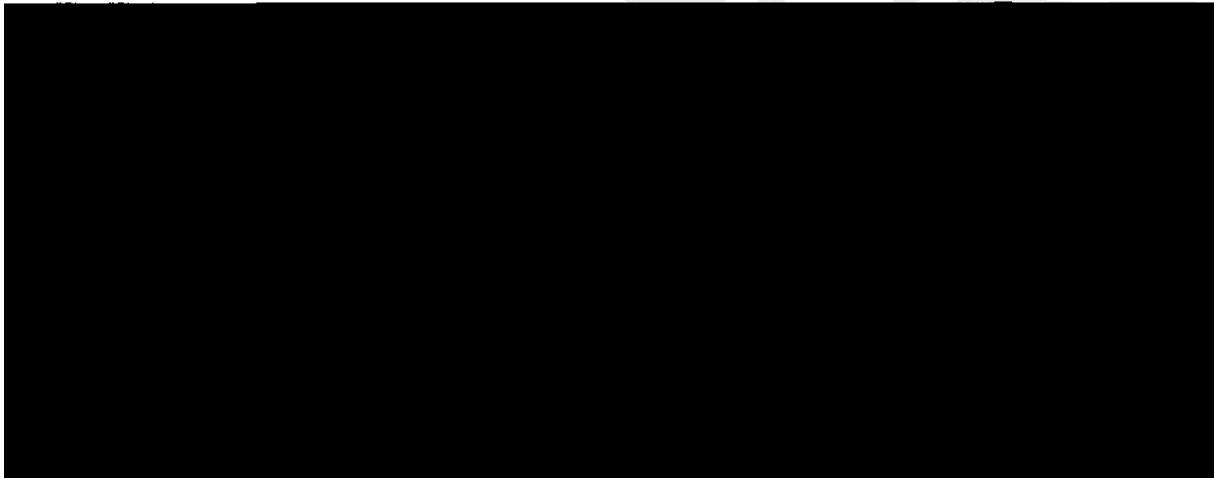




Judgment No. 2015-UNAT-537



Counsel for Mr. Wishah:

Self-represented

Counsel for Commissioner-General:

Lance Bartholomeusz

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. On 30 March 2014, the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA Dispute Tribunal or UNRWA DT and UNRWA or Agency, respectively) rendered Judgment No. UNRWA/DT/2014/008 in the case of **W**

6. Having considered the remanded case ~~ca~~ , the UNRWA Dispute Tribunal issued Judgment No. UNRWA/DT/2014/008 on 30 March 2014. On the question of whether the Agency's decision to terminate Mr. Wishah's appointment had been properly taken, the UNRWA DT answered in the negative. It found that the evidence against [Mr. Wishah] that he had committed assault was "not clear and convincing within the meaning of the test in ~~b/~~ ".² Likewise, the UNRWA DT found that "there was insufficient evidence to support a finding that [Mr. Wishah] had sought to mislead the investigation by producing falsified affidavits".³ It further found that "the disciplinary process [had] flagrantly breached [Mr. Wishah's] rights to due process".⁴ In addition, the UNRWA DT found that the decision to suspend Mr. Wishah without pay pending investigation failed to satisfy the requirements under UNRWA's Personnel Directive No. A/10 and the retroactive termination of Mr. Wishah's employment to the date of his suspension was without legal justification.

7. As remedy, the UNRWA Dispute Tribunal ordered the rescission of the decision to suspend Mr. Wishah without pay and the rescission of the decision to terminate his employment. It also ordered that Mr. Wishah be reinstated from the date of his suspension, or in the alternative, he be paid two years' net base salary, in addition to the reimbursement of salary and benefits withheld during the period of suspension without pay. It further ordered that Mr. Wishah be paid a sum of USD 15,000 as moral damages.

Submissions

The Commissioner-General's Appeal

8. The UNRWA DT exceeded its competence and jurisdiction by considering the issue of Mr. Wishah's suspension without pay, which did not form an element of Mr. Wishah's application before it. That issue was neither canvassed in his application nor raised during the hearing of the case. Consequently, the Agency had no opportunity to address issues relating to the suspension without pay.

² Impugned Judgment, para. 68. ~~b/~~ refers to Judgment No. 2011-UNAT-164 (~~b/~~ ~~CG/UN~~).

³ ~~b/~~ , para. 75.

⁴ ~~b/~~ , para. 84.

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failed to resolve the contradictory nature of the evidence provided by Mr. Wishah. Its findings in this regard were manifestly unreasonable.

13. The Commissioner-General requests that the UNRWA DT's award of moral damages of USD 15,000 be vacated or significantly reduced.

14. The Commissioner-General also requests that the Appeals Tribunal order the striking of paragraphs 91 through 98 from the impugned Judgment,⁶ as the UNRWA DT considered the issue of suspension without pay outside its competence and jurisdiction.

Mr. Wishah's Answer

15. The UNRWA DT did not exceed its competence and jurisdiction when it considered the issue of suspension without pay. The issue of suspension without pay was an inherent element for UNRWA's decision to terminate Mr. Wishah's service for misconduct. While it was imposed on Mr. Wishah not initially as a disciplinary measure, the suspension without pay was subsequently converted to the disciplinary measure of termination. In his application to the UNRWA DT, Mr. Wishah requested review of the "whole unfair process of his termination, which started with the suspension without pay and ended with the confirmation of his termination for serious misconduct and the conversion of the suspension without pay in a disciplinary measure". Pursuant to *Ap*,⁷ the Appeals Tribunal's role is not to conduct a merit-based review, but a judicial review, which is concerned with examining how the decision-maker reached the impugned decision and whether the contested decision was reasonable, legally and procedurally correct and proportionate.

16. The UNRWA Dispute Tribunal did not exceed its jurisdiction by considering the issue of distress in awarding moral damages of USD 15,000. Unlike the case of *D*,⁸ in which Mr. Debebe only claimed that he had suffered pecuniary damages, Mr. Wishah requested compensation for "psychological and moral" suffering in his pleas before the UNRWA DT.

⁶ The subtitle for paras. 91 through 94 is "Was the decision to suspend the Applicant without pay procedurally correct and justified?", and the subtitle for paras. 95 through 98 is "Was it lawful for the Agency to backdate the Applicant's termination to the date of suspension?" The UNRWA Dispute Tribunal answered these questions in the negative.

⁷ *Ap*, Judgment No. UNDT/2011/054. This UNDT Judgment was vacated by the Appeals Tribunal in Judgment No. 2012-UNAT-209.

⁸ *D*, Judgment No. 2013-UNAT-288.

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to several contradictions in the statements of the fifth witness, whose familial connection with the complainant and Mr. Wishah was unclear, to conclude that the evidence was not clear and convincing in support of the assault allegations.

29. The Appeals Tribunal is of the view that in this case, the investigator conducted an adequate review, and he was in the best place to weigh the evidence directly obtained and to reach a reasonable conclusion about the occurrence of the assault.

30. Examining the evidence summarized in the previous paragraphs, this Tribunal holds that there was sufficient evidence to support the finding that the investigated incident occurred as described by the complainant, i.e., that the truth of the facts is highly probable.¹⁰ The staff member was involved because the conflict began with his wife; he admitted taking part in an effort to separate the two women. Three persons, though related, asserted Mr. Wishah assaulted the victim, whose injuries were medically confirmed. That reasoned conclusion about the high probability that the incident had occurred in that way is what constitutes clear and convincing evidence, under our jurisprudence.¹¹ It seems that the UNRWA Dispute Tribunal, while applying the same legal framework, was re-weighing the evidence as if in a criminal case, which required proof beyond

that point of view, the Appeals Tribunal holds that the investigation yielded sufficient evidence that supported the high probability that the assault had taken place.

33. After examining the investigation report and its annexes and the evidence available on file, the Appeals Tribunal sees no reason to depart from the conclusion initially reached by the Agency, i.e., that the established facts amounted to serious misconduct.

34. Certainly, serious violence, even when committed in the private life of a staff member, cannot be tolerated, all the more so when the offender is a school teacher working for the Agency, who serves as a role model to his students.

35.

40. As we have stated in *Bt*,¹² 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.

Judgment

41. The appeal is allowed. Judgment No. UNRWA/DT/2014/008 is vacated.

¹² *Bt* v. *GC*,
v. *GC*

, Judgment No. 2015-UNAT-511, citing *D*,
, Judgment No. 2014-UNAT-420, para. 59.

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