



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

Judgment No. 2022-UNAT-1242

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2021-1582
Date of Decision:	1 July 2022
Date of Publication:	18 July 2022
Registrar:	Weicheng Lin

Counsel for Appellant: Amer Abu-Khalaf, LOSA
Counsel for Respondent: Ana Peyro Llopis

JUDGE GRAEME COLGAN, PRESIDING.

1. Ezzedine Loubani is a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency). He filed an application with the UNRWA Dispute Tribunal (UNRWA Dispute Tribunal or UNRWA DT) challenging the decision of the Agency to impose on him certain disciplinary measures, including a written censure, a deferment of consideration for promotion for one year, a fine equivalent to one week's salary and the obligation to retake an ethics course. These measures were instituted following an investigation into a complaint, alleging that Mr. Loubani had shouted at one of his subordinates and made derogatory remarks to her.

2. On 20 June 2021, the UNRWA Dispute Tribunal issued Judgment No. UNRWA/DT/2021/028,¹ rejecting Mr. Loubani's application and finding that the imposition of the disciplinary measures was lawful.

3. For the reasons set out below, we allow Mr. Loubani's appeal in part and modify the UNRWA DT's Judgment.

Facts and Procedure

4. Mr. Loubani began service at the Agency in August 2009. On 1 March 2011, he received a fixed-term appointment at Grade 14, Step 1, as an Administrative Officer at UNRWA's Headquarters in Amman.

5. An inquiry into Mr. Loubani's alleged misconduct began on 23 April 2019 when the Department of Internal Oversight Services (DIOS), UNRWA, received an email from the Chief, Central Support Services Division, who reported that, on the day before, Mr. Loubani had shouted at another staff member (the complainant), who was, at the time of the incident, his subordinate.

6. On 25 April 2019, the complainant e-mailed DIOS directly alleging that Mr. Loubani had used derogatory remarks toward her about the time she had spent in the restroom. She also said that Mr. Loubani had shouted at her in front of other colleagues and hit the desk around which they were gathered.

¹ *Loubani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2021/028 (Impugned Judgment).

7. On 13 June 2019, DIOS informed Mr. Loubani that he was the subject of an investigation regarding his conduct towards the complainant. The Investigation Report that followed determined that, on 22 April 2019, Mr. Loubani was derogatory towards the complainant about the time she spent in the restroom. The investigation also concluded that he had shouted at the complainant and hit the desk, which was witnessed by other staff members.

8. In a letter dated 25 July 2019, the Director of Human Resources (DHR) informed Mr. Loubani about the findings of the investigation and invited him to respond to the charges. Mr. Loubani responded to this letter on 8 August 2019.

9. On 20 January 2020, the DHR imposed on Mr. Loubani the disciplinary measures of a written censure, a deferment of consideration for promotion for one year, a fine equivalent to one week's salary and the obligation to retake an ethics course.

10. On 3 February 2020, Mr. Loubani submitted a request for decision review. He followed that unsuccessful request with an application to the UNRWA DT on 14 April 2020 challenging the impugned decisions.

The UNRWA DT Judgment

11. On 20 June 2021, the UNRWA Dispute Tribunal issued its Judgment, finding ultimately that the imposition of the disciplinary measures on Mr. Loubani was not unlawful. First, the UNRWA Dispute Tribunal found no merit in all but one of the Appellant's claims that his due process rights were violated. Regarding his claim that he ought to have had access to the Investigation Report during the investigative process, the UNRWA DT explained that there was no such provision in the applicable law, and that Mr. Loubani had indeed been provided with a copy of the Investigation Report during the UNRWA DT proceedings.

12. Regarding Mr. Loubani's claim that all his proposed witnesses were not interviewed by the investigators, the UNRWA Dispute Tribunal explained that, under the applicable law, the Agency was not obliged to interview all proposed witnesses. Furthermore, Mr. Loubani had not made an apparent case of how and to what extent his non-interviewed witnesses would have been relevant to the investigation.

13. After making the above findings, the UNRWA Dispute Tribunal conducted an analysis of the case to review whether: (i) the facts on which the disciplinary measures were based had been established by a preponderance of the evidence; (ii) whether the established facts amounted to misconduct; (iii) whether the sanction was proportionate to the offense, and (iv) whether the staff member's due process rights had been violated.

14. Regarding the establishment of facts, the UNRWA Dispute Tribunal noted that the statements of numerous witnesses confirmed that Mr. Loubani had raised his voice at the complainant and hit the desk. The UNRWA Dispute Tribunal also explained that, in doing so, Mr. Loubani breached his obligations as a supervisor and, in violation of the applicable law, failed to carry out his responsibility to ensure a harmonious work environment.

15. The UNRWA DT also found that Mr. Loubani's derogatory comments about the amount of time the complainant had spent in the restroom were improper and caused offence and humiliation to her. This was said to have constituted harassment.

16. However, regarding the claim of abuse of power, the UNRWA Dispute Tribunal found the actions of Mr. Loubani toward the complainant were insufficiently related to the use of a position of influence, power or authority. Additionally, Mr. Loubani was not given a meaningful opportunity to respond to that particular charge.

17. Regarding the claim that he was violent toward the complainant, the UNRWA DT held that, in the context of this case, Mr. Loubani's aggressive action of hitting the desk so loudly that it alarmed other staff members nearby constituted a violent act and was in breach of the applicable law. Importantly, the UNRWA DT noted that not only were Mr. Loubani's actions improper for an employee of the Agency, but also it was seriously inappropriate and offensive for a supervisor to conduct himself in that manner.

18. Finally, the UNRWA Dispute Tribunal concluded that the disciplinary measures imposed were proportionate to the nature and gravity of Mr. Loubani's misconduct. It explained the measures were not the most severe ones available to the Agency and reflected the gravity of the situation, especially in light of the fact that Mr. Loubani was a supervisor.

19. As an additional conclusion, however, the UNRWA Dispute Tribunal explained that Mr. Loubani had not been given an opportunity to address the "aggravating factors" listed in the disciplinary sanction letter of 20 January 2020. These factors included: the allegation that

Mr. Loubani denied all wrongdoing; the allegation that he went out of his way to accuse the complainant of committing misdeeds; and finally, the allegation that he must have been aware of the standards of behaviour required of him since he had taken an online ethics course in 2013. The UNRWA Dispute Tribunal held these factors should not have been considered by the DHR in reaching his decision on the disciplinary sanction as the Appellant did not have an opportunity to dispute or otherwise address them in mitigation. The UNRWA Dispute Tribunal ruled that this was a clear and significant breach of Mr. Loubani's due process rights. It also noted that the DHR should have considered that this was Mr. Loubani's first disciplinary offence when assessing the sanctions to be imposed on him.

20. Nevertheless, despite such breaches of Mr. Loubani's due process rights, the UNRWA Dispute Tribunal determined that the sanctions imposed were still proportionate to his misconduct considering the nature and gravity of it. As such, the violations of his due process rights were not significant enough to render the impugned decision unlawful.

21. The UNRWA Dispute Tribunal thus concluded:²

In view of all the foregoing, having determined that 1) the facts – excluding the aggravating factors - on which the disciplinary measures, i.e., of a written censure, a deferment of consideration for promotion for one year and a fine equivalent to one week's salary, were based have been established; 2) the established facts legally support the conclusion of [Mr. Loubani's] misconduct, 3) the impugned disciplinary measures were proportionate to the nature and gravity of [his] misconduct, and 4) the Agency's discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law, the Tribunal finds that [Mr. Loubani's] contestation of the impugned disciplinary measures must be dismissed.

22. On 19 July 2021, Mr. Loubani filed an appeal against Judgment No. UNRWA/DT/2021/028. The Commissioner-General filed an answer to the appeal on 24 September 2021.

² *Ibid.*, para. 58.

Submissions

Mr. Loubani's Appeal

23. Mr. Loubani submits first and generally that the statements of all witnesses provided by the parties should be considered, and the subject of the investigation must be given an opportunity to defend the allegations against him. As such, he submits the UNRWA Dispute Tribunal erred when it considered the witnesses relevant to the case to be only the ones who had been selected by the investigators.

24. Second, Mr. Loubani submits that the UNRWA Dispute Tribunal erred in its establishment of the facts that he had banged the table. Mr. Loubani argues that, according to the same eyewitness who was at the scene, it was the complainant who hit the desk.

25. Third, Mr. Loubani submits that, given the UNRWA Dispute Tribunal found there was no abuse of power on his part, it erred when it failed to address the absence of abuse of power in analyzing the proportionality of the disciplinary measures meted out to him.

26. Fourth, Mr. Loubani argues the disciplinary measure of reducing temporarily his salary was not proportionate to the alleged misconduct as he had never caused financial loss to the complainant or the Agency. As such, the imposition of such a deduction in his salary was excessive.

27. Penultimately, in light of the procedural irregularity that Mr. Loubani never had the opportunity to address the aggravating factors in the disciplinary sanction letter of 20 January 2020, this violation of his due process rights should have influenced either or both the impugned decision and the judgment delivered by the UNRWA DT.

28. In conclusion, Mr. Loubani submits the UNRWA DT failed to properly assess the witnesses and the evidence before it. In particular, the UNRWA Dispute Tribunal ignored a relevant eyewitness who was closer in proximity to the scene than any other witnesses and who stated that it was the complainant who had both provoked the altercation and hit the desk. The UNRWA Dispute Tribunal also did not adequately consider the due process violations in this case. As such, he asks the Appeals Tribunal to remand the case to the UNRWA DT for a re-decision.

The Commissioner-General's Answer

29. The Commissioner-General submits the UNRWA DT did not err as a matter of fact, law or procedure. Although Mr. Loubani had identified alleged errors of fact, he has failed to establish that the findings of fact were not supported by the evidence or that they were unreasonable.

30. Regarding the claim that the statement of the eyewitness who was in close proximity to the scene was ignored, the Commissioner-General first submits that, according to UNAT jurisprudence, some degree of deference must be given to the factual findings of the UNRWA DT as the court of first instance. Furthermore, the Respondent argues that the UNRWA DT reviewed the record and concluded that it was clearly established by the statements of numerous witnesses that Mr. Loubani had raised his voice at the complainant and hit the desk loudly. Additionally, the UNRWA DT established by the preponderance of the evidence that Mr. Loubani was derogatory towards the complainant about the amount of time she had spent in the restroom. These conclusions were all supported by the DIOS Investigation Report, and as such, and considering the overall evidence on the record, the claim that this eyewitness was ignored is to no avail.

31. In response to the argument that the UNRWA DT erred in considering which witnesses were relevant or ought to have been interviewed, the Commissioner-General explains that there is no requirement that all proposed witnesses be interviewed. Second, it was incumbent upon Mr. Loubani to demonstrate how and to what extent his non-interviewed witnesses would have been relevant to the investigation. In particular, the Respondent notes that the UNRWA DT was correct to decide that the information to be provided by the two other proposed witnesses was obviously insufficient to conclude that the allegations against Mr. Loubani were not established.

32. In regard to the claim that a fine equivalent to one week's salary was disproportionate to the alleged misconduct because Mr. Loubani caused no financial loss to the Agency or to the complainant, the Commissioner-General argues that the imposition of a fine was neither absurd nor arbitrary. There is also no evidence that the measures taken were tainted by erroneous reasons or bias. Significantly, the Commissioner-General notes the imposition of a fine is not predicated upon causing a financial loss to the complainant or the Agency but is

simply only one of the forms of disciplinary measures that the Agency may impose on a staff member.

33. Finally, regarding the claim that there was a clear procedural irregularity, namely in failing to consider, as a mitigating factor, the fact that Mr. Loubani was a first-time offender, the Respondent explains the UNRWA DT was alive to this issue and the applicable jurisprudence. As such, the Respondent submits the UNRWA DT was correct when it concluded that despite the breach of Mr. Loubani's due process rights, it was not significant enough to render the impugned decision unlawful.

34. In conclusion, the Respondent submits that Mr. Loubani has not identified reversible errors warranting interference by this Tribunal. He therefore asks this Tribunal to find that the UNRWA DT did not err on a question of fact, law or procedure when it dismissed Mr. Loubani's application and therefore, to dismiss the appeal in its entirety.

Considerations

35. Mr. Loubani's grounds of appeal fall into two broad categories: first, he challenges the investigative process which led to the imposition of the sanctions by the Agency; and second, he criticises the UNRWA DT's Judgment. There is an inevitable element of cross-over between these two categories, in that Mr. Loubani says that the UNRWA DT erred in fact or law by not acknowledging and acting upon the investigation's faults by finding that the sanctions for his conduct should not have been imposed.

36. We address first Mr. Loubani's allegation of breach of his fair process rights during the investigation and decision phase of the complaints against him, and also during his request for decision review. Under this first category, Mr. Loubani complains that the UNRWA DT decided three issues of procedural fairness against him and erroneously in law. The first was that the investigators did not interview all the witnesses to the confrontation that he wished them to. The second was that the investigators did not examine all the evidence he had provided to them. The third was that, despite his requests for a copy of the investigators' report to the Agency as a result of which he was subjected to sanctions, this was wrongfully withheld from him and only provided too late, during the UNRWA DT's hearing, and even then, in a partially redacted form.

37. On the matter of witnesses not interviewed, the UNRWA DT held that while parties were generally entitled to call such witnesses before the Dispute Tribunal as they wished (subject to the ability of such witnesses to give evidence relevant to the issues in the litigation), different rules applied to an investigation of a complaint of misconduct by a staff member. It held there was no express requirement in the Agency's regulatory framework requiring the investigator(s) to do so. Any failure to do so by the investigators in this case was, thereby, not a violation of Mr. Loubani's due process rights. In any event, it said that it was open to Mr. Loubani to adduce the evidence of these witnesses before the UNRWA DT but he failed to do so, at least persuasively.

38. Due process rights apply not only to proceedings before the UNRWA DT. Although not always in the same way as before a judicial body (the UNRWA DT), due or fair process rights also apply to the manner in which the Agency investigates allegations of misconduct which may lead to sanctions including, in some cases, serious sanctions affecting the rights of a staff member to continue working for the Agency. One such fair process right is that a staff member being investigated is entitled to expect that any decision or recommendation made by the investigation will have considered relevant matters and will not have considered irrelevant matters. If a proposed witness has evidence to give to an investigation that is relevant to its subject matter, if the investigators are made aware of the general nature of that evidence to enable them to confirm its *prima facie* relevance, and if the staff member being investigated requests that the investigators interview such a witness, there is a real risk that, by failing to do so, the investigation will reach a conclusion following a failure to take into account relevant matters. That is why fair process rights in an investigation of alleged misconduct are important.

39. While we agree with him that the Agency's investigation should have had regard to Mr. Loubani's request that the witnesses nominated by him be interviewed, that did not, however and as a matter of fairness and due process, require the investigators to interview those witnesses or rely on whatever evidence they may have provided. It would have been an appropriate and fair response to Mr. Loubani's request to have sought from him an indication what such witnesses might tell the investigators. Had that occurred, however and as it did in the UNRWA DT, it would have disclosed that the proposed witnesses had little or nothing relevant to add to the investigation and in these circumstances, the investigators would have been justified in not interviewing them. So, while it was a due process failing by the

investigation not to make such enquiries, it would have made no difference to the outcome had they done so. That failing cannot therefore amount to such a failure of fairness or natural justice that Mr. Loubani thereby succeeds in having the substance of his case reversed.

40. While for reasons we have given, a preliminary assessment should have been made by the investigators, this was done by the UNRWA DT and the evidence found to be so inadequate as to be safely ignored. Mr. Loubani had and took the opportunity to present this evidence before the UNRWA DT so that its proper assessment meant that his due process right was allowed, albeit belatedly. It would have made no difference to the outcome had the investigators done so. The investigators would have reached the same conclusion about the relevance and reliability of those witnesses' accounts.

41. On the question of the Agency's failure or refusal to supply a copy of its Investigation Report to Mr. Loubani (at least until it did so during the UNRWA DT's process), we conclude that the Agency and the UNRWA DT both erred in concluding that Mr. Loubani was not entitled to this, at least at the conclusion of the former's investigation and before it determined what was to be the outcome of the investigation's findings. That is for several reasons. It is a fundamental precept of natural justice and fair process that before a staff member is able to be sanctioned for misconduct which has been investigated and decided upon (including potentially as seriously as by the staff member's loss of employment), that staff member is entitled to know what was found and why. Such information may be, and indeed often is, important to a staff member in putting that staff member's case to the Agency about the consequences of the findings. It does not matter that such a right may not be specified in relevant procedures (although we consider that it should be); it is such a fundamental element of workplace natural justice that it should go without saying. Nor was it sufficient compliance with this basic right that the investigation report was only provided both during the UNRWA DT's hearing and then in redacted form. While careful consideration needs to be given to identifying witnesses at that stage, it is often the case that who told the investigation something is as important as what was told. That advice may reveal otherwise unknown ill motive by the witness towards the subject of the investigation, an alibi defence to the allegation or some other factor that would not be revealed by suppressing the identities of witnesses. And there are strong protections against retaliation for participation in an investigative interview. In all cases, it will be a matter of balancing rights to know one's accusers against the risks to those persons of disclosing their identities.

42. While its provision of the Investigation Report to Mr. Loubani at that belated stage may have been an acknowledgment of his entitlement to it, that came too late. And apparently without persuasive grounds for redaction of portions of the investigation's report, that form of unilateral censorship of it was likewise not only inadequate but itself another due process breach.

43. While the Agency's and the UNRWA DT's identified errors were serious, that does not mean that they necessarily negate the significance of findings properly made about Mr. Loubani's conduct. As in all cases of due process failures, it is necessary to weigh the significance of the failure against what would have been the outcome had the failure(s) not occurred. This is sometimes referred to as the "no difference" principle and indeed the UNRWA DT did apply it to the one due process failure it found the Agency was responsible for.

44. While neither party has appealed the UNRWA DT's conclusion of a due process breach (being the Agency's failure to allow Mr. Loubani to address what it categorised and took into account as aggravating factors affecting his conduct), Mr. Loubani does challenge the Tribunal's ultimate conclusion that these significant breaches of due process by the DHR did not affect the justification for the sanctions imposed on Mr. Loubani by the Agency.

45. Regarding those factors determined by the Agency as having aggravated Mr. Loubani's misconduct, it is difficult to accept that they would not have been reflected in the severity of the sanctions imposed upon him. So, while we agree with the UNRWA DT that these were exigencies which the Agency ought not to have taken into account, we consider that the UNRWA DT erred in law in failing to modify those sanctions by ameliorating them. We will do so at the conclusion of this Judgment.

46. We do not accept the ground of appeal that the UNRWA DT wrongly determined that it was the complainant, and not Mr. Loubani, who had struck the table. As well as being inherently unlikely that the complainant would have done so in all the circumstances, and correspondingly more likely that Mr. Loubani did so, the UNRWA DT was in the best position to determine this disputed fact, and nothing has been shown to persuade us that it did so erroneously.

47. In relation to Mr. Loubani's final point that insufficient account was taken of the Agency's due process error in not allowing him to bring to its attention positive factors which, if they had been taken into account, would also have ameliorated the sanctions imposed on him, we find this to be ultimately unpersuasive. While there was that failure to afford him due process which the Agency should not repeat in any future analogous case, we are not persuaded that the outcome would have been more favourable to Mr. Loubani had the Agency taken into account, as an ameliorating factor, Mr. Loubani's previously good work record. The sanctions imposed upon him were, for the most part and even for a staff member of his previous good standing, nevertheless proportionate to the circumstances of the misconduct exhibited by him on this occasion.

48. The Respondent is correct that the temporary reduction in Mr. Loubani's salary was not tied to any element of financial loss either to the complainant or to the Agency. It was penal and not compensatory in nature.

49. As to Mr. Loubani's argument that the UNRWA DT failed to take into account in determining the correctness of the sanctions on him imposed by the Agency the absence of any abuse of power, we likewise find this argument unpersuasive. Although there is no cross-appeal against the UNRWA DT's conclusion that there was no abuse of power in what Mr. Loubani did, he nevertheless raised his voice against a member of his staff who reported to him and hit his desk hard and angrily with his hand in the same communication. Even if not an abuse of authority, that was at least an unacceptable conduct by a staff member's supervisor and was rightly to be sanctioned.

50. It was open to the UNRWA DT to have preferred the evidence of witnesses that Mr. Loubani hit the desk with his hand rather than his account which was that the complainant, and not he, did so. The UNRWA DT was best placed to make this credibility finding and the significantly persuasive circumstances, which might make it appropriate to reverse that on appeal, have not been shown.

51. We are unpersuaded to Mr. Loubani's argument that the UNRWA DT wrongly rejected the evidence of a witness who, he says, was present, and preferred that of witnesses further by distance away from the scene of the confrontation, that the complainant provoked Mr. Loubani. Simply preferring the evidence of an eye witness because she was present, and rejecting that of other witnesses who may only have heard and observed other phenomena

which corroborated the complainant's, would ignore such more subtle considerations as the quality and consistency of the evidence, not to mention its inherent probability. The UNRWA DT was well placed to make those comparative assessments of the quality of the evidence presented to it and it has not been shown to have erred in its factual conclusions drawn from it. This ground of appeal is rejected.

52. There is really only one ground of appeal on which Mr. Loubani both succeeds and which should change the outcome of the case. We are persuaded that the UNRWA DT should have ameliorated the sanctions imposed by the Agency to reflect its inevitable harshening of these by taking account of considerations of which the Agency had given him no opportunity to be heard before determining those sanctions. That is most justly rectified by modifying the UNRWA DT's Judgment to rescind the Agency's decision to penalise Mr. Loubani by withholding one week's salary from him. That still leaves as appropriate sanction for his proven misconduct: a written censure, the one year deferral of consideration for promotion and the requirement to retake a relevant ethics course. The appeal is allowed but only in part and the UNRWA DT's Judgment is modified accordingly.

Judgment

53. Mr. Loubani's appeal is granted in part and Judgment No. UNRWA/DT/2021/028 is modified by rescinding the order that one week's salary be withheld from Mr. Loubani.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

(Signed)

Judge Colgan, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Judgment published and entered into the Register on this 18th day of July 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar