UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1195

Samer Mohammad

(Appellant)

v.

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

(Respondent)

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos
Case No.:	2021-1543
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Amer Abu-Khalaf, LOSA
Counsel for Respondent:	Ana Peyro-Llopis

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Mohammad filed an application with 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), challenging the decision to administer to him the disciplinary measure of summary dismissal on account of clear and convincing evidence establishing his misconduct of sexual exploitation and abuse (SEA). The UNRWA DT dismissed Mr. Mohammad's application. Mr. Mohammad appeals.

2. For the reasons set out below, we dismiss the appeal.

Facts and Procedure

3. Mr. Mohammad joined UNRWA in February 2001 as a Teacher at Husn Camp Preparatory Boys School No. 1, Grade 6C, Jordan Field Office (JFO). At the time material to the events of the present case, he was a Teacher of Arabic language, Grade 11, at Irbid Preparatory Boys School No. 1, JFO (Irbid School).

4. On 3 and 4 May 2016, allegations were reported to the Director of UNRWA Operations, JFO (DUO/J), that Mr. Mohammad had engaged in sexual exploitation and abuse of two 8th grade male students at Irbid School (Student A and Student B).

5. On 4 May 2016, the Officer-in-Charge (OiC) for DUO/J authorised the Field Investigation Officer, JFO (FIO/J) to conduct an investigation into the reported allegations against Mr. Mohammad. On 10 May 2016, the DUO/J placed Mr. Mohammad on administrative leave with pay, effective immediately, pending the outcome of the investigation.

6. The FIO/J conducted an investigation through 30 June 2016. In the Investigation Report dated 10 July 2016, the FIO/J stated that the testimonial, physical and circumstantial evidence, analyzed as a whole, supported the complainants' accounts of the events and their credibility. Moreover, he was satisfied that the allegations of SEA were founded and that Mr. Mohammad had engaged in misconduct by attempting to sexually exploit the two male students.

7. On 6 October 2016, the Head, Field Legal Office, Jordan (H/FLO/J) issued Mr. Mohammad a due process letter (DPL), informing him of the findings of the investigation, noting Mr. Mohammad's admission that he had given Student B a mobile phone of Sony brand in grey color and that he might have asked Student B if he had masturbated and provided Student B with advice in this respect. The H/FLO/J invited Mr. Mohammad to respond to the allegations.

8. On 24 October 2016, Mr. Mohammad responded to the DPL and denied the allegations. He highlighted some procedural irregularities including denial of his right to receive legal assistance or consultation, refusal to allow the presence of his colleague during the investigation, and failure to provide to him the final investigation report and its annexes. Specifically, in respect of Student A, Mr. Mohammad challenged the Agency to provide any evidence to substantiate the allegations that he had touched Student A's thigh on more than one occasion, that he had offered Student A a mobile phone, and that he had threatened Student A with bad grades. Regarding Student B, Mr. Mohammad denied all the investigative conclusions accusing him of spending time with Student B outside school time and forcing Student B to accept a mobile phone. Mr. Mohammad agreed that he did lend a mobile phone to Student B "temporarily" because Student B had told him that his own phone had been broken and because Student B and Mr. Mohammad were "relatives". According to Mr. Mohammad, Student B's father subsequently "broke it into two pieces", telephoned Mr. Mohammad to apologize and offered to pay Mr. Mohammad for the broken mobile phone. Mr. Mohammad stressed that the mobile phone that he gave to Student B did not contain any pornographic material. About masturbation, Mr. Mohammad stated that he had discussed the issue with Student B with an "innocent" intention because he had only wanted to give Student B some advice on the matter as "a teacher and educator". Among the attachments to his DPL response was a letter from Student A and his father withdrawing their complaints against Mr. Mohammad "[d]ue to a very personal reason".

9. On 1 February 2017, the DUO/J sought the agreement of the Director of Human Resources (DHR) and the Director of Legal Affairs (DLA) to impose on Mr. Mohammad the disciplinary measure of separation from service with termination indemnity.

10. On 26 July 2017, the DHR and the DLA informed the DUO/J that they did not agree with his recommendation. The DHR and the DLA underlined that neither the H/FLO/J nor the DUO/J had been provided with the translation of Mr. Mohammad's response to the DPL.

In addition, the DHR and the DLA noted that "in the absence of testimony from the mother of [Student B], [...] the evidence does not clearly and convincingly support a finding that the phone provided by [Mr. Mohammad] contained pornographic content". Therefore, in their opinion, "no decision/action should be taken on this case before the decision maker is provided with an opportunity to review all the evidence and due process response in English".

11. On 23 January 2018, the H/FLO/J requested the Department of Internal Oversight Services (DIOS), UNRWA, to consider re-opening the investigation that had been conducted by the FIO/J. On 31 January 2018, the DIOS decided to re-open the investigation for the limited purpose of interviewing the mother of Student B with respect to whether she had seen any pornographic material on the mobile phone that Mr. Mohammad had given to her son. Student B was also re-interviewed. In her interview, Student B's mother confirmed that she had seen graphic pornographic material on her son's mobile phone, but that it was not on the phone that Mr. Mohammad had given to him. Student B, on the other hand, confirmed that Mr. Mohammad had sent the pornographic material to his mobile phone.

12. In light of the new evidence from Student B's mother and Student B and H/FLO/J's new recommendation, in June 2018, the DUO/J sought the agreement of the DHR and the DLA to impose on Mr. Mohammad the disciplinary measure of summary dismissal.

13. On 1 October 2018, the DHR and the DLA agreed with the DUO/J's recommendation for summary dismissal on the basis of all evidence analyzed. The DHR and the DLA noted the fact that Mr. Mohammad had not been provided with the additional findings as a result of the DIOS' supplemental investigation, but did not view it as a "critical due process flaw", because those additional findings substantiated the charges that had already been communicated to Mr. Mohammad.

14. By memorandum dated 11 October 2018, the DUO/J sought the approval of the Commissioner-General of UNRWA (Commissioner-General) to impose the disciplinary measure of summary dismissal on Mr. Mohammad. The Commissioner-General approved the DUO/J's request on 4 November 2018.

15. On 8 November 2018, the Deputy Director of UNRWA Operations, Jordan (D/DUO/J), informed Mr. Mohammad that the Agency had concluded that the allegations of SEA regarding Student A were not substantiated, but that the allegations of SEA in respect of Student B were substantiated by clear and convincing evidence, "with the new information collected, in addition to the facts established in the original investigation", that he had kissed Student B on the mouth and attempted to do so on other occasions, that Student B's mother had seen pornographic material on her son's phone and Student B had confirmed having received the material from Mr. Mohammad through WhatsApp, and that a witness had seen Mr. Mohammad and Student B more than once in an empty classroom with the door closed. The D/DUO/J informed Mr. Mohammad that "the Commissioner-General decided to issue [him] with the following disciplinary measure: **Summary Dismissal**".[1]

16. Mr. Mohammad appealed by first requesting a decision review and then filing an application with the UNRWA Dispute Tribunal.

17. In Judgment No. UNRWA/DT/2021/003 dated 18 January 2021, the UNRWA DT dismissed Mr. Mohammad's application. The UNRWA DT recalled that only the Commissioner-General RAL is authorized to impose summary dismissal on staff members, and noted the unacceptable numerous mistakes in D/DUO/J's 8 November 2018 letter to Mr. Mohammad with respect to the identity of the decision-maker of the summary dismissal decision, but held that those mistakes were "not significant enough to render the imposition of the disciplinary measure of the summary dismissal unlawful".[2] The UNRWA DT rejected Mr. Mohammad's allegations of procedural irregularities. In its view, "any shortfall in the initial investigation was offset by further investigation and interviews that were conducted by the DIOS" in the form of "additional interviews conducted by the DIOS, namely of Student B and his mother", and Mr. Mohammad's "due process rights were amply observed during the investigative process and during the proceedings before [UNRWA DT]".[3] In this regard, the UNRWA DT considered that the record before it was sufficient for a decision without the need for an oral hearing, and that Mr. Mohammad "was entirely able to mount a proper

[1] Bold and underline in original.
[2] Impugned Judgment, para. 45.
[3] *Ibid*., paras. 51 & 52.

defence based on the documentary evidence" as he had received initially a redacted version of the Investigation Report and subsequently the unredacted version along with its annexes.[4]

18. On the merits, the UNRWA DT determined that there was no convincing evidence in support of Mr. Mohammad's credibility, and his explanations with respect to the allegations against him were not credible, while the statements of Student B, his mother and his father were entirely persuasive and credible. It concluded that all the evidence "constitute[d] a clear and convincing concatenation of evidence, establishing, with a high degree of probability, that the alleged misconduct had, in fact, occurred."[5]

19. Mr. Mohammad appealed Judgment No. UNRWA/DT/2021/003 to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 6 April 2021. The Commissioner-General filed an answer to the appeal on 2 June 2021.

Submissions

Mr. Mohammad's Appeal

20. Mr. Mohammad requests the Appeals Tribunal hold an oral hearing in his case. He also requests that the impugned UNRWA DT Judgment be vacated, and that his application be entertained *de novo*.

21. Mr. Mohammad says that the UNRWA DT erred in law in its interpretation of paragraph 4 of Area Staff Rule 110.1. The disciplinary measure was not issued by the Commissioner-General, but by the D/DUO/J. The UNRWA DT identified this flaw as a procedural irregularity, but erred in law in failing to consider this substantial irregularity as unlawful.

22. Mr. Mohammad maintains that the UNRWA DT erred in fact and in law in its assessment of the evidence and in its conclusion that there was a clear and convincing evidence establishing his misconduct of SEA.

[4] *Ibid*., para. 56.
[5] *Ibid*., para. 69.

23. Mr. Mohammad states that the UNRWA DT erred in holding that his due process rights had been respected. Note should be taken that due process was not accorded when a further interview was conducted by the DIOS. A "further interview of student B's mother by DIOS"[6] still failed to yield clear and convincing evidence, because the investigators identified no evidence of a WhatsApp message or gallery photos as emanating from Mr. Mohammad, nor did they report it in the Investigation Report. The UNRWA DT did not pay attention to the witness statements, such as that from the School Principal that confirmed that he had reported his stolen phone long before the alleged incident with Student B.

The Commissioner-General's Answer

24. The Commissioner-General requests that the Appeals Tribunal dismiss Mr. Mohammad's appeal in its entirety, including each and all of his pleas and all the relief sought.

25. The Commissioner-General submits that the UNRWA DT did not err in law in its consideration of the question of authority to impose summary dismissal. The UNRWA DT was cognizant of the enabling provisions of paragraph 4 of Area Staff Rule 110.1, and its consideration of the question of decision-making cannot be assailed. The crucial question for consideration in this regard is whether the Commissioner-General exercised his discretion to summarily dismiss Mr. Mohammad from service. The question of how it was communicated to Mr. Mohammad, though clumsy, is beside the point. The question of delegation as suggested by Mr. Mohammad did not arise, because the Commissioner-General duly exercised his discretion to make the summary dismissal decision on 4 November 2018. The requirements of Staff Rule 110.1 with regard to the authority on summary dismissal were thus complied with.

26. The Commissioner-General states that the UNRWA DT did not err in law, fact or procedure in its assessment of evidence and subsequent conclusions. It was cognizant of the applicable standard of proof in disciplinary cases and considered each element of the four prongs of the legal analysis before dismissing Mr. Mohammad's application. The UNRWA DT noted Mr. Mohammad's admission that he had given a mobile phone to

[6] Paragraph 8 of Mr. Mohammad's appeal. This is factually incorrect. Mr. Mohammad is under an erroneous impression that the investigator had originally interviewed Student B's mother. The DIOS interviewed her after the investigation was re-opened. That was the only interview of Student B's mother.

Student B and had a sexually themed (masturbation) conversation with Student B, considered multiple facts as corroborating evidence, assessed Mr. Mohammad's credibility and the evidence of Student B and his father's allegations against him. In addition, the UNRWAD DT found the statement of Student B's mother "significantly" supported the allegations against Mr. Mohammad. There was also evidence before the UNRWA DT that the pornographic materials in Student B's phone that his mother had seen had been sent by Mr. Mohammad. The fact that the UNRWA DT did not refer to the statements of the witnesses for Mr. Mohammad does not necessarily mean that they had not been considered.

27. The Commissioner-General maintains that the UNRWA DT did not err in its consideration of the question of Mr. Mohammad's due process. It properly considered due process issues in paragraphs 46-52 of the impugned Judgment. Notably, none of those findings is subject of Mr. Mohammad's appeal.

28. The Commissioner-General stresses that the remedies that Mr. Mohammad is seeking have no legal basis.

Considerations

Oral hearing

29. At the end of his appeal, Mr. Mohammad requests that his application "be entertained *de novo* … to include (an) oral hearing". Were Mr. Mohammad to request the oral hearing to be held before the UNRWA DT, a remand would be necessary for a *de novo* consideration and a new judgment. In any event, in light of the judgment below, the Appeals Tribunal does not find that holding an oral hearing is necessary before the UNRWA DT, nor does it find that it would "assist in the expeditious and fair disposal of the case" before the Appeals Tribunal, as required by Article 18(1) of its Rules and Article 8(3) of its Statute. The factual and legal issues arising from the appeal have already been clearly defined by the parties and there is no need for further clarification. All elements of discussion are already on the record. Mr. Mohammad's request for an oral hearing is denied.

The procedural issue of who took the contested administrative decision

30. In his appeal, Mr. Mohammad claims that the UNRWA DT erred when it failed to consider the authority to impose the disciplinary measure, which in this case was not the Commissioner-General, who is the only person empowered to impose summary dismissal on staff members, but the D/DUO/J.

31. Area Staff Regulation 10.2 stipulates that the Commissioner-General may impose disciplinary measures on staff members who engage in misconduct. More especially on the issue of disciplinary measures and procedures, Area Staff Rule 110.1(4) provides that "*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."[7]

32. Regarding the authority to impose disciplinary measures, Area Personnel Directive No. A/10/Rev.3 on "Disciplinary measures and procedures" (1 January 2017), in paragraphs 21 and 22, reaffirms that:

> … Only the Commissioner-General has the authority to impose summary dismissal as a disciplinary measure. The Commissioner-General may consult with the Director of Human Resources and the Director of Legal Affairs and, in cases involving the summary dismissal of Field staff, the relevant Field Office Director. After a summary dismissal has been imposed, the completed case file must be sent to the Director of Human Resources.
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> … The Commissioner-General has delegated the authority to impose disciplinary measures other than summary dismissal to the Director of Human Resources for Headquarters staff and to Field Office Directors for Field staff.

33. In the present case, while Mr. Mohammad claims that it was the D/DUO/J who imposed the disciplinary measure of dismissal, the Commissioner-General maintains that it was he who decided to summarily dismiss Mr. Mohammad on 4 November 2018, and that the D/DUO/J's letter of 8 November 2018 merely communicated his decision to Mr. Mohammad. Consequently, there was no delegation of authority or breach of Area Staff Rule 110.1(4).

[7] Emphasis added.

34. On the issue of authority to issue the decision, the UNRWA DT acknowledged that the letter of 8 November 2018, which communicated the disciplinary measure to Mr. Mohammad, had been signed by the D/DUO/J and contained mistakes, the nature and quantity of which, with respect to the identity of the decision-maker of the impugned disciplinary measure, were not acceptable. However, in light of the Appeals Tribunal's jurisprudence, the UNRWA DT considered that "these mistakes are not significant enough to render the imposition of the disciplinary measure of the summary dismissal unlawful".[8]

35. It is undisputable that the letter of 8 November 2018 was signed by the D/DUO/J and not by the Commissioner-General. The question is whether it merely formally conveyed a decision taken beforehand by the Commissioner-General or that it substantively constituted the impugned decision. The Appeals Tribunal finds that the letter only communicated the decision taken by the Commissioner-General on 4 November 2018, when he internally approved the DUO/J's request to impose on Mr. Mohammad the disciplinary measure of summary dismissal, a fact provided by the UNRWA DT Judgment and relied upon by Mr. Mohammad in his appeal.[9] This finding is in line with what should have been expected in cases such as the present one, when a decision is taken following an investigation into allegations of misconduct against a staff member. Before communicating such a decision to the staff member concerned, there has to be a procedure involving different phases, and proposals must be endorsed by management before the final decision is made. Only then is it communicated to the staff member concerned.

36. The finding that the Commissioner-General was the ultimate decision-maker in the present case is corroborated by the information contained in the interoffice memorandum dated 11 October 2018 directed to the Commissioner General, whereby the DUO/J sought approval from the Commissioner-General of his proposal to impose the maximum disciplinary measure of summary dismissal in accordance with Area Staff Rule 110.1.5(J). The sanction thus could not have been imposed without the consent of the Commissioner-General, who took the final decision.

37. The last part of the same document headed "Decision of the Commissioner-General" indeed clearly states that "[t]he aforementioned recommendations are hereby" approved, with the "Approved" box having been clearly highlighted and followed by the name

[8] Impugned Judgment, para. 45.
[9] *Ibid*., para. 22.

and the signature of the Commissioner-General and the date of 4 November 2018. On the one hand, this acknowledgment undoubtedly shows that the decision-maker was the Commissioner-General, as it should be. On the other hand, such an acknowledgment also makes it clear that the mistakes in the way the decision was communicated in the 8 November 2018 letter, although regrettable as highlighted by the UNRWA DT,[10] did not affect the fact that the real decision had ultimately been taken by the competent person and not by any delegated authority. The UNRWA DT was therefore correct in its reasoning, which was based on the Appeals Tribunal jurisprudence that only substantial procedural irregularities would render a disciplinary measure unlawful.[11]

The alleged procedural flaw of non-disclosure of the supplemental investigation and interviews

38. Mr. Mohammad claims that his due process rights were not respected when a further interview was conducted by the DIOS, with the effect that the suggestions of the DLA and DHR remained the same, in that his due process rights had not been respected.

39. In this regard, the UNRWA DT recalled that the DUO/J's initial intention to dismiss Mr. Mohammad was not supported by the DLA and the DHR because there was not clear and convincing evidence of misconduct. Following additional interviews conducted by the DIOS, namely with Student B and his mother, the Agency decided to summarily dismiss Mr. Mohammad. The UNRWA DT then found that:[12]

> … any shortfall in the initial investigation was offset by further investigation and interviews that were conducted by the DIOS. Moreover, during the proceedings before the [UNRWA Dispute] Tribunal, the Applicant was invited to produce written testimonies from individuals whom he contended the Investigator had not interviewed or from any other individuals. The Applicant submitted five written testimonies, namely from the Chairperson of the Staff Union, his former supervisor, his own wife, brother-in-law and a former colleague.

[10] *Ibid*., para. 45.
[11] *Ibid*., para. 45. See also *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 33.
[12] *Ibid*., para. 51.

Consequently, the UNRWA DT concluded that Mr. Mohammad's due process rights had been amply observed during the investigative process and during the proceedings before it.[13]

40. It is true that the initial approach of the DLA and DHR was not to support Mr. Mohammad's separation from service, based on the lack of evidence to the required standard of proof and the fact that Mr. Mohammad's response had not been translated into English.[14] However, this led to the re-opening of the investigation and the interviewing of more witnesses, culminating in another DUO/J's recommendation for the disciplinary measure of summary dismissal, which, this time, secured the agreement of the DHR and the DLA, before receiving the approval of the Commissioner-General.[15] Mr. Mohammad's assertion that the DLA's and DHR's opinion remained the same is without merit.

41. What matters most in this case was whether the non-disclosure of the supplemental investigation to Mr. Mohammad before the Agency handed down the summary dismissal decision was a serious due process violation and a "critical due process flaw". The supplemental investigation which led to the final contested administrative decision consisted of the interview with Student B's mother and a further interview with Student B. In this regard, Mr. Mohammad possibly confuses the right to be afforded an opportunity to defend himself in the course of a disciplinary procedure with the right to comment on the evidence produced against him during a judicial procedure. The latter is a natural consequence of the adversarial principle during a judicial procedure, whereas the former does not include the right to comment on every piece of evidence which could have a negative impact on his case during an investigation.

42. The Appeals Tribunal has previously held that due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defence and to question the veracity of the statements against her or him.[16] In the same way, "[i]n disciplinary cases, only when the preliminary investigation stage is completed and a disciplinary process has begun is the staff member entitled not only to receive written notification of the formal allegation, but also to be given the opportunity to assess the

[13] *Ibid*., para. 52.
[14] *Ibid*., para. 14.
[15] *Ibid*., paras. 14-22.
[16] *Mohammed Yousef ab del-Qader 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.

evidence produced against him or her".[17] It is incontrovertible that Mr. Mohammad was not afforded the opportunity to comment on the additional evidence produced against him after the re-opening of the investigation (the two interviews of student B's mother and student B himself).[18] However, it is true that neither in his appeal nor in his initial application to the UNRWA DT did Mr. Mohammad point out any shortcomings in either interview. In addition, he does not specifically contest any fact or information given by either interviewee. All he does is to claim generally that his due process rights were not respected during the investigation phase. As previously stated by this Appeals Tribunal, "[p]rocedural fairness is a highly variable concept and is context specific. The essential question is whether the staff member is adequately apprised of any allegations and had a reasonable opportunity to make representations before action was taken against him."[19]

43. In the present case, Mr. Mohammad was correctly informed of the allegations against him, which could lead to a disciplinary measure, and was afforded the opportunity to make representations before the decision was taken. Moreover, during the proceedings before the UNRWA DT, he had ample opportunity to respond to the evidence against him, and also to produce evidence in his favour.

44. There is no error in the UNRWA DT's finding that Mr. Mohammad's due process rights were observed.

The issue of sufficient evidence

45. Mr. Mohammad claims that there was no clear and convincing evidence about the misconduct, and that he had not admitted that he had given a mobile phone to Student B. Instead, his mobile phone had been lost in the school. Moreover, the Investigation Report i) did not find evidence of pornographic videos on student B's phone sent by Mr. Mohammad; and ii) did not affirm that he had given a mobile phone to Student B.

46. Before embarking on the assessment of the evidence in the present case, it is important to identify the applicable legal framework in the matter. The Agency's Area Staff Regulations provide, in relevant parts, that:

[17] *Elobai v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-822, para. 22.
[18] Impugned Judgment, para. 16.
[19] *Michaud v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-761, para. 56.

> **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.

47. In turn, Area Staff Rule 110.1(1) titled "Disciplinary measures and procedures" states that "[f]ailure 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".

48. Specifically on the misconduct disputed in this case, Area Personnel Directive No. A/10/Rev. 3 "Disciplinary measures and procedures" (1 January 2017), in paragraphs 9 to 11, stipulates:

> … UNRWA may identify several areas of misconduct that are of priority concern for the Agency and that may be amended from time to time. … The priority concern misconduct areas currently include:
>
> √ Sexual Exploitation and Abuse;
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> …
>
> … Sexual Exploitation and Sexual Abuse is always serious misconduct. …
>
> … Serious misconduct constitutes ground for the most severe disciplinary measures, up to and including summary dismissal.

49. General Staff Circular (GSC) No. 07/2010 entitled "Sexual exploitation and abuse complaints procedure" (20 August 2010) (Circular) establishes the general purpose and standards applicable to the present case. It addresses complaints of sexual exploitation and abuse made by Agency beneficiaries against persons employed by the Agency in a working capacity. It also clarifies the distinction between SEA complaints and complaints regarding sexual harassment, the SEA complaints being those made by Agency beneficiaries, not covering complaints of sexual harassment made by a person employed in any capacity by the Agency against another person employed by the Agency, which is dealt with under another

regulatory framework, GSC No. 06/2010. It is undisputable that the present case deals thus with a SEA complaint by Agency beneficiaries against an UNRWA employee, and the Circular is the specific legal instrument to be applied here.

50. The Circular draws a distinct line between the terms "sexual exploitation" and "sexual abuse". The former 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, while the latter means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.[20]

51. According to the Circular and in order to further protect the most vulnerable populations, especially women, children, and persons with disabilities, some specific standards which reiterate existing general obligations under UNRWA's Staff Regulations and Rules have been promulgated and are listed below. These standards are not intended to be an exhaustive list. Other types of sexually exploitative or sexually abusive behaviour may be grounds for administrative action or disciplinary measures, including summary dismissal, pursuant to UNRWA's Staff Regulations and Rules. The specific standards include:[21]

> (a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal;
>
> (b) Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defense;
>
> (c) Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance;
>
> (e) Where an UNRWA staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in UNRWA, another UN agency, or an institution external to the United Nations system, he/she must report such concerns via established reporting mechanisms;
>
> (f) UNRWA staff are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse. Managers at all levels have a

[20] Circular, para. 3.
[21] *Ibid.*, para. 4 (a) to (c), (e) & (f).

> particular responsibility to support and develop systems that maintain this environment.

52. Although in the present case, Mr. Mohammad contests the UNRWA DT's finding that he had admitted having given a mobile phone to Student B, claiming that his phone had been lost in the school (after the UNRWA DT had dismissed his explanation that Student B was his relative and had asked for a mobile phone),[22] he does not explain on appeal how his mobile phone could possibly have fallen into Student B's possession. Nor does he contest the fact that he had exchanged a "sexually themed conversation" with Student B.[23] All Mr. Mohammad appeals with regard to sufficient evidence is the UNRWA DT's finding that he had given Student B a mobile phone. Nonetheless, regardless of how Student B obtained access to Mr. Mohammad's mobile phone, the fact remains that Student B used Mr. Mohammad's phone and that Student B confirmed the information that Mr. Mohammad had sent pornographic material to his mobile phone by means of an application of social media.[24]

53. Moreover, Mr. Mohammad does not contest on appeal the following findings of the UNRWA DT based on the statements on the record, all of which relate to his determination to be alone with Student B at several opportunities: i) Mr. Mohammad invited Student B to his home to help Student B read his examination paper; ii) Mr. Mohammad, as an organiser of a school picnic, attempted to ensure Student B's presence at the picnic in order to have an opportunity to be alone with him at the end of the picnic; and iii) Mr. Mohammad was seen alone in an empty classroom with Student B on more than one occasion. For the UNRWA DT, while those facts, examined separately, would not be sufficient to constitute, *ipso facto*, an engagement in SEA, they are corroborating evidence with respect to allegations against Mr. Mohammad.[25] Contrary to Mr. Mohammad's contention, the witness statements in his favour were duly taken into consideration by the UNRWA DT judgment.[26]

54. In light of the aforementioned, the UNRWA DT was correct to determine that the statement by Student B's mother that she had seen pornographic material on her son's mobile phone, although not the phone that Mr. Mohammad had given him, and Student B's

[22] Impugned Judgment, para. 63.
[23] *Ibid.*, para. 60.
[24] *Ibid.*, para. 63.
[25] *Ibid.*, para. 65.
[26] *Ibid.*, para. 51.

affirmation that Mr. Mohammad had sent the material to his phone through a social media application, constituted clear and convincing evidence that Mr. Mohammad had indeed sent pornographic material to Student B's mobile phone, which his mother had seen. In light of the totality of the evidence, it would be implausible to conceive that Student B had obtained the pornographic material through other means, and that he had lied about the origin of the material to make it appear that he was just a passive recipient and not an active seeker to avoid a more severe punishment at home.

55. In the present case, the Appeals Tribunal reiterates its jurisprudence that some degree of deference must be given to the factual findings by the UNRWA DT as the court of first instance.[27] There is nothing in the appeal which could undermine the UNRWA DT Judgment. As the court of first instance, the UNRWA DT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to provide justice for both parties and therefore enjoys a wide margin of discretion in all matters relating to case management. The Appeals Tribunal "must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice".[28]

56. Lastly, the imposed sanction is well within the legal discretion of the UNRWA Administration, as it does not appear to be absurd, arbitrary or tainted by extraneous reasons or bias, which would otherwise be grounds for judicial review, if proven.[29]

57. The appeal, accordingly, fails.

[27] *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 81.
[28] *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr. 1, para. 32.
[29] *Mousa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-431, para. 30.

Judgment

58. The appeal is dismissed and Judgment No. UNRWA/DT/2021/003 is affirmed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)	*(Signed)*	*(Signed)*
Judge Halfeld, Presiding Juiz de Fora, Brazil	Judge Sandhu Vancouver, Canada	Judge Raikos Athens, Greece

Entered in the Register on this 19th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar