



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

Judgment No. 2017-UNAT-771

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge John Murphy Judge Martha Halfeld
Case No.:	2017-1051
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Al-Mussader:	Jamila Al-Abbasi, 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/2016/037, 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 8 December 2016, in the case of *El Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Hazem Al-Mussader¹ filed the appeal on 9 January 2017, and the Commissioner-General filed his answer on 13 March 2017.

Facts and Procedure

2. The following facts are uncontested:²

... Effective 22 February 1998, the Applicant was employed by the Agency as a Compensation Management Services Assistant. At the time material to the events set forth in the application, the Applicant occupied the post of Head Compensation and Benefits Section, Grade 18, Step 16 in the Department of Human Resources, Headquarters Gaza ("HQ/G").

... On 10 February 2015, the Agency issued vacancy announcement 15-FO-WB-09, for the post of Head, Field Human Resources Office, West Bank ("H/FHRO/WB"). The Applicant applied for the post but was not shortlisted for a written test or an interview.

... Following the Applicant's request on the status of the recruitment process, the Head Recruitment Section of the Department of Human Resources informed the Applicant, by email dated 14 April 2015, that the Hiring Director had decided to shortlist only Tranche 1 candidates in addition to a pre-approved rostered candidate. Furthermore, she informed the Applicant that he was not included in Tranche 1, as his qualifications as stated in his application were not assessed as fully meeting the requirements for the post.

... On 7 May 2015, the Applicant submitted a request for decision review of the decision not to classify him as a Tranche 1 candidate.

... By email from the Special Assistant to the Deputy Commissioner-General, dated 26 May 2015, the Applicant was informed that his request for decision review could not be considered at that point because the selection process had not been

¹ The Appeals Tribunal adopts the English spelling of the Appellant's name as it appears in his submissions.

² Impugned Judgment, paras. 2-13.

concluded. The Applicant was also informed that he had the right to re-submit his request for decision review once the selection process had been concluded.

... On 22 June 2015, the Advisory Committee on Human Resources recommended the selected candidate for appointment to the post of H/FHRO/WB. The recommendation was confirmed by the Commissioner-General on the same day.

... On 2 August 2015, the Applicant filed his application with the UNRWA [DT]. The application was transmitted to the Respondent on the same day.

3. On 8 December 2016, the UNRWA DT issued the impugned Judgment pursuant to which it dismissed the application on the merits. It found that Mr. Al-Mussader had not contested “that before being hired by the Agency he had never worked for an international organization outside of his home country”;³ that his Personal History Form (PHF) did not reflect his experience outside of his duty station; and, that he had not claimed three years of experience outside of his duty station. The UNRWA DT concluded that the Agency, thus, could not have considered him as having worked outside his home country at the international level. It also rejected his claims regarding a previous P-5 selection process on the grounds, *inter alia*, that each selection process had to stand on its own and being shortlisted for an international position once did not give him an entitlement to be shortlisted in a subsequent process.

4. As noted above, Mr. Al-Mussader filed the appeal on 9 January 2017, and the Commissioner-General filed his answer on 13 March 2017.

Submissions

Mr. Al-Mussader’s Appeal

5. The UNRWA DT erred in fact, law and procedure when it concluded that Mr. Al-Mussader did not have the requisite international experience and that the Agency had followed the applicable procedures. Mr. Al-Mussader should have been included in the Tranche 1 list of candidates as he met the required qualifications and, as an internal candidate, should have been given priority in the selection process.

6. The UNRWA DT erred by not considering Mr. Al-Mussader as having met the international experience requirement. Mr. Al-Mussader met the requirement by virtue of his secondment and other experience outside of his duty station, in accordance with the

³ *Ibid.*, para. 23.

International Personnel Staff Directive No. 1/104.2/Rev.3, para. 65. Although he did not include this information in his PHF, the Agency had access to this information through the recruitment system and its own files. The Tribunal erred by not finding discriminatory and arbitrary as applied to local staff the vacancy announcement's requirement that international experience was satisfied only by experience outside one's home country.

7. The UNRWA DT erred when it adopted the Commissioner-General's arguments and, further, when it "produced a new argument ... in support of the [Commissioner-General's case]". Mr. Al-Mussader's international experience had been previously accepted for a P-5 selection process, for which he was interviewed; accordingly, that same international experience should have been accepted in this P-4 selection process.

8. Mr. Al-Mussader respectfully requests that the Appeals Tribunal reverse the impugned Judgment and award compensation for "material damages of the missed job opportunity and the consequential financial loss incurred due to the unfair process" and moral damages for "stress, anxiety and discrimination suffered".

The Commissioner-General's Answer

9. The UNRWA DT did not make any error in its assessment of the evidence and its conclusion that Mr. Al-Mussader did not have the requisite international experience. The fact that details regarding Mr. Al-Mussader's duty travels and secondment outside of his duty station were in the recruitment system was irrelevant, because Mr. Al-Mussader had the burden of establishing that he met the requirements when he applied for the post.

10. The UNRWA DT did not err by not considering Mr. Al-Mussader's experience outside of his duty station. In any event, as noted by the UNRWA DT, Mr. Al-Mussader did not claim to have the requisite three years of work experience outside of his duty station.

11. Mr. Al-Mussader's claim that he should have been given priority consideration as an internal candidate was not canvassed below and, thus, is not properly before the Appeals Tribunal. He has also failed to adduce any evidence of discrimination based on a prohibited ground, and his claim that the Agency did not provide adequate feedback is without merit. The UNRWA DT was also correct to disregard his previous P-5 selection process.

12. Both the Agency and the UNRWA DT considered Mr. Al-Mussader's experience correctly. As Mr. Al-Mussader was not included in the Tranche 1 list of candidates, he had no foreseeable chance for promotion. There is no basis to award material or moral damages and no evidence supporting either was proffered.

13. The Commissioner-General respectfully requests that the appeal be dismissed.

Considerations

14. Before embarking on a consideration of the specific arguments made on appeal in this case, it is apposite to recap the jurisprudence of the Appeals Tribunal regarding the scope and exercise of judicial review in relation to matters of appointments and promotions.

15. In terms of the discretion vested in the Administration, 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 Tribunals 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.⁴

16. We have also stated that:⁵

... 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.

⁴ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 27, citing *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 21 and citations therein; *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30 and citations therein.

⁵ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26; see also *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 23, and *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 27.

... 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.

...

... 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.

17. The UNRWA DT correctly applied the foregoing principles in considering Mr. Al-Mussader's challenge to the selection process. As discussed in more detail below, the UNRWA DT did not make any errors of law or fact in dismissing his application.

18. Mr. Al-Mussader submits the UNRWA DT erred in fact and in law when it found that he did not have the required international experience for the post, and that the selection process had complied with the applicable procedures. He argues that he has the experience in performing all the duties outlined and has the required amount of years of international experience. He further argues that, although his secondment and duty travels were not detailed in his PHF, that information was available to the Agency on the recruitment system and by virtue of it having authorized and implemented them.

19. International Staff Personnel Directive I/104.2/Rev.3, para. 27, provides:

... Where the Hiring Director chooses to consider all qualified applicants, the Recruitment Section will complete reviewing all applications at the close of the advertisement period. The Recruitment Section shall then create a long list based on an initial assessment of the candidates' academic qualifications and working experience as set out in the vacancy announcement. Those candidates who fully meet the minimum requirements shall be termed "Tranche 1", those who partially meet the requirements or meet on equivalency shall be termed "Tranche 2" and those who do not as "Tranche 3". Tranche 1 and Tranche 2 candidates comprise the long list.

20. In the case at hand, the vacancy announcement required:

Three years of relevant experience in a large governmental, international or commercial organization at the international level outside one's home country, including experience in developing countries.

21. With respect to the required international experience for the post, the UNRWA DT found as follows:⁶

... It is not contested by the Applicant that before being hired by the Agency he had never worked for an international organization outside of his home country. His appointments with the Agency have always been in Gaza. Therefore, the [Dispute] Tribunal finds that the Agency could not have considered the Applicant as having worked outside his home country at the international level. The Applicant claims that he has worked as [Officer-in-Charge (OIC)] in different Fields of operation; however, this is not reflected in his PHF, and the Applicant did not claim that he was appointed as OIC outside of Gaza for a period of three years.

22. We find no reasons to differ from that conclusion. The findings of fact made by the UNRWA DT can only be disturbed under Article 2(1) (e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. We hold that the UNRWA DT gave careful and fair consideration to Mr. Al-Mussader's arguments regarding the required international experience for the post. Moreover, Mr. Al-Mussader has failed to discharge his burden of proving through clear and convincing evidence that he was denied a fair chance of selection.

23. Mr. Al-Mussader further submits that the UNRWA DT erred on questions of fact and law by deciding that the required international experience had to be outside one's home country. He submits that this runs contrary to paragraph 65 of International Staff Personnel Directive I/104.2/Rev.3, which stipulates that international experience is met, instead, by experience outside one's duty station. Mr. Al-Mussader points to the following language in paragraph 65: "it is important that the relevant experience includes a minimum of 2 years of international experience outside the duty station of the post".

⁶ Impugned Judgment, para. 23.

24. The UNRWA DT relevantly opined:⁷

... From [International Staff Personnel Directive I/104.2/Rev.3, para. 27.], it is clear that the Hiring Director is entitled to invite only Tranche 1 candidates for an interview. The Applicant claims that he should have been categorised as a Tranche 1 candidate, as he meets all the requirements of the post as set out in the vacancy announcement, and specifically since he has worked in the Agency's Compensation and Management Services Division, Department of Human Resources at HQ (G) since February 1998, and is presently the Head of the Section.

25. The Commissioner-General argues that the UNRWA DT's reasoning, based on the requirements set out in the vacancy announcement, was correct in that paragraph 27 of International Staff Personnel Directive I/104.2/Rev.3 provides that the long list is created based on an initial assessment of the candidates' academic qualifications and working experience as set out in the vacancy announcement. Even assuming *arguendo* that Mr. Al-Mussader's experience outside his duty station qualified as international experience, it remains as correctly found by the UNRWA DT that Mr. Al-Mussader did not reflect in his PHF that he worked as OiC in different fields of operation nor did he claim that he had been appointed as OiC outside Gaza for a period of three years.

26. We agree with the Commissioner-General. A plain reading of paragraph 27 of International Staff Personnel Directive I/104.2/Rev.3 supports the finding of the UNRWA DT that the selection exercise should be based on the assessment of the candidates' academic qualifications and working experience as set out in the vacancy announcement. Accordingly, the UNRWA DT's ruling that the Agency could not have considered Mr. Al-Mussader as having met the vacancy announcement's explicit requirement (i.e., of "three years of relevant experience in a large governmental, international or commercial organization at the international level outside[] one's home country" such that he would be eligible for the post in question) is in compliance with the above mentioned paragraph 27 of International Staff Personnel Directive I/104.2/Rev.3.

⁷ *Ibid.*, para. 21.

27. International Staff Personnel Directive I/104.2/Rev.3, under the heading “Qualifications and experience requirements. Requirements for professional posts”, prescribes in paragraph 65:

In line with the criteria for determining the requirements for the establishment of an international post (see Principles para. 5), it is important that the relevant experience includes a minimum of 2 years of international experience outside the duty station of the post. Accordingly, candidates will not normally be selected for an international professional post in their home country where such an appointment would be their first as an international professional.

And paragraph 67 goes on to state that:

In addition to the minimum requirements specified above, the job description and vacancy announcement should describe a number of desirable requirements which the hiring unit should consider in the short-listing and/or selection of candidates.

28. A plain reading of paragraph 65 in conjunction with paragraphs 27 and 67 of the same International Staff Personnel Directive satisfies us that the two years of international experience outside the duty station of the post is stipulated as the minimum experience requirement for international posts and that the job description and vacancy announcement can set out, in addition, the desirable qualifications and experience which the hiring unit should consider in the selection of candidates.

29. Thus, contrary to Mr. Al-Mussader’s argument, the vacancy announcement’s requirement does not run afoul of, or is otherwise inconsistent with, paragraph 65. Therefore, we find Mr. Al-Mussader’s argument without merit; and, moreover, his reliance on this provision is misplaced since he did not establish, as already alluded to earlier in this Judgment, that he had international experience for a period of three years outside his duty station.

30. For the same reasons, we hold as unfounded Mr. Al-Mussader’s contention that the UNRWA DT erred by not finding that the requirement for experience outside one’s home country is “discriminatory and arbitrary”.

31. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the UNRWA Dispute Tribunal made errors

of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.⁸

32. It is obvious that Mr. Al-Mussader was not satisfied with the UNRWA Dispute Tribunal's decision. He has failed, however, to demonstrate any error in the UNRWA DT's finding that the Agency's decision not to select him resulted from a valid exercise of its discretionary power and was not tainted by improper motives or otherwise unlawful. He merely voices his disagreement with the UNRWA DT's findings and resubmits his submissions to this Tribunal. He has not met the burden of proof of demonstrating an error in the impugned Judgment such as to warrant its reversal.⁹

33. In that vein, Mr. Al-Mussader contends that the UNRWA DT erred in finding him lacking the required international experience in the material P-4 selection process, though this experience had been previously accepted for a P-5 selection process, for which he was interviewed. As correctly found by the UNRWA DT, this contention is unsound in that each selection process has to stand on its own, and even if the candidate had been shortlisted for an international position once, this does not give him the entitlement to be shortlisted for a next selection process.

34. Finally, Mr. Al-Mussader points to various other provisions, including International Personnel Staff Directive No.1/104.2/Rev.4/Amend-1 and International Staff Regulations No. Cod.I/61/Rev.5, in support of his contention that he is eligible for the post, that he should have been shortlisted and that he should have been given priority as an internal candidate. These issues were not raised before the UNRWA Dispute Tribunal and, thus, cannot be

⁸ *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and citations therein; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

⁹ *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236, para. 37; see also *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 27; *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 30.

introduced for the first time on appeal for consideration by the Appeals Tribunal.¹⁰ We find that Mr. Al-Mussader's appeal in this regard is not receivable.

35. From the foregoing, we hold that Mr. Al-Mussader has failed to establish that the UNRWA DT committed errors on questions of facts and law such as to warrant a reversal of its Judgment.

36. Our conclusion that the UNRWA DT did not make any errors of law or fact in dismissing Mr. Al-Mussader's challenge of the decision not to select him precludes Mr. Al-Mussader from seeking compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal 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".¹¹

37. Accordingly, the appeal fails.

¹⁰ *Haimour and Al Mohammad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-688, para. 38; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 25; *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-221, para. 61.

¹¹ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

Judgment

38. The appeal is dismissed and Judgment UNRWA DT/2016/037 is hereby affirmed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Halfeld

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar