UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1196

Mohammad Yahya Al Othman

(Appellant/Respondent on Cross-Appeal)

v.

Commissioner-General

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

(Respondent/Appellant on Cross-Appeal)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge Martha Halfeld
Case No.:	2021-1550
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Mohammad Mustafa Abdullah
Counsel for Respondent:	Ana Peyro-Llopis

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. This is an appeal against Judgment No. UNRWA/DT/2020/073, by which the Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA DT or UNRWA Dispute Tribunal, and UNRWA or Agency, respectively) partially granted the Appellant's application challenging the administrative decision to impose on him the disciplinary measure of summary dismissal. The UNRWA Dispute Tribunal dismissed the Appellant's application against the separation decision, finding that the Agency had made the case of misconduct against him by clear and convincing evidence. However, it held the Appellant's summary dismissal was effective as of 26 September 2017 and awarded him compensation for material damages equivalent to his full salary, including all associated allowances and entitlements, for the period between 17 March 2017 and 26 September 2017.

2. In turn, the Commissioner-General of UNRWA (Commissioner-General) has cross-appealed the UNRWA DT Judgment, to the extent that it awarded the above compensation.

3. On appeal, the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) rejects both the appeal and the cross-appeal.

Facts and Procedure

4. For the second time, this case has come before the Appeals Tribunal. At the time material to the present case, Mr. Al Othman was employed by the Lebanon Field Office (LFO), UNRWA, as Teacher Mathematics at Amqa Preparatory Girls' School (Amqa School) in Nahr El Bared Camp (NBC).

5. According to a complaint that the LFO received from Mr. A. L., a teacher at Amqa School, on the last day of the 2014-2015 school year in June 2015, Mr. Al Othman allegedly sexually abused a 16-year-old student of Amqa School at a private tutoring centre (Centre) that he ran inside the NBC. There was no witness to the alleged incident. But, the student, Ms. A. did not tell her family about it, nor did she report it to any teacher or the authority of Amqa School until 10 November 2015, when she confided it to Mr. A. L.

6. On 16 November 2015, the complaint was referred to the Department of Internal Oversight Services (DIOS), UNRWA, and the Director of DIOS ordered a preliminary assessment report (PAR). The PAR, dated 13 December 2015, recommended that a formal investigation be conducted into the allegations against Mr. Al Othman.

7. In an investigation report dated 13 July 2016 (Investigation Report), the DIOS determined that there was sufficient evidence to conclude that Mr. Al Othman had breached the Agency's regulatory framework with respect to prohibition of sexual exploitation and abuse. The DIOS had analyzed the evidence available and assessed the inconsistencies in Ms. A's testimony, but found her account to be the most credible and accurate.

8. By letter dated 15 November 2016 (Due Process Letter), the Acting Director of UNRWA Affairs, Lebanon (A/DUA/L) informed Mr. Al Othman about the findings of the investigation and provided him with an opportunity to respond. Neither the PAR nor the Investigation Report was provided to Mr. Al Othman. Mr. Al Othman responded on 15 December 2016.

9. On 18 January 2017, the A/DUA/L recommended to the Commissioner-General that Mr. Al Othman be summarily dismissed from service for serious misconduct. The Commissioner-General approved the recommendation on 28 February 2017.

10. In a letter dated 17 March 2017, the A/DUA/L informed Mr. Al Othman that he had considered the latter's response to the Due Process Letter along with all evidence in the case and concluded that there was a clear and convincing evidence establishing the serious misconduct. The A/DUA/L continued:[1]

> In accordance with the delegated authority given to me under Area Personnel Directive: a/10/rev.3, disciplinary measures and procedures, dated 1 January 2017, having determined that you committed the misconduct I have considered what disciplinary measure would be proportionate to the misconduct that you have committed. In doing so I have taken into account all the facts of the misconduct proven, the information you provided in your response to the due process letter.
>
> Based on the foregoing, in relation to the serious misconduct, I decided the following disciplinary measure:

[1] Bold and underline in original. Letters in upper case and lower case and punctuations in original.

> **Summary Dismissal**
>
> No termination indemnity, pursuant to area staff rule 109.9(2)(c), or Provident Fund Benefit, pursuant to Area staff rule 109.10(3)(b), shall be paid. This decision is of immediate effect as of 17 March 2017.

11. Mr. Al Othman appealed the summary dismissal decision by first requesting a decision review and then filing with the UNRWA DT.

12. More than six months later, on 26 September 2017, the Commissioner-General issued a letter to Mr. Al Othman, stating that the A/DUA/L's letter of 17 March 2017 had been "issued in error notwithstanding [the Commissioner-General's] initial approval of the disciplinary measure", and that "[t]he interests of justice require that [the Commissioner-General] should retain the discretion to correct erroneous decisions. As such, this letter supersedes and replaces the previously issued letter of summary dismissal dated 17 March 2017." However, Mr. Al Othman's summary dismissal remained "effective 17 March 2017".

13. After receiving *ex parte* the preliminary and final investigation reports, including all annexes and/or appendices, from the Commissioner-General, the UNRWA DT held two hearings on 26 November 2018 and 20 March 2019, during which it heard the Respondent and his witnesses, namely, the Deputy School Principal, two experts (Ms. T. S. and Ms. Z. F.), and Ms. A. via video-link from the LFO. Neither Mr. Al Othman nor his representative participated in those hearings.

14. The UNRWA DT rendered Judgment No. UNRWA/DT/2019/019 on 17 April 2019 in respect of Mr. Al Othman's application.

15. Regarding the procedural issues that Mr. Al Othman raised, the UNRWA DT determined that it was appropriate to provide Mr. Al Othman with a redacted version of the Investigation Report, because the redacted version offered sufficient particulars of evidence against him to enable him to mount a proper defense while protecting the confidentiality of Ms. A., her family and the witness students. The UNRWA DT noted that despite his own

request for an oral hearing and the UNRWA DT's efforts to arrange it, Mr. Al Othman and his representative were not present at the hearings "for specious reasons".[2]

16. On merits, the UNRWA DT noted the conflicts between the testimony of the Deputy School Principal and Mr. Al Othman's statements, the failure by Ms. A. to report the incident "at the first reasonable opportunity",[3] the various versions given by Ms. A. about the alleged assault and their internal inconsistencies, the unavailability of the WhatsApp message that Mr. Al Othman had allegedly sent to Ms. A.'s mother, and the unclear cause of the bruise on Ms. A.'s neck. The UNRWA DT also noted Mr. Al Othman's attempts to locate photographs of Ms. A.'s that she had sent to her friends, his lies to the investigators about them, and his attempts to influence Ms. A. and her family, but considered that such behaviors on the part of Mr. Al Othman were common among individuals accused of wrongdoing, guilty or innocent, and that the fact that Mr. Al Othman had lied about his attempts to find photographs of Ms. A.'s was no evidence that he had also lied about the alleged assault, to which he had never admitted.

17. The UNRWA DT thus concluded that the facts upon which Mr. Al Othman was disciplined were not established by clear and convincing evidence. As remedies, it ordered rescission of the summary dismissal decision or an in-lieu compensation in the amount of USD 19,000 (corresponding to two years' net base salary). But the UNRWA DT declined to award Mr. Al Othman any moral damages.

18. Both parties appealed Judgment No. UNRWA/DT/2019/019 to the Appeals Tribunal. In Judgment No. 2019-UNAT-972 dated 25 October 2019, the UNAT remanded the case to a different Judge of the UNRWA DT for a new consideration of the merits, as it found itself unable to decide the case based on documentary evidence. In the view of the Appeals Tribunal, the UNRWA DT had committed errors of law and fact resulting in a manifestly unreasonable decision. Contrary to the UNRWA DT's determination, the Appeals Tribunal thought that Ms. A.'s sworn testimony before the UNRWA DT was consistent with her accounts on at least four previous occasions, that her denial of sexual assault before a larger group of people or publicly could not be understood as her voluntary statement, nor could it be used to assess her credibility, and that Ms. A.'s delay in reporting

[2] *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2019/019, para. 94.
[3] *Ibid*., para. 96.

the incident had no impact on her credibility, as a disclosure right after, or very close to the time of, the incident was very rare in that region, especially in that context, according to the gender-based violence coordinator. The Appeals Tribunal also thought that the UNRWA DT had erred in its assessment of Mr. Al Othman's credibility. On remand, the UNAT instructed the UNRWA DT to hear Mr. Al Othman, Ms. A., and preferably also her mother, examine Mr. Al Othman's allegations of due process violations and address his other claims and arguments.

19. Pursuant to Judgment No. 2019-UNAT-972, on 1 March 2020, the UNRWA DT commenced its proceedings to review the case on remand by instructing the parties to submit their comments. In the ensuing ten months, the parties filed a number of procedural motions and the UNRWA DT issued numerous interlocutory orders thereon.

20. For instance, on 4 August 2020, the UNRWA Dispute Tribunal issued a Notice of Hearing convoking the parties to a hearing on 7 September 2020 (Notice of Hearing No. 1) and ordering the presence of Ms. A., her mother, Mr. A. L., and the Deputy School Principal as witnesses to be heard. In response, the Commissioner-General requested that the testimony of Ms. A.'s mother be taken at a later date due to her illness and indicated that the Deputy School Principal was unwilling to attend the hearing. He later confirmed the availability of Ms. A., Mr. A. L., and Ms. A.'s mother via telephone, and proposed that the Deputy School Principal be allowed to provide written testimony. Mr. Al Othman also responded to Notice of Hearing No. 1 by proposing eight witnesses, including himself. He subsequently proposed the postponement of the hearing due to the COVID-19 pandemic-related movement restrictions for him and the unavailability of Ms. A.'s mother for health reason.

21. In Order No. 157 (UNRWA/DT/2020) dated 1 September 2020, the UNRWA Dispute Tribunal noted the crucial importance of Mr. Al Othman's participation and decided to postpone the hearing until further notice. In the same Order, the UNRWA DT reiterated its previous order that the Deputy School Principal be personally present at the hearing.

22. On 13 October 2020, the UNRWA DT issued Notice of Hearing No. 2 and set the hearing dates at 9 and 10 November 2020 to hear, as witnesses, Ms. A., her mother, Mr. A. L., the Deputy School Principal, and the School Principal. It subsequently issued Notice of

Hearing No. 3 to reschedule the hearing dates to 26 and 27 October 2020 due to the unavailability of the Respondent's Counsel on 9 and 10 November 2020.

23. On 21 October 2020, in response to *inter alia* Mr. Al Othman's motion seeking the Arabic translations of the statements of all individuals interviewed during the investigative process, the UNRWA DT issued Order No. 214 and Notice of Hearing No. 4, in which it *inter alia*: i) informed the parties that the hearing would be postponed to 7 and 8 December 2020; ii) ordered the Respondent to ensure the audio-visual presence of Ms. A. at the hearing; iii) ordered the Respondent to provide his response to Mr. Al Othman's motion for production of documents and to inform the UNRWA Dispute Tribunal whether the audio recordings of all the interviews of the investigative process were available; and iv) ordered the parties to submit any further motion for production of documents, including requests for translations, on or before 2 November 2020. On 28 October 2020, both parties filed their responses to Notice of Hearing No. 4, confirming their attendance at the hearing scheduled for 7 and 8 December 2020.

24. In Order No. 224 dated 4 November 2020, in response to the numerous requests in Mr. Al Othman's motion filed on 2 November 2020, the UNRWA Dispute Tribunal *inter alia*: i) provided the parties with instructions with respect to the hearing scheduled for 7 and 8 December 2020; ii) transmitted to Mr. Al Othman the unredacted version of the Investigation Report, along with its annexes, as well as the PAR; iii) ordered the Respondent to either provide Mr. Al Othman with the Arabic translation of the Investigation Report and other documents relating to the investigation, or reimburse him for the cost of the translations following the issuance of its Judgment; iv) denied Mr. Al Othman's request for production of documents; v) granted Mr. Al Othman's request to submit new evidence and allowed the Respondent to submit his comments on Mr. Al Othman's new evidence; vi) denied Mr. Al Othman's request for the audio-visual participation of Ms. A.'s mother at the hearing; and vii) denied Mr. Al Othman's request for the recording of the hearing scheduled for 7 December 2020.

25. By Order No. 236 dated 19 November 2020, the UNRWA Dispute Tribunal ordered Mr. Al Othman to proceed with the translations at his own cost and informed him that the UNRWA DT would order the Respondent by judgment to reimburse him for the cost of the translations. But on 22 November 2020, Mr. Al Othman indicated that, due to his financial constraints, he was unable to proceed with the translations at his own cost. Two weeks later,

on 6 December 2020, he filed a motion requesting the UNRWA Dispute Tribunal to: i) impose costs on the Respondent for not providing the translations and delaying the adjudication of the case; ii) order the Respondent to provide the translations; and iii) postpone the hearing until he was provided with the translations. Also, on 6 December 2020, the Commissioner-General informed the UNRWA DT that the Deputy School Principal would not be able to attend the hearing on 7 and 8 December as she had contracted COVID-19.

26. By Order No. 253 (UNRWA/DT/2020) dated 6 December 2020, the UNRWA Dispute Tribunal denied Mr. Al Othman's motion and informed him that the documents for which he had requested translations would not be the subject of the hearing, and that the subject of the hearing would be in reference only to documents that were entirely available to both parties in both Arabic and English. On 7 December, Mr. Al Othman wrote to the UNRWA DT requesting that it reconsider its decision to proceed with the hearing.

27. On 7 December 2020, the scheduled hearing took place. The UNRWA Dispute Tribunal heard the Respondent and four witnesses, namely, Ms. A., her mother, the School Principal and Mr. A. L. In the continuation of the hearing on 8 December, the UNRWA Dispute Tribunal heard the Respondent's closing arguments. Mr. Al Othman and his representative did not attend the hearing on those days.

28. In Judgment No. UNRWA/DT/2020/073 dated 29 December 2020, the UNRWA Dispute Tribunal upheld the decision to summarily dismiss Mr. Al Othman from service for serious misconduct of sexual exploitation and abuse, but found that the effective date of the summary dismissal decision was 26 September 2017 rather than 17 March 2017. Consequently, the UNRWA DT ordered that Mr. Al Othman be paid a monetary award equivalent to his full salary including all associated allowances and entitlements for the period from 17 March 2017 to 26 September 2017.

29. In respect of the effective date of the summary dismissal decision, the UNRWA DT found that, as *per* Area Staff Rule 110.1 only the Commissioner-General was authorized to impose the disciplinary measure of summary dismissal on staff members, the 17 March 2017 decision to summarily dismiss Mr. Al Othman from service taken by the A/DUA/L was unauthorized and thus unlawful *ab initio*, and such a critical error could not be simply corrected. It also found that the Commissioner-General's 26 September 2017 decision to

summarily dismiss Mr. Al Othman came into effect only on the date of its issuance, and it could not be implemented retroactively.

30. In line with the directive of the Appeals Tribunal in Judgment No. 2019-UNAT-972, the UNRWA DT addressed Mr. Al Othman's contentions of due process violation but dismissed them as without merit, noting that there was no obligation on the part of the Agency to transmit the PAR or the Investigation Report to Mr. Al Othman during the investigative process, that Mr. Al Othman had access to a redacted version of the Investigation Report and submitted his comments thereon of approximately 30 pages long, that he had been given the option to proceed with the translations at his own cost to be later reimbursed, that Mr. Al Othman alleged his inability to proceed with the translations due to financial constraints, but failed to provide any evidence in support of that allegation, and that Mr. Al Othman had been given every opportunity to participate in the hearing on an equal footing with the Respondent but had failed to attend the 7 and 8 December 2020 hearing.

31. On the basis of the available evidence and its *de novo* investigation in the form of hearing the testimony of Ms. A., her mother, Mr. A. L. and the School Principal, the UNRWAT DT examined the credibility of Mr. Al Othman, Ms. A. and the witnesses as well as the persuasiveness of their evidence. It concluded that Mr. Al Othman's version of the events was "not supported by his personal credibility",[4] but Ms. A.'s statements and testimonies were "entirely persuasive and credible",[5] and her mother's testimony and explanations were "credible and support[ed] Ms. A's credibility and testimonies".[6] It also considered Mr. A. L.'s testimony "to be credible and supportive of Ms. A's credibility and testimonies"[7] and the testimony of the School Principal "to be credible".[8] The UNRWA DT therefore concluded that there was "a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct had, in fact, occurred".[9] The UNRWA DT had no doubt that the sexual assault by Mr. Al Othman of one of his students constituted serious misconduct, that the disciplinary measure of summary dismissal was proportionate

[4] *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2020/073, para. 102.
[5] *Ibid*., para. 111
[6] *Ibid*., para. 114.
[7] *Ibid*., para. 115.
[8] *Ibid*., para. 116.
[9] *Ibid*., para. 117.

to the offence, and that it was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law.

32. Mr. Al Othman appealed Judgment No. UNRWA/DT/2020/073 to the Appeals Tribunal on 21 April 2021. On 4 May 2021, the Registry notified the Agency of Mr. Al Othman's appeal. The Commissioner-General filed an answer to the appeal on 2 July 2021. On 5 July 2021, the Commissioner-General filed a cross-appeal, to which Mr. Al Othman answered on 6 September 2021.

33. On 4 August 2021, Mr. Al Othman filed a motion for leave to file additional pleadings before the Appeals Tribunal to address i) the Commissioner-General's allegation in his answer that Mr. Al Othman had filed a frivolous and vexatious appeal, and ii) the Commissioner-General's request that the Appeals Tribunal award cost of USD 9,600 against him for abuse of process. In his view, this issue was raised for the first time and he should be given an opportunity to defend himself against this "serious and appalling accusation". In his response to the motion, the Commissioner-General did not oppose Mr. Al Othman's request to file additional pleadings.

34. In Order No. 430 dated 10 November 2021, the President of the Appeals Tribunal granted Mr. Al Othman's motion on the basis that the Commissioner-General did not oppose Mr. Al Othman's request for an opportunity to address the claim for costs. On 24 November 2021, Mr. Al Othman submitted additional pleadings.

Submissions

Mr. Al Othman' Appeal

35. Mr. Al Othman requests the Appeals Tribunal amend part of the UNRWA DT Judgment to make 11 October 2017, rather than 26 September 2017, as the date of his dismissal, and grant him moral damages for the deprivation of his salary and entitlements from 17 March 2017 to 11 October 2017. He also requests that the Appeals Tribunal reverse UNRWA DT's decision to uphold the summary dismissal, grant him all the means of redress including the Agency's Provident Fund contributions and the end-of-the-service indemnity, and impose costs on the Commissioner-General for abuse of the proceedings. Alternatively, he requests that the Appeals Tribunal remand his case to a different Judge of the UNRWA Dispute Tribunal.

36. Mr. Al Othman says that while the Commissioner-General signed the dismissal decision on 26 September 2017, he first heard of it only on 11 October 2017. Therefore, the effective date of the dismissal should be 11 October 2017. In that regard, Mr. Al Othman contends that the UNRWA DT erred by not granting him moral damages for the deprivation of his salary and other entitlements from 17 March 2017 through 11 October 2017, after it had found the 17 March 2017 decision to be unlawful.

37. Mr. Al Othman states that the UNRWA DT erred in law and fact in concluding that his due process rights had been respected. Its finding that there was no obligation to provide him with the PAR during the investigative process was irrational, unfair, and discriminatory, contrary to *Bagot*,[10] in which the Agency had respected the rights of Mr. Bagot, a high-level international staff member, during the investigative and disciplinary process. The UNRWA DT failed to exercise its jurisdiction when it declined to compel the Agency to provide Mr. Al Othman with the Arabic translations, or to impose costs on the Commissioner-General for abuse of process in refusing to comply with an order of the UNRWA DT to produce all the translations. Other procedural errors on the part of the UNRWA DT include failure to provide Mr. Al Othman with the audio recording or written text of a hearing, failure to hear the Deputy School Principal, a key witness, after her recovery from Covid, allowing Ms. A.'s mother to testify by telephone, convening the hearing without the English translation of the new evidence he had submitted on 10 November 2020, denying his motion for the production of documents in the Agency's possession such as Ms. A.'s attendance record and her timetable, and failure to refer to, or address, the sworn statements by the witnesses for the defense in the impugned Judgment.

38. Mr. Al Othman stresses that the UNRWA DT erred by finding that his version of the events was not supported by his personal credibility, but that Ms. A.'s description of the sequence of events, her mother's testimony and explanations and Mr. A. L.'s testimony were credible. There was no evidence in support of Ms. A.'s claims that she had not been expelled from the Centre in late April 2015, or that she had received a WhatsApp message on her mother's phone from Mr. Al Othman at or around the end of the 2014-2015 school year, or that she had gone to the Centre on the day alleged, or that Mr. Al Othman had abused Ms. A.

[10] *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718.

at the Centre on the day alleged or on any other day, or that the alleged bruise on her neck had indeed been caused by Mr. Al Othman. In sum, there was no clear and persuasive evidence that Mr. Al Othman had committed the misconduct of which he stood accused; nor was there any basis in fact or law for the UNRWA DT's finding that there was a clear and convincing evidence establishing that the alleged misconduct had in fact occurred.

The Commissioner-General's Answer

39. The Commissioner-General requests that the Appeals Tribunal dismiss Mr. Al Othman's appeal in its entirety. He also requests that the Appeals Tribunal award USD 9,600 as cost against Mr. Al Othman for abuse of process.

40. The Commissioner-General submits that the UNRWA DT did not err in law or fact when it held that there was no obligation on the part of the Agency to transmit the PAR or the Investigation Report to a subject of an investigation during the investigative process, cognizant of the Agency's applicable regulatory framework. Mr. Al Othman had had access to the redacted Investigation Report since 10 May 2018 and submitted detailed comments thereon of about 30 pages. On 20 November 2020, he was availed the unredacted Investigation Report along with its annexes as well as the PAR. Such provision amply cured any perceived violations of dure process. The same scenario happened in *Bagot*, with the Appellant first receiving the redacted Investigation Report followed by his receipt of its unredacted version at a different stage. The *Bagot* Judgment does not set a precedent that the unredacted Investigation Report must be shared with the staff member during the investigative process. The applicable provisions of the UNRWA regulatory framework do not lead to such a conclusion either.

41. The Commissioner-General states that the UNRWA DT did not err in its consideration of the requests for translation and correctly concluded that Mr. Al Othman was not prejudiced by the lack of translations.

42. The Commissioner-General notes Mr. Al Othman's argument that the lack of a written transcript of the UNRWA DT's hearing constituted a flaw for which the case should be remanded, but he also notes Mr. Al Othman's dramatically contradictory statement that the evidence in the record constituted a sufficient basis for the Appeals Tribunal to vacate the UNRWA DT Judgment. In the view of the Commissioner-General, the latter statement

would appear to make the lack of a written transcript a non-issue. In this regard, the Commissioner-General clarifies that it has been the practice of the UNRWA DT to provide the Appeals Tribunal with audio recording of the hearings but not their written transcripts. The Commissioner-General further notes that Mr. Al Othman or his representative did not request a copy of the audio recording of the UNRWA DT's hearings for the purpose of preparing the appeal, after the publication of the impugned Judgment, nor did he claim that he could not adequately prepare his appeal in the absence of the written transcript or audio recording.

43. The Commissioner-General maintains that the UNRWA DT's rejection of Mr. Al Othman's request that Ms. A.'s mother participate in the hearing via an audio-video link was entirely within the large discretion that Article 14 of the UNRWA DT's Rules of Procedure accords that Tribunal. The UNRWAD DT's approach did not cause any prejudice to Mr. Al Othman, especially considering that he refused to attend the hearing on his own volition. It is disingenuous for him now to claim that he had been deprived of an opportunity to cross-examine witnesses.

44. The Commissioner-General stresses that the UNRWA DT did not err in law, fact or procedure in its assessment of the evidence and subsequent conclusions. The UNRWA DT was cognizant of the applicable standards of proof in disciplinary cases and considered each element of the three prongs of the legal analysis before it dismissed Mr. Al Othman's application. Mr. Al Othman has failed to show reversible errors made by the UNRWA DT to warrant the interference by the Appeals Tribunal.

45. The Commissioner-General urges the Appeals Tribunal to award costs against Mr. Al Othman for having filed the instant appeal, which is meritless, frivolous and vexatious and devoid of good faith. In his view, the present appeal, which centers on translations and credibility of witnesses, is entirely unnecessary and constitutes an abuse of process, for which the Appeals Tribunal is requested to award USD 9,600 against Mr. Al Othman, as cost for appeals filed for, or against, the Agency.

The Commissioner-General's Cross-Appeal

46. The Commissioner-General requests that the Appeals Tribunal vacate the portion of the UNRWA DT Judgment relating to the award of compensation equivalent to Mr. Al Othman's full salary and all associated allowances and entitlements from 17 March 2017 to 26 September 2017.

47. The Commissioner-General submits that the UNRWA DT erred in fact and law and exceeded its competence in awarding compensation for loss of salary in the absence of a specific plea for such compensation by Mr. Al Othman in his request for decision review and where no evidence had been adduced to establish any financial losses or negative consequences as a result of the 17 March 2017 decision.

48. The Commissioner-General maintains that the UNRWA DT's reasoning for awarding compensation to Mr. Al Othman overlooks the fundamental fact that he had approved the summary dismissal recommendation on 28 February 2017 before the A/DUA/L issued the dismissal letter on 17 March 2017. In his view, the 17 March 2017 decision comports with the UNAT jurisprudence that "only substantial procedural irregularities will render a disciplinary measure unlawful".

Mr. Al Othman's Answer to Cross-Appeal

49. Mr. Al Othman requests that the Appeals Tribunal reject the cross-appeal, as allowing it would mean a gross injustice.

50. Mr. Al Othman submits that the UNRWA DT did not err or exceed its competence when it awarded him compensation for the loss of salary from 17 March 2017 to 26 September 2017. Indeed, in his request for decision review dated 15 May 2017,[11] he did not request compensation for financial losses resulting from the dismissal decision, because he was not represented and it was his first experience to have to address such a decision. However, in his request dated 8 December 2017 for review of the dismissal decision of 26 September 2017, with the assistance of Counsel, he did request, as remedy, compensation

[11] In the English translation of the answer to the cross-appeal, the date of Mr. Al Othman's request for decision review is "15 March 2017". This is a mistake. Mr. Al Othman signed the request for decision review form on 15 May 2017.

for all financial losses he had incurred as a result of the summary dismissal decision, namely, loss of source of income and of the Pension Fund benefits.

51. Mr. Al Othman maintains that the Commissioner-General's argument to the effect that he did not provide evidence to support his claim for financial compensation is baseless and insulting. He did not receive any salary after 17 March 2017 as a result of the decision issued by the A/DUA/L, who had no power to summarily dismiss him from service.

Mr. Al Othman's additional pleadings on the claim for costs

52. Mr. Al Othman states that the Commissioner-General's allegation accusing him of manifest abuse of the proceedings before the UNRWA DT is "false, misleading, and unsupported by evidence", and that the Respondent had never raised that issue before the lower court. He therefore requests that the Appeals Tribunal disregard this aspect of the Respondent's Answer.

53. Mr. Al Othman also states that the Appeals Tribunal should reject the Commissioner-General's allegation accusing him of manifest abuse of the process of the Appeals Tribunal, because it is "fallacious, misleading and unsupported by evidence". He requests that the Appeals Tribunal find that he did not abuse the proceedings before either the UNRWA DT or the Appeals Tribunal and dismiss the Commissioner-General's request for cost of USD 9,600 to be awarded against him.

Considerations

Preliminary issue

54. Mr. Al Othman requests that the Appeals Tribunal hold an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal's Statute, which states: "[t]he judges assigned to a case will determine whether to hold oral proceedings"; and by Article 18(1) of the Appeals Tribunal's Rules of Procedure (Rules), which states: "[t]he judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case". The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. Moreover, we do not find that an

oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. Accordingly, the request for an oral hearing is denied.

Merits of the case

55. The issues for consideration and determination in the appeal and cross-appeal are related to the lawfulness of the contested administrative decision and the remedies. We will examine these issues in turn.

I. Whether the UNRWA DT erred on a question of law or fact in establishing Mr. Al Othman's misconduct

Standard of review in disciplinary cases

56. In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed*[12] quoting *Applicant*,[13] and others:[14]

> Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".

57. Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards. The first ("clear") is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard ("convincing") requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of

[12] *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 18.
[13] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.
[14] See also *Ladu v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-956, para. 15; *Bagot v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-718, para. 46; and *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18.

events, or may be of evidential inferences that can be properly drawn from other direct evidence.[15]

58. In determining whether these evidential standards have been established in any case, the UNDT must consider and weigh not only the evidence put forward by witnesses produced for the Secretary-General, but also any countervailing evidence adduced for the staff member, and any relevant and probative documentary evidence which may either corroborate or cast doubt on the recollections of witnesses. Such an analysis has to be applied by the UNDT not only to each individual piece of disputed evidence, but also to the totality of the evidence in support of the allegation of misconduct. The judge can only then answer the fundamental question: "Is there clear and convincing evidence to enable the Tribunal to conclude that the allegation(s) of misconduct have been established?"[16]

59. The UNAT's task on appeal is to determine whether the UNDT did not apply the correct tests and whether the Dispute Tribunal could reasonably have reached the decisions it did about what happened.[17]

60. Furthermore, this Tribunal has held that in a system of administration of justice governed by law, the presumption of innocence has to be respected.[18]

61. It is in the context of these definitions and principles that Mr. Al Othman's appeal against the UNRWA DT's conclusions must be assessed.

Clear and convincing evidence established that Mr. Al Othman committed the offences

62. Applying the above-mentioned standards and criteria to the present case, we find that the facts on which the Administration based its decision to summarily dismiss Mr. Al Othman from service were established, in full respect of his due process rights. The records show clear and convincing evidence establishing facts which amount to misconduct and these facts have not been successfully rebutted by Mr. Al Othman. The UNRWA DT did not err as there was clear and convincing evidence that Mr. Al Othman indeed committed sexual exploitation and

[15] *Neguisse v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.
[16] *Ibid*., paras. 46-47.
[17] *Ibid*., para. 48.
[18] *Ladu*, *op cit* Judgment, para. 16; *Bagot*, *op cit*. Judgment, para. 47; *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28.

abuse against a beneficiary of UNRWA; neither did it err in concluding that the disciplinary sanction of summary dismissal was proportionate and lawful.

63. As the UNRWA DT provided thorough and convincing reasoning, we do not find it necessary to repeat each and every detail except to refer to paragraphs 76 to 130 of its Judgment. We will, however, present the most important pieces of evidence on record and highlight those factual findings which clearly demonstrate that Mr. Al Othman committed misconduct.

64. In reviewing the Administration's decision, the UNRWA DT had before it the documentary evidence on the record, including the Investigation Report and the testimonies of various witnesses together with that of Mr. Al Othman's before the investigators, as well as those of Ms. A's., Ms. A.'s mother's, Mr. A. L.'s, and the School Principal's at the hearing before it.

65. Regarding the material facts of the case, the UNRWA DT Judge made *inter alia* the following observations and findings:

66. At the outset, the UNRWA DT noted that,[19] in terms of evidence and witness statements, despite the voluminous nature of the case record, most of the evidence and witness statements were about the events following Ms. A.'s disclosure of the alleged incident to Mr. A. L., and not about the surrounding circumstances of the alleged incident, and that there were no independent witnesses to the alleged incident. Though the Judge attempted to gather additional explanations and evidence with respect to the surrounding circumstances of the alleged incident, his endeavor was to no avail. For these reasons, his Judgment was predominantly based on the oral evidence provided by the witnesses during the hearing. However, where it was deemed appropriate, he challenged the witnesses about certain inconsistencies in their statements taken during the investigative process.

67. The UNRWA DT considered and screened all the material facts of the case at hand against the backdrop of the contradictory allegations of Ms. A. and Mr. Al Othman. Ms. A. alleged that, prior to the meeting at which the incident occurred, Mr. Al Othman had sent a WhatsApp message to her mother's mobile telephone indicating that her class time had been changed to 3:00 p.m. She further alleged that the Centre was empty when she

[19] Impugned Judgment, para. 91.

arrived, and that Mr. Al Othman called her into his office upon her arrival to the Centre. Ms. A. claimed that, while in his office at the Centre, Mr. Al Othman held her from her behind, touched the upper parts of her body over her clothing, including her breasts, and kissed her on the neck—after having lifted her hijab—leaving a bruise on her neck.

68. The UNRWA DT was clearly not convinced by the different story proffered by Mr. Al Othman, who categorically denied Ms. A.'s allegations and claimed that such an incident could not have happened, as he had expelled Ms. A. from the Centre in April 2015, weeks before the end of the school year. While, with respect to his whereabouts during those days, he indicated that he would work at the Centre "from 2h30 to 4h30 p.m., if he had a session or if students had math examinations the following day".

69. In weighing his credibility, on the basis of the documentary evidence and the testimony of the witnesses, the first instance Judge considered that Mr. Al Othman's version of the events was not supported by his personal credibility. This consideration was predicated on the UNRWA DT's assessment of his behavior who had made unsuccessful attempts to blame a student for the sexual harassment of Ms. A., which had raised the attention of the School Principal, who had then confronted Mr. Al Othman together with the said student. The UNRWA DT Judge underscored that, as Mr. Al Othman was the subject of a serious allegation of sexual exploitation of a student, and although it might have been understandable that he would try to defend himself by all means, his efforts to put the blame on others did not support his credibility. The UNRWA DT Judge held the same appreciation in terms of Mr. Al Othman's attempts to tarnish Ms. A.'s reputation by asking two male students for photographs of Ms. A.'s, which she had sent to them.[20]

70. Then, the UNRWA DT Judge proceeded with examining the probative value of Ms. A.'s witness testimony, which—after having expended considerable time in an evidentiary balancing exercise and analyzing it—he found entirely persuasive and credible. The reasoning provided by the UNRWA DT Judge for accrediting that probative value to her account of events was set forth in clear and unambiguous wording in paragraphs 103-110 of his Judgment, wherein he underscored that it was consistent in all major aspects and without inexplicable contradictions compared to her earlier statements, as she described before that Tribunal, once again, the sequence of the events and, more importantly, Mr. Al Othman's

[20] Impugned Judgment, para. 101.

assault in a detailed and comprehensive manner. She explained persuasively why she kept this traumatic experience to herself for weeks, without even informing her family. In giving his own interpretation of the critical facts, the first instance Judge found that, consistent with the traditional values of her community, Ms. A. must have considered that it would not be appropriate to disclose events with sexual connotations. Ms. A., as a teenage girl, who felt that traditional restrictions were being imposed on her by her own family, was not in a position to find someone in whom to confide about such an incident at the time it occurred. She also expressed that, at the time of the alleged incident, she was not that close to her family members.

71. Moreover, the UNRWA DT Judge did not overlook, and took stock of, Ms. A.'s contradictions at earlier stages of the disciplinary procedure, some of which, as, for instance, those between Ms. A.'s and Mr. A. L.'s testimonies, he found to be minor and insignificant, while he dwelled on and pronounced on the evidentiary significance of others, as, for instance, with regard to the fact that Ms. A. had denied the alleged sexual assault on several occasions after her disclosure. In this respect, the UNRWA DT agreed with, and adopted, the UNAT's approach, which had held as follows:[21]

> The fact that Ms. A denied the alleged sexual assault on several occasions does not diminish her credibility. Two of these incidents happened in a larger group of people or even publicly: Ms. A denied the assault during a meeting at Mr. Al Othman's tutoring center, where she was asked about the assault in front of Mr. Al Othman, her family and another teacher. She later explained to the investigators that she had been intimidated by Mr. Al Othman and feared retaliation. We agree with the investigation report that the denial was understandable in the circumstances. Ms. A also denied the assault when she was compelled by Mr. Al Othman's wife to announce before five classrooms of students that she was not pregnant and that there was nothing between her and Mr. Al Othman. This cannot be understood as a voluntary statement by Ms. A and cannot be used to assess her credibility. Only the third incident happened in a more private situation when Ms. A denied the incident in a meeting in Ms. W's office on 1 or 2 October 2015. However, following Ms. W's statement before the investigators, she later had a conversation with Ms. A in her home in the second week of October 2015, where Ms. A apologized for not having confided in Ms. W explaining that she had been afraid that Ms. W would no longer consider her "the young innocent girl she knew", and Ms. W found her credible.

[21] *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-972, para. 72.

72. In this context, upon taking into consideration the pressure exerted on Ms. A., a 16-year-old girl, as well as the societal and family environment in which she lived, the UNRWA DT came to infer from Ms. A.'s decision not to report the incident in its immediate aftermath that she intended to forget about the whole matter in order to protect her future, as she feared that her family might have prevented her from going to school and instead arranged for her to get married. However, at the beginning of the new school year, she understood that she was going to be assigned to classes conducted by Mr. Al Othman. At that point, she could not stand any longer the humiliation she had suffered weeks prior, and she burst into a confession to someone she regarded as a reliable and sympathetic person, i.e., the teacher, Mr. A. L.

73. Further, the UNRWA DT Judge engaged in a thorough and considered assessment of the witness statements of Ms. A.'s mother and Mr. A. L., which he found both to be credible and supportive of Ms. A.'s credibility and testimonies. Notably, the UNRWA DT Judge ascribed considerable evidentiary weight upon the latter's testimony, namely Mr. A. L.'s, in view of his statement that he had normal collegial relations with Mr. Al Othman, whom he had known since their time at the university, the lack of any reason on his part to damage Mr. Al Othman's reputation by spreading rumours, i.e., that he had no reason to lie about what he had been told, and eventually his sense of duty as a teacher, as he had indicated that, even if there was only one percent truth in what Ms. A. had confided to him, it would have been impossible for him not to report the allegations to his supervisor, i.e., the School Principal.

74. Finally, after carefully and thoroughly considering the evidence on which the Administration had based the sanction, along with its own observations and findings thereupon, the UNRWA DT concluded that the facts on which the impugned disciplinary measure had been based were established by clear and convincing evidence.

75. The UNRWA DT also considered Mr. Al Othman's argument that his due process rights had not been respected during the investigation and disciplinary proceedings, but dismissed it as being without merit.

76. These are accurate conclusions from the evidence on record and common knowledge and we find no reason to differ from them. The Dispute Tribunal has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNRWA DT can only be

disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing the case had an appreciation of all the issues for determination and the evidence before it. We are satisfied that the UNRWA DT's conclusion is consistent with the evidence. Mr. Al Othman has not put forward any persuasive grounds to warrant interference by this Tribunal.

77. In all the circumstances of the case, this Tribunal is satisfied with the detailed analysis of the totality of the evidence by the UNRWA DT and agrees with its well-reasoned conclusion. Having regard to the factual findings made by the trial Judge, who is best placed to assess the nature and probative value of the evidence placed before him by the parties to justify his findings,[22] the chronology of the critical events and the overall deductive reasoning process of his, this Tribunal shares the UNRWA DT's view that the only reasonable conclusion available to the trial Judge, resulting from the evidence against Mr. Al Othman, uncovered by the investigation and the documentary evidence and notably the hearing before the first instance Judge, was that the latter had sexually abused and exploited Ms. A., an Agency's beneficiary.

78. Indeed, from the factual matrix of the present case, this Tribunal's determination is that, close to, and before, the end of the scholastic year, namely between 4 to 13 June 2015, Ms. A. came to the meeting in the Centre, where the incident occurred, following a WhatsApp message sent by Mr. Al Othman to her mother's mobile telephone. There, Mr. Al Othman sexually exploited and abused her by holding her from her behind, touching the upper parts of her body over her clothing, including her breasts, and kissing her on the neck. It is equally not disputed that Ms. A. confided the incident to Mr. A. L., a teacher of hers. It is common knowledge that it is typical in this kind of disputes concerning sexual exploitation and abuse that the alleged conduct most of the times takes place in private, without direct evidence other than from the complainant, and that the evidentiary questions in such cases center on the credibility of the complainant's testimony. In the circumstances, we find, as the UNRWA DT did, that Ms. A.'s account of the material events was detailed and consistent and is of considerable

[22] *George M'mbetsa Nyawa v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1024, para. 63; *Ladu*, *op cit*. Judgment, para. 26; *Goodwin v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-467, para. 36, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379, para. 20.

evidentiary weight. In this respect, we share the UNRWA DT Judge's assessment that it would be improbable that Ms. A. fabricated the whole story on account of lack of any motive on the part of a 16-year-old teenage girl to report such an incident, especially given the harm Ms. A. and her whole family suffered as a result of her reporting such an incident.

79. Moreover, the credibility of Ms. A.'s account of events has not been damaged by any countervailing evidence. On the contrary, its detailed content was confirmed by the abovementioned testimonies of her mother, and Mr. A. L., who relayed the version of hers with a consistency that added to their credibility. By contrast, Mr. Al Othman failed to provide any sound explanation or material facts that would render Ms. A.'s allegations doubtful, and his statements were mere allegations and conjectures, not supported by any evidence.

80. In sum, the documentary evidence on file, as well as the strong circumstantial evidence and the inherent probabilities of the situation given the potential harm the Complainant, a beneficiary of the Agency, could suffer as a result of her reporting such an incident, taken cumulatively, suggest to the appropriate evidentiary standard of clear and convincing evidence, as correctly held the UNRWA DT that Mr. Al Othman had committed the alleged misconduct. Therefore, his contentions to the contrary are rejected as being without merit.

81. Consequently, we see no error in that approach and in the determination of the facts. As already noted, we are satisfied that the UNRWA DT's conclusions are consistent with the evidence. Mr. Al Othman has not put forward any persuasive grounds to warrant interference by this Tribunal. Therefore, we reject the arguments advanced by Mr. Al Othman to the contrary, and the appeal fails on this ground.

The established facts qualify as misconduct

82. This Tribunal agrees with the finding of the UNRWA DT that the established facts amounted to serious misconduct on Mr. Al Othman's part.

Applicable provisions

83. Area Staff Regulations provides:

> **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. […]
>
> **REGULATION 10.2**
>
> The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

Area Staff Rule 110.1, effective as of 1 May 2015, stipulates:

> 1. Failure 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.

The General Staff Circular (GSC) No. 07/2010 titled "Sexual exploitation and abuse complaints procedure" dated 20 August 2010 specifies:

> 3. The present Circular addresses complaints of sexual exploitation and abuse made by Agency beneficiaries against persons employed by the Agency in a working capacity. The Agency will apply the following definitions of the terms "sexual exploitation" and "sexual abuse":
>
> (a) "Sexual Exploitation" 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.
>
> (b) "Sexual Abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.
>
> 4. In order to further protect the most vulnerable populations, especially women, children, and persons with disabilities, the following specific standards which reiterate existing general obligations under UNRWA's Staff Regulations and Rules, are promulgated:

> (a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal[.]

84. In view of the foregoing, Mr. Al Othman, by engaging in such actions, violated his obligations under the abovementioned provisions, and did not conduct himself in a manner befitting his status as an employee of the Agency and notably his capacity as a teacher. As the UNRWA DT Judge correctly noted, *inter alia*, "it was seriously inappropriate and egregious for the Applicant to sexually assault one of his students".[23]

The sanction of separation from service was proportionate to the offence

85. Area Staff Rule 110.4 gives the Commissioner-General the discretion to impose a disciplinary measure and Area Staff Rule 110.5 enumerates the disciplinary measures that may be imposed:

> … 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. The authority to further define the conditions and procedures concerning the imposition of disciplinary measures is delegated to the Director of Human Resources.
>
> Disciplinary measures
>
> … Disciplinary measures under Area Staff Regulation 10.2 may take one or more of the following forms only:
>
> a. written censure;
>
> b. loss of one or more steps in grade;
>
> c. deferment, for a specified period, of eligibility for salary increment;
>
> d. suspension without pay for a specified period;
>
> e. fine;
>
> f. deferment, for a specified period, of eligibility for consideration for promotion;
>
> g. demotion with deferment, for a specified period, of eligibility for consideration for promotion;

[23] Impugned Judgment, para. 123.

> h. separation from service, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, with termination indemnity;
>
> i. separation from service, also known as termination for misconduct, with notice or compensation in lieu of notice, notwithstanding Area Staff Regulation 9.3, and without termination indemnity pursuant to Area Staff Rule 109. 9;
>
> j. summary dismissal.

86. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures such as a sanction within the limits stated by the respective norms, sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy the victim(s) and restore the administrative balance. That is why the Tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal.[24] The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.[25]

87. Further, as we stated in *Samandarov*,[26]

> ... ... due deference [to the Administration's discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of

[24] *George M'mbetsa Nyawa*, *op cit*. Judgment, para. 89; *Ganbold v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-976, para. 58; *Ladu*, *op cit*. Judgment, para. 39; *Sall v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-889, para. 41.
[25] *George M'mbetsa Nyawa*, *op cit*. Judgment, para. 89; *Ladu*, *op cit*. Judgment, para. 40.
[26] *Samandarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-859, paras. 24-25.

> the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application.
>
> … … The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

88. In the present case, given the seriousness and degree of Mr. Al Othman's misconduct, the sanction of summary dismissal, though at the very end on the relevant scale of disciplinary measures, was not unreasonable, absurd, or disproportionate. The Appeals Tribunal finds that it was a reasonable exercise of the Commissioner-General's discretion to determine that a teacher intentionally abusing and exploiting sexually a beneficiary of UNRWA in a vulnerable situation rendered Mr. Al Othman unfit for further service with the Agency, and we are satisfied that the summary dismissal was neither unfair nor disproportionate to the seriousness of the offence. As the UNRWA DT correctly held, Mr. Al Othman violated the relationship of trust that had existed between him and the Agency. His conduct was particularly grave in light of the position he occupied as a teacher and the fact that, as a woman, the Complainant falls within the category of people who have a "most vulnerable" status in accordance with GSC No. 07/2010, and by exploiting this status, Mr. Al Othman placed the Complainant in a potentially harmful position where she could suffer from retaliation in her community because of such an incident, and for having made a complaint about it. As such, the Appeals Tribunal finds that imposing the sanction of summary dismissal was a reasonable exercise of the Administration's broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNRWA DT, thus, did not err in finding the sanction proportionate to the disciplinary offense in the present case. The appeal fails on that ground too.

II. Due process issues

Whether the UNRWA DT committed an error in procedure such as to affect the decision of the case?

89. Mr. Al Othman raises a variety of challenges to the correctness of the UNRWA DT's conclusions and additionally criticizes the fairness of the UNRWA DT's general approach and management of his case. In this respect, he submits, *inter alia*, that the UNRWA DT erred in its assessment of the witnesses' testimonies as well as when it failed to hear the Deputy School Principal, Ms. W., following her recovery, as a key witness; it further erred by allowing the Complainant's mother to participate in the oral hearing by telephone, despite Mr. Al Othman's concerns and his request that she be heard by audio-visual means; it finally erred by not considering a document, submitted to it on 10 November 2020, presented to the domestic Lebanese court by Mr. A. L.

90. We repeat that the UNRWA DT has broad discretion under its Rules of Procedure[27] to determine the admissibility of any evidence and the weight to be attached to such evidence.[28] Our jurisprudence has consistently held that the Appeals Tribunal will not lightly interfere with the broad discretion conferred on the first instance tribunal in the management of its cases[20] to enable cases to be judged fairly and expeditiously and for dispensation of justice. We will intervene only in clear cases of denial of due process of law affecting a party's right to produce evidence.[29]

91. In the instant case, we do not accept Mr. Al Othman's argument that this threshold has been met. An objective review of the impugned Judgment reveals that the UNRWA DT Judge meticulously and carefully examined the existing evidentiary material and weighed the credibility of the witnesses' testimonies in a proper way. Where it was deemed appropriate, the UNRWA DT Judge challenged the witnesses about certain inconsistencies in their statements taken during the investigative process. Hence, it is not accurate that the UNRWA DT Judge mis-evaluated or ignored any kind of evidence. As evident, on the face of the impugned Judgment, read as a whole, he took stock of the totality of the evidence, including the

[27] See Article 14 of the UNRWA DT Rules of Procedure.
[28] *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 43; *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.
[29] *Abdeljalil*, *supra*, para. 43; *Uwais v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-675, para. 27, citing *Wu v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-597, paras. 34 and 35.

testimonies of the witnesses for the defense who had given written statements and, eventually, upon exercising his discretion to determine the admissibility of any evidence and the weight to be attached to such evidence, he came to predominantly predicate his evidentiary conclusions on the oral evidence provided by the witnesses during the hearing and pronounce that other clear information stemming from the documentary evidence did not need to be challenged in the hearing and the documentary evidence was also relevant to verifying the credibility and truthfulness/persuasiveness of the oral evidence provided during the hearing. Be that as it may, this Tribunal has gone by itself through the evidence on file and found the UNRWA DT's reasoning and conclusions to be correct.

Whether the UNRWA DT erred on a question of law or fact when it held that the Agency had no obligation to transmit the PAR or the Investigation Report to Mr. Al Othman during the investigation process, and on the issue of translation of documents?

92. Next, we do not find merit in Mr. Al Othman's claims that the UNRWA DT erred in fact and law when it found that his due process rights had not been violated during the investigative process, as the Agency had failed to provide him the PAR and the Investigation Report, as well as the exhibits, and, subsequently in the proceedings before it, when it refused his request for Arabic translation of all the investigative files.

93. First, as UNRWA DT correctly held,[30] there was no obligation on the part of the Administration, prescribed in the Agency's applicable regulatory framework, namely, GSC No. 07/2010 as well as the DIOS Technical Instruction 02/2016 on UNRWA's Investigation Policy, or any other authority, to transmit the PAR or the Investigation Report to a subject of an investigation—in this case to Mr. Al Othman—during the investigative process.

94. Further, we find that Mr. Al Othman failed to demonstrate in what way the alleged violations of the Agency's regulatory framework prejudiced him within the context of the present case and impacted the outcome of his case. Additionally, we take note that due process rights of a staff member are complied with as long as s/he has a meaningful opportunity to mount a defense and to question the veracity of the statements against her/him. The Appeals Tribunal is satisfied that the key elements of Mr. Al Othman's right to due process were met, and that the interests of justice were served in this case.

[30] Impugned Judgment, para. 75.

95. Indeed, there is no evidence that Mr. Al Othman's rights had been infringed in any way during the investigation. The Administration diligently undertook the investigation, Mr. Al Othman was fully informed of the charges against him and was able to mount a defense and had ample opportunities to make his case. He was provided with the allegations of misconduct and was given, and availed himself of, the opportunity to answer them. While it is true that he was not provided with the Arabic version of the Investigation Report, the majority of the annexes to the Investigation Report were available in both Arabic and English, with only a few exceptions. What is more, in the relevant judicial proceedings, Mr. Al Othman had access to the redacted version of the Investigation Report since 10 May 2018 and was provided with statements of several key witnesses, to which he submitted detailed comments and arguments before the UNRWA DT. It was further established that, on 4 November 2020, he received the unredacted version of the Investigation Report, along with its annexes, as well as the PAR.

96. Moreover, it is common cause that Mr. Al Othman and his representative, on their own accord, did not attend the oral proceedings despite the various efforts made by the UNRWA DT Judge, who, in conformity with the restrictions imposed by the COVID-19 pandemic and in order to meet the UNAT's requirements in Judgment No. 2019-UNAT-972, ruled on a host of motions submitted by Mr. Al Othman with regard to the hearing(s) and meticulously took every step in managing the present case, including by scheduling, following consultations with both parties, the relevant hearings repeatedly.[31] In these circumstances, we hold that Mr. Al Othman was given every opportunity to participate in the hearing on an equal footing with the Respondent and to interrogate and cross-examine witnesses, but he chose not to do so on his own volition. So, his arguments fail in this regard. For one thing, the UNRWA DT could never have forced him to participate in the hearing. For another, *per* the principle "*venire contra factum proprium*", Mr. Al Othman is not allowed to predicate his arguments on his own incorrect choices.

97. Additionally, following Mr. Al Othman's request to be provided with numerous translations and in light of the Respondent's response to his motion, the UNRWA DT Judge provided him with the option to proceed with the translation at his cost and to be reimbursed afterwards. Consequently, the evidence on record supports the UNRWA DT Judge's finding,

[31] See impugned Judgment, paras. 22-59 & 81-87.

which we share and uphold, that Mr. Al Othman's due process rights were amply observed, and that he was entirely able to mount a proper defense based on documentary evidence.

98. Last but not least, even if any violations of Mr. Al Othman's due process rights had occurred in the course of the administrative stage of the disciplinary proceedings, they were cured during the judicial ones, when he was availed (twice) access to the whole evidentiary material of the present case and, when he had ample opportunity to defend his case before UNRWA DT.[32] Therefore, his contentions are without merit.

Whether the UNRWA DT erred on the issue of the alleged absence of a written transcript and audio recording?

99. Mr. Al Othman contends that the UNRWA DT erred in procedure when it failed to provide him with the audio recording of the oral hearing and a written record documenting what had been said at the oral hearing. In this regard, he, relying on the *ratio decidendi* of our Judgment in *Stoykov*,[33] contends that the absence of the written transcript and audio recording constitutes a grave and fundamental procedural flaw for which the case should be remanded to a different first instance Judge. Further, he submits that the evidence in the record constitutes a sufficient basis for this Tribunal to vacate the impugned Judgment.

100. Mr. Al Othman's interpretative approach of our Judgment in *Stoykov* is misplaced. His contentions do not fall within the parameters of our established jurisprudence in *Stoykov*, as referred to below such as to admit his ground of appeal.

101. In *Stoykov*, the Appeals Tribunal found that:[34]

> … The appellate review of facts, with which we are charged, requires a record. Article 2(1)(e) of our Statute requires that we decide, in some cases, whether the UNDT "[e]rred on a question of fact, resulting in a manifestly unreasonable decision". Further, Article 2(7) of the same Statute provides that "[f]or the purposes of the present article, 'written record' means anything that has been entered in the formal record of the Dispute Tribunal, including submissions, evidence, testimony, motions, objections, rulings and the judgment, and any evidence received in accordance with paragraph 5 of the present article".

[32] *Comp. Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 36-37.
[33] *Stoykov v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-440.
[34] *Ibid.*, paras. 20-22 (internal citations omitted).

> … Obviously, in a case with oral evidence, we cannot review the UNDT's findings unless we have a transcript of that testimony. In a case that turns on disputed facts, we would have no choice, in the absence of a written transcript, but to remand to the trial court for a new and recorded hearing.
>
> … This Tribunal has held that while the representatives of the parties were present at the oral proceedings, they are entitled to the record of the testimonies made at those proceedings from the relevant UNDT Registry. This record is critical to the preparation of the appeal case.

102. In the present case, the audio recordings of the hearings before the UNRWA DT, comprising *inter alia* the witnesses' testimonies, constituted part of its formal "written record", which, along with the rest of the written evidentiary material included in it, was capable of affording the Appeals Tribunal the capacity to pronounce on the disputed facts, which it did, and the parties to this litigation to make their case. Moreover, it is common cause that Mr. Al Othman and his representative, on their own accord, did not attend the oral proceedings. Notwithstanding the absence of Mr. Al Othman and his representative at the oral proceedings, they were entitled to said audio recordings of the testimonies made at those proceedings from the UNRWA DT Registry since these audio recordings were critical to the preparation of their appeal grounds. Nevertheless, he never exercised his entitlement to that effect. As a matter of fact, he never made, or even claims that he made, such a request to be availed of a written transcript or audio recording for purposes of preparing his appeal following the issuance of the impugned Judgment. He does not even claim that he could not properly prepare his appeal due to the absence of the written transcript or audio recording. As such, there is no merit in Mr. Al Othman's claims in relation to the "written record", which we reject as without merit.

103. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal the arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and

state the grounds relied upon in asserting that the judgment is defective.[35] Mr. Al Othman has failed to do so in the present case.

III. Whether the UNRWA DT erred on the remedies?

i. Compensation for pecuniary damages

104. In the instant case, the UNRWA DT awarded Mr. Al Othman, under Article 10.5(b) of its Statute, compensation for pecuniary damages (damages for harm) for an amount equivalent to his full salary, including all associated allowances and entitlements, for the period between 17 March and 26 September 2017.

105. The UNRWA DT's award is predicated upon its consideration of the effective date of the contested disciplinary measure. In particular, the UNRWA DT Judge declared illegal *ab initio* the contested A/DUA/L's 17 March 2017 decision to summarily dismiss Mr. Al Othman, as the sole competent authority to make such a decision was the Commissioner-General. Following that, the UNRWA DT found that Mr. Al Othman remained a staff member until 26 September 2017, the date on which the Commissioner-General issued a new decision and imposed on him the disciplinary measure of summary dismissal. Based on "the general principle of international civil service law[,] [...] a decision adversely affecting a staff member cannot have retroactive effect from a date prior to the date on which it is notified to her or him", the UNRWA DT Judge reasoned that the Commissioner-General did not simply "*ex post facto* validat[e] or [...] rubber stamp[] a previous decision; [he corrected] [...] a detected mistake",[36] but he issued a new decision that only came into effect on 26 September 2017, and not on 17 March 2017.[37]

106. As per the Appeals Tribunal's jurisprudence, the Dispute Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury.[38] Compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between

[35] *Cherneva v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-870, para. 30; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19.
[36] Impugned Judgment, paras. 71-72.
[37] *Ibid*., para. 72.
[38] *Sirhan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-860, para. 19 and cites therein.

both.[39] It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.[40]

107. On appeal, while Mr. Al Othman agrees in principle with the UNDRWA DT's finding concerning the effective date of the contested disciplinary decision, he then asserts, relying on Judgments 1669 and 4365 of the International Labour Organization Administrative Tribunal (ILOAT), that the UNRWA DT erred when it found that the decision taken by the Commissioner-General on 26 September 2017 had come into effect on that same date, instead of 11 October 2017, date on which he allegedly became aware of it. He therefore asks to be paid his salary, allowances and entitlements from 17 March 2017 to 11 October 2017.

108. Conversely, on cross-appeal, the Commissioner-General, while conceding to the correctness of the impugned Judgment in terms of its holdings on the unlawfulness of the 17 March 2017 administrative decision, contends that the UNRWA DT erred in fact and law and exceeded its competence in awarding compensation for loss of salary in the absence of a specific request at the decision review stage of the formal process, as the first time Mr. Al Othman introduced a plea for compensation for financial losses was in his submission of 29 March 2018 in response to Order No. 032/2018, and where no evidence had been adduced to establish any financial losses as a result of the decision of 17 March 2017. He further argues that the UNRWA DT erred in its reasoning that he remained a staff member until 26 September 2017, the date on which the Commissioner-General issued a new decision. In this connection, the Commissioner-General notes that "the danger with this kind of reasoning is that it overlooks the fundamental fact that on 28 February 2017, the summary dismissal of [Mr. Al Othman] had been approved by the Commissioner-General prior to the issuance of the letter of 17 March". Thereupon, he submits that "given that the CG had sanctioned or

[39] *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68; *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20; *Sirhan*, *ibid*., para. 19.

[40] *Boubacar Dieng*, *op cit*. Judgment, para. 68; *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 31; *Sirhan*, *op cit*. Judgment, para. 19.

approved the summary dismissal, the decision of 17 March 2017 comports with established jurisprudence that 'only substantial procedural irregularities will render a disciplinary measure unlawful'".

109. First, the general principle this Tribunal will apply is that an administrative decision may not be retrospective, unless legislative authority allows for such an effect[41] or where there is a reversal of an earlier decision,[42] and, in this case there was not, since the Commissioner-General issued, as pointed out above, a new decision on 26 September 2017, which came into effect on that same date. Hence, on that score, both Mr. Al Othman and the Commissioner-General are wrong: the summary dismissal as such was not at issue. However, it could not have retroactive effect from a date prior to that on which it was issued. The mere fact that the date set for termination was not the right one did not invalidate the whole decision, which took effect from the date at which the summary dismissal was valid, *to wit*, on 26 September 2017, which meant that Mr. Al Othman remained a staff member for the period between 17 March and 26 September 2017 and was entitled to the full salary, including all associated allowances and entitlements, for that period and only for that, as the UNRWA DT Judge correctly held. In this regard, Mr. Al Othman cannot rely on ILOAT Judgments 1669 and 4365, which, despite their persuasive authority, are not binding on the present Tribunal.

110. We will now address the rest of the Commissioner-General's contentions, which we find misplaced for the following reasons. While it is true that the Dispute Tribunal is not competent to award compensation of the specific kind, namely, for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury, without a previous claim for such damage and compensation; If no request for such compensation is made, the Dispute Tribunal lacks jurisdiction to award this kind of compensation *sua sponte*.[43] But this is not the case here.

111. Indeed, it is not in dispute that Mr. Al Othman did not make a request for compensation for financial losses incurred as a result of the A/DUA/L's 17 March 2017 unlawful decision. It is equally not disputed, however, that Mr. Al Othman subsequently

[41] *Margaret Mary Fogarty v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1117, para. 34.
[42] *Comp*. ILOAT Judgment 1020, consideration 12.
[43] *Sirhan*, *op cit*. Judgment, para. 20.

made such a specific request to the UNRWA DT in response to Order No. 032/2018, wherein he was requested by the UNRWA DT to submit comments on the Agency's reply, including any evidence, documentary or otherwise, in support of his application, along with any additional facts and legal arguments he wished to make and the relief sought by him.[44] This UNRWA DT Order followed the issuance, on 26 September 2017, of a new letter by the Commissioner-General, as noted above, which summarily dismissed Mr. Al Othman. In fact, the UNRWA DT held that this letter superseded the previous letter of 17 March 2017 signed by the A/DUA/L,[45] and this could not have resulted in Mr. Al Othman being obliged to submit a new application, as both letters had imposed on him the same disciplinary measure based on the same facts, rationale and conclusions.[46]

112. In these circumstances, the UNRWA DT's approach, by which it extended the scope of its judicial review such as to cover the receivability of Mr. Al Othman's application against both administrative decisions, i.e., one taken by the A/DUA/L on 17 March 2017 and the other by the Commissioner-General on 26 September 2017, which post-dated both the filing of his application and his submission on 15 May 2017 to the Deputy Commissioner-General of a request for review of the (initial unlawful) decision to summarily dismiss him, made it impossible for him to present at an earlier stage his request for pecuniary damages associated to the Commissioner-General's 26 September 2017 decision. Hence, as per the principle "*Impossibilium nulla obligatio est*" and in accordance with UNRWA DT's Order No. 032/2018, and finally with the above-mentioned UNRWA DT ruling—whose correctness is not disputed and in any case its judicial review does not fall within the scope of the present appeal or cross-appeal—we find that, contrary to the Commissioner-General's claims, the UNRWA DT did not exceed its jurisdiction by awarding compensation not requested by Mr. Al Othman, as a request for such award in fact existed.

113. Turning to the Commissioner-General's claim that the UNRWA DT erred in law in making the award because Mr. Al Othman did not demonstrate the existence of negative consequences in relation to the claim for material damages or loss of salary, we also find it without merit.

[44] Judgment No. UNRWA/DT/2019/019, para. 26.
[45] *Ibid.*, para. 20.
[46] *Ibid.*, para. 76.

114. This Tribunal has consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and that the Appeals Tribunal will not interfere lightly as "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".[47]

115. In the case before us, the UNRWA Dispute Tribunal followed this approach. It found there was harm directly caused by the impugned administrative decision to summarily dismiss Mr. Al Othman from service, and based, as alluded above, on the fact that, by his 26 September 2017 decision, the Commissioner-General unlawfully set the effective date of the impugned disciplinary measure at 17 March 2017, as well as that Mr. Al Othman remained a staff member until 26 September 2017, the UNRWA DT Judge exercised his remedial discretion in awarding compensation equivalent to his full salary, including all associated allowances and entitlements, for the period between 17 March and 26 September 2017. In this context, we hold that the UNRWA DT did not commit any error of law or fact in its assessment of the compensation award for pecuniary damages for this specific reason. The Commissioner-General has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the UNRWA Dispute Tribunal. In such circumstances, the Appeals Tribunal gives deference to the UNRWA Dispute Tribunal in the exercise of its discretion and will not lightly disturb the quantum of damages.[48] Therefore, the cross-appeal fails on this ground.

116. Therefore, this ground of appeal and of cross-appeal as well as the cross-appeal as a whole fall to be dismissed.

ii. Moral damages

117. Turning to the issue of non-pecuniary damages, we recall our jurisprudence that an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the

[47] *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 31: *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28, citing *Rantisi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-528, para. 71.

[48] *Ho*, *op cit*. Judgment, para. 34; *Maslei v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-637, para. 31; *Leclercq v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-429, para. 22, citing *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219.

employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.[49]

118. Mr. Al Othman requests the Appeals Tribunal to grant him compensation for moral damages allegedly incurred "because he was unlawfully deprived of his salary and financial entitlements from 17 March to 11 October 2017". However, he does not present any kind of evidence to that effect, or even challenge the relevant holding of UNRWA DT which, in its Judgment on the merits, found that there was no evidence on record to justify an award of moral damages and, accordingly, it did not grant such an award.[50] Therefore, the appeal fails on this ground too.

III. Costs of the proceedings

119. The remaining issue under appeal is related to the award of costs for abuse of the proceedings.

120. Mr. Al Othman attacks the impugned decision on the ground that the UNRWA DT failed to exercise its jurisdiction and objective authority under Article 10, paragraph 6, of its Statute, which allows it to impose costs at any party that has manifestly abused the proceedings before it. Conversely, the Commissioner-General seeks costs against Mr. Al Othman in the amount of USD 9,600, pursuant to Article 9(2) of the Appeals Tribunal's Statute, on the ground that "the procedural history leading up the hearing of this case leads to the irresistible conclusion on manifest abuse of proceedings before the UNRWA DT". In this regard, the Commissioner-General makes a reference to the fact that Mr. Al Othman filed a host of motions with regard to the hearing, which he and his representative did not attend eventually.

121. We dismiss the submissions by both parties as without merit. In terms of Mr. Al Othman's claim, although there is no question at all about the authority of the UNRWA Dispute Tribunal to impose such a sanction in cases where there has been abuse of litigation by a party, in the present case we consider that the exercise of that discretion was not warranted. Mr. Al Othman has not put forth a cogent reason for us to engage in such

[49] *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.
[50] Impugned Judgment, para. 134.

review of the UNRWA DT's alleged failure. While, in respect to the Commissioner-General's claim, despite the allegedly unfortunate maneuvers in the litigation, the somewhat repetitive nature and the large number of claims brought by Mr. Al Othman before the UNRWA DT, it cannot be said, from an overall consideration of the proceedings, that there was an abuse of process. Thus, the Commissioner-General's request for an award of costs is denied too.

122. In the premises, the appeal and the cross-appeal are dismissed.

Judgment

123. The appeal and the cross-appeal are dismissed and Judgment No. UNRWA/DT/2020/073 is hereby affirmed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

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

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

(Signed)

Weicheng Lin, Registrar