



JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. The Appellant, a Practical Nurse, Grade HL2, Step14, at Dheisheh Health Clinic, West Bank Field Office (WBFO) of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency) was separated from service without termination indemnity for sexual exploitation and abuse committed against a beneficiary. The UNRWA Dispute Tribunal (UNRWA DT) in its Judgment No. UNRWA/DT/2020/026 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. For the reasons set out below, we affirm the UNRWA DT's Judgment.

#### Facts and Procedure

2. The Appeals Tribunal is seized of an appeal against an UNRWA DT Judgment dismissing the Appellant's application contesting the Agency's decision to impose upon him a disciplinary sanction of termination without termination indemnity following the conclusion of an investigation into allegations that he sexually abused a female patient while examining her in his capacity as Practical Nurse at the Dheisheh Health Clinic. The Appellant has denied the allegations citing to his employment with the Agency as a Practical Nurse since 1991 clear of any misconduct and attributing the allegations made as part of a conspiracy against him by staff members who had made prior threats against him. The UNRWA DT dismissed his application.

3. On 5 October 2017 allegations of sexual exploitation and abuse (SEA) by the Appellant were reported to the Acting Area Health Officer and to the Dheisheh Camp Services Officer.

4. Specifically, the complainant visited the Dheisheh Health Clinic on 5 October 2017 to consult the midwife for abdomen pain who then instructed her to go to the Appellant's office for blood pressure and blood glucose testing. Noticing signs of nausea the Appellant helped her get onto the examination bed where the complainant indicates he gave her an internal vaginal examination while asking about her sexual relations with her husband and instructed her not to tell anyone he did this. Following this assault, she informed her sister-in-law who had joined her at the clinic. She then saw the midwife and asked if he was supposed to conduct an internal exam and the midwife confirmed he was not supposed to. The midwife, the psychosocial counsellor and the complainant went together to the Appellant's office to ask

about the examinations he had performed, and Mr. Al Farajeh denied having conducted an

- b) The DIOS investigator should have performed a physical examination of the complainant ;
- c) The investigator concluded she was sad from the assault, yet he has no expertise or experience assessing the psychological state of victims in such cases. He is not a gynecologist and thus not capable of determining whether an assault or contact occurred;
- d) The investigator was told she was in the exam room for 30 minutes, but never retrieved the electronic records of the patients that visited that day to document the time at which she arrived and departed to confirm her account;
- e) The Investigator did not ask her why she did not refuse the alleged assault by pushing away or striking him or running out of the room;
- f) His statement was taken and a transcript shown to him 20 days later; he should have been able to certify it the same day
- g) The investigators did not presume his innocence and was biased towards him;
- h) The decision was based on statements of witnesses who did not actually witness the incident and whom the Appellant has been unable to confront. Their testimony was hearsay based on what the complainant had coached them to say.This is circumstantial evidence;
- i) The UNRWA DT did not consider why she did not resist removing her clothes. "Human nature is such that, even in licit relations, if a man removes a woman's clothing without any response or resistance, that amounts to consent."
- j) The investigation was flawed as it did not allow him to confront the mid -wife and the claimant and the UNRWA DT did not rely on any psychological report to assess the complainant's condition;
- k)

amounts to a serious error that should have reversed the decision. He was denied his right to defend himself.

The Commissioner -General's Answer

9. In response, the Commissioner-General submits that the appeal should be dismissed in its entirety. He argues that the Appellant has failed to meet his burden and fails to identify any errors in fact or law warranting a reversal. Further, the UNRWA DT employed the correct legal standard of proof, i.e. that of clear and convincing evidence, to confirm the facts had been established and that they confirmed misconduct of a serious nature warranting the disciplinary sanction which was proportionate. Finally, he resists the Appellant's arguments that there were due process violations.

#### Considerations

##### *Preliminary Issues*

10. The Appellant requests an oral hearing, which he believes will be of assistance to the Appeals Tribunal. Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). Under Article 18(1) of the Rules, a request for an oral hearing may be granted when it would "assist in the expeditious and fair disposal of the case". As the Appeals Tribunal does not find that an oral hearing would assist it any further in resolving the issues on appeal, the request for an oral hearing is denied.

##### *Merits*

##### *Standard of review in disciplinary cases*

11.

context, the UNRWA DT 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 is imposed is proven by the facts.”



fact that the latter had approached the complainant to inform her about the location of the X-ray room.

21. The UNRWA DT was clearly not convinced by the Appellant's different story, who simply claimed that the complainant was a liar and added that he was a victim of a conspiracy against him, as he had been threatened by a staff member in front of another staff member, and had been told that a conspiracy had been planned against him. In this context, the UNRWA DT Judge rejected these claims as mere allegations and conjectures, which were not supported by any additional details or any evidence, and pointed to the significant and uncontested fact that the complainant had never encountered the Appellant before this incident, that the Appellant had failed to provide any credible reason or motive for the complainant to lie about the alleged incident, as well as that the complainant risked jeopardizing her and her family's reputation and other potential harm she could suffer as a result of her reporting such an incident in her community.

22. 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 was based were established by clear and convincing evidence and the Appellant had sexually abused and exploited the complainant when he conducted, on his own, the internal examination of the complainant in his office on 5 October 2017.

23. The UNRWA DT also considered the Appellant's argument that his due process rights

c



evidence.



GSC No. 07/2010 specifies:

30. 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







40. We agree.

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Judgment

49. The appeal is dismissed and Judgment No. UNRWA/DT/2020/026 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of June 2021.

*(Signed)*

Judge Raikos  
Athens, Greece

*(Signed)*

Judge Knierim

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JUDGE COLGAN 'S DISSENTING OPINION

1. I respectfully disagree that the Appellant has failed to establish error on the part of the UNRWA DT. This is on only one, albeit a very important, aspect of the Tribunal's Judgment, its conclusion that the process that lead to the Appellant's dismissal without payment of termination indemnity was due and lawful.

2. In view of my conclusion that the UNRWA DT erred in law in so finding, and that in my opinion the case should be remanded to a differently-constituted Dispute Tribunal, I will not comment on the merits of the Commissioner-General's case that Mr. Al Fararjeh sexually assaulted a patient he was nursing. What I do say, however, is that if upon a full and proper review the Dispute Tribunal came to the conclusion that he committed the conduct alleged, this would unquestionably amoA (b)-3.8 9 -1.732 Td nsnt,

person he named (GM). The implication was that the complainant had made a false complaint against him in connection with those threats he said he had received. When Mr. Al Fararjeh signed his written statement subsequently, he asked that reference to GM be removed “to maintain civil peace within the Camp.” He was later dismissed based on the investigation’s findings.

6. Although M8 (i)-3. sil fd42(A)-2.1 (6 (h)-2.7.9 (n)0.8 (e)-3.4 (d -0.0 U3.7 737.7 T.8 .30418 (e)-3.4 (d -0

b) Concluded that although it was regrettable that his “Due Process Letter” had only been provided to him in English rather than in his first language of Arabic, he had not requested a translation and had responded to the English version. c (i)-3.1 ( (rm-0.8 ( t h)-1 (n.

to the Tribunal, the Appellant was entitled to the same informational rights by the Agency, but was deprived by it of these. That is illustrated by the Tribunal's apparent acceptance that he had not received this information and the provision of it to him to attempt to cure that failure by the Respondent.

13. I would conclude also that it was an error of law by the UNRWA DT, in all the circumstances, to refuse the Appellant an oral hearing of his claims against dismissal for very serious reasons, after a long period of service. It was likewise in respect of the Tribunal's refusal to allow Mr. Al Fararjeh to have the Tribunal consider for itself the evidence of the witnesses whose accounts the Respondent had accepted as truthful and on which accounts the Appellant's denials of misconduct were disbelieved and rejected. So too was his request that the Tribunal have regard to the clinic's electronic patient records which Mr. Al Fararjeh said would have confirmed the times at which the complainant had been dealt with and which, he says, would have shown that it was unlikely that she had been locked in an examination room with him for 30 minutes as she claimed. That is not to say that these pieces of evidence would have changed the outcome of his case: indeed if examined and found to confirm the complainant's case, they may well have strengthened it against him. But the Tribunal's refusal to consider these defences was, in my view and despite the considerable discretion given to the Tribunal as to the admission of evidence, such an error of law as to require the Judgment to be set aside and the proceeding retried accordingly.

14. I wish to address finally Mr. Al Fararjeh's frequent mention in his submissions of his "right to confront" the complainant and the other witnesses against him. Especially in the case of alleged sexual/physical abuse of a vulnerable victim and of a power imbalance between perpetrator and victim, confrontation should not mean an entitlement to necessarily be in close physical presence with, and to question directly and argue with the complainant. Rather at least before the Tribunal, I understand the right to confront means in such cases a right to be present at and to see and hear what witnesses say and to present by evidence a contrary account of events. Different, perhaps lesser, rights may apply in the course of an investigation by the Agency of serious allegations, but should include an entitlement to know what has been said and adduced by witnesses to an investigator. These rights should include, also, the right to attempt to persuade a decision-maker of the outcome of an investigation if that decision-maker is not the same person who conducted the investigation. In this case, such rights ("to

