.

43. We conclude that the UNRWA DT erred by deciding that the decision to convene a medical board less than two months after Mr. Sirhan's service-incurred injury was unlawful and that, therefore, the termination was unlawful.

44. Thirdly, the UNRWA DT ignored both the Medical Board process established in the Agency's regulatory framework and the conclusions of the Board. The Medical Board concluded that Mr. Sirhan was "unfit for continued service with the Agency as Sanitation Labourer". Even after making its determination on 28 September 2017, and after the Agency had accepted this on 9 October 2017, the Medical Board issued a further report on

11 November explaining its earlier conclusions. It found that Mr. Sirhan was suffering from lumbar disc disease, a lifelong condition which necessitated cessation of carrying heavy objects. We infer that the events of 28 March 2017 when Mr. Sirhan first experienced severe lower back pain either identified this chronic disease or precipitated it so that it was fair for UNRWA to assume that this was not merely an injury from which he would recover in a reasonable time. We can add that if Mr. Sirhan had lumbar disc disease it does not matter whether he could have recovered from a muscle strain.

45. The UNRWA DT did not consider the medical investigation and the recommendations of the Medical Board to be procedurally flawed or biased. The decision of the UNRWA DT not to follow the conclusion that Mr. Sirhan was "unfit for continued service with the Agency as Sanitation Labourer" was only based on medical documents submitted by Mr. Sirhan after his examination by the Medical Board. A decision based on a regular medical process cannot be considered unreasonable without clear medical evidence and a medical assessment that neither the Agency nor the Tribunal is qualified to carry out. The purpose of the regulatory framework (Part VI of Personnel Directive PD/A/6/Amend. 72 titled "Medical Boards–authorities and procedures") is to establish a clear and fair process in which the rights and obligations of the parties are balanced and which can lead to clear and useful recommendations from the Medical Board. It is therefore not reasonable to consider that the documents submitted after the Medical Board, and which the Board did not have an opportunity to review, are as such relevant to rebut the medical conclusion and recommendations of the Board.

46. We conclude that the UNRWA DT erred in taking into account, in order to overturn the conclusions of the Medical Board, the contents of medical certificates produced by Mr. Sirhan after the Medical Board had reported to the Agency, when he had had the opportunity to present this evidence to the Medical Board before it had reached its conclusions. As the timeline of events shows, Mr. Sirhan had ample time to do so and no apparent explanation has been provided as to why he did not.

47. Finally, we address the recommendation of the Medical Board that if Mr. Sirhan was unfit for continued service with the Agency as Sanitation Labourer, "he [was] fit to work as a messenger".

48. Before notifying the decision to terminate Mr. Sirhan's appointment, the Agency affirmed that no such post was available. It appears that this statement was not challenged in the request for decision review or in the application filed with the UNRWA DT.

49. In addition, even if such an obligation exists for other categories of redundant staff members,[9] "the Agency's regulatory framework does not create any obligation on the Agency to find an alternative post for a staff member who is found unfit to continue his/her service in his/her current post".[10] The Tribunal which is only competent to review administrative decisions that are "alleged to be in non-compliance with (...) all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance"[11] is not competent to create an obligation to find the staff member a suitable placement.

50. We have been persuaded that the UNRWA DT's Judgment was erroneous and must be set aside. In these circumstances, it is strictly unnecessary for us to consider Mr. Sirhan's appeal which relates to the remedies awarded to him by the UNRWA DT, as our conclusions mean that he is not entitled to any remedies.

51. However, even if the UNRWA DT's Judgment had been affirmed on matters of liability, we would not have upheld one of the conclusions reached by it. That was its assessment of a 75 per cent chance of recovery and resumption of duty by Mr. Sirhan. We agree with the Commissioner-General that this assessment was made without evidence (indeed it was contrary to the findings of the Medical Board) and was arbitrary.

52. For the foregoing reasons, we dismiss Mr. Sirhan's appeal, allow the Commissioner-General's appeal and set aside the UNRWA DT's Judgment. Judge Colgan appends a dissenting opinion.

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[9] See UNRWA Area Staff Personnel Directive PD A/9/Rev. 10 titled "Separation from service", effective 23 June 2015, paras. 36-37.
[10] *Mansour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2019/057, para. 26..
[11] Statute of the UNRWA Dispute Tribunal, Article 2(1)(*a*).

Judgment

53. Mr. Sirhan's appeal registered under Case No. UNAT-2019-1290 is dismissed.

54. The Commissioner-General's appeal registered under Case No. UNAT-2019-1291 is granted and Judgement No. UNRWA/DT/2019/026 is set aside.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)	*(Signed)*
Judge Knierim Hamburg, Germany	Judge Neven Brussels, Belgium

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Judge Graeme Colgan's dissenting opinion

55. I agree with and adopt paragraphs 32-34 of the "Considerations" of the foregoing Judgment of the majority. The following is my dissenting Judgment.

56. I deal first with the Commissioner-General's appeal and start by observing that, generally, cases of personal injuries incurred at work and the consequential questions of recovery, long-term prognosis and alternative duties raise notoriously difficult issues for decision. These cases involving Mr. Sirhan are no exception. Here the subtle, but nevertheless significant, issues include that the injury occurred in the performance of the employee's work; that medical opinions as to cause, prognosis and underlying illness can and often do differ; that long-term prognosis can often not be predicted accurately until the worker's state of health has settled; the role, if any, of treatment, including surgery to treat the injury and mitigate against a repetition; whether, and if so to what extent, employers should be obliged to accommodate an injured staff member in an alternative role; and how a termination of an injured employee's employment should be undertaken by a good employer.

57. As always, it is necessary to start with the relevant rules, regulations and practices governing Mr. Sirhan's situation. The UNRWA Staff Regulations and Rules for Area Staff (as Mr. Sirhan was) contain several references to medical examinations in the course of employment. First, Area Staff Rule 104.4 under the heading "Medical Examinations", provides: "Staff members may be required to undergo medical examinations at such time or times as the Commissioner-General may consider necessary." Next, under the heading "Medical Certificates and Examinations", Area Staff Rule 106.2(9) provides: "A staff member may be required at any time to submit a medical certificate as to his/her condition or to undergo an examination by a medical practitioner nominated by the Director of Health". These rules do not, however, refer expressly to the requirements being undertaken by a medical board. Nevertheless, the Area Staff Rules allow a broad, but for reasons I will set out, not unfettered, discretion to the Agency to require a staff member to undergo a medical examination and reporting process.

58. Area Staff Rule 106.4 relating to compensation of staff for injury (among other conditions) provides at subparagraph (8) under the heading "Medical Examination": "Every person claiming under this rule or in receipt of compensation thereunder shall undergo such medical examination or examinations as the Commissioner-General may require, at such

time or times as he may consider necessary." While the issues in this case do not include Mr. Sirhan's entitlement to compensation, I have included this provision to emphasise its similarity to other relevant Rules, and the universal absence of any express link to the constitution, operation and reporting outcome of a medical board. Area Staff Rule 106.4(8) contains a similarly broad, but not absolute, discretionary power as does that under Area Staff Rule 104.

59. The foregoing powers to require a medical examination appear to rest with the Commissioner-General of UNRWA or its Director of Health. They do not refer to medical boards specifically.

60. Next are the relevant provisions of UNRWA's procedures and policies that do address medical boards expressly. These provisions cover the mechanics of convening a board and how it is to go about complying with its terms of reference which must be stated clearly. They are contained in Part VI of a document described as PD/A/6/A Amend. 72, which took effect on 1 September 1998. This latter document references Area Staff Rule 109.7(7) dealing with compensation for disability. Disability compensation may or may not have then been in issue for Mr. Sirhan, but that was not the reason at issue in this case that a medical board was established to examine and report on him. Rather, the Medical Board was convened in this case principally to assess Mr. Sirhan's continued performance of his duties as a sanitation labourer.

61. In the apparent absence of any purposive statements in UNRWA documentation affecting the establishment and operation of medical boards, it is useful to stand back and assess the overall purpose or intent of such a power, its exercise and the potential consequences of its use. That contextual examination will inform the interpretation and application of the express terms of this procedure.

62. UNRWA Medical Boards, their rationale, and their means of operation seem to be modelled on the same bodies established by the United Nations for its other agencies and operations. In circumstances where there is concern about an employee's long-term ability to perform his or her job as a result of illness or injury, and where there might be an entitlement to compensation for an injury, a medical board may be established to examine in detail the employee's condition and prognosis and to make recommendations to the Agency. A board's advice provides an expert and specialist medical assessment of a staff member's condition, prognosis for recovery and assessment of work capabilities, both likely and unlikely to be able

to be performed in the future. It is not a decision-making process affecting directly the staff member's future employment, but it is a very useful tool in the employer's decisions about the future of the employment relationship. It is the Agency's tool, but staff members examined and reported on have the ability to contribute to a board's assessment of their conditions including by providing their own medical assessments of their conditions. Although a medical board is able, by being informed of the relevant requirements of a staff member's current job, to assess the staff member's ability to continue to perform that job, it is unclear how a board is able to assess, as occurred in this case and has in others recently considered by us, that the staff member is able to perform only one other particular job-type. In this case, the Board concluded that Mr. Sirhan could not continue to perform the physical activities required of a sanitation labourer, but nevertheless recommended that he could perform the tasks expected of a messenger. Its recommendations did not address his ability to perform any other role for UNRWA, but nor did it rule out his ability to perform some role other than that of messenger.

63. A medical board is constituted for a specific referral and so can include particular medical expertise on the employee's particular condition. Although a board's report is recommendatory, it is nevertheless in practice a very significant document affecting at least two things: first, the employee's employment, including in the long term; and, second, entitlement to compensation for the injury and for loss of employment. A board's recommendations can result in loss of the employee's employment in circumstances beyond the employee's control and in which the employee is without fault. Mr. Sirhan's is an example of this extreme consequence. The establishment of a medical board is a powerful tool in United Nations employment relations generally, and, logically, no less in UNRWA's.

64. As just noted, Mr. Sirhan's case is a good example in practice of the power and significance of a medical board. Mr. Sirhan suffered a work injury after many years of performing, sometimes heavy, manual labour for UNRWA. A Medical Board recommended that he no longer work as previously but said that he could continue to work, although not in a job requiring the lifting of heavy weights. The Board recommended that Mr. Sirhan could perform the job of a messenger. UNRWA accepted the Board's recommendations. It then concluded promptly that it had no vacancies in the particular job field of messenger. At the age of 45 years and with a large extended family to support, Mr. Sirhan's long-standing employment was ended. It is unclear from the Judgment under appeal whether Mr. Sirhan

received compensation for his loss of employment. While that is a very important consideration for Mr. Sirhan himself and his dependents, it is not an issue that is strictly necessary for the decision of these appeals.

65. As I have noted already, UNRWA Staff Rule 104.4 (Medical Examinations) provides that a staff member "may be required to undergo medical examinations at such time or times as the Commissioner-General may consider necessary". Although broad and non-specific, this is not an unfettered discretion. Medical examinations may be, and frequently are, intrusive (both physically and emotionally) and involve the disclosure of intimate and private information. They may involve the taking and analysis of bodily samples. Employees do not have, or at least may perceive they do not have, a real choice other than to submit to them at least without putting their continued employment seriously at risk.

66. The Commissioner-General must have, and be able, to show objectively if called upon to do so that he has reasonable grounds to require employee submission. Requiring an employee to undergo a medical examination cannot be for no reason, or for an improper or inadequate reason. As the jurisprudence shows, and as we conclude also in our concurrent judgment in *Abu Fardeh*,[12] the decision to convene a medical board must be a reasonable decision in all the circumstances then prevailing: the question to be asked is whether a reasonable employer could, in all those circumstances, have required the employee to submit to a medical examination and report by a medical board? If the answer to that question is affirmative, it is not the role of the Tribunals to substitute their views for those of the Agency if its decision was open to it to make.

67. The relevant circumstances that the Agency should have taken into account in deciding whether to convene a medical board in this case included the timing, nature, and effect of Mr. Sirhan's injury and consequent potential or actual disablement; relevant medical information then held, or that should have then been held by, or known to, the Agency; and the effect on the employer's operation of Mr. Sirhan's absence on paid leave. The assembly of this information, and the consideration of it was necessary to have enabled the Agency to make a reasonable decision about whether a Medical Board should be convened at that time. It was relevant information that should have informed the Agency's decision whether to convene

[12] *Abu Fardeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1011.

a medical board. It appears that there was no evidence about this presented to the UNRWA DT and, unfortunately, there is nothing in its Judgment addressing these considerations.

68. I now address the Commissioner-General's particular grounds of his appeal. First, he submits that the UNRWA DT, without reasons, departed from established jurisprudence that a referral to a Medical Board is not a challengeable administrative decision. He relies, as but one example of that jurisprudence, on the Judgment of the UNRWA Dispute Tribunal in Fahjan.[13] That case is, however, clearly distinguishable from Mr. Sirhan's. Mr. Fahjan was referred to a medical board for assessment. He challenged that decision (but not any subsequent steps or decisions made about his employment) and the UNRWA DT concluded that the referral was not an administrative decision that was capable of being reviewed by it. Here, by contrast, Mr. Sirhan has challenged his termination from service but in which the establishment of, and the report from, a medical board was an important element. The Agency's termination decision is attributable directly to the Medical Board's recommendations, which in turn are linked directly to the Board's convening by a decision of the Agency. Thus, when the justification for the termination decision is considered, so too are relevant events leading to that ultimate decision, including the Agency's referral of Mr. Sirhan to the Medical Board. Put another way, if that referral decision had been taken lawfully, it would contribute to the justification for the termination; if taken unlawfully, it would taint the legality of the Agency's subsequent and consequential decisions affecting Mr. Sirhan. What was challenged by Mr. Sirhan was the decision to terminate his employment with the Agency. I (and I infer the other Judges in this case) therefore reject this non-receivability ground of the Commissioner-General's appeal. Our concurrent Judgment in *Abu Fardeh* reaches the same conclusion of law.

69. Next, I address the Commissioner-General's argument that the UNRWA Dispute Tribunal mis-interpreted and mis-applied Rule 106.4 of the UNRWA Area Staff Rules, which I have already summarised. The majority in this case accepts that ground of appeal, as do I. This submission is no doubt correct, at least in a strict sense: the Rule allows for a maximum of six months paid leave for a staff member who is, among other things, injured. It sets a maximum period of pay, but does not itself and expressly, as the UNRWA Disputes Tribunal interpreted it, require the Agency to wait for any particular period of time

[13] *Fahjan v Commissioner-General of United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No UNRWA/DT/2018/028.

following an injury to convene a medical board. The UNRWA DT erred in law in basing substantively its decision on a misinterpretation of the Area Staff Rule.

70. That said, however, Rule 106.4 is instructive as to the reasonableness or rationality of the timing of the Agency's decision to convene a medical board. The Rule is an indication by UNRWA of the desirability of waiting for a reasonable period following a work-related injury (and particularly as in this case a muscle strain injury) before assessing the long-term consequences of that injury. Such an approach suggests that a hasty decision to commence a process that may remove the staff member from his or her job (the convening of a medical board) may be an unreasonable or irrational decision.

71. Next, and not unassociated with this identification of the decision under challenge and its maker (the Agency), is the Commissioner-General's submission that the UNRWA DT was wrong to have taken into account medical information gathered and supplied to the Agency after it had received the Medical Board's recommendation. There is no suggestion that the Medical Board convened in this case did not follow the required process preceding its deliberations, which included advising Mr. Sirhan of what it would do and how, and in particular inviting him to submit his own medical evidence to it for evaluation along with the Board's own examination, tests and assessment. It was unfortunate that Mr. Sirhan did not do so until after the Board had made its recommendations to the Agency and the Agency had made its decision about the future of his employment. Mr. Sirhan says that he made medical reports available to the decision review exercise to which he referred the Agency's decision. However, its task was to review the correctness of the Agency's decision which had been taken without the benefit of this new medical information Mr. Sirhan said he had obtained and which he said confirmed that he was fit to resume duty as a sanitation labourer, including, impliedly, undertaking heavy lifting.

72. But, as I mentioned earlier in this judgment, the absence of any Rule 106.4 influence over the convening of a medical board does not mean that this discretionary exercise is unconstrained as counsel for the Commissioner-General submits, in effect, it is. Although I would not go so far as in the example postulated by counsel (that the Agency must always undertake what might be described as a screening medical evaluation before convening a medical board), I do conclude that the Agency must consider fairly and evaluate such evidence as it has, or should reasonably have, about a staff member's injury, condition and prognosis before convening a medical board. As the evidence seems to suggest, to do so at

about or very shortly after the expiry of a first sick leave certificate barely a month after this accidental injury and apparently without any other medical information or input from the staff member, requires very careful scrutiny of the propriety of that decision to convene a medical board. For me, the reasonableness or rationality of that decision has not survived that scrutiny. UNRWA's power to convene a medical board was not shown by the Agency to the UNRWA DT to have been exercised rationally.

73. There is another element of the Agency's actions that was likewise in error in my assessment. That relates to its response to, and acceptance of, the Medical Board's recommendations. It will be remembered that the Board recommended that although in its assessment Mr. Sirhan was unable to resume his role as a sanitation labourer involved in heavy lifting, it said he would be fit for other tasks including as a messenger. It could not, and I would conclude did not, limit his abilities to that role alone; it was merely an example of work, perhaps associated with sanitation duties, for which it assessed he would be fit. I infer, strongly, that Mr. Sirhan's assessed unfitness for the labouring position related to the expectation of his ability to lift heavy weights. UNRWA's mandate in Jordan and elsewhere in the Middle East covers a wide range of unskilled societal occupations including, no doubt, some other than messengering, which do not require heavy weights to be lifted.

74. The Agency, however, misinterpreted the Board's recommendation to mean that the only other available position for Mr. Sirhan was as a messenger. It limited its search for alternative positions to that occupation only and, when it found it had no vacancies in that job category, separated him from service. Mr. Sirhan was a long-standing staff member of more than 16 years' service to the Organisation. There seems to be no question that his injury was genuine and was work-related. The Agency is, by far, the largest employer of Palestinian refugees in Jordan and the income derived from such employment is vital to staff members' families. Put shortly, a UNRWA job is a good and highly valued job and is vital existentially to that community. That does not mean that UNRWA cannot terminate the employment of staff, including for medical reasons. But as a good employer of staff, I consider that UNRWA is obliged to be supportive rather than niggardly and to do its best in such circumstances to continue the employment relationship if that is possible. This should include taking into account the effects of a termination on the staff member and the staff member's dependent community. Not to be forgotten also is the fact that Mr. Sirhan's circumstances came about not because of any neglect of duty or misconduct by him, but as a

result of a workplace injury. Staff, in Mr. Sirhan's case of long-standing, should not just be cast aside without any further responsibility in such circumstances, at least unless there is, genuinely, no real possibility of their continued employment.

75. It is unclear to what extent, if any, the Commissioner-General adduced, or was required to adduce, evidence before the UNRWA DT of his efforts, if any, to ascertain the availability of other jobs and Mr. Sirhan's suitability for them. A good employer will enquire widely and open-mindedly about any other possible vacancies in its large and multi-tasked workforce, before concluding genuinely that there is no possibility of an alternative position that a partially disabled staff member can perform. Good employment relations would seem to indicate that part of that enquiry should be to seek the input of the affected staff member. That is not to say that the decision is not ultimately the employer's alone. Rather, it will ensure that this important question gets the best informational input before the employer's decision is made. It appears from the UNRWA Dispute Tribunal's Judgment that this was not done by the Agency which focused only on the availability of messenger positions and so misinterpreted and misapplied the Medical Board's recommendations and treated Mr. Sirhan unreasonably.

76. In summary, it follows that in the two foregoing respects, the Agency acted unreasonably (irrationally) and erroneously, in terminating Mr. Sirhan's employment. First, it was not reasonable for it to have established a medical board as it did shortly after the expiry of Mr. Sirhan's first medically-certified incapacity of a month after his accident, without further information. Second, it was unreasonable for the Agency to have misinterpreted the Board's advice to it that engagement as a messenger was the sole position for which Mr. Sirhan would have been fit and so restricted its enquiries about alternative positions to that role alone. In these circumstances, I would find the Agency's separation of Mr. Sirhan from service to have been irrational. It follows in my assessment, although for different reasons, that the UNRWA DT concluded correctly that Mr. Sirhan's separation from service was manifestly unreasonable.

77. I consider the Commissioner-General is on stronger ground, however, in his challenge to the remedies awarded to Mr. Sirhan. The Commissioner-General is correct that the UNRWA Dispute Tribunal exceeded its competence in law by assessing, without the necessary expert evidence, that Mr. Sirhan had a 75 per cent chance of recovery of fitness and, thereby, fixing that same percentage in calculating his compensable losses of income. Based

on the UNRWA Dispute Tribunal's written judgment, this was, at best, its own estimate but in a matter requiring expert evidence but of which I understand there was none. It was decided by the Tribunal without expert medical or medico/vocational evidence of the sort that must inform such remedial decisions. The Tribunal may have been correct, but it may well not have been.

78. I would, therefore, have remitted the matter of remedies to the UNRWA DT for re-decision based on the foregoing advice. In the event that the majority of this Tribunal finds that the termination of Mr. Sirhan's employment was not unlawful, that issue of remedies does not arise.

79. There is another aspect of this case which does not affect directly the central questions which we have decided. My following comments are, therefore, observations about what I consider was UNRWA's casual, even cavalier, treatment of Mr. Sirhan. UNRWA Area Staff Rule 111.2 allows disaffected staff members to seek a review of an adverse decision such as was made to terminate Mr. Sirhan's employment. He applied on 3 December 2017 for a review of the decision to terminate his service. He included in his request some four specialist medical certificates he says confirmed that he was fit to return to his job of a sanitation labourer. Mr. Sirhan says that these, or at least some of them, had been the subject of attempts by him to persuade the Medical Board and his employer's medical representatives, that he was fit to return to work, but in which efforts he says he was obstructed. I express no views about the correctness or otherwise of that assertion because that evidence is inadmissible on this appeal. Nevertheless, his review entitlement offered a further opportunity for receipt and consideration of this evidence by UNRWA.

80. The Agency had 30 calendar days within which to respond to Mr. Sirhan's request for review of its decision. It failed or refused to respond (its counsel admitted in submissions to the UNRWA DT that it did not do so) and provided no explanation or excuse for this failure or refusal. Had it considered, on review, the evidence Mr. Sirhan says he placed before it, the Agency could have at least stayed or revisited its termination decision and sought further medical information, including potentially from its Medical Board, to enable it to re-make a fair and fully-informed decision about Mr. Sirhan's fitness to resume his job. What it would have decided is now speculative because the Agency deprived itself of the opportunity to make a fully informed decision about Mr. Sirhan's future employment. Much time, expense and no doubt anguish to Mr. Sirhan and his family might thereby have been avoided if the

Agency had reviewed its separation decision and the grounds for it, or, at the very least, responded to Mr. Sirhan explaining why it could not do so in time.

81. In these circumstances, on 31 January 2018, Mr. Sirhan applied to the UNRWA Dispute Tribunal for relief. Even then the Agency made no attempt to explain why, or even offer any expression of regret about, its failure or refusal to follow its own process. I deprecate that failure or omission to engage with the important issues about Mr. Sirhan's future. I express my concern that UNRWA acted in this way: it is not good faith in employment relations that the Agency should both set up a fair and objective review system, but then apparently ignore it arbitrarily.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

Entered in the Register on this 27th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar