UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1186

Sharif Khalil Mezyed

(Appellant)

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No.:	2020-1493
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Sharif Khalil Mezyed:	Self-represented
Counsel for Commissioner-General:	Rachel Evers

JUDGE GRAEME COLGAN, PRESIDING.

1. Sharif Khalil Mezyed (the Appellant) appeals against Judgment No. UNRWA/DT/2020/055 of the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency and UNRWA DT, respectively) rejecting his challenge to the termination of his employment because he deliberately abandoned his post, electing to remain studying abroad, after he had been warned of the consequences of not returning to his post as directed.

2. For the reasons set out in this Judgment, we allow the appeal and set aside the UNRWA DT's Judgment.

Facts and Procedure

3. Beginning on 7 December 2009, the Appellant was employed by UNRWA on a fixed-term appointment as a science teacher with the Education Department, Gaza Field Office (GFO).

4. On 1 March 2011, UNRWA granted the Appellant's request for Special Leave Without Pay (SLWOP) to undertake studies in Turkey for the period from 2 March 2011 to 1 June 2011. The Appellant resumed his duties at the end of his SLWOP.

5. On 30 September 2012, UNRWA granted the Appellant's second request for SLWOP for the period from 6 October 2012 to 5 October 2014 to continue his studies in Turkey. The Appellant's SLWOP was extended again for the period from 5 October 2014 to 4 October 2016 to enable him to continue his studies.

6. On 27 September 2016, the Appellant requested SLWOP for one year beginning on 6 October 2016. On the same day, the Officer-in-Charge, Human Resources Office, informed the Appellant that his request for SLWOP was denied because he had exceeded the maximum one-year of SLWOP that is allowed under UNRWA's regulatory framework. The Officer-in-Charge advised him that his leave would expire on 5 October 2016, and that he was expected to report to his duty station by 6 October 2016.

7. On 30 September 2016, the Appellant obtained his PhD in Marine Chemistry from Dokuz Elyül University, Turkey. He resumed his duties at the GFO on 16 October 2016.

8. On 20 February 2017, the Appellant was granted further SLWOP for the period from 4 March 2017 to 1 June 2017 to undertake research at Palestine University. He resumed his duties at the end of this SLWOP.

9. On 21 February 2018, the Appellant was granted SLWOP for the period from 22 August 2018 to 26 August 2019 to study at Tallinn University in Estonia. He decided to pursue a second PhD, this one in Analytical Biochemistry. On 7 August 2019, the Appellant requested an extension of his SLWOP for the period of 27 August 2019 to 26 August 2020 to continue his PhD studies at Tallinn University.

10. By letter dated 15 August 2019, the Acting Head, Field Human Resources Office (AH/FHRO) informed the Appellant that his request for an extension of SLWOP was denied, because he had exceeded the maximum period allowed for SLWOP. The AH/FHRO informed him that he should return to Gaza and resume his duties on 27 August 2019.

11. By e-mail to the AH/FHRO dated 24 August 2019, the Appellant requested a review of the decision to deny him SLWOP and provided an explanation of his need for the leave. On 25 August 2019, the AH/FHRO informed the Appellant that upon review, the decision directing his return was affirmed.

12. The Appellant failed to resume his duties on 27 August 2019, and, on the same date, he e-mailed the Deputy Director, UNRWA Operations, Gaza to request a review of the decision to deny his SLWOP extension request, again explaining his position.

13. By letter dated 2 September 2019, the AH/FHRO informed the Appellant that because he failed to report to his duty station, he may be separated from service by reason of abandonment of post unless, by 15 September 2019, he submitted justifications for his absence that were acceptable to the Agency. By e-mail dated 3 September 2019, the Appellant provided his justifications for failing to report to duty.

14. By e-mail dated 5 September 2019, the AH/FHRO informed the Appellant that his case had been discussed “with the front office”, that a final decision had been taken not to extend his SLWOP, and that he was required to report for duty by 15 September 2019 based on the letter dated 2 September 2019. The Appellant failed to resume his duties on 15 September 2019.

15. By letter dated 29 September 2019, the Director, UNRWA Operations informed the Appellant that he was to be separated from service by reason of his abandonment of post.

16. On 10 October 2019, the Appellant requested review of UNRWA's decision to separate him from service.

17. On 26 November 2019, the Appellant filed an application with the UNRWA DT.

18. On 8 September 2020, the UNRWA DT issued Judgment No. UNRWA/DT/2020/055. It found that four of the five cumulative conditions in Area Staff Rule 109.4 for separation from service by reason of abandonment of post were clearly met: the Appellant voluntarily absented himself from duty; the absence was for more than three consecutive days; the absence was unauthorized; and the Appellant had been informed by letter of the consequences of failing to report for duty.

19. The UNRWA DT conducted a more extensive analysis for the fifth condition of Area Staff Rule 109.4, i.e. that Mr. Mezyed failed to submit an acceptable written explanation for his failure to report. In an e-mail dated 3 September 2019, the Appellant had provided a written explanation for his absence, which the Agency considered "unacceptable". The UNRWA DT reviewed the Appellant's arguments and examined whether the Agency's decision not to accept his justifications was a lawful exercise of the Agency's discretionary authority.

20. The UNRWA DT found that that there was no evidence in the record to establish that UNRWA had promised to extend his SLWOP and concluded that the jurisprudence of the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) requires such promises to be in writing.

21. The UNRWA DT further rejected the Appellant's assertion that the decision not to accept his justifications and terminate his employment for abandonment of post, was not taken in the interest of the Agency as it would make no difference to the Agency to keep him employed as a science teacher. The UNRWA DT noted that the Agency had been "extensively sympathetic"[1] to the Appellant and had allowed him to be on SLWOP for several years to complete his first PhD. The UNRWA found it clear that the Appellant's second PhD was a

[1] Impugned Judgment, para. 40.

qualification beyond that required for his post, and thus the extension he sought of his SLWOP would be solely in the interests of the Appellant.

22. The UNRWA DT determined that any expectation of the Appellant that the Agency would keep extending his SLWOP for three additional years, was unreasonable.

23. The UNRWA DT found that the Appellant had failed to meet his burden of establishing that the Agency's decision was procedurally flawed or irregular, exercised arbitrarily or capriciously, or was motivated by prejudice or other extraneous factors. Therefore, the UNRWA DT found that the fifth condition of Area Staff Rule 109.4 was also fulfilled.

24. After determining that all five conditions of Area Staff Rule 109.4 were met, the UNRWA DT held that the Agency's decision conformed with the regulatory framework and it dismissed the application.

25. On 7 December 2020, the Appellant submitted his appeal against the UNRWA DT Judgment.[2] On 4 February 2021, the Respondent filed his answer.

An Oral Hearing?

26. The Appellant requested an oral hearing of this appeal which was declined. We said we would provide our reasons in this Judgment which we now do. The Appellant asserted that an oral hearing would be helpful to describe his situation which he alleges had been dealt with unfairly and unequally in the GFO.

27. The discretionary grounds for departing from the default or usual position of considering such an appeal on the papers filed, are set out in Article 8 of the UNAT Statute. The test is whether UNAT is satisfied that a party's personal appearance is required at oral proceedings. That in turn assumes that there will be oral proceedings and that question is governed by Article 18 of the UNAT Rules of Procedure. The test there is whether an oral hearing would assist in the expeditious and fair disposal of the case.

[2] The Appellant originally submitted his appeal on 8 November 2020, but the filing was unsuccessful due to a technical error.

28. We were satisfied that the test for an oral hearing was not met and that, therefore, it would not be in the interests of justice that the Appellant be permitted to appear in person. We were not satisfied that there would be any benefit to his case that could not be achieved by his written submissions.

Submissions

The Appellant's Appeal

29. The Appellant submits that after each time he studied abroad on SLWOP, he returned to his duties. He argues that this demonstrates his eagerness to keep his position with UNRWA.

30. The Appellant emphasises the difficulty of traveling into and out of Gaza, which makes it impossible to guarantee that he could spend time in Gaza and be able to complete his studies.

31. The Appellant submits that UNRWA's decision is not in the Agency's best interest because, by separating him from service, the Agency will not reap any of the benefits of his education.

32. The Appellant argues that because UNRWA does not employ fixed-term teachers for terms of years, he did not inhibit the chance of other candidates.

33. The Appellant submits that UNRWA cancelled 70 per cent of his savings, even though he did not behave unethically or act against the interests of UNRWA.

34. The Appellant submits that UNRWA's decision to separate him from service and bar him from gaining other employment with UNRWA will have a detrimental effect on himself and his family.

35. The Appellant requests that the Appeals Tribunal reverse the decision to separate him from service, and the resulting decisions, such as denying him the right of access to the Agency's contribution to his savings funds and barring him from applying for jobs with UNRWA.

The Commissioner-General's Answer

36. The Respondent submits that the appeal is defective because the Appellant fails to identify any grounds of appeal under Article 2(1) of the Appeals Tribunal Statute. Instead, the Appellant in effect repeats the same arguments that failed before the UNRWA DT.

37. The Respondent further submits that the UNRWA DT did not err in fact, law, or procedure when it dismissed the Appellant's application, and thus no reversal of its Judgment is required. The Respondent argues that the UNRWA DT adhered to the applicable standard of review for abandonment of post matters, extensively considered whether the facts were established, and properly analysed whether the conditions for abandonment were met.

38. The Respondent contends that the UNRWA DT properly concluded that the Appellant failed to sustain the burden of proof required to establish that the Agency's decisions were exercised arbitrarily or capriciously, improperly motivated, or procedurally flawed.

39. The Respondent further argues that the UNRWA DT properly rejected the Appellant's argument that the UNRWA Human Resources Office misled or deceived him by promising him the extension of his SLWOP would not be a problem.

40. The Respondent asks that the Appeals Tribunal disregard the Appellant's submissions related to how his studies at Tallinn University were in the best interest of the Agency and that it would make no difference to the Agency to keep the Appellant employed as a teacher on SLWOP.

41. The Respondent objects to the Appellant's inclusion of the new assertion that UNRWA "cancelled" 70 per cent of his savings, as it is not appropriate to raise new arguments for consideration on appeal.

42. The Respondent requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

43. The Rules relevant to this appeal include the following (the emphases by italicising being ours):

> **UNRWA AREA STAFF RULE 105.2**
>
> **SPECIAL LEAVE**
>
> 1. Special leave with full or partial pay or without pay *may be granted in the interests of the Agency* in cases of extended illness, or for other exceptional reasons, for such period as the Commissioner-General may prescribe.
>
> 2. All special leave must be authorized by the Commissioner-General.
>
> …
>
> **UNRWA AREA STAFF RULE 109.4**
>
> **ABANDONMENT OF POST**
>
> 1. Where a staff member *voluntarily absents himself/herself from duty and such absence neither has been authorised nor is subsequently authorised in accordance with these rules, then such staff member may be separated from Agency service by reason of abandonment of post as provided hereunder*.
>
> 2. Where a staff member has absented himself/herself in the manner described in paragraph 1 above for three or more consecutive working days, the Commissioner-General may send to such staff member a letter informing him/her that unless, by a specified date (determined at the Commissioner-General's discretion), he/she reports for duty *or submits a written explanation of his/her absence which is acceptable to the Commissioner-General, he/she shall be deemed to have been separated from Agency service by reason of abandonment of post* under the provisions of this rule.
>
> 3. In accordance with the provisions of paragraph 2 above, *a staff member who fails to report for duty or to submit an acceptable written explanation by the date specified in the letter, shall*, unless for exceptional reasons the Commissioner-General decides otherwise, *be separated from Agency service* under this rule, with effect from 2400 hours (local time) on the day immediately preceding the first day of his/her unauthorised absence.
>
> **UNRWA Area Personnel Directive No. A/5/Rev.7/Part II**
>
> 1.4 Special leave may be approved for the following reasons:
>
> …
>
> 1.4.4. Study Leave. *Study Leave may be approved with or without pay for up to twelve months subject to the provisions of Personnel Directive A/17*, provided that the staff member shows written evidence of having received a scholarship or permission to study at an advanced level, a course of a defined duration. The staff member must also give written assurance that he/she will return to duty on completion of the course. *Periods in excess of twelve months may be authorized exceptionally upon certification by the*

> *Field Director or Director of Human Resources after consultation with the concerned Head of Department at Headquarters that it is in the Agency's interests to do so.*
> ...

44. Although the Respondent is strictly correct that an appellant cannot simply reiterate the case run before the UNRWA DT in the hope that this Tribunal will decide it differently on appeal, because the Appellant is unrepresented, we propose to deal with the appeal by examining the issues put before the UNRWA DT and addressed by him on the appeal. We cannot and will not consider new arguments advanced for the first time on appeal by the Appellant.

45. Although, strictly, the Appellant did not challenge before the UNRWA DT the denial of his request for further SLWOP, that decision was linked so inextricably to that of his separation from service for abandonment of his post that he relied on the following contention. He said that he informed the Agency that his earlier leave was to enable him to embark on a four-year post-graduate degree. He said that the Agency's response was that a renewal of his SLWOP (we infer after the expiry of its one-year duration) would "not be a problem" as he was engaged only as a teacher and not holding any particular post as such. He further said that by allowing him one year's SLWOP, the Agency implicitly promised to allow him further (we assume three) extensions to enable him to complete his second PhD degree.

46. Although the Appellant's record shows his timely (or almost timely) return to his teaching post in Gaza after each period of SLWOP during which he studied abroad and so his commitment to his teaching role with UNRWA, that also indicates his awareness of the necessity to comply with the temporal limitations on that leave. The Appellant was offered an opportunity to justify a further extension to his SLWOP which he took but which, after consideration, was declined. He was so notified and was allowed time to comply with the direction to return to his post. There is no suggestion that his failure or refusal to do so again finally was attributable to an inability for which he might have been allowed some leeway as it appears he had been on a previous occasion.

47. What is the scheme of the abandonment provisions under Staff Rule 109.4? We focus on the latter provisions because there is no argument that the first four (outlined above) were fulfilled in the Appellant's case. If the employee provides a written explanation for his or her non-return, then the fifth condition precedent to the deeming of an abandonment of employment does not exist and thus no deeming can occur. If the written explanation for

absence is accepted, there will be no sanction for that non-return. If the staff member provides a written explanation that is unacceptable, then the staff member may (and in most cases no doubt will) have his/her employment terminated for being absent without just cause. In these circumstances, the staff member is not deemed to have abandoned his/her post. The deeming provision is aimed at resolving the problem of the missing and/or unresponsive employee. The just cause of the staff member's absence must be determined and if found lacking he/she may be dismissed for being absent without just cause. The staff member is then dismissed on merit rather than being deemed to have abandoned post and thereby dismissed, the latter being an automatic process. Only employees who do not return on request or who fail to provide an explanation, can be deemed to be dismissed. Those who provide an unacceptable explanation are dismissed for being absent without an acceptable explanation.

48. Did the UNRWA DT consider and apply strictly, the scheme just described to enable the Agency to lawfully separate the Appellant from its service? Because he responded to the directive to return to his post, that part of the fifth condition precedent under *El Shaer*[3] triggering the deeming provisions of the scheme as we have outlined above, was inapplicable. We consider that the UNRWA DT applied correctly the first four of these conditions precedent to possible severance from service. The explanation provisions of the fifth condition precedent to a dismissal is therefore the pivot point of the Appellant's case and of this appeal.

49. The requirement of the staff member to provide an explanation for the non-return cannot be interpreted to mean that simply by sending a letter of explanation irrespective of that explanation's merits, either that separation can be avoided, or that abandonment is deemed to have taken place and separation follows. This fifth condition precedent to separation from service in these circumstances necessarily contemplates that the Agency will do several things in response to such an explanation. It will consider the explanation provided, decide upon its acceptability and advise the staff member either that the explanation is acceptable, and separation will not follow, or that the explanation is unacceptable and that the staff member may or will be separated from service for abandonment of his or her post.

[3] *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-942.

50. The foregoing requires, necessarily, that in cases such as Mr. Mezyed's where an explanation is provided, the Agency must consider the acceptability to it of that explanation and its decision, if it rejects the explanation, must be made on rational and transparent grounds.

51. What occurred in the Appellant's case? Relevant information in the possession of the Agency included the Appellant's printed application form for SLWOP to the Agency of 7 August 2019 requesting the extension of his SLWOP for one year (to 26 August 2020) to enable him to continue with his degree programme at the Tallinn University. The reason for the leave was said by him to be "Studying". Had this been the entirety of the exchanges, it may or may not have allowed the Agency to conclude that the Appellant's explanation was unacceptable. However, and to its credit, the Agency continued to engage with the Appellant, and he with it, in the course of which other and more detailed explanations emerged meaning that the Agency did not make a final decision about the extension of the Appellant's leave until some time later. Despite the (at most) minimal sufficiency of his initial reason for seeking further leave, the Appellant was significantly more forthcoming when he provided his explanations under Area Staff Rule 109.4(2). He and the Agency engaged mutually over the course of several weeks about whether he would be granted further leave and, on his part, addressing the reasons for his wish to have extended leave and, thereby, for not returning to his post as he had been directed.

52. His initial and minimal reason for seeking more leave, and thereby his explanation for his intended non-return, was responded to by the Agency by letter dated 15 August 2019 declining the extension sought and saying that he had exceeded the one-year maximum period of SLWOP under the Agency's regulatory framework. The Agency's letter set out part of Part II of the Area Personnel Directive A/5 which, after confirming the one-year limit for SLWOP, noted that a second year could, if requested, be considered by the Agency. The Directive recorded that grants of SLWOP were discretionary and there could be no expectation of a second-year extension. The letter told the Appellant that he had "exceeded the permissible SLWOP duration" and, hence, his application was refused. He was told that he was expected to return to his post in Gaza by 27 August 2019. The Area Personnel Directive's advice contained in the letter (set out above) that a longer period of SLWOP might be granted on request, may account for the increasingly detailed justifications sent by the Appellant and, perhaps also for the extended times for compliance allowed by the Agency as we will recount.

53. The Appellant, by e-mail of 24 August 2019 requested a review of the Agency's decision. His e-mail set out in some detail a number of grounds in support of his continued absence "[f]or study purposes". He assured the Agency of his intention to return (his family remained in Gaza) and enclosed an academic progress report. He described his profession (a chemist), said that his study was in this field and advised that his project had attracted funding. He said that the University had committed to having Masters' students under his supervision for the following year. He said that he had returned from his previous study leaves and had taken up part-time work as a teacher in Gaza. He referred to what he said had been advice that he had received to apply for study leave rather than research leave as the former was more likely to be granted. He said that it was "impossible" to leave his doctoral studies at that point; to do so would harm his own studies and those of others. He pointed out that UNRWA had not hired any teachers on fixed-term appointments since 2017 so that his school would not be affected adversely by his further absence.

54. Although the rules provide for one explanatory exercise under this abandonment of post procedure, we do not consider that what amounted to two explanations by the Appellant makes any difference to his or the Agency's compliance with the Rule. He had provided a detailed explanation for his proposed non-return and it was up to the Agency to decide whether this explanation was acceptable to it or not. It was required to apply the same standards of consideration, deliberation and reasoning to it as it was required to for the first explanation. That is not to say that there may be interminable explanatory exercises that paralyse the operation of the Rule in practice. In this case a second and fuller explanation was engaged with by the Agency and it cannot be criticised fairly for having done so.

55. Whether the Appellant's reasons were true and whether they carried any weight with the Agency, and if so, how much, is not for this Tribunal to determine. But they did constitute a statement or statements of his grounds to support the Appellant's continued absence from Gaza and so should have been considered, addressed and responded to (with appropriate reasons) by the Agency.

56. This request for extended leave and explanation why he did not intend to return were promptly rejected in two short sentences, and this was conveyed to the Appellant on 25 August. Added to the reason previously given that the one-year maximum had been exceeded, was a further reason, namely that the Appellant had already obtained a first PhD degree.

57. The Appellant did not return to Gaza by 27 August 2019. On that same day, however, he e-mailed the Agency seeking a further review of its previously announced decision and setting out both some of the same and further reasons for not returning to Gaza at that time. These reasons included that it was his experience that it was difficult to find an academic or a research position there without the qualifications and experience that he would bring back with him at the end of a further three years. He emphasised the practical applications of his training and experience and that although he had previously applied for a position in food analysis rather than school teaching, the response to this had been so delayed that he had sought leave to undertake further study which had been granted. The Appellant pleaded for even a one-year extension, despite the fact that this would only see him halfway through his doctoral course of study and that he would try to manage things at that stage if he was allowed that extension. He emphasised that he could not study extramurally from Gaza.

58. The Agency responded by letter to the Appellant on 2 September. This letter did not address his grounds for what was by then his absence without leave. Although we have concluded that the Appellant's several different explanations required the Respondent to consider and address them and to provide a reasoned response to them, this letter did not do so but dealt rather with his failure, to that point, to report for duty. It said that if he did not report for duty by 15 September and submit an acceptable justification for his absence, he might be separated from his service with the Agency on the ground of his abandonment of his post and that such separation would have the retrospective date of 27 August 2019. This might, he was advised, result in the financial loss to him of his Agency Provident Fund benefit.

59. The Appellant e-mailed the Agency on 3 September setting out again his reasons for not returning to Gaza. These elaborated on the effects on his degree programme and on others at the Tallinn University associated with it, of his having to cease his study and return to Gaza. He set out his plans for returning in the following year to Gaza which he said would enable him to complete parts of his written thesis from home. He said that if compelled to abandon his studies without the consent of the University, he could be deported from Estonia after cancellation of his residency permit. This e-mail was responded to by the Agency on 5 September, essentially reiterating its advice to him that had been in its 2 September letter. He was told that his case had been discussed but that a final decision had been taken not to allow his requested extension to his SLWOP. He was told to report for duties and resume his work in Gaza before 15 September. He did not do so.

60. By letter dated 29 September 2019, the Director, UNRWA Operations informed the Appellant that he was to be separated from service by reason of his abandonment of post. As to his explanations for his non-return to Gaza, the Agency advised him that "the justifications provided by your side to extend the SLWOP were not accepted, [and] you will be separated from agency services by reason of your abandonment of post under the provisions of Area Staff Rule 109.4". He was advised of his loss of Agency Provident Fund benefits.

61. As we have already concluded, the Agency having allowed the Appellant several opportunities to provide explanations and justifications for his proposed non-return to his post, it was incumbent on it to consider all these before deciding upon their acceptability and, as it transpired, its rejection of his pleas and its separation from service of him for abandonment of his post.

62. As the UNRWA DT noted at paragraph 36 of its Judgment, it is not its function (nor, we note, is it the function of this Tribunal on appeal) to substitute their decisions for that of the Agency, including as to whether the Appellant had provided acceptable reasons for his non-return. But the Appellant was entitled to have the UNRWA DT review the relevance or irrelevance of the factors taken into account, the lawfulness, the rationality, the procedural correctness and the proportionality of the Commissioner-General's decision.[4] The difficulty with the Agency's almost complete lack of stated reasons for apparently rejecting the grounds advanced by the Appellant for his non-return, is that the UNRWA DT could not have been able to assess at least some of those considerations, including whether the Agency took into account relevant and ignored irrelevant factors, the rationality of the decision the Agency took and the proportionality of the outcome to the Appellant of necessarily involved in the exercise that it had to undertake weighing the respective advantages and disadvantages to it and to him. A review of the rationality of a decision requires that there be adequate reasons and, in turn, a review of the adequacy of these of reasons includes a review of the record and the outcome. In this case where there was a dismissal and the Agency's decision has important significance for the individual. Where there is a statutory right of appeal, the circumstances require adequate reasons which should be addressed, at least minimally, at the time the decision is made and announced. That may be either in the contested decision alone (the letter of advice of the

[4] See *Sanwidi v. Secretary-General of the United Nations,* Judgment No. 2010-UNAT-084, para. 40.

decision in this case) or read with the record to determine whether the exercise of the Commissioner-General's discretion was lawful.

63. From the documentary evidence (the letters advising the Appellant of the Agency's refusal of further leave, requiring his return to his post and finally his severance from service), the Agency set out only two grounds for its rejection of his reasons for failing to return to Gaza. The first was that he had used up the one-year SLWOP allowed to him under the Staff Rules. That was at least insufficient, if not defective, reasoning because it addressed what the Agency was empowered to do but not the rationale for doing it. Additionally, that reasoning ignored the Appellant's request for a further year's SLWOP which was contemplated by the Rules, albeit as a discretionary power in exceptional circumstances. The Agency's second expressed ground for its refusal was because the Appellant already had a PhD degree. That reasoning neither addressed a ground advanced by the Appellant in support of his request for leave extension and failure or refusal to return to Gaza and, as it was baldly expressed by the Agency, was at odds with the fact that he had already been granted a year's SLWOP to continue studying and for what he had brought to its attention was a four-year degree. So, without more, this was not a reason or justification for the unacceptability of the Appellant's failure to return to Gaza which could be considered as to its rationality, relevance and its proportionality. That correspondence chain described above is the best evidence of the Commissioner-General's reasoning at the time those decisions were taken.

64. As this Tribunal noted in *El Shaer*, the powers purportedly exercised by the Agency were draconian, especially when the Appellant's was not a case of a staff member being incommunicado, missing without trace, failing or refusing to engage with the Agency or any of the other potential scenarios. In these circumstances, we apply the relevant principles stated in the *El Shaer* Judgment. They must be strictly and purposively interpreted, that is against the Agency seeking to invoke them in any case of other than strict adherence to them by the Agency.[5]

65. Had the Agency complied strictly with these obligations when it considered and decided on the acceptability of all the several reasons for the Appellant not returning to Gaza as it had directed, and having addressed them, it may or may not have found them to have been acceptable. As already noted, it is not for this Tribunal to make, and it was not for the

[5] *El Shaer, op. cit.,* para. 30.

UNRWA DT to have made, that decision in substitution for a properly reasoned and expressed decision arrived at by the Agency. Had it done so and advised the Appellant accordingly, it is possible that the Appellant could have reconsidered his position and returned within the deadline date imposed. But the erroneous (in one case) and inadequate reasoning proffered by the Agency precluded this outcome from occurring. That failure by the Agency to fulfill its obligations to the Appellant must, therefore, render unlawful his separation from service for abandonment of his post and consequential loss of his pension entitlements. The UNDT erred in law in concluding that there was no error in what the Respondent did.

66. As to remedies, we direct that the administrative decision to separate the Appellant from service be rescinded. If that remedy is provided by the Agency, his pension entitlements should be restored as if they had not been discontinued. As an alternative remedy (as we must specify under Article 9 of the UNAT Statute), we may direct the payment of up to two years' salary. Despite our conclusion about the Agency's failure to provide reasons indicating that it had properly considered the Appellant's explanation, the merits are not all with him. He had obtained one post-graduate degree on SLWOP with the assistance of the Agency and seems to have spent more time studying than teaching while employed by the Agency. It is not difficult to imagine that it may have considered that a continuation of this situation was not in its interests. The Appellant was allowed reasonable time and opportunities to make his case for an extension of his leave. He elected not to return to his post in circumstances in which he could both have done so and subsequently challenged the justification for the Respondent's decision not to extend his leave.

67. For these reasons, the amount of compensation awarded as an alternative to recission must take account of these factors. We direct the Agency pay to the Appellant compensation equivalent to three months' remuneration that he would have received had he returned to Gaza and taken up a teaching position with the Agency for that period. If this alternative remedial regime is chosen by the Agency, the Appellant must also be compensated for his loss of pension entitlements as if he had concluded his teaching role on 27 November 2019, that is three months after the severance of his service.

68. We consider both that the Appellant has not made out an evidential case for moral damages and that, in any event, his election not to return to Gaza made him in significant part responsible for what befell him. Therefore, either his reinstatement to his teaching role (including reinstatement of his pension entitlements), or monetary compensation for lost

remuneration and pension entitlements, constitute a just remedy for the consequences of the Agency's wrongs.

Judgment

69. The Appellant's appeal is allowed. Judgment No. UNRWA/DT/2020/055 is set aside as erroneous in law. The Respondent's decision to separate the Appellant from service is rescinded. If the Respondent elects not to reinstate the Appellant without loss of remuneration or benefits, the Respondent is directed to pay to the Appellant compensation equivalent to three months' remuneration for the period 28 August 2019 to 27 November 2019 and compensation for his loss of pension entitlements calculated by reference to the same period.

Original and Authoritative Version: English

Dated this 29 October 2021.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding Auckland, New Zealand	Judge Sandhu Vancouver, Canada	Judge Murphy Cape Town, South Africa

Entered in the Register on this 12th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar