Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

HUSHIYA

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Amer Abu Khalaf

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Yousef Mohammad Hushiya (the “Applicant”) challenging the amount of the *ex-gratia* payment awarded to him by the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”).

Facts

2. On 20 September 1980, the Applicant entered the service of the Agency as an Academic Instructor, English, Grade 10, in Qalandiya Training Centre, West Bank.

3. On 1 November 1999, he was selected to the post of Area Officer “A” - Jerusalem. At the time of the events relating to the application, the Applicant occupied the post of Area Officer - Jerusalem, Grade 20.

4. On 2 September 2001, while driving off duty a UN vehicle in the West Bank, the Applicant was involved in a road traffic accident. He sustained a fracture of his left leg and injury on his left elbow and underwent a surgery. According to the accident report, the car was beyond repair.

5. The Agency granted the Applicant extended sick leave on full pay from 2 September 2001 to 25 May 2002, and paid for hospital expenses amounting to approximately USD $9,000. A medical report given by an expert agreed upon by the Applicant and the Agency’s former insurer (Baltica Insurance Co. Limited) estimated the Applicant’s long term disability as a result of the accident at 10 percent.

6. On 16 September 2001, the Applicant was discharged from the hospital.

7. By memorandum dated 6 July 2002, the Applicant informed the Assistant Director of UNRWA Operations, West Bank (“A/DUO/WB”) of his 2 September 2001 car accident, requesting guidance and stating *inter alia:*
This car accident has had physical, material and emotional impact on me, and I am wondering how to settle the hospitalization bills, medication cost [sic] and I am puzzled by the type of insurance policy if any that applies to me while driving after duty hours.

8. By memorandum dated 12 July 2002, the Field Procurement and Logistics Officer, West Bank (“FPLO/WB”) informed the A/DUO/WB:

   In paragraph 11 of Ref. B [the Manual of Transport Technical Instructions No. 6] the issue of insurance is clearly outlined. A copy of Ref. B is given to all User Drivers. In paragraph 12 of Ref. C [Inter Office Memorandum to A/DUO/WB of 22 October 2001 ref. PL/MT/355] the Vehicle Control Officer advises that the Area Officer [the Applicant] was on a private trip at time [sic] of the accident and therefore he is NOT covered by the vehicle insurance.

9. By email dated 24 July 2002 to the Officer in Charge, Department of Legal Affairs, the Field Legal Officer (“FLO”) provided the following comments on the insurance issue:

   I received a copy of the Baltica insurance policy which was in effect at the time of the accident. It confirms what we suspected that our insurance does not cover staff on [sic] duty or user drivers. The other article of note is the “Local Law Clause” which notes that if there is a conflict in the provisions of the insurance and local law, the local law will apply – including the no-fault liability in respect of bodily injuries statutory in the West Bank, Gaza and Israel… Although the policy does not apply I believe the Agency should self insure on this case along the lines of local law. I am looking at this with an eye toward trying to head off a lawsuit against the Agency. I think the staff member has a good case against us since we “rented” the car to him in the first place. It could also raise more issues with the Israeli authorities about our insurance scheme, which I believe has already come into question. We currently have several vehicles that the Israelis will not register due to an insurance issue. I believe that the staff should be offered some sort of compensation in line with the local law. It is good to know that the Agency has taken steps to fill the “gap” in our insurance scheme and hopefully this type of incident will not happen in the future. I have asked A/DUO to send this to DAHR. I assume they will discuss it with you and do what is fair an equitable.
10. By letter dated 23 September 2002, the A/DUO/WB informed the Applicant of the steps the Agency had taken thus far in respect of his accident, mentioning for the first time the possibility of an *ex-gratia* payment as follows:

Following the FLO’s discussion with you, we would like to confirm the following:

1. UNRWA has filed a claim with Baltica insurance 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.

2. 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.

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

4. 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.

I hope you have a swift and successful recovery.

11. On 1 July 2004, Baltica Insurance Co. Limited (“Baltica”), the motor vehicle insurance company for UNRWA at the time of the accident, made an offer to the Applicant of NIS 16,900\(^1\) in compensation for his car accident.

12. On 27 March 2005, the Applicant filed a lawsuit in the Magistrate Court in Jerusalem against Baltica seeking compensation for the injuries he suffered in the car accident of 2 September 2001.

13. From March 2005 to April 2009, the Magistrate Court tried to have the parties agree on a settlement of the Applicant’s suit for a proposed amount of NIS 207,284.\(^2\) The Applicant agreed to the proposed settlement, but Baltica rejected it claiming it had no liability for the injuries the Applicant sustained because he was not on duty at the time of the accident.

\(^1\) NIS : New Israeli Shekel; NIS 16,900 = USD $4,536

\(^2\) NIS 207,284 = USD $55,646
14. On 22 April 2009, the Magistrate’s Court in Jerusalem issued a judgment dismissing the Applicant’s lawsuit against Baltica on grounds that the court in Israel is not the proper forum to hear the claim because, *inter alia*, the Applicant is a resident of the West Bank and not of Israel and the accident occurred in the West Bank and not in Israel, in short because “[t]here is no material connection, which ties the claim to Israel”.

15. By letter dated 1 July 2009, Mazen Qupty Law Offices representing the Applicant requested that the Agency compensate the Applicant in the amount of NIS 207,284 for the injuries he suffered in the accident.

16. By memorandum dated 30 August 2010, the Field Legal Officer, West Bank (“FLO/WB”) provided to the Director of UNRWA Operations, West Bank (“DUO/WB”) legal advice on the propriety of granting an *ex gratia* payment to the Applicant in compensation for the pain and suffering he endured.

17. By memorandum dated 30 August 2010, the DUO/WB addressed to the Director of Finance a recommendation to grant an *ex gratia* payment to the Applicant in the amount of NIS 20,000\(^3\), stating:

> In brief, [the Applicant] has been unsuccessful in his claim against the Agency’s vehicle insurers in relation to his accident. Given the circumstances of this case as set out in the attached brief and in view of the staff member’s long service, the Field requests that the Agency accept a measure of moral responsibility in this matter and make an *ex gratia* payment of NIS 20,000 to [the Applicant] for the pain and suffering caused by his accident.

18. The Director of Finance concurred with the recommendation of the DUO/WB to grant an *ex-gratia* payment to the Applicant.

19. By memorandum dated 25 October 2010, the Director of Human Resources conveyed to the Director of Finance her approval of an *ex-gratia* payment in the amount of NIS 20,000 to the Applicant.

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\(^3\) NIS 20,000 = USD $5,369
20. By memorandum dated 24 January 2011, the DUO/WB advised the Applicant that the Agency’s position is that it has no legal liability in connection with the incident, however it has approved an *ex-gratia* payment to him in the amount of NIS 20,000. The Applicant refused the amount offered.

21. By letter to the DUO/WB dated 23 February 2011, the Applicant sought a decision review. He received no reply to his request.

22. On 24 March 2011, the Applicant filed an application with the Registrar of the UNRWA Dispute Tribunal (the “Tribunal”).

23. On 30 January 2013, the Respondent filed his reply without requesting leave to take part in the proceedings or an extension of time to submit a reply.

24. On 10 April 2013, the Respondent requested that the Tribunal grant it leave to take part in the proceedings and accept the filing of his late reply.

25. On 11 April 2013, the Applicant requested the Tribunal to deny the Respondent’s motion.

**Applicant’s contentions**

26. The Applicant points out the following:

(i) the failure of the proceedings before an Israeli court wherein the Agency sought to have its vehicle insurance company settle the Applicant’s claim regarding the accident,

(ii) the Israeli court’s proposal that his claim be amicably settled for NIS 180,000 (based on 10 percent permanent disability and other factors), and

(iii) the *ex-gratia* amount offered by the Agency being only one tenth of what the court calculated.

27. In view of the above, the Applicant requests that the Tribunal order the Respondent to reconsider the *ex-gratia* amount as it is “almost one tenth of what the court calculated” and to award him “no less than 6 times more” than what the Agency has offered him.
Respondent’s contentions

28. The Respondent contends that the application is not receivable *ratione materiae*.

29. The Respondent requests that the Tribunal dismiss the application.

Considerations

Preliminary Issues

30. The Tribunal notes that the Respondent submitted his reply on 30 January 2013 without requesting leave of the Tribunal to take part in the proceedings or to file his reply late, i.e. beyond the thirty calendar day requirement under Article 6 of the Tribunal’s Rules of Procedure. However, by motion dated 10 April 2013, the Respondent requested that the Tribunal grant it leave to take part in the proceedings and accept the filing of his late reply dated 30 January 2013. The Respondent’s motion was transmitted to the Applicant who was given the opportunity to respond. By letter dated 11 April 2013, the Applicant requested the Tribunal to deny the Respondent’s motion.

31. Article 30 of the Rules gives the authority to the Tribunal to shorten or extend a time limit fixed by the Rules or waive any rule when the interests 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 it 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.

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4 The Tribunal notes the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: “The Dispute Tribunal shall not suspend, waive or extend the deadline for decision review”. 
32. The Tribunal takes issue with a statement made by the Respondent in paragraph 31 of his reply:

In November 2012, the Registrar of the Tribunal agreed that the Respondent was to file its reply to the Application by 30 January 2013.

33. Firstly, the Tribunal clarifies that the Registrar does not agree to anything. The Judge issues instructions to the Registrar who then notifies the parties of the Judge’s instructions. Secondly, there was and is no “agreement” between the Tribunal and the Respondent with regard to the filing of replies. Rather, when the Tribunal became operational in June 2011, it found itself in a position of having to instruct the Respondent to file his replies in dozens of cases that had been transferred to the Tribunal from the former Joint Appeals Board system and those that were filed after the establishment of the Tribunal, all of which constituted a large backlog of cases pending before the Tribunal and did not contain the Respondent’s replies. Plainly and simply put, the Respondent had not filed replies in more than 100 cases, and in order to decide these cases and issue Judgments, the Tribunal had to instruct the filing of a certain number of replies per month, taking into consideration the staffing and workload of the Tribunal and the Respondent’s legal representatives. Therefore, the Respondent’s statement is misleading as he complied with an instruction of the Tribunal rather than with an “agreement” with the Registrar as he states. The Tribunal furthermore highlights that despite the fact that the Respondent complied with an instruction of the Tribunal, this did not exclude him of the requirement to request leave to take part in the proceedings and to file his reply late.

Main Issue

Is the Applicant contesting an administrative decision?

34. From the outset, the Tribunal would like to point out that what the Applicant is challenging is the amount of the *ex-gratia* payment which he was awarded. However, before getting to the issue of the amount, the Tribunal must first determine whether the *ex-gratia* payment constitutes an appealable
administrative decision. The Respondent submits that it is not and that, for this very reason, the application is not receivable.

35. For the sake of clarity, the Applicant must understand that for the Tribunal to be competent in this case, he must demonstrate that he is indeed contesting an administrative decision i.e. the amount awarded to him as an \textit{ex-gratia} payment. To be successful in his application, the Applicant must demonstrate that such administrative decision is not in compliance with his terms of appointment or contract of employment, or that it violated the Area Staff Regulations, Rules and other administrative issuances.

36. With regard to the competence of the Tribunal, Area Staff Regulation 11.1 provides in relevant part that:

\begin{itemize}
\item[(A)] The UNRWA Dispute Tribunal shall, under conditions prescribed in its Statute and Rules of Procedure, which are set out in Staff Regulations 11.3 and 11.4, hear and render judgement on an application from a staff member:
\begin{itemize}
\item[(i)] to appeal an administrative decision that is alleged to be in non-compliance with his or her terms of appointment or contract of employment, including all pertinent regulations and rules and all relevant administrative issuances;
\end{itemize}
\end{itemize}

37. The jurisprudence of the former United Nations Administrative Tribunal has defined an administrative decision as:

\begin{quote}
… a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Judgment No. 1157, \textit{Andronov} (2003), quoted in Judgment No. 1213, \textit{Wyss} (2004)).
\end{quote}
38. The Agency’s Financial Regulations provide the following under:

**ARTICLE III**

**UTILIZATION OF THE ASSETS OF THE AGENCY**

3.4 The Commissioner-General may make such *ex gratia* payments as he deems to be necessary in the interests of the Agency.

39. Organization Directive No. 19 ("OD 19") on *Ex-Gratia* Payments provides that:

**5. DEFINITION**

An *ex-gratia* payment is a payment that is made to an individual or other entity 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 considerations exist that make such payment desirable in the interests of the Agency.

40. The Tribunal notes that the above definition is ambiguous as it can be interpreted in different ways. For example, does it mean that an *ex-gratia* payment is made when the legal liability of the Agency is disputed? In such a case the *ex-gratia* payment may be seen as a way to avoid the risk of litigation against the Agency. Or does it mean that such a payment is made when the legal liability of the Agency is not disputed? In any event, the Respondent is advised to revise this definition.

41. Having stated this, the Tribunal is of the opinion that the Agency’s Financial Regulations and OD 19 on *Ex-Gratia* Payments are exactly what they are: regulations and directives. They are part of the Agency’s body of regulations and administrative issuances. As a staff member’s terms of appointment or contract of employment are subject to the Agency’s Regulations and Rules and other administrative issuances, and as the *ex-gratia* payment is part of the Agency’s Financial regulations and administrative issuances, it follows that any decision to grant or not to grant an *ex-gratia* payment is an appealable administrative decision.
42. The Respondent has erred when submitting that the decision to grant the Applicant an *ex-gratia* payment in relation to injuries he suffered in a car accident while off duty in a UN vehicle does not constitute an appealable administrative decision falling within the competence of the Tribunal. However, the Applicant is not contesting the Respondent’s decision to grant him an *ex-gratia* payment but the amount of such payment.

*Does the amount awarded as an ex-gratia payment to the Applicant violate his terms of appointment or contract of employment?*

43. Having determined that the decision to award the Applicant an *ex-gratia* payment is an administrative decision, the Tribunal examines whether the amount awarded as an *ex-gratia* payment to the Applicant violates his terms of appointment or contract of employment, including the Area Staff Regulations, Rules and other administrative issuances.

44. Concerning the procedure to grant the Applicant the *ex-gratia* payment, the Tribunal notes that the Agency followed the procedure established in OD 19 in relation to the authority to make such payment and the steps to be followed in granting it, which include:

(a) an explanation of the circumstances leading to the request [i.e. the request for the award of an *ex-gratia* payment];

(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.

45. The lack of the Agency’s legal liability is made clear upon reading the Manual of Transport Technical Instructions No. 6, Revision 1, February 2000 (“MTTI No. 6”) which provides in relevant part as follows:
11. INSURANCE

It should be noted that the driver of a user/driver vehicle is not covered by the vehicle insurance if he/she sustain [sic] 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.

46. The Tribunal presumes that the Applicant was made aware of MTTI No. 6 when he was given a UN vehicle to drive. In any case, the Applicant has not filed evidence to the contrary and ignorance of the law is no excuse. Putting aside whether the insurance scheme was appropriate or not, it was indeed in the Applicant's own interest and his responsibility to be aware of the kind of insurance that applied to him while driving a UN vehicle.

47. Based on the MTTI No. 6, the Tribunal finds that the Applicant was not entitled to receive 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.

48. However, the Agency felt it had a moral obligation to pay compensation to the Applicant pursuant to Financial Regulation 3.4 and OD 19. In terms of moral responsibility, the Tribunal would like to recall that the Applicant was requested by the A/DUO/WB to refrain from instigating legal proceedings against Baltica while the Agency’s negotiations with the car insurance company continued. The Applicant did so. In exchange for this concession, the Applicant was reassured that the Agency, although having no legal liability in connection with the incident, would consider an ex-gratia payment in the event that he did not receive satisfaction from the insurers.

49. The Tribunal finds that the Agency followed properly the procedures prescribed in OD 19, as evidenced in the record, for the awarding of an ex-gratia payment to the Applicant who has not submitted any evidence to demonstrate the contrary. He mainly did not agree with the amount of the payment proposed and the rationale as to how this amount was determined.
50. The Applicant contends that the payment should be calculated under Israeli law, citing the amount of the settlement proposed by the Magistrate’s Court in Jerusalem, i.e. NIS 207,284. However, after attempting to bring the parties - the Applicant and Baltica - to a settlement, the Magistrate’s Court in Jerusalem issued a judgment on 22 April 2009 holding that it was not competent to hear the Applicant’s lawsuit - albeit belatedly - because, *inter alia*, the accident in which the Applicant was involved did not occur in Israel but in a Palestinian territory and the Applicant was not a resident of Israel.

51. 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 the Applicant’s 10 percent disability and other factors, such as the sums it had paid for his medical treatment, the salaries paid to him while 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 the Applicant’s long service with the Agency and the pain and suffering he endured due to the accident.

52. The Tribunal finds, based on the evidence, that the Agency took into account all necessary factors in deciding to grant the Applicant an *ex-gratia* payment. 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 the Applicant as an *ex-gratia* payment, did not violate the Applicant’s terms of appointment or contract of employment or any Area Staff Regulation, Rule or other administrative issuance.

53. As a final point, the Tribunal considers that the Applicant has failed to provide evidence of impropriety or bias on the part of the Respondent. The fact that the Applicant does not agree with the Respondent on the calculation of the amount of the *ex-gratia* payment is not enough to substantiate a procedural flaw.
54. Accordingly, the Tribunal finds that:

(i) the Respondent’s decision to grant the Applicant an *ex-gratia* payment pursuant to Financial Regulation 3.4 and OD 19 is an appealable administrative decision;

(ii) the Respondent followed properly the procedure prescribed in OD 19 for the awarding of an *ex-gratia* payment to the Applicant;

(iii) the Applicant has failed to provide evidence of impropriety or bias on the part of the Respondent; and

(iv) the contested decision constituted a proper exercise of the Respondent’s discretionary power and did not go against any Area Staff Regulation or Rule, the terms of the Applicant’s appointment or other rights which the Applicant was entitled to as a staff member.

**Conclusion**

55. For the reasons provided above, the application is dismissed.

_________________Signed __________

Judge Bana Barazi

Dated this 15th day of April 2013

Entered in the Register on this 15th day of April 2013

_________________ Signed __________

Laurie McNabb, Registrar, UNRWA DT, Amman