



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

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Judgment No. 2021-UNAT-1176

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

**JUDGMENT**

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Before:	Judge Sabine Knierim, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case Nos.:	2020-1501
Date:	29 October 2021
Registrar:	Weicheng Lin

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Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Rachel Evers

**JUDGE SABINE KNIERIM, PRESIDING.**

1. Mr. Elmenshawy appeals Judgment on Receivability No. UNRWA/DT/2020/068 rendered by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT) issued on 19 November 2020 (Impugned Judgment). In the Impugned Judgment, the UNRWA DT dismissed Mr. Elmenshawy's application contesting his not being short-listed in the selection process for the post of Director of Security and Risk Management, Grade D-1 (D/SRM) on grounds his application was not receivable *ratione materiae* as he had failed to file a request for decision review within the time limits, which is a required step prior to submitting an application. For the reasons set out below, we affirm the UNRWA DT judgment and dismiss Mr. Elmenshawy's appeal.

**Facts and Procedure**

2. Mr. Elmenshawy held a fixed-term appointment (FTA) at the P-5, Step 1 level as Chief of Security Operations and Analysis, Headquarters, Amman (HQA). He applied to the vacant D/SRM post along with 80 other applicants. On 20 October 2019 the decision was made not to short-list Mr. Elmenshawy.

3. On 14 November 2019, Mr. Elmenshawy discussed the reasons he was not short-listed with the Director of Human Resources (DHR) in his office. The DHR informed him he was not short-listed because he had only been in his current post for less than 12 months at the time of his application, his current post was his first post at the P-5 level and he had not yet completed his probationary period. By e-mail to the DHR dated 17 November 2019, Mr. Elmenshawy memorialised in writing the discussion of 14 November 2019, reading as follows:

On Thursday 14 December [sic]<sup>1</sup> 2019 at 1400 hours, at your office location in UNRWA HQA, I requested you verbally on reasons which are may be [sic] behind me not being shortlisted for the D1 post-Director of UNRWA Security and Risk Management Department. You stated that the reason is that I have spent less than one year in the P5 Chief of Security Operations and Analysis post and UNRWA rules do not allow this application further. I also requested your clarification if there is any other reason that could be also behind this exclusion from the short list

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<sup>1</sup> The Appellant in his 17 November 2019 e-mail to DHR erroneously referred to the month of their meeting as December, when it was actually in November. The Impugned Judgment takes note of this error at para. 38.

for the mentioned post, and you responded that there are no other explanations preventing me to be shortlisted for future openings at the D1 level after one year with UNRWA at the P5 level (which is due on 28 February 2020).

Please see extract from UNRWA HR rules:

Special Selection Measures

72. In the interests of Agency operational stability, the Hiring Department can decide, in consultation with the Director of Human Resources, to not shortlist an internal candidate who has served for less than one year in her or his current post at the time of the closing date of the vacancy, unless it is deemed in the interests of the Agency to do otherwise.

This message acts as a note for future references.

Please advise if there are any comments from your side (...)

4. On 30 January 2020, Mr. Elmenshawy sent a follow-up e-mail to the DHR, re-sending the previously sent e-mail quoted above, and with additional comments set forth in pertinent part below:

Dear [DHR]

On Wednesday 29 January 2020, and during our last day in the Management Committee retreat in Amman (...) you closed the final session (...) announcing to all members/participants (...) that the interviews for the “D1 Director of Security and Risk Management” will take place this week, and you added that “we should have him with us soon” (...)

This prompted my reminder to you on my below message with the below added details:

- Please confirm the reason of excluding me from the short list for the mentioned post, even though I am an internal candidate (...). You mentioned that because I am below a year in UNRWA, see para 72 from UNRWA confirming the opposite of your verbal statement to me (I may be included based on the agency’s interests), as detailed in my previous email sent to you on 17 November 2019 after our meeting on the subject matter.
- Please advise on your sent recommendation to the hiring manager- ACG regarding my application “you told me verbally that this is because I am less than a year in the UNRWA”. Can you support your statement by a sent written message to the ACG please or any other written mean [sic].
- Who took the final decision of not short-listing me? And why? (...)
- (...)

- (...) I have been since 17 November waiting for your reply, and you chose to ignore my request for clarification and to be reconsidered for the post, (...)
- (...)

5. On 2 February 2020, the DHR replied to Mr. Elmenshaw's above quoted e-mails stating as follows:

Dear Mohamed,

Feedback to candidates is provided at the end of the process, that is still ongoing.

My announcement to the MCM was in response to a request from them for an update on senior posts. The process was ongoing and that it would be concluded shortly. [...]

If you wish to discuss further, I am available.

.(...)

6. On 3 February 2020, Mr. Elmenshaw responded to the DHR's e-mail as follows:

Dear [DHR],

... thank you for this brief reply. However, you did not attend to any of my enquiries and clear questions to you. ... I officially seek your replies on [the points of his prior email were reiterated]

In this e-mail he asks Ms. MT, the deputy in HR, for assistance as follows:

Dear [MT]

With this lack of clarity on my requests to the DHR; may I please request guidance to the official channels with HR forum ... to formally file a complaint for the below subjects:

- Exclusion of my application to the mentioned post without [proper] [sic] justification and refusal to my continued invitations for the DHR to consider my application and the agency's best interest. I believe that this is jeopardized with bring a new head for the Security Department at this sensitive time of the agency.
- Compromising the agency security department structure and stability by this approach by the DHR. My team is equally worried that a new manager comes and all what was built for a year is redone somehow.
- Personally, targeting me as a qualified internal candidate and a UN security officer for 20 years with proven exceeding expectations performances. I have had some different view with the DHR on few subjects and I suspect that this exclusion may be reactive from the DHR for those differences recorded.

- I am a native Arabic speaker, and I believe that this is highly required for the post currently given the security and political arena surrounding our agency.
- This approach by DHR is unacceptable to me as the Chief [Department of Security and Risk Management I hereby request fair chance and treatment as a UN loyal staff member, who cares the most about the organization and its principles.

7. On 5 February 2020, the DHR responded via e-mail reiterating that he had informed Mr. Elmenshawy on 14 November that normally candidates are not short-listed for posts if they had been appointed to the post currently encumbered less than 12 months from the time of application, and had added that it was Mr. Elmenshawy's first time in a P-5 post and that he had not completed his probationary period. The DHR set forth paragraph 72 of PD/I/4/Part I/Rev. 1 (International Staff Selection Policy) quoted above and noted that it was "therefore discretionary to shortlist internal candidates who have served in his/her current post for less than one year." He then directed Mr. Elmenshawy to Chapter XI of the International Staff Rules for information on submitting a request for decision review.

8. On 11 February 2020, Mr. Elmenshawy filed a request for decision review against the decision not to shortlist him, and on 5 March 2020 filed his application before the UNRWA DT.

9. The UNRWA DT dismissed the application as not receivable on grounds Mr. Elmenshawy had not filed a *timely* request for decision review. The Tribunal noted that International Staff Rule 11.2 required staff contesting an administrative decision to first submit a request for decision review within 60 calendar dates from the date on which the staff member received notification of the administrative decision to be contested. The Tribunal further noted it did not have authority to extend or waive the time limit. The Tribunal determined that Mr. Elmenshawy "received notification of the administrative decision to be contested" on 14 November 2019 when he met with the DHR as notice is not required to be in written form. The Tribunal relied upon *Auda* wherein this Tribunal has held that "the decisive moment of notification for purposes of Staff Rule 11.2 is when 'all relevant facts ... were known, or should have reasonably been known'"<sup>2</sup> Since verbal notice is acceptable and since all relevant facts about his non-selection were made clear to Mr. Elmenshawy by the DHR at the 14 November 2019 meeting, as made clear by his

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<sup>2</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-746, para 31; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para 21.

memorialising e-mail, consequently he was informed of the decision on 14 November 2019 rendering his 60-day deadline to file a decision review as 13 January 2020. He filed a request for decision review late on 11 February 2020. As he did not file a timely decision review as required by International Staff Rule 11.2 the Tribunal has no jurisdiction to waive this requirement and the application was therefore not receivable.

10. On 16 December 2020, Mr. Elmenshawy filed an appeal.

11. On 19 February 2020, the Commissioner-General filed his answer.

12. As annexes 6 and 7 of the appeal had not been transmitted to the Respondent, he was given the opportunity to respond, and filed his additional comments, dated 13 September 2020, to the Appeals Tribunal.

### **Submissions**

#### **Mr. Elmenshawy's Appeal**

13. Mr. Elmenshawy requests the Appeals Tribunal to vacate the impugned judgment and remand the case to the UNRWA DT for a determination on the merits. In support he argues that the UNRWA DT erred in fact and law when assessing the evidence as to whether he was informed of the contested decision and by concluding the discussion of 14 November 2019 constituted notice of the administrative decision.

14. The DHR, in their meeting of 14 November 2019, told Mr. Elmenshawy that not shortlisting staff with less than 12 months in the post was discretionary and that he would take the matter up with the hiring manager and then revert to Mr. Elmenshawy. He heard nothing further until 29 January 2020, when there was a public announcement by the DHR that interviews for the position were taking place. On enquiry, he was told on 2 February 2020 that the process was ongoing and feedback would only occur at the conclusion. On 3 February 2020, he sent an e-mail to the DHR entitled "lack of clear response to my message" and specifically asked what the final decision was after consulting the hiring manager. It was on 5 February 2020 that the DHR wrote to the Appellant referencing their discussion and reiterating that shortlisting staff with less than 12 months in the post was discretionary and invited him to file a decision review.

15. On 11 February 2020, he learned that an external candidate had been selected for the post and he then submitted a decision review request. The issue of receivability turns on whether he received notification of the final decision rejecting his candidacy. In this case there was no written notification provide of the outcome of the selection process. He did not know the exact date the decision not to shortlist him was taken. He was not given any notice that his application was rejected he was only made aware on 29 January 2020 that a final decision in filing the post was made. He immediately prepared his request for review on 11 February upon confirmation from the DHR on 5 February 2020 that he would not be added to the shortlist. The Appeals Tribunal jurisprudence consistently holds that only a final decision may be appealed not preliminary communications leading up to it. When a public announcement was made on 29 January 2020 that interviews were taking place the following week, he was not notified personally so he wrote again to DHR for a clear response to his request to be included in the interviews. On 2 February 2020, the DHR initially responded by saying that feedback to candidates is provided at the end of the process that is still ongoing.

16. Further UNAT had held that in assessing an implied administrative decision the Tribunal must determine the date on which the staff knew or reasonably should have known of the decision based on objective elements known to both parties. UNAT has also held that such should be exercised in the applicant's favour since it affects access to justice. The UNRWA DT erroneously considered the meeting of 14 November 2019 with the DHR as the date of the decision because this was the first discussion that took place about the selection process and whether he had been shortlisted, however, the DHR was not the decision maker in the recruitment process and the appellant was advised that the DHR would be contacting the hiring manager. The hiring manager was the Deputy Commissioner General who told the Appellant on 20 November 2019 that he was awaiting the advice of DHR to form a decision. By any objective standard the facts indicate that the decision was not yet final at that time. The e-mail of 5 February 2020 clarified that the decision not to shortlist the Appellant was final by including the instruction that he could contest it by filing a decision review request. He received no written prior notice before 5 February 2020 and that is the date by which the deadline should be set. He filed for a decision review promptly on 11 February well within the 60-day deadline.

17. Thereafter he filed a request for protection against retaliation with the UNRWA Ethics Office which found he had engaged in a protected activity. In October 2020, he was advised that he was being investigated for misconduct and being placed on administrative leave. As he was preparing to be interviewed on 12 November 2020, he learned that his post was being abolished and his contract would not be renewed beyond February 2021. In addition, the explanation put forth by the DHR for not shortlisting the Appellant is problematic. The policy is discretionary in nature as in the Hiring department can decide not to shortlist but inclusion in the normal practice. It appears there was an effort to favour the external candidate which contradicts Staff Regulation 4.5 mandating preference for internal staff over external recruits.

### **Commissioner-General's Answer**

18. The Commissioner-General requests the appeal be dismissed. The Appellant fails to meet his burden in establishing the Impugned Judgment is defective per Article 2(1) of the Appeals Tribunal Statute. The appeal sets forth arguments already made and considered by the UNRWA DT. The Appellant incorrectly invokes the *Gergo Gelsei*<sup>3</sup> case in support of his assertion that the Tribunal's assessment of the elements needed to assume an implied administrative decision should be in his favour does not equate to the discretionary authority in that case. The alleged discussion between the Appellant and the Acting Commissioner-General is an assertion proffered for the first time and not supported by evidence nor has any reason been given for why it was not proffered before the UNRWA DT.

19. The UNRWA DT correctly determined the 14 November 2019 communication was evidence that the Appellant was aware of all the related facts related to his non-shortlisting. It is not relevant that the DHR was not the decision maker as he is responsible for all human resources matters in the Agency and had authority to communicate reasons for a recruitment decision. There is no supporting evidence that the DHR advised he would consult the hiring manager. This is a mere assertion by the Appellant. The allegation that the Hiring Manager told the Appellant he was awaiting advice from the DHR is a new allegation not previous before UNRWA DT and must be excluded from the appeal.

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<sup>3</sup> *Gergo Gelsei v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1035.



20. Annexes 6 and 7 of the appeal are not part of the UNRWA DT's case record but submitted for the first time before the Appeals Tribunal. As Mr. Elmenshawy did not request to allow new evidence and did not show any exceptional circumstances, they should not be received by the Appeals Tribunal. Also, annexes 6 and 7 cannot support Mr. Elmenshawy's claims on appeal.

### **Considerations**

#### *Receivability of Mr. Elmenshawy's application*

21. The crucial question on appeal is whether the UNRWA DT committed any errors of law or fact in holding that Mr. Elmenshawy's application is not receivable *ratione materiae*. We cannot find any errors in the Impugned Judgment but agree with the UNRWA DT that Mr. Elmenshawy's application is irreceivable because he did not respect the time limits for filing his request for management review.

22. Area Staff Rule 111.2 and International Staff Rule 11. 2 require that a staff member wishing to formally contest an administrative decision allegedly 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) shall as a first step submit a written request for a decision review. Pursuant to Area Staff Rule 111.2(3) and International Staff Rule 11.2(c), the "staff member shall submit a request for a decision review within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

23. It follows that Mr. Elmenshawy had to file his request for decision review within 60 calendar days from the date on which he received notification of the decision of "[n]ot being shortlisted in the ongoing recruitment process of the D1-Director of Security and Risk Management UNRWA HQ Amman" which he challenged in his 11 February 2020 request for decision review and his 5 March 2020 application to the UNRWA DT.

24. We agree with the UNRWA DT that the decision not to shortlist Mr. Elmenshawy was communicated to him on 14 November 2019. As the UNRWA DT correctly found, this becomes apparent from Mr. Elmenshawy's 17 November 2019 e-mail to the DHR in which he summarised their 14 November 2019 meeting, stating that he "requested you verbally on [sic] reasons which may be behind me not being shortlisted for the D1 post", and that such reasons

were given to him. This e-mail is clear evidence that, during his conversation with the DHR on 14 November 2019, Mr. Elmenshawy was told that he was not shortlisted for the post he had applied for.

25. We also agree with the UNRWA DT that this communication constitutes notification in the meaning of International Staff Rule 11.2. The Appeals Tribunal has considered what constitutes “notification” pursuant to Staff Rule 11.2. In this jurisprudence it is accepted that there is no explicit requirement for written notification as a prerequisite to contest an administrative decision.<sup>4</sup> In his appeal, Mr. Elmenshawy himself points to the fact that prior versions of Staff Rule 11.2(c) included the word “written” before notification but have since omitted it. However, if there is no written notification, it is incumbent upon the body reviewing the matter to consider whether the circumstances surrounding the verbal communication still constitute notification.

26. The fact that ‘The UNRWA Dispute Tribunal A Step-by-Step Guide to the administration of justice process’, on page 5 states that time limits start to run “60 calendar days from the date on which the staff member received written notification of the decision to be contested” has no legal effect on the interpretation of the legal provisions by the Tribunals. Further, it was not the Commissioner-General but the UNRWA DT which produced this document, and Mr. Elmenshawy did not allege that it was specifically his reliance on the Guide which resulted in his missing of the time limits. However, we strongly recommend that the UNRWA DT should update the Guide to reflect the present jurisprudence by the Appeals Tribunal.

27. In the Impugned Judgment, the UNRWA DT correctly laid down and applied our jurisprudence in *Auda*<sup>5</sup> where we stated:

...The Appeals Tribunal has repeatedly ruled that the decisive moment of notification for purposes of Staff Rule 11.2(c) is when “all relevant facts ... were known, or should have reasonably been known” which was undoubtedly the case on 2 October 2015. In the instant case, the Dispute Tribunal found that it was “stipulated by the parties” and stated by Mr. Auda in his application on the merits before the UNDT that he was

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<sup>4</sup> *Houran et al. v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2020-UNAT-1019, para. 30; *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-746, para. 30.

<sup>5</sup> *Auda v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-743, para. 31.

explicitly informed on 2 October 2015 that his contract would not be renewed upon expiry. The e-mail of 12 November 2015 expressly served to “confirm” the preceding, orally communicated decision. There is thus no dispute as to the date and content of the administrative decision in question. The non-renewal decision was also communicated with sufficient gravitas as it was conveyed by Ms. Pollard, a high ranking official, and in the course of an official meeting on Mr. Auda’s midpoint review. The situation is therefore different from one involving an informal or casual verbal communication or one where the content of the verbal communication is disputed and the facts do not support a reasonable basis upon which to make the necessary findings of “clear and unambiguous” and “sufficient gravitas”.

28. Applying these principles, we find that Mr. Elmenshawy undisputedly knew all the relevant facts, and was officially made aware with sufficient gravitas and, thus, properly notified of the decision not to shortlist him for the selection process for the D1 post. Mr. Elmenshawy confirmed, in his 17 November 2019 e-mail, that on 14 November 2019 at 2pm he was informed that he was not shortlisted for the D1 post, and the reasons therefore. The decision was communicated with sufficient gravitas as it was conveyed by the DHR, a high ranking official, and in the course of a meeting in the DHR's office. Staff members are presumed to know the rules applicable to them and it is the staff member’s responsibility to ensure that he or she is aware of the applicable procedure in the context of the administration of justice at the United Nations. On the totality of the facts and circumstances of this case, we find it reasonable to conclude that Mr. Elmenshawy ought to have recognised that he had been notified and drawn the legal consequences therefrom.

29. On appeal, Mr. Elmenshawy claims that there is disagreement over the full content of the discussion on 14 November 2019. He submits that the DHR indicated that he would take the matter up with the Hiring Manager, and then get back to Mr. Elmenshawy. On 20 November 2019, the Hiring Manager told him that he was awaiting the advice of the DHR to form a decision. Mr. Elmenshawy argues that, consequently, on 14 November 2019, there was no final decision of his not being shortlisted; such a decision was only taken and communicated to him at the earliest on 29 January 2020 when there was a public announcement by the DHR that interviews for the position would take place soon and Mr. Elmenshawy realised that he was not invited.

30. There is no merit in this argument. On close examination of Mr. Elmenshawy’s 17 November 2019 e-mail, in which he summarises the conversation which took place on 14 November 2019, we find nothing that could support Mr. Elmenshawy’s allegation that the

DHR had promised to reconsider the matter. According to Mr. Elmenshawý's e-mail, the DHR conveyed the reasons for the decision not to shortlist him for the position. Had the DHR really indicated during the 14 November 2019 conversation that he would review the decision, Mr. Elmenshawý would have said so in his 17 November 2019 e-mail. We do not deem it possible that he could have omitted such an important detail of the conversation.

31. Also, we reject Mr. Elmenshawý's statement that, on 20 November 2019, the Hiring Manager told him that he was awaiting the advice of the DHR to form a decision. This argument was not put forward at the UNRWA DT and can therefore not be brought before the Appeals Tribunal. Further, we do not believe Mr. Elmenshawý. In his 30 January 2020 e-mail to the DHR, he does not mention any such communication by the Hiring Manager. If such a conversation between the Hiring Manager and Mr. Elmenshawý had taken place on 20 November 2019, Mr. Elmenshawý would have mentioned it in his 30 January 2020 e-mail to the DHR.

32. If anything, Mr. Elmenshawý's 17 November 2019 e-mail to the DHR, in which he referred to Paragraph 72 of PD 1/4/Part I/Rev. 1 (International Staff Selection Policy), can be regarded as a request to the Administration to reconsider and review the earlier decision not to shortlist him because, in Mr. Elmenshawý's view, this provision had not been lawfully applied.

33. Under the constant jurisprudence of the Appeals Tribunal, new time limits are triggered when the Administration issues a new and fresh administrative decision<sup>6</sup>. However, in the present case, there is no such new and fresh decision on the matter of Mr. Elmenshawý's shortlisting after the 14 November 2019 communication between him and the DHR. In his 5 February 2020 e-mail, the DHR merely refers to the 14 November 2019 meeting and reiterates the reasons which were put forward to explain why Mr. Elmenshawý had not been shortlisted for the position.

34. Mr. Elmenshawý's allegations regarding the abolishment of his post have no legal relevance for the present appeal which deals only with issues of receivability.

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<sup>6</sup> *Elmi v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-704, para. 24.

**Judgment**

35. The appeal is hereby dismissed and Judgment UNRWA/DT/2020/068 is affirmed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of October 2021.

(Signed)

Judge Knierim, Presiding  
Hamburg, Germany

(Signed)

Judge Raikos  
Athens, Greece

(Signed)

Judge Murphy  
Cape Town, South Africa

Entered in the Register on this 4<sup>th</sup> day of January 2022 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar