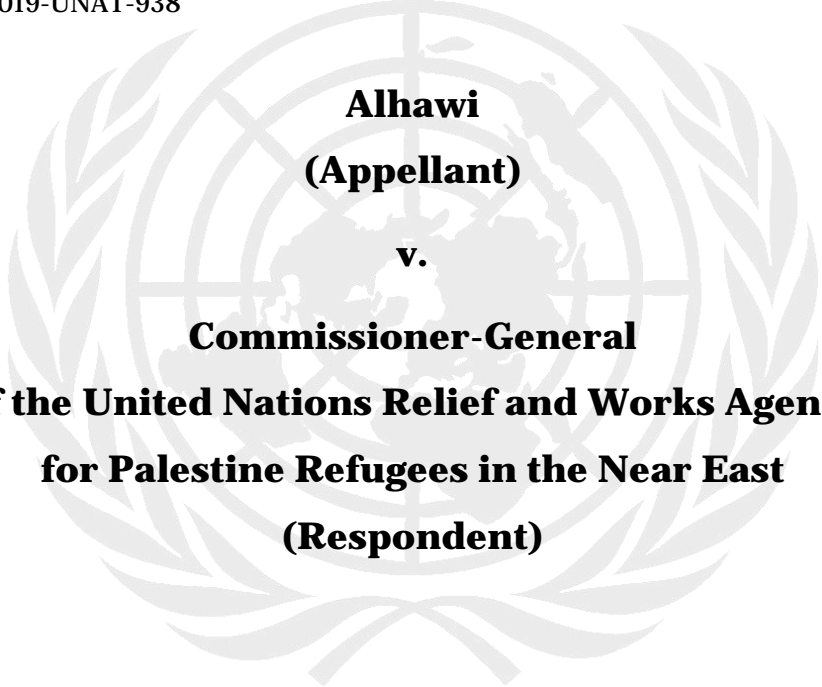




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-938



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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2019-1234
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Alhawi:	Self-represented
Counsel for Commissioner-General:	Rachel Evers

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/069, 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 18 December 2018, in the case of *Al Hawi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Younis Ahmad Alhawi¹ filed the appeal on 10 February 2019, and the Commissioner-General filed his answer on 16 April 2019.

Facts and Procedure

2. The following facts have been established by the UNRWA DT:²

... Effective 21 December 2002, the Applicant was employed as a Teacher at Baqaa Elementary Boys School 2 in the Jordan Field Office (“JFO”) on a fixed-term appointment, Grade 6B. Following several extensions and promotions, on 22 December 2012, the Applicant’s appointment was converted to a Temporary Indefinite Appointment, Grade 10.

... On 10 August 2016, a second post of Assistant Professor - English (Literature and Linguistics) became vacant following the resignation of the incumbent. On 19 October 2016, the Applicant was appointed to this post on an Acting basis, pending the post being filled after a recruitment.

... On 28 February 2017, a vacancy announcement for the post of Assistant Professor - English (Literature and Linguistics) was advertised. The Applicant applied for the position.

... Parallel to the selection process, the Agency issued an International Service Provider (“ISP”) contract to Ms. S.J. to fill a second post of Assistant Professor of English Language. Before that time, Ms. S. J. had been on a Limited Duration Contract as Assistant Professor - English Language for almost four years.

... On 5 July 2017, the Applicant was notified of his ranking as the second priority candidate “on Limited Duration Contract” [LDC], for the post of Assistant Professor - English (Literature and Linguistics) valid for 12 months from 29 May 2017. The first-selected candidate was appointed effective 24 September 2017.

¹ The Appellant’s name throughout this Judgment will be spelled Mr. Alhawi as set forth in his appeal. However, it is noted that the Appellant’s name is spelled “Al Hawi” in the impugned Judgment and “Al-Hawi” in his application before the UNRWA DT.

² Impugned Judgment, paras. 2-21.

... On 26 September 2017, the first-selected candidate submitted her resignation for personal reasons. The Dean of the Faculty of Education Sciences and Arts (“FESA”) decided not to draw from the roster of pre-approved candidates for the post of Assistant Professor - English (Literature and Linguistics).

... On 16 November 2017, the Applicant requested review of the decision not to appoint him from the roster.

... On 31 December 2017, the application was filed with the UNRWA Dispute Tribunal. It was transmitted to the Respondent on 2 January 2018.

... On 1 February 2018, the Respondent filed his reply. The reply was transmitted to the Applicant on 4 February 2018.

... On 8 February 2018, the Applicant filed a motion to submit observations. The motion was transmitted to the Respondent on the same day.

... By Order No. 025 (UNRWA/DT/2018) dated 18 February 2018, the [UNRWA Dispute] Tribunal granted the Applicant’s motion.

... On 27 February 2018, the Applicant submitted his observations. The observations were transmitted to the Respondent on 28 February 2018.

... By Order No. 118 (UNRWA/DT/2018) dated 1 July 2018 (“Order No. 118”), the [UNRWA Dispute] Tribunal ordered the Respondent to submit information with respect to the number of students registered for English language courses in the FESA in the years 2015/2016, 2016/2017 and 2017/2018 with the relevant related official documentation.

... On 16 July 2018, the Respondent filed a motion for extension of time to submit the requested information. The motion was transmitted to the Applicant on 17 July 2018.

... By Order No. 131 (UNRWA/DT/2018) dated 19 July 2018, the [UNRWA Dispute] Tribunal granted the Respondent’s motion.

... On 31 July 2018, the Respondent filed a motion for further extension of time until 8 August 2018. The motion was transmitted to the Applicant on 1 August 2018.

... By Order No. 144 (UNRWA/DT/2018) dated 2 August 2018, the [UNRWA Dispute] Tribunal granted the Respondent’s motion.

... On 8 August 2018, the Respondent filed his response to Order No. 118. The [UNRWA Dispute] Tribunal transmitted the response to the Applicant on 14 August 2018, without the annexes, as these had been submitted to the [UNRWA Dispute] Tribunal on an *ex parte* basis.

... On 6 November 2018, the [UNRWA Dispute] Tribunal issued a Notice of Hearing for Tuesday 27 November 2018. On 16 November 2018, the Respondent

confirmed his attendance and indicated that he would likely present two witnesses. The Applicant confirmed his presence by email dated 18 November 2018.

... On 27 November 2018, an oral hearing took place in Headquarters Amman. Both the Applicant and the Respondent were present at the hearing. The Respondent brought as a witness the Dean of the FESA. The Applicant did not bring any witnesses.

3. In the impugned Judgment, the UNRWA DT dismissed Mr. Alhawi's application. It found that the administrative decision in issue was Mr. Alhawi's challenge to the decision not to appoint him as Assistant Professor-English Literature and Linguistics at FESA following the resignation of the incumbent. The UNRWA DT noted that the Commissioner-General had wide discretion in appointment matters but such discretion was not unfettered. Thus, the UNRWA DT reviewed the contested decision for whether the procedures set forth in the Area Staff Regulations and Rules had been followed. The UNRWA DT found that being included on a roster did not guarantee appointment, rather the hiring director had discretion to recommend or to appoint a candidate from a pre-approved roster, without having to initiate a vacancy announcement. Likewise, the hiring director might decide not to fill a position even when there were suitable candidates on the roster. Thus, the Agency was not required to offer a post to rostered candidates. The Dean testified that there had been no need to fill the position due to low student registration and that the position had remained unfilled as of the date of the hearing before the UNRWA DT. The UNRWA DT found that the records on file supported his testimony. Accordingly, the UNRWA DT held that the Dean properly exercised his discretion and competence in accordance with the provisions of the applicable Area Staff Regulations and Rules and that there was no procedural irregularity or error in law.

4. Regarding Mr. Alhawi's arguments that the decision was arbitrary or capricious, or motivated by prejudice or extraneous factors, the UNRWA Dispute Tribunal found that Mr. Alhawi failed to meet his burden of proof. Mr. Alhawi did not demonstrate with clear and convincing evidence that the decision was tainted such as to disrupt the presumption of regularity of official acts. Mr. Alhawi's contentions that the Agency gave Ms. S. J. an ISP contract and appointed one person who was the Dean's cousin were speculation. While it was clear the Agency wanted to keep Ms. S. J., this did not necessarily mean that the decision not to appoint Mr. Alhawi was arbitrary or tainted by bias. Per the evidence on file the courses and teachers have changed and at the time of the hearing the position was unfilled. Thus, the UNRWA DT found the presumption of regularity stood.

Submissions

Mr. Alhawi's Appeal

5. Mr. Alhawi argues that the UNRWA DT “deliberately rejecte[ed] pieces of evidence and overlook[ed] others” which caused a flawed Judgment. He asserts that the UNRWA DT rejected the fact that Ms. S. J.’s status was not changed from an LDC to an ISP contract but rather was an illegal renewal of her prior unrenovable LDC, which could not be renewed beyond four years. The renewal was based on deceit in her application. The UNRWA DT deliberately rejected the breach of oath by two witnesses, as Mr. Alhawi set forth information proving they were lying. The UNRWA DT overlooked evidence that the Agency appointed Ms. S. J. to one of two identical posts of Assistant Professor of English Literature and Linguistics, when the vacancy announcements were still valid, and despite the restriction to extending her beyond four years. Her appointment to one of the two vacant posts meant that only one vacant post was left for others to compete for. This also violated the principle of priority recruitment of internal staff members, which if applied would mean he would have been recruited to the post before Ms. S. J. Violating the principle of priority was an irregularity of the process which denied him a chance of promotion. Ms. S. J. has repeatedly been renewed for the academic years 2017/18 and 2018/19, despite the availability of qualified professors with the relevant Ph.D. Her appointment without competitive recruitment was evidence of bias, nepotism, and corruption by the Agency. Her salary was unjustifiably high and squandered the Agency’s resources. Mr. Alhawi further indicates that the UNRWA DT’s deliberate rejection of evidence confirms its bias for the benefit of corrupt people within the Agency. Likewise, the Dean’s decision not to place him in the post after it had become vacant was evidence of malice against him.

6. Mr. Alhawi also argues that the Agency’s annexes to its reply before the UNRWA DT relating to student registration totals were submitted on an *ex parte* basis while they constituted evidence that should have been made available to him. The UNRWA DT should have at least informed him of what the evidence contained. It took the Agency 39 days to produce the *ex parte* documents, which contained lists of enrollments. When the judge asked the Dean to explain the numbers therein, he told the judge he could not explain them as they had been prepared by the Registrar. The UNRWA DT erred in not providing this evidence to him while it held that he had not adduced any evidence supporting how the contested decision was irregular. Furthermore, the UNRWA DT ignored his testimony that the number of students in the Department of English was fixed and he pointed out that if the incumbent had not suddenly resigned only two days after

taking up the role, she would still be teaching a course filled with students. In addition, the Dean testified that there had been several cancelled courses in general, but not specifically about the course in issue, namely the course from which the incumbent resigned. Thus, the Dean's testimonial evidence was irrelevant to whether the decision not to place him on the post was due to low student registration. The UNRWA DT failed to consider his testimony that students enroll in June or July so analysis as to whether there was low enrollment should have been done prior to placing the incumbent in the post and this disproves the Dean's explanation that they realized there was low enrollment when the incumbent resigned. Thus, the UNRWA DT erred in not finding the Dean's testimony untruthful.

7. Notwithstanding the enrollment, the Higher Education Accreditation Commission stipulates a minimum number of teachers with Ph.D.s in English Literature or Linguistics must be present and the Agency was not compliant as Ms. S.J., the Dean's cousin, did not have a Ph.D.

8. Based on the foregoing, Mr. Alhawi requests rescission of the administrative decision, his appointment to the post, compensation for moral damages, compensation for material damages, and compensation for lost salary.

The Commissioner-General's Answer

9. The Commissioner-General requests the Appeals Tribunal to dismiss the appeal in its entirety as Mr. Alhawi has not set forth any of the grounds of appeal under the Appeals Tribunal's Statute. He has failed to meet his burden to establish an appealable error. The appeal raises new elements and pleas that were not put forth before the UNRWA DT, such as his argument that the UNRWA DT did not consider the "principle of priority" for internal candidates when filling vacant posts. Nonetheless, the priority of internal candidates is not relevant as the Agency had decided not to fill the vacant post and there was therefore no consideration of preferencing involved. In addition, the Commissioner-General argues that the impugned Judgment is free from error as the UNRWA DT correctly held that being on a roster did not guarantee an appointment and the decision not to fill the post due to low student registration was an appropriate exercise of discretionary authority by the Dean. There was no procedural irregularity or error of law. The UNRWA DT correctly dismissed Mr. Alhawi's contentions that the decision was irregular and discriminatory as these contentions were not substantiated and the record supported the Dean's testimony that the decision not to fill the post was due to low student registration obviating the need for the course.

10. The UNRWA DT did not commit any procedural errors. Regarding Mr. Alhawi's contention that the UNRWA DT erred in not transmitting him the evidence submitted by the Agency on an *ex parte* basis, namely, the student registrations for English language courses for three years, the Commissioner-General submits that these documents were submitted *ex parte* due to the confidential and sensitive nature of the information therein, which included student details. The UNRWA DT gave Mr. Alhawi an opportunity at the hearing to review the documents and make submissions thereon. Further, the UNRWA DT explained in its Judgment the conclusions it made based on this evidence. Mr. Alhawi's submissions as to the number of students and classes were not previously submitted into evidence nor were they supported by the record. As such, the Appeals Tribunal should ignore these submissions. As to the hearing, the UNRWA DT clarified that only the testimony relevant to this case would be considered. Mr. Alhawi's assertion that the Dean "breached his oath" was based on his misrepresentation of the Dean's testimony.

11. Lastly, the Commissioner-General submits that there is no legal basis to rescind the contested decision. Mr. Alhawi has not proffered any evidence in support of his pleas for compensatory and moral damages and recalls this Tribunal's jurisprudence that no award shall be given when there is no harm suffered.

Considerations

12. We have considered all of the evidence presented in this case and note that the vacancy for the post of Assistant Professor English Literature and Linguistics, the position for which Mr. Alhawi applied was not filled. According to the evidence, the position remained unfilled through the date of the hearing of this case before the UNRWA DT.

13. This evidence is uncontroverted and indeed the Dean testified that a decision had been made not to fill the position due to low student registration. Instead, the Agency decided to cancel those courses and manage the rest of the courses with the professors who were still at the FESA. It appears, therefore, that the issues surrounding the non-selection of Mr. Alhawi, though relevant at the time, are academic in nature.

14. The Appeals Tribunal accepts the decision to leave the position vacant as an exercise of the discretionary authority of the Agency. In the absence of evidence to the contrary, we find that there was no procedural irregularity or error of law within the exercise of that decision.

15. We further find that Mr. Alhawi has not met the required burden to be heard on appeal, namely he has failed to identify any of the grounds of appeal prescribed by Article 2(1) of the Appeals Tribunal Statute. He has also raised new arguments on appeal with respect to priority consideration and facts on enrollment, which were not argued before the UNRWA DT; as a result, he is estopped to do so on appeal.³

16. In the circumstances, we affirm the Judgment of the UNRWA DT.

³ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547.

Judgment

17. The appeal is dismissed and Judgment No. UNRWA/DT/2018/069 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Knierim

(Signed)

Judge Lussick

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar