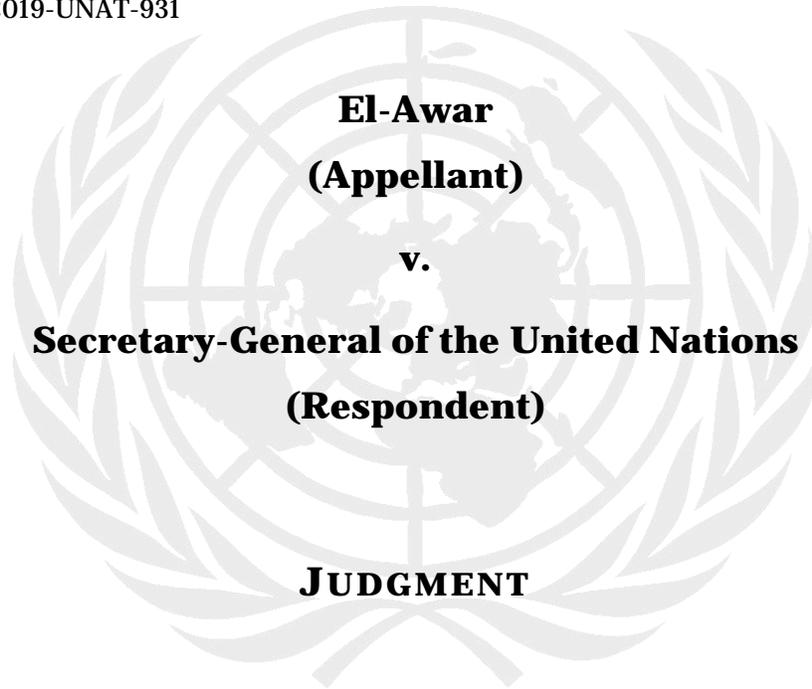




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-931



**El-Awar
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Martha Halfeld Judge Richard Lussick
Case No.:	2019-1227
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. El-Awar:	Mohamed Abdou, OSLA
Counsel for Secretary-General:	Noam Wiener

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/116, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 23 November 2018, in the case of *El-Awar v. Secretary-General of the United Nations*. Mr. Faraj El-Awar filed the appeal on 22 January 2019, and the Secretary-General filed his answer on 18 March 2019.

Facts and Procedure

2. Mr. El-Awar joined the United Nations Human Settlements Programme (UN-Habitat) in 2008 as a Programme Manager with the Global Water Operators Partnerships Alliance (GWOPA), at UN-Habitat's headquarters in Nairobi, Kenya. GWOPA is an alliance of partners established by UN-Habitat to promote the effective use of not-for-profit peer support partnerships through mutual assistance among the water and sanitation operators to realize its mission to achieve universal access to sustainable water and sanitation. It was launched in 2007 and was initially hosted by UN-Habitat's Water Sanitation and Infrastructure Branch based in Nairobi. In November 2014, GWOPA was relocated to Barcelona, Spain, where the responsibility for it was transferred to UN-Habitat's Urban Basic Services Branch.

3. GWOPA's activities are implemented under the overall strategic direction of a Steering Committee comprised of representatives of public and private water operators, civil society/non-governmental organizations, labour unions, partners, donors, one representative from UN-Habitat appointed by the Executive Director, the UN-Habitat, and one representative from the GWOPA Secretariat. Under the GWOPA Charter, the Steering Committee serves as an advisory body to the Executive Director on all GWOPA matters. It meets annually to provide strategic direction for GWOPA operations.

4. In 2014, Mr. El-Awar became the head of the GWOPA Secretariat under the direct supervision of the Senior Advisor to the Executive Director and sat *ex officio* on the GWOPA Steering Committee without voting rights as the representative of the GWOPA Secretariat. In the same year, the Executive Director delegated authority to Mr. El-Awar in respect of recruiting consultants and individual contractors, signing template agreements and legal instruments, and undertaking procurement.

5. During 2016, Mr. El-Awar discussed issues relating to GWOPA with the government of Spain and local authorities in Barcelona. He also conferred with the Regional Director for Europe and Central Asia of the United Nations Office for Project Services (UNOPS) and discussed transferring GWOPA from UN-Habitat to UNOPS and provided information to the GWOPA Steering Committee that led its members to believe that UN-Habitat had decided to de-prioritize GWOPA.

6. On 16 January 2017 the Executive Director received a letter from the Mayor of Barcelona querying the reported intentions of UN-Habitat to move the GWOPA Secretariat from Barcelona, expressing the wish of the Barcelona City Council for the GWOPA Secretariat to remain in Barcelona permanently, and requesting UN-Habitat to continue to provide political, institutional and financial support to ensure that the GWOPA Secretariat remain permanently in Barcelona.

7. On 2 February 2017, the Executive Director received a letter from the GWOPA Steering Committee. The letter commenced by setting out the relevant background, noting that UN-Habitat had significantly contributed to the success of GWOPA. In most relevant part, the letter concludes:

In response to UN-Habitat's recently communicated focus on urban priorities, and away from GWOPA's mandate, the Steering Committee has resolved the following:

In light of UN-Habitat's changing prioritization which de-emphasizes the Global WOPs Alliance platform and its activities, the GWOPA Steering Committee resolves to request the support of UN-Habitat in a smooth transition of the Global WOPs Alliance to another UN entity. The GWOPA Steering Committee also resolves to present a formal request to UNOPS to host the Global WOPS [sic] Alliance in furtherance of the original UN Secretary-General and UNSGAB mandate, and in light of demonstrated demand of water operators at the global level; the UNOPS model hosting terms shall form the basis for discussions between the GWOPA Secretariat and UNOPS. The GWOPA Steering Committee further directs the Secretariat to open discussions with the Government of Spain towards the conclusion of a new hosting arrangement ensuring the seamless operation of the GWOPA office in Barcelona, Spain.

GWOPA remains excited to work closely with UN-Habitat in support of its urban agenda, but we request your cooperation in achieving a seamless transition to the benefit of both UN-Habitat and GWOPA.

8. The Executive Director wrote to the GWOPA Steering Committee on 15 February 2017. The relevant part of the letter reads:

I have received with some surprise your letter dated 2 February 2017, in which you are proposing a move of GWOPA to another UN entity. You are justifying this move by what you consider to be a change in UN-Habitat's prioritization and de-emphasizing of the Global WOPs Alliance platform and its activities.

I would like to inform you that this is not the case at all

I would like to make it clear that for me, and for UN-Habitat, this is a very critical initiative, and we are convinced by its utility ... I do not know exactly the reasons for or information on which you base your conclusions, but I again reiterate that a de-prioritization of GWOPA is not part of the strategy of UN-Habitat ...

9. The next day, 16 February 2017, the Executive Director wrote to the Mayor of Barcelona, explaining that there had been some confusion and expressing the commitment of UN-Habitat to keep the GWOPA Secretariat in Barcelona as it had never been considered otherwise.

10. Upon further enquiry, UN-Habitat senior management received information indicating that the misunderstanding had been precipitated by the actions of Mr. El-Awar who had presented to the GWOPA Steering Committee UN-Habitat's lack of support for the initiative as a definitive fact and the need for the change of the GWOPA sponsor as the only alternative for the future of the initiative. The Executive Director's letter of 15 February 2017 was sufficient to allay the apprehension of the GWOPA Steering Committee.

11. However, Mr. El-Awar's conduct was perceived to be a breach of trust. According to Mr. Cox, Director, Management and Operations Division (MOD), UN-Habitat, the leadership of UN-Habitat became concerned about the manner in which Mr. El-Awar had discharged his functions in the overall management of GWOPA. Mr. El-Awar was called to the UN-Habitat headquarters for management discussions from 13 to 15 February 2017. In a sworn statement co-signed on 12 October 2018 by Mr. Cox and three others, who attended the *ad hoc* meetings between 13 and 16 February 2017 with the Executive Director, it is stated:

The participants at the meetings all deplored [Mr. El-Awar's] actions. Amongst the actions that were found particularly problematic were those pertaining to his endorsement of the appointment of interim Chair, Neil McLeod, in the place of the former Executive Director of UN-Habitat and his attempt to transfer GWOPA to UNOPS without consultation. Participants reached the conclusion that it was necessary to take preventive measures. These meetings thus culminated in a decision

by the Executive Director to urgently conduct a Management Review and immediately withdraw the Delegation of Authority from [Mr. El-Awar] with immediate effect, in order to protect the interest of the organization. Subsequently, a memorandum was issued on 16 February 2017 revoking [Mr. El-Awar's] Delegation of Authority and the Management Review commenced on 20 February 2017.

12. In a memorandum dated 16 February 2017, the Executive Director advised Mr. El-Awar as follows:

This memo serves to inform you that the Delegation of Authority to sign UN-Habitat Agreements and Legal Instruments, the Delegation of Procurement Authority and the Delegation of Authority to Recruit Consultants and Individual Contractors granted to you through my memoranda dated 16 December 2014 are hereby temporarily withdrawn with immediate effect, pending further notice.

13. In another memorandum, sent on the same day, Mr. Rafael Tuts, Director, Programme Division, UN-Habitat, notified Mr. El-Awar of UN-Habitat's decision to "conduct a management review of GWOPA". In that connection, Mr. Tuts issued Mr. El-Awar the following instructions:

[Y]ou are instructed to desist from entering into any financial commitments for GWOPA without my explicit approval. Disbursements against current commitments and obligations must be cleared through the Director, Management and Operations. You may not initiate any new procurements, hire of consultants, or travel without my authorization, until further notice ...

Until explicitly authorized by me, you are instructed not to engage with member states, UN agencies, the Steering Committee and the wider membership of GWOPA, media, other governments, or other partners on any topic, and if asked, simply inform inquiring parties that a management review has started with a view to strengthening GWOPA, and that you are awaiting further instructions from me or the Executive Director.

14. On 24 February 2017, Mr. El-Awar filed a request with the Management Evaluation Unit (MEU) for a management evaluation of the decisions set out in the two memoranda of 16 February 2017. He also filed a request with the Dispute Tribunal for suspension of action of the contested decisions. By Order No. 59 (GVA/2017) dated 28 February 2017, the UNDT suspended the execution of the two contested decisions, pending the outcome of the management evaluation.

15. In a letter dated 19 April 2017, the Under-Secretary-General for the Department of Management (USG/DM) informed Mr. El-Awar of the decision of the Secretary-General to uphold the contested decisions because they were the proper exercise of the Secretary-General's discretion with respect to staff management.

16. Mr. El-Awar appealed to the Dispute Tribunal on 1 June 2017. The Secretary-General filed a reply on 3 July 2017. By Order No. 134 (GVA/2018) dated 5 September 2018, the UNDT allowed Mr. El-Awar to respond to the reply and announced the date of 25 September 2018 for a first case management discussion (CMD) during which the UNDT would consider *inter alia* whether a hearing should be held or whether the case should be decided on the basis of the documents. In the 25 September 2018 CMD, Mr. El-Awar informed the UNDT that he had been served with a notice that his fixed-term appointment would not be renewed beyond its expiry date of 30 September 2018, and that he had filed a request for management evaluation challenging the non-renewal decision. On 20 November 2018, the UNDT held a third CMD, during which Mr. El-Awar informed the UNDT that he had filed an application before the UNDT against the non-renewal of his appointment and sought joinder of his two UNDT applications, one against the decision to temporarily withdraw his delegation of authority and the other against his contract non-renewal. The UNDT decided not to consolidate Mr. El-Awar's two cases and not to grant his request for a hearing on the grounds of his failure to adequately identify how oral evidence would assist in clarifying the issues in contention over and above identification of inaccuracies, the resolution of which would not disturb the essential factual findings and reasons for the impugned decisions.

17. In its Judgment now under appeal, the UNDT dismissed Mr. El-Awar's application, finding that the contested decisions did not deprive him of the ability to function; they rather subjected him to a stricter scrutiny by his superiors, as a result of UN-Habitat's concerns about his conduct which was perceived to be against the interests of UN-Habitat. The decisions taken by the UN-Habitat senior management were preventive, rational and proportionate in view of the perceived risks to UN-Habitat.

Submissions

Mr. El-Awar's Appeal

18. Mr. El-Awar complains that the UNDT precluded him from calling appropriate witnesses and adducing relevant evidence and, moreover, it failed to afford him a fair trial and due process by improperly denying his request for an oral hearing. Those decisions were unreasonable and led to serious errors, which materially affected the outcome of the case.

19. None of the witnesses, whose statements were produced by the Secretary-General, were active members of the GWOPA Steering Committee. Those statements were hearsay. Moreover, they contained numerous inconsistencies, inaccuracies and incorrect statements and lacked the requisite spontaneity and indicia of reliability and truthfulness.

20. It was therefore necessary for the UNDT to call witnesses who had direct knowledge of the relevant facts. But his request to call one or two Steering Committee members was denied. The hearing was necessary because of the important factual discrepancies between the parties regarding the motives and circumstances surrounding the contested decisions and the lack of contemporaneous records establishing the context for the decisions. An oral hearing would have enabled Mr. El-Awar to testify in person, test the evidence produced by the opposing party, clarify his acts and provide a detailed account of the events. By denying him such an opportunity, the UNDT failed to give effect to the principles of fairness and due process and substituted its own views for those of Mr. El-Awar's.

21. The reliability and probative value of Mr. Cox's statement and the joint statement of five witnesses are questionable, because those two statements were framed as a response to Mr. El-Awar's arguments and not as an objective statement of facts. The averment of truthfulness in both statements was substantially different from the requirements of Article 17(3) of the UNDT Rules of Procedure (RoPs). Furthermore, the joint statement by five witnesses was a "clear indication of co-witness contamination" and undue influence and highly problematic and manifestly improper. Lastly, the fact that a signature was missing from the joint statement, that Mr. Cox signed the joint statement in addition to filing a separate witness statement, and that the representative of the Secretary-General before the UNDT proceedings also signed the joint statement as a witness raises further questions about the reliability and truthfulness of the joint statement.

22. Mr. El-Awar requests that the Appeals Tribunal vacate the impugned Judgment and remand the case to the UNDT for a fresh determination.

The Secretary-General's Answer

23. The UNDT correctly exercised its discretion when it decided not to hold an oral hearing in accordance with Article 9 of its Statute and Article 16(1) of its RoPs, under which a UNDT judge has broad latitude to determine which evidence s/he should hear and discretion to determine whether to hold an oral hearing. The UNDT was not required to hear Mr. El-Awar's oral argument whenever requested by him. It was within the Dispute Tribunal's discretion to decide to rely on written evidence.

24. Mr. El-Awar makes a number of factually incorrect assertions: i) that the UNDT relied on hearsay statements; ii) that it made conflicting findings with regard to whether the contested decisions had the effect of preventing him from performing the majority of his functions; iii) that the UNDT did not have sufficient evidence on the basis of which to make a finding regarding the reasons behind the contested decisions; and iv) that the UNDT denied him an opportunity to introduce evidence while allowing the Secretary-General to adduce untested witness statements. On the contrary, the UNDT provided Mr. El-Awar with ample opportunities to confront and refute the evidence submitted by the Secretary-General and to provide evidence to support his case. The UNDT directly addressed both the witness statements submitted by the Secretary-General and Mr. El-Awar's response and comments on those witness statements.

25. The Appeals Tribunal should reject the six objections raised by Mr. El-Awar against the admission of evidence by the UNDT. Contrary to Mr. El-Awar's arguments, the acknowledgment by the witnesses that they were testifying on behalf of a party in response to the claims made by the other party may affect the weight of their testimony, but it did not render their testimony inadmissible. Article 17(3) of the UNDT RoPs governs the declaration made when a witness gives oral evidence before the Dispute Tribunal, but it does not require a document to contain a declaration for it to be admissible or be given probative weight.

26. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the impugned Judgment.

Considerations

27. The appeal by Mr. El-Awar primarily challenges the decision of the UNDT not to hold an oral hearing. The simple question for the UNDT was whether on the basis of the undisputed information the Executive Director exercised his managerial prerogative to limit Mr. El-Awar's authority reasonably. That required the UNDT to determine the basis, purpose and effect of the decisions, all of which are not pointedly disputed.

28. It is undisputed that the GWOPA Steering Committee and the Mayor of Barcelona were brought under the false impression that UN-Habitat had de-prioritized GWOPA and that it had become necessary to transfer GWOPA to another United Nations entity and to leave Barcelona. It is also undisputed, and borne out by the contemporaneous correspondence, that the Executive Director was surprised to hear of the misconception; and that a de-prioritization of GWOPA was not part of the strategy of UN-Habitat.

29. Moreover, it is a fact that, as a Senior Coordination Officer for GWOPA responsible for managing the GWOPA Secretariat, Mr. El-Awar had contributed to the confusion and misunderstanding. The correspondence from the Mayor of Barcelona and the GWOPA Steering Committee indicates that the initiative had come from the GWOPA Secretariat. The documentary evidence and Mr. El-Awar's submissions substantiate the conclusion that he probably had been involved in the proposal to move GWOPA from UN-Habitat to UNOPS and that he did not have the agreement of his superiors to take such steps. His belief that he was being retaliated against for his "dissenting views" on the future of GWOPA is tantamount to an admission that he differed from senior management on the way forward.

30. The contested decisions were not disciplinary measures. Their objective was merely to limit Mr. El-Awar's authority in certain of his work functions by requiring him in the identified instances to acquire pre-authorisation from his superiors. The decisions were temporary and intended to endure for the period of the management review of GWOPA, referred to in the memorandum of Mr. Tuts.

31. Most importantly, the reason for the decisions is not in contention. After discovery of the misunderstanding about UN-Habitat's commitment to GWOPA (which carried reputational risk for UN-Habitat), it was thought best to limit Mr. El-Awar's authority and bring him under closer supervision while a management review was conducted. The contested decisions were preceded

by consultations with Mr. El-Awar in Nairobi from 13 through 15 February 2015 where the issues of concern were raised and discussed.

32. The contested decisions no doubt had an impact on Mr. El-Awar's performance of his duties. The UNDT accurately delineated Mr. El-Awar's job description as requiring him to work under the direct supervision of the Senior Advisor to the Executive Director and conferring responsibility on him for: i) managing the GWOPA Secretariat; ii) supervising the Secretariat staff members; iii) leading the development of the strategic direction of GWOPA; iv) implementing the workplan of the GWOPA Secretariat; v) leading resource mobilization efforts; vi) liaising with donors and other relevant partners; and vii) representing UN-Habitat and GWOPA in various international, regional and national fora. The authorities delegated to Mr. El-Awar were not essential to the fulfilment of the functions delineated in his job description and were, for the most part, exceptional in nature. The withdrawal of the delegations did not unduly detract from Mr. El-Awar's core functions, though his discretion to interact with various stakeholders was significantly restricted by limiting his scope of action and subjecting him to closer supervision. But it cannot be said that the introduced constraint was disproportionate in effect. Mr. El-Awar could continue with his work activities as before; he was merely constrained by a firmer level of accountability and closer scrutiny of his performance while the management review was under way.

33. No other evidence is of any distinct relevance or value. In the ultimate analysis, not much turns on the admissibility, evidentiary weight and different interpretations of the various witness statements and documentary evidence. The submissions of the parties in that regard are largely irrelevant. The UNDT accordingly did not act improperly in the exercise of its discretion in terms of Article 9(2) of the UNDT Statute by holding that further oral evidence would not assist in clarifying the issues in contention over and above identification of some inaccuracies, the resolution of which would not disturb the essential factual findings and the reasons for the decisions.

34. In matters involving no disciplinary sanction, Tribunals are required to defer appropriately to the managerial process and to reasonable exercises of managerial discretion necessary to run, manage and operate the Organization. The UNDT correctly held that the Executive Director was best placed in this instance to understand the legitimate managerial needs of the Organization and enjoyed a margin of appreciation. Managerial decisions should be

sustained provided they are free from invidious or improper motivations and are based upon the exercise of reason and proper judgment.

35. In the premises, the undisputed facts sufficiently demonstrate that there was a rational connection between the information available to the Executive Director, the reasons given for the contested decisions and the purpose for which the decisions were taken. The decisions to subject Mr. El-Awar to stricter supervision were, moreover, tailored proportionally to the desired outcome of ensuring GWOPA's continued presence in Barcelona without unduly restraining Mr. El-Awar from carrying out his job. As such, the contested decisions were a legitimate, rational and proportional exercise of the managerial prerogative. We can put it no better than the UNDT, which concluded correctly as follows:¹

The Tribunal finds that the administrative measures were rational and proportionate to address the concerns expressed by management. Faced with a situation where the Applicant was taking initiatives that were perceived to be against the interests of UN-Habitat without any consultation with his hierarchy, it was appropriate to curtail his authority and to subject him to more stringent control. Further, it has not been established that the measures were disproportionate to the objective they sought to achieve. All the measures were aimed at preventing the Applicant from taking any action that would have the effect of binding GWOPA or UN-Habitat, formally or informally. Whilst they may have had a significant impact on the Applicant's way of exercising his functions, they did not have a disproportionate impact on him as he could still continue to occupy his post and fulfill his responsibilities as defined in his job description, albeit under more scrutiny.

36. The appeal must accordingly fail.

¹ Impugned Judgment, para. 56.

Judgment

37. The appeal is dismissed and Judgment No. UNDT/2018/116 is hereby affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Lussick

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

(Signed)

Weicheng Lin, Registrar