



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

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Judgment No. 2015-UNAT-537

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

**JUDGMENT**

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Before: Judge Luis María Simón, Presiding  
Judge Rosalyn Chapman  
Judge Inés Weinberg de Roca

Case No.: 2014-613

Date: 2 July 2015

Registrar: Weicheng Lin

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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 *Wishah v. Commissioner-General of UNRWA*. The Commissioner-General appealed on 29 May 2014 and Mr. Khalil Ibrahim Wishah answered on 30 June 2014.

**Facts and Procedure**

2. Mr. Wishah was a teacher in Gaza. On 4 July 2009, he and his family attended a wedding ceremony for a family relative. During the course of the ceremony, a scuffle broke out between Mr. Wishah's cousin, Ms. Iman Abu Al Amrain, and Mr. Wishah's wife. Ms. Iman Abu Al Amrain and Messrs. Naser Wishah and Ashraf Wishah (Naser and Ashraf), also Mr. Wishah's relatives, subsequently filed separate complaints with the Agency, accusing Mr. Wishah of assaulting Ms. Iman Abu Al Amrain during the wedding and assaulting Naser and Ashraf later the same day near the latter's home.

3. On 7 October 2009, Mr. Wishah was placed on suspension from duty without pay, pending investigation. On 5 April 2011, the Agency informed Mr. Wishah of its decision to retroactively terminate his employment for misconduct, having determined that Mr. Wishah had been involved in multiple violent altercations during and after the wedding celebration and for attempting to provide falsified affidavits to mislead the investigation.

4. Mr. Wishah appealed. On 28 February 2012, the UNRWA Dispute Tribunal dismissed Mr. Wishah's application.

5. Mr. Wishah appealed that UNRWA DT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal). On 28 March 2013, the Appeals Tribunal annulled the UNRWA DT Judgment of 28 February 2012 and remanded Mr. Wishah's case for a *de novo* consideration by a different Judge. The Appeals Tribunal found that the UNRWA DT had committed a significant error of procedure when it denied Mr. Wishah's request for a copy of the investigation report, which formed the basis of the decision to terminate his service with UNRWA.<sup>1</sup>

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<sup>1</sup> *Wishah v. Commissioner-General of UNRWA*, Judgment No. 2013-UNAT-289.

6. Having considered the remanded case *de novo*, 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 *Molari*".<sup>2</sup> 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".<sup>3</sup> It further found that "the disciplinary process [had] flagrantly breached [Mr. Wishah's] rights to due process".<sup>4</sup> 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.

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<sup>2</sup> Impugned Judgment, para. 68. *Molari* refers to Judgment No. 2011-UNAT-164 (*Molari v. Secretary-General of the United Nations*).

<sup>3</sup> *Ibid.*, para. 75.

<sup>4</sup> *Ibid.*, para. 84.

9. The UNRWA DT exceeded its jurisdiction by considering the issue of distress in awarding moral damages. Mr. Wishah neither claimed that he had suffered distress nor requested compensation for such damage. In *Debebe*, the Appeals Tribunal vacated the award of compensation for distress rendered by the United Nations Dispute Tribunal “without a previous claim for such damage and compensation”.<sup>5</sup>

10. The UNRWA DT erred in law in concluding that the disciplinary process “flagrantly breached” Mr. Wishah’s due process rights. The Commissioner-General notes that Mr. Wishah did not raise any issue in respect of the language of the Due Process Letter or the particulars of the evidence relating to the assaults or falsified affidavits. Those issues were raised for the first time in the course of the UNRWA DT’s hearing. Consequently, the Agency had no time to verify whether Mr. Wishah had indeed received the Due Process Letter and other crucial documents in both Arabic and English. In this connection, the Agency notes that Mr. Wishah replied to the Due Process Letter in English and did not indicate that he had any difficulty understanding the contents of the letter. While he was not provided with a copy of the investigation report, Mr. Wishah was advised of the allegations against him, was provided the names of the complainants, and was given the opportunity to contest those allegations, of which he availed himself. On the allegation of falsification of affidavits, the Agency maintains that, contrary to the UNRWA DT’s finding, Mr. Wishah’s proffering of the affidavits in his defence was a sufficient thread linking him to the affidavits. The Commissioner-General stresses that the Agency’s practice of informing the staff member of the findings made by an investigation committee (without necessarily providing the full investigation report) and giving the staff member an opportunity to respond has been upheld by the Appeals Tribunal as satisfying the key elements of due process following an investigation.

11. The UNRWA DT erred by failing to establish any exceptional circumstances justifying an award of compensation in excess of two years’ net base salary in the present case.

12. The UNRWA DT erred in law in the application of the standard of review set out in *Molari* with regard to the evidence of witnesses. To accede to the UNRWA DT’s reasoning would mean that the “clear and convincing test” would be insurmountable in cases involving witnesses who are closely related to an accused staff member. Moreover, the UNRWA DT

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<sup>5</sup> *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288, para. 19.

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,<sup>6</sup> 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 *Applicant*,<sup>7</sup> 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 *Debebe*,<sup>8</sup> 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.

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<sup>6</sup> 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.

<sup>7</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/054. This UNDT Judgment was vacated by the Appeals Tribunal in Judgment No. 2012-UNAT-209.

<sup>8</sup> *Debebe v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-288.

17. The UNRWA Dispute Tribunal correctly determined that the disciplinary process flagrantly breached Mr. Wishah's right to due process. There is no need for him to raise the due process rights issue in order for the UNRWA DT to consider it. The fact that he did not mention the violation of his due process rights in his application does not preclude or bar the UNRWA DT from determining whether the requirements of due process had been complied with during the course of the investigation and the disciplinary process.

18. The UNRWA Dispute Tribunal considered the totality of the evidence both in favor of and against Mr. Wishah and correctly concluded that the evidence against him was not clear and convincing within the meaning of the *Molari* test. Contrary to the Commissioner-General's assertion, the UNRWA Dispute Tribunal stated that the evidence given by the witnesses who were closely related to Mr. Wishah should be given "appropriate weight".

19. Mr. Wishah requests that the Appeals Tribunal dismiss the present appeal in its entirety and uphold the UNRWA DT Judgment.

### **Considerations**

20. As stated by our jurisprudence, when reviewing a disciplinary sanction imposed by the Administration, the role of the Dispute Tribunal is to ascertain whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.<sup>9</sup>

21. Following the first step of that review, the UNRWA Dispute Tribunal found that the Agency's investigation did not yield clear and convincing evidence or show sufficient facts to amount to misconduct. In making this finding, the UNRWA Dispute Tribunal conducted a *de novo* review of the evidence and placed itself in the shoes of the decision-maker, namely, the UNRWA Administration.

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<sup>9</sup> *El-Khalek v. Commissioner-General of UNRWA*, Judgment No. 2014-UNAT-442, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

22. Consequently, the UNRWA Dispute Tribunal rescinded the contested decision to terminate Mr. Wishah's appointment, ordered his reinstatement and reimbursement of lost salary and benefits or the payment of two years' net base salary in lieu thereof plus reimbursement of lost salary and benefits, and compensation for moral damages.

23. The Appeals Tribunal is of the view that the UNRWA Dispute Tribunal set out the correct legal framework, but thereafter erroneously reviewed the evidence and interfered with the administrative discretion, since the Agency had established the facts by clear and convincing evidence and the established facts constituted misconduct.

24. This Court holds that the UNRWA DT erred in law in its evaluation of the evidence, and that the Agency established the existence of the facts warranting disciplinary sanction. Thus, the procedure and the subsequent decision were lawful and there is no basis to rescind the termination or to award any compensation for damages.

25. It must be taken into account that the alleged misconduct was committed in a domestic context against the relatives of the staff member. In that context, the testimonies obtained usually come from persons directly affected by the event or closely related to the victims and/or offenders. Consequently, their subjective character cannot be disregarded, nor can the investigation avoid interviewing these persons, since they are the "necessary" witnesses to the facts under investigation. Furthermore, the victim should be heard and the accused offender should not be deprived of an opportunity to defend himself or herself through deposition or testimony.

26. This context is particularly common in cases that involve gender violence, such as the first infraction attributed to Mr. Wishah, or family violence, such as the second infraction in which Mr. Wishah was involved.

27. Therefore, the UNRWA Dispute Tribunal erred in finding that there was no clear and convincing evidence in support of the allegations against Mr. Wishah.

28. With regard to the first count, i.e., assault on Ms. Iman Abu Al Amrain during the wedding, the UNRWA Dispute Tribunal did not assign any value to her testimony, though she was the victim. It refused to rely on the corroborating testimonies of the groom and the brother of the bride due to their close relation to the complainant, Ms. Iman Abu Al Amrain, and because the incident occurred before a "great gathering of people". Moreover, it pointed

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.<sup>10</sup> 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.<sup>11</sup> 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 reasonable doubt.

31. A similar conclusion may be reached regarding the UNRWA DT's analysis of the evidence related to the second count against the staff member, namely the assault on Naser and Ashraf. The UNRWA Dispute Tribunal did not consider the evidence to be clear and convincing because it came from the two complainants, Naser's wife and his two sisters, five persons in total. Though it acknowledged that those persons and the staff member were the only eye witnesses to the incident, the UNRWA Dispute Tribunal found that their testimonies could not be considered as wholly impartial and thus the second count was not supported by clear and convincing evidence.

32. The Appeals Tribunal is cognizant of the possible interest of the complainants, their two sisters and the wife of one of them, but finds that the UNRWA Dispute Tribunal erred in disregarding their testimonies without explaining why those five persons would repeatedly lie to prejudice the staff member. Again, the facts must be considered in their context. From

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<sup>10</sup> *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

<sup>11</sup> *Ibid.*

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. Therefore, as the UNRWA Dispute Tribunal acknowledged, we agree that there is no need to examine the third count against the staff member, given there was sufficient evidence following a proper investigation, and that the assault could be considered as serious misconduct warranting termination as an appropriate sanction.

36. Mr. Wishah's due process rights were respected when this Tribunal annulled the UNRWA DT's previous judgment and remanded the case for a *de novo* trial by a different Judge. The due process defects were cured when this Tribunal's order was executed.

37. As Mr. Wishah had the opportunity to examine and comment on all the evidence, this Court finds no breach of his due process rights either at the administrative or the judicial stage that could prejudice the outcome of the proceedings on the merits.

38. The Appeals Tribunal concludes that the Agency found the facts amounting to misconduct were established and selected a lawful sanction proportionate to the nature of the offence among the possible options, which was not absurd or arbitrary and was without any kind of bias, deviated purpose or procedural irregularity.

39. This conclusion leads us to affirm the impugned administrative decision of termination imposed by the Agency and to vacate the reinstatement and compensation ordered by the UNRWA Dispute Tribunal.

40. As we have stated in *Bastet*,<sup>12</sup> 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.

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<sup>12</sup> *Bastet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-511, citing *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420, para. 59.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of July 2015 in Geneva, Switzerland.

*(Signed)*

Judge Simón, Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 20<sup>th</sup> day of August 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar