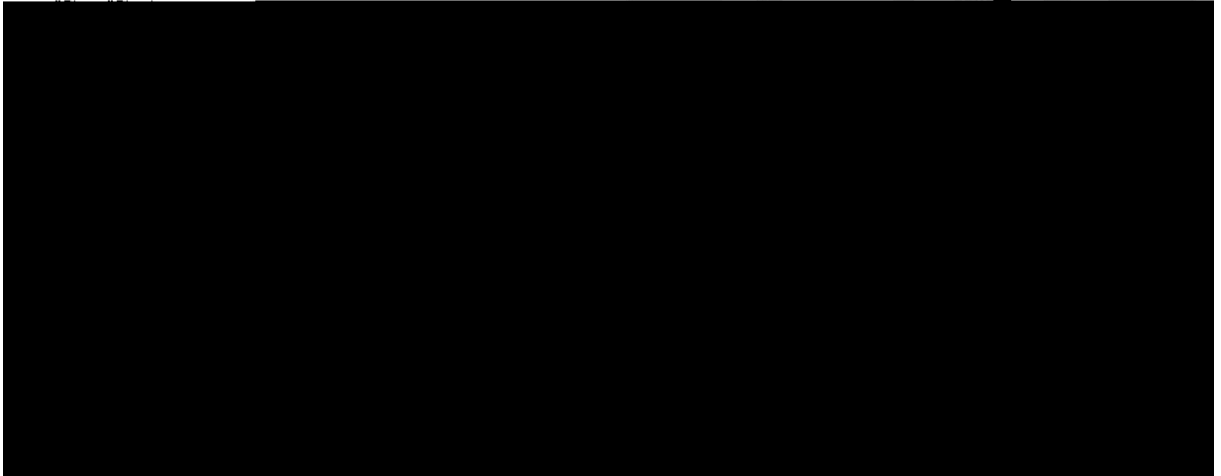


JdgmentNo. 2015-UNAT-603



JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by Mr. Michael Niedermayr of Judgment No. UNRWA/DT/2015/002, 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 20 January 2015, in the case of *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. On 17 March 2015, Mr. Niedermayr filed his appeal, and the Commissioner-General filed his answer on 13 May 2015.

#### Facts and Procedure

2. The following facts are uncontested:<sup>1</sup>

... Effective 1 May 2012, the Applicant joined the Agency as a P-3 Field Safety Advisor, Damascus, Syria on a one-year Fixed-Term Appointment. The appointment was renewed for the period of 1 May 2013 to 30 April 2014.

... In the beginning of July 2013, the Syrian authorities drove the Applicant out. Effective 7 July 2013, he was relocated to Beirut, Lebanon where he remained on duty at that time.

... On 21 July 2013, the post of Field Security Officer, P-3, Gaz Field Office (FSO/GFO) was advertised internally and externally. The vacancy announcement provided that

***NB: This recruitment process will also serve to generate a roster of suitable candidates for similar vacancies in different Fields within UNRWA's area of operations*** (emphasis in original).

... The direct transfer of the Field Security Officer in Lebanon Field Office (FSO/LFO) to the post of FSO/GFO was approved on 28 August 2013. However, it was noted that the transfer could not be effected until the position of FSO/LFO was filled. On that same day the Applicant requested to be transferred to the relevant post of FSO/LFO.

... On 29 August 2013, the Director of UNRWA Affairs, Lebanon (DUA/L) informed the Officer in Charge, Human Resources Services Division (OIC/HRSD) that the Applicant's transfer to Lebanon Field Office (LFO) could not occur because the Applicant's references had not been provided to the required standard.

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<sup>1</sup> Impugned Judgment paras 2-15 (emphasis in original).



5. The UNRWA DT found that Mr. Niedermayr was not selected because he had not been found suitable for the post of FSO/LFO at the end of August 2013 when he requested his transfer. Pursuant to paragraph 8 of the International Staff Personnel Directive (ISPD) No. 1/104.2, the DUA/L had the authority to appoint a person to the FSO/LFO post and as he had refused to transfer Mr. Niedermayr to his post two months prior, the UNRWA DT found that it was a proper exercise of her managerial discretion not to shortlist him since he had no chance of being appointed. The DUA/L's motive was not to select Mr. Niedermayr as specified in her e-mail of 29 August 2013. He had not been shortlisted because of his poor social interaction and communication skills.

6. Finally the UNRWA DT rejected Mr. Niedermayr's claim that preference in the selection of candidates should be given to internal candidates. The UNRWA DT considered that UNRWA's International Staff Regulation 4.5 meant that when there is equality between an internal and external candidate, the internal candidate should be selected. This is however, not the situation in the present case.

#### Submissions

##### Mr. Niedermayr's Appeal

7. Mr. Niedermayr contends that the UNRWA DT failed to exercise its jurisdiction to examine the reasons behind his exclusion from consideration for the FSO/LFO post. He was an internal candidate in performance evaluation ratings of performance exceeds expectations. He was however, neither shortlisted nor interviewed for the position and an external candidate was eventually selected. Mr. Niedermayr questions whether he was afforded full and fair consideration for the post. The UNRWA DT further failed to address his substantive claim in his application by focusing entirely on the selection procedure rather than on the initial decision to exclude him from consideration.

8. The Commissioner-General's reply to Mr. Niedermayr's application was the first time Mr. Niedermayr received an explanation for his exclusion and the UNRWA DT did not afford him an opportunity to respond. The UNRWA DT erred in law and fact by accepting at face value the negative assessment by the DUA/L of Mr. Niedermayr which was at variance with the official record reflecting outstanding performance reviews.





Considerations

*Preliminary matter – request for oral hearing*

16. Mr. Niedermay requests an oral hearing without providing any reasons. The Appeals Tribunal does not find that an oral hearing is necessary in his case within the meaning of Article 8(3) of the Appeals Tribunal Statute (Stat) and Article 18(1) of its Rules of Procedure (Rules). Accordingly, the request for an oral hearing is denied.

*The issues for consideration*

17. The decision reached by the UNRWA DT in respect of Mr. Niedermay's application is encompassed in the following paragraphs <sup>2</sup>

... The Applicant takes issue with the fact that he was not shortlisted for his selection process and notes that the hold has been shortlisted as a result of the expedited recruitment process. The Respondent replies that the Applicant was not among the candidates who applied for the FSO/GFO post and that only those candidates were shortlisted for the selection process for the FSO/LFO post. The Tribunal considers that this argument is not persuasive as the hiring manager knew that the Applicant was interested in the FSO/LFO post.

... It is obvious for the Tribunal that the Applicant was not selected because he had not been found suitable for the post of FSO/LFO at the end of August 2013 when he requested his transfer.

... ISPD No. 1/104.2 at paragraph 8 provides that Field Directors have the authority to appoint International Staff at the P-3 grade. As the DUA/L had the authority to appoint a person to the FSO/LFO post and as she had refused to transfer the Applicant to his post two months prior, the Tribunal considers that it was a proper exercise of her managerial discretion not to shortlist the Applicant as his chance to be appointed was non-existent.

... The Field Director shall exercise discretionary power in matters of recruitment and appointment. The DUA/L should not select the Applicant as specified in the email dated 29 August 2013. The Applicant was not shortlisted because of his poor social interaction and communication skills. Therefore, assuming that he had all the qualifications and experience for the FSO/LFO post, the circumstances do not establish that the Agency committed a manifest error by not selecting him, and the Applicant does not give any explanation as





21. In *Ljungdell*, referred to the discretion which is in the Administration in the following terms <sup>4</sup>

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that in reviewing such decisions it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute their decision for that of the Administration.

22. In *Abbassi*, emphasized that <sup>5</sup>

... [I]n reviewing administrative decisions regarding appointment and promotions the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

... The Secretary-General has a broad discretion in making

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant candidate was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant to show through clear and convincing evidence that she was denied a fair chance of promotion.

24. In *Rees*, we went on to say <sup>7</sup>

... The Appeals Tribunal recalls the jurisprudence that it is imperative that the Administration adheres to the rule of law and standards of due process in its decision-making. Given that Ms Rees's performance was the principal reason for her decision to resign her, the Administration was required to provide a performance-related justification for its informal Ms Administration's decision.

*The alleged failure to exercise jurisdiction and alleged errors of law on the part of the UNRWA DT*

27. In the context of raising the arguments advanced on her side, it is necessary to reprise in some detail the events that occurred between August and November 2013. As set out in the e-mail of 29 August 2013 from the OIC/HRSD to the DUA/L, Mr. Niedermayer expressed his interest in being transferred to the FSO/LFO post. His application in his regard was rejected by the DUA/L in her response of 29 August 2013 to the OIC/HRSD in which he stated that Mr. Niedermayer's transfer "will not happen" as [r]eferences taken have not come up to the standard required."

28. The DUA/L's rejection was noted by the Commissioner-General in his e-mail of 29 August 2013 wherein he directed, effectively, that an accelerated recruitment process be carried out to fill the FSO/LFO position.

29. By 13 November 2013, when a third party candidate was recommended for the position, the recruitment process had been carried out neither of which involved Mr. Niedermayer as a candidate. Nor does it appear that Mr. Niedermayer was informed on 29 August 2013, or at any time during the recruitment process, of the fact that his transfer application had been rejected or of the reasons for that rejection, or indeed that the Agency had embarked on a competitive recruitment process for the post.

30. Mr. Niedermayer's e-mail of 13 November 2013 upon learning that a candidate for the FSO/LFO post had been selected is instructive. It reads in part

Following the withdrawal of my Syria in Iraq and my subsequent relocation to Lebanon, in August [the FSO/LFO incumbent] expressed his interest to move on to Gaz, here was a proposal [.] for me to replace [him] in LFO. Needless to say that I was delighted, since he would have allowed me to remain in UNRWA and in Lebanon (and hence in my family), and, from the attached email correspondence [], I was under the impression that this move/transfer also had the blessing of both HQ Amman and LFO. Accordingly I briefed [.] my own director, who also approved the move, scheduled to take place in October (or so I understood), and in the meantime continued in my present job remotely

To my surprise, I have now heard that LFO has instead gone ahead with a formal recruitment process and selected another candidate, although I hold not here that I did not receive any formal communications in his regard, neither from LFO, nor from HR. This is grateful if he could be clarified, and if indeed confirmed, if somebody

could explain to me why I was not even considered, given that I am an internal candidate, in an ongoing process record, already present in Lebanon, and intimately familiar with UNRWA, the area and the current situation.

31. The response Mr. Niedermayr received on 28 November 2013 is equally instructive. It reads in part

Please note that the post of Field Security Officer, P-3, Gaza was advertised following the departure of the incumbent of the post in Gaza Field Office. The post was advertised internally and externally for 4 weeks from 21 July to 21 August 2013. An internal applicant to the FSO, Gaza post, and already occupying the same post in Lebanon was approved by GFO for direct transfer to the post upon identification of a suitable replacement for his position in Lebanon Field Office.

At his juncture, and as in any other vacancy internal lateral reassignment opportunities for the reassignment of Mr. Niedermayr, were considered along with available rotated candidates as a first instance for the Lebanon vacancy prior to a full recruitment process. As part of a desk review the Hiring Department considered Mr. Niedermayr as a candidate along with other rotated candidates. Following the review and in none of the candidates recommended for the position in Lebanon, it was decided to launch the recruitment process initially launched for the FSO, Gaza post to fill the FSO, Lebanon vacancy whereby applicants were contacted to confirm their interest in the FSO, Lebanon post.

While the Agency staffing policies and practices were followed, in hindsight it is acknowledged that the Agency could have kept Mr. Niedermayr apprised of developments in his regard.

32. A perusal of the documentary record at the Appeals Tribunal confirms that it was disingenuous to say the least for the Agency to suggest that Mr. Niedermayr's transfer application was considered in the same manner as the other candidates who were elected from the roster subsequent to the event of 29 August 2013. First and foremost Mr. Niedermayr's application for reassignment was rejected without this being afforded any interview or assessment process other than the DUA/L's one-sided rejection of

skills and experience, an opportunity to Mr. Niedermayr by the same manner in which his expression of interest in being reassigned to the FSO/LFO position was dismissed. Furthermore, when timely that exercise did not yield a successful candidate for the position and the Agency turned to the pool of candidates from the Gaz recruitment exercise, Mr. Niedermayr's name was not on that list nor had anything applied for the Gaz position. In the course of its judgment the UNRWA DT rejected the Commissioner-General's argument that as Mr. Niedermayr was not among the candidates who applied for the FSO/GFO position he could not have been considered for the Lebanon position in the second accelerated recruitment process finding that Mr. Niedermayr's interest in the FSO/LFO position was known to the hiring manager. Notwithstanding the UNRWA DT's finding, however, it nevertheless upheld the validity of the DUA/L's action of 29 August 2013.

33. The Appeals Tribunal holds that full and "fair" consideration of Mr. Niedermayr's interest as communicated in August 2013, in being reassigned to the Lebanon position required his being afforded the opportunity of knowing the terms which the DUA/L had expressed on 29 August 2013, and being given an opportunity to counter those terms and present his case for reassignment to Lebanon, in whatever manner he wished. The failure to offer him that opportunity coupled with the accelerated process which we embarked on hereafter without Mr. Niedermayr's participation, culminated in a process whereby Mr. Niedermayr's candidacy never got off the starting blocks. We hold that this was not sufficient for the UNRWA DT to rely on as communicated by the DUA/L on 29 August 2013, in light of the failure to offer Mr. Niedermayr the opportunity to rebut the negative feedback and his appeal for a situation whereby at least a proper weighing exercise could have been embarked upon before any decision was made as to his suitability to be assigned to the Lebanon position. Furthermore, the UNRWA DT failed to take due account of the fact that Mr. Niedermayr was further prejudiced by being excluded from the recruitment process which commenced subsequent to the rejection of his reassignment application. That exclusion left Mr. Niedermayr without the opportunity to participate in a competitive environment where he had professed to offer in terms of the FSO/LFO position could be openly and transparently assessed and his work measured against that which was being offered by the other candidates invited to participate in the selection process for the Lebanon position. In failing to

34. Moreover, it is not that point to be then applicable to recruitment ISPD No. 1/104.2/Rev2, while the recruitment of international staff at the Grade P-3 level and below is delegated by the Commissioner-General to the Field Directors in their respective fields, the Commissioner-General is required to provide final approval for managed resignation of staff at all levels following a recommendation of the ACHR.<sup>8</sup> This did not happen in the present case, as it should have in our view, given that the process entered into by Mr. Niedermay in August 2013 was one in which he was seeking resignation. Thus, we find that the UNRWA DT erred in law in relying on the authority of the DUA/L to reject Mr. Niedermay's application for resignation.

35. However, we do not uphold the contention that Mr. Niedermay had a legitimate expectation of succeeding to the FSO/LSO post. This argument does not appear to have been raised before the UNRWA DT. Thus, as stated in *Staedtler*:<sup>9</sup>

[I]t is not reasonable to assert that the UNDT erred on questions of fact or law in respect to allegations which were not raised before the UNDT for its consideration. [...]

37. Thus for all of the reasons set out above, we are satisfied that there is merit in Mr. Niedermayr's submission that the UNRWA DT did not enquire into the circumstances which eliminated, effectively, in excluding him from consideration for the position of FSO/LFO, which had the full and fair consideration which was his due did not materialize. His appeal is upheld.

*Remedy*

38. We are satisfied, rather than remanding the matter back to the UNRWA DT to determine the question of remedy that the appropriate remedy is rescission of the contested appointment in the option to hire the Commissioner-General to pay an amount in compensation in lieu of rescission.

39.

to the second scenario, as the pool of candidates for the two recruitment exercises that were carried out had been three or 31, respectively. At the best of times, the assessment of chance is an inexact science; in his case, it is more complicated for the reasons set out. The Appeals Tribunal finds the matter in the round and arrives at a figure that is deemed by it to be fair and equitable, having regard to the number of imponderables that present in his case. In all the circumstances, it holds that the sum of USD 10,000 constitutes an adequate remedy for the loss of chance which arose by reason of the prejudice suffered by Mr. Niedermayr. The moral damages claim is dismissed.

#### Judgment

41. The appeal is upheld, in part and the UNRWA DT Judgment is vacated.
42. The Appeals Tribunal orders rescission of the contested decision or, in the alternative, payment of USD 10,000 to Mr. Niedermayr in compensation for the loss of chance of being considered for the FSO/LFO position. The compensation is payable with interest at the US Prime Rate accruing from the date on which the first violation of Mr. Niedermayr's right to full and fair consideration for the FSO/LFO position occurred, i.e., 29 August 2013, to the date of payment. If the amount is not paid within the 60-day period counting from



Original and Authorized Version: English

Dated his30<sup>th</sup> day of October 2015 in New York, United States

*(Signed)*

Judge Fahery Preiding

*(Signed)*

Judge Thomas Felix

*(Signed)*

Judge Lick

Entered in the Register on his30<sup>th</sup> day of December 2015 in New York, United States

*(Signed)*

Weicheng Lin, Registrar