

2024-UNAT-1474-Corr.1, Erdinch

Lutfiev

UNAT Held or UNDT Pronouncements

The Appeals Tribunal found that the Administration's decision not to investigate further Mr. Lutfiev's allegations against his former Chief of Staff was one which it was entitled to make given that the former Chief of Staff was no longer an UNRWA staff member.

Furthermore, the Appeals Tribunal was satisfied that the UNRWA DT's decision rescinding Mr. Lutfiev's separation from service was decided erroneously. The Dispute Tribunal applied the wrong methodology to its consideration of the grounds for Mr. Lutfiev's separation from service and failed to undertake what is known as the four-pronged examination of the lawfulness of that administrative decision. As a result, the UNRWA DT did not make findings to the clear and convincing evidential standard required in this case.

The Appeals Tribunal reversed the UNRWA DT's rescission of the decision not to investigate Mr. Lutfiev's complaint of prohibited conduct towards him; reversed the decision to impose on Mr. Lutfiev the disciplinary measure of separation from service and remanded the matter to the UNRWA Dispute Tribunal for re-hearing and re-decision; and reversed the associated awards of compensation and costs.

Decision Contested or Judgment/Order Appealed

When a perpetrator of misconduct is no longer with the Organization, sanctions cannot be imposed and there cannot be a specific deterrent to that individual's continuation or repetition of the particular misconduct whilst employed by the Agency or Organization. Investigation of allegations of misconduct and its sanctioning in specific cases is not a compensatory or other remedial process for a staff member claiming to be the subject of misconduct.

In disciplinary cases, the Dispute Tribunal must establish: i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, iii) whether the sanction is proportionate to the offence, and iv) whether the staff member's due process rights were observed in the investigation and the disciplinary process. Furthermore, when termination is a possible outcome, misconduct must be established by clear and convincing evidence.

Legal Principle(s)

Before the UNRWA DT, Mr. Lutfiev contested, *inter alia*, the decision not to conduct an investigation into Mr. Lutfiev's prohibited conduct complaint against the former Chief of Staff (CoS) and the decision to separate Mr. Lutfiev from service, with compensation in lieu of notice and termination indemnity, for serious misconduct.

In Judgment No. UNRWA/DT/2023/028, the UNRWA DT recalled that in cases where an applicant can call on protection against retaliation, the Administration must prove by clear and convincing evidence that it would have taken the same action absent the protected activity as referred to in GSC 5/2007. The UNRWA DT was satisfied that the Department of Internal Oversight Services had found that there was a credible case of retaliation and thus GSC 5/2007 applied. The UNRWA DT found that the Commissioner-General had made no reference to GSC 5/2007 or the applicable burden of proof, and thus failed to provide any evidence, let alone clear and convincing evidence, to prove that it would have taken the same decisions absent the complaints of discriminatory treatment.

The UNRWA DT rescinded the decision not to conduct an investigation into Mr. Lutfiev's prohibited conduct complaint and awarded Mr. Lutfiev compensation for the inordinate delay in handling his complaint as well as legal costs.

The UNRWA DT also rescinded the decision to terminate Mr. Lutfiev's appointment for misconduct and awarded in-lieu compensation and legal costs.

The Commissioner-General filed an appeal.

Outcome

Appeal granted

Outcome Extra Text

The Commissioner-General's appeal is granted and Judgment No. UNRWA/DT/2023/028 is reversed, in part, as follows: the UNRWA DT's rescission of the decision not to investigate the former [Chief of Staff] and the related award of costs are reversed. The UNRWA DT's rescission of the decision to separate Mr. Lutfiev from service is reversed, and the issue is remanded to the UNRWA DT for re-hearing and re-decision. The related awards of in-lieu compensation and costs are reversed.

Full judgment

[Full judgment](#)

Applicants/Appellants

Erdinch Lutfiev

Entity

UNRWA

Case Number(s)

2023-1850

Tribunal

UNAT

Registry

New York

Date of Judgement

14 Aug 2024

President Judge

Judge Colgan

Judge Sandhu

Judge Savage

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Disciplinary measure or sanction

Dismissal/separation

Facts (establishment of) / evidence

Investigation (see category: Investigation)

Fact-finding investigation

Disciplinary sanction

Disciplinary matters / misconduct

Investigation

Termination (of appointment)

Applicable Law

Laws of other entities (rules, regulations etc.)

- UNRWA General Staff Circular GSC 5/2007

Related Judgments and Orders

2023-UNAT-1375