



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

Judgment No. 2019-UNAT-972

Al Othman
(Respondent/Appellant)

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Dimitrios Raikos Judge Graeme Colgan
Case Nos:	2019-1273 & 2019-1280
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Al Othman:	Self-represented
Counsel for Commissioner-General:	Rachel Evers/Michael Schoiswohl

JUDGE SABINE KNIERIM, PRESIDING.

1. The present cases arose from the summary dismissal for serious misconduct of Mr. Mohammad Al Othman, a Teacher in Mathematics at a Preparatory Girls' School employed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) in Lebanon. By Judgment No. UNRWA/DT/2019/019, the UNRWA Dispute Tribunal (UNRWA DT) concluded that the facts upon which Mr. Al Othman had been disciplined had not been established by clear and convincing evidence. The UNRWA DT rescinded the decision to summarily dismiss Mr. Al Othman and ordered in-lieu compensation in the amount of USD 19,000 (corresponding to two years' net base salary). Absent any evidence of harm, the UNRWA DT denied his request for moral damages. We remand the case to a different Judge of the UNRWA DT for a new consideration of the merits.

Facts and Procedure

2. Effective 10 September 2001, Mr. Al Othman was employed by the Agency as "Secondary Teacher Math/Computer" on a Limited Duration Contract, Level 6U, Step 1. Effective 1 August 2004, Mr. Al Othman's appointment was converted from the "Z" to the "X" category, and he was appointed on a fixed-term appointment, Grade 10, Step 1, Lebanon Field Office (LFO). After several extensions, effective 14 September 2006, Mr. Al Othman was transferred to the post of "Teacher Mathematics" at Amqa Preparatory Girls' School, (Amqa School) in Nahr El Bared Camp (NBC). Mr. Al Othman held this post at the time relevant to his application before the UNRWA DT.

3. By e-mail to the Grievances Officer, LFO (GO/LFO) dated 10 November 2015, the Protection Officer, Operations Support Office (PO/OSO) reported that the OSO Team had received a phone call from Mr. A. L., a teacher at Amqa School, alleging that Mr. Al Othman had raped Ms. A, a 16-year old student of the school. The incident allegedly took place at Mr. Al Othman's private tutoring center, inside the NBC. In the same e-mail, the PO/OSO also indicated that they had received a call from Ms. A's sister clarifying that Ms. A had not been raped but that she had been sexually assaulted.

4. On 16 November 2015, the complaint was referred to the Department of Internal Oversight Services (DIOS) and a preliminary assessment was ordered by the Director of the DIOS. The preliminary assessment dated 13 December 2015 recommended that a formal investigation be conducted into the allegations of sexual exploitation and abuse committed by Mr. Al Othman. In the final report of investigation dated 13 July 2016, the DIOS reported that there was sufficient evidence to conclude that Mr. Al Othman had breached the Agency's Regulations and Rules with respect to the prohibition of sexual exploitation and abuse.

5. The investigation made the following findings:

... With respect to the sexual exploitation and abuse allegation, both the victim and the subject present drastically different versions of the incident. Both versions cannot be true. As is often the case in these types of situations, there were no independent witnesses to the incident, and DIOS must therefore carefully assess the evidence available, and especially the independent evidence, to determine which version is the most credible, and hence, the most likely.

... First, the existence of a text message sent to [Ms. A] (through her mother) to change the time of the tutoring class on the last day of the school year is important. Mr. Al Othman claims that he did not send this message, and would only communicate through [Ms. A's sister]. It is regrettable that given the time that had elapsed, the specific text message was not available to DIOS. However, it was seen not only by [Ms. A] and her family, but also by the Assistant Principal of the school, Ms. W(...). Ms.] W(...) saw the message when she visited [Ms. A]'s house to try to understand what had happened. While some of the dates provided by Ms. W(...) seem to be off, the rest of her evidence regarding the events after the allegation was first raised is consistent with the evidence of other witnesses, and DIOS accordingly considers that on this point, it is equally accurate. DIOS also did not find, nor was it suggested by any of the witnesses or the subject, that Ms. W(...) would be biased or had a motive to lie. This not only corroborates and significantly enhances the credibility of [Ms. A]'s version, it casts doubt on Mr. Al Othman's credibility as he flatly denied having sent that message.

... Second, Mr. Al-Othman also denied asking two young boys ... for photos of [Ms. A] despite the evidence suggesting the contrary. Both [boys] stated Mr. Al-Othman asked for photos of [Ms. A] so that he could prove [she] was a "dirty" girl and tarnish her reputation. Even had [Ms. A] shared photos, DIOS would not consider this in any way affecting [her] credibility, but its relevance is that Mr. Al Othman's mind, this was relevant to help him counter the accusation and he therefore not only attempted to find such photographs, but also denied having done so. Mr. Al Othman was also quick to lay blame on someone else ... to try to deflect the allegation against him, but the school principal was quick to admonish Mr. Al Othman for doing so. It was also a curious feature of Mr. Al Othman's evidence that he seemed to be more upset with Mr. L(...) for pursuing the

allegations than with [Ms. A] for making what he claims was a false accusation. These actions, trying to tarnish the victim's reputation and accusing someone else of a serious wrongdoing, are not those of someone unjustly accused and only trying to defend himself. They also cast doubt on Mr. Al Othman's entire account of the events.

... Third, the evidence also does not support Mr. Al Othman's contention that he was not in the room when [Ms. A] was asked at the centre the first time whether she had been sexually assaulted by Mr. Al Othman. This contention is central to Mr. Al Othman's version, in that he claims that her denial at that stage shows that nothing had happened, and that it was Mr. L(...) who had then pursued the matter. However, Mr. T(...), [a teacher at the school and] another independent witness, as well as [Ms. A's] father, rather state that Mr. Al Othman was present during the meeting. In that context, the denial by [Ms. A] in front of her alleged aggressor is readily understandable, and does not, in DIOS view, undermine [Ms. A]'s credibility.

... In contrast, the inconsistencies found in [Ms. A]'s testimony when compared to the evidence in general were minor. For example, Mr. K(...), the eldest teacher in the school,] denied being present when [Ms. A] met with Mr. Al Othman in the principal's office and challenged him, but then both Mr. Al Othman and the school principal Mr. H(...) confirm[ed] that a meeting took place but were vague about what was discussed. DIOS gained the impression that some of the UNRWA staff interviewed were more concerned with avoiding any involvement in the matter, believing that this was an internal matter, or avoiding any accusation of wrongdoing and mishandling the complaint, rather than genuinely assisting DIOS in gathering a clear picture of the events that took place. As importantly, [Ms. A]'s account does not suffer from indications that she was fabricating the story, and it is difficult to imagine that a young woman in her specific cultural and religious context doing so, and risking being doubly victimized, as appeared to already have happened. [Ms. A]'s account was also largely consistent over time, to Mr. L(...) initially, but then also to the school principal and vice principal, as well as to DIOS on two separate occasions.

... Finally, DIOS notes that this incident would have remained concealed from DIOS and UNRWA's knowledge absent Mr. Al Othman's wife's insistence on not letting the matter rest. It appears that despite the matter being informally resolved between Ms. A's father and Mr. Al Othman, first through the intervention of Mr. A[, the school supervisor, North Area, FLO], and then through the principal, she felt the overall belief would be that the incident did take place, and therefore insisted on publicly trying to claim that this was a fabrication from Mr. L(...).

... In light of the above analysis, DIOS finds [Ms. A]'s account to be the most credible, and therefore the most accurate. It was unswerving throughout, consistent with the other evidence (also the bruise on her neck), and DIOS also did not find anything in her demeanor during her two interviews with DIOS to suggest that she was lying. In fact, it could be seen that the incident still carried severe emotional stress upon her, and she started crying when recounting the details of the assault to DIOS. When contrasted

with Mr. Al Othman's evidence, shown to be self-serving, contrived, and inconsistent with the evidence, it can only lead to the conclusion that Mr. Al Othman did sexually assault [Ms. A] by forcibly holding her and kissing her on her neck, without her consent.

... DIOS also finds that Mr. Al Othman operated his private tutoring centre without proper UNRWA authorization since 2014.

6. By letter to Mr. Al Othman dated 15 November 2016, the Acting Director of UNRWA Affairs/Lebanon (A/DUA/L) informed him about the findings of the investigation and provided him with an opportunity to respond. Mr. Al Othman responded on 15 December 2016.

7. By memorandum to the Commissioner-General dated 18 January 2017, the A/DUA/L recommended the summary dismissal of Mr. Al Othman for his engagement in serious misconduct. The Commissioner-General approved the recommendation on 28 February 2017.

8. By letter dated 17 March 2017, the A/DUA/L imposed on Mr. Al Othman the disciplinary measure of summary dismissal, and Mr. Al Othman was separated from the Agency that same day.

9. On 15 May 2017, Mr. Al Othman requested review of the decision to summarily dismiss him.

10. On 5 July 2017, Mr. Al Othman filed a motion with the UNRWA Dispute Tribunal requesting that he be given copies of the preliminary and final investigation reports and that the Tribunal grant him an extension of time to file his application.

11. By Order No. 090 (UNRWA/DT/2017) dated 12 July 2017, the UNRWA DT found that it had received sufficient information to open a case file and considered Mr. Al Othman's motion as an application. In the same order, the UNRWA DT ordered the Commissioner-General to submit his reply and copies of the preliminary assessment report and the report of investigation on an *ex parte* basis.

12. On 26 September 2017, the Commissioner-General issued a new letter summarily dismissing Mr. Al Othman. This letter superseded the previous letter dated 17 March 2017, which had been signed by the A/DUA/L. The Commissioner-General found that Mr. Al Othman abused his position as a teacher by engaging in "Sexual Exploitation and Abuse of an UNRWA beneficiary". The Commissioner-General also indicated that the effective date of Mr. Al Othman's summary dismissal remained the same, i.e., 17 March 2017.

13. On 18 November 2018, Mr. Al Othman filed a submission to the UNRWA DT claiming that his representative had received a letter from the Director of UNRWA Operations, Jordan (DUO/J) preventing him from representing Mr. Al Othman and that he and his representative would not be present at the hearing. On 21 November 2018, the Commissioner-General submitted that it was not the intent of the Agency to prevent Mr. Al Othman's representative from taking part in the UNRWA DT's hearing, and that the referenced letter was a reminder to Mr. Al Othman's representative of his obligations and limitations as a staff representative.

14. On 26 November 2018 and 20 March 2019, the UNRWA DT conducted oral hearings. The UNRWA DT heard from the Commissioner-General and several witnesses and Ms. A testified via video-link from the LFO. Mr. Al Othman and his representative were not present at the hearing.

15. Throughout the pre-trial proceedings, the UNRWA DT ruled on a host of motions submitted by Mr. Al Othman. He was *inter alia* seeking access to materials such as the unredacted preliminary assessment report and the final report of investigation with all annexes and/or exhibits as well as requests to receive translations of relevant documents. His requests were largely denied.

16. On 17 April 2019, the UNRWA DT issued its Judgment. The UNRWA DT rejected the Commissioner-General's contention that the application was not receivable on the ground that the contested decision had been superseded by a subsequent administrative decision of the Commissioner-General dated 26 September 2017. The UNRWA DT was satisfied that Mr. Al Othman had timely filed his application contesting the decision to summarily dismiss him and the fact that the Commissioner-General issued a new letter of summary dismissal could not result in Mr. Al Othman being obliged to submit a new application, as both letters imposed the same disciplinary measure based on the same facts, rationale and conclusions.

17. As a preliminary matter, the UNRWA DT found that, given the sensitive nature of the case, it was appropriate to provide Mr. Al Othman with a redacted version of the report of investigation in order to protect Ms. A and her family as well as the student witnesses who were minors on the date of the alleged incident. The UNRWA DT emphasized that its Judgment was based upon the facts and testimonies known to both parties. The UNRWA DT further noted that, irrespective of Mr. Al Othman's non-appearance at both hearings, its task remained unchanged, namely, to review the legality of the contested disciplinary measure.

18. Turning to the merits, the UNRWA DT first examined whether the facts upon which the disciplinary measure was based had been established. Since Mr. Al Othman contended that he had never sexually assaulted Ms. A, it was for the Agency to establish by clear and convincing evidence that he had engaged in sexual exploitation and abuse.

19. The UNRWA DT concluded that there was no clear and convincing evidence that Ms. A was actually at the center on the last day of the 2014-2015 school year. In reaching its finding, the UNRWA DT noted Mr. Al Othman's contention that he had not met with Ms. A on the day she claimed she had been assaulted by him and that on that date, Ms. A was not even a student of the center, as he had previously expelled her. In addition, the UNRWA DT noted that while Ms. A had stated to the investigators that the alleged incident occurred on the last day of the 2014-2015 school year, the investigation report did not indicate a specific date. Finally, it noted that Ms. A had gone, in the past, to the center accompanied by her mother or brothers, but on the day of the alleged incident, she was not accompanied.

20. The UNRWA DT found that one of the significant pieces of evidence that the investigators relied on was the testimony of the deputy school principal who had stated during her interview before the investigators that there had been a WhatsApp group that included Mr. Al Othman and the students attending his private center which had been used to exchange information on the schedule of classes. The deputy school principal stated that Ms. A's mother had, however, shown her WhatsApp messages from Mr. Al Othman on her phone, in which he reminded Ms. A of the time of some lectures at the private center. According to the deputy principal, there was one message directly addressed to Ms. A advising her of a change in schedule of a particular lecture which was dated the day of the alleged incident.

21. The UNRWA DT noted that the deputy principal's testimony conflicted with Mr. Al Othman's own statements, and while agreeing with the investigators that the WhatsApp message Mr. Al Othman sent to Ms. A was a significant piece of evidence, it decided to hear testimony from the deputy principal since the WhatsApp message had not been available to the investigators. During the hearing, the deputy principal testified under oath that Ms. A's mother had shown her the WhatsApp message, but that she was unable to read it or see the date on it due to the distance between herself and Ms. A's mother. The UNRWA DT therefore concluded that it had not been established that Mr. Al Othman had sent Ms. A a WhatsApp message on the last day of the school year.

22. The UNRWA DT further found that the bruise on Ms. A's neck, which had been seen by Ms. A's family members, could not be considered as evidence for the alleged assault since it was not clear when it had been caused and by whom.

23. The UNRWA DT acknowledged the findings the investigators had made about Mr. Al Othman's behaviour in response to the allegations against himself. It noted that, according to the investigators, Mr. Al Othman had tried to influence Ms. A and her family, had attempted to locate photographs to weaken Ms. A's credibility, had made statements to the investigators with the intent to tarnish her reputation and integrity, and had lied to the investigators about his attempt to obtain photographs of Ms. A. The UNRWA DT, however, found that such behaviour was common among individuals accused of wrong doing, regardless of whether they were guilty or innocent and that the fact that Mr. Al Othman had lied to the investigators about his attempts to obtain photographs of Ms. A could not be considered as evidence that he had also lied about the alleged assault. Finally, the UNRWA DT noted that Mr. Al Othman had participated in several meetings with Ms. A's family for the purpose of closing the case by mediation; yet, there was no evidence or testimony that Mr. Al Othman had ever admitted to assaulting Ms. A.

24. The UNRWA DT noted that in cases, where there was no material evidence or percipient witness other than a complainant and an accused, the credibility of the complainant was crucial. The UNRWA DT found that if the assault had occurred, Ms. A unfortunately did not report the incident at the first reasonable opportunity and when she reported it to a teacher after the summer break, her versions changed several times. The UNRWA DT also noted the testimonies of two witnesses who testified before the UNRWA DT that Ms. A's allegations were credible and that her highly sensitive state of mind could result from a sexual assault, but concluded that there was no evidence that it indeed was the result of an assault and that Ms. A's behaviour had already been a cause of concern to her family before the alleged assault.

25. The UNRWA DT concluded that there was no material evidence nor a direct witness of the assault and the investigation's findings that Ms. A's account was the most credible and accurate were not supported by clear and convincing evidence. The UNRWA DT therefore held that the facts upon which Mr. Al Othman had been disciplined had not been established by clear and convincing evidence. The UNRWA DT rescinded the decision to summarily dismiss Mr. Al Othman and ordered in-lieu compensation in the amount of USD 19,000 (corresponding

to two years' net base salary). Absent any evidence of harm, the UNRWA DT denied his request for moral damages.

26. The Commissioner-General filed an appeal on 17 June 2019 which was registered under Case No. 2019-1273, and Mr. Al Othman filed his answer on 16 August 2019. Mr. Al Othman filed an appeal on 1 July 2019 which was registered under Case No. 2019-1280, and the Commissioner-General filed his answer on 2 September 2019.

Submissions

The Commissioner-General's Appeal

27. As a preliminary matter, the Commissioner-General contends that the UNRWA DT failed to provide oral transcripts. Since Ms. A's credibility was critical to the preparation of the appeal, the Appeals Tribunal may consider that the absence of written transcripts constitutes a fundamental flaw requiring a remand. However, the evidence on record provides a sufficient basis for the Appeals Tribunal to affirm the summary dismissal.

28. The UNRWA DT erred in law and fact by finding that the facts upon which Mr. Al Othman was disciplined had not been established by clear and convincing evidence. There was clear and convincing evidence that Mr. Al Othman had sexually assaulted Ms. A. Upon finding that she would be assigned to Mr. Al Othman's class, she sought a transfer and then disclosed the details of the assault to a trusted teacher. Ms. A described the incident on multiple occasions, first in her conversation with Mr. L, then, in a meeting with the principal at which her mother and sister were present and finally in a meeting with the deputy principal. In these accounts, Ms. A provided the same key details, namely that Mr. Al Othman pinned her arms behind her back and forcibly kissed her neck, leaving marks. The persons who spoke to Ms. A later confirmed these details.

29. Ms. A's account of the events was further corroborated by the bruise on her neck, which Ms. A's father at the time thought was a "love bite" and which made the family think that something was wrong. In their conversations with Ms. A's family, the principal and deputy principal heard Ms. A's mother discuss her memory of the bruise on the day Ms. A had returned from the tutoring center.

30. By contrast, when asked about the incident, Mr. Al Othman simply denied the assault. His main response to the charges of misconduct consisted of a series of questions about the recipients of the WhatsApp message sent on the day of the incident, the failure of the family to file criminal charges, and the personal motivations of the investigators.

31. The UNRWA DT erred in its assessment of Ms. A's credibility. Ms. A's sworn testimony before the UNRWA DT was consistent with her accounts on at least four previous occasions, including when she reported the incident to Mr. L, when she spoke with the principal, her mother and her sister at home, when she spoke with the deputy principal at home, and when she was interviewed by the investigators.

32. The UNRWA DT erred in concluding that there were inconsistencies in Ms. A's accounts. Its conclusion is based on several errors.

33. First, contrary to the UNRWA DT's finding that Ms. A had denied the assault on several occasions, there was only one occasion during which Ms. A denied the assault, in a meeting at Mr. Al Othman's tutoring center, where she was asked about the assault in front of Mr. Al Othman, her family and another teacher. She later explained to the investigators that she had been intimidated by Mr. Al Othman and feared retaliation. The investigation report considered that the denial by Ms. A was readily understandable in the circumstances and a gender-based violence coordinator testified before the UNRWA DT that it was common to see recantations in child abuse cases due to fear of retribution. The UNRWA DT may also have accepted Mr. Al Othman's argument that Ms. A had denied the assault on another occasion, when she was compelled by Mr. Al Othman's wife to announce before five classrooms of students that she was not pregnant and that there was nothing between her and Mr. Al Othman. This incident may not be considered a voluntary statement by Ms. A and may not be used to assess her credibility.

34. Second, the UNRWA DT mistakenly thought that Ms. A accused Mr. Al Othman of rape and then retracted this accusation. Ms. A, however, never stated the Mr. Al Othman had raped her and took great care to point out that he had touched her over, not under, her clothing. The fact that her teacher, Mr. L, misspoke and used the word rape when he reported her allegation cannot be attributed to Ms. A and cannot be used to assess her credibility.

35. Third, the UNRWA DT was under the erroneous impression that Ms. A accused Mr. Al Othman of assaulting her on previous occasions. However, nowhere in Ms. A's interviews or the investigation report was any record of Ms. A saying that she had been attacked by Mr. Al Othman on previous occasions. The UNRWA DT's erroneous impression stems from a misunderstanding by the Judge, a francophone, of the English word "abuse". While in French "*abuser de quelqu'un*" is commonly understood in a judicial context as a physical or sexual assault, the English word "abuse" encompasses a broader range of actions. Ms. A testified that she had been abused by Mr. Al Othman before the incident and gave examples of him criticizing the way she dressed or him assuming that she had an affair when a male colleague asked her about the materials they were studying. The transcripts reveal that the Judge misunderstood and thought that Ms. A had said that Mr. Al Othman had previously assaulted her when she had said that he had "abused her" by criticizing the way she was dressed or accusing her of having an affair. The Judge thought that her testimony undermined her credibility, when in reality this part of her testimony was yet another example of how Ms. A remained consistent in her accounts of the incidents.

36. The UNRWA DT erred in relying on an alleged delay in reporting to draw an adverse inference about Ms. A's credibility. Approximately four months lapsed between the incident and her discussion with Mr. L. During her testimony before the UNRWA DT, the gender-based violence coordinator stated, based on her experience documenting gender-based violence in that region, that it took usually between four and seven months for incidents to be reported and that a disclosure right after an incident or very close to the time of the incident was very rare, especially for this context. While as the Appeals Tribunal held in *Mbaigolmem*,¹ a prompt reporting may contribute to the evidentiary weight of a report, the inverse should not be accepted as true. The absence of prompt reporting cannot serve to undermine the credibility of an allegation, particularly in sexual abuse cases involving children. The UNRWA DT therefore erred in drawing a negative inference about the credibility of Ms. A from her delayed reporting.

37. The UNRWA DT erred in concluding that there was no clear and convincing evidence that Ms. A went to the tutoring center. First, in accordance with the jurisprudence of the Appeals Tribunal, the use of hearsay evidence is not prohibited if there is corroborating evidence of misconduct. Ms. A stated that she had received a text on her mother's phone telling her that the time of the class had changed. Her mother recalled receiving the message and subsequently

¹ *Mbaigolmem v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-819.

told the deputy principal. Regardless of whether the deputy principal personally read the message, her testimony confirms that Ms. A's mother also recalled that Mr. Al Othman had sent the message to change the time of the lesson. This serves to corroborate Ms. A's testimony that she went to the tutoring center that day. Second, the UNRWA DT appears to have based its conclusion that there was no clear and convincing evidence that Ms. A went to the tutoring center on the fact that the exact date of the incident was not identified in the investigation report. However, Ms. A has consistently stated that she was at the tutoring center the last day of the school year. Under the circumstances, the absence of a specific date did not provide a basis for the UNRWA DT to conclude that she never went to the center at all.

38. The UNRWA DT erred in rejecting the evidence of the UNRWA witnesses. Before the UNRWA DT, a psychotherapist testified that the symptoms exhibited by Ms. A were associated with a traumatic event involving sexual abuse. The gender-based violence coordinator testified that upon entering university, Ms. A was bullied by her former classmates who knew about her sexual assault. She left and attempted suicide. She also testified about the difficulties of reporting in child abuse cases, particularly in the Middle East. The UNRWA DT dismissed these testimonies without any reasoning, simply stating that there was no evidence that her suicide attempt was a result of the assault. However, the testimony of medical practitioners or other professionals who have personal knowledge of the clients about whom they are testifying constitutes evidence. The only question that the UNRWA DT Judge posed to the psychotherapist during her testimony was to ask her to confirm that she was an UNRWA staff member paid by UNRWA, implying that she could not be trusted to provide reliable testimony about Ms. A. Moreover, the UNRWA DT's observation in its Judgment that Ms. A's behaviour was already a cause of concern before the alleged assault implies that because Ms. A had allegedly indulged in some previous unspecified transgression, her account of sexual assault could not be believed.

39. Ms. A was under tremendous pressure from her community, including from many members of the school, a religious figure in the NBC and the Chairman of the LFO Area Staff Union and her willingness to persist and give oral testimony before the UNRWA DT is relevant to assessing her credibility.

40. The UNRWA DT therefore erred in assessing Ms. A's credibility and in declining to find that her testimony constituted clear and convincing evidence that she had been sexually assaulted by Mr. Al Othman.

41. The UNRWA DT also erred in its assessment of Mr. Al Othman's credibility. While finding that Mr. Al Othman's refusal to appear before the UNRWA DT was "specious", it failed to draw any inference about Mr. Al Othman's credibility.

42. Finally, the other criteria for the confirmation of a disciplinary sanction are also met. The sexual assault of Ms. A by Mr. Al Othman constitutes serious misconduct. The Appeals Tribunal has recognized that separation from service is a proportionate sanction for such cases. Furthermore, Mr. Al Othman's due process rights were fully respected. He was interviewed during the investigation by DIOS and was provided with an opportunity to provide comments on the charges against him based on the investigation report. Mr. Al Othman tried to influence Ms. A, her family and witnesses, requested two high school students to provide photographs of Ms. A with other boys in order to malign her reputation, while denying that he did so, made statements to the investigators with the intent to tarnish Ms. A's reputation and integrity and falsely accused another student of sexually harassing Ms. A. The UNRWA DT erred in finding that none of these actions undermined Mr. Al Othman's credibility in any way and that the intimidation of witnesses, including minor children, and the presentation of false evidence constituted common behaviour of innocent individuals.

43. The Commissioner-General requests that the Appeals Tribunal allow the appeal and affirm the decision to summarily dismiss Mr. Al Othman. In the alternative, the Commissioner-General requests that the Appeals Tribunal remand the case.

Mr. Al Othman's Answer

44. As a preliminary matter, Mr. Al Othman objects to the Commissioner-General's reasons for a request of a potential remand of the case. He, however, does not object to a remand as such. He contends if the Appeals Tribunal remands the case, it should do so because the UNRWA DT erred in allowing the two hearings to go ahead when Mr. Al Othman was deprived of his right to be assisted by the representative of his choice. He asks the Appeals Tribunal to encourage the UNRWA DT to remedy its procedures and enable Mr. Al Othman and his representative to appear in a new hearing, in the knowledge that the latter faces no threat of retaliation and to provide him and his representative with the opportunity to scrutinize documents that had previously been withheld in safety at a properly constituted hearing before the court of first instance would serve justice.

45. Contrary to the Commissioner-General's contention, there is no clear and convincing evidence that Mr. Al Othman sexually assaulted Ms. A. The transcripts and documents containing statements by Ms. A and various witnesses, annexed to the Commissioner-General's appeal, show that Ms. A's many and varied accounts of the alleged events are neither consistent nor credible.

46. In paragraphs 10 and 11 of her statement to the investigators, Ms. A described the first moments as she entered the center. There are two salient points contained in Ms. A's statement to the investigators: First, she went to the center alone; and second, Mr. Al Othman walked around the centre closing all the doors and windows. This version differs from what emerges in the statement by Ms. A's sister, who stated that Ms. A arrived at the centre, accompanied by two girlfriends, and Mr. Al Othman yelled at them both and they left hurriedly, leaving Ms. A alone with him. There is no mention in Ms. A's testimony of other students supposedly leaving the centre as she arrived, nor of Mr. Al Othman walking around the centre and closing doors and windows. Both versions also contradict the deputy principal's testimony, who stated that Ms. A had told her that upon her arrival at the centre, Mr. Al Othman's son was closing the windows rather than the windows and doors. This version in turn contradicts the statement made by the school principal that Ms. A had informed him at the end of the school year 2014-2015 that Mr. Al Othman had asked her to attend his tutoring centre before the private class started. When she arrived at his private tutoring centre, she found him sitting and he tried to sexually harass her, over her clothes. The above testimonies also contradict Mr. L's statement to the investigators, who said that Ms. A had told him that Mr. Al Othman had raped her.

47. Given the multitude of Ms. A's inconsistent accounts, Mr. Al Othman asks the Appeals Tribunal to find that the UNRWA DT did not err in its assessment of Ms. A's credibility. As already stated, the tangle of inconsistencies emerging from Ms. A's accounts is the clearest indicator that she lacks credibility.

48. The UNRWA DT further did not err in concluding that there were inconsistencies in Ms. A's accounts. The Commissioner-General's claim that Ms. A only once retracted the charges levelled at Mr. Al Othman is incorrect. Explicit reference is made in paragraph 26 to the statement of the deputy school principal who stated that Ms. A had told her in her office that she had never spoken about rape or harassment. The UNRWA DT's conclusions with regard to the contradictions in the accounts given by Ms. A still stand.

49. Contrary to the Commissioner-General's argument, the UNRWA DT was not mistaken in its belief that Ms. A had accused Mr. Al Othman of rape and then retracted the accusation. Mr. L's statement to the investigators indicates unequivocally that Ms. A told him that she had been raped by a teacher.

50. There is also no merit in the Commissioner-General's contention that the UNRWA DT was under the false impression that Ms. A had accused Mr. Al Othman of assaulting her on previous occasions, but that was not so. Mr. L's statement to the investigators clearly shows that Ms. A accused Mr. Al Othman of abusing her on three occasions. At a meeting, Mr. K, the eldest teacher in the school, addressed Ms. A in front of 10 teachers and her father and asked what had happened. She answered that he had abused her three times. At the hearing, Ms. A denied that Mr. Al Othman had assaulted her three times and spoke of a single incident. Those inconsistencies seriously undermine Ms. A's credibility and the reliability of her testimony and, as a result, the UNRWA DT did not err in that respect.

51. The UNRWA DT did not err in concluding that Ms. A did not report the incident at the first reasonable opportunity. Even supposing that the incident took place, Ms. A had no reason to delay reporting the assault for nearly four months.

52. The UNRWA DT did not err in its conclusion that there was no clear and convincing evidence that Ms. A actually went to the tutoring center. Mr. Al Othman highlights the contradictions in Ms. A's testimony with regard to her motive for allegedly going to the center. Pursuant to the deputy school principal, Ms. A had told her that she had gone alone because Mr. Al Othman had threatened her to show photos to prove that she had relationships with other boys. The reason given lacks credibility, given that Ms. A herself had stated to the investigators that photos of her had been deleted from a male colleague's mobile telephone. According to Mr. L, she had told him that the reason for going to the center was that she "wanted to succeed". This new motive is untrue. In her statement to the investigators, Ms. A named her mathematics teachers, with no mention of Mr. Al Othman.

53. The UNRWA DT did not err in rejecting the evidence of the UNRWA witnesses. On 12 December 2018, Mr. Al Othman submitted his observations on clarifications made by the Commissioner-General regarding the first hearing. He submits that he replied extensively to those clarifications and remarked that the testimony given by all the UNRWA witnesses (Ms. W and the two expert witnesses, Ms. Stewart and Ms. Fayad) at that hearing had been of

value. Mr. Al Othman asks the Appeals Tribunal to review the transcript and his submission and to find that the UNRWA DT did not err by lending the appropriate weight to the testimony of those witnesses.

54. As to the Commissioner-General's contention that the UNRWA DT failed to draw any inferences from Mr. Al Othman's refusal to appear before the UNRWA DT, Mr. Al Othman contends that he and his representative could not attend the hearings because they had feared retaliation.

55. Mr. Al Othman submits that the criterion set by the Appeals Tribunal for reviewing the sanction, by which his service was terminated, has not been met and that the conclusions of the UNRWA Dispute Tribunal were valid and fully compliant with the jurisprudence of the Appeals Tribunal. The UNRWA DT therefore did not err by concluding that the evidence brought against Mr. Al Othman was not clear and convincing. Mr. Al Othman asks the Appeals Tribunal to dismiss the appeal entirely. Alternatively, he asks that the Appeals Tribunal remand the case to the UNRWA DT for a new hearing that Mr. Al Othman and his representative could attend without fear and with the assurance that his representative would not be subject to retaliation.

Mr. Al Othman's Appeal

56. The UNRWA DT erred and failed to exercise its jurisdiction by failing to consider that the Agency had violated Mr. Al Othman's right to due process and failing to award him compensation on that ground. Mr. Al Othman alleges the following breaches of his due process rights: The UNRWA DT erred in procedure in impeding Mr. Al Othman's access to all the documentation in the case file in the Commissioner-General's possession, thereby depriving him of the opportunity to mount a proper defense. The UNRWA DT finally furnished only a redacted copy of the report of investigation and denied Mr. Al Othman's plea for access to an unredacted version, in Arabic, as well as for access to all exhibits. It also denied his request for access to the testimony of Mr. L.

57. In his submissions before the UNRWA DT, Mr. Al Othman had consistently called upon the UNRWA DT to hold a hearing and had named the witnesses he wished to call to testify under oath. In its Judgment, the UNRWA DT noted that both oral hearings had been scheduled to allow parties to present their witnesses and had been scheduled to take place

in the afternoon, as the UNRWA DT understood that Mr. Al Othman's representative, a teacher and an UNRWA staff member, would not be available in the mornings. Yet, Mr. Al Othman refused for "specious reasons" to appear before the UNRWA DT and be confronted with Ms. A. The UNRWA DT erred in procedure when it allowed the Commissioner-General to violate Mr. Al Othman's right to representation of his choice. Moreover, it failed to exercise its jurisdiction *ratione materiae* and procedural powers to deter the Commissioner-General from intimidating Mr. Al Othman and his counsel and to protect them from retaliation.

58. The UNRWA DT also erred in procedure in failing to call Mr. Al Othman's witnesses, and in particular Mr. L, to testify under oath, especially since the UNRWA DT had denied him access to Mr. L's statement to the investigators. That witness' statement to the investigators was the "black box" of this case. It was within the UNRWA DT's broad authority to invite Mr. L to answer questions regarding the lack of consistency between his statement to the investigators and that of Ms. A, and the contradictions between the statement that he had made to the investigators and the one that he had made to the Lebanese authorities, as well as to hear the recording that Mr. L had played to the school principal in which Ms. A said that Mr. Al Othman had sexually harassed her.

59. The UNRWA DT failed to exercise its jurisdiction *ratione materiae* and erred in procedure when it omitted to subject the deputy school principal to cross-examination. In her testimony before the UNRWA DT, she stated that Ms. A had told her that when she went to the private tutoring center, no students were there and only Mr. Al Othman was present with his son, who was closing the center's windows. However, with the exception of the deputy school principal, no one involved in the case alluded to his son's presence at the center. It was an error on the part of the UNRWA DT not to have the witness clarify that particular detail of her testimony, and it failed to raise the matter with Ms. A during her testimony under oath.

60. Moreover, the UNRWA DT failed to mention that part of the deputy school principal's testimony in its Judgment or to make any reference to the lack of consistency between her testimony and that of Ms. A. Ms. A recounted contradictory stories, one to the investigators and another at the hearing, about the first moments as she entered the tutoring center, and they were both inconsistent with the testimony of the deputy school principal. The UNRWA DT erred by not probing those inconsistencies in order to test Ms. A's credibility.

Moreover, had Mr. Al Othman been provided with the documents during the proceedings and had he been allowed to participate in the hearing, he would have been able to focus on this particular issue of inconsistencies in the testimony.

61. The UNRWA DT erred in fact and law when it implicitly acknowledged that the second letter of the Commissioner-General summarily dismissing Mr. Al Othman dated 26 September 2017 was the contested decision and when it implicitly ruled that the Commissioner-General had the right to punish a former staff member. Mr. Al Othman had already been punished on 17 March 2017 and the Commissioner-General only reviewed his reply to the letter containing the charges after it had been translated in September 2017. As a result of this error, the UNRWA DT failed to exercise its jurisdiction with regard to ensuring Mr. Al Othman's due process rights and erred *ratione materiae* with regard to redress for the procedural violations of his rights by the 17 March 2017 letter summarily dismissing him without a legal basis.

62. Mr. Al Othman requests that the Appeals Tribunal affirm the rescission of the decision of his summary dismissal, increase the amount of in-lieu compensation, order the Commissioner-General to pay Mr. Al Othman's benefits, including wages, allowances and the Agency's contributions to the Provident Fund, from the date of his dismissal from service until the date of the Judgment, award compensation for the violation of his due process rights and moral damages, and refer the case to the Commissioner-General for enforcement of accountability. In the alternative, Mr. Al Othman requests that the Appeals Tribunal remand the case to the UNRWA DT.

The Commissioner-General's Answer

63. Mr. Al Othman's appeal is misconceived and not receivable. Given the outcome of his application before the UNRWA DT, Mr. Al Othman is prevented from filing an appeal. Assuming *arguendo* that the alleged errors were committed by the UNRWA DT, they did not have an impact on the final outcome of the process. Considering the established jurisprudence that a party in whose favour a case has been decided is not permitted to appeal against the judgment on academic grounds, the instant appeal is not receivable. The only grounds of appeal that may be receivable relate to the quantum of compensation.

64. In relation to compensation, the Commissioner-General contends that the UNRWA DT made no reversible error. Mr. Al Othman's claim that the UNRWA DT erred by not ordering payment of salary, allowances, end of service indemnity, and contributions to the Provident Fund has no merit. Mr. Al Othman seems to confuse the different types of compensation under Article 10(5)(b) of the UNRWA DT Statute. The UNRWA DT did not make any award of compensation under Article 10(5)(b). The UNRWA DT ordered rescission of the contested decision and in-lieu compensation, in compliance with Article 10(5)(a). It set the amount of in-lieu compensation to the equivalent of two years' net base salary taking into account Mr. Al Othman's salary at the time of his summary dismissal. In the absence of reasons characterizing this case as exceptional and noting that the UNRWA DT set the amount of in-lieu compensation at two years' net base salary, an enhanced compensation would be in violation of Article 10(5), which provides for a two-year cap. There is therefore no basis to enhance the award of compensation.

65. The UNRWA DT also made no errors when it did not order compensation for the alleged violation of Mr. Al Othman's due process rights. The UNRWA DT made no findings on due process violations and in accordance with the Appeals Tribunal jurisprudence, no compensation may be awarded when no illegality has been established. Similarly, the UNRWA DT did not err in not awarding moral damages in the absence of harm supported by evidence.

66. The Commissioner-General requests that the Appeals Tribunal reject Mr. Al Othman's appeal in its entirety.

Considerations

Preliminary issues

67. To protect the confidentiality of several witnesses, their names have been redacted in this Judgment.

The Commissioner-General's appeal

68. We agree with the Commissioner-General that the UNRWA DT committed errors of law and fact resulting in a manifestly unreasonable decision.

69. In disciplinary cases under Article 2(1)(b) of the UNDT Statute, the UNDT will examine the following: i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.²

70. In order to overturn a finding of fact by the UNDT, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is unreasonable. The Appeals Tribunal considers that some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.³

71. In the present case, we find that the UNRWA DT erred in its assessment of Ms. A's credibility. Contrary to its findings, she did not give "various versions" about the alleged assault. Ms. A's sworn testimony before the UNRWA DT was consistent with the accounts she gave on at least four previous occasions, including when she reported the incident to Mr. L, when she spoke with the principal, her mother and her sister at home, when she spoke with the deputy principal at home, and when she was interviewed by the investigators. She never changed the essentials of her story nor did she add any new facts. Also, Ms. A never stated that she had been raped; on the contrary, she took great care to point out that Mr. Al Othman had touched her over, not under, her clothing. The fact that her teacher, Mr. L, misunderstood or misspoke and used the word "rape" when he reported her allegations cannot be attributed to Ms. A.

² *Nadasan v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-918, para. 38.

³ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.

72. The fact that Ms. A denied the alleged sexual assault on several occasions does not diminish her credibility. Two of these incidents happened in a larger group of people or even publicly: Ms. A denied the assault during a meeting at Mr. Al Othman's tutoring center, where she was asked about the assault in front of Mr. Al Othman, her family and another teacher. She later explained to the investigators that she had been intimidated by Mr. Al Othman and feared retaliation. We agree with the investigation report that the denial was understandable in the circumstances. Ms. A also denied the assault when she was compelled by Mr. Al Othman's wife to announce before five classrooms of students that she was not pregnant and that there was nothing between her and Mr. Al Othman. This cannot be understood as a voluntary statement by Ms. A and cannot be used to assess her credibility. Only the third incident happened in a more private situation when Ms. A denied the incident in a meeting in Ms. W's office on 1 or 2 October 2015. However, following Ms. W's statement before the investigators, she later had a conversation with Ms. A in her home in the second week of October 2015, where Ms. A apologized for not having confided in Ms. W explaining that she had been afraid that Ms. W would no longer consider her "the young innocent girl she knew", and Ms. W found her credible.

73. Additionally, we note that in Ms. A's social environment, her family and school, there was a strong inclination to "hush up" the story. It seemed more important to protect Mr. Al Othman's reputation and financial situation as well as Ms. A's reputation than to find out what had really happened. Ms. A was under a lot of pressure not to incriminate Mr. Al Othman and not to talk about the incident anymore. Following the testimony of Ms. W, in the 1 or 2 October 2015 meeting, Ms. A added that the same day her father would meet with the headmaster and "put an end to it". Further, a gender-based violence coordinator testified before the UNRWA DT that it was common to see recantations in child abuse cases due to fear of retribution.

74. There is no record that Ms. A stated that she had been sexually attacked by Mr. Al Othman on previous occasions. The UNRWA DT's erroneous impression might stem from a misunderstanding by the Judge, a francophone, of the English word "abuse". The Judge apparently misunderstood Ms. A when she said that Mr. Al Othman had previously assaulted her meaning that he had "abused her" by criticizing the way she was dressed or accusing her of talking to boys or having an affair.

75. The delay in reporting - approximately three to four months had lapsed between the incident in June 2015 and Ms. A's discussion with Mr. L in September 2015 - has no impact on Ms. A's credibility. During her testimony before the UNRWA DT, the gender-based violence coordinator stated, based on her experience documenting gender-based violence in that region, that it usually took between four and seven months for a victim to disclose or discuss such an incident, and that a disclosure right after the incident or very close to the time of the incident, was very rare, especially for this context. While a prompt reporting may contribute to the evidentiary weight of a report, the absence of prompt reporting cannot serve to undermine the credibility of an allegation, particularly in sexual abuse cases involving children. The UNRWA DT therefore erred in drawing a negative inference about the credibility of Ms. A from her delayed reporting.

76. The UNRWA DT also erred in its assessment of Mr. Al Othman's credibility. We find that Mr. Al Othman's behaviour after the reporting of the incident by Ms. A were not usual and legitimate actions of an individual trying to prove his or her innocence. Mr. Al Othman attempted to influence Ms. A, her family and witnesses, requested two high school students to provide photographs of Ms. A with other boys in order to malign her reputation, while denying that he did so, made statements to the investigators with the intent to tarnish Ms. A's reputation and integrity and falsely accused another student of sexually harassing Ms. A. The UNRWA DT erred in finding that none of these actions undermined his credibility in any way.

77. However, the Appeals Tribunal finds itself unable to decide the case based on documentary evidence. As the outcome will depend on the credibility of Mr. Al Othman and Ms. A, a decision cannot be taken without oral testimony, preferably also by Ms. A's mother. We are aware that a new hearing will be a heavy burden on Ms. A who already had to testify several times during the investigation process and before the UNRWA DT. However, we are confident that the matter will be handled with utmost sensitivity on remand.

Mr. Al Othman's appeal

78. On remand, the UNRWA DT will have to examine Mr. Al Othman's allegation that his due process rights had been violated during the investigation proceedings. His other claims and arguments will also have to be addressed by the UNRWA DT.

Judgment

79. The case is remanded to a different Judge of the UNRWA DT.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Colgan

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar