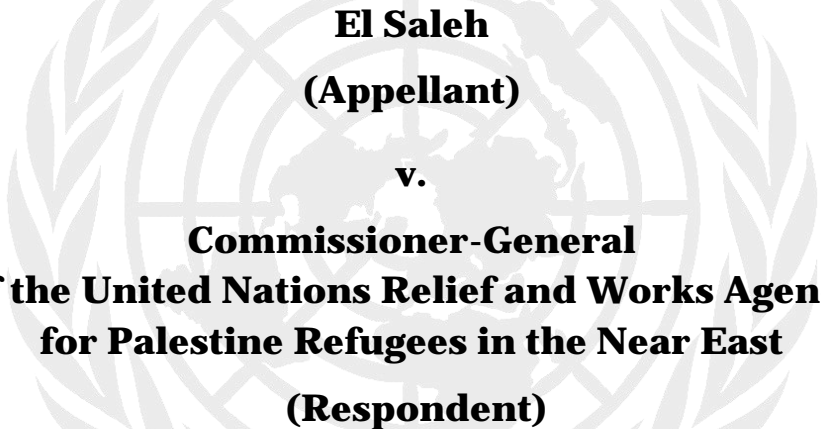




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2015-UNAT-594



**El Saleh  
(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 Luis María Simón, Presiding  
Judge Sophia Adinyira  
Judge Deborah Thomas-Felix

Case No.: 2015-692

Date: 30 October 2015

Registrar: Weicheng Lin

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Counsel for Mr. El Saleh:

Self-represented

Counsel for Commissioner-General:

Lance Bartholomeusz

**JUDGE LUIS MARÍA SIMÓN, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2014/026 (on the merits) and Judgment No. UNRWA/DT/2014/051 (on revision), 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 September 2014 and 7 December 2014, respectively, in the case of *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Zaki Moussa El Saleh filed his appeal on 28 January 2015, which he perfected on 4 February 2015, and the Commissioner-General of UNRWA filed his answer on 30 March 2015.

**Facts and Procedure**

2. Mr. El Saleh entered the service of UNRWA in 1992 as a Dental Surgeon, Grade 14, at Mahr El Bared Camp Health Centre in the North Lebanon Area. In May 2008, he was promoted to the post of Senior Dental Surgeon, Grade 15.

3. From mid-2008 to 2011, ongoing discussions took place within UNRWA concerning the reclassification of certain posts, including that of Senior Dental Surgeon, which Mr. El Saleh encumbered. However, the reclassification exercise was repeatedly postponed due to budget constraints. E-mail exchanges during this time show that discussions concerned, inter alia, the classification level of the post of Senior Dental Surgeon.

4. On 1 November 2011, UNRWA's Director of Health and the Director of Human Resources advised all UNRWA Field Office Directors that, after extensive discussions, "adjustments" would be necessary "in the human resources structure of the Health Programme" since the increasing complexity of the health services rendered by the Agency entailed a need for staff to hold higher level qualifications. The memorandum thus advised Field Office Directors of the new classification levels for a number of existing posts in the Health Programme. Among the posts, that of Senior Dental Surgeon, Grade 15, was henceforth to become Field Oral Services Officer, Grade 16.

5. On 1 February 2012, the Deputy Director of UNRWA, Lebanon, wrote to Mr. El Saleh to inform him of the reclassification of his post. The e-mail stated, *inter alia*:

As you will see from the [attached memorandum], it does not reflect your wishes to be upgraded to Grade 17. I will raise your observations/concerns with HQ. I cannot, however, promise a result that satisfies your wishes. I will let you know if/when I receive a response.

6. On 2 February 2012, UNRWA's Human Resources Department informed the UNRWA Deputy Director that the Senior Dental Surgeon post, Grade 15 "was never requested at Grade 17", and on 3 February 2012, the UNRWA Deputy Director conveyed the same to Mr. El Saleh.

7. On 22 March 2012, Mr. El Saleh requested decision review of "[r]eclassification of [his] post and, the grade of Field Oral Health Services Officer from grade 16 to be read 17". He challenged the "[u]nder grading [of his] post as Field Oral Health Services Officer-Grade 16" and, by way of remedy, he requested the Agency to "raise the grade of the post of Field Oral Health Services Officer from 16 to 17". The Agency did not reply to Mr. El Saleh's request.

8. On 7 June 2012, Mr. El Saleh filed an application with the UNRWA Dispute Tribunal challenging the reclassification of his post at the new level of Grade 16, rather than Grade 17.

9. On 26 March 2013, Mr. El Saleh was informed that his post had been upgraded to Field Oral Health Services Officer (FOHSO) resulting in his promotion to Grade 16, retroactively to 1 January 2013.

10. On 7 September 2014, the UNRWA Dispute Tribunal issued its Judgment in the matter. It considered that the decision to reclassify Mr. El Saleh's post from Grade 15 to Grade 16 was a positive decision and thus could not be the subject of a challenge. To the extent that Mr. El Saleh challenged the decision not to reclassify his post from Grade 15 to Grade 17 directly, there was no refusal decision to contest as Mr. El Saleh "ha[d] never formally asked the Agency to upgrade his post to a Grade 17". Finding that Mr. El Saleh could not contest a decision which did not exist, the UNRWA DT held that his application was not receivable and dismissed his case.

11. On 23 October 2014, Mr. El Saleh filed a “Motion for Revision of Judgment No. UNRWA/DT/2014/026” with the UNRWA Dispute Tribunal. He claimed that comments on pages 4 to 9 of Annex 5 of his UNRWA DT application showed that he had previously made an “official request” for his post to be classified at Grade 17, but that the text was illegible.

12. On 7 December 2014, the UNRWA Dispute Tribunal issued Judgment No. UNRWA/DT/2014/051,<sup>1</sup> dismissing the application for revision. The UNRWA DT found that pages 4 to 9 of Annex 5 “could be read without difficulty” and that the information therein could thus not be said to be “a decisive fact unknown to the Tribunal” warranting revision of its Judgment, pursuant to Article 12 of the UNRWA Dispute Tribunal Statute.

13. On 22 December 2014, citing the UNRWA DT Judgment, Mr. El Saleh submitted to the Chief of the Field Health Programme an “official request” to upgrade his post to Grade 17.

14. On 19 January 2015, the Chief of the Field Health Programme advised Mr. El Saleh that in view of the 2013 classification of the post from Grade 15 to Grade 16, there was no plan to revisit the classification level of the post.

### **Submissions**

#### **Mr. El Saleh’s Appeal**

15. The UNRWA DT erred on a question of law by concluding that the 2011 decision to classify his post at the Grade 16 level was a positive decision when such decision was based on a job description from 2003, since which time the post’s duties and responsibilities had significantly changed.

16. The UNRWA DT erred on a question of fact resulting in a manifestly unreasonable decision in finding there was no adverse decision to review, since it is the responsibility of UNRWA’s management, namely the Director of Health and the Director of Human Resources, to request the classification of his post at the correct level in the first instance, or subsequently that it be further upgraded. Mr. El Saleh considers that his request for decision review amounted to the same.

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<sup>1</sup> And on 9 December 2014, the UNRWA DT issued Judgment No. UNRWA/DT/2014/051/Corr.1.

17. The UNRWA DT failed to exercise its jurisdiction by ignoring his request for compensation of benefits and not awarding him compensation for the delay in implementing the reclassification exercise since 2008.

18. Mr. El Saleh makes submissions concerning the discussions that took place between 2008 and 2011 relating to the classification of, inter alia, his post and the delay in implementing the classification exercise. He claims that the review exercise that resulted in the upgrading of his post by only one level, rather than two levels as all other health posts were upgraded, was discriminatory, biased and marred by procedural irregularities.

19. Mr. El Saleh requests that the Appeals Tribunal: award him compensation “for the benefits of grade 16” for the period from 1 June 2008 to 31 December 2012, and for the delay in implementing the 2008 reclassification exercise; order the Director of Health to officially request the reclassification of his post to Grade 17; award him compensation for emotional suffering as a result of humiliating, frustrating and unfair treatment by the Agency; and “[r]etroactively reconstitute the FOHSO post to grade 17” as of 1 January 2013.

#### **The Commissioner-General’s Answer**

20. The UNRWA DT correctly concluded that Mr. El Saleh’s application was not receivable *ratione materiae* and Mr. El Saleh did not discharge the burden of proving how either Judgment was defective. He failed to establish any errors warranting a reversal of either of the UNRWA DT Judgments, as required by Article 1 of the Special Agreement between the United Nations and UNRWA and Article 2 of the Appeals Tribunal Statute. Rather, Mr. El Saleh impermissibly seeks to reargue the merits of his case.

21. The UNRWA DT did not err in law or procedure in dismissing Mr. El Saleh’s application given that it had found that there was no administrative decision to contest.

22. The Commissioner-General requests that this Tribunal dismiss Mr. El Saleh’s appeal in its entirety.

### Considerations

#### *Request for an oral hearing*

23. As a preliminary matter, this Tribunal denies Mr. El Saleh's request for an oral hearing finding that the parties' applications adequately clarified the issues submitted to the Appeals Tribunal for its decision.

#### *Appeal against the Judgment on the merits*

24. Mr. El Saleh filed his appeal on 28 January 2015. His appeal challenged both the UNRWA DT's Judgment on the merits, issued on 7 September 2014, and a subsequent Judgment dismissing his application for revision, issued on 7 December 2014.

25. Pursuant to Article 7(1)(c) of the Appeals Tribunal Statute, "[a]n appeal shall be receivable if [...] [t]he appeal is filed within 60 calendar days *of the receipt of the judgement* of the Dispute Tribunal or, where the Appeals Tribunal has decided to waive or suspend that deadline in accordance with paragraph 3 of the present article, within the period specified by the Appeals Tribunal".<sup>2</sup> Article 2(4)(a) of the Special Agreement between the United Nations and UNRWA provides that "[f]or the purposes of the Appeals Tribunal's exercise of jurisdiction over appeals under this special agreement: [...] all references to the United Nations Dispute Tribunal in the Statute of the Appeals Tribunal shall be deemed to refer to the UNRWA Dispute Tribunal".

26. This Tribunal has repeatedly held that it "has been strictly enforcing, and will continue to strictly enforce, the various time limits".<sup>3</sup> The Appeals Tribunal has also consistently held that "[i]t 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" and that "[i]gnorance cannot be invoked as an excuse".<sup>4</sup>

27. In view of Article 7(1)(c) of the Appeals Tribunal Statute, we find that Mr. El Saleh's appeal against the Judgment on the merits is filed out of time. Mr. El Saleh was represented before the UNRWA Dispute Tribunal by UNRWA's Legal Office for Staff Assistance. That office was notified of the issuance of the Judgment on 7 September 2014 and confirmed receipt on the

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<sup>2</sup> Emphasis added.

<sup>3</sup> *Dawas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Order No. 234 (2015) of 10 August 2015, para. 6 and cites therein.

<sup>4</sup> *Ibid.*, and cites therein.

same day. Consequently, Mr. El Saleh should have filed his appeal by 6 November 2014. It was, however, not filed until 28 January 2015, approximately two and a half months after the expiration of the filing deadline. Further, given that Mr. El Saleh never requested an extension or waiver of the time limits for the purpose of filing his appeal against the Judgment on the merits, we are precluded from considering whether an extension or waiver of the time limit may have been warranted.<sup>5</sup> Accordingly, Mr. El Saleh's appeal against the Judgment on the merits is not receivable.

*Appeal against the Judgment on revision*

28. In contrast, Mr. El Saleh's appeal against the Judgment on revision was timely filed.

29. Turning to the merits, Mr. El Saleh's appeal brief altogether fails to identify which of the grounds of appeal set out in Article 2(1) of the Appeals Tribunal Statute he relies upon in challenging the Judgment on revision. Mr. El Saleh's appeal brief solely expresses disagreement with the Judgment on the merits and repeats arguments already thoroughly considered and rejected by the UNRWA DT. The appeal thus constitutes an impermissible attempt to reargue the merits of his case.

30. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court.<sup>6</sup> The function of the Appeals Tribunal is to determine if the UNRWA Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. The appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective.<sup>7</sup>

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<sup>5</sup> *Gallo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-552, para. 16, citing *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, paras. 29-30 (with reference to a written request for waiver pursuant to Article 8(3) of the UNDT Statute).

<sup>6</sup> *Hassan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-504, para. 18 and cites therein.

<sup>7</sup> *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15 and cites therein.

31. Having nonetheless reviewed the Judgment on revision, we cannot discern any identifiable error warranting reversal.

32. Pursuant to Article 12(1) of the UNRWA DT Statute:

Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. [...]

33. In view of the express text of Article 12, “[c]entral to the question of whether a UNDT Judgment should be open to revision is the discovery of a decisive fact, ‘unknown to the Dispute Tribunal and to the party applying for revision’”.<sup>8</sup>

34. In rejecting Mr. El Saleh’s application for revision, the UNRWA DT held that the document which Mr. El Saleh claimed amounted to a new fact was, in fact, already before the UNRWA Dispute Tribunal. Consequently, Mr. El Saleh did not identify any ground for revision or raise any previously unknown fact which could justify reopening the case.

35. We agree that the “fact” upon which Mr. El Saleh based his revision application does not meet the strict test set out in Article 12(1) of the UNRWA DT Statute; rather, his revision application more aptly contained submissions challenging the findings of the Judgment on the merits. The UNRWA DT thus correctly rejected Mr. El Saleh’s application for revision.

36. As Mr. El Saleh has not persuaded us that the UNRWA DT erred in any way in dismissing his revision application, his appeal in this regard must fail.

### **Judgment**

37. The appeal against Judgment No. UNRWA/DT/2014/026 is not receivable *ratione temporis*; the appeal against Judgment No. UNRWA/DT/2014/051 is dismissed and that Judgment is affirmed.

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<sup>8</sup> *Abassa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-484, para. 32.



Original and Authoritative Version: English

Dated this 30<sup>th</sup> day of October 2015 in New York, United States.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Adinyira

*(Signed)*

Judge Thomas-Felix

Entered in the Register on this 18<sup>th</sup> day of December 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar