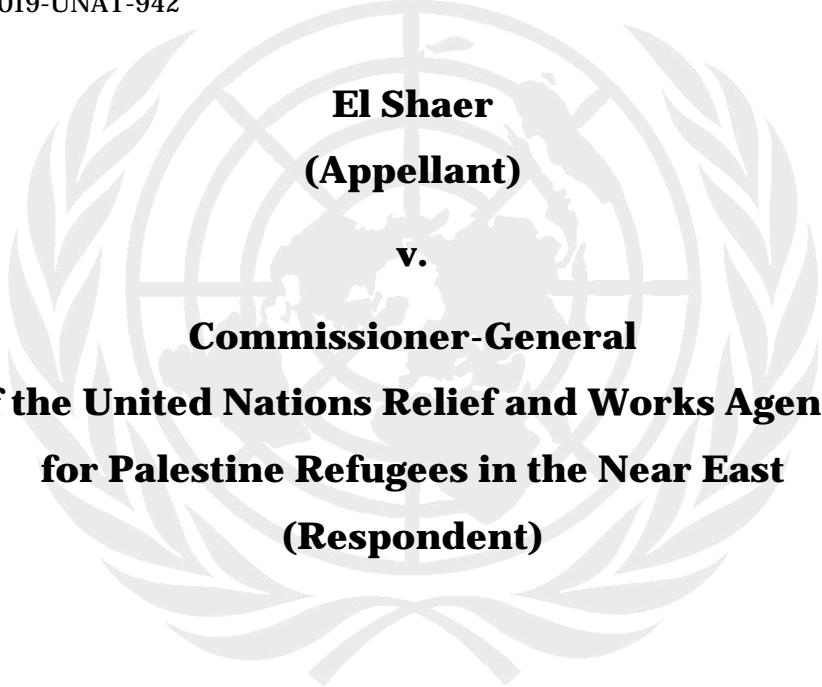




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-942



**El Shaer  
(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 John Raymond Murphy, Presiding Judge Martha Halfeld Judge Deborah Thomas-Felix
Case No.:	2019-1238
Date:	28 June 2019
Registrar:	Weicheng Lin

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

**JUDGE JOHN RAYMOND MURPHY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2019/002, 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 21 January 2019, in the case of *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Tamer Yaser El Shaer filed the appeal on 5 March 2019, and the Commissioner-General filed an answer on 9 May 2019.

**Facts and Procedure**

2. Mr. El Shaer commenced employment with the Agency on a fixed-term appointment, Grade 4, Step 1, as Distribution Supervisor at the Rafah Distribution Centre in the Emergency Programme, Gaza Field Office (GFO) with effect from 21 February 2009.

3. On 21 December 2015, Mr. El Shaer was re-assigned to the Rajah Fuel Section as Assistant Storekeeper pending an investigation into allegations of misconduct against him.

4. Almost two years later, by letter dated 22 August 2017, the Director of UNRWA Operations, GFO (DUO/G) informed Mr. El Shaer that the investigation into the allegations of misconduct had been closed without any substantive findings.

5. At a meeting on 25 September 2017, and as confirmed by e-mail dated 26 September 2017, Mr. El Shaer was informed by the Deputy Field Human Resources Services Officer (D/FHRSO) that, following the conclusion of the investigation, his reassignment would come to an end and he was requested to resume his duties as Distribution Supervisor at the Rafah Distribution Centre on 1 October 2017.

6. By e-mail dated 27 September 2017, the Deputy, Head Field Logistics Office (D/HFLO) informed Mr. El Shaer that, in the event he did not present himself at the Rafah Distribution Centre on 1 October 2017, his absence would be treated in line with UNRWA Staff Regulations and Rules.

7. Mr. El Shaer was on sick leave between 1 October 2017 and 9 October 2017.

8. By letter dated 2 October 2017, the DUO/G formally informed Mr. El Shaer that he was exonerated of any wrongdoing, that his reassignment pending the investigation had come to an end and that he was now expected to return to his post at the Rafah Distribution Centre as per standard procedure. By letter dated 9 October 2017, the DUO/G informed Mr. El Shaer that the letter dated 21 December 2015, by which he had been temporarily transferred to the post at the Rafah Fuel Section during the investigation, had been removed from his official status file.

9. On 10 October 2017, Mr. El Shaer met with the Head, Field Human Resources (H/FHRO). At the meeting, Mr. El Shaer raised two concerns: the removal of certain letters from his official status file and his fear of retaliation. In an e-mail to Mr. El Shaer dated 11 October 2017, the H/FHRO confirmed that the letters regarding the allegations and their investigation had been removed from his official status file. More importantly, the letter recorded that it had been agreed that Mr. El Shaer would submit through his supervisors a request to transfer to another suitable post which would be addressed by the Logistics Office management in conjunction with Heads of Departments where there may be suitable vacancies. It was agreed that Mr. El Shaer would return to work on Sunday 15 October 2017 at the Rafah Fuel Station as requested by his manager.

10. On 30 January and 13 and 28 February 2018, Mr. El Shaer again met with the H/FHRO to discuss certain issues with respect to his case where he again expressed his request to be transferred to a post other than the post of Distribution Supervisor at the Rafah Distribution Centre. By letter dated 1 March 2018, the H/FHRO informed Mr. El Shaer that his request for transfer would be considered and that, in the meantime, he was requested to present himself to the Logistics Office for assignment of distribution duties.

11. Mr. El Shaer was on leave from 5 March 2018 to 8 March 2018.

12. By e-mail dated 6 March 2018, Mr. El Shaer's second level supervisor requested him to contact his immediate supervisor to discuss the details with respect to the resumption of his duties as Distribution Supervisor.

13. By e-mail dated 12 March 2018, Mr. El Shaer's second level supervisor once more instructed him to resume his duties as Distribution Supervisor with immediate effect. The instruction was reiterated by other communications between 6 and 13 March 2018.

14. On 14 March 2018, the DUO/G addressed the following letter to Mr. El Shaer:

**Subject: Abandonment of Post**

You are hereby informed that serious complaints have been received concerning your attendance. In particular:

You were informed by Mr. Jonathan Porter, Head Field Human Resources Office, in his letter of 1 March 2018 that you should present yourself to the Logistics Office for assignment for distribution duties. Nonetheless you consistently refused to carry out your duties as a Distribution Supervisor.

Instead, you continued to report to Rafah Fuel Station, where you did nothing during the period from 11 through 18 March 2018.

You are hereby advised that unless by 08:00 hrs on Monday 19 March 2018 you report to the Logistics Office and submit a convincing written justification for your absence from your duties as a Distribution Supervisor, you may be separated from service from the Agency by reason of your abandonment of post under the provisions of Area Staff Rule 109.4. This separation will take effect from 24.00 hours on 19 March 2018.

In this eventuality, I wish to advise you that under paragraph 3 C of Area Staff Rule 109.1 you may lose your entitlement to the Agency Provident Fund benefit. Meanwhile, you are considered to be on unauthorized absence without pay as from 11 March 2018.

15. Area Staff Rule 109.4 (referred to in the letter) reads as follows:

1. Where a staff member voluntarily absents himself/herself from duty and such absence neither has been authorised nor is subsequently authorised in accordance with these rules, then such staff member may be separated from Agency service by reason of abandonment of post as provided hereunder.

2. Where a staff member has absented himself/herself in the manner described in paragraph 1 above for three or more consecutive working days, the Commissioner-General may send to such staff member a letter informing him/her that unless, by a specified date (determined at the Commissioner-General's discretion), he/she reports for duty or submits a written explanation of his/her absence which is acceptable to the Commissioner-General, he/she shall be deemed to have been separated from Agency service by reason of abandonment of post under the provisions of this rule.

3. In accordance with the provisions of paragraph 2 above, a staff member who fails to report for duty or to submit an acceptable written explanation by the date specified in the letter, shall, unless for exceptional reasons the Commissioner-General decides otherwise, be separated from Agency service under this rule, with effect from 2400 hours (local time) on the day immediately preceding the first day of his/her unauthorised absence.

16. The rule must be read together with Area Personnel Directive A/9 which provides:

25. The Director of Human Resources in case of Headquarters staff and Field Office Director in case of Field Staff, are authorised to act on behalf of the Commissioner-General in implementation of Staff Rule 109.4.

26. Written communications to staff members pursuant to Paras. 2 and 3 of Staff Rule 109.4 shall, whenever possible, be delivered by hand against receipt. Where such delivery proves unsuccessful, letters shall be sent, where possible, by registered mail.

27. Where a staff member returns to duty and submits an explanation for his absence which the Agency accepts, for exceptional reasons if so decided by the Commissioner-General, the staff member may be allowed to resume duty. The period of absence, if not exceptionally authorized retroactively, will be treated as leave without pay or unauthorized leave. If warranted by the circumstances, disciplinary proceedings under Personnel Directive No. A/10 may also be initiated.

17. Mr. El Shaer failed to report to the Logistics Office on 19 March 2018 and instead, on the same day, sent an e-mail to the DUO/G providing a written justification for his absence. By letter dated 19 March 2018 to Mr. El Shaer, the DUO/G explained that Mr. El Shaer had failed to provide the required convincing written justification for his absence and was satisfied that his numerous refusals to resume his duties as Distribution Supervisor were not acceptable to the DUO/G and thus it was decided to separate him from service for abandonment of post with effect from that date.

18. On 17 May 2018, Mr. El Shaer submitted his request for decision review.

19. On 14 July 2018, Mr. El Shaer filed an application with the UNRWA Dispute Tribunal challenging the decision to terminate his employment.

20. On 21 January 2019, the UNRWA DT issued Judgment UNRWA/DT/2019/002 dismissing Mr. El Shaer's application. The UNRWA DT found that, despite several reminders and requests by the Administration, Mr. El Shaer had never resumed his duties as Distribution Supervisor after 1 October 2017. The UNRWA DT found it was clearly established that Mr. El Shaer had been absent from duty on three or more consecutive days and accordingly, on 14 March 2018, the Commissioner-General was entitled, pursuant to paragraph 2 of Area Staff Rule 109.4 to advise Mr. El Shaer that, if he did not report to the Logistics Office by 8 am on 19 March 2018, he would be separated from the Agency for abandonment of post. The UNRWA DT concluded that Mr. El Shaer had failed to demonstrate by convincing evidence that

the decision to separate him from service for abandonment of post was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors or was flawed by procedural irregularity or error of law.

### **Submissions**

#### **Mr. El Shaer's Appeal**

21. Mr. El Shaer is not legally represented in these proceedings and his submissions are not clearly articulated. However, he notes that on 1 October 2017, while on sick leave (from 1 to 9 October 2017), he was requested to resume his duties. However, after the meeting of 10 October 2017 he could continue reporting to the Rafah Fuel Section. He was on authorized leave during the early part of March 2018 and returned to the Rafah Fuel Section on 12 March 2018.

22. Mr. El Shaer contends that considering the foregoing, Area Staff Rule 109.4 does not apply. He was not absent from duty.

23. Mr. El Shaer requests that the Appeals Tribunal rescind the Agency's decision to terminate his appointment and award compensation for "physical, moral and psychological harm" he suffered.

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

24. The Commissioner-General submits that Mr. El Shaer has failed to identify the grounds for his appeal, and as such, his appeal is defective. The appeal is not well founded on any of the grounds set out in Article 2(1) of the Appeals Tribunal Statute. It appears that Mr. El Shaer resorts to merely repeating the same arguments submitted before the UNRWA DT. Mr. El Shaer's failure to explain how the UNRWA DT erred in deciding his claims is sufficient for the Appeals Tribunal to dismiss the appeal.

25. Additionally, the UNRWA DT did not commit errors of fact or law that would require a reversal of its Judgment. The UNRWA DT was cognizant of the established facts and the legal framework regarding Mr. El Shaer's abandonment of post.

26. Considering the foregoing, the relief sought by Mr. El Shaer has no legal basis. With specific reference to Mr. El Shaer's plea for moral damages, the Commissioner-General contends that Mr. El Shaer has not proffered any evidence in support of such plea.

27. Finally, the Commissioner-General avers that Mr. El Shaer's appeal is frivolous and vexatious and constitutes a manifest abuse of the appeal process. The Agency which is facing an "unprecedented and existential financial crisis" cannot be asked to pay for Mr. El Shaer's "misguided attempt to re-litigate a case that was properly considered by the UNRWA DT". The Commissioner-General requests an award of costs in the amount of USD 250 for abuse of the appeal process.

### **Considerations**

28. Mr. El Shaer's appeal is poorly formulated. However, given the fact that he is unrepresented and clearly has difficulty in communicating in English, we have allowed him some leeway when considering the grounds of appeal. The basis of his appeal is clear enough. Mr. El Shaer alleges that the UNDT erred in law by accepting that Area Staff Rule 109.4 applied to his case.

29. Area Staff Rule 109.4 is an exceptional deeming provision that allows the Agency to deem a staff member separated from service by reason of abandonment of post in certain circumstances. It applies only where five conditions precedent have been met, namely: i) the staff member has voluntarily absented himself from duty; ii) the absence from duty was for three or more consecutive working days; iii) the absence was unauthorized; iv) the Commissioner-General sent the staff member a letter informing him that if he did not report for duty or provide a written explanation for his absence within a specified time he shall be deemed to have been separated from service; and v) the staff member thereafter failed to report for duty or provide a written explanation within the specified time. Should any of these conditions precedent be absent the provision will not apply.

30. The possibly harsh consequences of Area Staff Rule 109.4 are ameliorated by paragraph 27 of Area Personnel Directive A/9 which permits a staff member deemed separated from service in terms of Area Staff Rule 109.4 to be reinstated if he reports for duty and provides a satisfactory explanation for his absence. Area Staff Rule 109.4 is nonetheless draconian in that it allows for separation from service on the grounds of absence without the Agency being required

to determine the validity or reasonableness of the reason for absence. The rule is a sensible and rational one, as it provides an expedient mechanism to deal with staff members who have absconded or deserted posts. It will apply most often when the whereabouts of the absent staff member are unknown. The exceptional and draconian nature of the rule, however, requires that it be construed restrictively and purposively and applied strictly in accordance with the stipulated conditions precedent.

31. Mr. El Shaer did not voluntarily absent himself from duty and he did not fail to report for duty. He reported for duty throughout (other than on the days he was on authorized leave in October 2017 and March 2018) at the Rafah Fuel Section.

32. The UNRWA DT erred factually in assuming that Mr. El Shaer had illegitimately refused to report at the Rafah Distribution Centre from 1 October 2017. He was given permission to remain at the Rafah Fuel Section on 15 October 2017. The issue of his reassignment back to the Distribution Centre only arose again with some intensity in March 2018, while he was on official leave. Moreover, Mr. El Shaer's whereabouts were known to the Agency and he clearly did not intend to abandon his position.

33. In so far as Mr. El Shaer refused to report to the Rafah Distribution Centre as instructed, it may be that his conduct is open to censure or discipline. Depending on the rationality of the instruction to him and the legitimacy of his non-compliance, his conduct may or may not have constituted insubordination for refusing to obey a reasonable instruction of the employer. However, there has been no trial of those issues. The Agency did not determine if the conduct constituted insubordination and, if so, a proportional sanction. It failed to do that and instead relied inappropriately and precipitously on the deeming provision to separate Mr. El Shaer from service. As intimated, if his refusal was not justified there might have been a performance or conduct issue. However, given his obvious concerns about retaliation and the requirements of progressive discipline, it is unlikely that termination of employment would have been a proportional disciplinary measure in the then prevailing circumstances.

34. In the premises, Area Staff Rule 109.4 had no application and it was inappropriate for the Agency to have relied upon it. There was no rational connection between the purpose of Area Staff Rule 109.4, the information before the decision-maker, and the reasons for the administrative decision; with the result that the decision falls to be set aside on the grounds of irrationality.



35. Mr. El Shaer's separation from service was therefore unlawful and his appeal succeeds. In terms of Article 9 of the Appeals Tribunal Statute, the decision must be rescinded, Mr. El Shaer must be reinstated and an amount of in-lieu compensation be set.

**Judgment**

36. The appeal is upheld and Judgment No. UNRWA/DT/2019/002 is set aside.
37. The decision of the Agency of 19 March 2018 separating Mr. El Shaer from service is rescinded.
38. The Agency is ordered to reinstate Mr. El Shaer on similar terms and conditions of employment with effect from 19 March 2018.
39. As an alternative to the order of specific performance in paragraph 37, the Agency may elect to pay an amount of compensation equal to 12 months' net base salary. The award of compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said award. An additional five percent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

Original and Authoritative Version: English

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

*(Signed)*

Judge Murphy, Presiding

*(Signed)*

Judge Halfeld

*(Signed)*

Judge Thomas-Felix

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

*(Signed)*

Weicheng Lin, Registrar