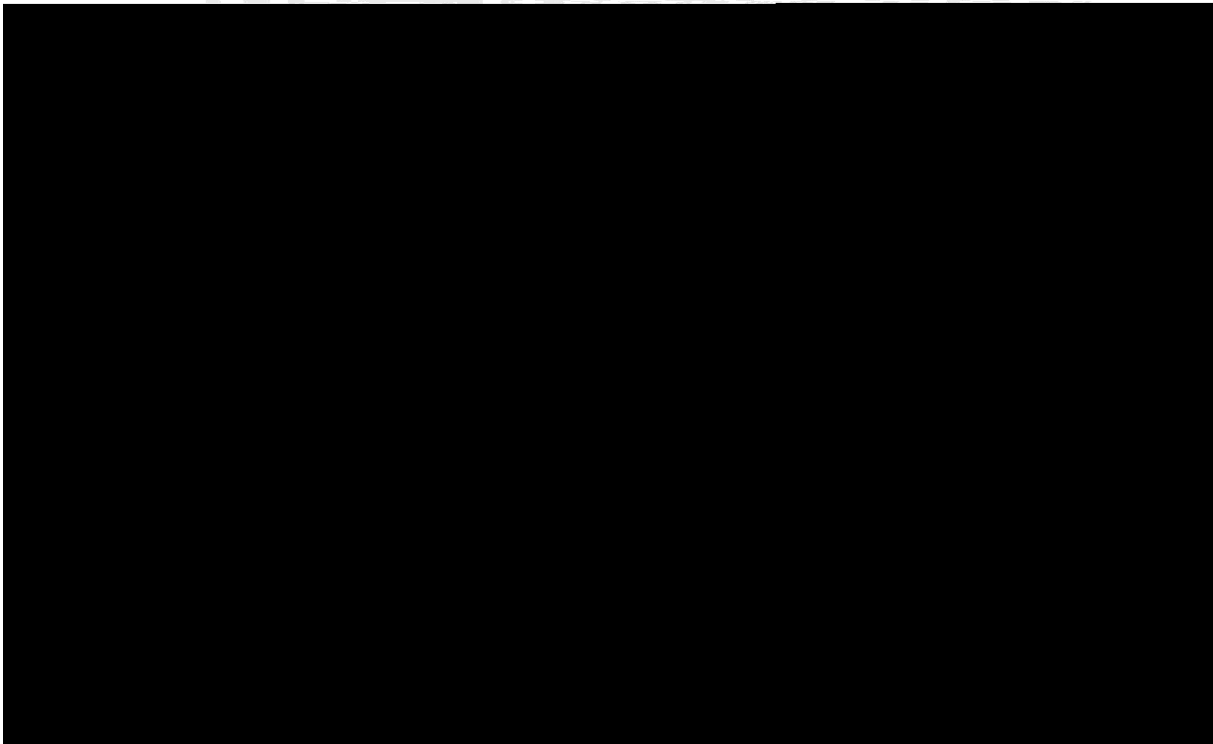


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Judgment No. 2018-UNAT-839



JUDGE SABINE KNIERIM , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNRWA/DT/2017/031, rendered by 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) on 10 October 2017, in the case of *Hamdan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*. Mr. Jihad Hamdan filed the appeal on 28 November 2017, and the Commissioner-General filed an answer on 20 January 2018.

Facts and Procedure

2. Effective 1 July 2013, Mr. Hamdan was employed by the Agency on a fixed-term appointment as Chief, Field Education Programme (C/FEP), Grade 20, in the Jordan Field Office. Following his request, Mr. Hamdan's fixed-term appointment was extended beyond the age of 60 for a period of two years.

3. On 17 May 2015, the Head, Education Development Centre (H/EDC) submitted a complaint of harassment to the Director of UNRWA Operations, Jordan (DUO/J) against Mr. Hamdan, in which she elaborated on several problems and incidents. The H/EDC referred to one incident in particular where she had been excluded from the interviews of the Heads of the Education Units. The H/EDC further mentioned an incident that occurred during a meeting on 4 May 2015, with Ms. N.K., Head, Field Human Resources Office (H/FHRO), regarding the interview process for the posts of Coordinators of the Education Units. The H/EDC claimed that, during this meeting, she had expressed different points of view from the C/FEP, who then had used disrespectful language towards her. She complained that she had been exposed to great pressure to change her opinion concerning the interview process for the Coordinator posts.

4. On 6 June 2015, Mr. Hamdan sent an e-mail to the Deputy Director of UNRWA Operations, Jordan (D/DUO/J), in which he alleged that the H/EDC was having someone edit her e-mails before sending them, thus giving a third person access to confidential information. He requested this to be investigated.

5. By two Terms of Reference (ToR), dated 10 June 2015 and 30 July 2015, the DUO/J authorised investigation INV 15-112 regarding the H/EDC's complaint against the C/FEP for abuse of power, partiality, and improper interference in the management of the EDC.

- Retaliating against the H/EDC for having expressed her opinion contrary to his with regard to the Unit Coordinator Interviews and in following meetings at the Field Human Resources Office (FHRO);
- Humiliating the H/EDC in a meeting held at the FHRO and displaying an abusive attitude towards her in a subsequent meeting;
- Negatively affecting the career 2168i1.2 690.2 TD668i1.by "beginneting1 395.2()JTJ 0 -1.3

- Harassment of several other Education Specialists.

16. On 12 September 2016, Mr. Hamdan requested review of the decision to impose on him the disciplinary measure of a fine of two months' net base salary.

17. On 24 November 2016, Mr. Hamdan filed an application with the UNRWA Dispute Tribunal against the decision of the Agency to impose on him the disciplinary measure of a fine equivalent to two months' net base salary. The application was transmitted to the Commissioner-General on 27 November 2016.

18. The UNRWA DT rendered its Judgment on 10 October 2017, dismissing the application in its entirety. As a preliminary matter, the UNRWA DT considered that since all the incidents underlying the imposed fine occurred after 1 May 2005—the date of the promulgation of the rule establishing fines as possible disciplinary measures—none of the alleged incidents was to be precluded on that basis. Furthermore, the UNRWA DT considered that in accordance with the Appeals Tribunal's jurisprudence in *Gallo*,¹ the Agency could impose the disciplinary measure of a fine against Mr. Hamdan even at a time when he was no longer a staff member. The UNRWA DT further found that Mr. Hamdan could only be charged with the first two of the charges contained in the contested decision of 24 August 2016, namely abuse of power and retaliation against the H/EDC, and not also with the third charge, that is harassment against several EDC Education Specialists, because th

considered as misconduct the same facts as the UNRWA DT, namely only the first charge as contained in the 24 August 2016 decision letter. As his employment contract had already expired but he had not yet received the final payment due upon his retirement, imposing a fine was the only reasonable disciplinary measure. The UNRWA DT considered that the misconduct was particularly serious in light of Mr. Hamdan's senior managerial position and the contested sanction was, therefore, not absurd or perverse.

Submissions

Mr. Hamdan's Appeal

19. Mr. Hamdan submits that the UNRWA DT erred in fact and in law by finding that the Commissioner-General had been entitled to impose the disciplinary measure of a fine irrespective of the end date of

demonstrated that the H/EDC's performance evaluation was neither arbitrary nor retaliatory. Mr. Hamdan also claims that this issue was neither included in any complaint by the H/EDC against Mr. Hamdan nor in the ToR of INV 15-112.

22. Mr. Hamdan asserts that the UNRWA DT, despite its finding that all the incidents underlying the sanction occurred after 1 May 2015, referenced incidents, where the H/EDC had been excluded from the interview of the Heads of Education Unites, which had allegedly occurred before the provision introducing fines as disciplinary measures came into effect. Consequently, no fine could be imposed on this basis. In this context, Mr. Hamdan also claims that "[a]mong the alleged facts of misconduct committed by [him] as stated in the [Investigation Report, namely] 'negatively affecting the career of the H/EDC[] by 'beginning to pay close negative attention to her work' and 'placing unreasonable deadlines' and 'micromanagement of EDC, incitement to the mobbing of the H/EDC'" were allegations that were cited in a complaint submitted on 22 September 2015 by the H/EDC and several Education Specialists at the EDC. He asserts that "[t]hese alleged acts of misconduct should be dropped because the DUO/J had not authorized the investigation".

23. In Mr. Hamdan's view, the UNRWA DT also erred in law and fact by excluding some parts of evidence and being particularly selective in excerpts from the witness testimonies in violation of UNRWA Area Staff Regulation 11.4 and the Appeals Tribunal's jurisprudence in *Sanwidi*.⁵ In particular, the UNRWA DT gave disproportionate weight to the testimony of the H/FHRO "who [had] led the battle against [Mr. Hamdan] (...) and had never been on good terms with [him]" and the UNRWA DT failed to hear of her witnesses who were more closely involved in the alleged incidents. Moreover, the UNRWA DT failed to consider important excerpts of the

investigation procedures. The UNRWA DT failed to address this breach of his “procedural right (...) to be informed on the course of [the] investigation”.

25. In light of the foregoing, Mr. Hamdan requests that the Appeals Tribunal order (i) reversal of the UNRWA DT Judgment and repayment of the “unjustified fine imposed by the Agency”; (ii) compensation of 50,000 Jordanian Dinar (JOD) “for moral and reputational damage due to the unjustified disciplinary measure”; and, (iii) expungement of the disciplinary measure from his official status file.

The Commissioner-General's Answer

26. The Commissioner-General submits that the UNRWA DT did not err on a question of fact or law in its conclusion that the Agency could impose on Mr. Hamdan the disciplinary measure of a fine, irrespective of the end date of his contract. The UNRWA DT was cognisant of the material fact that Mr. Hamdan's contract had ended at the time of the imposition of the sanction. Mr. Hamdan's interpretation of the *Gallo* Judgment is too narrow and restrictive. In fact, it emerges from a dispassionate reading of the *Gallo* Judgment that the authority to manage the Organization's records is not limited to discretionary administrative decisions but also extends to disciplinary measures and this authority does not lapse upon a staff member's separation from service. The UNRWA DT has provided a reasoned holding as to why the *Gallo* jurisprudence should apply *mutatis mutandis* to disciplinary measures.

27. The Commissioner-General further submits that the UNRWA DT did not err on a question of law and/or fact when it dismissed the application on the merits. First, Mr. Hamdan's claim that multiple issues were investigated without the proper authorization according to the ToR is without merit. Having properly determined the scope of the complaints that were duly authorized for investigation, the UNRWA DT correctly held that Mr. Hamdan could not be charged with allegations of harassment of the H/EDC and nine Education Specialists as indicated in the second charge contained in the contested decision of 24 August 2016. The suggestion that the UNRWA DT did in fact consider these aspects in its decision is unfounded.

28. Furthermore, the Commissioner-General contends that the UNRWA DT was correct in its conclusion that Mr. Hamdan's evaluation of the H/EDC's performance was either an act of retaliation or at least of abuse of power. The UNRWA Dispute Tribunal was cognisant of the

the underlying facts and evidence before reaching its correct conclusion that any abuse of power complaint may, in certain instances such as in this case, involve a consideration of a performance evaluation.

29. Mr. Hamdan's contention that the UNRWA DT erred in imposing a fine based on incidents that had occurred before the relevant provision introducing fines as disciplinary measures had entered into force, are without merit. In fact, a review of the Judgment reveals

39. We note that under the United Nations system, Section 2.3 of the recent Administrative Instruction ST /AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) explicitly states that “all references to ‘staff member’ shall include former staff members” thus enabling the Tribunals to apply the relevant regulations to former staff members. The Commissioner-General has not presented, and we did not find, a similar legal provision for UNRWA.

40. On 24 August 2016 when the disciplinary measure of a fine was imposed on Mr. Hamdan, he had already left active service and was no longer a staff member of UNRWA. Examining the written record, we have no doubt

... Second, we agree with the Secretary-General that this reasoning, were it to prevail, would render nugatory those standards of conduct (e.g., confidentiality obligations pursuant to Staff Regulation 1.2(i), amongst others) that survive active service. More importantly, from a practical perspective, it would also stymie the Secretary-General's ability and discretionary authority to properly manage investigations and discipline staff. The Secretary-General clearly has the authority to administer the Organization's records, including those of former staff members, and to ensure they reflect the staff member's performance and conduct during his or her period of employment. This authority does not lapse upon the staff member's separation from service. In this regard, we are persuaded by the Secretary-General's submission that to conclude otherwise would mean that the conduct by a staff member in his or her last days of service could not be recorded in the Organization's files if the staff member separated prior to such conduct being recorded. As the Secretary-General argued, a staff member could essentially obviate the Administration's broad discretion and authority in administrative matters by simply resigning or otherwise separating from the Organization.

42. The UNRWA DT erred in finding that the reasoning presented in *Gallo* was applicable *mutatis mutandis* to the present case. First, the wording of the above-mentioned provisions is clear and unambiguous in the sense that disciplinary measures may only be imposed during an ongoing appointment. Therefore, unlike the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to United Nations Staff Rule 10.2(b)(i) referred to in *Gallo*, there is a requirement that the Commissioner-General's authority to impose disciplinary measures is indeed predicated upon and limited to the existence of an ongoing employment. In light of the significant impact of disciplinary measures when compared to the less severe consequences of non-disciplinary measures such as reprimands, it is only logical to require a specific legal basis for the imposition of a disciplinary procedure. Second, even though some elements of the *ratio* contained in paragraph 18 of the *Gallo* Judgment seem equally relevant to disciplinary measures, this alone is insufficient to overcome the clear and unambiguous language of the applicable provisions.

43. In the present case, the Commissioner-General imposed on Mr. Hamdan the disciplinary measure of a fine after he had left active service which, as stated above, is not in accordance with UNRWA's disciplinary system. It follows that the disciplinary measure of a fine has to be rescinded. As a direct consequence of this rescission, the Commissioner-General will have to reconstitute the amount of the fine to Mr. Hamdan and remove the 24 August 2016 decision from Mr. Hamdan's official status file.

44. As the contested administrative decision concerns a disciplinary measure and not appointment, promotion or termination, the Appeals Tribunal is not required to set an amount of compensation that the Commissioner-General may elect to pay as an alternative to the rescission of the contested administrative decision under Article 9(1)(a) of the Statute of the Appeals Tribunal.

Award of compensation for moral harm

45. By dismissing his application in its entirety, the UNRWA DT has (implicitly) dismissed Mr. Hamdan's application for compensation for moral harm. There was no need for the UNRWA DT to provide any further reasoning for this decision because it directly followed from the UNRWA DT's finding of lawfulness of the contested administrative decision and its dismissal of Mr. Hamdan's application. As we have stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".¹⁰

46. However, having overturned the UNRWA DT's finding that the 24 August 2016 decision was lawful, we must now decide whether Mr. Hamdan is entitled to compensation.

47. In this regard, Article 9 of the Statute of the Appeals Tribunal provides:

1. The Appeals Tribunal may only order one or both of the following:

...

- (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

¹⁰ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, citing *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. 40, and citations therein.

