Case No.: UNRWA/DT/JFO/2014/021
Judgment No.: UNRWA/DT/2015/052/Corr.01
Date: 10 November 2015
Original: English

Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

KHAWAJA

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. This is an application by Mahmoud Khawaja (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his appointment for misconduct.

Facts

2. Effective 19 January 1992, the Applicant joined the Agency as a Clerk “A”, Grade 7, Step 1, at the Supply and Transport Department (“STD”). On 21 April 1993, he was promoted to the post of Head Storekeeper, Grade 9, at the STD. On 14 August 1994, the Applicant was transferred to the post of Chief Clerk and, on 1 January 1996, he was promoted to the post of Stock and Material Inspection Officer, Grade 12, at the STD. Effective 9 October 1996, the Applicant was transferred to the post of Administration Officer at the same grade. Effective 11 September 2006, the Applicant was promoted to the post of Supply Control Officer at the Procurement and Logistics Department (“PLD”) at Grade 14.

3. On 28 April 2012, after having received allegations of staff misconduct from the Jordan Field Office (“JFO”), the Department of Internal Oversight Services (“DIOS”) initiated an investigation of some staff members, including the Applicant.

4. By letter dated 18 November 2012, the Director of UNRWA Operations, Jordan (“DUO/J”) informed the Applicant that he was suspended from duty with full pay pending the outcome of an investigation into the charges against him.

5. During the investigation, DIOS interviewed the Applicant on 16 December 2012, on 27 August 2013 and on 18 September 2013 regarding the allegations made against him.

6. On 5 November 2013, DIOS issued its report of investigation in relation to the allegations of misconduct involving the Applicant. In its report, DIOS concluded that:
[The Applicant] obtained a gratuity from a vendor who was engaged in an active bidding process with UNRWA and in doing so, [the Applicant] abused his position as an UNRWA staff member.

[The Applicant] intimidated and harassed Mr. […].

[The Applicant] systematically misused UNRWA pool vehicles for his own financial benefits.

[The Applicant] sent an email containing derogatory and racist material to another UNRWA staff member using ICT resources and the official UNRWA email network.

[When questioned by DIOS investigators, [the Applicant] deliberately misrepresented the truth regarding his interactions with [Technical Distribution Agency ("TDA")]]\(^1\) and Mr. […].

[When questioned by DIOS investigators, [the Applicant] deliberately misrepresented the truth regarding his intimidation and harassment of Mr. […].

Accordingly, DIOS concludes that [the Applicant’s] conduct is in violation of Area Staff Rule 104.2, Area Staff Regulations 1.1, 1.4, 1.5 and 1.6, General Staff Circulars Numbered 6/2010 and 3/2008, Organization Directive No. 26, the Manual of Transport Procedures Section 4 and the Standards of Conduct for the International Civil Service at paragraphs 2, 4, 5, 17, 19, 20 and 22.

As a result of the aforementioned violations, [the Applicant’s] conduct is concurrently in violation of General Staff Circular 5/2007 at paragraphs 5 and 9.

In view of the above findings, DIOS recommended that: 1) appropriate action be taken against the Applicant, 2) the JFO calculate the amount which the Applicant should have paid for home/office/home and personal use of official vehicles and recover that amount from him and 3) the Applicant be held financially responsible for the payment of suitable remuneration to TDA for the free laptop that he obtained.

7. By letter dated 2 December 2013, the Associate Legal Officer, JFO informed the Applicant of the conclusions of the DIOS investigation. The Applicant was given 14 days to provide a response.

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\(^1\) TDA is the vendor engaged in an active bidding process with the PLD referred to above.
8. By undated letter received by the JFO on 29 December 2013, the Applicant provided his comments on the conclusions of the DIOS investigation and denied the allegations against him.

9. By letter dated 29 January 2014, the DUO/J informed the Applicant that following the completion of the Agency’s investigation, and in accordance with Area Staff Regulation 10.2 and Area Staff Rule 110.1, his appointment would be terminated for misconduct effective 30 January 2014.

10. By letter dated 5 February 2014, the Applicant requested the DUO/J to “help [him] to receive all [his] separation benefits in accordance with [S]taff [R]egulation 109.2 (early retirement) or in accordance with [S]taff [R]egulation 9.1 (for the interest of the Agency)”.

11. By letter dated 13 March 2014, the Deputy Commissioner-General responded to the Applicant’s request for review. The Deputy Commissioner-General noted that the decision to terminate the Applicant’s appointment was based on serious misconduct and that, as a consequence, the decision not to grant him separation benefits was made in full accordance with the Agency’s Regulations, Rules and Personnel Directives.

12. On 22 May 2014, the Applicant filed an application with the UNRWA Dispute Tribunal (the “Tribunal”).

13. On 20 June 2014, the Respondent filed a motion requesting an extension of time to file his reply. The motion was transmitted to the Applicant who did not object.

14. By Order No. 071 (UNRWA/DT/2014) dated 3 July 2014, the Tribunal granted the Respondent’s request for extension of time to file his reply.

15. On 14 July 2014, the Respondent filed a reply to the application.

16. On 21 July 2014, the Respondent filed an _ex parte_ motion for the imposition of measures to preserve the confidentiality of evidence.
17. By Order No. 099 (UNRWA/DT/2014) dated 29 September 2014, the Tribunal requested the Respondent to submit an Arabic translation of the reply. The Respondent submitted the Arabic translation of the reply which was then transmitted to the Applicant.

18. On 21 May 2015, the Tribunal transmitted to the Applicant the Respondent’s ex parte motion\(^2\) for the imposition of measures to preserve the confidentiality of evidence. The Applicant did not provide any response in this respect.

19. By Order No. 076 (UNRWA/DT/2015) dated 9 July 2015, the Tribunal ordered the Respondent to produce ex parte all the exhibits referenced in the investigation report and a proposal of a redacted version of the exhibits to be transmitted to the Applicant.

20. On 16 July 2015, the Respondent submitted ex parte all the exhibits referenced in the investigation report.

21. By Order No. 087 (UNRWA/DT/2015) dated 28 July 2015, the Tribunal referred to its previous Order No. 076 (UNRWA/DT/2015) and ordered the Respondent to produce a redacted version of all the exhibits referenced in the investigation report.

22. On 31 July 2015, the Respondent submitted a redacted version of the exhibits requested by the Tribunal.

23. On 4 August 2015, the Tribunal transmitted to the Applicant a redacted version of all the exhibits referenced in the investigation report.

**Applicant’s contentions**

24. The Applicant contends that:

i) The termination decision was arbitrary and prejudicial and “not based on legal grounds”;

\(^2\) The Respondent incorrectly called his request an *ex parte* motion whereas the motion was not *ex parte* in itself.
ii) “The Investigation Committee was not impartial, and the results that they reached were not real”;

iii) “There were errors in the procedure … (the due process was not followed)”;

iv) The Applicant was subject to an investigation “for the same matters more than one time”;

v) He “was suspended from work for more than 14 months for claims that does not deserve more than days”[sic];

vi) “The Investigation Committee did not provide any material evidence to prove the claims raised against [the Applicant]”; and

vii) “The investigation was suspended for a period of more than 8 months without a serious justification, which is an error from the management of the Agency”.

25. The Applicant requests the Tribunal to order the rescission of the impugned decision and to grant him compensation for the moral damages that he suffered as a result of being suspended from work for more than 14 months.

**Respondent’s contentions**

26. The Respondent contends that:

   i) The termination of the Applicant’s appointment for misconduct was properly effected;

   ii) The facts on which the disciplinary measure was based were established by clear and convincing evidence collected during the investigation. The Applicant’s actions, as established by the investigation, constituted misconduct. Termination for misconduct was not so disproportionate as to amount to an injustice;
iii) No evidence, convincing or otherwise, was adduced to show that the termination decision was arbitrary and the burden to produce such evidence rests on the Applicant;

iv) The Applicant was informed of the allegations against him and was given the opportunity to contest them;

v) No evidence, convincing or otherwise, was adduced to suggest that DIOS was not impartial;

vi) Given that the Applicant was on suspension with full pay, no prejudice was occasioned to the Applicant; and

vii) The remedies sought by the Applicant have no legal basis.

27. The Respondent requests the Tribunal to dismiss the application.

Considerations

Preliminary Issue

28. On 21 July 2014, the Respondent filed an *ex parte* motion for the imposition of measures to preserve the confidentiality of evidence. Attached to his motion, the Respondent included two versions of the investigation report prepared by DIOS: an unredacted version and a proposal of a redacted version to be transmitted to the Applicant.

29. The Respondent submitted that given the serious nature of the allegations against the Applicant, and the fact that the Applicant lived in Amman, there was a real risk that the disclosure of the names and identifying details of witnesses would compromise their personal safety.

30. The Tribunal notes that the Respondent incorrectly called his motion *ex parte* whereas the motion, itself, was not *ex parte* but the evidence attached to it was *ex parte*. The motion was, therefore, transmitted to the Applicant on 21 May 2015. He did not provide any response.
31. Pursuant to Article 13, paragraph 4 of the Tribunal’s Rules of Procedure, the Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances. In the present case, in order to protect the identity and the integrity of the witnesses, as well as the efficiency of present and future investigations conducted by DIOS, the Tribunal decided to grant the Respondent’s motion. Consequently, a redacted version of the report and its annexes, were transmitted to the Applicant.

**Main Issue**

Was the Respondent’s decision to terminate the Applicant’s appointment for misconduct properly made?

32. It is important to refer to the legal and administrative framework applicable in the case at bar and to the existing jurisprudence.

33. Area Staff Regulation 1.4 provides in relevant part that:

   Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency…

34. Former Area Staff Personnel Directive No. A/10/Rev.1/Amend.1 on Disciplinary Measures (“PD A/10”), which is applicable to this case, provides at sub-paragraph 4.1, that:

   Disciplinary measures will normally be imposed for wilful misconduct, irresponsible conduct, or wilful failure to perform assigned duties or to carry out specific instructions.

35. Area Staff Regulation 10.2 provides that “[t]he Commissioner-General may impose disciplinary measures on staff members who engage in misconduct”.

36. In relation to the disciplinary measures that may be taken against staff who engage in misconduct, Area Staff Rule 110.1 provides:
1. Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct […]

37. Pursuant to PD A/10, paragraph 3.2, the Commissioner-General has delegated to Field Office Directors the authority to impose disciplinary measures on area staff serving in the Field.

38. With regard to termination for misconduct, PD A/10 provides, at paragraph 10, that:

Where a staff member’s appointment is terminated for misconduct under Area Staff Regulation 10.2, this will constitute a disciplinary measure affecting entitlement to termination indemnity. In such cases the letter of termination will state that termination is for misconduct of the staff member.

39. In relation to gratuities or favours, Area Staff Regulation 1.6 provides that:

Staff members shall not accept gratuities or favours of any kind from commercial firms or individuals doing or seeking business with the Agency.

40. With regard to harassment, General Staff Circular No. 06/2010 (“GSC 06/2010”) dated 19 August 2010 on PROHIBITION OF DISCRIMINATION, HARASSMENT – INCLUDING SEXUAL HARASSMENT – AND ABUSE OF POWER, provides in relevant part, the following:

3. All staff are responsible for maintaining a workplace free of any form of discrimination, harassment – including sexual harassment – and abuse of power (hereinafter referred to as ‘prohibited conduct’).

* * *

6. The Agency defines discrimination, harassment – including sexual harassment – and abuse of power, as follows:

* * *

(b) Harassment is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or
which create an intimidating, hostile or offensive work environment (emphasis in the original).

* * *

11. …All staff have an obligation to ensure they do not engage in, or condone, prohibited conduct…

41. With regard to the proper use of the Agency’s vehicles, the Manual of Transport Procedures, Revision No. 1 (the “Manual of Transport Procedures”) of 23 April 2003, provides in Section 4, paragraph 1, that:

(A) All vehicles, including those hired commercially, will normally be used only in the performance of Agency business.

* * *

(E) Home/Office/Home and private use of Agency vehicles

Use of Agency vehicles for Home/Office/Home and private use may be authorised to a staff member based on need and availability from the pool against payment and subject to the discretion of:

1. The Field Office Director, on the recommendation of Field Procurement and Logistics Officer in the Field.

2. The Coordinator and Representative, HQ (A) on the recommendation of Chief, Procurement and Logistics Division…

42. With regard to the appropriate use of the Agency’s information and telecommunication technology facilities, the Information Systems Directive (“Organizational Directive No. 26”) dated 30 July 2006, provides in paragraph 64, the following:

ICT resources must not be used to view, store or disseminate:

a. Pornographic text or images;

b. Material promoting sexual exploitation, discrimination, racism or violence;

c. Contents that are derogatory or inflammatory in any respect;

d. Information concerning drugs (other than for health-related purposes) and weapons.
43. In relation to the staff member’s duty to cooperate with investigations, General Staff Circular No. 5/2007 (“GSC 5/2007”) dated 31 December 2007 provides in paragraph 9 that “[i]t is the duty of staff members to cooperate with duly authorized audits, inspections or investigations …”.

44. As held by the former United Nations Administrative Tribunal in Judgment No. 1321 (2007), paragraph IX:

   The Tribunal wishes to affirm, once again, that it is within the discretionary authority of the Secretary-General to decide whether a staff member has met the standards of conduct laid down in the Charter and the Staff Regulations & Rules.

45. Accordingly, while recognising that disciplinary matters are within the discretionary authority of the Commissioner-General, the Tribunal will follow the United Nations Appeals Tribunal (the “UNAT”) in Portillo Moya 2015-UNAT-523 referring to Kamara 2014-UNAT-398 and Haniya 2010-UNAT-024 when reviewing the contested disciplinary measure. The Tribunal, therefore, will consider (i) whether the facts on which the sanction is based have been established, (ii) whether the established facts qualify as misconduct, and (iii) whether the sanction imposed is proportionate to the offence. Noting however, as held by the United Nations Appeals Tribunal in Abu Hamda 2010-UNAT-022, that:

   As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.

   Have the facts in which the disciplinary measure was based been reasonably established?

46. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based have been reasonably established. The record shows that DIOS started an investigation after having received allegations of staff misconduct in the JFO, involving the Applicant. The evidence shows that the DIOS investigation included the collection and analysis of all available information and documents including official telephone records, UNRWA e-mail accounts, the Applicant’s work computer, vehicle logs and other official UNRWA
Furthermore, DIOS conducted interviews with UNRWA staff, personnel of TDA – an UNRWA vendor – and other witnesses. During the course of the investigation, the Applicant was interviewed on 16 December 2012, on 27 August 2013 and on 18 September 2013.

47. The Tribunal reviewed the evidence collected and the analysis conducted by DIOS in its investigation report and finds that DIOS’s conclusions are well-documented and based on a proper assessment of the evidence. The Tribunal also finds that the Applicant’s contradictions and inconsistencies confirm his lack of credibility.

- The Applicant obtained a gratuity from a vendor

48. The evidence shows that around April 2012 the Applicant obtained a gratuity, in the form of a laptop from TDA: a vendor, who was engaged in an active bidding process with UNRWA. While the Applicant denies this fact, the witness statement of two employees of TDA and the statement of an external witness confirm that the Applicant indeed received the laptop as a gratuity. The evidence also reveals that the Applicant visited the office of the General Manager of TDA to collect a second-hand laptop and returned some days later to collect the laptop’s charger from a bookstore located in the same building. The Tribunal notes that in his interview of 27 August 2013, the Applicant denied having been in contact with the General Manager of TDA during the bidding process and having obtained any gratuity from TDA. However, when the Applicant was confronted with the records of his official mobile number during his interview of 18 September 2013, he admitted contacting the General Manager of TDA on seven occasions and explained that “contact with vendors, in [that] manner, was normal”.

49. The Applicant claimed in his interview of 27 August 2013 that the General Manager of TDA was making up the allegation that the Applicant had asked for a laptop because UNRWA “must not have renewed” its contract with TDA. The Applicant claimed that the allegation was fabricated “because this [was] Arabic culture” and that he was vulnerable to complaints because he was suspended. However, the evidence shows that the Applicant provided no clear explanation in
relation to his statement about Arab culture or any evidence to support his assertions when DIOS explicitly requested him to do so in his interview of 18 September 2013.

50. In his comments on the conclusions of the DIOS investigation, the Applicant claimed that the meeting in April 2012\(^3\) with the General Manager of TDA was for the purpose of signing a contract with UNRWA and that a Procurement Officer was present in that meeting. He also argued that he would not have “ruin[ed] his career for a cheap bribe” and reiterated that this issue was fabricated by the management of TDA. However, the Applicant did not provide any evidence – convincing or otherwise – to support his allegations.

- The Applicant intimidated and harassed a colleague

51. The evidence shows that the Applicant intimidated and harassed a colleague (the “victim”) during meetings conducted in September or October 2012. During those meetings, the victim was accused of informing the Field, Procurement and Logistics Officer (“FPLO”) on irregularities in the PLD and of being involved in the early voluntary retirement of another staff member. The Tribunal notes that, while the Applicant denied having been present at such meetings, three witnesses, including the victim, confirmed the Applicant’s presence, and two of them confirmed his active participation in the meetings. When DIOS confronted the Applicant on 18 September 2013, with the witness statements, he was not able to provide a clear or plausible explanation. He first denied having been present and later on he mentioned that “if the [witnesses] said that he was present, then they [were] correct but that he [did] not recall being present”.

52. In its investigation report, DIOS found that “regardless of the purpose of these meetings, the manner in which they were conducted clearly intimidated and harassed [the victim]”. In this regard, the Tribunal notes inter alia that two witness statements confirm that the Applicant and the former Deputy, Field Procurement and Logistics Officer (“D/FPLO”) forced the victim to swear on the Holy Qur’an that the victim was not involved in the early voluntary retirement of

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\(^3\) The date of the meeting is not clear. According to the investigation report, it took place between 7 and 23 April 2012.
another staff member. The Tribunal considers that, among other issues properly documented in the investigation report, this particular action is an act of intimidation and harassment and that DIOS’s findings, in this regard, were supported by convincing evidence.

53. In his comments on the conclusions of the DIOS investigation, the Applicant claimed that he may have been present in the former D/FPLO’s office for some other purpose but that he did not take part in the meetings. The Applicant also denied having intimidated or harassed the victim. He argued that the victim was forced by the FPLO to make such allegations because the FPLO wanted to “get rid of [the Applicant] by any means”. However, the Applicant did not provide any evidence – convincing or otherwise – to support his arguments.

- *The Applicant misused UNRWA pool vehicles outside duty hours*

54. The evidence shows that the Applicant misused UNRWA pool vehicles outside duty hours for his own benefit. As reflected in the investigation report, DIOS properly reviewed the UNRWA vehicle records – vehicle daily work tickets and electronic records – and conducted several interviews with PLD staff. The vehicle records from 6 February 2011 to 17 June 2012 confirm “unauthorized or excessive after duty travel by [the Applicant] in UNRWA pool vehicles”. The statements of the witnesses confirm that the Applicant was not authorised to use an UNRWA vehicle for home/office/home travel and that requisitions for use of pool vehicles after duty hours required a special authorisation.

55. In his interview dated 16 December 2012, the Applicant stated that he had the authority to use a vehicle for home/office/home travel. However, when he was questioned further by DIOS, he admitted that he only had authorisation for “on duty” use of pool vehicles and not for home/office/home travel. In his interview dated 27 August 2013, the Applicant denied having ever used UNRWA vehicles for private purposes. In his comments on the conclusions of the DIOS investigation, the Applicant reiterated that he used UNRWA vehicles for official purposes and with the approval of his supervisors. The Applicant argued that the FPLO was using this issue to “show his bad intention against [him]”. He claimed that he should have been advised earlier that he had been misusing UNRWA
vehicles or he should have been charged for any mileage driven for private purposes. The Tribunal finds the Applicant disingenuous because he was well aware of the procedures governing the use of Agency vehicles after duty hours or for personal benefits.

56. The Tribunal finds that DIOS’s conclusions in relation to the Applicant’s misuse of UNRWA pool vehicles outside duty hours are based on convincing evidence and that the Applicant has failed to provide any evidence in support of his allegations against the FLPO. Furthermore, the Tribunal notes that the Applicant contradicted himself during the interview on 16 December 2012 in relation to the alleged authorisation to use a vehicle for home/office/home travel and finds that the Applicant’s testimony lacks credibility. The Tribunal points out that the Applicant, as a PLD staff, should have been aware of his obligations in relation to the use of UNRWA pool vehicles.

- **The Applicant misused an UNRWA laptop for viewing and forwarding an email containing derogatory and racist material**

57. The evidence shows that the Applicant misused an UNRWA laptop and network on 27 February 2012 for viewing and forwarding an email containing derogatory and racist material. The Tribunal notes that, in his interview of 16 December 2012, the Applicant admitted that he had received and forwarded the e-mail. Therefore, this fact is not contested.

- **The Applicant deliberately misled DIOS investigators**

58. The evidence shows that the Applicant deliberately misled DIOS investigators by misrepresenting the truth regarding his interactions with the TDA management, his involvement in the harassment and intimidation of a colleague as explained above and his claim to have authorisation to use a vehicle for home/office/home travel. DIOS found that the evidence of the witnesses and supporting UNRWA phone records clearly show a series of events that the Applicant denied in relation to his interactions with the TDA management. Furthermore, DIOS found that the Applicant purposely misrepresented the truth to the investigators when interviewed about his involvement in the intimidation and
harassment of a colleague. The Tribunal also notes that the Applicant misled the investigators about his alleged authorisation to use a vehicle for home/office/home travel. The Tribunal reviewed the investigation report, including its annexes, and is of the opinion that DIOS’s findings are based on convincing evidence.

59. The Tribunal recalls that when it comes to reasonably establishing the facts on which disciplinary measures are based, the former United Nations Administrative Tribunal has held in Judgment No. 1022, *Araim* (2001), that:

> [T]he Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations. Adequate means “reasonably sufficient for legal action” […] in other words sufficient facts to permit a reasonable inference that a violation of law had occurred.

60. Based on the evidence gathered during the investigation, the Tribunal is satisfied that the facts on which the disciplinary measure was based have been reasonably established. As for the Applicant, all he offered to rebut this evidence were unsubstantiated statements.

*Do the facts amount to misconduct?*

61. The reasonably established facts regarding the Applicant’s actions legally support the characterisation of misconduct. Indeed, soliciting a free laptop computer from a vendor actively engaged in an UNRWA bidding process is in breach of Area Staff Regulations 1.4 and 1.6. The Tribunal finds that the Applicant, who was a Supply Control Officer at PLD and claims to have extensive knowledge of the Procurement Manual, was well aware of his wrongdoings and should bear the consequences of his actions.

62. Furthermore, the intimidation and harassment of a colleague is in breach of paragraphs 3 and 11 of GSC 06/2010. The misuse of UNRWA pool vehicles outside duty hours for the Applicant’s own benefit is in breach of Section 4, paragraph 1 (A) and (E) of the Manual of Transport Procedures. The misuse of an UNRWA laptop for viewing and forwarding an email containing derogatory and racist material is in breach of paragraph 64 of the Organizational Directive No. 26.
63. Finally, the fact that the Applicant deliberately misled DIOS investigators by misrepresenting the truth regarding his interactions with the TDA management and his involvement in the harassment and intimidation of a colleague is in breach of GSC 5/2007 that requires staff members to cooperate in duly authorised investigations.

64. The UNAT held in *Molari* 2011-UNAT-164 that:

> [W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt – it means that the truth of the facts asserted is highly probable.

65. In the present case, the Tribunal finds that the Respondent duly exercised his broad discretionary authority with regard to disciplinary matters. The facts reasonably established the Applicant’s failure to abide by the standards of conduct required and expected of him as a staff member of the Agency, and the Tribunal finds that the Applicant’s misconduct has been established by clear and convincing evidence.

66. In the Tribunal’s opinion, in deciding to terminate the Applicant’s appointment for misconduct, the Agency complied with the requirements of Area Staff Regulation 10.2, Area Staff Rule 110.1 and PD A/10. Furthermore, the Tribunal finds that the Agency was correct in not granting the Applicant separation benefits as the decision to terminate his appointment was based on serious misconduct and, as a consequence, he was not entitled to separation benefits.

*Was the Respondent’s decision taken arbitrarily, motivated by prejudice or flawed by procedural irregularity or error of law?*

67. The question to ask now is whether the Respondent’s decision to terminate the Applicant was taken arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law, as held in *Asaad* 2010-UNAT-021.
68. The Applicant claims that there were errors in the procedure and that his due process rights were not respected. The Tribunal notes that, based on the applicable legal framework, the Agency launched an investigation which was properly conducted by DIOS as mentioned in paragraphs 46 and 47 above. The record in the file also indicates that the Applicant’s due process rights during the investigation and prior to the issuance of the disciplinary measure were respected. Indeed, the Tribunal notes that the Applicant was given sufficient opportunities during the investigation to challenge the allegations made against him and submit evidence in support of his case. The Applicant was interviewed by DIOS investigators on three separate occasions. The Applicant was given the record of his interviews. Furthermore, the Applicant was informed about the conclusions of the DIOS investigation and he was accorded the opportunity to challenge them. The Tribunal finds that the Applicant’s claims are unsubstantiated as the record does not indicate any arbitrariness or error of law or procedure on the part of the Agency.

69. The Applicant argues that the decision to terminate his employment was arbitrary but he failed to produce any evidence in support of his allegation. The Tribunal recalls that the facts upon which the decision was based were reasonably established by DIOS and the Agency complied with the applicable legal framework in deciding to terminate the Applicant’s appointment for misconduct. Therefore, the Applicant’s contention in this regard is unfounded.

70. The Applicant alleges that the “Investigation Committee” was not impartial and that it did not provide any material evidence to support the claims against the Applicant. The records shows that DIOS made a proper assessment of the evidence in its investigation report and the Applicant did not provide any evidence to suggest that DIOS investigators were partial. Therefore, the Tribunal considers that this claim is baseless.

71. The Applicant challenges the lengthy duration (19 months) of the investigation and claims that it was suspended for more than eight months without justification. The Tribunal notes that the investigation started on 28 April 2012 and ended on 5 November 2013 with the issuance of the investigation report.
Considering the gravity of the allegations and their multiplicity, the Tribunal finds that the length of the investigation was not unreasonable. The investigation report shows that DIOS took the time to investigate the allegations thoroughly. The Applicant’s contentions that the investigation should have taken only a few days is ludicrous.

72. The Applicant claims that he was subject to an investigation “for the same matters more than one time”. The Tribunal notes that the Applicant was interviewed three times in the course of one and the same investigation.

73. The Applicant challenges, in his application, his suspension from duty during the investigation. The Tribunal notes that the decision to suspend him from duty was not the subject of his request for decision review and, therefore, the Tribunal does not have jurisdiction to review it.

74. The UNAT has held that a party who alleges a fact bears the burden of proving its veracity (see Azzouni 2010-UNAT-081 and Hepworth 2011-UNAT-178). The Applicant is also reminded that he bears the burden of proof and must produce convincing evidence that the Respondent’s decision was tainted by improper motivation or other extraneous factors as he has claimed in his application.

75. Looking at the record, the Tribunal finds that the Applicant’s allegations against the disciplinary process, the investigation and the decision to terminate his appointment for misconduct are unsubstantiated. The Applicant has failed to provide any evidence – convincing or otherwise – as stated by the former United Nations Administrative Tribunal in Judgment No. 834, Kumar (1997), of the Respondent’s allegedly improper motivation or prejudice when imposing on him the disciplinary measure of termination for misconduct.
Was the Respondent’s decision to terminate the Applicant for misconduct so disproportionate as to amount to an injustice?

76. As determined by the UNAT in Aqel 2010-UNAT-040, the level of the sanction falls within the ambit of the Administration and can only be reviewed in cases of “obvious absurdity or flagrant arbitrariness”.

77. As the multiple facts on which the sanction was based have been established, as the Applicant has been properly found to have engaged in misconduct on several grounds, and as the contested decision was not flawed by arbitrariness or error of law, the Tribunal is of the opinion that the disciplinary measure to terminate the Applicant’s appointment for misconduct was not so disproportionate or unwarranted as to amount to an injustice.

78. When considering proportionality, the Tribunal takes special note of the nature of an Applicant’s post. Referring to the conduct of a staff member, the UNAT held in Haniya 2010-UNAT-024 that:

His misconduct is particularly grave in light of the position he held [i.e., a position of trust that he failed to respect], and the responsibilities he was entrusted with […]

79. As a Supply Control Officer at PLD, the Applicant was entrusted with the responsibility to conduct the analysis of tender submissions and to recommend contracts for the Agency. A high standard of conduct and integrity was expected of him. Therefore, even letting aside the other offences he committed, the single fact that the Applicant obtained a gratuity from a vendor, who was engaged in an active bidding process with the Agency, would have justified his termination for misconduct.

Is there any legal basis to the relief sought by the Applicant?

80. The Applicant requests rescission of the contested decision. Having determined that:

(i) the facts on which the disciplinary measure, i.e. termination for misconduct, was based have been reasonably established;
(ii) the facts legally support the characterisation of misconduct;

(iii) the disciplinary measure was proportionate to the offences; and

(iv) the Respondent’s discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law;

the Tribunal finds that the Applicant’s request for relief has no basis in fact or in law.

81. As for the Applicant’s request for compensation for the moral damages that he allegedly suffered as a result of his suspension from work, the Tribunal would like to remind the Applicant that he was suspended with full pay and that he has submitted no evidence whatsoever in support of his alleged moral suffering. Furthermore, it is important to recall that the Applicant did not raise the issue of suspension in his request for decision review, therefore placing this issue beyond the jurisdiction of the Tribunal.

**Conclusion**

82. In view of the foregoing, the Tribunal determines that the application is dismissed.

____(Signed)__________________________
Judge Bana Barazi
Dated this 10th day of November 2015

Entered in the Register on this 10th day of November 2015

____(Signed)__________________________
Laurie McNabb, Registrar, UNRWA DT, Amman