UNRWA DISPUTE TRIBUNAL

Before: Judge Jean-François Cousin
Registry: Amman
Registrar: Laurie McNabb

Cases Nos.: UNRWA/DT/WBFO/2014/032
UNRWA/DT/WBFO/2014/043
Judgment No.: UNRWA/DT/2015/057
Date: 7 December 2015
Original: English

UWAIS

v.

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

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. These are two applications filed by Alaa Saleh Mohammed Uwais (the “Applicant”) against the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), (1) to close the case in relation to the Applicant’s complaints of harassment and abuse of power, and (2) to terminate her appointment in the interest of the Agency.

Facts

2. Effective 2 July 2012, the Applicant was employed by the Agency on a fixed-term appointment as a Deputy Field Pharmaceutical Services Officer, Grade 14, at the Health Department Central Pharmacy, West Bank Field Office (“WBFO”). The appointment was subject to a probationary period of one year.

3. In an interim periodic report dated 18 March 2013, the Applicant was evaluated as “[a] staff member who maintains a good standard of efficiency”. However, her direct supervisor – the Field Pharmaceutical Services Officer (“FPSO”) – noted the Applicant’s weakness in the calculation of medical supplies for the Health Clinic and her inability to organize her work. The Deputy Chief, Field Health Programme (“DCFHP”) recommended that the Applicant “be evaluated after 2 months”.

4. In a document titled Note for the Record (“Note for the Record”) dated 28 May 2013, the FPSO documented a discussion that she had with the Applicant regarding shortcomings in the Applicant’s performance.

5. On 10 June 2013, the Applicant replied to the Note for the Record dated 28 May 2013. In her reply, the Applicant contested the alleged shortcomings in her performance.

6. By another Note for the Record dated 12 July 2013, the FPSO drew the Applicant’s attention to recurrent performance issues, noting that there was no improvement in the Applicant’s work performance.
7. On 16 July 2013, the Applicant submitted a complaint to the Ethics Office alleging abuse of power and harassment by the FPSO. With regard to abuse of power, the Applicant claimed that the Central Pharmacy distributed expired suppositories used to cure haemorrhoids and that upon informing the FPSO about this anomaly, “the [FPSO] had mixed the expired quantity with the valid quantity” to hide her own mistakes in the management of medicine stocks.

8. On 18 July 2013, the Applicant replied to the Note for the Record dated 12 July 2013. In her reply, the Applicant contested the alleged deficiencies in her performance.

9. In the Applicant’s periodic report dated 25 July 2013, her overall performance was rated as unsatisfactory. The FPSO recommended “not to appoint her after [her] probation period”. The DCFHP concurred with the recommendation.

10. On 26 July 2013, the Applicant’s probationary period was extended until 31 December 2013.

11. On 31 July 2013, the Applicant requested that her performance, as reflected in her periodic report dated 25 July 2013, be re-evaluated.

12. On 4 August 2013, the Applicant resubmitted to the Ethics Office and the Director of UNRWA Operations, West Bank (“DUO/WB”) in a formal format her complaint of abuse of power and harassment against the FPSO.

13. By email dated 21 August 2013, the DUO/WB requested the Chief, Field Health Programme (“CFHP”), inter alia, to review carefully the Applicant’s complaint, particularly with regard to the issue of the management of medicines stock. The CFHP replied to the DUO/WB’s request noting that the issue had been investigated carefully and that no evidence had been found to support the Applicant’s claim. He also mentioned that several measures had been taken to address the management issues raised by the Applicant in her complaint.
14. On 16 September 2013, the Applicant and the FPSO agreed on the objectives and indicators for the Applicant’s performance evaluation through an Opportunity to Improve (“OTI”) process.

15. By email to the D/DUO/WB dated 28 September 2013, the Applicant inquired about the results of the investigation into her complaint.

16. By email dated 30 September 2013, the Deputy Director of UNRWA Operations in the West Bank (“D/DUO/WB”) informed the Applicant that her complaint had been submitted to the Field Investigations Committee (“Investigation Committee”) for action and was being processed accordingly. He pointed out that she would be informed of the outcome in due course.

17. On 27 October 2013, the Applicant submitted a complaint of physical harassment against the FPSO.

18. By email dated 14 November 2013, the Applicant submitted another complaint of harassment against the FPSO with the Ethics Office.

19. In the Applicant’s performance evaluation report (“PER”) dated 2 December 2013, the overall rating of her performance was “[d]oes not fully meet expectations”. The FPSO recommended terminating the Applicant’s duties in the interest of the Agency, and the DCFHP noted that the Applicant did not meet the performance objectives.

20. By a report dated 16 February 2014, the Investigation Committee concluded that there was no evidence to substantiate the Applicant’s complaints of harassment against the FPSO.

21. By letter dated 21 February 2014, the DUO/WB informed the Applicant of the outcome of the investigations into the allegations of misconduct that she had raised against the FPSO. The letter provides, in relevant part, as follows:

   […] I have authorized investigation committees to look into your allegations on two separate occasions – the first committee was tasked with investigating the misconduct allegations you raised on 16 July 2013 and the second investigation dealt with your
misconduct allegations from both 27 October 2013 and 14 November 2013. Neither investigation committee substantiated the misconduct allegations you brought against [the FPSO]. Accordingly, the Agency considers this matter closed.

22. On 17 March 2014, the Applicant requested review of the decision to close the case in relation to her complaints of harassment and abuse of power.

23. By letter dated 23 April 2014, the DUO/WB informed the Applicant of the decision to terminate her services in the interest of the Agency. The letter provides, in relevant part, that:

   Accordingly, I have no option but to terminate your service from the Agency by close of business effective the date you received this letter under SR 109.9 Termination for the interest of the Agency.

   If you wish to appeal this decision which is a disciplinary measure, please refer to Area Staff Rule 111.2.[…]

24. Effective 28 April 2014, the Applicant was separated from the Agency.

25. On 20 May 2014, the Applicant requested review of the decision to terminate her appointment in the interest of the Agency.

26. On 10 July 2014, the Applicant filed an application with the UNRWA Dispute Tribunal (the “Tribunal”) contesting the decision to close the case in relation to her complaints of harassment and abuse of power. Her application was registered under case number UNRWA/DT/WBFO/2014/032.

27. On 12 August 2014, the Respondent filed a reply to the application in case number UNRWA/DT/WBFO/2014/032.

28. On the same date, the Respondent filed a motion for an extension of time to submit the Arabic translation of the reply. The motion was transmitted to the Applicant who did not object to the Respondent’s request.

29. By Order No. 084 (UNRWA/DT/2014) dated 27 August 2014, the Tribunal granted the Respondent’s motion for an extension of time to submit the Arabic translation of the reply.
30. On 29 August 2014, the Respondent filed an Arabic translation of the reply in case number UNRWA/DT/WBFO/2014/032. The translation was transmitted to the Applicant.

31. On 11 September 2014, the Applicant filed another application with the Tribunal contesting the decision to terminate her appointment in the interest of the Agency. Her application was registered under case number UNRWA/DT/WBFO/2014/043.

32. On 11 October 2014, the Respondent filed a motion for extension of time to file a reply in case number UNRWA/DT/WBFO/2014/043. The motion was transmitted to the Applicant who did not object to the Respondent’s request.

33. By Order No. 107 (UNRWA/DT/2014) dated 15 October 2014, the Tribunal granted the Respondent’s motion for an extension of time to file a reply.

34. On 21 October 2014, the Respondent filed a reply to the application in case number UNRWA/DT/WBFO/2014/043.

35. On 22 October 2014, the Respondent filed a motion for an extension of time to submit the Arabic translation of the reply. The motion was transmitted to the Applicant who did not file any response.

36. By Order No. 112 (UNRWA/DT/2014) dated 11 November 2014, the Tribunal granted the Respondent’s motion for an extension of time to submit the Arabic translation of the reply.

37. On 13 November 2014, the Respondent filed an Arabic translation of the reply in case number UNRWA/DT/WBFO/2014/043. The translation was transmitted to the Applicant.

38. By Notice of Hearing dated 6 October 2015, the parties were convoked to a hearing on Wednesday, 14 October 2015 in the main conference room at UNRWA Headquarters Amman (“HQA”).
39. On 14 October 2015, a hearing was held. The Applicant, her counsel and counsel for the Respondent participated in the hearing.

40. By Order No. 112 (UNRWA/DT/2015) dated 15 October 2015 (“Order No. 112”), the Tribunal ordered the Respondent to provide written comments in relation to the main issues that were discussed during the hearing on 14 October 2015.

41. On 29 October 2015, the Respondent filed his comments as ordered by the Tribunal. The Respondent’s comments were transmitted to the Applicant.

42. On 4 November 2015, the Applicant submitted her observations in relation to the Respondent’s comments in response to the Tribunal’s Order No. 112. The Applicant’s observations were transmitted to the Respondent.

Applicant’s contentions

Closure of the case in relation to the Applicant’s complaints

43. The Applicant contends:

   i) The investigation into the Applicant’s complaints was closed despite the overwhelming evidence to the contrary;

   ii) The Applicant was a victim of abuse of power and harassment by her supervisor;

   iii) There was abuse of authority by the Investigation Committee;

   iv) The Investigation Committee was not neutral as it was composed of members from the Health Department. Moreover, it did not interview witnesses who were aware of the mistreatment of the Applicant by her supervisor. The Investigation Committee ignored 12 witnesses that the Applicant had named in her Prohibited Conduct Complaints Referral Form; and
v) The Agency did not take into account the psychological, moral and physical suffering of the Applicant.

44. The Applicant requests:

i) The re-opening of the investigation in relation to her complaints;

ii) The Agency to conduct a new investigation by a neutral fact-finding committee;

iii) To receive compensation for moral and psychological harm; and

iv) To receive an official apology.

Termination of appointment

45. The Applicant contends:

i) She completed her probationary period on 2 July 2013, with an assessment rating of 3 out of 5;

ii) The Agency should not have re-evaluated the Applicant’s performance after twenty-two days of completing her one-year probationary period;

iii) She was a victim of retaliation for reporting mistakes that had taken place in the pharmacy, and she had the right to be protected against retaliation;

iv) The Applicant’s relationship with her supervisor deteriorated after she filed complaints of harassment and abuse of power against her;

v) The termination of her appointment was premeditated and retaliatory;

vi) The OTI process was unlawful and led to the termination of the Applicant’s appointment;

vii) Her supervisor used the Applicant’s performance assessment as a tool to terminate her services with the Agency; and
viii) She suffered financial and moral damages.

46. The Applicant requests:

   i) Rescission of the decision to terminate her appointment and reinstatement in her former post;

   ii) Payment of her entitlements from the date of her separation until her reinstatement; and

   iii) Compensation for moral damages estimated at one year’s salary.

Respondent’s contentions

Closure of the case in relation to the Applicant’s complaints

47. The Respondent contends:

   i) The decision not to take further action in response to the Applicant’s complaints was properly effected as her allegations were not substantiated;

   ii) Following the Applicant’s complaint dated 16 July 2013, the Agency requested the “PLD” to conduct a preliminary assessment. The preliminary assessment did not find the allegations substantiated. On the contrary, it found that the anomalies in the pharmacy were regularly dealt with;

   iii) Following the complaints of harassment and physical harassment, the DUO/WB instructed the CFHP and the D/CFHP to conduct an investigation. The Investigation Committee interviewed the Applicant, the alleged offender and four witnesses and concluded that there was no evidence to substantiate the Applicant’s allegations. The Applicant did not request the Investigation Committee to interview particular witnesses;

   iv) Performance issues per se, do not constitute prohibited conduct. In the present case, the Agency properly dealt with performance related issues;

   v) The Applicant’s contention that the Investigation Committee was not neutral because it was composed of members from the same department is
untenable. It was desirable to have staff members in the Investigation Committee who had knowledge of the operations of the department, and there is no evidence of any abuse of authority by the Investigation Committee; and

vi) The relief sought by the Applicant has no legal basis.

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

*Termination of appointment*

49. The Respondent contends:

i) The Applicant’s appointment was subject to a probationary period of one year, and her confirmation in the post was contingent upon the receipt of a satisfactory work performance;

ii) The decision to terminate the Applicant’s probationary appointment was based on properly documented shortcomings relating to her overall performance;

iii) Contrary to the content of the termination letter, the contested decision is an administrative decision and not a disciplinary measure;

iv) Notwithstanding the lack of evidence in relation to the extension of the Applicant’s probationary period, there is sufficient evidence in the record to justify the decision to terminate her appointment;

v) The continuous probationary period exceeding 21 months is attributable, in part, to the strike action that affected the WBFO for a period of two months;

vi) The Applicant’s performance was re-evaluated on 25 July 2013 following the recommendation of the DCFHP on the Applicant’s interim performance report of 18 March 2013;
vii) While the evaluation of the Applicant’s performance through the OTI process was irregular, this irregularity does not vitiate the decision to terminate her appointment as there is sufficient evidence in relation to the Applicant’s unsatisfactory performance;

viii) The Applicant’s allegation that her termination was retaliatory is unfounded as the record of her unsatisfactory performance predates the submission of the Applicant’s complaints against her supervisor;

ix) There is no evidence that the Applicant was a whistle-blower. The complaints were investigated and found to be unsubstantiated; and

x) The Applicant has provided no reason to interfere with the Agency’s discretionary decision to terminate her appointment during the probationary period.

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

Considerations

Preliminary issue

51. In cases number UNRWA/DT/WBFO/2014/032 and UNRWA/DT/WBFO/2014/043, the Applicant contests the Agency’s decisions to close the case in relation to her complaints of harassment and abuse of power and to terminate her appointment in the interest of the Agency. The Applicant particularly claims that her termination was an act of retaliation for the complaints that she had filed against the FPSO. Therefore, the Tribunal holds that the two cases must be consolidated and adjudicated in a single judgment.

1) The decision to close the case in relation to the Applicant’s complaints of harassment and abuse of power

52. The Applicant contests the DUO/WB’s decision to close the case in relation to her complaints of abuse of power and harassment against her direct supervisor,
the FPSO. The DUO/WB considered that the evidence obtained during the investigation did not substantiate the Applicant’s allegations.

53. General Staff Circular No. 06/2010 (“GSC No. 06/2010”) about Prohibition of Discrimination, Harassment – including sexual harassment – and abuse of power provides, in relevant part, as follows:

**Obligations of managers and supervisors**

12. Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of any form of prohibited conduct […] Managers and supervisors have an obligation to ensure complaints are addressed promptly and fairly, in a confidential manner, in accordance with the Agency’s relevant procedures.

* * *

25. After receiving a complaint, the Focal Point shall forward it to the Field Director for cases in the Field, or to the Director of Human Resources (DHR) for cases in Headquarters, with a copy to the Director of the Department of Internal Oversight Services (DDIOS) for monitoring purposes. The Field Director or DHR, as applicable, shall then designate an appropriate staff member(s) or functional unit to conduct a preliminary assessment to determine if the matter should be closed or if a formal investigation is warranted.

* * *

29. One of the following actions may be taken by the Field Director or DHR, as applicable:

(a) If it is considered that the allegations are unfounded, provided the complaint was made in the reasonable belief that what is being reported is true, no action will be taken if the complaint turns out to be misguided or false. The case will be closed and the alleged offender and aggrieved individual provided with a summary of the investigation’s findings and conclusions. Complainants may be called upon to support their complaints, and where complaints are found not to have been made in good faith or on reasonable grounds, complaints may be subject to disciplinary action.

(b) If it is considered there was a factual basis for the allegations that does not justify disciplinary proceedings but warrants some other action, a decision will be made on managerial action to be taken which may include, but is not limited to, mandatory training,
reprimand, a change of functions or responsibilities, counseling or other appropriate corrective measure. The staff member and complaint shall be informed of the outcome of the investigation and the action being taken.

(c) If it is considered that the allegations were well-founded and misconduct has occurred, appropriate disciplinary proceedings will be initiated under Chapter X of the International Staff Rules or Chapter X of the Area Staff Rules, as applicable…

- **Complaint of abuse of power**

54. In the Applicant’s 16 July 2013 complaint of abuse of power and harassment against the FPSO, the Applicant claimed that the Central Pharmacy distributed expired suppositories used to cure haemorrhoids and that, upon informing the FPSO about this anomaly, “the [FPSO] had mixed the expired quantity with the valid quantity” to hide her own mistakes in the management of medicine stocks.

55. The Tribunal notes that on 21 August 2013, the DUO/WB requested the CFHP to conduct a careful assessment of the alleged errors in the management of medicine stocks. The CFHP informed the DUO/WB that the issue had been investigated carefully and that no evidence was found to support the Applicant’s claim. The CFHP also noted that “all actions taken at the pharmacy are normal procedures and have been documented and audited by CPLD”. The Applicant does not contest that this preliminary assessment was properly conducted. Therefore, the Tribunal considers that the Agency rightly closed the case in relation to the Applicant’s complaint of abuse of power.

- **Complaints of harassment**

56. In her complaint of 16 July 2013, the Applicant also claimed that she had been harassed by the FPSO. In another complaint dated 27 October 2013, the Applicant claimed that she had been physically harassed when the FPSO allegedly pushed the Applicant out of the FPSO’s office. In her last complaint dated 14 November 2013, the Applicant claimed that the FPSO had intentionally locked her in the Central Pharmacy at the end of the working day on 1 November 2013.
57. The Applicant’s allegation that the DUO/WB closed the case in relation to her 16 July 2013 complaint of harassment without taking any action is without merit. Indeed, the evidence shows that by email dated 21 August 2013, the DUO/WB requested the CFHP to check whether any action had been implemented to improve the “climate” at the Health Department Central Pharmacy. In his email, the DUO/WB noted that with the exception of the issue of errors in the management of medicine stocks, the remaining claims appeared to be purely management issues. The CFHP informed the DUO/WB about the measures that had been taken in cooperation with the Department of Human Resources to improve the working relationship and communication between the Applicant and the FPSO.

58. The evidence also shows that following the Applicant’s complaints dated 27 October 2013 and 14 November 2013 against the FPSO, an investigation was conducted by the DCFHP and the Field Nursing Officer (“FNO”) of the Health Department. The Applicant contests the manner in which the investigation was conducted in relation to these complaints. The Tribunal now turns to the issue of the investigation.

   - *The investigation*

59. The Applicant claims that the investigation was not properly conducted. She argues that the Investigation Committee was not neutral as it was composed of members from the Health Department. In this regard, the Tribunal notes that the GSC No. 06/2010 provides that the Agency shall designate one or more “appropriate staff member” or “functional unit” to conduct a preliminary assessment. The Tribunal considers that the DCFHP and the FNO of the Health Department were properly designated to conduct the preliminary assessment and that the Applicant did not submit any evidence of the investigators’ alleged lack of neutrality.

60. At the hearing on 14 October 2015, the Applicant’s main contention was that the Investigation Committee did not interview all of the 16 witnesses that she had named in her complaint; rather it interviewed only four of them.
61. The only instruction on how the investigation should be conducted is provided by the Agency’s “guide to conducting misconduct investigations” of December 2010, which provides in Chapter 5, page 38, that:

Witness testimony is the cornerstone of every investigation. Witnesses are a valuable source of information because they may have directly perceived something with their senses. [...] All witnesses who are relevant to the investigation should be interviewed. When deciding relevance, a good rule of thumb is to identify those that have information or created documents that concern the subject matter under inquiry (emphasis added).

62. The investigation report dated 16 February 2014 shows that the Applicant and the FPSO were each interviewed separately on two occasions in relation to the Applicant’s complaints for harassment. The Tribunal notes that in her statements before the Investigation Committee, which are included in the investigation report, the Applicant did not request that any particular witness be interviewed. The only person who was mentioned by the Applicant in her witness statements was Ms. S. who was, indeed, interviewed by the Investigation Committee. Three other witnesses were also interviewed. The Tribunal considers that the investigators rightly interviewed only those witnesses who were considered the most relevant for the investigation. While the Applicant named 16 witnesses in her written complaint, she failed to provide any information about the relevance of their respective testimonies for the matter under inquiry.

63. The Tribunal notes that in Flores 2015-UNAT-525, the United Nations Appeals Tribunal (“UNAT”) held that due process required the Administration to interview the witnesses proposed by the Appellant who, herself, was the subject of the investigation. However, the present case is distinguishable from Flores. In Flores, the Administration did not interview any of the witnesses proposed by the Appellant, whereas, in the present case, the Investigation Committee interviewed four of the witnesses proposed by the complainant Applicant. Contrary to the Applicant’s claim, there is no provision in the Agency’s legal framework that obliges the investigators to interview all the proposed witnesses.

64. Furthermore, the Tribunal notes that the Applicant did not submit any written witness statements or other documents along with her application to
corroborate her allegations against the conclusions of the Investigation Committee. Moreover, the Applicant has never asked the Tribunal to hear any particular witnesses, including at the hearing. Therefore, the Tribunal considers that the Applicant has not established that the testimony of additional witnesses would have been useful for the investigation or would have modified the conclusions of the Investigation Committee.

- Harassment

65. At this stage, the Tribunal examines whether the Investigation Committee rightly concluded that the Applicant’s complaints of harassment were not founded.

66. The UNAT held in Messinger 2011-UNAT-123 that:

> It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a de novo investigation into a complaint of harassment.

67. Therefore, the Tribunal holds that it is entitled to review the Applicant’s complaints of harassment and physical harassment against the FPSO even if the DUO/WB concluded that the evidence obtained during the investigation did not substantiate the Applicant’s complaints.

68. During the investigation, the investigators first addressed the Applicant’s complaint of harassment against the FPSO dated 27 October 2013. In her interview, the Applicant confirmed that on 9 October 2013, the FPSO “put her hands in [the Applicant’s] stomach and push[ed] [her]” out of the FPSO’s office. In the FPSO’s interview, she denied the accusation. The only witness who was present during the incident, Ms. S., denied the Applicant’s description of the alleged facts. Three other witnesses, who were not present during the incident, affirmed in their statements that the FPSO treated employees in a respectful manner.
69. The investigators then addressed the Applicant’s complaint dated 14 November 2013, in which she claimed that she was intentionally locked inside the Central Pharmacy at the end of the working day on 1 November 2013. In her interview, the Applicant claimed that the FPSO could not have overlooked the fact that she was in the Central Pharmacy ladies’ room at the time the FPSO locked the door. The FPSO affirmed in her interview that on the day of the incident, she had followed the standard daily routine for closing the Central Pharmacy at the end of the working day. The FPSO noted that she was always the last person to leave the building and that she carried out all the security measures for closing the building. The FPSO stated that she was not aware that the Applicant was still inside the building, and as soon as she learned that the Applicant was locked in the Central Pharmacy, she returned to check the situation. The four witnesses affirmed in their testimonies that the FPSO is always the last person to leave the Central Pharmacy and that she closes the building.

70. Considering the above, the Tribunal finds that the evidence does not support the Applicant’s claims of harassment. Apart from the Applicant’s own testimony, none of the other witnesses’ testimonies supports her allegations of harassment. Indeed, the Applicant has failed to produce any evidence to corroborate her assertions of harassment allegedly committed against her by the FPSO.

- Retaliation

71. The Tribunal now has to adjudicate if the Applicant was, indeed, a victim of retaliation for having submitted complaints against the FPSO. As the Applicant claims that the harassment against her started after she filed her first complaint, the chronology of some facts must be recalled.

72. Effective 2 July 2012, the Applicant was employed by the Agency as a Deputy Field Pharmaceutical Services Officer at the Health Department Central Pharmacy, WBFO, with a probationary period of one year. In an interim periodic report dated 18 March 2013, the Applicant was evaluated “as a staff member [with] a good standard of efficiency” but with “weaknesses in calculations and accuracy in issued quantities for health clinic, still unable to organize or
controlling her work [sic]”. In a Note for the Record dated 28 May 2013, the FPSO memorialised a discussion with the Applicant in which the Applicant’s shortcomings in her performance were pointed out. In another Note for the Record dated 12 July 2013, the FPSO noted that there was no improvement in the Applicant’s work performance.

73. Contrary to the Applicant’s claim, the evidence shows that the FPSO was not satisfied with her work performance well before 16 July 2013, when she filed her first complaint of abuse of power and harassment against the FPSO. The Tribunal considers that the working relationship between the Applicant and her supervisor deteriorated after the FPSO repeatedly drew the Applicant’s attention to the deficiencies in her performance. Contrary to the Applicant’s assertion, the evidence in the case file does not demonstrate that she was a victim of retaliation for having submitted complaints against the FPSO.

74. It follows from the analysis above that the Administration took appropriate action in relation to the Applicant’s complaints of harassment and abuse of power. The evidence shows that the investigation was properly conducted and that the decision to close the case in relation to the Applicant’s complaints was correct as the Investigation Committee rightly concluded that there was no evidence to support her allegations. Furthermore, the Applicant has failed to produce any evidence of the alleged retaliation committed against her by the FPSO. Consequently, the application is rejected in this respect.

2) The decision to terminate the Applicant’s appointment

75. At the outset, the Tribunal expresses its astonishment at the content of the letter whereby the Applicant was informed of the decision to terminate her appointment in the interest of the Agency. The Respondent explained in his reply that the Applicant’s appointment was terminated due to her unsatisfactory performance during her probationary period. However, the DUO/WB’s letter dated 23 April 2014, which is the contested decision, does not provide the same. The letter provides that the decision was taken “under [Staff Rule] 109.9
termination for the interest of the Agency [sic]” and that the decision was a “disciplinary measure”.

76. Confronted with this discrepancy between the Respondent’s reply and the text of the letter of termination, the Tribunal requested clarification from the Respondent during the hearing and ordered him to provide written comments in this regard. In his response to the Tribunal’s Order No. 112, the Respondent admitted that the letter erroneously characterised the decision as a disciplinary measure but that the contested decision was an administrative decision. The Respondent asserted that the mischaracterisation did not prejudice the Applicant. Based on the evidence in the case file, the Tribunal accepts the Respondent’s explanation as it is evident that the Applicant was not the subject of a disciplinary process. However, the Tribunal considers very regrettable that none of the parties had raised this error before the Tribunal and that the Tribunal had to raise such an evident mistake on its own.

77. In relation to a staff member’s termination in the interest of the Agency, Area Staff Rule 109.1, paragraph 1, provides that:

Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member’s probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

78. Area Staff Regulation 4.2 provides that:

Appointments shall be subject to the satisfactory completion of not less than one month’s probationary service.

79. Area Staff Regulation 9.1 provides that:

The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

80. Personnel Directive A/4/Part. VII/Rev.7 (“PD A/4/Part. VII/Rev. 7”) effective 1 February 1993, provides in relevant part the following:
3. PURPOSE OF PROBATION

The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance. Staff members are subject to probation on the occasions of:

(i) Appointment;

(ii) Reassignment or transfer with or without promotion.

* * *

6. NOTIFICATION TO EMPLOYEE OF PROBATION ON TRANSFER AND PROMOTION

[…] If any extensions of such initial probation are decided upon, the employee will similarly be informed in writing, and given the grounds for the extension.

* * *

9. EXTENSION OF INITIAL PROBATIONARY TERMS

9.1 […] It should not therefore normally be necessary to extend an initial period of probation, but, if this becomes necessary, the total period of continuous probation shall not in any circumstances exceed eighteen months.

9.2. If an initial period of probation, whether for new appointments, transfers, or promotions, is extended, such extension and the grounds for it must be communicated to the employee in writing, prior to the expiry of the initial probationary term.

* * *

11. In all circumstances satisfactory probationary service is a condition for confirmation of appointment, transfer and promotion.

12. Appointment may be terminated without notice during the probationary period or during any extension thereof.

81. The Applicant claims that there were procedural irregularities in the course of the extension of her probationary period. The Tribunal notes that effective 2 July 2012, the Applicant was employed by the Agency on a fixed-term appointment with a probationary period of 12 months. The evidence shows that on 26 July 2013, the Applicant’s probationary period was extended until 31 December 2013. The Tribunal notes that PD A/4/Part. VII/Rev. 7 provides that
the decision to extend a probationary period must be communicated to the employee in writing prior to the expiry of the initial probationary period. The Respondent has failed to submit any evidence – documentary or otherwise – in relation to the decision to extend the Applicant’s probationary period or any notification of such decision to the Applicant. Therefore, it is clear for the Tribunal that the Agency committed an irregularity as it did not apply the terms of PD A/4/Part. VII/Rev. 7.

82. The Tribunal notes that the DUO/WB indicated in his letter dated 23 April 2014 that the Applicant was placed on an Opportunity to Improve (“OTI”) process during her probationary period. However, the Respondent failed to address this issue in his reply. Noting the discrepancy, the Tribunal addressed the issue during the hearing and subsequently ordered the Respondent (Order No. 112) to clarify whether or not the Applicant was placed on an OTI process.

83. The Performance Management Policy for Area Staff dated 17 March 2010 provides in Section III, managing under performance, in footnote 1, the following:

“The OTI process depends on effective management of two relevant but separate processes, i.e. the probation period (Ref. PD A4 part VII) and discipline and misconduct measures (Ref. PD A10 part III). Firstly, having an effective process for evaluating staff during the probation period ensures that the staff members who satisfactorily complete the probation period are assessed as being able to perform at consistently satisfactory levels. The OTI process is aimed at restoring declining performance to previously demonstrated levels of performance. It is not aimed at bringing a staff member’s performance to a satisfactory level for the first time […]”.

84. At the hearing, the Respondent confirmed that the OTI process is not the appropriate procedure for evaluating a staff member’s performance during his or her probationary period of service. He also admitted in his response to the Tribunal’s Order No. 112 that the evaluation of the Applicant’s performance through the OTI process was irregular.

85. The Tribunal observes that while the extension of the Applicant’s probationary period was scheduled to end on 31 December 2013, the decision to
terminate her appointment was taken on 23 April 2014. As mentioned above, there is no evidence in relation to the decision to extend the Applicant’s probationary period neither concerning the extension of 31 December 2013 nor thereafter. The Respondent claimed that the continuation of the Applicant’s service with the Agency up to 23 April 2014 was due to the strike action at the WBFO.

86. In light of the above-mentioned inconsistencies and procedural irregularities in the decision-making process, the Tribunal should examine whether or not the decision to terminate the Applicant’s appointment was lawful. The Tribunal has previously stated that the Applicant has not provided any evidence that she was a victim of harassment, abuse of power or retaliation by her supervisor. Therefore, only the evaluation of the Applicant’s performance will be considered.

87. In an interim periodic report dated 18 March 2013, the Applicant’s overall performance was evaluated as “[a] staff member who maintains a good standard of efficiency”. However, the report also recorded the Applicant’s weakness in the calculation of medical supplies for the health clinics and her inability to organize her work.

88. In a Note for the Record dated 28 May 2013, the FPSO memorialized a discussion with the Applicant regarding shortcomings in the Applicant’s performance. In another Note for the Record dated 12 July 2013, the FPSO drew the Applicant’s attention to recurrent performance issues, noting that there was no improvement in the Applicant’s work performance. The Tribunal also remarks that the Applicant did not accept the feedback of her supervisor and she even refused to sign one of the Notes.

89. In the periodic report dated 25 July 2013, the Applicant’s overall performance was rated as unsatisfactory. The FPSO recommended “not to appoint her after [her] probation period” and the DCFHP concurred with the recommendation.

90. In view of the Applicant’s performance evaluations, the Tribunal considers that it was in the interest of the Agency to terminate the Applicant’s appointment
after her probationary period. None of the procedural irregularities noted above was an obstacle to a fair evaluation of the Applicant’s performance. While the OTI was not the appropriate process for the evaluation of the Applicant’s performance, and her probationary period was extended beyond the 18-month-time limit, these irregularities did not cause the Applicant any harm. In fact, the extension of her probationary period gave the Applicant more time to improve her performance.

91. In light of the above, the Tribunal considers that the Applicant’s unsatisfactory performance justified the termination of her appointment, and as a consequence, her application must be rejected.

92. Having considered that the contested decisions are lawful, the Tribunal finds that the relief sought by the Applicant has no basis in fact or in law.

Conclusion

93. There is no merit to these applications, and they are dismissed in their entirety.

(Signed) 
Judge Jean-François Cousin
Dated this 7th day of December 2015

Entered in the Register on this 7th day of December 2015

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