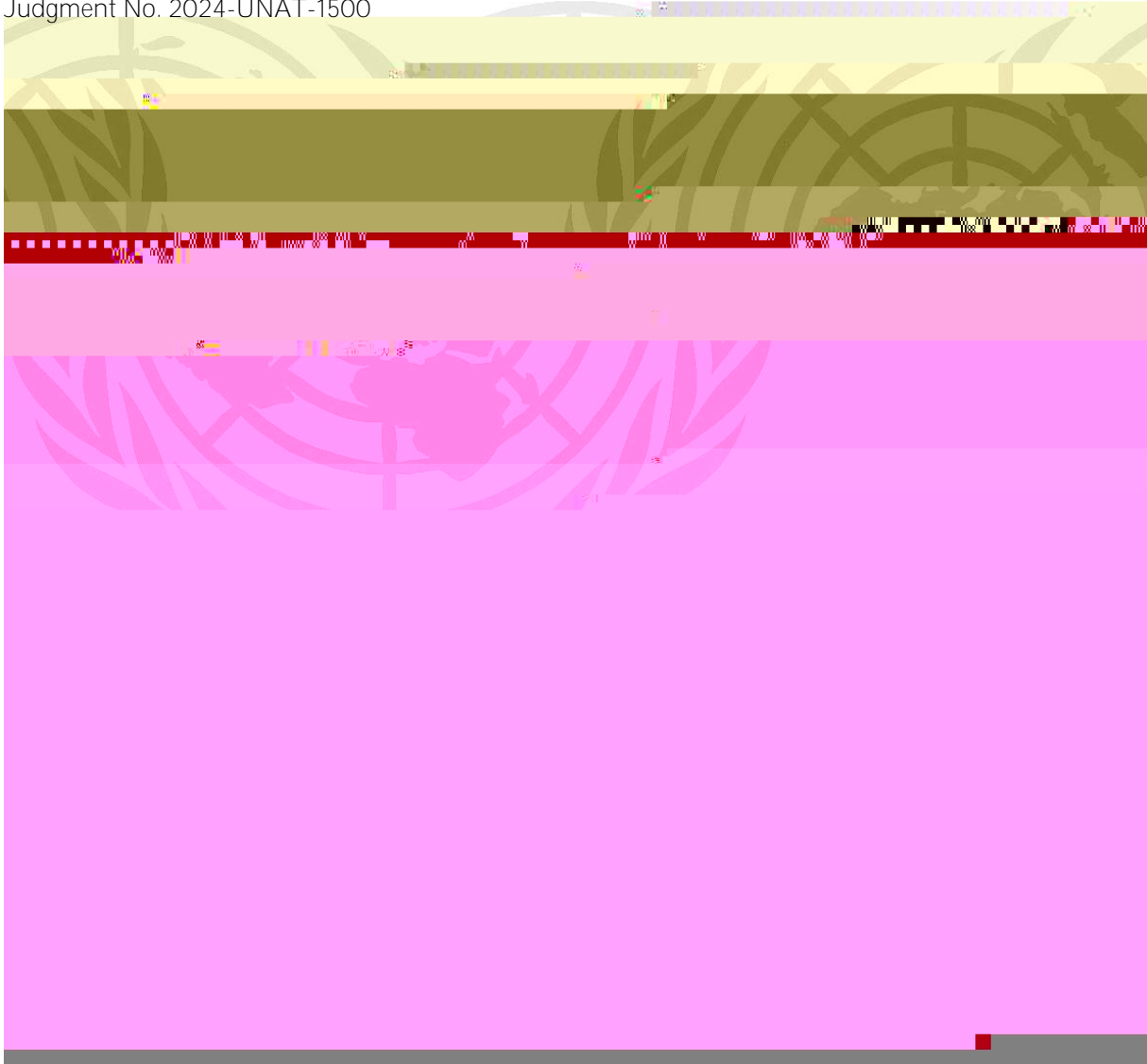


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Judgment No. 2024-UNAT-1500



Counsel for Appellant: Self-represented

Counsel for Respondent: Stephen Margetts

1. Mr. Qasem Abdelilah Mohammed Qasem, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or Agency), contested before the UNRWA Dispute Tribunal (UNRWA DT) the decision to impose on him the disciplinary measures of a written censure and a fine equivalent to two months' salary (contested decision).
2. By Judgment No. UNRWA/DT/2023/037 dated 25 September 2023 (impugned Judgment), the UNRWA Dispute Tribunal dismissed Mr. Qasem's application based on a review of the written record.
3. Mr. Qasem filed an appeal before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) on the basis that the UNRWA Dispute Tribunal failed to hold an oral hearing and that the investigation process was procedurally unfair.
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.
5. Effective 21 May 2016, Mr. Qasem was appointed as Medical Officer B, Grade 15, Step 1, in



You admitted to pushing [the HCC] with your body to avoid his reaction but denied kicking him.

[...]

On 30 March 2021, the investigation was completed and, based on the statements summarised above, the investigators concluded that you committed physical assault by pushing [the HCC].

In light of the foregoing, it is reasonable to believe that you engaged in misconduct, namely physical assault.

14. On 26 July 2021, Mr. Qasem replied to the OTR letter. He denied assaulting the HCC and stated that the Investigators had failed to consider discrepancies in the HCC's statements and had falsified statements in his interview. Mr. Qasem alleged that the HCC had initiated physical contact by pushing him, and that he pushed the HCC away in self-defense each time the HCC

*The Impugned Judgment*

19. In the impugned Judgment dismissing the application, the UNRWA DT first considered whether it had been established by a preponderance of the evidence that Mr. Qasem had physically assaulted the HCC or whether Mr. Qasem's actions were instead in self-defense based on Mr. Qasem's contention that he had not initiated physical contact with the HCC.<sup>15</sup>

20. The UNRWA DT considered the record before it, including the statements of six witnesses, three of whom (W02, W03 and W06) were eyewitnesses in the room with Mr. Qasem and the HCC when the altercation between them began. The UNRWA DT found that W02, W03 and W06 all stated that Mr. Qasem had initiated the altercation; W02, W05 (who had witnessed part of the altercation), and W06 all stated that Mr. Qasem had pushed the HCC until he fell to the ground and then kicked him; W03 stated that Mr. Qasem initially had pushed the HCC but then both were holding each other; W03 confirmed that the HCC had fallen to the ground but stated that Mr. Qasem had not kicked the HCC; and four witnesses (W02, W06, W07 and W08) all stated that Mr. Qasem had been "restrained" by W08. The UNRWA DT also found that no witness testified that the HCC had started the altercation or had to be restrained and that there was no evidence to corroborate Mr. Qasem's claim of self-defense. Ultimately, the UNRWA DT found established that Mr. Qasem "[had] initiated physical contact with the HCC and [had been] the primary aggressor".<sup>16</sup>

21. The UNRWA DT was also satisfied that Mr. Qasem's established conduct constituted misconduct. The UNRWA DT found that Mr. Qasem's conduct violated the Agency's regulatory f

considered the aggravating and mitigating factors that had been considered by the Agency and



32. Mr. Oasem claims that the UNRWA DT “ignored” the Appeals Tribunal Judgment in *Loubani*.<sup>23</sup> The UNRWA DT should have been “guided” by it to “take appropriate similar



40.





*Merits of the Appeal*

54. In reviewing disciplinary cases, it is well settled that the task of the UNDT is to determine whether: i) the facts on which the sanction is based are established according to the evidentiary standard (which is on a preponderance of evidence if separation is not a likely outcome); ii) the established facts qualify as misconduct in terms of the applicable legal framework; iii) the sanction is proportionate to the misconduct; and iv) there has been due process or procedural fairness by the original decision-maker,<sup>26</sup> which in this instance is the Agency.

*i) Establishment of the Facts on which the Sanction is based*

55. Mr. Qasem was charged with committing “physical assault by pushing” the HCC.<sup>27</sup> In the contested decision, the decision-maker stated that the Investigators found that Mr. Qasem had engaged in misconduct, namely “physical assault, by kicking and pushing [the HCC] to ground” and that this constituted workplace violence.<sup>28</sup>

56. In the impugned Judgment, the UNRWA DT upheld the contested decision and found, on a preponderance of evidence, that Mr. Qasem had physically assaulted the HCC. In doing so, it relied on the “totality of the evidence” which consisted of the evidence obtained during the investigation and the written material provided by the parties in the UNRWA DT proceedings.<sup>29</sup>

57. We note that Mr. Qasem does not dispute that he was involved in a physical altercation with the HCC on the date in question. In the interview with the Investigators, Mr. Qasem admits that he pushed the HCC with his hand and that he and the HCC were both pushing each other inside the room. He also confirms that the HCC was on the ground. This is also corroborated by the testimony of witnesses interviewed in the investigation, three of whom were present during the altercation. Further, in the appeal submissions, Mr. Qasem does not deny that he physically pushed the HCC or that the HCC ended up on the ground.

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<sup>26</sup> *AAC v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1370, para. 38.

<sup>27</sup> OTR Letter, page 4.

<sup>28</sup> Disciplinary Measures Letter, pages 1, 2 and 7.

<sup>29</sup> Impugned Judgment, para. 54.

58. But Mr. Qasem disputes the UNRWA DT's findings that he initiated the altercation, "kicked" the HCC and was "restrained" by others. In the UNRWA DT application, Mr. Qasem stated that the HCC "initiated the physical contact with his body and I defended myself by pushing back".<sup>30</sup>

59. The UNRWA DT found that Mr. Qasem "initiated physical contact with the HCC and was the primary aggressor" and stated he had to be "restrained".<sup>31</sup> It made no specific finding on whether Mr. Qasem "kicked" the HCC. Mr. Qasem argues that the UNRWA DT erred in making these findings.

60. We accept the UNRWA DT's factual findings are based on the testimonies of witnesses as reported in the investigation report which is hearsay. Normally if there are facts established by witnesses that are in dispute, which in the present case is whether Mr. Qasem acted in self-defense, "kicked" the HCC, or was "restrained", an oral hearing would be required to properly determine the factual issues particularly if there is contradictory or inconsistent evidence and testimonies. The UNRWA DT did not make a finding on whether Mr. Qasem "kicked" the HCC so any inconsistencies or contradictions between witnesses on this point are not significant.

61. In the disciplinary process, an investigation report prepared will contain largely hearsay evidence as it contains evidence not tendered by a witness at the proceedings before the UNDT but evidence reported on by an investigator. The UNDT, as the first instance tribunal, may consider it inadmissible, or it may be given less weight than direct evidence given by a witness before the UNDT as the first instance tribunal. What weight will be given to the investigation report and whether an oral hearing will be ordered will depend on the circumstances of the case and on an assessment of the totality of evidence. This includes whether there exist material factual disputes on key issues; whether corroborating evidence such as video and other evidence exists; whether significant due process violations have occurred during the investigation; and the severity











threatened the HCC, and who else was present. However, the Investigators did not put to Mr. Qasem the identities of witnesses they had interviewed and what their evidence was. This was required for a proper investigation.

82. Therefore, we are troubled that he was not given an opportunity to respond to that evidence or to explain during the interview.

83. Despite this lack of due process and procedural fairness, the UNRWA Dispute Tribunal was correct that "it is necessary to weigh the significance of the failure against what would have been the outcome had the failure(s) not occurred"<sup>40</sup> which is what the UNRWA DT did in the impugned Judgment.

84. We agree with the UNRWA DT that there is an insufficient basis to find that the due process violation in the investigation and disciplinary process had an impact on the outcome on the case, but we arrive at this conclusion for different reasons.

85. Despite our concern that Mr. Qasem did not know the specific details of the case against him including having a copy of the investigation report that included the identities and testimonies of the witnesses that were interviewed, we note that the admitted and undisputed facts are sufficient to make a finding of misconduct. By Mr. Qasem's evidence alone, there is a sufficient basis to support the allegation of physical assault as he does not dispute that he pushed the HCC in the workplace and an insufficient basis to make a claim of self-defense.

86. Therefore, we find that the significance of the due process failures did not outweigh the outcome or establishment of the facts had the failures not occurred.

*Denial of an Oral Hearing by the UNRWA Dispute Tribunal*

87. Mr. Qasem also submits that there were due process violations during the UNR





