

# **2015-UNAT-537, Wishah**

## **UNAT Held or UNDT Pronouncements**

UNAT considered an appeal by the Commissioner-General. UNAT held that UNRWA DT set out the correct legal framework, but thereafter erroneously reviewed the evidence and interfered with the administrative discretion, since UNRWA had established the misconduct by clear and convincing evidence. UNAT held that UNRWA DT erred in law in its evaluation of the evidence and that UNRWA had established the existence of the facts warranting disciplinary sanction. UNAT held that the procedure and the subsequent decision were lawful and there was no basis to rescind the termination or to award any compensation. UNAT held that UNRWA DT erred in finding there was no clear and convincing evidence in support of the allegations against Mr Wishah. On the first count (assault against Imam Abu Al Amrain), UNAT held that the investigator conducted an adequate review and that he was in the best place to weigh the evidence directly obtained and to reach a reasonable conclusion about the occurrence of the assault. UNAT held that there was sufficient evidence to support the finding that the incident occurred as described by the complainant, i. e. , that the truth of the facts was highly probable. On the second count (the assault of Naser Wishah and Ashraf Wishah), UNAT held that UNRWA DT erred in disregarding the testimonies of the two complainants, their two sisters and the wife of one of them, without explaining why those five persons would repeatedly lie to prejudice the staff member. UNAT held that the investigation yielded sufficient evidence that supported the high probability that the second count (assault) took place. UNAT held that there was no reason to depart from the conclusion initially reached by UNRWA, i. e. , that the established facts amounted to serious misconduct. UNAT agreed with UNRWA DT that there was no need to examine the third count against the staff member, given there was sufficient evidence following a proper investigation, and that the assault could be considered as serious misconduct warranting termination as an appropriate sanction. UNAT held that there was no breach of Mr Wishah's due process rights. UNAT held that UNRWA found the facts amounting to misconduct were established and selected a lawful sanction proportionate to the nature of the offence among the possible options,

which was not absurd or arbitrary and was without any kind of bias, deviated purpose or procedural irregularity. UNAT allowed the appeal and vacated the UNRWA DT judgment.

## Decision Contested or Judgment/Order Appealed

Mr Wishah contested the decision to suspend him without pay and to terminate his employment with retroactive effect for misconduct, having determined that he had been involved in multiple violent altercations during and after a wedding celebration and for attempting to provide falsified affidavits to mislead the investigation. Following previous proceedings which resulted in an appeal to UNAT, the matter was remanded back to UNRWA DT for consideration de novo. UNRWA DT found for Mr Wishah, rescinded the decisions, and ordered reinstatement from the date of suspension (or a payment in the alternative), reimbursement of salary and benefits withheld during the suspension. UNRWA awarded moral damages.

## Legal Principle(s)

When reviewing a disciplinary sanction imposed by the Administration, the role of UNDT (or equivalent first-instance tribunal) is to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

## Outcome

Appeal granted

## Outcome Extra Text

No relief ordered; No relief ordered.

## Full judgment

[Full judgment](#)

## Applicants/Appellants

Wishah

## Entity

UNRWA

## Case Number(s)

2014-613

## Tribunal

UNAT

## Registry

New York

## Date of Judgement

2 Jul 2015

## President Judge

Judge Simón

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Disciplinary matters / misconduct

Assault (verbal and physical)

Dismissal/separation

Termination (of appointment)

Disciplinary sanction

## Related Judgments and Orders

2014-UNAT-420

2015-UNAT-511

2011-UNAT-164

2013-UNAT-302

2014-UNAT-442