UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1136

Abdulhamid Al Fararjeh[1]

(Appellant)

v.

Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East

(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case Nos.:	2020-1463
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Appellant: Basem Masoudeh

Counsel for Respondent: Rachel Evers

[1] The appeal refers to the Appellant as "Abdel Hameed Mahmoud AlFararjeh." We adopt the spelling of the UNRWA Dispute Tribunal Judgment.

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Appellant, a Practical Nurse, Grade HL2, Step-14, at Dheisheh Health Clinic, West Bank Field Office (WBFO) of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) was separated from service without termination indemnity for sexual exploitation and abuse committed against a beneficiary. The UNRWA Dispute Tribunal (UNRWA DT) in its Judgment No. UNRWA/DT/2020/026 dismissed the Appellant's application against the separation decision, finding that the Agency had made the case of misconduct against him by clear and convincing evidence. For the reasons set out below, we affirm the UNRWA DT's Judgment.

Facts and Procedure

2. The Appeals Tribunal is seized of an appeal against an UNRWA DT Judgment dismissing the Appellant's application contesting the Agency's decision to impose upon him a disciplinary sanction of termination without termination indemnity following the conclusion of an investigation into allegations that he sexually abused a female patient while examining her in his capacity as Practical Nurse at the Dheisheh Health Clinic. The Appellant has denied the allegations citing to his employment with the Agency as a Practical Nurse since 1991 clear of any misconduct and attributing the allegations made as part of a conspiracy against him by staff members who had made prior threats against him. The UNRWA DT dismissed his application.

3. On 5 October 2017 allegations of sexual exploitation and abuse (SEA) by the Appellant were reported to the Acting Area Health Officer and to the Dheisheh Camp Services Officer.

4. Specifically, the complainant visited the Dheisheh Health Clinic on 5 October 2017 to consult the midwife for abdomen pain who then instructed her to go to the Appellant's office for blood pressure and blood glucose testing. Noticing signs of nausea, the Appellant helped her get onto the examination bed where the complainant indicates he gave her an internal vaginal examination while asking about her sexual relations with her husband and instructed her not to tell anyone he did this. Following this assault, she informed her sister-in-law who had joined her at the clinic. She then saw the midwife and asked if he was supposed to conduct an internal exam and the midwife confirmed he was not supposed to. The midwife, the psychosocial counsellor and the complainant went together to the Appellant's office to ask

about the examinations he had performed, and Mr. Al Fararjeh denied having conducted an internal exam. Thereafter the complainant, midwife, and psychosocial counsellor went together to inform Dr. IS the Head of the Clinic, the Senior Medical Officer, and Dr. AA, the Acting Area Health Officer.

5. The next day on 6 October 2017, the Director of UNRWA Operations, WBFO, reported the complaint to the Department of Internal Oversight Services (DIOS), which commenced its investigation and interviewed the complainant within days, on 9 October 2017. The Appellant was informed of the allegations against him on 12 October and placed on administrative leave with full pay. DIOS interviewed the Appellant on 19 October and gave him an opportunity to respond to the allegations. On 8 November 2017, DIOS concluded its investigation and issued its report.

6. The imposition of the disciplinary sanction was made on 17 July 2018. The Appellant submitted a decision review on 12 September 2018 and on 2 December 2018 filed his application before the UNRWA DT. He did not receive a decision review response from the Agency.

7. On 17 May 2020 the UNRWA DT issued Judgment No. UNRWA/DT/2020/026 whereby it dismissed the Appellant's application against the separation decision by holding that the critical facts were established by the Agency to a clear and convincing standard and amounted to serious misconduct justifying his termination from service.

Submissions

Appellant's Appeal

8. The Appellant submits that the UNRWA DT erred in law and fact and therefore its Judgment is to be reversed. In this context, he puts forward the following grounds of appeal:

a) The DIOS interviewed the complainant without him present so he could confront her. (Mr. Al Fararjeh seems to assert that because he couldn't confront the complainant that this equates to not being able to refute the allegations and provide a defense);

b) The DIOS investigator should have performed a physical examination of the complainant;

c) The investigator concluded she was sad from the assault, yet he has no expertise or experience assessing the psychological state of victims in such cases. He is not a gynecologist and thus not capable of determining whether an assault or contact occurred;

d) The investigator was told she was in the exam room for 30 minutes, but never retrieved the electronic records of the patients that visited that day to document the time at which she arrived and departed to confirm her account;

e) The Investigator did not ask her why she did not refuse the alleged assault by pushing away or striking him or running out of the room;

f) His statement was taken and a transcript shown to him 20 days later; he should have been able to certify it the same day;

g) The investigators did not presume his innocence and was biased towards him;

h) The decision was based on statements of witnesses who did not actually witness the incident and whom the Appellant has been unable to confront. Their testimony was hearsay based on what the complainant had coached them to say. This is circumstantial evidence;

i) The UNRWA DT did not consider why she did not resist removing her clothes. "Human nature is such that, even in licit relations, if a man removes a woman's clothing without any response or resistance, that amounts to consent."

j) The investigation was flawed as it did not allow him to confront the mid-wife and the claimant and the UNRWA DT did not rely on any psychological report to assess the complainant's condition;

k) His direct supervisor has not been questioned or interviewed and had information that shows a procedural error was made during the investigation. The failure of the investigation panel to allow him to confront the witnesses and complainant

amounts to a serious error that should have reversed the decision. He was denied his right to defend himself.

The Commissioner-General's Answer

9. In response, the Commissioner-General submits that the appeal should be dismissed in its entirety. He argues that the Appellant has failed to meet his burden and fails to identify any errors in fact or law warranting a reversal. Further, the UNRWA DT employed the correct legal standard of proof, i.e. that of clear and convincing evidence, to confirm the facts had been established and that they confirmed misconduct of a serious nature warranting the disciplinary sanction which was proportionate. Finally, he resists the Appellant's arguments that there were due process violations.

Considerations

Preliminary Issues

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

Merits

Standard of review in disciplinary cases

11. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*[2] quoting *Applicant*,[3] and others:[4] Judicial review of a disciplinary case requires the UNRWA DT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this

[2] *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.
[3] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.
[4] See also *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para.15; *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 46; *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18.

context, the UNRWA DT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".

12. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence must be respected.[5]

13. It is in the context of these definitions and principles that the Appellant's appeal against the UNRWA DT's conclusions must be assessed.

Clear and convincing evidence established that the Appellant committed the offences

14. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Agency based its decision to dismiss the Appellant from service were established, in full respect of his due process rights. The record shows clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by the Appellant. The UNRWA DT did not err as there was clear and convincing evidence that the Appellant indeed committed sexual exploitation and abuse against a beneficiary of UNRWA; neither did it err in concluding that the disciplinary sanction of dismissal from service without termination indemnity was proportionate and lawful.

15. As the UNRWA DT provided thorough and convincing reasoning, we do not find it necessary to repeat each and every detail except to refer to paragraphs 38 to 58 of its Judgment. We will, however, present the most important pieces of evidence on record and highlight those factual findings which clearly demonstrate that the Appellant committed serious misconduct.

[5] *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 16; *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 47; *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28.

16. In reviewing the Agency's decision, the UNRWA DT had before it the documentary evidence on the record, including in the investigation report and the testimonies of various witnesses together with that of the Appellant before the investigators.

17. Regarding the material facts of the case, the UNRWA DT Judge made *inter alia* the following observations and findings:[6]

18. In assessing the credibility of the complainant, he underscored that in the immediate aftermath of the incident, it was not contested that the Appellant approached the complainant and told her where the X-ray room was. It was at this time that the complainant mentioned the incident to her sister-in-law. Shortly thereafter, in particular after the X-ray examination, the complainant went to see the midwife to inquire about whether the Appellant was supposed to have conducted an internal examination.

19. Moreover, he took into consideration the complainant's demeanor, both during her interview by the Investigator and in the immediate aftermath of the alleged incident. The Report of Investigation indicated that, during her interview, the complainant seemed genuinely affected, displayed sadness, shock and dismay, and often cried. She also expressed that she was a victim of an injustice and how the incident has impacted her ability to take care of her children. The witnesses who had interacted with the complainant on the day of the alleged incident reported similar impressions about the complainant's demeanor in view of the alleged incident.

20. Next, the UNRWA DT Judge noted that the Appellant's explanation to the midwife and her statement to the Investigator during her interview were consistent and provided a detailed account of the incident. He observed that, the consistency and details were further confirmed by the midwife's statement to the Investigator; in addition, the events after the initial discussion between the complainant and the midwife, such as the midwife's confrontation with the Appellant, together with the Psychosocial Counsellor, as well as the fact that they informed the HC/SMO and A/AHO about the incident, were clearly confirmed through the witnesses' statements. The first instance Judge assessed these factual elements along with the Appellant's confirmation of all of the other circumstances surrounding the alleged incident, including the

[6] Impugned Judgment, paras. 49-52.

fact that the latter had approached the complainant to inform her about the location of the X-ray room.

21. The UNRWA DT was clearly not convinced by the Appellant's different story, who simply claimed that the complainant was a liar and added that he was a victim of a conspiracy against him, as he had been threatened by a staff member in front of another staff member, and had been told that a conspiracy had being planned against him. In this context, the UNRWA DT Judge rejected these claims as mere allegations and conjectures, which were not supported by any additional details or any evidence, and pointed to the significant and uncontested fact that the complainant had never encountered the Appellant before this incident, that the Appellant had failed to provide any credible reason or motive for the complainant to lie about the alleged incident, as well as that the complainant risked jeopardizing her and her family's reputation and other potential harm she could suffer as a result of her reporting such an incident in her community.

22. Finally, after carefully and thoroughly considering the evidence on which the Administration had based the sanction, along with its own observations and findings thereupon, the UNRWA DT concluded that the facts on which the impugned disciplinary measure was based were established by clear and convincing evidence and the Appellant had sexually abused and exploited the complainant when he conducted, on his own, the internal examination of the complainant in his office on 5 October 2017.

23. The UNRWA DT also considered the Appellant's argument that his due process rights had not been respected during the investigation and disciplinary proceedings, but dismissed it as being without merit.

24. These are accurate conclusions from the evidence on record and common knowledge and we find no reason to differ from them. The Dispute Tribunal has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNRWA DT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing the case had an appreciation of all the issues for determination and the evidence before it. We are satisfied that the UNRWA DT conclusion is consistent with the

evidence. The Appellant has not put forward any persuasive grounds to warrant interference by this Tribunal.

25. In all the circumstances of the case, this Tribunal is satisfied with the detailed analysis of the totality of the evidence by the UNRWA DT and agrees with its well-reasoned conclusion. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and probative value of the evidence placed before them by the parties to justify their findings,[7] the chronology of the critical events and the overall deductive reasoning process of his, this Tribunal shares the UNRWA DT's view that the only reasonable conclusion available to the trial Judge, resulting from the evidence against the Appellant, uncovered by the investigation and the documentary evidence before the first instance Judge, was that the latter had sexually abused and exploited the complainant when he conducted, on his own, an inappropriate gynecological examination of the complainant in his office on 5 October 2017, which he was not competent or allowed to do.

26. Indeed, it is common cause that on 5 October 2017 the complainant visited Dheisheh Health Clinic to consult the midwife as she felt pain in her abdomen and lower back, and then she went to the Appellant's office following the midwife's instructions to have her blood pressure and blood glucose levels measured. It is equally not disputed that the complainant made a report about the incident at the first reasonable opportunity in the immediate aftermath of the event, to her sister-in-law and the midwife, which is a previous consistent statement of the kind exceptionally admissible in cases involving sexual harassment or assault and is of considerable evidentiary weight. The credibility of it has not been damaged by any countervailing evidence. On the contrary, its detailed content was confirmed by the abovementioned persons' testimonies before the Investigator, in which they relay the version of the complainant with a conspicuous consistency that added to their credibility. By contrast, the Appellant failed to provide any explanation or material facts that would render the complainant's allegations doubtful, and his statements were mere allegations and conjectures, not supported by any evidence. Moreover, as UNRWA DT found and is not disputed,[8] the complainant had never encountered the Appellant before this incident; there has been no prior

[7] *Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 63; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 26; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.
[8] Impugned Judgment, para. 53.

association between hem whatsoever and therefore it is objectively unlikely that she would conspire with others against him, as she had no reason to do so.

27. In sum, the documentary evidence on file, as well as the strong circumstantial evidence and the inherent probabilities of the situation given the potential harm the complainant could suffer as a result of her reporting such an incident, taken cumulatively, suggest to the appropriate evidentiary standard of clear and convincing evidence, as correctly held the UNRWA DT, that the Appellant had committed the alleged misconduct. Therefore, his contentions to the contrary are rejected as being without merit.

The established facts qualify as misconduct

28. This Tribunal agrees with the finding of the UNRWA DT that the established facts amounted to serious misconduct on the part of the Appellant.

Applicable provisions

29. Area Staff Regulations provides:

> REGULATION 1.1 Staff members, by accepting appointment, pledge themselves to discharge their functions with the interest of the Agency only in view. […]
>
> REGULATION 1.4
>
> Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency. […]
>
> REGULATION 10.2
>
> The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.
>
> Area Staff Rule 110.1 stipulates:
>
> 1. Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the UNRWA Area Staff Regulations and UNRWA Area Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.
>
> PD A/10 provides:
>
> 10. Sexual Exploitation and Sexual Abuse is always serious misconduct. […]

GSC No. 07/2010 specifies:

30. The present Circular addresses complaints of sexual exploitation and abuse made by Agency beneficiaries against persons employed by the Agency in a working capacity. The Agency will apply the following definitions of the terms "sexual exploitation" and "sexual abuse": (a) "Sexual Exploitation" means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. (b) "Sexual Abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions. 4. In order to further protect the most vulnerable populations, especially women, children, and persons with disabilities, the following specific standards which reiterate existing general obligations under UNRWA's Staff Regulations and Rules, are promulgated: (a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal[.] […]

31. In view of the foregoing, the Appellant, by having the complainant removing her pants and underwear and engaging in such a sensitive and specific medical examination, which he did not have the required competencies and entitlements to do, he violated his obligation under the abovementioned provisions, and his conduct amounted to sexual abuse and exploitation against a beneficiary of UNRWA in a vulnerable situation, as correctly held by the UNRWA DT.

The sanction of separation from service was proportionate to the offence

32. Area Staff Rule 110.3 gives the Commissioner General the discretion to impose a disciplinary measure:

> 4. The decision to impose a disciplinary measure shall be within the discretionary authority of the Commissioner-General. For the imposition of disciplinary measures other than summary dismissal, such authority is delegated to the Director of Human Resources for Headquarters staff and Field Office Directors for Field staff. The authority to further define the conditions and procedures concerning the imposition of disciplinary measures is delegated to the Director of Human Resources. Disciplinary measures
>
> 5. Disciplinary measures under Area Staff Regulation 10.2 may take one or more of the following forms only: A) written censure; B) loss of one or more steps in grade; C) deferment, for a specified period, of eligibility for salary increment; D) suspension

> without pay for a specified period; E) fine; F) deferment, for a specified period, of eligibility for consideration for promotion; G) demotion with deferment, for a specified period, of eligibility for consideration for promotion; H) separation from service, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, with termination indemnity; I) separation from service, also known as termination for misconduct, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, and without termination indemnity pursuant to Area Staff Rule 109.9; J) summary dismissal.

33. The matter of the degree of the sanction is usually reserved for the Agency, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Agency that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Agency is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Agency where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal.[9] The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.[10]

34. Further, as we stated in *Samandarov*,[11]

> … due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis,

[9] *Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 89; *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 39; *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.
[10] *Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 89; *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 40
[11] *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24-25.

> purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. … The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

35. In the present case, given the seriousness and degree of the Appellant's misconduct, the sanction of separation from service without termination indemnity was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Commissioner-General's discretion to determine that intentionally abusing and exploiting sexually a beneficiary of UNRWA in a vulnerable situation rendered the Appellant unfit for further service with the Agency, and is satisfied that separation from service without termination indemnity was neither unfair nor disproportionate to the seriousness of the offence. As the UNRWA DT correctly held, the Appellant violated the relationship of trust that had existed between him and the Agency. His conduct was particularly grave in light of the position he occupied as a Practical Nurse, which involved daily interactions with physically and emotionally vulnerable beneficiaries, and the fact that, as a woman, the complainant falls within the category of people who have a "most vulnerable" status in accordance with GSC No. 07/2010, and by exploiting this status, the Appellant placed the complainant in a potentially harmful position where she could suffer from retaliation in her community because of such an incident, and for having made a complaint about it. As such, the Appeals Tribunal finds that imposing the sanction of separation from service without termination indemnity was a reasonable exercise of the Agency's broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNRWA DT thus did not err in finding the sanction proportionate to the disciplinary offense in the present case.

Due process grounds of appeal

36. The Appellant raises a variety of challenges to the correctness of the UNRWA DT'S conclusions and additionally criticizes the justness and fairness of the UNRWA DT's general approach and management of his case, i.e. by submitting that the UNRWA DT erred when: it considered the case based on the statements of witnesses who did not actually witness the incident; did not allow him to confront the complainant and the investigative panel's witnesses, namely the midwife, who was not at the scene of the incident; did not allow him to bring witnesses to testify against the complainant; it did not retrieve the electronic records of the patients who had visited the Dheisheh Health Clinic on the day of the incident, in order to document the time at which the complainant had arrived.

37. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.[12] The Appellant has failed to do so in the present case.

38. Be that as it may, this Tribunal has gone itself through the evidence on file and found the UNRWA DT's reasoning and conclusions correct.

39. First, as to the Appellant's contention that he was deprived of the opportunity to bring staff members to testify against the complainant in terms of the conspiracy against him, the UNRWA DT held that these (two) staff members would be limited to the alleged conspiracy against the Appellant, and they would not possibly affect the outcome of the present Judgment.

[12] *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19.

40. We agree. Again, we repeat that this Tribunal considers that some degree of deference must be given to the discretion of the UNRWA DT as the court of first instance. As the Appeals Tribunal clarified, clear and convincing evidence can be established without an oral hearing in certain circumstances and this is in the discretion of the Dispute Tribunal.[13]

41. In the present case, the UNRWA DT indicated that it considered this was a case "where the record before the Tribunal, compiled during the investigation, is sufficient to render a decision without the need for an oral hearing".[14] Without an oral hearing, the determination was based entirely on the documentary evidence and written submissions before the UNRWA DT. In view of the adequacy and the consistency of the evidence on file, we find the UNRWA DT's decision not to hold an oral hearing was reasonable and was not an error of procedure "such as to affect the decision of the case" as per Article 2(1)(d) of the Statute of the Appeals Tribunal.

42. Next, the Appeals Tribunal do not find merit in the Appellant's contention that he was not present, when the Investigators (DIOS) officially questioned the complainant and thus he was not afforded the opportunity to dispute her account of the events. However, there is no legal or administrative provision obliging the Administration to allow the presence of the charged person in the investigative process. On the contrary, the investigation phase is not a disciplinary proceeding, which is only initiated after the completion of the investigation, and hence, only after the investigative process is over and the disciplinary process has begun, the staff member has a right to receive written notification of the formal allegations and to respond to them,[15] as it occurred in the litigated case.

43. Finally, due process does not always require that a staff member defending a disciplinary action of separation has the right to confront and cross-examine his accusers.[16] This is particularly the case when the accusers and witnesses are young children or vulnerable people where it may be inadvisable for such a confrontation to occur. In this instance, the

[13] *Abu Osba v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* Judgment No. 2020-UNAT-1061, para. 40.
[14] Impugned Judgment, para. 55.
[15] *Benamar v. Secretary-General of the United Nations*, Judgment No.2017-UNAT-797, paras. 53-54, citing *Powell v. Secretary-General of the United Nations*, Judgment No.2013-UNAT-295, para. 23.
[16] *Abu Osba v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* Judgment No. 2020-UNAT-1061, para. 69; *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 33.

Appellant's request to "face his accusers" must give way to the need to protect vulnerable witnesses from the emotional distress the confrontation would entail as long as the Appellant was afforded the fair and legitimate opportunity to defend his position. Due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against him.

44. The Appeals Tribunal is satisfied that the key elements of the Appellant's right to due process were met and that the interests of justice were served in this case. Consequently, we find no error in the UNDT's finding that there were no breaches of the Appellant's due process rights during the investigation and disciplinary process. Indeed, there is no evidence that the Appellant's rights had been infringed in any way during the investigation. The Agency diligently undertook the investigation, the Appellant was fully informed of the charges against him and was able to mount a defense and had ample opportunities to make his case. He was provided with the allegations of misconduct and was given, and availed himself of, the opportunity to answer them. He concedes in the appeal brief that his interview with the Investigators lasted three hours. Therefore, we agree with the UNRWA DT that there was no merit in the Appellant's argument that the investigation was procedurally defective.

45. Additionally, even if any violations of the Appellant's due process rights had occurred in the course of the administrative stage of the disciplinary proceedings, they were cured during the proceedings before the UNRWA DT, wherein, on 25 March 2019, he was provided with the Report of Investigation, along with the Respondent's reply, and, since that time, the Appellant has had ample opportunity, in his case before the Tribunal, to respond to the allegations against him.[17] Therefore, this contention is also without merit.

46. Finally, the Appellant claims the Administration was biased towards the complainant simply because she had lodged a complaint. However, there is nothing which could support this allegation. There is no indication of bias against the Appellant on the part of the Agency and the Appellant, who bears the onus of proving any allegations of ill-motivation or bias, has

[17] *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No.2015-UNAT-537, paras. 36-37.

not made his case. We note, further, that the Appellant has not shown, as he ought to, how this alleged "bias" affected the decision of the case.[18]

Request for compensation

47. The Appellant's claim for compensation is rejected. Since no illegality was found, there was no justification for the award of any compensation. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".[19]

48. For the foregoing reasons, we find that the Appellant has failed to establish that the UNRWA DT made any error of law or fact in its review of the disciplinary measure imposed by the Commissioner-General. It follows that the appeal must fail.

[18] *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-879, para. 33; *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733, para. 31.
[19] *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, which in turn cited *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein.

Judgment

49. The appeal is dismissed and Judgment No. UNRWA/DT/2020/026 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 5th day of August 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar

JUDGE COLGAN'S DISSENTING OPINION

1. I respectfully disagree that the Appellant has failed to establish error on the part of the UNRWA DT. This is on only one, albeit a very important, aspect of the Tribunal's Judgment, its conclusion that the process that lead to the Appellant's dismissal without payment of termination indemnity was due and lawful.

2. In view of my conclusion that the UNRWA DT erred in law in so finding, and that in my opinion the case should be remanded to a differently-constituted Dispute Tribunal, I will not comment on the merits of the Commissioner-General's case that Mr. Al Fararjeh sexually assaulted a patient he was nursing. What I do say, however, is that if upon a full and proper review the Dispute Tribunal came to the conclusion that he committed the conduct alleged, this would unquestionably amount to serious misconduct for which the sanction imposed would be entirely justified.

3. What gives me serious concern, however, is whether the process that led the UNRWA DT to that conclusion was a fair (due) process and in accordance with the law's expectations. If so, that would have enabled the Tribunal to have concluded safely that the Respondent had established his case to the clear and compelling evidential standard that we agree was applicable.

4. Upon receipt of the complaint against the Appellant, the Respondent established an investigation to report to the Commissioner-General about what had happened. Mr. Al Fararjeh was not professionally represented in that process as he continued not to be before the UNRWA DT. When confronted with it shortly thereafter, Mr. Al Fararjeh denied the allegation of sexual assault. He was subsequently placed on leave while the investigation continued. The investigation team interviewed the complainant, her midwife and the complainant's sister-in-law to both of whom she had made a relatively prompt complaint of sexual assault.

5. Mr. Al Fararjeh's own interview by the investigators occurred about one month later. It does not appear that the Appellant was told by the investigators more than the nature of the allegations against him. He was not told what those witnesses had said occurred, or given transcripts of their statements. In the course of giving his account, Mr. Al Fararjeh told the investigators that he had been threatened, indirectly through the clinic where he worked, by a

person he named (GM). The implication was that the complainant had made a false complaint against him in connection with those threats he said he had received. When Mr. Al Fararjeh signed his written statement subsequently, he asked that reference to GM be removed "to maintain civil peace within the Camp." He was later dismissed based on the investigation's findings.

6. Although Mr. Al Fararjeh requested management evaluation of the decision to dismiss him (a step that was essential to bringing his proceedings before the UNRWA DT), this was not only not decided by UNRWA, but he received no response whatsoever to his request for management evaluation. I simply record the irony and the inequity of the requirement, strictly enforced, on the one hand of requiring a staff member to undergo managerial review before he or she can bring a claim to the UNRWA DT, while at the same time there is no corresponding sanction on the Commissioner-General if he fails or refuses to consider a request for management evaluation.

7. In his claim against his dismissal before the UNRWA DT in which he was unrepresented by counsel, Mr. Al Fararjeh requested an in-person hearing and that the Tribunal call for evidence from the complainant, the other witnesses interviewed by the investigators and from those whom he said had threatened him and communicated these threats through his workplace, giving the Tribunal their names for this purpose. The UNRWA DT declined all these requests and instead decided his case solely on the documentary exhibits that were before it. I consider that, in the circumstances, this was the erroneous exercise of its discretion by the UNRWA DT and thus an error of law.

8. In addition to my foregoing remarks about the UNRWA DT's refusal to conduct an oral hearing and to decline to hear from witnesses nominated by the Appellant, I have identified other errors of law committed by the UNRWA DT in these regards.

9. Between paras. 30 and 37 of its Judgment, it:

a) Concluded, assuming that Mr. Al Fararjeh had not previously been provided with this, that his due process rights were protected by its (i.e. the UNRWA DT's) provision to him of the Respondent's Investigation Report, saying that he had, thereafter, ample opportunity to respond in the Tribunal to the allegations against him.

b) Concluded that although it was regrettable that his "Due Process Letter" had only been provided to him in English rather than in his first language of Arabic, he had not requested a translation and had responded to the English version.

c) Concluded that the Appellant had not been deprived of his due process rights "either at the administrative or the judicial stage that could prejudice the following outcome of this proceeding on the merits."

d) That the Agency's failure to respond to the request for management evaluation was not a procedural irregularity with respect to a contested decision.

10. At para. 53 of its Judgment, the UNRWA DT wrote that the Appellant had "failed to provide any credible reason or motive for the complainant to lie about the alleged incident". In the following paragraph it wrote about the Appellant's contention before the Tribunal that he had been threatened by a staff member in front of another staff member, told that he was being conspired against and that the staff member who had threatened him had been seen more than once outside the complainant's house.

11. Whether such evidence would have been found to be credible or not, the Tribunal deprived the Appellant of advancing it as his explanation of the stark conflict between his and the complainant's accounts of an event that was not witnessed by any other person. Its decision in this regard was an unreasonable exercise of its discretion to exclude evidence entirely and, thereby in my opinion, an error of law affecting, adversely to the Appellant, fair process before the Tribunal. In my opinion, the UNRWA DT's conclusion at para. 55 of its Judgment that: "… the potential testimonies of these two staff members would be limited to the alleged conspiracy against the Applicant, [and] could not possibly affect the outcome of the present Judgment" is an error of law. It cannot be said that, if these witnesses' accounts were admitted in evidence and accepted, the Tribunal could still then resolve against Mr. Al Fararjeh the conflicting stories of the complainant and him about events to which there was no other witness, certainly to a clear and compelling evidential test standard.

12. Mr. Al Fararjeh was, as the Tribunal noted, entitled to due or fair process rights from both the Respondent (in relation to its investigation and dismissal of him) and the Tribunal (in relation to the hearing and decision of his appeal against that dismissal). While the provision to him by the Tribunal of the Investigation Report may have satisfied those rights in relation

to the Tribunal, the Appellant was entitled to the same informational rights by the Agency, but was deprived by it of these. That is illustrated by the Tribunal's apparent acceptance that he had not received this information and the provision of it to him to attempt to cure that failure by the Respondent.

13. I would conclude also that it was an error of law by the UNRWA DT, in all the circumstances, to refuse the Appellant an oral hearing of his claims against dismissal for very serious reasons, after a long period of service. It was likewise in respect of the Tribunal's refusal to allow Mr. Al Fararjeh to have the Tribunal consider for itself the evidence of the witnesses whose accounts the Respondent had accepted as truthful and on which accounts the Appellant's denials of misconduct were disbelieved and rejected. So too was his request that the Tribunal have regard to the clinic's electronic patient records which Mr. Al Fararjeh said would have confirmed the times at which the complainant had been dealt with and which, he says, would have shown that it was unlikely that she had been locked in an examination room with him for 30 minutes as she claimed. That is not to say that these pieces of evidence would have changed the outcome of his case: indeed if examined and found to confirm the complainant's case, they may well have strengthened it against him. But the Tribunal's refusal to consider these defences was, in my view and despite the considerable discretion given to the Tribunal as to the admission of evidence, such an error of law as to require the Judgment to be set aside and the proceeding re-tried accordingly.

14. I wish to address finally Mr. Al Fararjeh's frequent mention in his submissions of his "right to confront" the complainant and the other witnesses against him. Especially in the case of alleged sexual/physical abuse of a vulnerable victim and of a power imbalance between perpetrator and victim, confrontation should not mean an entitlement to necessarily be in close physical presence with, and to question directly and argue with the complainant. Rather at least before the Tribunal, I understand the right to confront means in such cases a right to be present at and to see and hear what witnesses say and to present by evidence a contrary account of events. Different, perhaps lesser, rights may apply in the course of an investigation by the Agency of serious allegations, but should include an entitlement to know what has been said and adduced by witnesses to an investigator. These rights should include, also, the right to attempt to persuade a decision-maker of the outcome of an investigation if that decision-maker is not the same person who conducted the investigation. In this case, such rights ("to confront") should have included the provision to the Appellant of all the evidence gathered

against him in the investigation before a decision was made about his conduct; a right to make submissions to the decision-maker responsible for any sanction; and a right to appear before the UNRWA DT to see and hear the case adduced against him and to participate fully himself by calling evidence and making submissions to the Judge. The Appellant was deprived of these several due process rights for which the answer, that they are within the UNRWA DT's discretion, is wrong.

15. For all the foregoing reasons, I would find the Tribunal's Judgment so flawed in law that it should be set aside and the case remanded for a rehearing before another Judge taking into account and applying the reasoning set out above.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Colgan
Auckland, New Zealand

Entered in the Register on this 5th day of August 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar