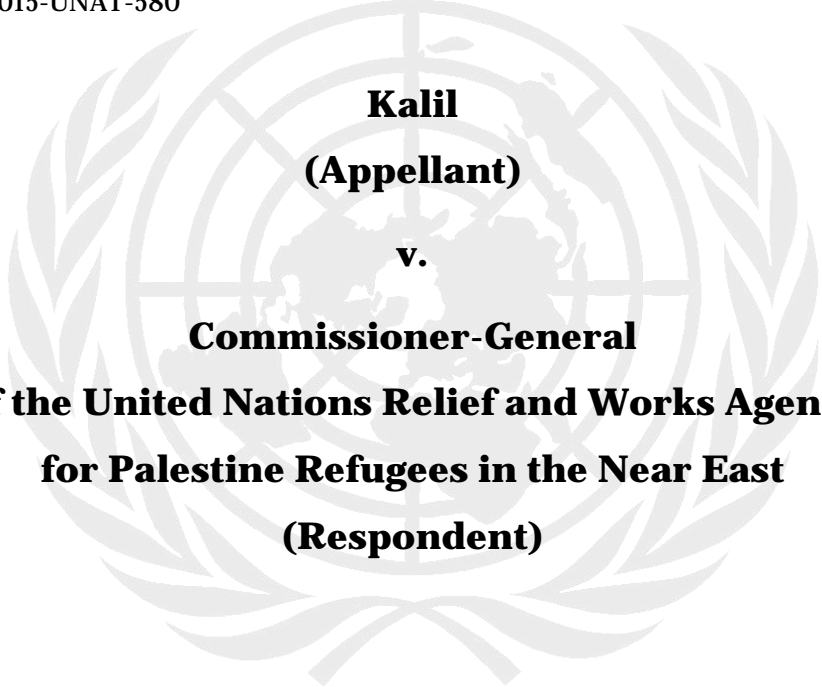




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-580



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

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Luis María Simón Judge Mary Faherty
Case No.:	2014-675
Date:	30 October 2015
Registrar:	Weicheng Lin

Counsel for Mr. Kalil: Self-represented

Counsel for Commissioner-General: Lance Bartholomeusz

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 057 (UNRWA/DT/2014) (hereafter, Order No. 057) and Judgment No. UNRWA/DT/2014/027, 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 5 May 2014 and 15 September 2014, respectively, in the case of *Kalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Cristopher Kalil filed his appeal on 4 November 2014 and the Commissioner-General of UNRWA filed his answer on 6 January 2015.

Facts and Procedure

2. On 15 November 2009, Mr. Kalil entered the service of UNRWA as a Legal Officer at the P-4 level on a one-year fixed-term appointment in the Department of Legal Affairs (DLA). His appointment was to expire on 14 November 2010. Mr. Kalil's appointment was subsequently renewed for a second year to expire in November 2011.

3. On 24 October 2011, Mr. Kalil's First Reporting Officer (FRO), being the Chief of the General Legal Division (C/GLD), signed Mr. Kalil's performance evaluation report (PER) for the performance cycle of the preceding year, namely November 2009 to September 2010. Mr. Kalil was given an overall performance rating of "meets performance expectations".

4. On 22 November 2011, Mr. Kalil accepted a one-month extension of his appointment through to 14 December 2011. The one-month extension was granted in order to allow Mr. Kalil's supervisors the time to complete his performance evaluation for the cycle of November 2010 to 30 September 2011, completion of which was a prerequisite in order for them to make further extension recommendations.

5. On 2 December 2011, the C/GLD, as FRO, signed Mr. Kalil's PER for the 2010-2011 cycle.

6. On 8 December 2011, the Chief of the Personnel Services Division wrote to the Legal Adviser with reference to Mr. Kalil's one-year extension, advising:

[I]f the PER is not finalized but you and [the C/GLD] can confirm that [Mr. Kalil] at least meets expectations as an overall rating I will recommend that we extend the contract now,

provided the PER is done within 2 weeks of [Mr. Kalil] returning. The whole matter will need to go to the [Advisory Committee on Human Resources (ACHR)] given the one year versus three year extension but I do not think the staff member should be prejudiced on the immediate one year extension of contract because of the time needed to reach agreement on his PER.

7. On 13 December 2011, the Legal Adviser replied to the Chief of the Personnel Services Division, as follows:

[...] I would like to confirm that [Mr. Kalil]'s contract should be extended for a further period of 11 months (i.e., this plus original one month making a full one-year contract extension).

... [Mr. Kalil's PER] will be finalized [...] early in the New Year [and] will have an overall rating of meets expectations, and therefore both [the C/GLD] and I are comfortable with the one-year extension.

I understand that the whole [sic] will need to go to ACHR once the PER is finalized.

8. On 14 December 2011, the Personnel Services Division notified Mr. Kalil that his appointment would be extended to 14 November 2012, thereby constituting a full one-year extension. On 18 December 2011, Mr. Kalil accepted the one-year extension.

9. On 3 January 2012, upon Mr. Kalil's enquiry as to why his contract had only been extended for one year, the Human Resources Department informed Mr. Kalil that his one-year extension had been based on the recommendation of his supervisors.

10. On 5 January 2012, Mr. Kalil asked the Legal Adviser and the C/GLD why his contract extension was limited to one year instead of three years, as per UNRWA practice. He also informed them of his intention to resign from his post on 25 February 2012.

11. On 30 January 2012, Mr. Kalil formally notified his supervisors of his resignation, to be effective as of 5 March 2012.

12. On 11 February 2012, Mr. Kalil requested review of the decision to only extend his appointment for one additional year, rather than the standard three years. He received no response by the Agency.

13. On 13 February 2012, the Legal Adviser signed off on Mr. Kalil's 2010-2011 PER. Mr. Kalil again received an overall performance rating of "meets performance expectations".

14. On 8 March 2012, Mr. Kalil separated from service.

15. On 8 June 2012, after the UNRWA Dispute Tribunal had rejected Mr. Kalil's request for a three-month extension of time in which to file his application,¹ Mr. Kalil filed his application with the UNRWA Dispute Tribunal. He challenged the Agency's failure to renew his appointment for the standard three years and requested commensurate compensation for material and moral damages incurred on account of the Agency's actions.

16. On 4 October 2012, in light of the Commissioner-General's failure to submit a timely reply to his application, Mr. Kalil filed a motion seeking to exclude the Commissioner-General from the proceedings. He requested entry of default judgment and summary judgment against the Commissioner-General.

17. On 14 October 2012, the Registry of the UNRWA Dispute Tribunal requested the Commissioner-General by e-mail to file a reply to Mr. Kalil's motion by 18 October 2012.

18. On 18 October 2012, the Commissioner-General filed his comments *ex parte* in which he sought, inter alia, leave to participate in the proceedings and file a reply to Mr. Kalil's UNRWA DT application by 18 November 2012, and requested that the UNRWA DT either deny Mr. Kalil's motion for a default judgment or postpone its consideration of that motion until the UNRWA DT may have considered the Commissioner-General's reply to the application.

19. On 6 December 2012, after being notified by the Registrar of the UNRWA DT that the Commissioner-General had missed the filing deadline of 18 November 2012, the Commissioner-General requested to submit his reply on or before 21 December 2012.

20. On 21 December 2012, the Commissioner-General filed his reply, which submitted, inter alia, that: Mr. Kalil's claim concerning the granting of only a one-year extension was not receivable as it had been rendered moot by his unilateral resignation; and that the claim concerning the circumstances surrounding Mr. Kalil's resignation, including alleged harassment and abuse of authority, were not receivable as they did not constitute appealable administrative decisions.

¹ Order No. 012 (UNRWA/DT/2012), dated 7 June 2012.

21. On 6 January 2013, only after the Commissioner-General's reply had been served on Mr. Kalil and Mr. Kalil had requested a copy of the Commissioner-General's submission of 18 October 2012, the Registrar transmitted a copy to Mr. Kalil.

22. On 25 January 2013, Mr. Kalil requested leave to submit rejoinders on: (a) the Commissioner-General's comments on his motion of 4 October 2012 for default judgment, including the Commissioner-General's request for leave to re-enter the proceedings; and (b) the Commissioner-General's limited reply on receivability.

23. On 4 October 2013, Mr. Kalil filed a "Motion for Production of Documents and Evidence".

24. On 5 May 2014, the UNRWA Dispute Tribunal, by way of Order No. 057, ruled on all the parties' motions. The UNRWA DT, inter alia, granted the Commissioner-General's request to participate in the proceedings and file his reply, as well as Mr. Kalil's request to submit a rejoinder. With the exception of Mr. Kalil's request for confidentiality, consideration of which was deferred to the Judgment, the UNRWA DT denied the remainder of the requests.

25. On 15 September 2014, the UNRWA Dispute Tribunal rendered its Judgment. As Mr. Kalil did not seek rescission of the impugned decision, but only compensation for damages resulting from the decision not to renew his fixed-term appointment for a three-year period, the UNRWA DT limited itself to examining whether there was a causal link between the contested decision and the compensation sought. The UNRWA DT denied Mr. Kalil's request for material damages in the sum of 33 months' net base salary that he claims he would have received had he been awarded a three-year appointment, finding that any alleged damages were caused by his own resignation.

26. The UNRWA DT also rejected Mr. Kalil's request for moral damages for emotional distress caused by only being offered a one-year extension, on the basis that International Staff Rule 104.3 clearly states that a fixed-term appointment does not carry any expectation of renewal. Further, the UNRWA DT found that it could not award moral damages related to Mr. Kalil's claims concerning the circumstances surrounding his resignation, namely the alleged ongoing marginalisation, deliberate and widespread withholding of information, abuse of power, harassment and disregard of PER procedures by his FRO, as these were never the subject of a formal harassment complaint or investigation to establish the veracity of the alleged facts. The UNRWA DT also declined to award compensation for the apparent delays by Mr. Kalil's FRO in

completing the former's PERs as Mr. Kalil was rated on both occasions as "meet[ing] performance expectations" and, consequently, could not claim that the evaluations caused him either material or moral damages. Lastly, the UNRWA DT denied Mr. Kalil's request for confidentiality and altogether dismissed Mr. Kalil's application.

Submissions

Mr. Kalil's Appeal

27. The UNRWA DT failed to exercise its jurisdiction and erred on several critical questions of law and fact, as well as in procedure.

28. Firstly, in finding that Mr. Kalil had no general expectancy of renewal of his contract, the UNRWA DT failed to consider: (a) whether Mr. Kalil's renewed appointment was improperly limited to one year, as opposed to three, by reason of bad faith and improper motives on the part of his FRO; and (b) his argument that his resignation amounted to constructive termination as the Appeals Tribunal recognised in *Koda*.²

29. The UNRWA DT also erred on critical questions of law and fact in that it:

(a) failed to consider that Mr. Kalil had a legitimate expectation by reason of International Staff Circular No. 1/4/97 (Policy on Renewal of Fixed-Term Contracts of International Staff) (ISC No. 1/4/97), which envisages the possibility of three-year extensions,³ as well as the Agency's practice in implementing this policy with respect to staff members with good performance evaluations;

(b) failed to consider the evidence that, even if he had not submitted a formal harassment complaint against his FRO, he had nonetheless properly resorted to informal resolution processes in seeking assistance from his second-level supervisor, in accordance with General Staff Circular No. 06/2010 (Prohibition of Discrimination, Harassment,

² Citing *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, para. 1.

³ International Staff Circular No. 1/4/97, para. 3, provides: "Upon completion of the two years the Agency may renew the appointment for a fixed-term of an additional three years."

including Sexual Harassment and Abuse of Power), and as recognised by the UNRWA DT in *Abdullah*;⁴

(c) improperly determined that the FRO's handling of Mr. Kalil's performance evaluations did not constitute "prohibited acts" under General Staff Circular No. 06/2010, notwithstanding that his overall performance rating was deemed good; and

(d) improperly separated the PER-related issues from the overall context of harassment and constructive termination claimed by Mr. Kalil.

30. The UNRWA DT erred in procedure in issuing its Judgment: (a) without having held an oral hearing and giving Mr. Kalil the opportunity to present additional proof to establish his allegations of bad faith by his FRO and constructive termination; and (b) without having ever received a reply by the Commissioner-General as to the merits.⁵ The UNRWA DT thus ought to have limited itself to pronouncing on the receivability of his application.

31. The Commissioner-General's failure to file a reply on the merits violated Mr. Kalil's due process rights to be apprised of contested facts and defences and to build his case by, *inter alia*, seeking further particulars of the reply or disclosure of relevant documents. The UNRWA DT also erred in denying Mr. Kalil's request for production of documents and failing to consider that the absence of a reply on the merits hindered his ability to seek production.

32. The UNRWA DT erred in procedure in engaging in *ex parte* communications with the Commissioner-General in relation to the latter's 18 October 2012 request for leave to participate and file a reply on the merits. In issuing Order No. 057, the UNRWA DT also abused its discretion and committed an error of law in granting the Commissioner-General leave to participate and file a reply that caused substantial prejudice to Mr. Kalil. Both Order No. 057 and the Judgment reward the Commissioner-General for egregiously flaunting the UNRWA DT's Rules of Procedure (UNRWA DT Rules) at the expense of Mr. Kalil's basic due process rights. The *ex parte* communications between the Commissioner-General and the UNRWA DT demonstrate further "underhanded behavio[u]r".

⁴ Citing *Abdullah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees*, Judgment No. UNRWA/DT/2013/037/Corr.1, para. 45 ("it is up to the complainant [...] to choose how to proceed, if at all, under the Circular").

⁵ Citing *Khisa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-422, para. 20.

33. The UNDT also erred in denying his request for confidentiality given that he is the victim of misconduct who has suffered emotional distress.

34. Mr. Kalil requests that the Appeals Tribunal:

- (a) declare the Commissioner-General “enjoined”, by virtue of Article 6(1) of the UNRWA DT Rules, from filing a reply on the merits;
- (b) declare that the facts set out in the appeal, being uncontested, are true;
- (c) reverse Order No. 057 and the UNRWA DT Judgment;
- (d) award 33 months’ net base salary, with interest, which he would have received had proper procedures and rules been followed, and for the moral injury, ongoing deprivation of his due process rights, and harm to his dignity, reputation and career;
- (e) grant him confidentiality and direct the UNRWA DT to do the same; and
- (f) receive into evidence annexes 3-6 which accompany his appeal, claiming he would have submitted them to the UNRWA DT “had proper procedures been followed”.

The Commissioner-General’s Answer

35. The UNRWA DT did not fail to exercise its jurisdiction. The UNRWA DT considered the improper motives of the FRO, as alleged by Mr. Kalil, as well as his claim of constructive termination at paragraphs 35 to 36 of the Judgment. Nonetheless, the UNRWA DT correctly held that as the alleged facts underpinning Mr. Kalil’s claim for constructive termination were not established, it could not grant any compensation for the alleged moral damages. Further, the fact that Mr. Kalil may have utilized the informal resolution process is not material to the UNRWA DT’s determination that the alleged facts were not established.

36. The UNRWA DT correctly held that no causal link existed between the decision to offer Mr. Kalil a one-year extension and the alleged material damages claimed by Mr. Kalil and, in the absence of a causal link, compensation could not be awarded.⁶ Further, the UNRWA DT did not err in examining the causal link between the contested decision and the claimed damages, rather

⁶ Citing *Israbhakdi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-277, paras. 24 and 26.

than the legality of the contested decision, since the absence of a causal link would of itself have caused the application to fail. Doing so served the interests of judicial economy.

37. The UNRWA DT did not err in finding that Mr. Kalil had voluntarily resigned. As the UNRWA DT could not find that the allegations supporting the claim for constructive termination were established in the absence of a formal investigation, Mr. Kalil's resignation must be taken as a voluntary, unilateral act that would only be rebuttable if he had demonstrated duress.

38. The UNRWA DT did not err on a question of law or a question of fact resulting in a manifestly unreasonable decision. The UNRWA DT did consider the Agency's policy and practice on renewal of fixed-term contracts and whether Mr. Kalil had a reasonable expectation for a three-year renewal. That Mr. Kalil disagrees with the UNRWA DT's findings does not mean that the UNRWA DT did not consider his arguments.

39. The UNRWA DT did not err when it determined that the FRO's delay in concluding Mr. Kalil's PERs did not cause the latter either material or moral damages.

40. The UNRWA DT did not commit any errors of procedure affecting the Judgment. Mr. Kalil failed to demonstrate that the exercise of the UNRWA DT's discretionary authority was arbitrary, capricious or motivated by prejudice or extraneous factors, or that the absence of an oral hearing affected the decision of the case. Mr. Kalil also had every opportunity to present proof with his application to the UNRWA DT and in his rejoinder to the Commissioner-General's reply. Further, Mr. Kalil failed to demonstrate how any additional proof would have affected the decision of the case.

41. Concerning the *ex parte* communications between the UNRWA DT and the Commissioner-General: the Registry's notification of 6 December 2012 to the Commissioner-General that he had missed the 18 November 2012 filing deadline and the Commissioner-General's same day response purely related to the timing of the Agency's reply, were not substantial and did not prejudice Mr. Kalil; the Commissioner-General's comments of 18 October 2012 to Mr. Kalil's motion for summary/default judgment was sent to Mr. Kalil by the Registrar on 6 January 2013; and the Commissioner-General's reply of 21 December 2012 was transmitted to Mr. Kalil on 23 December 2012.

42. As concerns the production of evidence, Mr. Kalil has not demonstrated that the UNRWA DT's decision not to order production of evidence was arbitrary, capricious or motivated by prejudice or extraneous factors.

43. The UNRWA DT similarly did not err when it denied Mr. Kalil's confidentiality request. The UNRWA DT's finding accords with the Appeals Tribunal's jurisprudence in this regard.

44. Mr. Kalil's due process rights were not violated by virtue of the Commissioner-General's reply. The UNRWA DT considered that it had all the relevant documents before it to make a decision. Moreover, the Commissioner-General's reply provided adequate legal submissions for the UNRWA DT to dispose of the case. The Commissioner-General has the right to determine his litigation strategy, including how he frames and responds to legal arguments, and it is within his discretion to limit his reply to relevancy. The content of the Agency's legal submissions has no bearing on whether Mr. Kalil was accorded due process by the UNRWA DT.

45. The Agency requests that this Tribunal dismiss Mr. Kalil's appeal in its entirety.

Considerations

Preliminary matters

- *Request for an oral hearing*

46. In this case, Mr. Kalil requests an oral hearing, which he believes will be of assistance to the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be granted when it would "assist in the expeditious and fair disposal of the case". As the Appeals Tribunal does not find that an oral hearing would assist it any further in resolving the issues on appeal, the request for an oral hearing is denied.

- *Request for confidentiality*

47. Mr. Kalil's request for confidentiality before the UNRWA DT was denied. In his appeal, Mr. Kalil requests that this Tribunal grant him confidentiality and direct the UNRWA DT to do the same.

48. Article 10(9) of our Statute provides that “[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal”. Our jurisprudence shows that the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.⁷ Mr. Kalil does not make any case as to why he should be granted confidentiality on appeal and, consequently, we are not satisfied that there are any reasons warranting such an order. For the same reasons, we reject his request for the redaction of his name from the UNRWA DT Judgment and affirm the UNRWA DT’s reasoning in declining his confidentiality request.

- *Request to submit new evidence to the Appeals Tribunal*

49. Mr. Kalil requests the Appeals Tribunal receive into evidence four annexes which he claims he would have submitted to the UNRWA DT “had proper procedures been followed”.

50. Article 2(5) of our Statute provides, inter alia, that:

In exceptional circumstances, and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence, including written testimony, it may receive such additional evidence if that is in the interest of justice and the efficient and expeditious resolution of the proceedings. [...]

51. Save for the provisions of Article 2(5), all evidence is to be submitted to the first instance Tribunal.⁸ We have consistently held that “we will not admit evidence which was known to the party and could have, with due diligence, been presented to the UNDT. The UNDT is not a dress rehearsal.”⁹ While Mr. Kalil claims that he would have submitted the proposed documents to the UNRWA DT, he does not offer any explanation as to why he was precluded from filing them at any point while his proceedings were extant before the UNRWA Dispute Tribunal. Moreover, we do not find any exceptional circumstances that would require this Tribunal to receive this documentary evidence. We also find that its content would not affect the decision of the case. The request is denied.

⁷ *Kazazi v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-557, para. 21 and cites therein.

⁸ *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-332, para. 18; *Seddik Ben Omar v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-264, para. 27.

⁹ *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056. See also *Seddik Ben Omar v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-264.

Alleged procedural errors by the UNRWA DT

52. Mr. Kalil alleges a number of procedural errors by the UNRWA DT which he claims have undermined its Judgment, among which is its failure to hold an oral hearing at which Mr. Kalil could present additional proof to establish his claims of bad faith by his FRO and constructive termination, and the fact that the UNRWA DT issued its Judgment without having received a reply by the Commissioner-General as to the merits of Mr. Kalil's case.

53. At the outset, we note the large discretion afforded to the UNRWA Dispute Tribunal in relation to case management matters, pursuant to Article 14 of the UNRWA DT Rules, which provides that the UNRWA DT "may, at any time, either on an application of a party or of its own initiative make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties". Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion of the UNRWA DT in the management of its cases.¹⁰

54. The UNRWA DT equally enjoys broad discretion to decide whether an oral hearing is necessary, as is clear from the provisions of the UNRWA DT Statute and UNRWA DT Rules governing oral hearings. Pursuant to Article 9(2) of the UNRWA DT Statute, "[t]he Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings [...]". Article 11(1) of the UNRWA DT Rules similarly provides "[t]he Judge hearing a case *may* hold oral hearings".¹¹

55. In this case, the UNRWA DT was in possession of Mr. Kalil's application, which detailed his complaints, as well as the Commissioner-General's reply and supporting annexes. Although Mr. Kalil takes issue with the adequacy of the Commissioner-General's reply, claiming that it did not address the merits of his claims, but only receivability, our review shows that the reply adequately set out, inter alia, the Agency's version of the facts relating to Mr. Kalil's extension. The fact that the reply otherwise contended that aspects of Mr. Kalil's application were not

¹⁰ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-560, para. 30, citing *Leboeuf et al. v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-354, para. 8, *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-294, para. 20, and *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23. See also *Darwish v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-369, para. 26 (noting that the UNRWA DT has discretion in matters of procedure).

¹¹ Emphasis added.

receivable did not render the reply incomplete. We are thus of the view that it was open to the UNRWA DT to consider that it had before it sufficient information to enable it to reach its decision without holding an oral hearing. We see no error in this regard and thus reject Mr. Kalil's claim that the UNRWA DT erred in issuing its Judgment without having before it a reply by the Commissioner-General on the merits.

56. For the foregoing reasons, we also reject Mr. Kalil's contention that his due process rights to seek production of documents and build his case were violated by reason of the Commissioner-General's allegedly limited reply, and that the UNDT erred in rejecting his motion for production of documents. Mr. Kalil had the opportunity to present the facts underlying his case in his UNRWA DT application and it was open to the Commissioner-General to put forward the arguments that he did. Further, contrary to his contention, Mr. Kalil has no *right* to the production of documents, but only the right to request such production, which he duly exercised by his motion of 4 October 2013.

57. Article 9(1) of the UNRWA DT Statute, which provides "[t]he Dispute Tribunal *may order* production of documents or such other evidence *as it deems necessary*",¹² makes clear that the production of documents is equally a matter that falls within the UNRWA DT's discretion. In relation to a Tribunal's power to order the production of documents or other evidence it deems necessary and the issue of admissibility of evidence, we have consistently held "that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before it".¹³ In paragraph 23 of Order No. 057, the UNRWA DT rejected Mr. Kalil's request, finding that it had all the documents necessary for it to render its decision. Accordingly, we discern no error in procedure in the UNRWA DT's rejection of Mr. Kalil's motion for production of documents.

58. Mr. Kalil also contends that the UNRWA DT erred in granting the Commissioner-General leave to participate in the proceedings after he had failed to file his reply within the time limits prescribed by the UNRWA DT Rules. This argument is without merit. It is now settled that the UNRWA Dispute Tribunal may, under its Rules, permit the Respondent to file a tardy reply and to participate in the proceedings.¹⁴ Article 6(1) of the UNRWA DT Rules provides: "The

¹² Emphasis added.

¹³ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and cites therein; *Wang v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-454, para. 36.

¹⁴ *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 37, citing *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-321.

Respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings *except with the leave of the Tribunal.*¹⁵

59. On 5 May 2014, the UNRWA DT, by way of Order No. 057 addressing a number of the parties' motions, granted the Commissioner-General's *ex parte* request of 18 October 2012 to participate in the proceedings and accepted his reply filed on 21 December 2012. Order No. 057 provides:¹⁶

While the Tribunal does not condone the Respondent's late filing, the [UNRWA Dispute] Tribunal finds it appropriate for a fair and expeditious disposal of the case and [to] do justice to the parties to accept the Respondent's reply, even if it is late.

60. We see no error in the manner in which the UNRWA DT exercised its discretion. While Mr. Kalil claims that the acceptance of the late reply caused him prejudice, in the same order the UNRWA DT also granted Mr. Kalil's motion of 25 January 2013 requesting an opportunity to file a rejoinder to the reply. Nonetheless, no rejoinder was filed. In the circumstances, Mr. Kalil's claim of prejudice must be dismissed.

61. Lastly, Mr. Kalil claims that the UNRWA DT erred in procedure in engaging in *ex parte* communications with the Commissioner-General in relation to the latter's 18 October 2012 request for leave to participate and file a reply on the merits. We have previously urged the UNRWA DT to act transparently when it allows such belated participation by the Respondent.¹⁷ Notwithstanding that the UNRWA DT continues to improperly engage in *ex parte* communications contrary to the guidance of this Tribunal, a practice we do not condone, we are not persuaded that this amounts to "underhanded behaviour" as alleged by Mr. Kalil. Further, as the UNRWA DT acted transparently when it addressed the issue of the Respondent's tardy reply in the Judgment,¹⁸ we are satisfied that no prejudice was caused to Mr. Kalil.

62. In conclusion, Mr. Kalil has not established any procedural errors warranting the reversal of the UNRWA DT Judgment.

¹⁵ Emphasis added.

¹⁶ Order No. 057, para. 18.

¹⁷ *Chahrour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-406, para. 37, citing *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2012-UNAT-321.

¹⁸ *Chahrour*, *ibid.*, para. 37.

Appeal on the merits

63. Mr. Kalil was initially employed by the Agency on a one-year contract which was renewed twice. On 5 January 2012, less than one month after the second renewal of his contract for an additional one-year period, Mr. Kalil questioned why he was not given a three-year contract and informed the Legal Adviser and the C/GLD of his intention to resign from his post. He subsequently submitted his resignation effective 5 March 2012.

64. Mr. Kalil argues that the UNRWA DT failed to consider that underpinning his grounds of appeal to the UNRWA DT was a case of constructive dismissal. We see no merit in that submission which misunderstands the key finding upon which the UNRWA Dispute Tribunal's Judgment rests.

65. The Appeals Tribunal in *Koda* held that "in a case of alleged constructive termination, the actions of the *employer* must be such that a reasonable person would believe that the employer was 'marching them to the door'".¹⁹ In such circumstances, although there has been no actual dismissal, the treatment is sufficiently bad to the extent that it usually creates a hostile working environment such that the resignation of the employee is not considered to be voluntary; it is in effect a termination and the employee is entitled to regard himself as having been dismissed.

66. In the instant case, the UNRWA DT could not be satisfied that the actions of Mr. Kalil's supervisors forced Mr. Kalil to leave his job as Mr. Kalil had never filed a formal complaint in this regard.²⁰ More significantly, however, and contrary to the constructive dismissal argument, the UNRWA DT determined that it was Mr. Kalil who voluntarily tendered his resignation just one month after being further extended for an additional one year.²¹ Furthermore, there was no evidence that the fact that his appointment was only extended by one year, as opposed to the three-year extension which he expected, was motivated by ill will or was intended to harass Mr. Kalil.

67. Additionally, we disagree with Mr. Kalil's contention that the UNRWA erred in fact and in law in finding that he did not have any expectancy of renewal for a three-year period. There is not a modicum of evidence before the UNRWA DT to suggest that Mr. Kalil had a legitimate

¹⁹ *Koda v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-130, para. 36 (original emphasis), citing *Balestrieri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-041, para. 24.

²⁰ Impugned Judgment, para. 36.

²¹ *Ibid.*, para. 31.

expectation that his contract would be renewed for three years and not for the one year which he was offered in the past. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case as we found was established in the case of *Munir*.²² Notwithstanding his reliance on the terms of ISC No. 1/4/97, which we highlight are discretionary,²³ and the Agency's purported long-standing practice of granting three-year appointments upon satisfactory completion of the first two years, there is no evidence of a firm commitment to renew his contract for an additional three years; in fact, there is no evidence that Mr. Kalil even had discussions on the issue with his supervisor.²⁴ Further, as the UNRWA DT correctly held, the fact that the decision to only extend Mr. Kalil's appointment for one year would have been submitted for review to the ACHR does not establish otherwise.²⁵

68. We have considered all of the other claims by Mr. Kalil and find them to be without merit.

69. In view of the foregoing, Mr. Kalil's appeal cannot succeed.

Judgment

70. The appeal is dismissed and the Judgment of the UNRWA Dispute Tribunal is affirmed.

²² *Munir v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-522, para. 24, citing *Ahmed v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-153 and *Abdalla v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-138.

²³ *Supra*, footnote 3.

²⁴ *Cf. Munir v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-522, paras. 29-30.

²⁵ Impugned Judgment, para. 33.

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Faherty

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

(Signed)

Weicheng Lin, Registrar