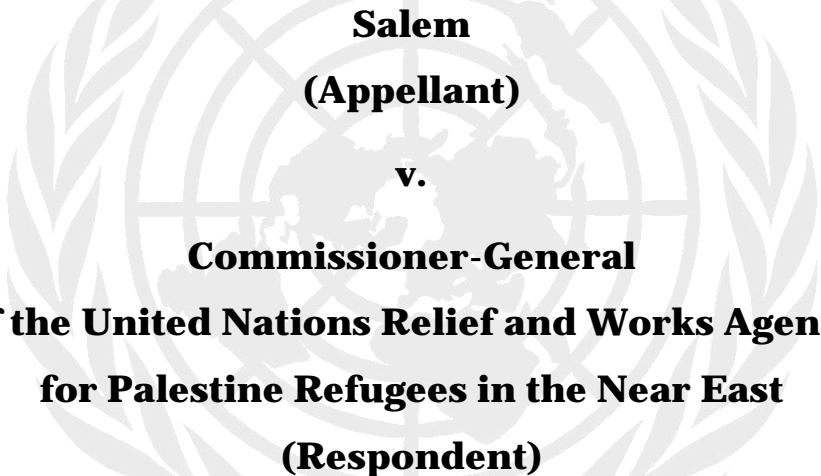




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2018-UNAT-855



**Salem**  
**(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 Murphy  
Judge Martha Halfeld

**Case No.:** 2018-1144

**Date:** 29 June 2018

**Registrar:** Weicheng Lin

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**Counsel for Ms. Salem:** Amer Abu-Khalaf, LOSA

**Counsel for Commissioner-General:** Rachel Evers

**JUDGE SABINE KNIERIM, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2017/042, 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 7 December 2017, in the case of *Salem v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Ms. Ayat Salem filed her appeal on 23 January 2018, and the Commissioner-General filed an answer on 26 March 2018.

**Facts and Procedure**

2. Effective 20 April 2016, Ms. Salem was employed by the Agency as a Protection Information Management & Reporting Officer at the Jordan Field Office (JFO) on a Limited Duration Contract (LDC) with an expiration date of 19 October 2016.

3. By e-mail dated 21 August 2016 to the Director of UNRWA Operations, Jordan (DUO/J), Ms. Salem made a complaint of abuse of power against the Protection Mainstreaming Officer (PMO).

4. On 18 October 2016, the PMO evaluated Ms. Salem's performance and concluded as follows: "The staff member has had a good first six months with the protection unit, displayed a good performance and I recommend an extension of her current contract to the end of the year: 31 December 2016."

5. By e-mail dated 18 October 2016, Ms. Salem informed the Operations Support Officer, Team Leader & Field Protection Coordinator (OSO/FPC) that she would only agree to an extension of her appointment if her LDC were to be extended for at least six months.

6. By e-mail dated 19 October 2016, the OSO/FPC explained to the Staff Services Officer (SSO) the position of Ms. Salem as follows:<sup>1</sup>

As you can read below ("*[...] whatever the new position will be I am interested in current contract extension if is [sic] for six months at lease [sic] not less than that [...]*") and as Ayat confirmed again to me in a meeting I had with her yesterday afternoon, despite my explanations about the possible opportunity this planned

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<sup>1</sup> Emphasis in original.

change on the position could be for her, Ayat decided not to accept the extension we were proposing to her. This is of course completely her choice and we certainly fully respect it.

7. On 19 October 2016, upon the expiry of her appointment, Ms. Salem was separated from the Agency.

8. By memorandum to the joint investigators dated 25 October 2016, the DUO/J set out the terms of reference for a preliminary assessment into Ms. Salem's complaint of prohibited conduct. The preliminary assessment report dated 13 November 2016 recommended that the case be closed. The report, *inter alia*, states as follows:

**VII. Assessment of Case:**

Upon interviewing Ms. Salem and the Driver, it was noted that the complaint [against] Ms. Kaberia is credible. The interview with the Driver supported some of Ms. Salem's allegations: Instructing the Driver not to respond to her phone calls; instructing the driver to drive from her home to Zarqa to pick [up] her daughter (which is out[side] of the destination specified in the drivers requisition form); not accepting the driver's suggestion to drop Ms. Salem first but he did not confirm the allegations that she responded in an abusive manner; Ms. Kaberia accused Ms. Salem in front of the Driver that she did not stay [in] Aqaba and does not deserve the [Travel Subsistence Allowance (TSA)].

**VIII. Recommendations**

Based on the foregoing and taking into consideration that both Ms. Kaberia and Ms. Salem are no more Agency staff members, it is recommended to close[] the case.

9. On 8 December 2016, Ms. Salem submitted a request for review of the decision to extend her LDC for only two months and 10 days instead of six months. The DUO/J affirmed the contested decision on 8 January 2017.

10. On 12 February 2017, Ms. Salem filed an application with the UNRWA Dispute Tribunal and on 15 March 2017, the Commissioner-General filed his reply.

11. By Order No. 160 (UNRWA/DT/2017) dated 12 November 2017, the UNRWA Dispute Tribunal ordered the Commissioner-General to provide a copy of the outcome of Ms. Salem's complaint.

12. On 27 November 2017, the Commissioner-General submitted the 13 November 2016 Preliminary Assessment Report, which was transmitted to Ms. Salem on 28 November 2017.

13. The UNRWA DT rendered its Judgment on 7 December 2017, dismissing the application in its entirety. As regards the contested decision not to extend Ms. Salem's LDC for a period of six months, the UNRWA DT was satisfied with the justification for the decision provided by the Commissioner-General, namely that there was a change in the source of funding for Ms. Salem's post. The UNRWA DT further considered, in light of Ms. Salem's positive Performance Evaluation Report, that the contested decision did not constitute an act of retaliation following her complaint against the PMO.

### **Submissions**

#### **Ms. Salem's Appeal**

14. Ms. Salem submits that the UNRWA DT erred in fact and in law by failing to assess the evidence on the erroneous outcome of the Preliminary Assessment Report and by concluding that her complaint against the PMO had not resulted in retaliation. She claims that having been provided with the outcome of the assessment less than one week before the issuance of the UNRWA DT Judgment although the report had been finalized more than two weeks prior to notification, she was deprived of her procedural right to comment on the report, which had a crucial effect on her application. The UNRWA DT failed to acknowledge that the outcome of the report, namely the recommendation to close the preliminary assessment procedure, was based on the factually false statement that Ms. Salem and the PMO were no longer staff members at the time of the issuance of the report on 13 November 2016. In fact, the evidence suggests that the PMO's last day at the Agency was 15 December 2016. Even assuming, *arguendo*, that they had both already separated from the Agency, the applicable legal framework does not require the parties involved in an investigation into allegations of abuse of power to be current staff members. Ms. Salem argues that she was deprived of her right to a proper investigation considering, in particular, that the report had actually affirmed that her complaint of abuse of power was credible.

15. Ms. Salem further asserts that the UNRWA DT failed to analyze the contradictory justifications for the non-renewal of her contract. Moreover, the UNRWA DT erred in connecting two unrelated facts, namely the alleged abuse of power and her performance evaluation.

16. In light of the foregoing, Ms. Salem requests the Appeals Tribunal to (a) vacate the UNRWA DT Judgment “in order to conduct a comprehensive investigation of [her] complaint of abuse of power”; (b) order the Agency to compensate her for loss of her salary “until the end of her contract”; and (c) award moral damages.

**The Commissioner-General’s Answer**

17. The Commissioner-General submits that the UNRWA DT did not err on a question of fact, a matter of law or in procedure when it dismissed Ms. Salem’s application on the merits.

18. In particular, the UNRWA DT did not err on a question of law or fact in its assessment of the evidence and its conclusion that Ms. Salem’s complaint against the PMO did not result in retaliation. Ms. Salem has failed to demonstrate how the UNRWA DT erred in finding that the positive evaluation of Ms. Salem’s performance and the recommendation to extend her contract suggest that no retaliation occurred.

19. The Commissioner-General objects to the e-mail screenshot included by Ms. Salem in her appeal brief in support of her argument that the PMO’s last day at the Agency was in fact 15 December 2016. It constitutes a new consideration that was not put forward before the UNRWA DT and may not be raised for the first time on appeal. Moreover, the evidence was not part of the case record before the UNRWA DT and Ms. Salem has not requested leave to have it admitted as required by Article 10(2) of the Appeals Tribunal Rules of Procedure (Rules). As Ms. Salem has not demonstrated exceptional circumstances warranting the admission of the evidence, the Commissioner-General requests the Appeals Tribunal not to consider it.

20. Ms. Salem’s assertion that she was provided with the outcome of the preliminary assessment less than a week before the issuance of the UNRWA DT Judgment is factually incorrect as the Judgment was actually issued one year later, on 7 December 2017. To the extent that Ms. Salem suggests that the issuance of the Judgment prevented her from challenging the outcome of the assessment, the Commissioner-General claims that she had the opportunity to contest the report but chose not to do so as her request for decision review dated 8 December 2016 focused on the administrative decision not to extend her LDC contract for six months and not the outcome of the preliminary assessment. In addition, the issue of the alleged timeframe within which to challenge the Preliminary Assessment Report is a new issue not previously presented to the UNRWA DT.

21. As regards the remedies sought by Ms. Salem, the Commissioner-General asserts that Ms. Salem has failed to demonstrate any reversible error by the UNRWA DT or the existence of any negative consequences warranting the award of compensation. Her appeal seems not to challenge the main element of the application before the UNRWA DT, namely the decision not to extend her contract for six months. Moral damages may not be awarded in the absence of evidence of harm, as stated by the Appeals Tribunal's jurisprudence.

22. In light of the foregoing, the Commissioner-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

### **Considerations**

23. Article 2(1) of the Statute of the Appeals Tribunal provides:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

24. We find that Ms. Salem has not shown any errors in the UNRWA DT Judgment and her claims on appeal cannot succeed.

*Closing of case against the PMO based on the recommendation of the 13 November 2016 Preliminary Assessment Report*

25. The UNRWA DT examined whether the decision not to renew Ms. Salem's appointment for six months was motivated by retaliation because of her complaint against the PMO. We find no fault in the UNRWA DT's finding that there was no retaliation against Ms. Salem. Contrary to her contentions, the UNRWA Dispute Tribunal did not err on a question of law or fact, resulting in a manifestly unreasonable decision, nor did it commit an error in procedure, such as to affect the decision of the case.

26. The recommendation in the 13 November 2016 Preliminary Assessment Report to close the case was mainly based on the fact that only some of Ms. Salem's allegations against the PMO had been supported by the driver, while other accusations had not been confirmed or appeared less grave than presented by Ms. Salem. Additionally, the report took into consideration that both the PMO and Ms. Salem were no longer Agency staff members. Regardless of whether the PMO's last day of service was before 13 November 2016 or on 15 December 2016 as Ms. Salem suggests, we cannot find any illegality in the Agency's decision to close the case against the PMO. Following our consistent jurisprudence, the Administration has broad discretion whether or not to conduct disciplinary investigations against a staff member.<sup>2</sup> Only under special circumstances may a staff member request that such investigations be undertaken against another staff member. In this case, it was within the discretion of the Agency to close the case against the PMO. Ms. Salem's allegations, although credible, were only partly supported by the only neutral witness, the driver, and the PMO's alleged misconduct seemed less substantial than previously presented by Ms. Salem. Additionally, under the current legal provisions, the Agency has no authority to issue a disciplinary measure against a former staff member.<sup>3</sup> Given that no case of serious misconduct towards Ms. Salem could be established, and the PMO, according to Ms. Salem's submission, left the Agency on 15 December 2016 and it is reasonable to assume that a final disciplinary procedure could not have been concluded before that date, the decision to close the preliminary investigation was lawful and reasonable.

27. The submissions in Ms. Salem's appeal do not put into doubt the UNRWA DT's finding that the PMO's 18 October 2016 performance evaluation and recommendation of an extension of her contract show that Ms. Salem's complaint of abuse of power did not result in retaliation. She has presented no reason to assume that the UNRWA DT's findings in this respect are erroneous.

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<sup>2</sup> *Oummih v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-518/Corr. 1, para. 31, citing *Abboud v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

<sup>3</sup> *Hamdan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-839, para. 37.

*Justification for the non-renewal decision*

28. The UNRWA DT did not err in finding that Ms. Salem's contentions do not demonstrate that the justification provided for the non-renewal decision by the Commissioner-General was a false one. Contrary to Ms. Salem's submissions, there is no contradiction between the various statements given to Ms. Salem as to the reasons for an extension of her appointment for only two months and 10 days. In her request for decision review, Ms. Salem stated that the OSO/FPC had told her that her current position would be re-advertised "as new LDC with different [Terms of Reference] and with additional tasks and responsibilities starting from 1/1/2017 till 31/7/2017". The PMO also stated that this position would be changed "into a new one". Mr. Khaled Abu Touq's remark "that there is no available budget to extend the management officer contract, so they want just to make the extension till 31/12/2016" is consistent with these contentions. Ms. Salem's position was to be restructured and reclassified with effect from 1 January 2017 and there were no funds to simultaneously uphold her current position as Protection Information Management & Reporting Officer; consequently, it was only possible to extend her LDC until the end of 2016.

29. By e-mail dated 18 October 2016, Ms. Salem made clear that "whatever the new position will be I am interested in current contract extension if [it] is for six months at least not less than that". As her position was to be restructured, an extension of her current appointment beyond 31 December 2016 was not possible for budgetary reasons, and Ms. Salem had declined the offer of an extension until the end of the year, the UNRWA DT did not err when finding that the Administration's decision was lawful.



**Judgment**

30. The appeal is dismissed and Judgment No. UNRWA/DT/2017/042 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29<sup>th</sup> day of June 2018 in New York, United States.

*(Signed)*

Judge Knierim, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Halfeld

Entered in the Register on this 10<sup>th</sup> day of August 2018 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar