UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1397

Ibrahim Ahmad Fanous
(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 Kanwaldeep Sandhu, Presiding Judge Gao Xiaoli Judge Abdelmohsen Sheha
Case No.:	2022-1766
Date of Decision:	27 October 2023
Date of Publication:	5 December 2023
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Nathalie Boucly

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Before 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), Mr. Ibrahim Ahmad Fanous filed three applications challenging the following decisions: 1) his non-selection for the roster for the post of School Principal, Grade 15, Syria Field Office (SFO) following Vacancy Announcement (VA) No. 74-2016 (SP/2016) (First Contested Decision); 2) the issuance of a letter of reprimand (Second Contested Decision); and 3) the refusal to shortlist him for the post of School Principal following VA No. 70-2019 (SP/2019) (Third Contested Decision).

2. By Judgment No. UNRWA/DT/2022/021 dated 31 May 2022 (impugned Judgment), the UNRWA DT consolidated the three cases. It rescinded the decision not to select Mr. Fanous for the roster for the post of SP/2016 and awarded in-lieu compensation in the amount of USD 1,500. It rescinded the decision to serve Mr. Fanous with a letter of reprimand and ordered the Agency to expunge the letter of reprimand from his official status file. It also dismissed Mr. Fanous' application against the decision not to shortlist him for the post of SP/2019.

3. Mr. Fanous appealed the impugned Judgment, and the Commissioner-General filed a cross-appeal.

4. For the reasons that follow, we dismiss the appeal and cross-appeal and affirm the impugned Judgment.

Facts and Procedure

5. At the time material to Mr. Fanous' applications before the UNRWA DT, Mr. Fanous occupied the post of Teacher, Central Area, SFO, at Grade 10, Step 17.

First Contested Decision – Non-Selection for the Roster SP/2016

6. On 18 August 2016, the Agency internally advertised the VA for the roster of School Principals SP/2016 for all areas. The Agency received 285 applications in total. Sixty-four candidates, including Mr. Fanous, took the written test. The recruitment process was then put on hold. In 2019, the recruitment process was reinitiated. Sixty-six candidates,

including Mr. Fanous, were invited for a personal interview. Two candidates did not attend the interview.

7. The Recruitment Report stated that the roster was capped at sixty candidates. The Recruitment Report further stated that the Interview Panel (Panel) comprised seven members. Mr. Fanous was one of the sixty-four candidates who were interviewed by the Panel for the roster of School Principal posts across various areas of Syria, and one of three candidates who were interviewed by the Panel for the roster of School Principal posts in the Central Area. The Recruitment Report indicates that the Panel recommended 41 of the 64 candidates interviewed to be placed on the roster for the post of SP/2016: Damascus Area (32 candidates recommended), South Area (two candidates recommended), Central Area (two candidates recommended) and North Area (five candidates recommended).

8. The assessment form for Mr. Fanous shows that the Panel concluded that he partially met four competencies and fully met one competency and did not recommend him for the roster.

9. In the Judgment, with respect to the First Contested Decision, the UNRWA DT found that the Panel had been wrongly constituted due to the absence of a representative of the Recruitment Administrator with voting rights, which was a requirement under the applicable regulatory framework. Consequently, the UNRWA DT concluded that it did not need to consider the merits of the other alleged irregularities and held that the decision not to select Mr. Fanous for placement on the roster was unlawful and had to be rescinded.

10. The UNRWA DT awarded in-lieu compensation in the amount of USD 1,500. In setting the amount of in-lieu compensation, the UNRWA DT took the following factors into consideration: the likelihood of selection had the Panel been properly composed; Mr. Fanous' salary at the time; the impact that the addition of one Panel member and the potential removal of another Panel member could have had on the deliberations and voting of the other Panel members; and the fact that even had Mr. Fanous been rostered, this did not guarantee a future selection. The UNRWA DT dismissed Mr. Fanous' request for moral damages finding that the statements of two fellow teachers mentioning that Mr. Fanous had been negatively affected by the non-selection decision, without any further explanation or details, was of low probative value, as the teachers were not medical practitioners/experts or psychologists/psychiatrists who could professionally attest to the existence and causes of an individual's moral harm.

Second Contested Decision – Letter of Reprimand

11. Mr. Fanous had an argument with the School Principal on 12 February 2020 about the school's duty schedule, the absence of certain students and the fact that he had not been invited to meetings held by the Area Education Officer during the latter's visit to the school.

12. On 17 February 2020, he was served a letter of reprimand which read:

> Central Area Management draws your attention to your unacceptable conduct. In particular, your disparaging response to the School Principal on Wednesday 12 February, including yelling at her in front of all colleagues, contravenes educational and administrative work ethics. Therefore, we issue you this strong-worded letter of reprimand which will adversely impact "your future career status".

13. With respect to the Second Contested Decision, the UNRWA DT held that the facts on which the decision was based had not been established by a preponderance of evidence, and it therefore rescinded the decision. The UNRWA DT, however, dismissed Mr. Fanous' claim for moral damages in relation to this incident on grounds that the only evidence supporting his claim was his own testimony which was not sufficient evidence of harm.

Third Contested Decision – Non-Shortlisting for SP/2019

14. From 11 to 24 July 2019, the Agency internally advertised the VA for the post of SP/2019 on a fixed-term appointment for three years, Grade 15. The required work experience, as per the VA was "eight years satisfactory teaching experience in an UNRWA school including supervisory experience".

15. Mr. Fanous applied for the post on 22 July 2019. In his Personal History Form (PHF), he submitted his employment record, including the relevant supervisory experience, under the section of "Education" (Section No. 19) instead of the designated section of "Employment Record" (Section No. 20). Also, under the section of "Employment Record", he answered "0" to the questions of "Number of Employees supervised by you" and "Kind of Employees supervised by you". In the final section of the PHF, Mr. Fanous answered "yes" to the question whether he had sufficient years of teaching experience including supervisory experience.

16. Upon the advertisement of the vacancy, the Agency received a total of 304 applications. Forty-seven candidates were shortlisted and invited for an interview. Mr. Fanous was not shortlisted. On 12 May 2021, the Human Resources Assistant B informed Mr. Fanous that he had not been shortlisted because he did not possess any supervisory experience.

17. With regard to the Third Contested Decision, the UNRWA DT noted that it was undisputed that Mr. Fanous had the required experience for the post as advertised and that he included it in his PHF, but in the wrong section. The UNRWA DT concluded that the relevant Recruitment Administrator was acting within his or her discretion in excluding Mr. Fanous from the recruitment process and dismissed Mr. Fanous' application.

18. On 26 November 2022, Mr. Fanous filed an appeal, and on 10 February 2023, the Commissioner-General filed his answer and cross-appeal. Mr. Fanous did not file an answer to the cross-appeal.

Submissions

Mr. Fanous' Appeal

19. Mr. Fanous submits that the UNRWA DT erred in awarding USD 1,500 as compensation in lieu of rescission of the decision not to place him on the roster for SP/2016. Mr. Fanous contests this decision on grounds that the compensation was not proportionate to the loss he sustained and requests that the Appeals Tribunal award him compensation in a higher amount. Mr. Fanous asserts that the UNRWA DT erred when it failed to consider the moral damages he sustained and erred when it did not consider the testimony of two of his colleagues in this regard.

20. Mr. Fanous further submits that the UNRWA DT erred in failing to award him compensation for moral damages after rescinding the decision to issue a letter of reprimand.

21. Finally, Mr. Fanous submits that the UNRWA DT erred in dismissing his application challenging his non-selection for the post of SP/2019 following the Administration's failure to give his candidacy full and fair consideration. He asks that the Appeals Tribunal award an amount that it deems appropriate as compensation for the moral harm that he suffered as a result of not being invited to interview for the post of SP in 2019.

The Commissioner-General's Answer

22. The Commissioner-General contends that the UNRWA DT did not err in its assessment of the weight to attach to the statements of Mr. Fanous' colleagues and, since no expert evidence of any kind had been submitted, it did not err in finding that his claim for moral damages was insufficiently substantiated and could not be awarded.

23. Turning to the request for compensation relating to the letter of reprimand, the Commissioner-General submits that in the absence of any evidence other than Mr. Fanous' own testimony to support his claim for moral damages, the UNRWA DT did not err in denying compensation on this basis.

24. Regarding the decision not to shortlist Mr. Fanous for the post of SP/2019, the Commissioner-General submits that the UNRWA DT did not err in finding that Mr. Fanous had not proffered any evidence that the selection decision was irregular, and it therefore did not err in dismissing his application.

25. The Commissioner-General asks that the Appeals Tribunal dismiss the appeal in its entirety.

The Commissioner-General's Cross-Appeal

26. By way of cross-appeal, the Commissioner-General appeals the quantum of compensation awarded in lieu of recission of the decision not to select Mr. Fanous for the roster of School Principals (SP/2016). The UNRWA DT did not make factual findings on the likelihood of Mr. Fanous' placement on the roster and selection for a post as School Principal had there been no irregularities in the recruitment exercise. The UNRWA DT having erred in that regard, the Commissioner-General maintains that Mr. Fanous would have had a one in three chance of being selected for a post of School Principal had he been rostered following the SP/2016 recruitment exercise, because in that case he would have been one of three candidates on the Central Area roster.

27. Had Mr. Fanous indeed been rostered and later appointed to a similar post, that would have represented a promotion and a nominal increase in his base salary. His post in the Agency at the time he applied for the post of SP/2016 was Grade 10, Step 17 with a base salary of USD 858.70, while for a newly appointed School Principal the base salary was USD 838.20 at

Grade 15, Step 1. In accordance with UNRWA Area Staff Rule 103.3(2), Mr. Fanous, if eventually selected for appointment to a School Principal position, would have been placed on Grade 15, Step 5 and would have received a net base salary increase of USD 62.80 per month (USD 753.60 per year). The Commissioner-General concludes that the amount of compensation awarded to Mr. Fanous in lieu of rescission, should thus be USD 251.20 (i.e., one third of the annual salary difference between his current grade/step and the recruited post), representing the chance of one third of being appointed from the roster. The amount of compensation awarded is contrary to the law and the facts as found by the UNRWA DT, namely, the finding that the staff member would have merely been placed on a roster rather than selected.

28. Accordingly, the Commissioner-General requests the UNAT to set aside this decision of the UNRWA DT and to award Mr. Fanous compensation in lieu of recission in the amount of USD 251.20.

Considerations

Compensation in lieu of Rescission of the First Contested Decision

29. The issue is whether the UNRWA Dispute Tribunal erred in setting at USD 1,500 the amount of compensation in lieu of rescission of the decision not to select Mr. Fanous for the roster of School Principals (SP/2016).

30. Neither party appealed the UNRWA Dispute Tribunal's finding that the First Contested Decision was unlawful and should be rescinded. Both parties appeal the amount of compensation in lieu of rescission. Mr. Fanous says the UNRWA DT also erred in not awarding him moral damages.

31. Article 10(5) of the UNRWA Dispute Tribunal Statute provides that:

> 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[.]

32. Therefore, if the UNRWA Dispute Tribunal orders recission of a contested administrative decision that concerns appointment, promotion or termination, the UNRWA DT shall also set an amount of compensation that the Respondent may elect to pay as an alternative to rescission of the contested decision.

33. The purpose of in-lieu compensation is to place the staff member in the same position they would have been in, had the unlawful decision not been made. Also, the Dispute Tribunal must set compensation following a principled approach and on a case-by-case basis.[1]

34. In the present case, the UNRWA DT set the amount of compensation at USD 1,500, *ex aequo et bono,* which represents approximately two months of Mr. Fanous' base salary at the time. The UNRWA Dispute Tribunal took into consideration: i) the likelihood of selection had the Panel been properly composed; ii) his current salary; iii) the impact that the addition of one Panel member and potential removal of another member could have had on the deliberations and voting of the Panel; and iv) the fact that there was no guarantee that Mr. Fanous would have been selected even if he had been rostered.

35. Mr. Fanous says the USD 1,500 is very small in comparison with the harm he has suffered. The difference between the salary in his current post and the post of SP/2016 amounts to nearly USD 200 per month, and assuming he would have been appointed in September 2019, the financial loss would be approximately USD 8,000 by the time he filed his appeal. However, this assumes that he would have been selected for a vacant position.

36. The determination of the quantum of in-lieu compensation is not an exact science but will depend on the circumstances of each case.[2] The Appeals Tribunal has previously held that many factors can be considered, including the nature of the post occupied, the remaining time of appointment, the salary difference, the number of candidates involved, and the possibility of selection.[3]

37. Mr. Fanous was one of 64 candidates who were interviewed for the roster of School Principal posts across various areas of Syria, and one of three candidates who were interviewed for the roster of School Principals in the Central Area. The Panel eventually

[1] *Afm Badrul Alam v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-124, para. 23.
[2] *Ibid*., para. 29.
[3] *Ibid*., para. 28.

recommended 41 of the 64 candidates to be placed on the roster, of which two candidates were to be placed on the Central Area roster. Mr. Fanous was not one of them.

38. Assuming the unlawful First Contested Decision did not occur, Mr. Fanous could have been one of the three candidates to be placed on the Central Area roster. In accordance with UNRWA Area Staff Rule 103.3(2), Mr. Fanous, if eventually selected for appointment to a School Principal position, would have been placed at Grade 15, Step 5 and would have received a net base salary increase of USD 62.80 per month (USD 753.60 per year).

39. The Commissioner-General contends that the amount of compensation awarded to Mr. Fanous in lieu of rescission, should be USD 251.20 (i.e., one third of the annual salary difference between his current grade/step and the recruited post), representing the chance of one third of being appointed from the roster.

40. We find that the UNRWA Dispute Tribunal did not err in its award of in-lieu compensation. It appropriately considered Mr. Fanous' chance of selection for the post when it stated that it considered there was no "guarantee" of a future selection. The UNRWA DT applied a context-specific lump sum amount. It considered the likelihood of selection and Mr. Fanous' salary at the time. It made a determination that was fair and just in the present case but also took a principled approach that considered all relevant considerations. As we ruled in *Lutta*, we will generally defer to the Dispute Tribunal's assessment of the damages award.[4]

Moral Damages for First and Second Contested Decisions

41. The issue here is whether the UNRWA Dispute Tribunal erred in refusing to award moral damages after rescinding the First Contested Decision and the Second Contested Decision (to place a letter of reprimand in Mr. Fanous' official status file).

42. Mr. Fanous says the UNRWA Dispute Tribunal erred in not awarding moral damages for both decisions.

43. Article 10(5)(b) of the UNRWA Dispute Tribunal Statute provides that the UNRWA DT may order"[c]ompensation 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,

[4] *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117, para. 1.

however, in exceptional cases order the payment of a higher compensation for harm supported by evidence and shall provide the reasons for that decision."

44. As per Appeals Tribunal jurisprudence, the claimant bears the burden to establish, on a balance of probabilities, three elements: the harm itself, an illegality, and a nexus between both. Therefore, the harm must be shown to be directly caused by the unlawful administrative decision in question.[5]

45. In the present case, Mr. Fanous provided his statements, in support of a request for compensation, regarding both the First and Second Contested Decisions. Regarding the First Contested Decision, he also provided statements from two fellow teachers stating that he had been negatively affected by the First Contested Decision without further explanation or details.

46. In its Judgment, the UNRWA Dispute Tribunal concluded that the teachers' evidence provided was of low probative value. The Appeals Tribunal has previously held that an entitlement to moral damages may arise where there is evidence by way of a medical, psychological report or otherwise of "harm, stress or anxiety" caused to the staff member, which can be "directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights" and where the Tribunal is "satisfied that the stress, harm or anxiety is such as to merit a compensatory award".[6]

47. In the present case, the UNRWA Dispute Tribunal was not satisfied on this issue. The Appeals Tribunal will not interfere lightly as the Dispute Tribunal is in the best position to decide the level of compensation given its appreciation of the case.[7]

48. We find that the UNRWA Dispute Tribunal did not err in not awarding moral damages with respect to both the First and Second Contested Decisions.

Third Contested Decision

49. The issue is whether the UNRWA Dispute Tribunal erred in finding that the relevant Recruitment Administrator was acting within their discretion in excluding Mr. Fanous from the shortlist for SP/2019. If so, Mr. Fanous requests an award for moral damages.

[5] *Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68.
[6] *Claude Cahn v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1329, para. 69.
[7] *Ibid.*, para. 70.

50. In the present case, it was not disputed that Mr. Fanous had the required experience but he had included the relevant experience in his PHF under the wrong section of the application. The UNRWA Dispute Tribunal held that the inclusion of his relevant experience in the wrong section of the application was sufficient reason not to shortlist him. The UNRWA Dispute Tribunal held that the Recruitment Administrator was acting within their discretion in excluding Mr. Fanous from the recruitment process.

51. The Appeals Tribunal has previously held that the Agency has broad discretion in matters of staff selection. In non-selection cases, all official acts are presumed to have been regularly performed, if the Agency can minimally show that full and fair consideration was given to the candidate. This has been done here. There is no evidence in this instance that the shortlisting was not based on objective criteria. The staff member can rebut this presumption, through clear and convincing evidence, that the procedures were violated, the Panel was biased or discriminated against the candidate, relevant material was ignored, or irrelevant material was considered, or other grounds depending on the facts of the case.[8]

52. Although Mr. Fanous had the required experience, he failed to properly provide that information in his application and his PHF did not reflect his supervisory experience. The candidate has the obligation to complete his application accurately and appropriately and failure to do so or to follow instructions reflects on his candidacy.[9] The UNRWA Dispute Tribunal found that the Agency published a guide and circulated instructions by e-mail on how to fill out the PHF which instructions Mr. Fanous did not follow.

53. Therefore, we find that the UNRWA Dispute Tribunal did not err when it held that Mr. Fanous failed to discharge his burden to rebut the presumption that the Agency improperly exercised its discretion in the Third Contested Decision.

[8] *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.
[9] See *Vladislav Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1066, para. 29.

Judgment

54. Mr. Fanous' appeal and the Commissioner-General's cross-appeal are dismissed. Judgment UNRWA/DT/2022/021 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Gao	Judge Sheha

Judgment published and entered into the Register on this 5th day of December 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar