



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

Judgment No. 2015-UNAT-603

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

JUDGMENT

Before:	Judge Mary Faherty, Presiding Judge Deborah Thomas-Felix Judge Richard Lussick
Case No.:	2015-700
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Mr. Niedermayr:	George G. Irving
Counsel for Commissioner-General:	Lance Bartholomeusz

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Michael Niedermayr of Judgment No. UNRWA/DT/2015/002, 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 January 2015, in the case of *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. On 17 March 2015, Mr. Niedermayr filed his appeal, and the Commissioner-General filed his answer on 13 May 2015.

Facts and Procedure

2. The following facts are uncontested:¹

... Effective 1 May 2012, the Applicant joined the Agency as a P-3 Field Safety Advisor, Damascus, Syria on a one-year Fixed-Term Appointment. The appointment was renewed for the period of 1 May 2013 to 30 April 2014.

... In the beginning of July 2013, the Syrian authorities withdrew the Applicant's visa. Effective 7 July 2013, he was relocated to Beirut, Lebanon where he remained on duty travel status.

... On 21 July 2013, the post of Field Security Officer, P-3, Gaza Field Office ("FSO/GFO") was advertised internally and externally. The vacancy announcement provided that:

NB: This recruitment process will also serve to generate a roster of suitable candidates for similar vacancies in different Fields within UNRWA's area of operations (emphasis in original).

... The direct transfer of the Field Security Officer in Lebanon Field Office ("FSO/LFO") to the post of FSO/GFO was approved on 28 August 2013. However, it was noted that the transfer would not be effected until the position of FSO/LFO was filled. On that same day the Applicant requested to be transferred to the newly vacant post of FSO/LFO.

... On 29 August 2013, the Director of UNRWA Affairs, Lebanon ("DUA/L") informed the Officer in Charge, Human Resources Services Division ("OIC/HRSD") that the Applicant's transfer to Lebanon Field Office ("LFO") would not occur because the Applicant's references had not been up to the required standard.

¹ Impugned Judgment, paras. 2-15 (emphasis in original).

... The Commissioner-General (“CG”) endorsed the DUA/L’s view that the position must be filled as soon as possible and the Agency carried out an accelerated process to find a replacement for the FSO/LFO.

... On 10 and 13 September 2013, a panel comprised of the DUA/LFO, the Acting Deputy Director, Support, Lebanon, and the then FSO/LFO, conducted telephone interviews with two previously rostered external candidates. The post was not filled through this exercise.

... In order to expedite the process, Headquarters Amman used the recruitment process for the post of FSO/GFO to shortlist 30 candidates for the FSO/LFO post. Thirty candidates from the previous recruitment process were shortlisted and sat for a written technical test on 10, 13 and 20 October 2013. As the Applicant did not apply for the FSO/GFO post he was not one of 30 shortlisted candidates on the roster. Of the 30 candidates, six were invited to an interview before a new interview panel consisting of four persons (the “Panel”). In the report dated 13 November 2013, the Panel recommended one suitable candidate.

... On 13 November 2013, the Applicant asked the Director of Human Resources (“DHR”) why he was not considered for the post of FSO/LFO.

... On 14 November 2013, the DUA/L approved the Panel’s recommendation.

... On 19 December 2013, the Applicant requested decision review [of] the decision to reject his candidacy for the post FSO/LFO and to appoint an external candidate.

... By letter dated 13 March 2014, the CG approved the Applicant’s appointment to the post of Security Risk Manager at the P-3 level based in Beirut, and issued a proposed letter of appointment for a one-year contract.

... On 27 March 2014, the Applicant declined the offer of appointment.

... On 21 April 2014, the Applicant submitted his application to the [UNRWA Dispute] Tribunal.

3. On 20 January 2015, the UNRWA DT issued its Judgment. The UNRWA DT dismissed Mr. Niedermayr’s application finding that Mr. Niedermayr had not established that the contested decision was unlawful.

4. The UNRWA DT noted that the security situation in Gaza and Lebanon required that the FSO/LFO post be filled quickly and the Agency therefore decided to utilize the recruitment process for the post of FSO/GFO, for which a candidate had been selected, to expedite the recruitment process. The UNRWA DT found no procedural irregularity in the fact that the Agency did not issue a separate vacancy notice for the FSO/LFO post and instead used the already completed list of suitable candidates from the FSO/GFO recruitment.

5. The UNRWA DT found that Mr. Niedermayr was not selected because he had not been found suitable for the post of FSO/LFO at the end of August 2013 when he requested his transfer. Pursuant to paragraph 8 of the International Staff Personnel Directive (ISPD) No. 1/104.2, the DUA/L had the authority to appoint a person to the FSO/LFO post, and as she had refused to transfer Mr. Niedermayr to this post two months prior, the UNRWA DT found that it was a proper exercise of her managerial discretion not to shortlist him since he had no chance of being appointed. The DUA/L's motives not to select Mr. Niedermayr were specified in her e-mail of 29 August 2013. He had not been shortlisted because of his "poor social interaction and communication skills".

6. Finally, the UNRWA DT rejected Mr. Niedermayr's claim that preference in the selection of candidates should be given to internal candidates. The UNRWA DT considered that UNRWA's International Staff Regulation 4.5 meant that when there was equality between an internal and external candidate, the internal candidate should be selected. This was, however, not the situation in the present case.

Submissions

Mr. Niedermayr's Appeal

7. Mr. Niedermayr contends that the UNRWA DT failed to exercise its jurisdiction to examine the reasons behind his exclusion from consideration for the FSO/LFO post. He was an internal candidate with performance evaluation ratings of "performance exceeds expectations". He was, however, neither shortlisted nor interviewed for the position and an external candidate was eventually selected. Mr. Niedermayr questions whether he was afforded full and fair consideration for the post. The UNRWA DT further failed to address the substantive claim in his application by focusing entirely on the selection procedure rather than on the initial decision to exclude him from consideration.

8. The Commissioner-General's reply to Mr. Niedermayr's application was the first time Mr. Niedermayr received an explanation for his exclusion and the UNRWA DT did not afford him an opportunity to respond. The UNRWA DT erred in law and fact by accepting at face value the negative assessment by the DUA/L of Mr. Niedermayr, which was at variance with the official record reflecting outstanding performance reviews.

9. Mr. Niedermayr contends that under UNRWA's staff selection policy, the authority for management reassignments is retained by the Commissioner-General on a recommendation by the Advisory Committee on Human Resources (ACHR). In the present case, the decision was left to the DUA/L and the Commissioner-General justified it based on the DUA/L's "unsubstantiated and highly biased opinions of [Mr. Niedermayr]". The consistent jurisprudence of the justice system has rejected the use of adverse material in making administrative decisions unless that material has been previously disclosed and properly vetted. The UNRWA DT erred in accepting the DUA/L's opinion of Mr. Niedermayr as justification for the decision not to consider him further for the position. By doing so, the UNRWA DT violated Mr. Niedermayr's due process rights, leading to a denial of justice and a manifestly unreasonable decision.

10. Mr. Niedermayr requests that the Appeals Tribunal overturn the UNRWA DT's findings. He asks that the Appeals Tribunal rescind the contested decision or, alternatively, award him compensation for loss of career potential, professional dislocation and loss of earnings, including approximately USD 30,000 as the education grant for his son and daughter that he did not receive while working for the Office of the United Nations High Commissioner for Refugees (UNHCR) under a temporary assignment, plus approximately USD 6,000 which is the differential in pay between the position he would have been entitled to with UNRWA and the position he accepted with UNHCR. Moreover, he requests that the Appeals Tribunal award moral damages for the violation of his due process rights and emotional stress.

The Commissioner-General's Answer

11. The UNRWA DT did not fail to exercise the jurisdiction vested in it in the consideration of Mr. Niedermayr's case on the merits. A review of the record reveals that the UNRWA DT was cognizant of the reasons for Mr. Niedermayr's exclusion from consideration for the FSO/LFO post. Mr. Niedermayr does not explain how the UNRWA DT's consideration of the reasons for his exclusion amounts to a failure to exercise its jurisdiction or competence. Moreover, contrary to Mr. Niedermayr's contention, the UNRWA DT correctly characterized his application as challenging the decision not to appoint him to the post of FSO/LFO and to appoint an external candidate. Such characterization was within the purview of the UNRWA DT Judge.

12. The UNRWA DT did not commit any errors of fact resulting in a manifestly unreasonable decision. There is no merit in Mr. Niedermayr's contention that the UNRWA DT's conclusion was unsupported and at variance with the official record. Its conclusion was informed by

its appreciation of the authority of Field Directors in matters of recruitment and appointment and the DUA/L's prior decision not to accede to Mr. Niedermayr's transfer request. The UNRWA DT referred to Mr. Niedermayr's "poor social interaction and communication skills" as the motives not to short-list him and there is no reason to suggest that the UNRWA DT's assessment of the reasons for his non-selection was manifestly unreasonable. Furthermore, there is no merit in Mr. Niedermayr's contention that he was never given an opportunity to contest the rationale for his exclusion after the rationale had been provided by the Commissioner-General. Mr. Niedermayr was not precluded from seeking leave of the UNRWA DT to make additional submissions or to file a rejoinder to the Commissioner-General's reply.

13. Finally, the UNRWA DT committed no errors of law in its Judgment. In response to Mr. Niedermayr's contention that his right to full and fair consideration of his request for lateral transfer was violated, the Commissioner-General submits that, in light of the broad discretion conferred on the Commissioner-General by International Staff Regulation 4.3 with respect to the organization of work and the Appeals Tribunal's recognition that it is for the Administration to determine whether such a measure is in its interest, the rejection of Mr. Niedermayr's lateral transfer request was within the bounds of reasonableness. Moreover, Mr. Niedermayr had no right or legitimate expectation to a lateral transfer and the Administration had no obligation to inform him of the reasons for the rejection of his lateral transfer request.

14. There is no basis for a reversal of the impugned Judgment as it was, as a matter of law, free of error. The specific pleas for USD 30,000 for education grant as well as USD 6,000 in pay differential are new pleas that were not before the UNRWA DT and should be rejected. At any rate, Mr. Niedermayr rejected the subsequent offer of a post and thereby unreasonably failed to mitigate his losses, if any. As to the request for moral damages, in the absence of a fundamental breach giving rise to moral damages and having failed to establish that the UNRWA DT erred in its conclusions, as well as in the absence of any evidence, there is no basis for an award of moral damages.

15. The Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

Preliminary matter – request for oral hearing

16. Mr. Niedermayr requests an oral hearing without providing any reasons. The Appeals Tribunal does not find that an oral hearing is necessary in this case within the meaning of Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of its Rules of Procedure (Rules). Accordingly, the request for an oral hearing is denied.

The issues for consideration

17. The decision reached by the UNRWA DT in respect of Mr. Niedermayr's application is encompassed in the following paragraphs:²

... The Applicant takes issue with the fact that he was not shortlisted for this selection process and notes that he should have been shortlisted as a result of the expedited recruitment process. The Respondent replies that the Applicant was not among the candidates who applied for the FSO/GFO post and that only those candidates were shortlisted for the selection process for the FSO/LFO post. The Tribunal considers that this argument is not persuasive as the hiring manager knew that the Applicant was very interested in the FSO/LFO post.

... It is obvious for the Tribunal that the Applicant was not selected because he had not been found suitable for the post of FSO/LFO at the end of August 2013 when he requested his transfer.

... ISPD No. 1/104.2 at paragraph 8 provides that Field Directors have the authority to appoint International Staff at the P-3 grade. As the DUA/L had the authority to appoint a person to the FSO/LFO post, and as she had refused to transfer the Applicant to this post two months prior, the Tribunal considers that it was a proper exercise of her managerial discretion not to shortlist the Applicant as his chance to be appointed was non-existent.

... The Field Directors have wide discretionary power in matters of recruitment and appointment. The DUA/L's motives not to select the Applicant were specified in the email dated 29 August 2013. The Applicant was not shortlisted because of his poor social interaction and communication skills. Therefore, assuming that he had all the qualifications and experience for the FSO/LFO post, the circumstances do not establish that the Agency committed a manifest error by not selecting him, and the Applicant does not give any explanation as to his allegations of discrimination.

² Impugned Judgment, paras. 25-29.

... Finally, with regard to the Applicant's claim that preference in the selection of candidates should be given to an internal candidate, International Staff Regulation 4.5 provides: "With due regard to [the] recruitment of fresh talent, and on as [wide a] geographical basis as possible, preference shall be given to persons already in the service of the Agency who have the requisite qualifications and experience". The Tribunal considers that this rule means that when there is equality between an internal and an external candidate, the internal candidate shall be selected. This is not the present case.

18. Mr. Niedermayr asserts that the UNRWA DT failed to exercise jurisdiction and erred in law and fact in respect of its consideration of his application for reassignment to the post of FSO/LFO. He argues that he did not contest the selection process *per se* for the position of FSO/LFO; rather he questioned why he was excluded from the competition which duly took place. Mr. Niedermayr submits that by focusing entirely on the selection process for the filling of the post rather than the initial decision to exclude him from consideration for the post, the UNRWA DT failed to address the substantive claim made in the course of his application to the UNRWA DT.

19. The Commissioner-General disputes the assertion that the UNRWA DT failed to exercise the jurisdiction vested in it or that it erred in law or in fact, and maintains that there is no merit in the argument that the UNRWA Dispute Tribunal failed to consider the substantive claim. In this regard, the Commissioner-General submits that the UNRWA DT was cognisant of all the reasons for Mr. Niedermayr's exclusion in light of the powers of the Field Directors in matters of recruitment and appointment. This was reflected in the UNRWA DT's finding "that it was a proper exercise of her managerial discretion not to shortlist [Mr. Niedermayr] as his chance to be appointed was non-existent".³

20. Before embarking on a consideration of the arguments made on appeal in this case, it is apposite to reprise the jurisprudence of the Appeals Tribunal as to how the UNDT, or in this case the UNRWA DT, should exercise its powers of judicial review in relation to matters of appointments and promotions.

³ Impugned Judgment, para. 27.

21. In *Ljungdell*, we referred to the discretion which vests in the Administration in the following terms:⁴

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

22. In *Abbassi*, we emphasised that:⁵

... [I]n reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

... The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

23. In *Rolland*, we stated:⁶

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

...

⁴ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216 and cites therein.

⁵ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24.

⁶ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26.

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

24. In *Rees*, we went on to say:⁷

... The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms. Rees' performance was the principal reason for the decision to reassign her, the Administration was required to provide a performance-related justification for its decision. This could have been properly done with the PAS, in accordance with ST/AI/2002/3.

...

... The UNDT correctly found that Ms. Rees had been informally criticised and humiliated based on inconsistent and subjectively-held biases. She was never given an opportunity to comment on or rebut the negative opinions that her supervisors purportedly held.

... We affirm the decision of the UNDT that the reassignment of Ms. Rees was unlawful. Accordingly, the appeal is dismissed on this ground.

25. It is against the backdrop of the above case law that the Appeals Tribunal has considered the arguments raised in this case, giving due deference to Regulation 1.2 of the UNRWA International Staff Regulations, which provides, in relevant part:

Staff members are subject to the authority of the Commissioner-General and to assignment by the Commissioner-General to any of the activities or offices of the Agency. Staff members are responsible to the Commissioner-General in the exercise of their functions.

26. The Appeals Tribunal also has had regard to the provisions of ISPD No. 1/104.2/Rev. 2 on international staff selection policy, the salient provisions of which are referred to in the Judgment.

⁷ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, paras. 65 and 68-69.

The alleged failure to exercise jurisdiction and alleged errors of law on the part of the UNRWA DT

27. In the context of reviewing the arguments advanced on these issues, it is necessary to reprise in some detail the events that occurred between August and November 2013. As set out in the e-mail of 29 August 2013 from the OIC/HRSD to the DUA/L, Mr. Niedermayr expressed his interest in being transferred to the FSO/LFO post. His application in this regard was rejected by the DUA/L in her response of 29 August 2013 to the OIC/HRSD in which she stated that Mr. Niedermayr's transfer "will not happen" as "[r]eferences taken have not come up to the standard required".

28. The DUA/L's rejection was noted by the Commissioner-General in his e-mail of 29 August 2013 wherein he directed, effectively, that an accelerated recruitment process be carried out to fill the FSO/LFO position.

29. By 13 November 2013, when a third party candidate was recommended for the position, two recruitment processes had been carried out, neither of which involved Mr. Niedermayr as a candidate. Nor does it appear that Mr. Niedermayr was informed on 29 August 2013, or at any time during the recruitment processes, of the fact that his transfer application had been rejected or of the reasons for that rejection, or indeed that the Agency had embarked on a competitive recruitment process for the post.

30. Mr. Niedermayr's e-mail of 13 November 2013 upon learning that a candidate for the FSO/LFO post had been selected is instructive. It reads, in part:

Following the withdrawal of my Syria visa last July and my subsequent relocation to Lebanon, in August, when [the FSO/LFO incumbent] expressed his interest to move on to Gaza, there was a proposal [...] for me to replace [him] in LFO. Needless to say that I was delighted, since the move would have allowed me to remain with UNRWA and in Lebanon (and thus also with my family), and, from the attached email correspondence [...], I was under the impression that this move/transfer also had the blessing of both HQ Amman and LFO. Accordingly, I briefed [...] my own director, who also approved the move, scheduled to take place in October (or so I understood), and in the meantime continued in my present job remotely.

To my surprise, I have now heard that LFO has instead gone ahead with a formal recruitment process and selected another candidate, although I should note here that I did not receive any formal communications in this regard, neither from LFO, nor from HR. Thus grateful if the issue could be clarified, and if indeed confirmed, if somebody

could explain to me why I was not even considered, given that I am an internal candidate, with an outstanding service record, already present in Lebanon, and intimately familiar with UNRWA, the area and the current situation.

31. The response Mr. Niedermayr received on 28 November 2013 is equally instructive. It reads, in part:

Please note that the post of Field Security Officer, P-3, Gaza was advertised following the departure of the incumbent of the post in Gaza Field Office. The post was advertised internally and externally for 4 weeks from 21 July to 21 August 2013. An internal applicant to the FSO, Gaza post, and already occupying the same post in Lebanon was approved by GFO for direct transfer to the post upon identification of a suitable replacement for his post in Lebanon Field Office.

At this juncture, and as with any other vacancy, internal lateral reassignment opportunities for the reassignment of serving staff, you were considered along with available rostered candidates as a first instance for the Lebanon vacancy prior to a full recruitment process. As part of a desk review, the Hiring Department considered your candidature along with two rostered candidates. Following the review, and with none of the candidates recommended for the position in Lebanon, it was decided to utilize the recruitment process initially launched for the FSO, Gaza post to fill the FSO, Lebanon vacancy whereby applicants were contacted to confirm their interest in the FSO, Lebanon post.

While the Agency's staffing policies and practices were followed, in hindsight, it is acknowledged that the Agency could have kept you better apprised of developments in this regard.

32. A perusal of the documentary record satisfies the Appeals Tribunal that it was disingenuous, to say the least, for the Agency to suggest that Mr. Niedermayr's transfer application was considered in the same manner as the two candidates who were selected from the roster subsequent to the events of 29 August 2013. First and foremost, Mr. Niedermayr's application for reassignment was rejected without his being afforded any interview or assessment process, other than the DUA/L's one-sided rejection of his application. Secondly, at the time of Mr. Niedermayr's rejection, there were no other candidates for the FSO/LFO position as no recruitment exercise had commenced. Thirdly, once such exercise was commenced, the two rostered candidates from previous recruitment exercises each had the benefit of a telephone and Skype interview. The record of those interviews shows that each had the opportunity to demonstrate the breadth of their knowledge of the prospective task to be performed and the extent of their respective

skills and experience, an opportunity lost to Mr. Niedermayr by the summary manner in which his expression of interest in being reassigned to the FSO/LFO position was dismissed. Furthermore, when ultimately that exercise did not yield a successful candidate for the post in question and the Agency turned to the pool of candidates from the Gaza recruitment exercise, Mr. Niedermayr's name was not on that list, not having applied for the Gaza post. In the course of its Judgment, the UNRWA DT rejected the Commissioner-General's argument that as Mr. Niedermayr was not among the candidates who applied for the FSO/GFO post, he could not have been considered for the Lebanon post in the second accelerated recruitment process, finding that Mr. Niedermayr's interest in the FSO/LFO position was known to the hiring manager. Notwithstanding the UNRWA DT so finding, however, it nevertheless upheld the validity of the DUA/L's action of 29 August 2013.

33. The Appeals Tribunal holds that "full and fair" consideration of Mr. Niedermayr's interest, as communicated in August 2013, in being reassigned to the Lebanon post required his being afforded the opportunity of knowing the views which the DUA/L had expressed on 29 August 2013, and being given an opportunity to counter those views and present his case for reassignment to Lebanon, in whatever manner he wished. The failure to offer him that opportunity, coupled with the accelerated processes which were embarked on thereafter without Mr. Niedermayr's participation, culminated in a process whereby Mr. Niedermayr's candidacy never got off the starting blocks. We hold that it was not sufficient for the UNRWA DT to rely on what was communicated by the DUA/L on 29 August 2013, in light of the failure to offer Mr. Niedermayr the opportunity to rebut the negative feedback and thus allow for a situation whereby, at least, a proper weighing exercise could have been embarked upon before any decision was made as to his suitability to be assigned to the Lebanon post. Furthermore, the UNRWA DT failed to take due account of the fact that Mr. Niedermayr was further prejudiced by being excluded from the recruitment process which commenced subsequent to the rejection of his reassignment application. That exclusion left Mr. Niedermayr without the opportunity to participate in a competitive environment where what he professed to offer in terms of the FSO/LFO post could be openly and transparently assessed and his worth measured against that which was being offered by the other candidates invited to participate in the selection process for the Lebanon post. In failing to consider all of the foregoing, we hold that the UNRWA DT failed to properly exercise the jurisdiction vested in it and erred in law in failing to have regard to Mr. Niedermayr's due process entitlements.

34. Moreover, we note that pursuant to the then applicable statutory instrument, ISPD No. 1/104.2/Rev.2, while the recruitment of international staff at the Grade P-3 level and below is delegated by the Commissioner-General to the Field Directors in their respective fields, the Commissioner-General is required to provide “final approval” for “managed reassignments of staff at all levels” “following a recommendation of the ACHR”.⁸ This did not happen in the present case, as it should have in our view, given that the process entered into by Mr. Niedermayr in August 2013 was one where he was seeking reassignment. Thus, we find that the UNRWA DT erred in law in relying on the authority of the DUA/L to reject Mr. Niedermayr’s application for reassignment.

35. However, we do not uphold the contention that Mr. Niedermayr had a legitimate expectation of succeeding to the FSO/LSO post. This argument does not appear to have been canvassed before the UNRWA DT. Thus, as we stated in *Staedtler*:⁹

... [I]t is not reasonable ... to assert that the UNDT erred on questions of fact or law with respect to allegations, which were not raised before the UNDT for its consideration. [...]

... We find that these issues were not submitted before the court of first instance and therefore cannot be raised for the first time on appeal [...].

Alleged error of fact

36. We uphold Mr. Niedermayr’s argument that the UNRWA DT erred in fact in, effectively, accepting the DUA/L’s private assessment of Mr. Niedermayr, which was at odds with Mr. Niedermayr’s official record available to this Tribunal,¹⁰ and in the absence of any evidence produced before the UNRWA DT to substantiate the DUA/L’s contention that “[r]eferences taken” with regard to Mr. Niedermayr “have not come up to the standard required”. This error was such that it led to a manifestly unreasonable decision.

⁸ ISPD No. 1/104.2/Rev.2, para. 7.

⁹ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, paras. 24-25.

¹⁰ For the performance cycle covering the period from 1 May 2012 to 31 December 2012, Mr. Niedermayr received the overall performance rating of “1 (exceeds performance expectations)”.

37. Thus, for all of the reasons set out above, we are satisfied that there is merit in Mr. Niedermayr's submission that the UNRWA DT did not enquire into the circumstances which culminated, effectively, in excluding him from consideration for the position of FSO/LFO, such that the "full and fair consideration" which was his due did not materialise. His appeal is upheld.

Remedy

38. We are satisfied, rather than remanding the matter back to the UNRWA DT to determine the question of remedy, that the appropriate remedy is rescission of the contested appointment, with the option to the Commissioner-General to pay an amount in compensation in lieu of rescission.

39. Our assessment of compensation does not factor in the amounts claimed by Mr. Niedermayr by way of education grant, as this claim was not canvassed before the UNRWA DT. Equally, the claimed loss of earnings has to be subordinate to this Tribunal's assessment of Mr. Niedermayr's loss of chance with regard to the FSO/LFO post. In *Sprauten*, we stated that "[t]he Appeals Tribunal affirmed in *Lutta* that there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts".¹¹ In *Marsh*, we opined that "the lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had ... material and financial consequences".¹²

40. Thus, in determining the compensatory amount, the Appeals Tribunal must assess Mr. Niedermayr's chance of reassignment to the FSO/LFO position or, if that did not occur, his chances of being selected in the course of the selection processes that ultimately took place, had he been a participant in those processes, as he ought to have been. With regard to the first scenario, we are cognisant of the broad discretion the Commissioner-General enjoys in matters of reassignment, and it may well be, even if Mr. Niedermayr had been afforded the opportunity to counter the DUA/L's opposition to him, that the Commissioner-General could have lawfully exercised his discretion against reassigning him, notwithstanding Mr. Niedermayr's employment record and the fact that he was carrying out similar duties in the position he encumbered. The assessment exercise is equally problematic with regard

¹¹ *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219, para. 22.

¹² *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205, para. 32.

to the second scenario, as the pool of candidates for the two recruitment exercises that were carried out would have been three or 31, respectively. At the best of times, the assessment of chance is an inexact science; in this case, it is more complicated for the reasons set out. Thus, the Appeals Tribunal must assess the matter in the round and arrive at a figure that is deemed by us to be fair and equitable, having regard to the number of imponderables that present in this case. In all the circumstances, we hold that the sum of USD 10,000 constitutes an adequate remedy for the loss of chance which arose by reason of the prejudice suffered by Mr. Niedermayr. The moral damages claim is dismissed.

Judgment

41. The appeal is upheld, in part, and the UNRWA DT Judgment is vacated.

42. The Appeals Tribunal orders rescission of the contested decision or, in the alternative, payment of USD 10,000 to Mr. Niedermayr in compensation for the loss of chance of being considered for the FSO/LFO position. The compensation is payable with interest at the US Prime Rate accruing from the date on which the first violation of Mr. Niedermayr's right to full and fair consideration for the FSO/LFO position occurred, i.e., 29 August 2013, to the date of payment. If the amount is not paid within the 60-day period counting from the date of issuance of this Judgment, an additional interest at five per cent shall be added to the US Prime Rate from the 61st day until the date of payment.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Lussick

Entered in the Register on this 30th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar