



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1242



Ezzedine Loubani
(Appel lant)

v.

Commissioner -General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No:	2021-1582
Date of Decision:	1 July 2022
Date of Publication:	18 July 2022
Registrar:	Weicheng Lin

Counsel for Appellant: Amer Abu-Khalaf, LOSA

Counsel for Respondent: Ana Peyro Llopis

JUDGE GRAEME COLGAN , PRESIDING .

1. Ezzedine Loubani is a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency). He filed an application with the UNRWA Dispute Tribunal (UNRWA Dispute Tribunal or UNRWA DT) challenging the decision of the Agency to impose on him certain disciplinary measures, including a written censure, a deferment of consideration for promotion for one year, a fine equivalent to one week's salary and the obligation to retake an ethics course. These measures were instituted following an investigation into a complaint, alleging that Mr. Loubani had shouted at one of his subordinates and made derogatory remarks to her.

2. On 20 June 2021, the UNRWA Dispute Tribunal issued Judgment No. UNRWA/DT/2021/028, ¹ rejecting Mr. Loubani's application and finding that the imposition of the disciplinary measures was lawful.

3. For the reasons set out below, we allow Mr Loubani's appeal in part and modify the UNRWA DT's Judgment.

Facts and Procedure

4. Mr. Loubani began service at the Agency in August 2009. On 1 March 2011, he received a fixed-term appointment at Grade 14, Step 1, as an Administrative Officer at UNRWA's Headquarters in Amman.

5. An inquiry into Mr. Loubani's alleged misconduct began on 23 April 2019 when the Department of Internal Oversight Services (DIOS), UNRWA, received an email from the Chief, Central Support Services Division, who reported that, on the day before, Mr. Loubani had shouted at another staff member (the complainant) , who was, at the time of the incident, his subordinate.

6. On 25 April 2019, the complainant e-mailed DIOS directly alleging that Mr. Loubani had used derogatory remarks toward her about the time she had spent in the restroom. She also said that Mr. Loubani had shouted at her in front of other colleagues and hit the desk around which they were gathered

¹ *Loubani v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. UNRWA/DT/2021/028 (Impugned Judgment).

7. On 13 June 2019, DIOS informed Mr. Loubani that he was the subject of an investigation regarding his conduct towards the complainant. The Investigation Report that followed determined that, on 22 April 2019, Mr. Loubani was derogatory towards the complainant about the time she spent in the restroom. The investigation also concluded that he had shouted at the complainant and hit the desk, which was witnessed by other staff members.

8. In a letter dated 25 July 2019, the Director of Human Resources (DHR) informed Mr. Loubani about the findings of the investigation and invited him to respond to the charges. Mr. Loubani responded to this letter on 8 August 2019.

9. On 20 January 2020, the DHR imposed on Mr. Loubani the disciplinary measures of a written censure, a deferment of consideration for promotion for one year, a fine equivalent to one week's salary and the obligation to retake an ethics course.

10. On 3 February 2020, Mr. Loubani submitted a request for decision review. He followed that unsuccessful request with an application to the UNRWA DT on 14 April 2020 challenging the impugned decisions.

The UNRWA DT Judgment

11. On 20 June 2021, the UNRWA Dispute Tribunal issued its Judgment, finding ultimately that the imposition of the disciplinary measures on Mr. Loubani was not unlawful. First, the UNRWA Dispute Tribunal found no merit in all but one of the Appellant's claims that his due process rights were violated. Regarding his claim that he ought to have had access to the Investigation Report during the investigative process, the UNRWA DT explained that there was no such provision in the applicable law, and that Mr. Loubani had indeed been provided with a copy of the Investigation Report during the UNRWA DT proceedings.

12. Regarding Mr. Loubani's claim that all his proposed witnesses were not interviewed by the investigators, the UNRWA Dispute Tribunal explained that, under the applicable law, the Agency was not obliged to interview all propos6 Tw 12.87 06 (ep)-2 (6n7b0.9 -3d [(R)-1.rs14 (s6)-3.2 (v)4.

13. After making the above findings, the UNRWA Dispute Tribunal conducted an analysis

Mr. Loubani denied all wrongdoing; the allegation that he went out of his way to accuse the complainant of committing misdeeds; and finally, the allegation that he must have been aware of the standards of behaviour required of him since he had taken an online ethics course in 2013. The UNRWA Dispute Tribunal held these factors should not have been considered by the DHR in reaching his decision on the disciplinary sanction as the Appellant did not have an opportunity to dispute or otherwise address them in mitigation. The UNRWA Dispute Tribunal ruled that this was a clear and significant breach of Mr. Loubani's due process rights. It also noted that the DHR should have considered that this was Mr. Loubani's first disciplinary offence when assessing the sanctions to be imposed on him.

20. Nevertheless, despite such breaches of Mr. Loubani's due process rights, the UNRWA Dispute Tribunal determined that the sanctions imposed were still proportionate to his misconduct considering the nature and gravity of it. As such, the violations of his due process rights were not significant enough to render the impugned decision unlawful.

21. The UNRWA Dispute Tribunal thus concluded: ²

In view of all the foregoing, having determined that 1) the facts – excluding the aggravating factors - on which the disciplinary measures, i.e., of a written censure, a deferment of consideration for promotion for one year and a fine equivalent to one week's salary, were based have been established; 2) the established facts legally support the conclusion of [Mr. Loubani's] misconduct, 3) the impugned disciplinary measures were proportionate to the nature and gravity of [his] misconduct, and 4) the Agency's discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law, the Tribunal finds that [Mr. Loubani's] contestation of the impugned disciplinary measures must be dismissed.

22. On 19 July 2021, Mr. Loubani filed an appeal against Judgment No. UNRWA/DT/ 2021/028. The Commissioner-General filed an answer to the appeal on 24 September 2021.

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simply only one of the forms of disciplinary measures that the Agency may impose on a staff member.

33. Finally, regarding the claim that there was a clear procedural irregularity, namely in failing to consider, as a mitigating factor, the fact that Mr. Loubani was a first -time offender,

37. On the matter of witnesses not interviewed, the UNRWA DT held that while pahS35M 705

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42. While its provision of the Investigation Report to Mr. Loubani at that belated stage may have been an acknowledgment of his entitlement to it, that came too late. And apparently without persuasive grounds for redaction of portions of the investigation's report, that form of unilateral censorship of it was likewise not only inadequate but itself another due process breach.

43. While the Agency's and the UNRWA DT's identified errors were serious, that does not mean that they necessarily negate the significance of findings properly made about Mr. Loubani's conduct. As in all cases of due process failures, it is necessary to weigh the significance of the failure against what would have been the outcome had the failure(s) not occurred. This is sometimes referred to as the "no difference" principle and indeed the UNRWA DT did apply it to the one due process failure it found the Agency was responsible for.

44. While neither party has appealed the UNRWA DT's conclusion of a due process breach (being the Agency's failure to allow Mr. Loubani to address what it categorised and took into account as aggravating factors affecting his conduct), Mr. Loubani does challenge the Tribunal's ultimate conclusion that these significant breaches of due process by the DHR did not affect the justification for the sanctions imposed on Mr. Loubani by the Agency.

45. Regarding those factors determined by the Agency as having aggravated Mr. Loubani's misconduct, it is difficult to accept that they would not have been reflected in the severity of the sanctions imposed upon him. So, while we agree with the UNRWA DT that these were exigencies which the Agency ought not to have taken into account, we consider that the UNRWA DT erred in law in failing to modify those sanctions by ameliorating them. We will do so at the conclusion of this Judgment.

46. We do not accept the ground of appeal that the UNRWA DT wrongly determined that it was the complainant, and not Mr. Loubani, who had struck the table. As well as being inherently unlikely that the complainant would have done so in all the circumstances, and correspondingly more likely that Mr. Loubani did so, the UNRWA DT was in the best position to determine this disputed fact, and nothing has been shown to persuade us that it did so erroneously.

47. In relation to Mr. Loubani's final point that insufficient account was taken of the Agency's due process error in not allowing him to bring to its attention positive factors which, if they had been taken into account, would have led to a different outcome, the Tribunal finds that the Agency's decision is not manifestly unreasonable.

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which corroborated the complainant's, would ignore such more subtle considerations as the quality and consistency of the evidence, not to mention its inherent probability. The UNRWA DT was well placed to make those comparative assessments of the quality of the evidence presented to it and it has not been shown to have erred in its factual conclusions drawn from it. This ground of appeal is rejected.

52. There is really only one ground of appeal on which Mr. Loubani both succeeds and which should change the outcome of the case. We are persuaded that the UNRWA DT should have ameliorated the sanctions imposed by the Agency to reflect its inevitable harshening of these by taking account of considerations of which the Agency had given him no opportunity to be heard before determining those sanctions. That is most justly rectified by modifying the UNRWA DT's Judgment to rescind the Agency's decision to penalise Mr. Loubani by withholding one week's salary from him. That still leaves as appropriate sanction for his proven misconduct: a written censure, the one year deferral of consideration for promotion and the requirement to retake a relevant ethics course. The appeal is allowed but only in part and the UNRWA DT's Judgment is modified accordingly.

Judgment

53.