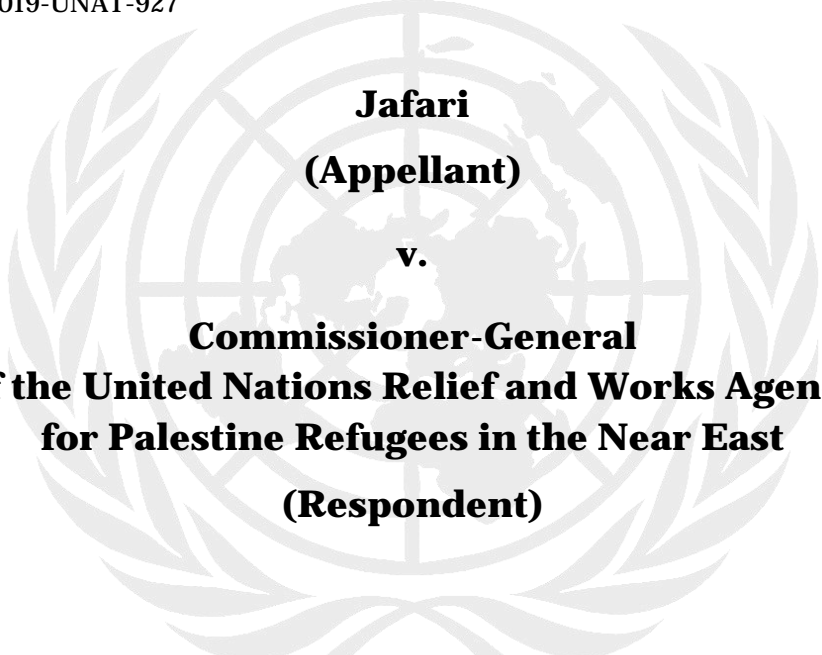




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-927



**Jafari**  
**(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 Dimitrios Raikos, Presiding Judge Martha Halfeld Judge John Raymond Murphy
Case No.:	2019-1222
Date:	28 June 2019
Registrar:	Weicheng Lin

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

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2018/034, 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 Agency, respectively) on 13 May 2018, in the case of *Jafari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Moeen Mohammad Salem Jafari filed the appeal on 13 January 2019. The Commissioner-General filed his answer on 18 March 2019.

**Facts and Procedure**

2. Mr. Jafari entered the service of UNRWA on 6 February 2006. At the time of the material events, he was an Area Loan Supervisor in the Agency.

3. By letter dated 1 December 2016, the Human Resources Services Officer (HRSO) informed Mr. Jafari of his impending retirement when he reached the age of sixty on 23 March 2017 and drew his attention to his related entitlements including retirement benefits, the Provident Fund benefits<sup>1</sup> and cash payment in lieu of accrued leave. The HRSO also mentioned the possibility for Mr. Jafari to extend his service beyond the age of sixty if he was interested, cautioning that such an extension was subject to medical fitness and a fully satisfactory performance rating for the last two performance evaluation cycles. A form titled “Request to be retained in service beyond attaining the official age of retirement” and a leaflet of frequently asked questions (FAQ) on the matter in Arabic were attached to the letter. According to the English translation that Mr. Jafari has provided to the Appeals Tribunal, the FAQ leaflet contains a question and the answer thereto as follows: “—If a staff member requests extension and they meet all of the requirements, are they entitled to extension of services? —Answer: Yes. If a staff member meets the requirements mentioned in the applicable policy, then they will be entitled to extension of services.”

4. In a letter dated 20 December 2016, the HRSO advised Mr. Jafari that the “validity of [his] post ha[d] been extended for a further period which [would] expire on 31 December 2017”.

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<sup>1</sup> The Provident Fund is a scheme established by the Commissioner-General for the purpose of providing certain benefits to eligible staff members upon their separation.

5. On 26 December 2016, Mr. Jafari completed and submitted the request for extension of his service, beyond his official retirement age of sixty, for a period of two years.
6. By letter dated 31 January 2017, the HRSO informed Mr. Jafari that the Director of UNRWA Operations, Jordan (DUO/J), did not approve his extension request and that his separation from the Agency on the basis of retirement would be effective 23 March 2017 on his 60<sup>th</sup> birthday.
7. On 1 March 2017, Mr. Jafari requested the DUO/J to reconsider the decision not to extend his service beyond retirement age.
8. The DUO/J responded by letter dated 21 March 2017, in which he confirmed the content of the HRSO's letter of 31 January 2017. He informed Mr. Jafari that the latter's request for reconsideration had been "thoroughly reviewed", and that the decision for his separation from the Agency on a retirement basis had been taken "in accordance with the provisions of Area Staff Rule 109.2" and "in the interest of the Agency". The DUO/J stressed that, while Mr. Jafari met the preconditions for extension of service beyond his retirement age, the negative decision had been taken, "as [his] continuation in the post hinder[ed] internal succession plans".
9. Mr. Jafari appealed the DUO/J's decision by first requesting decision review on 27 March 2017 and then filing an application with the UNRWA Dispute Tribunal on 24 July 2017.
10. In the impugned Judgment, the UNRWA DT determined that Mr. Jafari's application was timely filed, but it dismissed his application on the merits. In the UNRWA Dispute Tribunal's view, the relevant rules authorized the Agency to grant an extension of service beyond retirement age, but they did not entitle a staff member to such a right. In the present case, the UNRWA DT found that the Agency had properly exercised its discretionary authority when it decided that it was not in its interest to extend Mr. Jafari's service beyond the retirement age. Moreover, the UNRWA DT did not find any evidence of arbitrariness or prejudice, procedural irregularity or error of law that could have tainted the Agency's decision in respect of Mr. Jafari's request for extension of service beyond retirement.
11. This is the subject of the instant appeal.

### **Submissions**

#### **Mr. Jafari's Appeal**

12. The decision by the UNRWA Dispute Tribunal was “unfair and cruel”, in that it failed to take into account the rules of law or financial and social considerations, and moreover, it violated his right to a two-year extension of his service beyond retirement. The HRSO’s letter and the FAQs attached to her letter mentioned that he had such a right if he fulfilled all three conditions, which he did. Mr. Jafari questions why the Agency sent a form for him to complete and involved him in the extension procedures, especially when it knew all along that the continuation of his service beyond retirement would hinder the succession plans, if an extension beyond retirement age was not a right, but an exception to the rules, as the UNRWA Dispute Tribunal indicated. The fact that the Agency sent him the form and asked him to complete it gave him hope and a lawful expectation that his service would be extended because he met all the conditions.

13. There were procedural irregularities in the taking of the decision not to extend Mr. Jafari’s service beyond retirement. The decision was taken on 31 January 2017, before the results of his medical examination became available on 30 May 2017. The contested decision contradicted the HRSO’s letter of 20 December 2016, which stated clearly that his job validation had been extended to the end of 2017.<sup>2</sup> Accordingly, the contested decision “should be rejected”.

14. The contested decision should be rejected, because, though his continuation hindered the internal succession plans, it would be in the interest of the Agency to do so, considering all his achievements and the profits that he had generated.

15. The upholding of the contested decision by the UNRWA Dispute Tribunal should be vacated, because the contested decision was the product of an abuse of power, discrimination, and double standards. While claiming that the continuation of his service beyond retirement would hinder the succession plans, the Agency extended the service of a loan officer and a verification officer beyond retirement, despite the knowledge that those extensions also hindered the internal succession plans.

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<sup>2</sup> In this regard, Mr. Jafari stated that he was not satisfied with the 20 December 2016 letter, which extended his service beyond retirement “only for 9 months”. That was the reason for his submission of the service extension request for two years on 26 December 2016.

16. The contested decision caused Mr. Jafari mental harm and human suffering, which did not require any evidence to prove. It also caused him to lose an opportunity to become a manager at the Grade 16 level.

17. Mr. Jafari requests that the Appeals Tribunal vacate the UNRWA DT Judgment, rectify the situation by extending his service for two years beyond retirement including his “financial and employment rights for 2 years”, and pay him an unspecified amount of compensation for the human suffering and the loss of opportunity for promotion as a branch manager as a result of the non-extension decision.

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

18. Mr. Jafari’s appeal is not well founded on any of the grounds set out in Article 2 of the Statute of the Appeals Tribunal. He has filed the appeal merely to express his disagreement with the outcome of the UNRWA DT Judgment. He has failed to identify any reversible errors in the UNRWA DT Judgment warranting the interference of the Appeals Tribunal. Such an appeal is defective and should be dismissed.

19. The impugned Judgment was free of error as a matter of law. The UNRWA DT was cognizant of the legal framework applicable to the extension of service beyond retirement age and the relevant jurisprudence of the Appeals Tribunal on its role with regard to administrative decisions. In this respect, the Commissioner-General notes that Mr. Jafari is making the same argument that he already presented to the UNRWA Dispute Tribunal, though he “does not criticize the interest of the Agency” set forth in the letter of the DUO/J on 21 March 2017.

20. Regarding Mr. Jafari’s arguments about the sequence of events (the contested decision had been taken on 31 January 2017 before the results of his medical examination became available on 30 May 2017), the Commissioner-General submits that the argument is speculative in nature, and moreover that it was not put forward before the UNRWA Dispute Tribunal. It should not be considered by the Appeals Tribunal because this was a new fact raised for the first time during the appeals proceedings.

21. Mr. Jafari accuses the Agency of an abuse of power and discrimination, but he fails to articulate the prohibited grounds set forth in Article 26 of the International Covenant on Civil and Political Rights with a view to proving discrimination. The extension of service beyond retirement for another staff member that Mr. Jafari refers to in his appeal was not

discrimination against Mr. Jafari because that staff member occupied a different post than that encumbered by Mr. Jafari.

22. There is no basis for considering Mr. Jafari's pleas for moral damages and various compensatory awards, as no evidence has been proffered in their support.

23. The Commissioner-General requests that the Appeals Tribunal dismiss the present appeal in its entirety.

### **Considerations**

24. The issue on appeal is whether the UNRWA DT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision by the Agency not to extend Mr. Jafari's service for a period of two years beyond the age of retirement was lawful.

25. The applicable law on this matter is as follows:

Area Staff Rule 109.2 provides in relevant parts:

1. A staff member is retired on grounds of age when the Agency requires him/her to leave Agency employment on account of his/her age, as provided hereunder.

2. A staff member may be retained in active service after having reached the official age of retirement of 60 years when an extension of his/her age limit is authorised under the provisions of paragraph 4 below.

[...]

3. A staff member who is due to retire shall be given not less than 60 (sixty) calendar days' written notice of his/her retirement. This notice shall specify the date on which the staff member is to be separated from Agency's service, which shall not be earlier than his/her 60th birthday.

4. For extensions past the official age of retirement:

[...]

(B) Staff members reaching the official age of retirement on or after 1 January 2014, may request no later than sixty (60) calendar days after receiving the written notice of retirement referred to in paragraph 3 above, that he or she be retained in service to the Agency beyond attaining the official age of retirement for a cumulative period not to exceed two (2) years.

[...]

(E) Further extensions of service beyond a staff member's 62nd birthday shall not exceed one year, and may be authorized at the sole discretion of the Commissioner-General. The Commissioner General retains the authority, in exceptional cases, to deny a request by a staff member to be retained in service beyond the official age of retirement.

Area Personnel Directive No. A/9/Rev. 10 (PD No. A/9/Rev. 10) on separation from service, states in relevant parts at paragraph 20:

20. A staff member shall be eligible for consideration for extension of his/her appointment beyond the official age of retirement upon the following preconditions:

[...]

b. For staff members reaching the official age of retirement on or after 1 January 2014:

i. Staff members seeking to be retained in service to the Agency beyond attaining the official age of retirement for a cumulative period not to exceed two (2) years must make a request, no later than sixty (60) calendar days after receiving the written notice of retirement referred to in paragraph 3 of Rule 109.2.

[...]

iii. The Director of Human Resources (upon the recommendation of the relevant Department Director) for Headquarters staff, and Field Office Directors for Field staff, shall approve requests made in accordance with paragraph 20(b)(i) and (ii), provided such requests meet the requirements set out in paragraphs 20(c) and (d) [...].

c. In all cases of extension of service, the staff member's performance must be rated as at least "fully meets expectations" or a grade of "3" in their last two performance evaluation cycles preceding the staff member's request for extension of service beyond the official age of retirement.

d. In all cases of extension of service, the staff member shall submit to a medical examination by a doctor nominated by the Agency and it shall be a condition of such extension that the Chief, Field Health Programme in the Fields or Director of Health in the case of Headquarters certifies that the staff member is cleared as medically fit to continue service beyond the official age of retirement.

[...].

26. Based on Mr. Jafari's submissions, the Appeals Tribunal discerns that what he claims is that the UNRWA DT erred on a matter of law in its consideration of the requirements for the extension of his service beyond the age of retirement. Specifically, he claims that he met all the conditions for extension of service beyond the retirement age as set forth in the letter of 1 December 2016 from the HRSO and the FAQ, since he submitted the extension request

within the prescribed time-limit and satisfied the performance requirements. This claim was rejected by the first instance Judge on the grounds that “[t]hese two conditions are the *minimum* that must be met before the Agency can give further *consideration* to the request for extension in light of what is in the best interest of the Agency”.<sup>3</sup>

27. Further, the UNRWA DT concluded that the Agency had no obligation to accept Mr. Jafari’s request for an extension of his service beyond the age of retirement, since the extension of service was not a right of a staff member but an exception to the normal rule of retirement at the age of 60 and lay within the discretionary authority of the Administration.<sup>4</sup> Moreover, the UNRWA DT concluded that the Agency properly exercised its authority when it decided that it was not in its interest to extend Mr. Jafari’s service beyond retirement age.<sup>5</sup>

28. In the first place, we agree with the UNRWA DT that the above-quoted provisions of the existing regulatory framework did not establish an automatic right of the staff member to extension of his/her service beyond the age of retirement upon the submission of the pertinent application, even if he/she satisfies these two conditions. As expressly stipulated in law, on receipt of such a request, the Administration decides whether the staff member shall be eligible for consideration for extension of his/her service beyond the official age of retirement provided that the preconditions of the law are met. Undoubtedly, this decision falls within the discretionary authority of the Agency, which determines on such a request by balancing the aforesaid preconditions and its own interests.

29. However, for the reasons that follow, we do not share the UNRWA DT’s holding that the denial of the extension of Mr. Jafari’s service beyond the age of retirement was a valid exercise of the discretion of the Administration.

30. The Appeals Tribunal has held that, as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion.<sup>6</sup>

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<sup>3</sup> Impugned Judgment, para. 34 (italics in original).

<sup>4</sup> *Ibid.*, paras. 33-34.

<sup>5</sup> *Ibid.*, para. 33.

<sup>6</sup> *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, para. 17; comp. *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para. 18; *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-482, para. 59.



31. The Appeals Tribunal recalls its jurisprudence that the discretionary power of the Administration is not unfettered. The Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee are implied in every contract of employment. Both parties must act reasonably and in good faith.<sup>7</sup>

32. When judging the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the first instance tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The first instance tribunal may consider whether relevant matters were ignored, and irrelevant matters considered, and also examine whether the decision is absurd or perverse. It is not the role of the first instance tribunal to consider the correctness of the choice made by the Administration amongst the various courses of action open to it. Nor is it the role of the first instance tribunal to substitute its own decision for that of the Administration.<sup>8</sup>

33. As a result of the judicial review, the first instance tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process, the first instance tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the tribunal has acted as an appellate authority over the decision-maker's administrative

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<sup>7</sup> *Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 17, citing, *inter alia*, *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, para. 24; *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 40; *Pérez-Soto v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-329; *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

<sup>8</sup> *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 27; *Abu Lehia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 20; *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 13; *Riecan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-802, para. 13.

decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker.<sup>9</sup>

34. As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision.<sup>10</sup> In this respect, the Tribunal may examine the surrounding circumstances to determine whether the impugned decision was tainted by abuse of authority.

35. As we have stated in *Obdeijn*,<sup>11</sup>

the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice established by the General Assembly resolution 63/253 and the principle of accountability of managers that the resolution advocates for.

36. Hence, in compliance with the above stated principles of judicial review, an administrative decision, which adversely impacts on a staff member's status, must be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised.<sup>12</sup> In this respect, the harmful administrative decision must be fully and adequately motivated. The reasoning must be sufficiently clear, precise, and intelligible. A generic reasoning befitting every case is not enough and renders the decision unlawful.

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<sup>9</sup> *Abu Leahia v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-814, para. 20; *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-798, para. 24; *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 26, citing *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 28.

<sup>10</sup> *Toure v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-660, para. 30.

<sup>11</sup> *Obdeijn v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-201, para. 36.

<sup>12</sup> *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 45; *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 30, citing *Ncube v. Secretary General of the United Nations*, Judgment No. 2017-UNAT-721, para. 17 and cites therein.

37. Further, in the present case, as discussed and set out above, the applicable instruments bestow on the Agency the discretion in deciding on the extension of the staff member's service beyond his/her official age of retirement. Nevertheless, according to subparagraph (E), paragraph 4 of Area Staff Rule 109.2, "[t]he Commissioner-General retains the authority, *in exceptional cases*, to deny a request by a staff member to be retained in service beyond the official age of retirement".<sup>13</sup> As demonstrated plainly in the wording of this sentence and by juxtaposing it with the preceding sentence of the same subparagraph (E), where the extension of service beyond a staff member's 62<sup>nd</sup> birthday "shall not exceed one year, and may be authorized at the *sole discretion* of the Commissioner-General",<sup>14</sup> in the view of the Appeals Tribunal, the Agency is vested with the discretion to deny such a request for extension of service beyond the retirement age only under exceptional circumstances. So, quite contrary to the UNRWA DT's finding that "the Agency may exceptionally extend the service of a staff member beyond retirement age when such an extension is in the interest of the Agency",<sup>15</sup> the Administration, as a rule, has the discretion to deny such a request only in exceptional cases and on account of the interests of the Agency, which must be reflected clearly and precisely in the reasoning for the impugned administrative decision.

38. In the case at hand, the reasoning underpinning the Agency's denial of Mr. Jafari's request for extension of his service beyond the official retirement age consists in the generic determination that his "continuation in the post hinder[ed] internal succession plans".<sup>16</sup> However, this was not a duly motivated exercise of the administrative discretion, since the Agency did not specify, in precise and unequivocal terms, in what way the continuation of Mr. Jafari's service constituted an obstacle to its internal succession plans. Concomitantly, the Appeals Tribunal does not have the ability to review whether or not there existed exceptional circumstances warranting the decision of the Agency not to grant Mr. Jafari's request.

39. Therefore, under the afore-mentioned legal and factual circumstances, the Agency's decision to deny Mr. Jafari's request for extension of his service beyond the official retirement age was unreasonable and thus unlawful. The Agency's failure to provide adequate reasons for the contested decision and the exercise of its discretion, as required by Area Staff Rule 109.2 and the afore-mentioned jurisprudence, resulted in

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<sup>13</sup> Emphasis added.

<sup>14</sup> Emphasis added.

<sup>15</sup> Impugned Judgment, para. 33.

<sup>16</sup> *Ibid.*, para. 21.

the Administration's decision of 21 March 2017 being an unlawful decision, which was inconsistent with Area Staff Rule 109.2.

40. The contested decision was accordingly wrong and invalid. The UNRWA DT hence erred in holding otherwise. Consequently, we order rescission of this decision, and, as it concerns termination, set an amount of compensation that the Commissioner-General may elect as an alternative to the rescission of the contested administrative decision pursuant to Article 9(1) (a) of the Appeals Tribunal Statute.

41. Having in mind that, in establishing the amount of in-lieu compensation, the Appeals Tribunal exercises discretion, and that the in-lieu compensation is not intended to compensate for all the possible harm suffered by the injured person, as this is the specific aim of the compensation set forth in Article 10(5)(b) of the UNRWA Dispute Tribunal Statute (compensation for harm),<sup>17</sup> which will be the subject of appreciation below, as well as that an in-lieu compensation has to be assessed in the round which we deem to be fair and equitable, having regard to the number of imponderables,<sup>18</sup> we set the in-lieu compensation in the amount of six months' net base salary.

*Award of compensation*

42. Article 9(1) (b) of the Statute of the Appeals Tribunal provides:

The Appeals Tribunal may only order one or both of the following:

...

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

43. In the present case, Mr. Jafari did not present any evidence showing that he suffered material or moral injury due to the contested administrative decision. Consequently, there can be no award of compensation in this respect, as correctly found by the UNRWA DT.

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<sup>17</sup> *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, paras. 18-19.

<sup>18</sup> *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 40.

**Judgment**

44. The appeal is partly upheld and Judgment No. UNRWA/DT/2018/034 is hereby modified as follows.

45. The decision to deny Mr. Jafari's request for extension of his service beyond the official age of retirement is rescinded. The Commissioner-General may elect to pay in-lieu compensation in the amount of six months' net base salary.

46. In all other respects, the appeal is dismissed and Judgment No. UNRWA/DT/2018/034 is affirmed.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of June 2019 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Murphy

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

*(Signed)*

Weicheng Lin, Registrar