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JUDGE SABINE KNIERIM, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/014, 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 15 February 2018, in the case of *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Alaa Eddin Fayeze Nimer¹ filed the appeal on 24 April 2018, and the Commissioner-General filed his answer on 25 June 2018.

Facts and Procedure

2. On 25 June 2006, Mr. Nimer entered the service of UNRWA as a teacher. At the time of the events relevant to the application before the UNRWA DT, Mr. Nimer was a teacher at Beer Saba'a School in Khan Eshieh camp near Damascus, Syria.

3. On 1 July 2014, Mr. Nimer's house was hit by a barrel bomb. Mr. Nimer suffered minor injuries, but his wife sustained major ones. She spent two months in Al-Muwasat Hospital in Damascus, followed by treatment in private hospitals. Lack of medical resources in Syria to treat the type of injuries suffered by Mr. Nimer's wife compelled her to seek treatment in Turkey.

4. By letter dated 27 November 2016, addressed to the Head, Education Department (H/ED) through the Principal of Beer Saba'a School, Mr. Nimer requested Special Leave Without Pay (SLWOP) for a year effective 1 December 2016

... As it is clear from Article 8 (2) [of the UNRWA DT Rules of Procedure] that the Agency's framework specifically provides that a party may be represented by a staff member, it is unquestionable that the Agency has to allow the representative to attend the hearing as any other representative would, either in person, by telephone or via video-link.

... However, it is not for the [UNRWA Dispute] Tribunal to dictate the conditions under which a staff member will be released from his normal post duties for the purpose of representing a party in a case before the [UNRWA Dispute] Tribunal. The staff representative is voluntarily representing [Mr. Nimer], and it is certain that his tasks in representing [Mr. Nimer] are not related to his post duties as a teacher.

... Just as the [UNRWA Dispute] Tribunal cannot order the Agency to pay for any legal or other representation for an Applicant, it cannot, in this case, order the Agency to compensate the staff representative for performing tasks during normal working hours that are unrelated to his post duties. However, in the interests of justice, the [UNRWA Dispute] Tribunal is hopeful that the Agency and staff representative will find a workable solution in order to allow the staff representative to attend the hearing either in person, by telephone or via video-link.

15. A hearing was held on 8 February 2018. Two hours before the hearing, Mr. Nimer and his representative informed the UNRWA Dispute Tribunal that they would not attend the hearing. In his communication, Mr. Nimer's representative stated that he had been denied the approval to leave his duty station during working hours to attend the hearing. He also referred to previous occasions where the Agency had granted approval for him to leave his duty station to attend mediation sessions in cases in which he was representing other applicants. He added that under these circumstances, i.e. his absence from the hearing, he would advise Mr. Nimer against participating in the hearing via telephone from Turkey. Mr. Nimer indeed informed the UNRWA DT by e-mail that he would not participate in the hearing via telephone. The UNRWA Dispute Tribunal heard by video-link the testimony of the School Principal and immediate supervisor of Mr. Nimer, and the testimony of the H/ED.

16. The UNRWA DT rendered its Judgment on 15 February 2018, dismissing the application in its entirety. Regarding Mr. Nimer's representative's alleged inability to attend the oral hearing, the UNRWA DT found no procedural violation. In particular, the UNRWA DT considered based on the evidence submitted by the Commissioner-General after the hearing that Mr. Nimer's representative had failed to request leave from the Agency to attend the hearing, had made no attempt to utilise any other means such as telephone or video-link to participate in it and had not filed any motion with the UNRWA DT requesting an additional change of the hearing date.

17. On the issue of SLWOP, the UNRWA DT considered that the application was not receivable *ratione materiae* as no administrative decision had been taken by the Agency with regard to Mr. Nimer's request for SLWOP. The UNRWA DT found that the written request for SLWOP Mr. Nimer had sent on 27 November 2016 via the School Principal did not respect the required one-month notice period before his intended leave date, and he had ceased to report for duty three days later, on 1 December 2016. However, as the request sent by pouch by the School Principal never reached the responsible Area Education Office or the H/ED and as Mr. Nimer never reported in order to sign the proper forms for SLWOP, the Agency has not decided on his request.

18. On the issue of termination, the UNRWA DT dismissed the application on the merits. It considered that the Agency's decision to terminate Mr. Nimer's employment by reason of abandonment of post was made in accordance with the applicable Regulations and Rules and other administrative issuances. In particular, Mr. Nimer had failed to comply with his obligations as a staff member, when he absented himself from work from 1 December 2016 until the date of his termination on 31 January 2017 and had failed to provide an explanation for his unauthorised absence by the deadline of 31 January 2017 as contained in the OiC's letter dated 11 January 2017.

19. Not having found any illegality in the Agency's decisions, the UNRWA DT declined to grant any of the relief sought by Mr. Nimer.

Submissions

Mr. Nimer's Appeal

20. Mr. Nimer contends that the UNRWA DT erred in procedure and violated his right to equal treatment and proper legal representation by preventing his representative from participating in the oral hearing. When the UNRWA DT issued a notice of hearing ordering Mr. Nimer's representative to appear in person on 7 February 2018 which was the first day of school, it willingly or negligently disregarded the reality of the representative's employment situation as a teacher working for the Agency. In response to Mr. Nimer's motion, the UNRWA DT merely rescheduled the hearing for the following day but did not change the location or time of the hearing. Rather than expressing its hope that the Agency and staff representative find a workable solution, the UNRWA DT should have settled the matter with a clear order

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outstanding for years and he had not been absent a single day throughout his years of service up until 1 December 2016. The UNRWA DT also erred in failing to take into consideration his exceptional circumstances and *force majeure*.

25. Based on the foregoing, Mr. Nimer requests that the Appeals Tribunal vacate the UNRWA DT Judgment and remand the case for a *de novo* hearing before a different Judge. He

29. The Commissioner-General further asserts that while Mr. Nimer has identified alleged errors or fact, he has not demonstrated that the6c

Mr. Nimer's representation

33. The UNRWA DT did not commit an error of procedure such as to affect the decision of the case by failing to order the Agency to allow the participation of Mr. Nimer's representative in the oral hearing or by failing to accommodate the latter's employment situation. While a staff member has a right to be represented by another staff member pursuant to Article 8(2) of the UNRWA DT Rules of Procedure, the UNRWA DT has wide discretion in matters of case management.⁴ In this case, Mr. Nimer's representative did not submit an additional motion requesting another change of the hearing date, made no attempt to participate via telephone, video-link etc. and failed to request leave from work in order to attend the oral hearing before the UNRWA DT. On the contrary, the documentary evidence shows that Mr. Nimer's representative requested and was granted leave on the very day of the oral hearing to pursue some other private business. It was thus within the UNRWA DT's discretion to encourage an amicable solution rather than to order the Agency to give his representative permission to absent himself from work in order to attend the hearing. We note, further, that even if there was a procedural error Mr. Nimer would need to show that this error affected the decision of the case,⁵ which, in the present case, he has not done.

SLWOP

34. The UNRWA DT did not err on a question of fact, resulting in a manifestly unreasonable decision when it determined that the H/ED had not received Mr. Nimer's request for SLWOP and, consequently, that there had not been an administrative decision with regard to this request.

35. The UNRWA DT did not err in relying on the testimony of the H/ED when it found that she had not received a request for SLWOP by Mr. Nimer. The H/ED testified that she "did not receive any written letter from [Mr. Nimer]" but "a letter signed and stamped by the school

36. Even if the UNRWA DT, by relying on the testimony of the School Principal who stated that in late November 2016 he had sent Mr. Nimer's written request for SLWOP to the H/ED, the UNRWA DT had committed an error of fact, this would not have resulted in a manifestly unreasonable decision as the UNRWA DT's conclusion that no administrative decision had been taken on the issue of SLWOP is still correct. Both witnesses testified to this effect. The H/ED, in her testimony, pointed out that for a request for SLWOP, certain rules and procedures had to be followed, and that she had called the School Principal and told him that Mr. Nimer "had to come and sign these forms or to send someone authorised in order to do that". The School Principal confirmed that the H/ED had called and told him that Mr. Nimer had "to report to the education department and sign the relevant forms". The School Principal expressly denied Mr. Nimer's submission in his application to the UNRWA DT that the School Principal had informed him on 8 December 2016 of the Agency's decision to deny SLWOP. In his testimony, the School Principal made it clear that he "only reported [the matter] to [Mr. Nimer's] father" and "told him that Alaa [(Mr. Nimer)] had to attend and to appear before the area (...) education office department, in order to sign the forms or to send someone authorised to do that on his behalf".

37. It becomes clear from these testimonies that the 27 November 2016 letter, whether or not it was received by the H/ED, di

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29 January 2017 letter as a written explanation under UNRWA Area Staff Rule 109.4(2) and (3) and in response to the 11 January 2017 letter. As long as the staff member, within the time limit specified, submits a written explanation of his or her absence to the Agency, the onus is on the Agency to lay its eyes on it and decide whether the explanation is acceptable or not.

42. The 29 January 2017 request for decision review was submitted before or on 31 January 2017 and hence within the time limit specified in the 11 January 2017 letter. In his appeal, Mr. Nimer stated that he submitted his review request before 31 January 2017, and, among others, to the very person who issued the 11 January letter, that is the OiC. The Commissioner-General did not question this submission in his answer to the appeal but merely clarified “that the issue whether the Appellant submitted a timely decision review request did not form part of the impugned judgment and is therefore irrelevant for purposes of the instant appeal”. At no time has the Commissioner-General alleged that the Agency did not receive Mr. Nimer’s decision review request on or before 31 January 2017. Mr. Nimer’s submission is strongly supported by his 5 February 2017 letter to the OiC where he submits that on 31 January 2017, he filed a request for decision review to the Deputy Commissioner-General, contesting the decision not to approve his leave request as well as the decision to separate him from service on grounds of abandonment of post, and, at the same time, sent this request by e-mail to the OiC. The Respondent, in his reply to Mr. Nimer’s application, had stated that “on 29 January 2016 [(correct: 2017)] the Applicant submitted a request for decision review stating that the Agency had denied his request for SLWOP”.

43. Under the circumstances, the Agency’s decision to separate Mr. Nimer from service for abandonment of post is not reasonable and thus unlawful. The Agency, after having received Mr. Nimer’s 29 January 2017 request for decision review, should have examined whether the request provided an acceptable explanation for his absence. Therefore, we order rescission of this decision, and, as it concerns termination, set an amount of compensation that the Commissioner-General may elect as an alternative to the rescission of the contested administrative decision pursuant to Article 9(1)(a) of the Appeals Tribunal Statute.

Award of compensation for moral harm

44. By dismissing his application in its entirety, the UNRWA DT (implicitly) dismissed Mr. Nimer’s application for compensation for moral harm. There was no need for the UNRWA DT to provide any further reasoning for this decision because it directly followed

from its finding of lawfulness of the contested administrative decision and its dismissal of Mr. Nimer's application. As we have stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".⁷

45. However, having overturned the UNRWA DT's finding that the decision to separate Mr. Nimer from service was lawful, we must now decide whether Mr. Nimer is entitled to compensation.

46. In this regard, Article 9(1)(b) of the Statute of the Appeals Tribunal provides:

1. The Appeals Tribunal may only order one or both of the following:

(...)

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals 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.

47. The Appeals Tribunal may only award compensation for harm in cases where the staff member has presented evidence other than his own testimony that he or she suffered moral injury due to the contested administrative decision.⁸ Mr. Nimer did not present any evidence showing that he suffered mental distress, anxiety or other moral injury. Consequently, there can be no award of compensation in this respect.

⁷ *Kawamleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-818, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40, and citations therein.

⁸ *Langué v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-858, paras. 17-20, citing *Kallon v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-742, Concurring Opinion of Judge Knierim, para. 2.

Judgment

48.