



Federation of International
Civil Servants' Associations

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How to establish a claim for moral damages

In Brief

In almost every claim lodged with an international administrative tribunal, the applicant seeks moral damages as part of the remedies sought against an international organisation. But what is actually required to successfully establish an applicant's right to moral damages? This was most recently considered by the UN Appeals Tribunal (UNAT) in *Al-Bustanji v Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, [2024-UNAT-1442](#).

Facts

Ms Al-Bustanji was a teacher in the Jordan Field Office and was placed on administrative leave with pay pending the outcome of an investigation into allegations that she had shouted at the Deputy School Principle and attempted to physically assault her with a stapler. Shortly after the investigation was opened, Ms Al-Bustanji was diagnosed with a "severe nervous breakdown".

The allegations were received by UNRWA's Intake Committee on 6 and 13 September 2018. The investigation report was issued on 10 September 2019 and concluded that the allegation of physical assault was not substantiated, but that Ms Al-Bustanji had failed to comply with professional workplace standards. On 9 March 2020, Ms Al-Bustanji was served with a written reprimand letter. She requested a review of that decision on 5 August 2020, and UNRWA upheld the contested decision on 11 August 2020.

Ms Al-Bustanji lodged her application with the UNRWA Dispute Tribunal (DT) and provided a medical report and letter from her psychiatrist that set out her diagnosis and ailments, and a statement from her husband describing the impact of the applicant being on leave.

The judgment was issued on 29 November 2022. The DT held that although the merits of the decision to give Ms Al-Bustanji a written reprimand were correct, the unexplained 11-month delay in authorising the investigation was (i) inconsistent with the 10-day deadline in UNRWA's policies; and (ii) "so objectively excessive that it would distress an average person". Accordingly, UNRWA dismissed the application but awarded Ms Al-Bustanji JOD 400 (~USD 564) in moral damages.

UNRWA appealed this decision to the UNAT.

Reasons for decision

There were two key issues for consideration by the UNAT. First, as a matter of law, could the DT properly award moral damages when it did not find any substantive illegality on the merits of the contested decision? Second, was there a sufficient evidentiary basis for the award of moral damages?

On the first issue, UNAT has consistently stated that compensation for harm must be supported by three elements: (i) the harm itself; (ii) an illegality and (iii) a nexus between the harm and the illegality. If one of the three elements is not established, compensation cannot be awarded, because the right to compensation is inextricably linked to the illegality of the impugned decision.

However, UNAT has also awarded moral damages, even absent an express finding of substantive illegality, when there had been an unreasonable delay in the underlying proceedings which was detrimental to a staff member's well-being. In other words, a finding of substantive illegality is not a necessary precondition to having a right to moral damages. A violation of rights suffered as a result of an undue delay may be tantamount to an illegality for the purposes of having a basis to award moral damages.

In this case, the majority judges held that the DT was the trier of fact and was empowered to exercise its discretion in formulating remedies, provided it was consistent with the evidence, its statute and the fair administration of justice. The issue of moral damages is necessarily unique in each case, and there is no absolute rule regarding the nature or quantum of evidence required to support a moral damage claim. The UNAT was content to defer to the DT's findings.

On the second issue, the majority judges found that Ms Al-Bustanji had met her burden of proof because the issue of moral damages is necessarily unique in each case and there is no absolute rule regarding the nature or quantum of evidence required to support a moral damage claim. Here, the DT gave weight to Ms Al-Bustanji's testimony, which was in part corroborated by her psychologist's letter, and properly disregarded her husband's statement and a medical report which pre-dated the investigative delays. Accordingly, the majority judges upheld the DT's decision to award moral damages in the amount of half of one month's salary.

It should be noted that Judge Savage's dissenting judgment refers to the fact that UNRWA's internal policies do not impose absolute deadlines but "time frames of a recommendatory nature", such that every delay does not amount to a procedural fairness. Judge Savage concluded that there had been no procedural irregularity and that in any case, on the evidence available, Ms Al-Bustanji had not established a sufficient nexus between the investigation delay and the harm (mental distress) that she suffered. Judge Savage would have upheld the appeal and reversed the DT's decision.

Key takeaways

Compensation for moral damages is thought to repair non-pecuniary damages suffered by employees as a consequence of their organisation's actions or inaction. Non-pecuniary damages often include psychological or physical suffering.

For the UNAT to compensate for a delay, the staff member must establish: (1) that their due process rights have been violated by the delay; and (2) that they have been harmed or

prejudiced by the violation of their due process rights. In other words, what was the exact harm caused to the staff member by the delay and was it because the organisation was not following its rules and procedures?

Different judges will reach different conclusions on the impact of delay in any one case and the severity of the impact of that delay on the staff member, as exemplified by the dissenting judgment. However, this case reflects the importance of assessing each and every case on its particular facts, and that there is no golden rule or one-size-fits-all approach to assessing moral damages.

There is no minimum quantitative evidence, and there are no restrictions on the nature of the evidence that a staff member can rely upon. At the very least, staff members should provide their own testimony, testimony from any relevant witnesses and expert testimony if possible (e.g. from a doctor or psychologist).

Interestingly, excessive delays in the investigation process have been identified as a key impediment in the 2020 [United Nations review of the state of investigation function](#). The review reports that the extended length of investigations, from the receipt of the allegation until the conclusion of an investigation with the issuance of an investigation report, was considered a serious impediment to accountability and integrity and a root cause of the perception of impunity and the lack of trust in the investigation function. Another aggravating element was the additional, often significant, amount of time required for the subsequent disciplinary and internal administration of justice processes.

Organisations should follow the time limits imposed in their internal policies, and generally enforce strict timelines in the conduct of their investigations (if they do not have any prescribed time limits). This preserves the integrity of the evidence, reduces the risk of psychological impact on staff members and improves staff members' confidence in the investigation findings.

Staff members should voice their concerns about delays during investigations and not be shy in seeking psychological or other assistance where an investigation is having an adverse effect on their mental, emotional or physical wellbeing.

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