UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2013-UNAT-289

Wishah

(Appellant)

v.

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

(Respondent)

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Rosalyn Chapman
Case No.:	2012-316
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Appellant: Hala Abu Hijleh/Ghada A. Yasin

Counsel for Respondent: Anna Segall

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Khalil Ibrahim Wishah (Mr. Wishah) against Judgment No. UNRWA/DT/2012/014, rendered by the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT and UNRWA or Agency, respectively) on 28 February 2012. Mr. Wishah appealed on 23 April 2012, and the Commissioner-General of UNRWA answered on 3 July 2012.

Facts and Procedure

2. Mr. Wishah joined UNRWA in November 1987. At the material time, he was a teacher in Gaza.

3. According to an undated complaint by Ms. Iman Abu Al Amrain, Mr. Wishah's cousin, Mr. Wishah assaulted her during the course of her nephew's wedding celebration on 4 July 2009, which resulted in injuries to her face.

4. According to another complaint dated 28 July 2009 jointly filed by Mr. Naser Wishah and Mr. Ashraf Wishah, Mr. Wishah's relatives, Mr. Wishah assaulted them on the evening of 4 July 2009, causing serious injuries requiring hospitalization to one of them.

5. On 19 August 2009, Mr. Wishah was charged by the General Prosecution at the Magistrate Court in Deir Al Balah with attacking Ms. Al Amrain. On 1 November 2009, he was also charged by the General Prosecution to the First Court in Deir Al Balah with hitting Mr. Naser Wishah and Mr. Ashraf Wishah with sticks and metal poles in the course of an altercation involving Mr. Wishah and some members of his family.

6. On 7 October 2009, the Agency notified Mr. Wishah of the allegations of misconduct against him. Specifically, it was alleged that during a family wedding gathering on 4 July 2009, Mr. Wishah beat his sister, Ms. Iman Wishah,[1] attacked Mr. Ashraf Wishah and Mr. Naser Wishah, repeatedly stabbed Mr. Naser Wishah in the throat and chest with a metal gear, and evaded arrest for his actions for several weeks. The Agency decided to suspend Mr. Wishah from duty without pay, pending investigation.

[1] It appears that the UNRWA Administration was mistaken here. The allegation of assault was filed by Mr. Wishah's cousin, Ms. Iman Abu Al Amrain.

7. On 20 October 2009, Mr. Wishah requested that the Agency reconsider his suspension and reject the complaints against him because he had not violated any local law or the UNRWA Regulations and Rules and the accusations against him were "malicious". Mr. Wishah stated that he had denied the accusations under oath before the judge of the Magistrate Court. In addition, Mr. Wishah stated that, contrary to the accusation of arrest evasion, he had appeared before the police and the General Prosecution. On 1 November 2009, the UNRWA Administration responded that the investigation was ongoing and that, before it took any decision, Mr. Wishah would be provided with a full opportunity to respond to the allegations and to the evidence.

8. According to Mr. Wishah, the Agency appointed a Legal Aid Assistant, Gaza (LAA/G) to investigate the allegations. The LAA/G is a relative of both Mr. Wishah and the complainants. The LAA/G conducted parts of the investigation in his home outside of working hours.

9. On 29 December 2009, the Agency informed Mr. Wishah that the investigation had uncovered credible evidence to support the allegations of misconduct against him, and invited him to respond within seven days to the investigation findings, which basically confirmed the allegations of misconduct summarized in the Agency's communication of 7 October 2009.

10. On 4 January 2010, Mr. Wishah denied the allegations of misconduct and provided the Agency with multiple affidavits and other supporting documents.

11. In a letter dated 21 October 2010, the Agency advised Mr. Wishah that the majority of the affidavits that he had provided had been falsified and that the witnesses attesting to the facts contained in the affidavits had, contrary to their statements, not witnessed the events. The Agency asked Mr. Wishah to provide explanations within seven days. On 28 October 2010, Mr. Wishah responded, denying the allegations of affidavit falsification.

12. In a letter dated 9 December 2010, Mr. Wishah advised the Agency that the Appeal Court of Gaza had cleared him of the charges of assault. He attached a copy of the court decision in Arabic.

13. In a letter dated 5 April 2011, the Agency advised Mr. Wishah of the decision to retroactively terminate his employment for misconduct under UNRWA Area Staff Regulation 10.2 and Area Staff Rule 110.1, with effect from 7 October 2009, when he was placed on suspension without pay. The Agency determined that, despite his acquittal at the local court and his denial, Mr. Wishah had been involved in multiple violent altercations and had attempted to mislead the

investigation, and his responses did not provide satisfactory explanations or demonstrate mitigating circumstances.

14. On 14 April 2011, Mr. Wishah wrote to the Agency requesting administrative review of the decision to terminate his service with UNRWA. In a letter dated 16 May 2011, the Agency informed Mr. Wishah of its decision to maintain the 5 April 2011 decision.

15. Mr. Wishah appealed on 5 June 2011. On 18 September 2011, he applied to the UNRWA DT for an order for full disclosure of all documents pertaining to the investigation, including the investigation report. The UNRWA DT requested, and was provided with, the investigation report. However, after it reviewed the contents of the investigation report and compared them with Mr. Wishah's application, the UNRWA DT denied Mr. Wishah's request as, in its opinion, "there [was] no relevant material contained in the report of the investigation that [was] not already in the possession of [Mr. Wishah]". In addition, the UNRWA DT decided that it would not rely on the investigation report in reaching its decision on the merits and that it would disregard and remove the investigation report from Mr. Wishah's case file.[2]

16. In Judgment No. UNRWA/DT/2012/014, the UNRWA DT dismissed Mr. Wishah's application in its entirety. Finding that the affidavits submitted by Mr. Wishah lacked probative value, the UNRWA DT concluded that Mr. Wishah was involved in multiple violent altercations on 4 July 2009, and that he had attempted to mislead the Agency by producing falsified evidence. It also concluded that those actions on the part of Mr. Wishah, even when committed outside regular working hours, constituted misconduct and that the termination was proportionate to the characterization of the misconduct. On the issues of procedure, the UNRWA DT observed that, while LAA/G's conducting investigation from his home outside working hours was "not the best of professional practices", Mr. Wishah had failed to explain the "causality" between his kinship with the LAA/G and the lack of transparency of the investigation, or why the LAA/G's investigative conduct could have tainted the procedure. The UNRWA DT dismissed Mr. Wishah's acquittal by the courts in Gaza as "irrelevant to the determination of misconduct" by the Agency.

[2] Order No. 009 (UNRWA DT 2011) dated 11 December 2011, paras. 5 and 6.

Mr. Wishah's Appeal

17. The UNRWA DT erred in procedure when it allowed the Agency as the Respondent to participate in the proceedings without first seeking leave of the Tribunal. It should be noted that Mr. Wishah submitted an application to the UNRWA DT on 5 June 2011, but the Agency did not answer until 20 January 2012, beyond the time limit.

18. The UNRWA DT erred on the question of conflict of interest, resulting in a manifestly unreasonable decision. Mr. Wishah states that he brought to the UNRWA DT's attention the issue of procedural irregularity concerning the appointment of the LAA/G to conduct the investigation and the LAA/G's conducting the investigation at his home outside working hours. In his view, these procedural irregularities in contravention of the Agency's internal investigation guidelines compromised the independence, credibility and fairness of the investigation.

19. The UNRWA DT erred in procedure when it denied Mr. Wishah's request for a copy of the investigation report. While it decided to disregard the investigation report, the UNRWA DT nevertheless relied on the findings made by the Agency, which presumably were based on the investigation report, without giving Mr. Wishah an opportunity to review it. Mr. Wishah stresses that the failure to provide him with the investigation report prejudiced him and denied him due process since he did not know how the investigation was conducted and could not refute the findings or evidence contained in the report. The provision of the investigation report was all the more relevant and important since Mr. Wishah had raised a conflict of interest claim.

20. The UNRWA DT erred in procedure in failing to address the excessive time between Mr. Wishah's suspension without pay and his termination. He was placed on suspension on 7 October 2009. Only on 5 April 2011, one year and six months later, was he informed of the decision to retroactively terminate his service effective from the date of his suspension. During his long suspension, Mr. Wishah was unsure when the investigation would end, suffered stress at the uncertainty of his employment with the Agency, and was not kept informed of the progress of the investigation.

21. Mr. Wishah maintains that termination was disproportionate to the offense committed, even if the established facts were to point to his guilt, considering the personal and unofficial setting in which the altercation occurred.

22. Mr. Wishah also maintains that the decision to terminate his UNRWA service did not follow the proper termination procedure, as there was no evidence to show that the termination decision was taken in coordination with the UNRWA Legal Advisor and/or Director of Personnel.

Commissioner-General's Answer

23. The Commissioner-General challenges Mr. Wishah's grounds of appeal as invalid as they relate to the UNRWA DT's allowing the Agency to participate in the proceedings, its failing to address excessive time between his suspension and termination and its failing to address the Agency's noncompliance with the termination procedure. In his view, these are new elements that were not put forward at the UNRWA DT level. The Commissioner-General submits that the UNRWA DT implicitly allowed or waived the time limit for the Agency to submit an answer and allowed the Agency to participate in the proceedings.

24. The Commissioner-General submits that the UNRWA DT correctly concluded that Mr. Wishah had failed to demonstrate that there was sufficient kinship between him and the LAA/G as would give rise to actual or perceived conflict of interest.

25. The Commissioner-General maintains that Mr. Wishah's due process rights were respected as he was informed of the charges against him, was invited on more than one occasion to respond to the findings of the investigation, and responded to the allegations of misconduct and produced multiple affidavits in his defense. As the UNRWA DT found, there was no relevant material contained in the investigation report that was not already in Mr. Wishah's possession.

26. The Commissioner-General submits that there is no basis for Mr. Wishah's claim that the disciplinary measure of termination was disproportionate, and the UNRWA DT's assessment was consistent with the jurisprudence of the Appeals Tribunal considering the nature of his post as a teacher.

Considerations

27. As a preliminary issue to be decided, the Appeals Tribunal holds that the UNRWA DT did not follow the proper procedure when it allowed the Respondent to participate in the proceedings without a formal request for waiver of time limit for filing its answer and taking part in the trial.

28. Article 6(1) of the UNRWA DT Rules of Procedure reads as follows:

> The respondent's reply shall be submitted within 30 calendar days from the date of receipt of the application by the Respondent in one signed original together with annexed documents, which may be electronically transmitted. The Respondent who has not submitted a reply within the requisite period shall not be entitled to take part in the proceedings except with the leave of the Tribunal.

29. Transparency, equal treatment of the parties and due respect to the quoted norm require that a formal motion be introduced when there is an attempt to file a late answer, and that the other party must be notified and preferably heard about the petition before the Judge decides on the motion, through a proper and motivated order.[3]

30. The records show no evidence that the Appellant had any notice of the late answer before the UNRWA DT Judgment was rendered and communicated to him. Hence, he is entitled to raise this issue on appeal.

31. Another significant irregularity took place during the proceedings before the UNRWA DT, in light of which we are compelled to annul the Judgment under appeal and remand the case for a *de novo* consideration by a different UNRWA DT Judge. We find that the UNRWA DT committed an error in procedure when it denied the Appellant's request for a copy of the investigation report, all the more so when one of the main reasons for his request was the allegation of conflict of interest and bias on the part of the LAA/G, which, he claimed, affected the administrative investigation that served as the basis for the termination of his contract.

32. Due process requires, in the present case, that the staff member be able to assess by himself the relevance or irrelevance of the content of the investigation report, after a direct reading of it, as the Administration's charges were mainly founded on that investigation, the characteristics and outcome of which were under discussion.

33. When challenging a termination for disciplinary reasons, the staff member is entitled to review by him- or herself the evidence used to support the conclusion of misconduct, to examine whether the fact finding conducted by the Administration indeed leads to the conclusions and the

[3] The same position is adopted by this Tribunal in *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292 (also decided during the Appeals Tribunal's 2013 spring session).

impugned administrative decision. If that opportunity is denied, due process of law is not respected, as it occurred in the present case.

34. The Appellant had requested the document; it was produced by the UNRWA Administration, and it was the UNRWA DT Judge who "found that there was no relevant material contained in the report of the investigation that was not already in the possession of [Mr. Wishah]".[4]

35. The Appellant had the right to make that assessment himself, and his view may or may not be the same as that of the Judge, considering his claim that the investigation, which led to the termination of his contract, was improperly conducted by the LAA/G, who had a conflict of interest.

36. Therefore, the failure to provide Mr. Wishah with the investigation report prejudiced his right to due process. We hereby annul the Judgment under appeal. This conclusion renders unnecessary the examination of other grounds of appeal submitted by the Appellant.

Judgment

37. The UNRWA DT Judgment is annulled and the case is remanded for a *de novo* trial, before a different UNRWA DT Judge.

[4] Judgment No. UNRWA/DT/2012/014, para. 20.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(*Signed*)	(*Signed*)	(*Signed*)
Judge Simón, Presiding	Judge Weinberg de Roca	Judge Chapman

Entered in the Register on 24th of May 2013 in New York, United States.

(*Signed*)

Weicheng Lin, Registrar