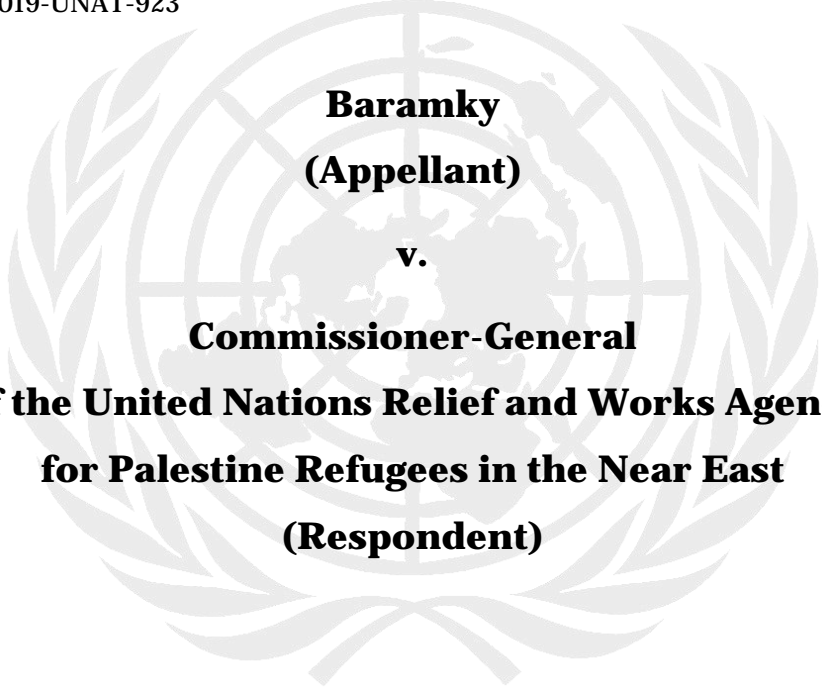




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-923



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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Deborah Thomas-Felix Judge John Raymond Murphy
Case No.:	2018-1216
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Baramky:	Self-represented
Counsel for Commissioner-General:	Rachel Evers

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/065, 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 29 November 2018, in the case of *Baramky v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Anton Suheil Baramky filed the appeal on 7 December 2018, and the Commissioner-General filed his answer on 8 February 2019.

Facts and Procedure

2. The following facts have been established by the UNRWA Dispute Tribunal:¹

... Effective 2 April 2002, the Applicant was employed by the Agency as Finance Assistant at the Agency's Finance Department in the West Bank Field Office ("WBFO").

... On 11 January 2016, the Applicant reported that he had been assaulted by another staff member.

... On 3 May 2016, the Applicant raised allegations of mismanagement and corruption in the Finance Department, WBFO.

... Effective 1 July 2016, the Applicant was temporarily transferred to [the] Job Creation Programme ("JCP Programme") as Finance Assistant, Grade 10, pending the investigations into the Applicant's report of assault and allegations of mismanagement and corruption.

... On 11 July 2016, the Director of UNRWA Operations, WBFO ("DUO/WB") appointed an Investigator ("first Investigator") to conduct an investigation into the Applicant's allegation of assault dated 11 January 2016.

... Following the first Investigator's failure to submit his report, the DUO/WB appointed another Investigator (hereinafter "the Investigator") on 19 December 2016 to conduct an investigation into the Applicant's report of assault. This first investigation was registered under Case No. INV-16-0015.

... On the same day, the DUO/WB appointed the Investigator to conduct an investigation into the Applicant's allegations of mismanagement and corruption dated 3 May 2016. This second investigation was registered under Case No. INV-16-0175.

¹ Impugned Judgment, paras. 3-37.

... By an email dated 13 January 2017 to the Investigator, the Applicant raised an allegation of discrimination. This allegation of the Applicant was included into the ongoing investigation registered under Case No. INV-16-0175.

... By letter dated 9 October 2017, the DUO/WB informed the Applicant of the outcome of the investigations into his complaints.

... On 20 October 2017, the Applicant filed a request for decision review, challenging the disciplinary measures that had been imposed on two staff members following the outcome of the investigations into the Applicant's complaints against them.

... By letter dated 27 October 2017, the DUO/WB informed the Applicant of the decision to permanently transfer him to the Cash for Work Programme.

... On 27 October 2017, the Applicant filed a request for decision review challenging the decision to permanently transfer him to the Cash for Work Programme.

... By email dated 7 December 2017, the Chief, Ethics Office ("C/EO") informed the Applicant that the Deputy Commissioner-General referred to the Ethics Office his allegation of retaliation contained in his request for decision review dated 27 October 2017, and that the Ethics Office would conduct a preliminary assessment about this aspect of his request for decision review.

... On 9 December 2017, [Mr. Baramky filed two applications with the [UNRWA Dispute] Tribunal against UNRWA's decisions 1) to permanently transfer him from the Finance Department to the Cash for Work Programme, and 2) to impose disciplinary measures on two staff members following the outcome of the investigations into Mr. Baramky's complaints against them]. The applications were transmitted to the Respondent on 12 December 2017.

... On 10 January 2018, the Respondent filed, in each case, a motion for extension of time to file his reply outside the 30-calendar day time limit set out in Article 6(1) of the Rules of Procedure of the [UNRWA Dispute] Tribunal. The motions were transmitted to the Applicant on 11 January 2018.

... By Order Nos. 011 and 012 (UNRWA/DT/2018) dated 18 January 2018, the [UNRWA Dispute] Tribunal granted the Respondent's motions.

... By email dated 24 January 2018, the C/EO informed the Applicant of the preliminary assessment of his allegation of retaliation, which found that the decision to permanently transfer him constituted *prima facie* evidence of retaliation. By the same email, the Applicant was also informed that the C/EO had recommended the DUO/WB to approve the Applicant's request to return to his previous post.

... On 25 January 2018, the Respondent filed his replies to the applications. On 28 January 2018, the replies were transmitted to the Applicant.

... On 17 February 2018, the Applicant filed a motion requesting leave to submit additional evidence in support of both applications. On 18 February 2018, the motion was transmitted to the Respondent.

... By Order Nos. 029 and 030 (UNRWA/DT/2018) dated 1 March 2018, the [UNRWA Dispute] Tribunal granted the Applicant's motion.

... On 6 March 2018, the Applicant submitted his additional evidence in support of both applications. The Applicant's submissions were transmitted to the Respondent on 7 March 2018.

... On 12 April 2018, the Applicant filed a motion for expedited consideration in support of both applications. The Applicant's motion was transmitted to the Respondent on 15 April 2018.

... On 19 April 2018, the Respondent filed a motion in each case for leave to file comments on the Applicant's additional evidence. These were transmitted to the Applicant on 22 April 2018.

... By Order Nos. 072 and 073 (UNRWA/DT/2018) dated 26 April 2018, the [UNRWA Dispute] Tribunal rejected the Applicant's motion for expedited consideration and granted the Respondent's motions to file comments.

... By Order No. 080 (UNRWA/DT/2018) dated 9 May 2018 ("Order No. 080"), the [UNRWA Dispute] Tribunal consolidated the applications and ordered the Respondent to produce additional documents.

... On 11 June 2018, the Respondent submitted his response to Order No. 080 and informed the [UNRWA Dispute] Tribunal that Mr. Y. A. had received the disciplinary measure of deferment of salary increment for one year and had been served with a letter of censure. In the same response, the Respondent also informed the [UNRWA Dispute] Tribunal that Mr. P. F. had been served with a letter of censure. The response was transmitted to the Applicant on 13 June 2018. [In addition, both Mr. Y. A. and Mr. P. F. were required to apologize to Mr. Baramky.]

... By Order No. 108 (UNRWA/DT/2018) dated 14 June 2018, the [UNRWA Dispute] Tribunal ordered the Applicant to keep strictly confidential the investigation reports that had been submitted with the Respondent's response to Order No. 080.

... By Order No. 110 (UNRWA/DT/2018) dated 20 June 2018 ("Order No. 110"), the [UNRWA Dispute] Tribunal ordered the Respondent to produce further documents on an *ex parte* basis.

... On 27 June 2018, the Respondent submitted his response to Order No. 110.

... On 16 July 2018, the Applicant filed a further submission without requesting leave of the [UNRWA Dispute] Tribunal. This was transmitted to the Respondent on 17 July 2018.

... By Order No. 134 (UNRWA/DT/2018) dated 22 July 2018 (“Order No. 134”), the [UNRWA Dispute] Tribunal ordered the Respondent to produce further documents.

... On 3 August 2018, the Respondent submitted his response to Order No. 134. [The Respondent informed the UNRWA DT that Mr. P. F. had apologized to Mr. Baramky in writing. The Respondent was unable to confirm whether Mr. Y.A. had apologized.] This was transmitted to the Applicant on 6 August 2018.

... On 8 November 2018, the Applicant filed a motion requesting leave to submit further evidence. The motion was transmitted to the Respondent on 11 November 2018.

... By Order No. 216 (UNRWA/DT/2018) dated 22 November 2018, the [UNRWA Dispute] Tribunal granted the Applicant’s motion to submit further evidence.

... On 24 November 2018, the Applicant submitted his additional evidence. On 25 November 2018, the Applicant’s submission was transmitted to the Respondent.

3. On 29 November 2018, the UNRWA DT issued Judgment No. UNRWA/DT/2018/065 dismissing the applications. The UNRWA DT found that Mr. Baramky’s first application had become moot to the extent that the decision to permanently transfer him to the Cash for Work Programme had already been rescinded. The UNRWA DT further found that the remainder of his application, the request for damages resulting from the transfer decision, was not supported by evidence and accordingly, it dismissed that part of the application.

4. Turning to the second application which contested the disciplinary measures imposed on two staff members following the outcome of the investigation into Mr. Baramky’s complaints, the UNRWA DT found that since Mr. Baramky had not raised any further claim about the lack of an apology on the part of Mr. Y. A. following the Commissioner-General’s response dated 3 August 2018, the apology was no longer an issue between the parties. The UNRWA DT further dismissed Mr. Baramky’s contention that the disciplinary measures taken against Mr. P. F. and Mr. Y. A. were disproportionate to the gravity of their respective acts of misconduct. Finally, the UNRWA DT dismissed Mr. Baramky’s request for moral damages finding that his moral damage was attributable to the staff members concerned and not to any fault of the Agency.

5. On 7 December 2018, Mr. Baramky filed the appeal against the UNRWA DT Judgment. On 10 December 2018, Mr. Baramky filed a request for interpretation of judgment before the UNRWA DT asking that the UNRWA DT provide an interpretation of paragraph 55 of its Judgment in which the UNRWA DT rejected his request for moral damages on the ground that Mr. Baramky’s moral damage was only attributable to the two staff members concerned and not to any fault of the Agency. By Order No. 230 (UNRWA/DT/2018) dated 11 December 2018,

the UNRWA DT denied Mr. Baramky's request for interpretation of judgment holding that paragraph 55 of the Judgment was clear and did not require interpretation.

6. On 7 January 2019, Mr. Baramky filed a motion for leave to file additional evidence before the Appeals Tribunal. By Order No. 338 (2019) dated 28 January 2019, the Appeals Tribunal dismissed Mr. Baramky's motion.

7. On 11 February 2019, Mr. Baramky filed a motion seeking leave to submit additional pleadings. By Order No. 342 (2019) dated 1 March 2019, the Appeals Tribunal dismissed Mr. Baramky's motion.

Submissions

Mr. Baramky's Appeal

8. Mr. Baramky submits that he had raised the issue of a written apology by Mr. Y. A. in his application to the UNRWA DT and he had never been asked by the UNRWA DT to submit additional claims concerning the apology before the issuance of its final decision. The UNRWA DT's finding that the written apology by Mr. Y. A. was no longer an issue among the parties because Mr. Baramky had not submitted any additional claim after receiving the Commissioner-General's response on 6 August 2018 was merely a personal assumption.

9. The UNRWA DT, having received Mr. Baramky's request for compensation, found that Mr. Baramky's moral damage was only attributable to Mr. P. F. and Mr. Y. A. and not to any fault of the Agency. Mr. Baramky contends that therefore, as long as UNRWA provides judicial immunity to Mr. P. F. and Mr. Y. A. in national courts, it must provide remedies to compensate him for moral and psychological damages in the amount of USD 3,900,000

The Commissioner-General's Answer

10. The Commissioner-General submits that Mr. Baramky has failed to identify, by citation to any provision in Article 2(1) of the Appeals Tribunal Statute, the grounds for his appeal, and as such, his appeal is defective. Mr. Baramky has failed to demonstrate in what respect the UNRWA DT, by dismissing his claim for moral damages, exceeded or failed to exercise its jurisdiction, erred in law or erred in fact resulting in a manifestly unreasonable decision or committed an error in procedure. Mr. Baramky does not challenge the reasons for dismissing

his claim for moral damages and merely disagrees with the outcome of his case. Failure to raise claims under the Appeals Tribunal Statute and to explain how the UNRWA DT erred in deciding his claims is a sufficient basis for the Appeals Tribunal to dismiss the appeal.

11. Additionally, the UNRWA DT did not err in fact or law requiring a reversal of its Judgment. The UNRWA DT reviewed the pertinent facts and was cognizant of the relevant jurisprudence. As to the UNRWA DT's conclusion that Mr. Y. A.'s apology was no longer an issue between the parties, it is not contested that Mr. Baramky did not apprise the UNRWA DT on whether Mr. Y. A. had provided him with an apology as instructed in the letter of censure. As such, the UNRWA DT's conclusion cannot be assailed. In addition, in accordance with the Appeals Tribunal's jurisprudence, satisfaction for wrongs done is received through the Judgment and not an apology. In the present case, the UNRWA DT's narrative of facts and the Agency's actions constitute a public record that Mr. Baramky had been wronged and that action was taken by the Agency.

12. Mr. Baramky's assertion that the Agency is liable to pay damages to compensate for the alleged immunity enjoyed by the two staff members is wholly misconceived as the concept of functional immunity is for the benefit of the Organization and not the staff. Mr. Baramky proceeds on a wrong premise as if the quantum of compensation had been determined by the UNRWA DT. The UNRWA DT did not make any determination on the question of quantum.

13. The UNRWA DT's refusal to award moral damages is correct in law. There was no breach of Mr. Baramky's terms of appointment or contract of employment. Mr. Baramky did not demonstrate that the harm he had suffered, if any, resulted from the acts complained of.

14. The Commissioner-General requests that the UNRWA DT dismiss the appeal in its entirety.

Considerations

15. Article 2(1) of the Appeals Tribunal Statute provides that:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal^[2] in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

16. This appeal raises two issues for consideration and determination. The first issue is whether the UNRWA DT erred on a question of law or fact, resulting in a manifestly unreasonable decision, or committed an error in procedure, such as to affect the decision of the case, when it found that, despite the fact that the Commissioner General had not been able to confirm whether Mr. Y. A. had apologized to Mr. Baramky as required by the disciplinary measure of the letter of censure, this was no longer an issue between the parties, since Mr. Baramky had not raised any further claim about the lack of such an apology.

17. In accordance with our jurisprudence, once the disciplinary measure has been imposed on the staff member, the victim of retaliation is entitled to know whether a disciplinary measure is commensurate in gravity with the misconduct.³ Otherwise, the Administration would have failed to comply with its duty to provide effective remedies when prevention has failed. Only when a proportionate sanction to the misconduct is imposed will the effects of the harmful transgression be alleviated. This is the proper way for the victim to know whether justice was done to the perpetrators.⁴

[2] Pursuant to Article 2(4) of the Special Agreement between the United Nations and UNRWA, for the purposes of the Appeals Tribunal's exercise of jurisdiction over appeals under the Special Agreement, "(a) all references to the [UNDT] in the Statute of the Appeals Tribunal shall be deemed to refer to the UNRWA Dispute Tribunal; and (b) the reference to the Secretary-General in Article 9 of the Statute of the Appeals Tribunal shall be deemed to refer to the Commissioner-General of UNRWA".

³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, para. 36; *Rahman v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-453, paras. 42-44.

⁴ *Rahman v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-453, para. 44.

18. In his appeal, Mr. Baramky claims that he had never been asked to submit such comments and that the decision was based on a mere assumption. He does not contest the regularity of the procedure and he no longer challenges the disciplinary measures imposed on the staff members. All he seeks in his appeal is the implementation of the sanction imposed on Mr. Y. A. by the letter of censure.

19. However, Mr. Baramky's claim for implementation of the sanction is raised, it would seem, for the first time on appeal. While contesting the reasoning of the UNRWA DT's Judgment that this was no longer an issue between the parties, he raises a new claim – the implementation of the sanction imposed on Mr. Y. A. – that should have previously been the object of a new administrative decision. In light of the foregoing, while we find that Mr. Baramky's appeal is not receivable in this regard, Mr. Baramky is not barred from requesting the Agency to enforce its letter of censure with respect to Mr. Y. A.

20. Mr. Baramky further contends that UNRWA must provide remedies to compensate him for the moral damages he suffered, insofar as it provides immunity to the two staff members who caused the harm. This issue was raised as a consequence of the UNRWA DT Judgment, which rejected Mr. Baramky's request for compensation for moral damages on the ground that the harm suffered was only attributable to the staff members who had been disciplined and not to the Agency.⁵

21. Although we have some doubts with respect to the UNRWA DT's reasoning in this regard, we find no error in its final order denying Mr. Baramky's request for moral damages, since there was no evidence of harm in the present case, as required by Article 10(5) (b) of the UNRWA DT Statute.

⁵ Paragraph 55 of the impugned Judgment. Following the issuance of the Judgment, Mr. Baramky filed a request for interpretation of judgment before the UNRWA DT, asking for interpretation of this specific paragraph of the Judgment, but his request was denied, for the Judgment was held to be "clear and without need for interpretation".

Judgment

22. The appeal is dismissed and Judgment No. UNRWA/DT/2018/065 is affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar