



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

Judgment No. 2018-UNAT-887

Elayyan
(Appellant/Respondent on Cross-Appeal)

v.

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

JUDGMENT

Before: Judge Richard Lussick, Presiding
Judge Dimitrios Raikos
Judge Sabine Knierim

Case No.: 2018-1180

Date: 26 October 2018

Registrar: Weicheng Lin

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

Counsel for Commissioner-General: Rachel Evers

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/025, 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 16 April 2018, in the case of *Elayyan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Fawzi Salameh Elayyan filed the appeal on 20 May 2018, and the Commissioner-General filed his answer and a cross-appeal on 20 July 2018. Mr. Elayyan filed his answer to the cross-appeal on 15 August 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... On 25 October 1981, the Applicant was appointed as Teacher D, at Irbid Sub Area. Effective 1 July 1999, the Applicant was appointed as School Supervisor, Grade 12, at South Amman Area.

... Effective 1 September 2011, the Applicant's post was reclassified as Education Specialist, Grade 13.

... Effective 1 November 2015, the Applicant was transferred to the post of Professional Development and Curriculum Coordinator, Grade 15.

... By Jordan Field Staff Bulletin No. J/61/2015 dated 2 November 2015, the Applicant was appointed as Acting Area Education Officer, North Amman. The Applicant held this position at the time relevant to the material events in this application.

... Between 4 September 2016 and 3 October 2016, the Agency published internally and externally, a vacancy announcement for the post of Area Education Officer, North Amman ("AEO/NA"), Grade 17, in the North Amman Area.

... The Agency received 850 applications for the post. Thirty nine candidates, including the Applicant, were shortlisted. A written test was held on 17 November 2016. Seven candidates, one of whom was the Applicant, were invited for a personal interview on 4 January 2017.

¹ Impugned Judgment, paras. 2-14.

... The Interview Panel was comprised of the Chief Area Officer (“CAO”), North Amman, the Chief[,] Technical and Vocational Education and Training (“C/TVET”), the Deputy Chief[,] Field Education Programme (“D/CFEP”), and a representative from the Human Resources Department.

... The Interview Panel noted that the Applicant fully met the competencies of communication skills, leadership, problem solving and teamwork. The Applicant was recommended as the second priority candidate. The Interview Panel noted that the first priority candidate scored higher than the Applicant.

... On 12 January 2017, the Director of UNRWA Operations, Jordan (“DUO/J”) approved the recommendation for the appointment of the first priority candidate.

... By email dated 15 January 2017, the Recruitment Officer informed the Applicant that he was ranked second on the roster, which was valid for twelve months.

... On 25 January 2017, the Applicant requested review of the decision not to select him for the post of AEO/NA.

... On 1 February 2017, the Applicant resumed his duty as Professional Development and Curriculum Coordinator.

... On 21 March 2017, the Applicant filed his application with the UNRWA Dispute Tribunal (...).

3. The UNRWA DT issued its Judgment on 16 April 2018. The UNRWA DT found that the Interview Panel had been composed in an irregular manner as the Human Resources (HR) representative should have been, but was not, a voting member. The UNRWA DT rejected as mere speculation the Commissioner-General’s contention that this irregularity was without any consequence since the Interview Panel had been unanimous in its decision. The difference between the scores of the selected candidate and Mr. Elayyan was small and a voting HR representative could have weighed in extensively on the assessment of the candidates and could have persuaded other panel members that Mr. Elayyan should be the first priority candidate.

4. While not all irregularities automatically lead to rescission of an administrative decision, the UNRWA DT held that this single irregularity was of such significance that it could have affected the outcome of the recruitment process. The UNRWA DT therefore ordered rescission of the decision not to select Mr. Elayyan and in the alternative, pursuant to Article 10(5) (a) of the UNRWA DT Statute, in-lieu compensation in the amount of USD 2,000. In calculating this number, the UNRWA DT took into consideration the fact that the test result, the interview, the experience, and the performance of the selected candidate and of Mr. Elayyan were of similar

standing and that therefore, Mr. Elayyan's chances of being selected to a higher grade would have been significant, had the Interview Panel been properly constituted.

5. On 20 May 2018, Mr. Elayyan filed his appeal. Together with his appeal, Mr. Elayyan filed a motion seeking leave to adduce additional evidence. On 31 May 2018, the Commissioner-General filed his comments. By Order No. 323 (2018) dated 5 June 2018, the Appeals Tribunal granted the motion. On 20 July 2018, the Commissioner-General filed an answer and a cross-appeal. Mr. Elayyan filed his answer to the cross-appeal on 15 August 2018 together with a motion for supplementary evidence in relation to his answer to the cross-appeal. On 24 August 2018, the Commissioner-General of UNRWA filed his comments.

Submissions

Mr. Elayyan's Appeal

6. The UNRWA DT erred in calculating the amount of in-lieu compensation. The UNRWA DT noted that Mr. Elayyan had a significant chance of being selected and lost an increase in base salary. In addition to lost actual salary, Mr. Elayyan was also deprived of a valuable chance of having his contract renewed or extended and of an opportunity to enhance his career and improve his status within the Agency. Therefore, the difference of salary between two steps (Grades 15 and 17) for a period of two years was unjustifiably calculated by the UNRWA DT as equal to USD 2,000.

7. Considering that the UNRWA DT Statute establishes a two-year limit for compensation, Mr. Elayyan submits his calculations and supporting evidence for the material damages suffered due to negligence of the Agency based on the applicable rates for the period of 1 February 2017 to 31 January 2019 (24 months):

- a) Lost difference between Grade 15 and Grade 17 – 1,939.2 JOD
- b) Differences in Provident fund entitlements – 290.8 JOD
- c) Special Occupation Allowance (SOA) for [G]rade 17 – 21,481.6 JOD
- d) Difference in end-of-service (retirement) indemnity – 3,925.3 JOD

8. Mr. Elayyan requests that the Appeals Tribunal substitute the amount of USD 2,000 awarded as compensation with JOD 27,636.9 for lost salary and related benefits and lost career opportunity.

The Commissioner-General's Answer

9. The Commissioner-General contends that the UNRWA DT did not err in law or fact in awarding compensation in the amount of USD 2,000 in lieu of rescission. He, however, points out that he will challenge, in his cross-appeal, the basis for the award and contend that the UNRWA DT erred in law and fact.

10. The appeal reflects a misapprehension of the scope of awards under Article 10(5) of the UNRWA DT Statute and the different purposes the awards under that provision are intended to serve. The appeal relates to an award under Article 10(5) (b) of the UNRWA DT Statute which provides for compensation for harm supported by evidence, whereas the UNRWA DT set an amount of compensation in lieu of rescission under Article 10(5) (a) of the UNRWA DT Statute. The UNRWA DT did not award compensation for economic loss, including loss of salary. Rather, the UNRWA DT awarded compensation in lieu of rescission which does not constitute compensatory damages based on economic loss. Given that Mr. Elayyan did not seek loss of salary or "related benefits" in his application before the UNRWA DT, these elements cannot now be introduced at the appeal stage "disguised as compensation in lieu of rescission". Moreover, it is well established jurisprudence that when compensation has not been requested, none should be awarded.

11. The remedies sought by Mr. Elayyan have no legal basis. He has not shown a reversible error by the UNRWA DT and as such, there is no legal basis for the plea to enhance the compensation awarded in lieu of rescission. Assuming *arguendo* that a case for an enhanced award had been made out, which the Commissioner-General rejects, the basis for a 24-month award is misconceived as it ignores the possibility that Mr. Elayyan would not have served out the full 24 months of the contract for various reasons, such as abolition of post, illness, resignation or "private business".

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

The Commissioner-General's Cross-Appeal

13. The UNRWA DT erred in law by finding that the written test scores were the determining evaluation method in the selection of the successful candidate and thereby erroneously concluded that the difference in the scores between the selected candidate and Mr. Elayyan was small. As

provided for in the Jordan Field revised interim procedures referred to by the Interview Panel in its report, the written test results are only invoked, if two candidates score the same result in the personal interview, which was not the case here. By relying on the test results, the UNRWA DT improperly assumed the role of deciding which evaluation method should be the determinant in the selection process. Moreover, Area Staff Personnel Directive A/4/PartII/Rev.7, Section I (UNRWA Area Staff Selection Policy), paragraph 38, provides that tests may be administered or waived as determined by the Hiring Director and may either support the shortlisting process or be conducted with the personal interview.

14. The UNRWA DT therefore erred in law by ruling that the difference in the scores of the selected candidate and Mr. Elayyan was small and that a voting HR representative could have weighed in extensively on the assessment of the candidates. The UNRWA DT further erred in fact in finding that the difference between the scores of the selected candidate and Mr. Elayyan was small when Mr. Elayyan fully met the competencies, while the selected candidate exceeded the requirement for one of the competencies and fully met the others.

15. The Interview Panel was unanimous in its evaluation of the selected candidate. There was, therefore, no need for voting and the fact that the HR representative did not have voting rights had no consequences considering that the final decision in this case was based on the results from the personal interview and not the written test results. The UNRWA DT therefore erred in its finding that a voting HR representative could have weighed in extensively on the assessment of the candidates and could have convinced the other panel members that Mr. Elayyan should be the first priority candidate. The irregularity, if any, is therefore not of such significance to have affected the outcome of the recruitment process to warrant rescission of the impugned decision.

16. The UNRWA DT's findings of fact that the difference between the scores of the selected candidate and Mr. Elayyan was small, that a voting HR representative could have weighed in for him and that the test result, the interview, the experience, and the performance of the selected candidate and Mr. Elayyan were of similar standing are not supported by the evidence. The Commissioner-General requests that the Appeals Tribunal vacate the UNRWA DT Judgment in its entirety.

Mr. Elayyan's Answer to the Commissioner-General's Cross-Appeal

17. The Commissioner-General's cross-appeal is in contradiction with his recent actions taken to implement the impugned Judgment. By e-mail to Mr. Elayyan dated 27 July 2017 [sic.], the Agency advised Mr. Elayyan that it had chosen not to rescind the non-selection decision and to pay him in-lieu compensation. Mr. Elayyan replied on 28 July 2018, refusing the offer because, in his view, the amount of compensation had been miscalculated. The Commissioner-General misled Mr. Elayyan by offering him compensation while at the same time appealing the UNRWA DT Judgment. The cross-appeal is therefore a waste of resources since the Commissioner-General already agreed with the outcome of this case and expressed his readiness to pay compensation.

18. The Commissioner-General merely repeats his arguments that did not succeed before the UNRWA DT and has not provided any evidence proving that the UNRWA DT erred in fact or law or exceeded its competence.

19. The Commissioner-General's contention that the Interview Panel was unanimous and the HR representative's vote would not have changed the outcome of the selection process is mere speculation and unsubstantiated. The proper staff selection procedures pursuant to Area Personnel Directive PD A/4/PartII/Rev.7/Section I were not followed as the HR representative did not have voting rights and there is no provision in the Directive establishing whether and how much the HR representative's vote is weighed. The Commissioner-General had the burden of proof to substantiate his claim and has failed to do so in his cross-appeal. Moreover, PD A/4/PartII/Rev.7/Section I assigns an essential role to the HR representative which is to ensure that all interviews evaluate candidates fairly and consistently throughout the interview process. Thus, the presence of a voting HR representative was necessary to ensure a fair and consistent evaluation process. Therefore, the entire selection process is affected, not only in terms of voting, but also in terms of monitoring the compliance with the UNRWA Regulations and Rules, and thus is void.

20. The Interview Panel applied the interim procedures related to the technical test results arbitrarily and inconsistently in the overall scoring process. Pursuant to PD A/4/PartII/Rev.7, the Field Director may issue guidelines to address specific aspects for the staff selection process, but they must be consistent with PD A/4. Pursuant to PD A/4/PartII/Rev.7/Section I, the candidate's assessment score is based on a combined total of the candidate's technical test,

if applicable, performance scores on any other candidate assessment tool, the interview assessment scores and the candidate's references. In the present case, Mr. Elayyan scored the highest mark in the technical test that was supposed to assess the competencies required for the job, while the selected candidate ranked third. The Interview Panel, however, failed to include the written test scores as part of the applicants' final scores and thereby violated the formal procedures of calculating the assessment scores. The Interview Panel also failed to add past technical experience as well as technical performance appraisals to the final accumulative score.

21. Mr. Elayyan requests that the Appeals Tribunal dismiss the cross-appeal in its entirety.

Mr. Elayyan's Motion for Supplementary Evidence

22. Mr. Elayyan seeks leave to file supplementary evidence in relation to his answer to the cross-appeal. Mr. Elayyan submits that, before filing its cross-appeal, the Agency had already taken action to implement the UNRWA DT Judgment. He refers to an e-mail dated 27 July 2018 by which the Agency advised Mr. Elayyan that it had chosen not to rescind the non-selection decision and to pay him in-lieu compensation. A letter regarding the implementation of the UNRWA DT Judgment was attached to that e-mail. Mr. Elayyan replied on 28 July 2018, refusing the offer because, in his view, the amount of compensation had been miscalculated. Mr. Elayyan now seeks to submit as evidence the aforementioned communication. He contends that the Agency's actions misled him since the Agency was offering compensation while, at the same time, appealing the UNRWA DT Judgment. The cross-appeal therefore wastes time and resources of the Appeals Tribunal and the UNRWA Legal Office of Staff Assistance.

The Commissioner-General's Comments on Mr. Elayyan's Motion for Supplementary Evidence

23. Mr. Elayyan's contention for leave to submit supplementary evidence is misconceived and belies the purpose of a cross-appeal. Pursuant to Article 2(5) of the Appeals Tribunal Statute, the Appeals Tribunal may receive additional evidence in exceptional circumstances, when it is in the interest of justice and the efficient and expeditious resolution of the proceedings. In the present case, it is not in the interest of justice to receive such additional evidence and it would not promote the efficient and expeditious resolution of the proceedings as the intended evidence is irrelevant. Neither

is the cross-appeal a waste of resources. In accordance with the Appeals Tribunal holding in *Bagot*,² a cross-appeal is of subordinate nature entitling a party to cross-appeal portions of a judgment unfavourable to it upon learning that his or her opponent has appealed. The intended evidence is irrelevant and its content would not affect the decision of the case. The Commissioner-General therefore requests that the Appeals Tribunal reject the motion.

Considerations

Mr. Elayyan's Motion for Leave to Submit Additional Evidence

24. Mr. Elayyan seeks leave to file supplementary evidence in relation to his answer to the Commissioner-General's cross-appeal. Pursuant to Article 2(5) of the Appeals Tribunal Statute, "[i]n exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings". In the present case, we find that Mr. Elayyan has not demonstrated any exceptional circumstances which would justify this Tribunal exercising its discretion to allow him to file any additional documentary evidence. In the absence of any evidence of exceptional circumstances, Mr. Elayyan's motion must be denied.

Mr. Elayyan's Appeal

25. It is not contested that the Interview Panel was not properly constituted according to the applicable law.

26. A/4/PartII/Rev.7, paragraph 69 provides that "[i]nterview panels must consist of at least three and normally up to five members, and must include at least one representative of the Recruitment Administrator and one from the Hiring Department ... The representative of the Recruitment Administrator will be a voting member."

27. In the case at hand, the HR representative was an Assistant "B" who was not a voting member. The UNRWA DT considered that the irregularity was of such significance that it may well have affected the outcome of the recruitment process. Accordingly, it ordered rescission of

² *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718.

the decision not to select Mr. Elayyan and, in the alternative, pursuant to Article 10(5) (a) of the UNRWA DT Statute, in-lieu compensation in the amount of USD 2,000.

28. Article 10(5) (a) 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[.]

29. Mr. Elayyan claims that the UNRWA DT was mistaken in calculating the amount of compensation due to him. He submits that Article 10(5) (b) of the UNRWA DT Statute establishes a two-year limit for an award of compensation and he “therefore ... would like to submit his calculation and supporting evidence on the material damages suffered due to the negligence of the Agency based on the period 1 February 2017 [to] 31 January 2019 (24 months)”.³ He then lists his claims for compensation of 1,939.2 JOD for loss of salary, 290.8 JOD for differences in Provident Fund entitlements, 21,481.6 JOD for Special Occupation Allowance and 3,925.3 JOD for end-of-service (retirement) indemnity.

30. Mr. Elayyan is labouring under a misunderstanding of the different compensations provided for in Article 10(5) of the UNRWA DT Statute. The UNRWA DT did not make any award of compensation under Article 10(5) (b). The compensation set by the UNRWA DT under Article 10(5) (a) was in compliance with a mandatory requirement upon it to set an amount of compensation as an alternative to an order rescinding a decision concerning an appointment. The compensation of USD 2,000 set by the UNRWA DT is the amount that the Agency would have to pay if it decided not to execute the rescission. These are not compensatory damages based on economic loss.⁴ Rather, they are covering the event that a staff member does not receive the concrete remedy of rescission ordered by the UNRWA DT.

³ Underlining in original.

⁴ *Zachariah v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-764, para. 36.

31. Such compensation is completely different from the compensation regulated by Article 10(5) (b) of the UNRWA DT Statute, which compensates the victim for the negative consequences caused by the illegality committed by the Administration.⁵

32. Article 10(5) (b) provides:

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

...

(b) Compensation for harm supported by evidence, 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 for harm supported by evidence and shall provide the reasons for that decision.

33. Article 10(5) (b) allows compensation for non-pecuniary damage, such as moral injury, and also for pecuniary or economic loss other than the "value" of the rescinded administrative decision. Compensation may be awarded for harm that is directly caused by the administrative decision in question and that is supported by evidence.⁶

34. Mr. Elayyan has specifically brought his claim for increased compensation under Article 10(5) (b) of the UNRWA DT Statute. No such claim was brought before the UNRWA DT and cannot be introduced for the first time on appeal for consideration by the Appeals Tribunal.⁷

35. Consequently, Mr. Elayyan's appeal is dismissed.

Commissioner-General's Cross-Appeal

36. The Commissioner-General submits that the Interview Panel was unanimous in its evaluation of the selected candidate. There was, therefore, no need for voting and the fact that the HR representative did not have voting rights had no consequences considering that the final decision in this case was based on the results from the personal interviews and not the written test results. According to the Commissioner-General, the irregularity, if any, is therefore not of such significance to have affected the outcome of the recruitment process to warrant rescission of the impugned decision.

⁵ *Ibid.*; *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469, para. 27.

⁶ *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, para. 20.

⁷ *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 44.

37. We find no merit in the cross-appeal. PD A/4/PartII, paragraph 69, provides that “[i]nterview panels must consist of at least three and normally up to five members and must include at least one representative of the Recruitment Administrator and one from the Hiring Department ... The representative of the Recruitment Administrator will be a voting member.”

38. We agree with the finding of the UNRWA DT that the absence of a representative of the Recruitment Administrator with voting rights rendered the composition of the Interview Panel irregular. Compliance with that requirement is not optional. The obvious intention of that legislative provision is that the vote of the representative of the Recruitment Administrator will be one of the components of the Interview Panel’s recommendation.

39. The UNRWA DT was correct to find that the irregularity “is of such significance as it could well have affected the outcome of the recruitment process” and that the decision not to select Mr. Elayyan must be rescinded.⁸

40. The Commissioner General’s cross-appeal is entirely without merit and accordingly, it is dismissed.

⁸ Impugned Judgment, para. 29.

Judgment.

41. The appeal and cross-appeal are dismissed. Judgment No. UNRWA/DT/2018/025 is affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar