



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

Judgment No. 2018-UNAT-860

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

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge John Murphy
Judge Martha Halfeld

Case No.: 2018-1154

Date: 29 June 2018

Registrar: Weicheng Lin

Counsel for Mr. Sirhan: Abu-Khalaf Amer, LOSA

Counsel for Commissioner-General: Rachel Evers

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2017/047/Corr.1, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal and UNRWA or Agency, respectively) on 20 December 2017, in the case of *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. The Commissioner-General filed the appeal on 19 February 2018, and Mr. Hasan Sirhan filed his answer on 22 March 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... Effective 24 August 2003, the Applicant started to work with the Agency as a Site Engineer at the Gaza Field Office.

... The Applicant was on Special Leave Without Pay from 2 May 2010 to 1 May 2012, while pursuing a Doctorate Degree in Engineering Hydrology and Groundwater Modelling at the University of Kassel in Germany.

... On 19 June 2016, the Agency published, internally and externally, a vacancy announcement for the post of Hydrogeologist at the Field Infrastructure and Camp Improvement Programme (“FICIP”), at the Lebanon Field Office (“LFO”). The Applicant applied for the post.

... The Agency received a total of 45 applications for the post, including the Applicant’s. Seven candidates were invited for a technical test. Two candidates passed the technical test and were invited for an interview. One of the candidates was the Applicant.

... In a report dated 18 August 2016, the Interview Panel fully recommended the Applicant for the post. The Interview Panel further noted that, due to the Applicant’s ongoing fixed-term appointment at the Gaza Field Office (“GFO”), it was necessary to look into possibilities of secondment.

... By memorandum to the Director of Human Resources (“DHR”) dated 2 September 2016, the Director of UNRWA Affairs, Lebanon (“DUA/L”) requested a special allowance to facilitate the secondment of the Applicant from the GFO to the LFO.

¹ Impugned Judgment, paras. 2-19.

... By email to the Director of UNRWA Operations, Gaza (“DUO/G”) dated 2 September 2016, the DUA/L sought the DUO/G’s approval for the secondment of the Applicant to the LFO.

... By email dated 22 September 2016, the Head, Field Human Resources Office, Lebanon Field Office (“H/FHRO/LFO”) informed the Applicant that the DUO/G had informed the DUA/L that he would respond to the LFO’s request to release the Applicant by the end of the week.

... By email to the H/FHRO/LFO dated 30 September 2016, the Water- Sanitation and Hygiene Expert (“WASH Expert”) noted the necessity of filling the post of Hydrogeologist before 1 November 2016.

... By another email to the H/FHRO/LFO dated 3 October 2016, the WASH Expert noted the decision to engage in “Head Hunting” to fill the post of Hydrogeologist.

... On 10 October 2016, the LFO reissued vacancy announcement No. 986/2016 for the post of Hydrogeologist – Water Specialist with a start date of 1 November 2016.

... By email dated 12 October 2016, the Applicant notified the Head, Field Human Resources Office, Gaza Field Office (“H/FHRO/GFO”) that the DUA/L was awaiting the response of the DUO/G for his release on secondment.

... By email dated 12 October 2016, the H/FHRO/GFO reminded the DUO/G to confirm to the DUA/L that he agreed to release the Applicant on secondment.

... By email to the H/FHRO/GFO dated 14 October 2016, the H/FHRO/LFO transmitted the arrangements that were submitted to the DHR and sought the GFO’s confirmation for the Applicant’s release.

... By email dated 14 October 2016, the DUO/G confirmed his agreement with the modalities for the Applicant’s secondment to the LFO.

... By email to the DUO/G dated 17 October 2016, the DUA/L informed the DUO/G that they were no longer pursuing the secondment of the Applicant.

... On 23 October 2016, the Applicant submitted to the Deputy Commissioner-General a request for decision review.

... On 10 January 2017, the present application was filed with the UNRWA Dispute Tribunal [...].

3. In his application to the UNRWA Dispute Tribunal, Mr. Sirhan sought i) rescission of the contested decision and his secondment to the post of Hydrogeologist at the LFO; ii) compensation for the expenses incurred in preparing for his secondment to the LFO; and iii) compensation for moral damages caused by the Agency's abuse of power.²

4. In the impugned Judgment, the UNRWA Dispute Tribunal found that the decision taken by the DUO/L to cancel Mr. Sirhan's secondment to the LFO was lawful. However, the delay for more than one month caused by the DUO/G in providing his approval for Mr. Sirhan's release, knowing the urgency of the matter, was inordinate. Consequently, Mr. Sirhan had not been treated fairly and was deprived of the opportunity of being appointed to the post. The UNRWA DT therefore ordered the Agency to pay Mr. Sirhan USD 24,600 for loss of salary for one year, representing the difference between his current net salary and the amount advertised for the post. That amount also served to compensate Mr. Sirhan for the expenses incurred in preparing for his secondment to the LFO. However, the UNRWA Dispute Tribunal declined to award Mr. Sirhan moral damages, as the delay on the part of the DUO/G in providing his approval was not of a fundamental breach of Mr. Sirhan's rights and Mr. Sirhan had failed to produce any details or evidence establishing his moral damages.

Submissions

The Commissioner-General's Appeal

5. The UNRWA Dispute Tribunal erred in fact and law and exceeded its competence in awarding compensation for loss of salary in the absence of a specific request and where no evidence had been adduced to establish any financial losses as a result of the cancellation of secondment.

6. Neither in his decision review request nor in his UNRWA DT application did Mr. Sirhan make a request for compensation for loss of salary. The only material damages claimed were the expenses incurred. Where compensation has not been requested, none should be awarded.

7. The award of compensation for loss of salary was not justified, after the UNRWA Dispute Tribunal held that the cancellation of secondment was lawful, as Mr. Sirhan had failed to demonstrate the existence of negative consequences resulting from the contested decision.

² See impugned Judgment, para. 25.

8. Moreover, the UNRWA DT failed to consider the special circumstances of the present case, which were such that by the time the secondment was cancelled (17 October 2016) it was not apparent that Mr. Sirhan had all the chances to be appointed to the post of Hydrogeologist at the LFO. On 17 October 2016, he had no United Nations Laissez-Passer (UNLP) or entry visa for Jordan, and had not obtained the Israeli permit to exit Gaza. He did not obtain an UNLP and a Jordanian visa until 24 November 2016. The UNRWA Dispute Tribunal therefore erred in fact in concluding that Mr. Sirhan had all the chances of being appointed to the Hydrogeologist post.

9. The Commissioner-General requests that the Appeals Tribunal grant his appeal and vacate the impugned Judgment.

Mr. Sirhan's Answer

10. The Commissioner-General has failed to meet the time limit to appeal. He received the impugned Judgment on 20 December 2017, and the 60-day deadline expired on 18 February 2018. The Commissioner-General submitted his appeal on 19 February 2017, clearly missing the deadline.

11. The UNRWA DT Statute and the Appeals Tribunal jurisprudence enable the UNRWA DT to order compensation in a case of violation of a staff member's rights. Since the loss of opportunity is compensable, the UNRWA Dispute Tribunal is in the best position to award and determine the amount of damages depending on the specific circumstances of each case.

12. Submission of a request for decision review is aimed at giving the Administration an opportunity to confirm or amend its decision. Allowances and damage claim are not the core elements of that request. Notwithstanding the above, Mr. Sirhan asked for compensation for him not being appointed to the Hydrogeologist position due to the DUO/G's delay in approving his release.

13. Contrary to the Commissioner-General's assertion that Mr. Sirhan obtained his UNLP and a Jordanian visa on 24 November 2016, Mr. Sirhan in fact received them on 20 and 24 October 2016, respectively, one week after the cancellation of secondment.

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

Considerations

Receivability

15. Mr. Sirhan's contention that the appeal of the Commissioner-General is not receivable because it is time-barred is mistaken. The Judgment of the UNRWA DT was delivered to the parties on 20 December 2017. The Commissioner-General filed his appeal on Monday, 19 February 2018. Article 7(1)(c) of the Statute of the Appeals Tribunal (Statute) provides that an appeal shall be receivable if it is filed within 60 calendar days of the receipt of the judgment of the UNDT, or for that matter, the UNRWA DT. The calculation of time limits is governed by Article 29 of the Rules of Procedure of the Appeals Tribunal (Rules). Article 29(a) of the Rules provides that the calculation will not include the day of the event from which the period runs. On that basis, the period for filing the appeal expired, in this instance, on Sunday, 18 February 2018, the day before the appeal was filed. However, Article 29(b) of the Rules provides that the time period shall include the next working day of the Registry when the last day of the period is not a working day. Sunday is not a working day for the Appeals Tribunal. Accordingly, the parties had until the close of business on 19 February 2018 to file their appeals. In the premises, the Commissioner-General's appeal is not time-barred; it is receivable.

Merits

16. This Tribunal holds that the UNRWA DT erred in law and exceeded its competence by awarding compensation in the amount of USD 24,600 for loss of earnings without a previous claim for such damage and compensation.

17. Article 10(5) of the UNRWA DT Statute provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

18. As we held in *Rantisi*,³

The UNRWA DT therefore has the statutory discretion to order remedies under sub-paragraph (5)(a) or (5)(b) of Article 10 or both, so that, for example, the compensation referred to in sub-paragraph (5)(b) can represent an additional remedy to rescission/specific performance (or mandatory compensation in lieu thereof where the issue relates to appointment, promotion or termination) ordered pursuant to sub-paragraph (5)(a). Yet again, compensation under Article 10(5)(b) can constitute the independent sole remedy where the UNRWA DT decides rescission or specific performance of a contested administrative decision is not appropriate or merited. Equally, rescission or specific performance can constitute the sole remedy awarded save the mandatory requirement to set an alternative compensation under Article 10(5)(a). The decision on remedy is quintessentially a matter for the first instance Tribunal, having regard to the circumstances of each particular case and the constraints imposed by its governing Statute.

19. The Dispute Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings,⁴ as well as non-pecuniary damage, procedural violations, stress, and moral injury.⁵ It is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. Our case law requires that the harm be directly caused by the administrative decision in question.⁶ If these

³ *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 53; see also, *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 24.

⁴ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Cohen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-131.

⁵ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21; *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-587, para. 26; *Nyakossi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-254, para. 18, citing *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095, para. 21.

⁶ *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 21, citing *Diatta v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-640; *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277.

other two elements of the notion of responsibility are not justified, only the illegality can be declared but compensation cannot be awarded.⁷

20. The Dispute Tribunal is not competent to award compensation of the specific kind, namely for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury, without a previous claim for such damage and compensation.⁸ If no request for such compensation is made, the Dispute Tribunal lacks jurisdiction to award this kind of compensation *sua sponte*.

21. In his submissions to the UNRWA DT, Mr. Sirhan claimed that he had suffered illegality and sought, by way of relief: i) rescission of the impugned decision and his secondment to the post of Hydrogeologist at the LFO; ii) compensation for the expenses incurred in preparing for his secondment to the LFO; and iii) compensation for moral damages caused by the Agency's abuse of power.⁹

22. Thus, Mr. Sirhan plainly restricted his claim, at the time of expressing his concrete pleas, to material or pecuniary damages related to the expenses incurred as a consequence of his preparation for his secondment, as well as to the non-pecuniary damage (moral harm) he suffered. He did not make any specific request for compensation for loss of earnings (salary). Any other way of reading Mr. Sirhan's submissions, namely by expanding the scope of the relief sought through his application to the first instance Tribunal so as to cover a request for loss of salary, would prejudice due process of law, affecting the ability of the opposing party to effectively answer his petition that failed to explicitly refer to the specific kind of damage or request adequate compensation for it.

23. Therefore, in the present case, as the party had not first requested it, the UNRWA DT did not have jurisdiction to award compensation for loss of earnings in the sum of USD 24,600.

24. Moreover, in the present case, without ignoring the sad fact that Mr. Sirhan lost an opportunity to pursue his career within the Agency in the post for which he had been selected, the Appeals Tribunal takes note of the following troubling issues: First, any financial

⁷ *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, para. 24.

⁸ *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19; see also *Ten Have v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-599, para. 15.

⁹ Impugned Judgment, paras. 25 and 37.

loss Mr. Sirhan may have suffered (loss of salary, expenses), appears to be generated, as a main cause and directly, by the DUA/L's decision to cancel his secondment. However, this decision was found to be lawful by the UNRWA DT.¹⁰ Secondly, the DUO/G's delay in providing his approval was held by the UNRWA DT not to be a fundamental breach of Mr. Sirhan's rights.¹¹ Consequently, even if the compensation for loss of salary were requested, we would not award it in the instant case. As this Tribunal has stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".¹² We have also stated that not every violation of due process rights will necessarily lead to an award of compensation.¹³ Therefore, under the specific circumstances of the case, we differ with the UNRWA DT over this matter.

25. Accordingly, the UNRWA DT Judgment is hereby vacated for the above-mentioned reasons.

¹⁰ *Ibid.*, para. 34.

¹¹ *Ibid.*, para. 40.

¹² *Al-Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-771 para. 36, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, and citations therein.

¹³ *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-787, para. 59, citing *Benfield-Laporte v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-505, para. 41, in turn citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042, para. 33.

Judgment

26. The Commissioner-General's appeal is upheld and Judgment No. UNRWA/DT/2017/047/Corr.1 is vacated.

Original and Authoritative Version: English

Dated this 29th day of June 2018 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Entered in the Register on this 10th day of August 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar