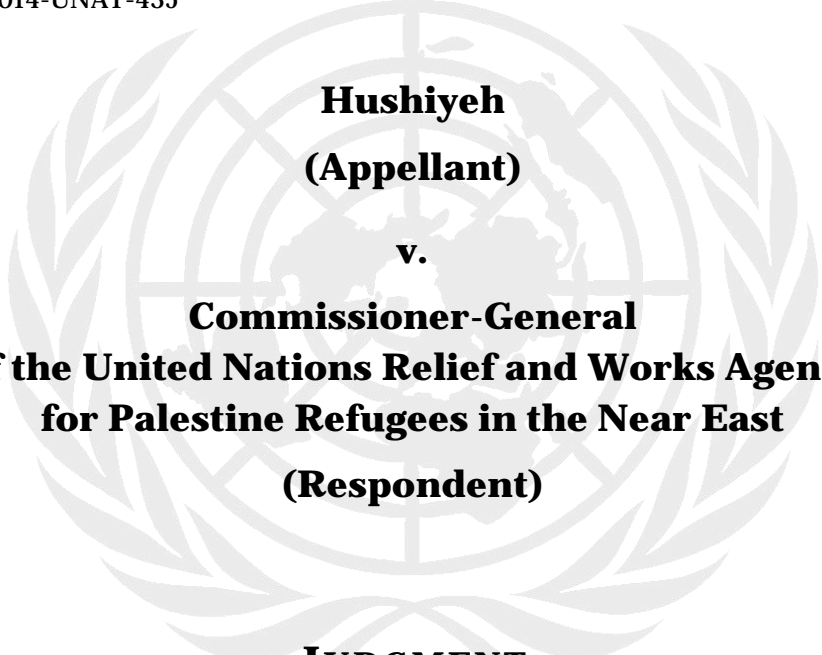




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-435



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

JUDGMENT

Before: Judge Rosalyn Chapman, Presiding
Judge Sophia Adinyira
Judge Richard Lussick

Case No.: 2013-497

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Appellant: Ghada Yasin

Counsel for Commissioner-General: Lance Bartholomeusz

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal has before it an appeal by Mr. Yosef Mohammad Hushiyeh of Judgment No. UNRWA/DT/2013/009, 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 April 2013, in the case of *Hushiya vs. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*.¹

Facts and Procedure

2. Since 1 November 1999, and at the time of the underlying events, Mr. Hushiyeh held the post of Area Officer “A” - Jerusalem, Grade 17.

3. On Sunday, 2 September 2001, Mr. Hushiyeh was driving an Agency vehicle in the West Bank when he was involved in a serious automobile accident. The car was demolished and he was hospitalized for two weeks.

4. An Agency investigative report of the accident, dated 16 January 2002, found Mr. Hushiyeh was “75% at fault in th[e] accident”. The report was approved by the then-Director of UNRWA Operations, West Bank (DUO/WB).

5. On 6 July 2002, Mr. Hushiyeh advised the Agency of the automobile accident, stating:

On Sept. 2nd, 2001, I had a serious car accident while driving an UNRWA vehicle which was assigned to me on a full time user/driver basis. The accident resulted in a comminuted fracture in my left leg. I was admitted to Makassed hospital where I spent two weeks and then underwent a long sick leave during which I have to report to the hospital on a month-by-month basis. Everytime [sic] I report to the hospital I am kept reminded that I have to cover 25 % of the hospitalization and the cost of the medical apparatus which is internally fixed inside my leg, and which is expected to be removed in another surgery in 18 - 24 month period from the date of the accident.

¹ Mr. Hushiyeh’s last name is spelled in various ways in the documents before the UNRWA DT. However, since he submitted his application to the UNRWA DT using the spelling “Hushiyeh”, rather than “Hushiya” as spelled in Judgment No. UNRWA/DT/2013/009, this Tribunal will spell the Appellant’s last name as “Hushiyeh” as in this Judgment.

Furthermore, I had to buy medications according to specialists['] prescriptions on my own expense – bills of some NIS. [new Israel shekels] 3000.[²]

...

This car accident has had physical, material and emotional impact on me, and I am wondering how to settle the hospitalization bills, medication cost and I am puzzled by the type of insurance policy if any that applies to me *while driving after duty hours*. ... (emphasis added)

6. In a memorandum to Mr. Hushiyeh dated 23 September 2002, the Assistant Director of UNRWA Operations, West Bank, memorialized a discussion between the Officer in Charge, Department of Legal Affairs, Field Legal Officer (FLO), and Mr. Hushiyeh:

... UNRWA has filed a claim with Baltica Insurance [Baltica] to cover the costs from your car accident. Given the circumstances of your case (driving off-duty), and the fact that you requested UNRWA to file the claim 10 months after the accident when UNRWA is no longer insured with Baltica, we cannot be sure of the outcome of this claim.

... If UNRWA is unable to obtain full satisfaction of its claim, the Field Office will, at that time, consider recommending to the Commissioner-General an *ex gratia* payment in your case.

... Accordingly, you have agreed to suspend legal action pending the outcome of the above.

... Pursuant to your request, UNRWA has notified Maqassed Hospital, that it had submitted an insurance claim and requested that the hospital continue to provide you with all medical services necessary to allow for a full recovery.

7. On 1 July 2004, Baltica offered Mr. Hushiyeh compensation in the amount of NIS 16,900 (approximately USD 4,536) for the accident. However, Mr. Hushiyeh declined the offer.

8. In 2005, Mr. Hushiyeh brought a law suit against Baltica in the Magistrate's Court in Jerusalem, where it pended for several years until it was dismissed on 22 April 2009, on *forum non conveniens* grounds. While the matter was pending, the Israeli court attempted unsuccessfully to broker a settlement between Mr. Hushiyeh and Baltica and, in so doing, offered its evaluation of Mr. Hushiyeh's damages.

[²] Approximately USD 804.29, at the exchange rate of one US Dollar : 3.73 NIS. This exchange rate applies throughout the text.

9. On 30 August 2010, the FLO sent a memorandum to the DUO/WB recommending an *ex-gratia* payment to Mr. Hushiyeh to compensate him for the injuries he suffered during the accident. In the memorandum, the FLO set forth: the Agency's rules for making an *ex-gratia* payment; an explanation of the circumstances leading to the request for an *ex-gratia* payment; the reasons for the absence of legal liability and the justifications for accepting moral or other responsibility; the amount of the proposed payment of NIS 20,000 (approximately USD 5,361.39); and the rationale for determining the amount under Palestinian law. On the same date, the DUO/WB concurred with the recommendation and forwarded it to the Agency's Director of Finance. The Director of Finance also concurred with the recommendation.

10. On 25 October 2010, the Agency's Director of Human Resources advised the Director of Finance that she agreed with the proposed *ex-gratia* payment to Mr. Hushiyeh in the amount of NIS 20,000.

11. On 24 January 2011, the DUO/WB offered Mr. Hushiyeh an *ex-gratia* payment in the amount of NIS 20,000 in exchange for a release and quitclaim of liability, explaining that the Agency bore no legal liability in connection with the incident. Mr. Hushiyeh rejected the offer.

12. On 24 March 2011, Mr. Hushiyeh brought an application before the UNRWA DT challenging the amount of the *ex-gratia* payment offered by the Agency. In his application, he prayed for six times more than what the Agency had offered.

13. On 30 January 2013, the Commissioner-General submitted a late reply to the Registry of the UNRWA DT, and on 10 April 2013, he made a motion for leave to participate in the proceedings and for the late reply to be filed. Mr. Hushiyeh opposed the motion.

14. On 15 April 2013, the UNRWA DT issued Judgment No. UNRWA/DT/2013/009, in which it dismissed Mr. Hushiyeh's application. In dismissing the application, the UNRWA DT concluded that: (a) the decision to grant an *ex-gratia* payment was an administrative decision subject to judicial review; (b) the Agency followed proper procedures in awarding the *ex-gratia* payment; (c) Mr. Hushiyeh "failed to provide evidence of impropriety or bias on the part" of the Agency; and (d) the Agency properly exercised its

discretionary power and did not violate any Area Staff Regulations or Rules affecting the terms of Mr. Hushiyeh's appointment or his other rights as a staff member.

Submissions

Mr. Hushiyeh's Appeal

15. The UNRWA DT erred on a question of fact when it determined that Mr. Hushiyeh was not acting in the course of his official duty on the day the accident happened. According to the Agency's description of the duties for Mr. Hushiyeh's post, he must represent the Agency and act as liaison with host government authorities, refugee community representatives and others, especially regarding security situations likely to affect the Agency's operations. On the Sunday of the accident, tensions were high and the situation was volatile in the West Bank. Thus, it was vital for Mr. Hushiyeh to work on the weekend in accordance with his job duties.

16. The UNRWA DT erred on questions of fact and law when it determined that Mr. Hushiyeh was not entitled to receive compensation and erred on a question of law when it determined that the Agency did not have a legal obligation to compensate him for his injuries under the Manual of Transport Technical Instruction No. 6 (MTTI No. 6). As noted above, since the accident occurred in the course of Mr. Hushiyeh's official duties, he was covered by the Agency's insurance and UNRWA had a legal obligation to compensate him for his injuries.

17. The UNRWA DT erred on a question of fact when it failed to consider Mr. Hushiyeh's claim that his long term disability as a result of the accident was 17 per cent. This issue should be addressed by the Appeals Tribunal.

18. The UNRWA DT erred in procedure when it allowed the Commissioner-General to take part in the proceedings absent a motion for extension of time or on the Tribunal's own motion.

19. Mr. Hushiyeh seeks reversal of the UNRWA DT Judgment and, among other things, requests that the Appeals Tribunal issue an order requiring the Agency to: compensate him for 17 per cent permanent injury; pay the balance of his hospital bill; compensate him for the out-of-pocket medical costs he incurred; and pay him full compensation for his injuries.

The Commissioner-General's Answer

20. The appeal should be dismissed in its entirety because Mr. Hushiyeh has failed to show that the UNRWA DT erred on questions of fact resulting in an unreasonable judgment or erred on a question of law warranting reversal of the Judgment.

21. The UNRWA DT properly found that Mr. Hushiyeh was not on duty at the time of the accident because he presented no evidence showing that he was on official duty when the accident occurred; the record is devoid of documentary proof.

22. Mr. Hushiyeh merely repeats arguments he made before the UNRWA DT when he claims that the UNRWA Dispute Tribunal made an error of law in finding that the Agency has no legal obligation to compensate him. He makes public policy arguments about why the Agency's insurance on its vehicles should cover all injuries of Agency staff and seeks to have the Tribunal legislate or redesign the Agency's Regulations in respect of off-duty accidents.

23. The UNRWA DT did not err on a question of law when it did not consider the degree of disability Mr. Hushiyeh may have suffered as a result of the accident. This issue was beyond the competence of the UNRWA Dispute Tribunal under the circumstances of the case. And there has been no decision made on disability or administrative review of any alleged disability.

24. The UNRWA DT properly granted the Commissioner-General's motion to join the proceedings and to file a late reply.

Considerations

25. The UNRWA Dispute Tribunal granted the Respondent's motion to participate in the proceedings and to file a late reply, stating:

... Article 30 of the Rules gives the authority to the Tribunal to ... extend a time limit fixed by the Rules or waive any rule when the interest of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. It is the Tribunal's belief that submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. Therefore, the Tribunal finds it is in the interests of justice – and that would be appropriate for a fair and expeditious disposal of the case and would do justice to the

parties – for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s reply. Therefore, the Tribunal grants the Respondent leave to take part in the proceedings and accepts his late reply.³

26. Mr. Hushiyeh claims that the UNRWA DT erred when it granted the Respondent’s motion to file a late reply since the Respondent failed to file a request for an extension of time and the UNRWA Dispute Tribunal failed to issue an order extending the time limit. There is no merit to this claim. When the UNRWA DT granted the Respondent’s motion to participate in the proceedings despite his failure to file a timely reply, the UNRWA DT inferentially granted the Respondent an extension of time. Moreover, it is now settled that the UNRWA DT may rule on such motions in the Judgment, rather than in a separate written order.⁴ Thus, the UNRWA Dispute Tribunal did not err.

27. In his application, Mr. Hushiyeh requested that the UNRWA DT order the Agency “to reconsider the *ex-gratia* amount” that the Agency had offered him. Mr. Hushiyeh contended the amount was grossly inadequate. It is solely in this context that the Appeals Tribunal considers Mr. Hushiyeh’s arguments that the UNRWA DT erred in fact and law.

28. Mr. Hushiyeh claims that the UNRWA DT made errors of fact and law when it failed to consider the following in reaching its decision: (1) that all medical expenses and costs resulting from his accident should be covered by the Agency under MTTI No. 6, because he was acting in his official capacity and was on duty at the time of the accident; (2) that the Israeli court estimated that a fair settlement of his legal action against Baltica (assuming 10 per cent disability) was NIS 180,000 (approximately USD 48,257.37); and (3) that he has been 17 per cent permanently disabled as a result of the accident.

29. “An *ex-gratia* payment is a payment that is made to an individual ... when, although no legal requirement exists for such payment by the Agency or the legal liability of the Agency is disputed, a moral obligation or other consideration exist[s] that make[s] such payment desirable in the interests of the Agency.”⁵

³ Judgment No. UNRWA/DT/2013/009, para. 31 (internal citation omitted).

⁴ *Chahrour v. Commissioner-General of UNRWA*, Judgment No. 2014-UNAT-406; *Abu Jarbou v. Commissioner-General of UNRWA*, Judgment No. 2013-UNAT-292.

⁵ Organization Directive No. 19 dated 28 January 2009, para.5.

30. UNRWA's Financial Regulation 3.4 provides that "[t]he Commissioner-General may make such *ex-gratia* payments as he deems to be necessary in the interests of the Agency". Pursuant to paragraph 6.1(a) of Organization Directive No. 19:

The authority to make *ex-gratia* payments is delegated by the Commissioner-General to the Comptroller subject to the following conditions:

(a) An *ex-gratia* payment in an amount less than US\$ 30,000 or its equivalent in local currencies may be authorized by the Comptroller, except that the agreement of the Director of Human Resources is also required if the recipient is a staff member.

31. UNRWA's Organization Directive No. 19 does not list criteria for making an *ex-gratia* payment. However, it does set forth the following procedures for initiating *ex-gratia* requests:

A recommendation for making an *ex-gratia* payment must be submitted to the Comptroller by Field Office Directors in the Field or by Directors/Department Heads in the Headquarters. The request must include:

- (a) An explanation of the circumstances leading to the request;
- (b) The reasons for the absence of legal liability and the justifications for accepting moral or other responsibility; and
- (c) The amount of the payment proposed, and a rationale as to how this amount was determined.⁶

32. Section 11 of MTTI No. 6, which was in effect at the time of the accident, provides:

It should be noted that the driver of a user/driver vehicle is not covered by the vehicle insurance if he/she sustain[s] bodily injury or property damage. In that case, the driver is only eligible for compensation by the Agency if the accident occurs in the course of official duty. It is, therefore, recommended that user/drivers arrange for a personal accident insurance to cover themselves in the event that the accident occurs on a private trip.

33. Under this provision, a staff member who is involved in an accident in the course of his official duty has the legal right to compensation for all expenses and costs resulting from the accident. The UNRWA DT found that Mr. Hushiyeh "was not entitled to receive

⁶ *Ibid.*, para. 7.

compensation from the Agency for the injuries he suffered in the car accident because he was not in the course of his official duties on the day the accident happened”.⁷

34. This mixed factual finding and legal conclusion is not erroneous, based on the record. First, in his memorandum of 6 July 2002 advising the Agency of the automobile accident, Mr. Hushiyeh acknowledged that he was “driving after duty hours”. Second, Mr. Hushiyeh failed to provide any documentary or other evidence to the contrary. Rather, he argues that his responsibilities or duties (under his job description) are broad enough to cover working on a Sunday. That may be true; however, it does not show that he actually was working or on official duty on the day of the accident. Argument is not evidence.⁸ Thus, the UNRWA DT did not err in fact when it found that Mr. Hushiyeh was not on duty at the time of the accident and did not err in law when it determined he had no legal right to compensation under MTTI No. 6.

35. Moreover, Mr. Hushiyeh’s reliance on the Israeli court’s evaluation of his case against Baltica is not a basis for finding that the amount of the *ex-gratia* payment is too low. For one thing, settlement negotiations are supposed to be confidential. They may not be used as evidence in the formal proceedings and should not be considered when addressing the merits of a claim or case.⁹ Apart from that, judges and parties evaluating the merits of a claim or case often have differing views – and that does not make any particular view more or less reasonable than any another. The Appeals Tribunal is unpersuaded by this argument, and finds the UNRWA DT did not make an error of law in discounting the Israeli court’s evaluation of Mr. Hushiyeh’s damages.

36. As noted above, Organization Directive No. 19 does not set forth any criteria for making an *ex-gratia* payment; it merely sets forth certain procedures to be followed. Without specific criteria for awarding an *ex-gratia* payment, the Agency had discretion to consider or not consider whether Mr. Hushiyeh was disabled from the accident. Thus, the UNRWA DT did not err when it did not discuss the Agency’s failure to consider that Mr. Hushiyeh may be 17 per cent disabled as a result of the accident.

⁷ Judgment No. UNRWA/DT/2013/009, para. 47.

⁸ *Balinge v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-377, para. 16.

⁹ See Article 15 of the Rules of Procedure of the Appeals Tribunal.

37. The UNRWA DT explained in detail its reasons for finding no merit to Mr. Hushiyeh's challenge to the *ex-gratia* payment as too low, stating:

The evidence shows that the Agency calculated the amount of the *ex-gratia* payment, i.e. NIS 20,000, under Palestinian law, taking into consideration [Mr. Hushiyeh's] 10 percent disability and other factors, such as the sums it had paid for his medical treatment, the salaries paid to him which he was on extended sick leave, as well as the absence of future loss of wages since he returned to work and his salary was unaffected by his disability. The record demonstrates that the Agency also took into account [his] long service with the Agency and the pain and suffering he endured due to the accident.

... It must be clarified that an *ex-gratia* payment, by nature, is not based on a right of the staff member or a legal obligation on the part of the Agency. It is rather a *gratia*, a favour. An *ex-gratia* payment is not based on positive law and, as such, is a payment not legally required. Therefore, the amount of an *ex-gratia* payment is totally discretionary and cannot be determined as satisfactory or not, as far as the procedure to grant it is properly followed. It follows thus that the contested decision, i.e. the amount awarded to [Mr. Hushiyeh] as an *ex-gratia* payment, did not violate [his] terms of appointment or contract of employment or any Area Staff Regulation, Rule or other administrative issuance.¹⁰

38. The UNRWA Dispute Tribunal's explanation is well-reasoned and we find no errors of law in the rationale. Moreover, as the UNRWA DT properly concluded, the Agency fully complied with the requisite procedures under paragraphs 6 and 7 of Organization Directive No. 19, and Mr. Hushiyeh does not contend otherwise. Although the Appeals Tribunal can understand Mr. Hushiyeh's displeasure with the amount of the *ex-gratia* payment – especially since he was so seriously injured and it took ten years for the Agency to offer the payment to him – there is no basis to reverse the UNRWA DT's decision.

Judgment

39. Judgment No. UNRWA/DT/2013/009 is affirmed and the appeal is dismissed.

¹⁰ Judgment No. UNRWA/DT/2013/009, paras. 51-52.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Lussick

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar