



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

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Judgment No. 2019-UNAT-899

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

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2018-1190
Date:	29 March 2019
Registrar:	Weicheng Lin

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Counsel for Appellant:	Amer Abu-Khalaf, LOSA
Counsel for Respondent:	Rachel Evers

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/040, 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 13 June 2018, in the case of *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Majdi Ashour filed the appeal on 7 August 2018, and the Commissioner-General filed his answer on 5 October 2018.

**Facts and Procedure**

2. The following facts are established by the UNRWA DT:<sup>1</sup>

... Effective 24 April 2005, [Mr. Ashour] was employed by the Agency on a fixed-term appointment as Medical Officer B, Grade 14, Step 1, at the Health Programme in the Gaza Field Office (GFO). [Mr. Ashour] [at the time of his application to the Dispute Tribunal was] the Deputy Head, Health Centre A, GFO.

... On 25 September 2016, the Agency internally advertised the post of Deputy Chief Field Health Programme (D/CFHP) [...]. Six candidates, including [Mr. Ashour], were shortlisted and were invited for an interview.

... On 5 December 2016, [Mr. Ashour] was interviewed [...]. The Interview Panel concluded that [Mr. Ashour] was not suitable for the post.

... Following the interview, [Mr. Ashour] called the Human Resources Career Management Officer (HRCMO) mentioning that, before the interview, he had overheard a discussion between the Interview Panel members about his candidacy.

... In the record of the selection process, it is noted that a discussion in fact had occurred between the Interview Panel members before [Mr. Ashour's] interview. During this discussion, the Director of Health, Headquarters Amman (DH/HQA) raised the issue of [Mr. Ashour's] eligibility. The note in the record also specifies that the HRCMO confirmed to [Mr. Ashour] that the discussion had taken place between the panel members but that it had not affected the Interview Panel's assessment of [Mr. Ashour's] interview.

... On 15 December 2016, the Interview Panel recommended one candidate for the post of D/CFHP. On 23 January 2017, the selected candidate was announced through a GFO Staff Bulletin.

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<sup>1</sup> Impugned Judgment, paras. 2-9.

... On 23 March 2017, [Mr. Ashour] requested review of the decision not to select him for the post of D/CFHP in the GFO.

... On 19 July 2017, [Mr. Ashour] filed his application with the UNRWA Dispute Tribunal.

3. On 13 June 2018, the UNRWA Dispute Tribunal issued its Judgment and found that the selection process had been tainted by irregularities and bias. The UNRWA DT ordered that the decision not to select Mr. Ashour be rescinded, or in the alternative, the Respondent pay Mr. Ashour USD 2,363.76.<sup>2</sup> In setting this amount, the UNRWA DT noted the calculation method set forth by the Appeals Tribunal in *Chhikara*,<sup>3</sup> wherein the Appeals Tribunal determined the percentage of chance of selection as relates to the total of short listed candidates and assessed that percentage in light of one year's salary as any duration further would be speculative given possibilities such as abolishment of post, resignation, illness, etc. In the instant matter, the UNRWA DT found that Mr. Ashour's chances of selection were one in five since he was one of five interviewed candidates. Given that the position involved promotion with a one-year probationary period, the UNRWA DT calculated compensation equal to one-fifth of the difference between the amount Mr. Ashour earned when informed of his non-selection and the amount he would have earned had he been selected for one year. If Mr. Ashour had been selected he would have earned the new salary scale amount set forth under Area Staff Rule 103.1, of USD 3,035.30 per month, a difference of USD 984.90 per month compared to his then monthly earning of USD 2,050.40. The annual difference was USD 11,818.80 and one-fifth of the yearly total difference was USD 2,363.76. Thus, the UNRWA DT set the in-lieu compensation for Mr. Ashour at USD 2,363.76. The UNRWA DT further held that Mr. Ashour's request for moral damages for psychological harm was not supported by evidence and therefore Mr. Ashour was not awarded moral damages.

### **Submissions**

#### **Mr. Ashour's Appeal**

4. Mr. Ashour argues that the UNRWA DT erred in fact and law when it calculated the amount of in-lieu compensation, found his claim for moral damages was not supported by evidence and failed to consider his request to refer the matter to the UNRWA Commissioner-General for accountability. Mr. Ashour requests the Appeals Tribunal to award

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<sup>2</sup> Impugned Judgment, paras. 28 and 39.

<sup>3</sup> *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723.

him two years of salary as in-lieu compensation (USD 57,844.80) and two years of salary for moral damages (USD 57,844.80) for a total of USD 115,689.60. He also requests the Appeals Tribunal consider calculating his award annually until his retirement since he holds a permanent appointment.

5. Mr. Ashour contends that the UNRWA DT erroneously relied upon *Chhikara*, when it calculated the difference in his salary for only one year because the UNRWA DT failed to consider that he was a permanent staff member (as proven by his pay stubs) unlike Mr. Chhikara, who was employed on a yearly contract. Mr. Ashour requests his compensation span until his retirement expected in September 2028 and include the loss of development opportunity. He notes that his calculation was much less than that calculated in several other Appeals Tribunal Judgments.<sup>4</sup>

6. Furthermore, Mr. Ashour contends that the UNRWA DT erred in fact as his monthly salary and level at the time the impugned decision occurred was USD 2,410.20 (not USD 2,050.40) and his level was HLO7/01 not HLO6/05. The UNRWA DT further erred in fact as the decision was made in February and not January 2017.

7. Mr. Ashour also contends that the UNRWA DT erred in failing to consider material loss in the difference in UNRWA's contributions to the Provident Fund (which staff contribute at a rate of 7.5 per cent and UNRWA contributes at a rate of 15 per cent of the base salary). Mr. Ashour indicates the difference of salary with contributions is USD 97,514.00, with one-fifth equaling USD 19,502.80. The difference in the UNRWA contribution to the Provident Fund would be USD 14,627.1 and one-fifth of this difference would be USD 2,925.42. Lastly, Mr. Ashour argues that his material damages should extend beyond salary and allowances and include loss of chance as recognized in the *Gusarova*<sup>5</sup> case. The UNRWA DT, however, failed to consider his permanent status, and the considerable improvement of his career within the organization had he been selected.

8. With regard to his claim for moral damages, Mr. Ashour argues that the UNRWA DT erroneously concluded he was not entitled to moral damages as it ignored the medical documentation submitted to support that his health, namely his blood sugar controls, had

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<sup>4</sup> *Kozlov and Romadanov v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-228; *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042; *Kasyanov v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-076; *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

<sup>5</sup> *Gusarova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-439, paras. 35-44.

deteriorated due to the emotional harm caused by him hearing the interview panel's comments and by him not being selected to the position. Mr. Ashour, thus, requests the Appeals Tribunal to award him the maximum possible compensation for the harm to his health in moral damages in the amount of two years' net base salary (USD 57,844.80).

9. Lastly, Mr. Ashour argues that he presented evidence to the UNRWA DT that he was subjected to managerial harassment and abuse of power and requested the UNRWA DT to refer the case to the Commissioner-General for accountability. However, the UNRWA DT failed to exercise its jurisdiction to consider his request.

### **The Commissioner-General's Answer**

10. The Commissioner-General requests the Appeals Tribunal to dismiss the appeal in its entirety. In furtherance, the Commissioner-General submits that the Appellant did not seek loss of salary, lost career opportunity, lost Provident Fund entitlements, and allowances in his application and is therefore barred from introducing these elements on appeal. There is therefore, no basis to enhance the award. Likewise, Mr. Ashour did not request a referral for accountability before the UNRWA DT and is thus barred from seeking that remedy on appeal. Mr. Ashour's claim that he requested a referral when he actually did not is a blatant misrepresentation warranting contempt proceedings.

11. The Commissioner-General further submits that the UNRWA DT did not err in law or fact in calculating the compensatory amount, noting that the Appeals Tribunal's jurisprudence indicates that there is more than one method by which to assess damages. The UNRWA DT's decision to assess the probabilities of his chance of appointment is an established method and reliance upon *Chhikara* was appropriate. Thus, Mr. Ashour's argument that his award is lower than other Appeals Tribunal's awards does not indicate there was an error, as each case turns on its own facts.

12. The Commissioner-General also submits that the UNRWA DT did not err on the facts by calculating his award on the wrong base salary. Mr. Ashour admitted that the contested decision was made and he was notified thereof in January 2017. Mr. Ashour's statement in his appeal brief that the decision was taken in February 2017 is a misrepresentation that is cause for contempt proceedings.

13. The Commissioner-General argues that Mr. Ashour failed to request moral damages in his application and is barred from doing so for the first time on appeal. Mr. Ashour admits in his appeal that he did not request compensation for moral damages but for emotional harm that resulted in irreparable health damage. In the alternative, if the Appeals Tribunal considers Mr. Ashour's claim for moral damages, the Commissioner-General submits that the UNRWA DT correctly found that Mr. Ashour did not support his claim with evidence as lab results about his blood sugar levels do not establish psychological harm. Mr. Ashour contended in his appeal that his diabetes was exacerbated by the impugned decision. However, this Tribunal has held that testimony of the appellant, even if formed by his knowledge as a medical professional, is not satisfactory proof without corroboration by an independent expert.

14. Furthermore, the Commissioner-General submits that Mr. Ashour's request to submit additional evidence to support a moral damages claim should be rejected in violation of Article 2(5) of the Appeals Tribunal's Statute as the evidence was already known to Mr. Ashour, namely, he admitted to having sought expert opinions from his colleagues but did not submit such evidence to the UNRWA DT. Mr. Ashour has ultimately failed to provide evidence to the UNRWA DT of a causal link between the impugned decision and his alleged harm.

15. Lastly, the Commissioner-General submits that Mr. Ashour's appeal is a manifest abuse of the appeals process under Article 9(2) of the Appeals Tribunal's Statute. Mr. Ashour is represented by the Legal Office of Staff Assistance. His appeal is based on grounds that are newly raised for the first time on appeal seeking a chance to re-litigate his case. The appeal has misrepresentations rising to the level of contempt. Mr. Ashour argued that the contested decision was made in February 2017 when it was actually made in January 2017 so he could benefit from the salary scale increase. This appeal costs UNRWA USD 9,600 at a time when UNRWA's primary donor has ceased its funding. Mr. Ashour has manifestly abused the appeals process by filing this appeal, which is blatantly frivolous, and therefore requests the Appeals Tribunal to award costs against Mr. Ashour.

### **Considerations**

16. The main issues for consideration and determination in the present appeal relate to the amount of compensation awarded in lieu of rescission and the amount of compensation awarded for harm. There is no dispute as to the UNRWA DT's finding that the selection

process was tainted by irregularities and bias, nor as to the order of rescission of the decision not to select Mr. Ashour for the post of D/CFHP.

*The amount of in-lieu compensation*

17. Mr. Ashour contests the amount of the in-lieu compensation granted by the UNRWA DT. However, we find that he failed to advance any error of law or of fact leading to a manifestly unreasonable decision in this respect.

18. It is settled jurisprudence that the very purpose of in-lieu compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations.<sup>6</sup> In establishing the amount of in-lieu compensation, the Appeals Tribunal exercises discretion; however, it shall ordinarily give some justification and set an approximate amount that this Tribunal considers is an appropriate substitution for rescission or specific performance in a given and concrete situation.

19. In so doing, the Tribunal may consider economic loss or loss of chance deriving from the illegal decision which has been rescinded, as an alternative to the rescission, as was the case in *Chhikara*.<sup>7</sup> Nevertheless, in-lieu compensation is not intended to compensate for all the possible harm suffered by the injured person, as this is the specific aim of the compensation set forth in Article 10(5)(b) of the UNRWA Statute (compensation for harm), which will be the subject of appreciation below.

20. In other words, in-lieu compensation differs from compensation for harm. The former is an alternative to rescission or specific performance and should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred. The latter is not an alternative to rescission or specific performance, it can be cumulative with the former, insofar as the in-lieu compensation sometimes does not compensate for all the harm suffered by the injured person. Compensation for material damages shall be claimed under Article 10(5)(b) of the UNRWA Statute – and this is why Mr. Ashour's claims of being deprived of the opportunity to enhance his career or improve his status within the Agency, as

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<sup>6</sup> *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059, para. 10.

<sup>7</sup> *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723.

well as his allegations of being discriminated against by his superiors cannot be taken into consideration for the calculation of the in-lieu compensation in the present case.

21. In any event, the amount of in-lieu compensation will essentially depend on the circumstances of the case. For this reason, our jurisprudence has also settled that due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach.<sup>8</sup> On this matter, there is more than one method by which the trial court can assess damages, and it is up to that court to determine the method to employ in each case.<sup>9</sup>

22. Mr. Ashour's argument that there was an error in his employment level by the UNRWA DT, if this really occurred, would mean that his salary was higher than the one considered by the UNRWA DT. The difference, therefore, between the salary that the UNWRA DT had considered, and the amount he would have earned had he been selected for the post in question, would be smaller. This means that the UNWRA DT made an error in his favour. Thus, there is no merit in Mr. Ashour's appeal in this respect.

23. As for Mr. Ashour's submission that the UNRWA DT should have awarded him two years' net base salary or compensation until his retirement, this Tribunal dismisses this claim and upholds the UNRWA DT's finding that Mr. Ashour's continuation in the post beyond one year was speculative. The UNRWA DT based its award on the one-year probationary period after the promotion had Mr. Ashour been successful in the selection exercise.<sup>10</sup> There is no sound reason that could justify an award of the requested two-year compensation, apart from Mr. Ashour's bare assertion that this would be more appropriate. Even much weaker and unjustified is his request that the compensation be calculated until the time of his retirement.

24. Further, as regards the argument that Mr. Ashour holds a permanent appointment, what matters for the calculation of the in-lieu compensation is the post Mr. Ashour had applied for—and whose selection has been deemed illegal—not the post he actually encumbered at the time of the impugned decision.

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<sup>8</sup> *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 34; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16; *Flores v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-525, para. 26.

<sup>9</sup> *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347, para. 21.

<sup>10</sup> Impugned Judgment, para. 32.



25. Likewise, awarding Mr. Ashour two years of salary as in-lieu compensation based on the full salary of the desired position without deduction of the amount of salary related to the post he actually encumbered would result in duplicative remuneration for the same period under the same legal provision, which would be unacceptable in the light of the principle that prohibits unjust enrichment.

26. In view of the foregoing, while there is no static set of criteria for calculating in-lieu compensation, as the analysis is done on a case by case basis, the UNRWA DT has discretion to fix its amount in a generic sum and is not bound by any detailed or intricate calculations involving contribution to the Provident Fund or other possible allowances.

27. Mr. Ashour has thus failed to provide any convincing argument for the Appeals Tribunal to interfere with the amount set by the UNRWA DT.

*Compensation for harm*

28. Mr. Ashour claims that the UNRWA DT erred in not awarding him compensation for harm to his health, as a result of emotional stress from what he called a “clear provocation” of the conversation he overheard just before being interviewed for the post he was applying for and from his ultimate non-selection.

29. We first take note of the fact that Article 10(5)(b) of the UNRWA DT Statute was amended effective 1 January 2018 and is now identical to the United Nations Dispute Tribunal’s Statute, requiring that harm be supported by evidence.<sup>11</sup>

30. Further, Mr. Ashour claims the emotional stress of non-selection exacerbated his diabetes causing irreparable harm to his health and sought in the UNRWA DT application compensation for this harm. Although he did not expressly state in his application that this harm constitutes “moral damages”, he did refer to it as a health harm from emotional stress, which falls within the realm of psychological harm. The UNRWA DT was thus, correct in analyzing the issue, despite Mr. Ashour not having articulated the words “moral damages”.

31. The next issue is whether there was evidentiary support by way of the lab results provided to the UNRWA DT regarding the exacerbation of his diabetes. In this respect, it is not enough to demonstrate an illegality to obtain compensation: the claimant bears the

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<sup>11</sup> Statute of the UNRWA Dispute Tribunal, Cod./A/59/Rev.25/Amend.155.

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.<sup>12</sup> If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.<sup>13</sup>

32. Even though there appears to have been some fluctuation in Mr. Ashour's control of blood sugar level between 3 September 2016 and 19 July 2017, the time lapse since the 5 December 2016 interview was long enough to enable factors other than the recognized illegality to have played a role in the variation, particularly due to the fact that Mr. Ashour already had diabetes, leaving the opinion on causation to that of Mr. Ashour alone. Therefore, Mr. Ashour's interpretation of the lab reports needed to have been corroborated by additional evidence.

33. Despite the fact that in his appeal Mr. Ashour mentioned the possibility of producing additional evidence to complement the comparative lab results, he has neither requested leave to present such evidence, nor presented the evidence itself before the UNRWA DT or before the Appeals Tribunal. Consequently, we find that Mr. Ashour has failed in his duty to provide sufficient evidence of any harm resulting from the impugned decision.

34. We therefore find no error in the UNRWA DT Judgment on this matter.

*Referral for accountability – Abuse of appeals process*

35. Mr. Ashour claims that the UNRWA DT erred in not having referred the case to the Commissioner-General for action to enforce accountability, with a view to ending the prejudice against people who lack the patronage of the existing power inside the Gaza Health Program and to improve the recruitment process therein.

36. On this subject, apart from the fact that Mr. Ashour did not seek a referral in his application before the UNRWA DT, previous decisions regarding previous submissions of alleged prejudice against him inside the Gaza Field Health Program do not fall within the

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<sup>12</sup> *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.

<sup>13</sup> *Sirham v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-860, para. 19, *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, para. 24.

scope of the present case and therefore should not be dealt with in this Judgment. Moreover, despite the fact that Mr. Ashour referred to his submissions in the original application before the UNRWA DT and attached them as an annex to his appeal, he does not produce any evidence whatsoever therefor. The exchange of correspondence annexed to his appeal reveals that although his requests were not always attended to, the matters were treated in a professional and respectful manner.

37. The UNRWA DT Judgment is upheld.

38. Even though the appeal is dismissed, we find no grounds for awarding costs against Mr. Ashour, as there is no intentional or manifest abuse of the appeal process.<sup>14</sup>

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<sup>14</sup> *Hayek v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-606, para. 28.

**Judgment**

39. The appeal is dismissed and Judgment No. UNRWA/DT/2018/040 is affirmed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of March 2019 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Knierim

Entered in the Register on this 29<sup>th</sup> day of May 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar