

Judgment No. 2024-UNAT-1429



Counsel for Mr. Shahwan

THE UNITED NATIONS APPEALS TRIBUNAL

Facts and Procedure

7. Given that neither party appeals the UNRWA DT's determination on the merits of Mr. Shahwan's claims, only a brief summary of the factual background is presented.³
8. As of 1 March 2018, Mr. Shahwan was the Chief of Staff (CoS) of the Agency at the D-2 level. In January 2019, the Secretary-General requested that the United Nations Office of Internal Oversight Services (OIOS) investigate Mr. Shahwan and four other senior managers of UNRWA, including the former Commissioner-General.
9. On 4 July 2019, Mr. Shahwan submitted his resignation effective 31 July 2020 pursuant to conditions negotiated with the former Commissioner-General about matters unrelated to the OIOS investigation. These conditions were set out in a Separation Agreement.
10. The Separation Agreement specified in Section 12 that "UNRWA will provide the Staff Member with a positive performance evaluation (E-PER) by his supervisor(s) to enable him to seek alternative employment outside UNRWA". Section 13 also stated that UNRWA would provide Mr. Shahwan "with a certificate of service addressing position and duration of service with UNRWA", and that if more information on his performance was needed, it would be provided on the basis of "the Agency's official records, i.e., completed performance evaluations".⁴

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Judgment No. 20

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Submissions

Case No. 2023-1816

The Commissioner-General's Appeal

31. The Commissioner-General appeals against the award of costs for legal representation. He submits that the UNRWA DT erred in fact and law and exceeded its competence in awarding costs for legal representation in the absence of a specific finding of manifest abuse of proceedings.

32. The Commissioner-General relies on Article 10(6) of the UNRWA Dispute Tribunal Statute that states: "Where the Dispute Tribunal determines that a party has abused the proceedings before it, it may award costs against that party." He also points to the Appeals Tribunal's Judgment in *Kamunyi*, where the UNAT held that "no legal costs are due to a party when the opposing party has not abused the process".¹⁹

33. The Commissioner-General contends that the UNRWA DT erred when it made an award of legal costs in the absence of any finding that the Agency had manifestly abused the proceedings before it. He argues that the UNRWA DT provided no substantiation for this award of costs.

34. The Commissioner-General also submits that the Appeals Tribunal has advised that litigants cannot be expected to be reimbursed for hiring private counsel when there is a legal service funded by the Organization available to the staff member.²⁰ In this case, Mr. Shahwan could have availed himself of the services of the Legal Office for Staff Assistance (LOSA).

35. The Commissioner-General notes that the Dispute Tribunal did not request any estimation or explanation of the actual costs of Mr. Shahwan's counsel; indeed, the Tribunal expressly found that Mr. Shahwan "failed to substantiate" them. The Commissioner-General submits that the UNRWA DT has no discretion to award legal costs in the absence of any substantiation of the costs by Mr. Shahwan and in the absence of a finding that the Agency has manifestly abused the proceedings.

¹⁹ *Kamunyi v. Secretary -General of the United Nations*, Judgment No. 2012-UNAT-194, para. 36.

²⁰ *Angiulli Rolli v. Secretary -General of the World Meteorological Organization*, Judgment No. 2023-UNAT-1346, para. 62.

about his fees. Given that the procedure before the Dispute Tribunal lasted three years, Mr. Shahwan had no way of knowing when the time for submission of his legal bills would be.

44. Mr. Shahwan states that the amounts awarded (JOD 3,000 per case) is far below what he actually paid in legal fees, which was CHF 11,691.

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could have required more evidence of harm to his reputation, nor did it state what evidence should have been provided.

51. Mr. Shahwan submits that the Agency has acted maliciously by tarnishing his name in the media, and as the UNRWA DT found, violated his due process rights by not informing him of the outcome of the investigation or allowing him to defend himself, which supports the damage done to him.

52. The fact that he did not produce a medical report about his mental stress and anxiety around these issues is irrelevant since egregious violations of his due process rights, malicious acts by the Agency, and silence by the Agency to the rumours circulating about his integrity, are patently sufficient to cause severe distress and anxiety. Mr. Shahwan submits that he suffered due to the Agency's acts and simply withdrawing the Note is insufficient to compensate him for the material and moral damage incurred by him and his family for three years.

53. He contends further that the UNRWA DT erred on a question of fact when it asserted that he had not produced evidence that he remained unemployed following the end of his contract with the Agency. Mr. Shahwan states

it still refuses to issue the requested documents in spite of the impugned Judgment, moral damages are justified.

55. He seeks that the Agency be held responsible for pressuring him into entering into a Separation Agreement that it had no intention of respecting and seeks that the negative effects of the unlawful contested decisions be corrected and that he be awarded compensation for the distress, anxiety, and deception caused by the Agency's acts, and the precarious financial situation that he and his family have been in for the past three years.

56. Since the UNRWA DT took more than two and a half years after submission of his first application, and two years from the submission of his third application, to issue the impugned Judgment, an unjustifiable delay resulted which provides a basis for an award of moral damages, as found by the Appeals Tribunal in Benfield-Laporte.²⁶

57. Mr. Shahwan requests that in accordance with Article 9(1) of the Appeals Tribunal Statute (Statute), that the UNAT (i) order UNRWA to pay him material damages in the amount of one year of his last salary (level D-2, step 2) for the placement of the Note in his OSF; (ii) order UNRWA to pay him the equivalent of his gross salary from 1 August 2020 until such time as the performance evaluations and corrected work certificate are delivered to him; (iii) order UNRWA to pay him compensation in the amount of four months of gross salary for mental stress and anxiety; and (iv) order UNRWA to pay him for the legal costs incurred in this appeal, TJ.1

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69. An appeal is required to be determined efficiently and fairly.³⁰ By their nature, in most appeals the factual and legal issues have already been clearly defined by the parties, with a limited need for further clarification of such issues as a result.³¹ An oral hearing on appeal is considered exceptional for the reason that such a hearing will very often not “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. In *Ular*, an oral hearing was declined on the basis that the Appeals Tribunal does not sit as one of first instance and that an appeal is not a rehearing of the matter “but an opportunity for the parties to appeal on narrow bases, such as errors of law, fact and jurisdiction”.³²

70. Mr. Shahwan advanced no particular reasons why an oral hearing of his appeal is required, other than his wish for a personal audience with a judge, which is not a proper ground for a hearing. The factual and legal issues have already been clearly defined by the parties and do not require further clarification in an oral hearing. No exceptional circumstances exist which would warrant an oral hearing in the matter and there is no apparent reason proffered to show why an oral hearing is required to facilitate the expeditious and fair determination of the matter. For these reasons the application for an oral hearing is refused.

71. Two issues remain for determination in these appeals. The first is whether the UNRWA

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to substantiate the actual amount of legal costs for representation in this procedure”,³³ it nevertheless awarded him legal costs of JOD 3,000 following the rescission of contested decision 1. In relation to contested decision 3, the Tribunal found that the Agency had no valid reasons for its refusal to complete Mr. Shahwan’s performance evaluations and ordered that the Commissioner-General pay Mr. Shahwan JOD 3,000 for legal costs. With no evidence of a manifest abuse of proceedings by the Commissioner-General before the Tribunal, nor any finding of such an abuse of proceedings made, the costs orders made by the Tribunal did not accord with the terms of Article 10 of the UNRWA DT Statute and were therefore unjustified and cannot be sustained.

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unusual award or that Mr. Shahwan was unable to make use of the staff legal assistance available to him (LOSA) which caused him to incur the cost of external legal advice.

76. It follows that if we considered that the legal costs were awarded by the Dispute Tribunal under Article 10(5)(b) (which is not apparent from the impugned Judgment), there existed no basis on which to justify such an order given the evidence before the Tribunal. It follows that in awarding legal costs against the Commissioner-General the UNRWA DT erred. The Commissioner-General's appeal against both of the costs orders made must therefore succeed and the orders are hereby set aside.

Appeal against refusal to grant moral damages

77. Turning to Mr Shahwan's appeal against the refusal to award him moral damages, Article 10(5)(b) of the UNRWA DT Statute echoes Article 10(5)(b) of the UNDT Statute, following its amendment by the General Assembly in 2014. Article 10(5)(b) provides that the Dispute Tribunal may order:

(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.

78. In terms of Article 9(1)(b) of the Statute, this Tribunal may award compensation for harm on a similar basis.

79. To justify an award of compensation for harm, three elements must be proved, namely: (i) an illegality; (ii) the existence of harm; and (iii) proof of a nexus between the two.³⁸ It is thus not enough simply to demonstrate the existence of an illegality in order to obtain compensation.³⁹ The claimant bears a burden, in addition, to adduce sufficient evidence to prove that the illegality caused moral injury or harm which should be compensated. While the facts may in some circumstances speak for themselves and constitute sufficient evidence to allow a finding of harm, this is not always so,⁴⁰ and the mere fact of an administrative

³⁸ See *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, paras. 20-22.

³⁹ *Kallon Judgment*, op. cit., para. 60; *Marius Mihail Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1095, para. 39.

⁴⁰ *Kallon Judgment*, op. cit., para 63.

wrongdoing will not necessarily lead to an award of compensation.⁴¹ Compensation may be awarded for a proven illegality where the existence of harm caused by it is supported by sufficient evidence adduced.

80. In *Kallon*⁴² it was recognized that implicit in the notion of “compensation for harm” in Article 10(5)(b) of the UNDT Statute is the possibility that compensation may be awarded for non-economic harm or moral injury, subject to the express prohibition on exemplary or punitive damages contained in Article 10(7) of the UNDT Statute. It was reiterated that the award of moral damages is only permissible in circumstances in which a proper evidentiary basis has been laid to allow such an unusual award. In a contractual setting, including the contract of employment, compensation for actual financial loss sustained is usually regarded as sufficient for both the loss and the vexation or inconvenience caused by the breach.⁴³ For moral damages to be justified, evidence as to peculiar circumstances which have caused a violation of personality rights that are not able to be sufficiently remedied by compensation for actual patrimonial loss must exist. Although in certain circumstances the facts may speak for themselves and lead to a presumption of moral injury, given the unusual nature of an award of moral damages, there must exist a sufficient evidentiary basis to support such an award. That evidence must prove on a balance of probabilities the existence of factors causing harm, which may include evidence of damage to a staff member’s personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non-patrimonial incidents of personality.⁴⁴

81. The UNRWA DT rescinded the Commissioner-

which was insufficient to establish his claim for damages. Consequently, his claim for compensation under both heads was rejected.

82. Ordinarily, as set out in cases such as Ross,⁴⁵ the testimony of an applicant alone, without corroboration by independent evidence, expert or otherwise, affirming that non-pecuniary harm has occurred, is generally not sufficient to support an award of damages.

85. There is no serious dispute that following his termination Mr. Shahwan remained unemployed and was placed in a precarious financial position over an extended period of three years. Mr. Shahwan had been a staff member with a long career with the United Nations of approximately 30 years, with positive performance evaluations received at UNRWA until 2018. The evidence of his repeated unsuccessful applications for employment was not disputed before the Dispute Tribunal, nor was the fact that his repeated requests for the documentation were ignored. It can hardly be questioned that as a direct result Mr. Shahwan was unable to prove his past employment record with the United Nations to prospective employers.

86. There is no merit in the Commissioner-General's argument that there was no evidence

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