



Judgment No. 2019-UNAT-972

Counsel for Mr. Al Othman:

Self-represented

Counsel for Commissioner-General:

Rachel Evers/Michael Schoiswohl

JUDGE SABINE KNIERIM , PRESIDING .

1. The present cases arose from the summary dismissal for serious misconduct of Mr. Mohammad Al Othman, a Teacher in Mathematics at a Preparatory Girls' School employed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) in Lebanon. By Judgment No. UNRWA/DT/2019/019, the UNRWA Dispute Tribunal (UNRWA DT) concluded that the facts upon which Mr. Al Othman had been disciplined had not been established by clear and convincing evidence. The UNRWA DT rescinded the decision to summarily dismiss Mr. Al Othman and

4. On 16 November 2015, the complaint was referred to the Department of Internal Oversight Services (DIOS) and a preliminary assessment was ordered by the Director of the DIOS. The preliminary assessment dated 13 December 2015 recommended that a formal investigation be conducted into the allegations of sexual exploitation and abuse committed by Mr. Al Othman. In the final report of investigation dated 13 July 2016, the DIOS reported that there was sufficient evidence to conclude that Mr. Al Othman had breached the Agency's Regulations and Rules with respect to the prohibition of sexual exploitation and abuse.

5. The investigation made the following findings:

... With respect to the sexual exploitation and abuse allegation, both the victim and the subject present drastically different versions of the incident. Both versions cannot be true. As is often the case in these types of situations, there were no independent witnesses to the incident, and DIOS must therefore carefully assess the evidence available, and especially the independent evidence, to determine which version is the most credible, and hence, the most likely.

... First, the existence of a text message ~~se~~ to [Ms. A] (through her mother) to change the time of the tutoring class on the last day of the school year is important. Mr. Al Othman claims that he did not send this message, and would only communicate through [Ms. A's sister]. It is regrettable that given the time that had elapsed, the specific text message was not available to DIOS. However, it was seen not only by [Ms. A] and her family, but also by the Assistant Principal of the school, Ms. W(...). Ms.[.] W(...) saw the message when she visited [Ms. A]'s house tdy to understand what had happened. While some of the dates provided by Ms. W(...) seem tbe off, the rest of her evidence regarding the events after the allegation was first raised is consistent with the evidence of other witnesses, and DIOS accordingly considers that on this point, it is equally accurate. DIOS also did not find, nor was it suggested by any of the witnesses or the subject, that Ms. W(...) would be biased or had a motive to lie. This not only corroborates and significantly enhances the credibility of [Ms. A]'s version, it casts doubt on Mr. Al Othman's credibility as he flatly denied having sent that message.

... Second, Mr. Al-Othman also denied asking two young boys ... for photos of [Ms. A] despite the evidence suggesting the contrary. Both [boys] stated Mr. Al-Othman asked for photos of [Ms. A] so that he could prove [she] was a "dirty" girl and tarnish her reputation. Even had [Ms. A] shared photos, DIOS would not consider this in any way affecting [her] credibility, but its relevance is that Mr. Al Othman's mind, this was relevant to help him counter the accusation and he therefore not only attempted to find such photographs, but also denied having done so. Mr. Al Othman was also quick to lay blame on someone else ... to try to deflect the allegation against him, but the school principal

allegations than with [Ms. A] for making what he claims was a false accusation. These actions, trying to tarnish the victim's reputation and accusing someone else of a serious wrongdoing, are not those of someone unjustly accused and only trying to defend himself. They also cast doubt on Mr. Al Othman's entire account of the events.

... Third, the evidence also does not support Mr. Al Othman's contention that he was not in the room when [Ms. A] was asked at the centre the first time whether she had been sexually assaulted by Mr. Al Othman. This contention is central to Mr. Al Othman's version, in that he claims that her denial at that stage shows that nothing had happened, and that it was Mr. L(...) who had then pursued the matter. However, Mr. T(...), [a teacher at the school and] another independent witness, as well as [Ms. A's] father, rather state that Mr. Al Othman was present during the meeting. In that context, the denial by [Ms. A] in front of her alleged aggressor is readily understandable, and does not, in DIOS view, undermine [Ms. A]'s credibility.

... In contrast, the inconsistencies found in [Ms. A]'s testimony when compared to the evidence in general were minor. For example, Mr. K(...), the eldest teacher in the

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13. On 18 November 2018, Mr. Al Othman filed a submission to the UNRWA DT claiming that his representative had received a letter from the Director of UNRWA Operations, Jordan (DUO/J) preventing him from representing Mr. Al Othman and that he and his representative would not be present at the hearing. On 21 November 2018, the Commissioner-General submitted that it was not the intent of the Agency to prevent Mr. Al Othman's representative from taking part in the UNRWA DT's hearing, and that the referenced letter was a reminder to Mr. Al Othman's representative of his obligations and limitations as a staff representative.

14. On 26 November 2018 and 20 March 2019, the UNRWA DT conducted oral hearings.

18. Turning to the merits, the UNRWA DT first examined whether the facts upon which the disciplinary measure was based had been established. Since Mr. Al Othman contended that he had never sexually assaulted Ms. A, it was for the Agency to establish by clear and convincing evidence that he had engaged in sexual exploitation and abuse.

19. The UNRWA DT concluded that there was no clear and convincing evidence that Ms. A was actually at the center on the last day of the 2014-2015 school year. In reaching its finding, the UNRWA DT noted Mr. Al Othman's contention that he had not met with Ms. A on the day she claimed she had been assaulted by him and that on that date, Ms. A was not even a student of the center, as he had previously expelled her. In addition, the UNRWA DT noted that while Ms. A had stated to the investigators that the alleged incident occurred on the last day of the 2014-2015 school year, the investigation report did not indicate a specific date. Finally, it noted that Ms. A had gone, in the past, to the center accompanied by her mother or brothers, but on the day of the alleged incident, she was not accompanied.

20. The UNRWA DT found that one of the significant pieces of evidence that the investigators relied on was the testimony of the deputy school principal who had stated during her Ahe de16 -1.787 Tc -.0002

22. The UNRWA DT further found that the bruise on Ms. A's neck, which had been seen by Ms. A's family members, could not be considered as evidence for the alleged assault since it was not clear when it had been caused and by whom.

23. The UNRWA DT acknowledged the findings the investigators had made about Mr. Al Othman's behaviour in response to the allegations against himself. It noted that, according to the investigators, Mr. Al Othman had tried to influence Ms. A and her family, had attempted to locate photographs to weaken Ms. A's credibility, had made statements to the investigators with the intent to tarnish her reputation and integrity, and had lied to the investigators about his attempt to obtain photographs of Ms. A. The UNRWA DT, however, found that such behaviour was common among individuals accused of wrong doing, regardless of whether they were guilty or innocent and that the fact that Mr. Al Othman had lied to the investigators about his attempts to obtain photographs of Ms. A could not be considered as evidence that he had also lied about the alleged assault. Finally, the UNRWA DT noted that Mr. Al Othman had participated in several meetings with Ms. A's family for the purpose of closing the case by mediation; yet, there was no evidence or testimony that Mr. Al Othman had ever admitted to assaulting Ms. A.

24. The UNRWA DT noted that in cases, where there was no material evidence or percipient witness other than a complainant and an accused, the credibility of the complainant was crucial. The UNRWA DT found that if the assault had occurred, Ms. A unfortunately did not report the incident at the first reasonable opportunity and when she reported it to a teacher after the summer break, her versions changed several times. The UNRWA DT also noted the testimonies of two witnesses who testified before the UNRWA DT that Ms. A's allegations were credible and that her highly sensitive state of mind could result from a sexual assault, but concluded that there was no evidence that it indeed was the result of an assault and that Ms. A's behaviour had already been a cause of concern to her family before the alleged assault.

25. The UNRWA DT concluded that there was no material evidence nor a direct witness of the assault and the investigation's findings that Ms. A's account was the most credible and accurate were not supported by clear and convincing evidence. The UNRWA DT therefore held that the facts upon which Mr. Al Othman had been disciplined had not been established by clear and convincing evidence. The UNRWA DT rescinded the decision to summarily dismiss Mr. Al Othman and ordered in-lieu compensation in the amount of USD 19,000 (corresponding

30. By contrast, when asked about the incident, Mr. Al Othman simply denied the assault. His main response to the charges of misconduct consisted of a series of questions about the recipients of the WhatsApp message sent on the day of the incident, the failure of the family to file criminal charges, and the personal motivations of the investigators.

31. The UNRWA DT erred in its assessment of Ms A's credibility. Ms. A's sworn testimony before the UNRWA DT was consistent with her accounts on at least four previous occasions, including when she reported the incident to Mr. L, when she spoke with the principal, her mother and her sister at home, when she spoke with the deputy principal at home, and when she was interviewed by the investigators.

32. The UNRWA DT erred in concluding that there were inconsistencies in Ms. A's accounts. Its conclusion is based on several errors.

33. First, contrary to the UNRWA DT's finding that Ms. A had denied the assault on several occasions, there was only one occasion during which Ms. A denied the assault, in 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. The investigation report considered that the denial by Ms. A was readily understandable in the circumstances and a gender-based violence coordinator testified before the UNRWA DT that it was common to see recantations in child abuse cases due to fear of retribution. The UNRWA DT may also have accepted Mr. Al Othman's argument that Ms. A had denied the assault on another occasion, 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 incident may not be considered a voluntary statement by Ms. A and may not be used to assess her credibility.

34. Second, the UNRWA DT mistakenly thought that Ms. A accused Mr. Al Othman of rape

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41. The UNRWA DT also erred in its assessment of Mr. Al Othman's credibility. While finding that Mr. Al Othman's refusal to appear before the UNRWA DT was "specious", it failed to draw any inference about Mr. Al Othman's credibility.

42. Finally, the other criteria for the confirmation of a disciplinary sanction are also met. The sexual assault of Ms. A by Mr. Al Othman constitutes serious misconduct. The Appeals Tribunal has recognized that separation from service is a proportionate sanction for such cases. Furthermore, Mr. Al Othman's due process rights were fully respected. He was interviewed during the investigation by DIOS and was provided with an opportunity to provide comments on the charges against him based on the investigation report. Mr. Al Othman tried to influence Ms. A, her family and witnesses, requested two high school students to provide photographs of Ms. A with other boys in order to malign her reputation, while denying that he did so, made statements to the investigators with the intent to tarnish Ms. A's reputation and integrity and falsely accused another student of sexually harassing Ms. A. The UNRWA DT erred in finding that none of these actions undermined Mr. Al Othman's credibility in any way and that the intimidation of witnesses, including minor children, and the presentation of false evidence constituted common behaviour of innocent individuals.

43. The Commissioner-General requests that the Appeals Tribunal allow the appeal and affirm the decision to summarily dismiss Mr. Al Othman. In the alternative, the Commissioner-General requests that the Appeals Tribunal remand the case.

Mr. Al Othman's Answer

44. As a preliminary matter, Mr. Al Othman objects to the Commissioner-General's reasons for a request of a potential remand of the case. He, however, does not object to a remand as such. He contends if the Appeals Tribunal remands the case, it should do so because the UNRWA DT erred in allowing the two hearings to go ahead when Mr. Al Othman was deprived of his right to be assisted by the representative of his choice. He asks the Appeals Tribunal to encourage the UNRWA DT to remedy its procedures and enable Mr. Al Othman and his representative to appear in a new hearing, in the knowledge that the latter faces no threat of retaliation and to provide him and his representative with the opportunity to scrutinize documents that had previously been withheld in safety at a properly constituted hearing before the court of first instance would serve justice.

45. Contrary to the Commissioner-General's contention, there is no clear and convincing evidence that Mr. Al Othman sexually assaulted Ms. A. The transcripts and documents containing statements by Ms. A and various witnesses, annexed to the Commissioner-General's appeal, show that Ms. A's many and varied accounts of the alleged events are neither consistent nor credible.

46. In paragraphs 10 and 11 of her statement to the investigators, Ms. A described the first moments as she entered the center. There are two salient points contained in Ms. A's statement to the investigators: First, she went to the center alone; and second, Mr. Al Othman walked around the centre closing all the doors and windows. This version differs from what emerges in the statement by Ms. A's sister, who stated that Ms. A arrived at the centre, accompanied by two girlfriends, and Mr. Al Othman yelled at them both and they left hurriedly, leaving Ms. A alone with him. There is no mention in Ms. A's testimony of other students supposedly leaving the centre as she arrived, nor of Mr. Al Othman walking around the centre and closing doors and windows. Both versions also contradict the deputy principal's testimony, who stated that Ms. A had told her that upon her arrival at the centre, Mr. Al Othman's son was closing the windows rather than the windows and doors. This version in turn contradicts the statement made by the school principal that Ms. A had informed him at the end of the school year 2014-2015

49. Contrary to the Commissioner-General's argument, the UNRWA DT was not mistaken in its belief that Ms. A had accused Mr. Al Othman of rape and then retracted the accusation. Mr. L's statement to the investigators indicates unequivocally that Ms. A told him that she had been raped by a teacher.

50. There is also no merit in the Commissioner-General's contention that the UNRWA DT was under the false impression that Ms. A had accused Mr. Al Othman of assaulting her on previous occasions, but that was not so. Mr. L's statement to the investigators clearly shows that Ms. A accused Mr. Al Othman of abusing her on three occasions. At a meeting, Mr. K, the eldest teacher in the school, addressed Ms. A in front of 10 teachers and her father and asked what had happened. She answered that he had abused her three times. At the hearing, accuseds 0pe-3.6(o)--1.9(.7(o)-2.8.7(o)-d(

value. Mr. Al Othman asks the Appeals Tribunal to review the transcript and his submission and to find that the UNRWA DT did not err by lending the appropriate weight to the testimony of those witnesses.

54. As to the Commissioner-General's contention that the UNRWA DT failed to draw any inferences from Mr. Al Othman's refusal to appear before the UNRWA DT, Mr. Al Othman contends that he and his representative could not attend the hearings because they had feared retaliation.

55. Mr. Al Othman submits that the criterion set by the Appeals Tribunal for reviewing the sanction, by which his service was terminated, has not been met and that the conclusions of the UNRWA Dispute Tribunal were valid and fully compliant with the jurisprudence of the Appeals Tribunal. The UNRWA DT therefore did not err by concluding that the evidence brought against Mr. Al Othman was not clear and convincing. Mr. Al Othman asks the Appeals Tribunal to dismiss the appeal entirely. Alternatively, he asks that the Appeals Tribunal remand the case to the UNRWA DT for a new hearing that Mr. Al Othman and his representative could attend without fear and with the assurance that his representative would not be subject to retaliation.

Mr. Al Othman's Appeal

56. The UNRWA DT erred and failed to exercise its jurisdiction by failing to consider that the Agency had violated Mr. Al Othman's right to due process and failing to award him compensation on that ground. Mr. Al Othman alleges the following breaches of his due process rights: The UNRWA DT erred in procedure in impeding Mr. Al Othman's access to all the documentation in the case file in the Commissioner-General's possession, thereby depriving him of the opportunity to mount a proper defense. The UNRWA DT finally furnished only a redacted copy of the report of investigation and denied Mr. Al Othman's plea for access to an

in the afternoon, as the UNRWA DT understood that Mr. Al Othman's representative, a teacher and an UNRWA staff member, would not be available in the mornings. Yet,

Moreover, had Mr. Al Othman been provided with the documents during the proceedings and had he been allowed to participate in the hearing, he would have been able to focus on this particular issue of inconsistencies in the testimony.

61. The UNRWA DT erred in fact and law when it implicitly acknowledged that the second letter of the Commissioner-General summarily dismissing Mr. Al Othman dated 26 September 2017 was the contested decision and when it implicitly ruled that the Commissioner-General had the right to punish a former staff member. Mr. Al Othman had already been punished on 17 March 2017 and the Commissioner-General only reviewed his reply to the letter containing the charges after it had been translated in September 2017. As a result of this error, the UNRWA DT failed to exercise its jurisdiction with regard to ensuring Mr. Al Othman's due process rights and erred *ratione materiae* with regard to redress for the procedural violations of his ri

64. In relation to compensation, the Commissioner-General contends that the UNRWA DT made no reversible error. Mr. Al Othman's claim that the UNRWA DT erred by not ordering payment of salary, allowances, end of service indemnity, and contributions to the Provident Fund has no merit. Mr. Al Othman seems to confuse the different types of compensation under Article 10(5)(b) of the UNRWA DT Statute. The UNRWA DT did not make any award of compensation under Article 10(5)(b). The UNRWA DT ordered rescission of the contested decision and in-lieu compensation, in compliance with Article 10(5)(a). It set the amount of in-lieu compensation to the equivalent of two

The Commissioner-General's appeal

68. We agree with the Commissioner-General that the UNRWA DT committed errors of law and fact resulting in a manifestly unreasonable decision.

69. In disciplinary cases under Article 2(1)(b) of the UNDT Statute, the UNDT will examine the following: i) whether the facts on which the disciplinary measure is based have been established (by a preponderance of evidence, but where termination is a possible sanction, the facts must be established by clear and convincing evidence); ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected.

70. In order to overturn a finding of fact by the UNDT, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is unreasonable. The Appeals Tribunal considers that some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.

71. In the present case, we find that the UNRWA DT erred in its assessment of Ms. A's credibility. Contrary to its findings, she did not give "various versions" about the alleged assault. Ms. A's sworn testimony before the UNRWA DT was consistent with the accounts she gave on at least four previous occasions, including when she reported the incident to Mr. L, when she spoke with the principal, her mother and her sister at home, when she spoke with the deputy principal at home, and when she was interviewed by the investigators. She never changed the essentials of

72. 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.

73. Additionally, we note that in Ms. A's social environment, her family and school, there was

75. The delay in reporting - approximately three to four months had lapsed between the incident in June 2015 and Ms. A's discussion with Mr. L in September 2015 - has no impact on Ms. A's credibility. During her testimony before the UNRWA DT, the gender-based violence coordinator stated, based on her experience documenting gender-based violence in that region, that it usually took between four and seven months for a victim to disclose or discuss such an incident, and that a disclosure right after the incident or very close to the time of the incident, was very rare, especially for this context. While a prompt reporting may contribute to the evidentiary weight of a report, the absence of prompt reporting cannot serve to undermine the credibility of an allegation, particularly in sexual abuse cases involving children. The UNRWA DT therefore erred in drawing a negative inference about the credibility of Ms. A from her delayed reporting.

76. The UNRWA DT also erred in its assessment of Mr. Al Othman's credibility. We find that Mr. Al Othman's behaviour after the reporting of the incident by Ms. A were not usual and legitimate actions of an individual trying to prove his or her

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