Before: Judge Jean-François Cousin

Registry: Amman

Registrar: Laurie McNabb

APPLICATION

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. The Applicant contests the decisions of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to 1) suspend him from duty without pay; 2) demote him one grade; and 3) transfer him outside of the Safety and Security Department.

2. The UNRWA Dispute Tribunal (the “Tribunal”) hereby imposes confidentiality measures *sua sponte* with regard to the Applicant’s name for the welfare of his family.

Facts

3. Effective 1 January 2005, the Applicant was employed by the Agency as Security Supervisor, Grade 5, Step 1 at the Administrative Services Division, Syria Field Office (“SFO”).

4. On 1 February 2010, the Applicant was transferred on promotion to the post of Security and Safety Officer, Grade 12 at SFO, effective 1 November 2012. At the time relevant to the application, the Applicant had received a promotion to Security and Safety Officer, Grade 14.

5. In January 2014, the Director of UNRWA Affairs, Syria (“DUA/SAR”) received allegations that on 25 January 2014, the Applicant had assaulted his wife at the UNRWA, Damascus Training Centre (“DTC”), which is currently an Internally Displaced Persons Centre (“IDP Centre”).

6. On 28 January 2014, the DUA/SAR named a Panel of Investigation (“POI”) to investigate the allegations against the Applicant.

7. By memorandum dated 28 January 2014, the Applicant was notified that an investigation had been initiated with regard to the allegations that he had assaulted his wife and that he was suspended with pay pending the completion of the investigation.

8. On 16 February 2014, the investigation report was submitted to the DUA/SAR. The investigation report concluded that on 25 January 2014, the Applicant had seriously assaulted
his wife on UNRWA property and that it was not an isolated incident. The POI recommended that a disciplinary measure be taken against the Applicant.

9. On 30 March 2014, the DUA/SAR informed the Applicant of the conclusions of the POI and requested that the Applicant provide a written response to the findings of the investigation report within eight days. In an undated letter to the DUA/SAR, the Applicant responded to the POI’s conclusions.

10. By letter dated 21 September 2014 from the DUA/SAR, the Applicant was suspended without pay for a period of four months and demoted to Grade 13 effective upon his return to duty on 24 January 2015. It was further noted that the Applicant could no longer hold any position in the Department of Safety and Security, and that he was required to attend counselling and to sign a document attesting that he would abstain from inflicting any form of violence against a member of his family or any other person.

11. By letter dated 19 October 2014 to the DUA/SAR, the Applicant requested decision review of the imposed disciplinary measures. On 23 November 2014, the Applicant sent his request for decision review to the Deputy Commissioner-General (“DCG”).

12. By letter dated 16 January 2015, the DCG responded to the Applicant’s request for decision review and affirmed the decision to impose disciplinary measures on him.

13. On 18 February 2015, the Applicant filed his application with the Tribunal. The application was transmitted to the Respondent on 22 February 2015.

14. On 24 March 2015, the Respondent submitted his reply. Annex 11, the unredacted report of investigation, was submitted ex parte to the Tribunal.

15. On 31 March 2015, the Tribunal transmitted the Respondent’s reply and a redacted Annex 11 to the Applicant.


17. On 7 October 2015, the Tribunal reminded the Respondent that he had not complied with Order No. 079.
18. On 16 October 2015, the Respondent submitted the translation of his reply. The Applicant was copied on the email.

**Applicant’s contentions**

19. The Applicant contends:

   i) There are many fallacies in the investigation report including the fact that the POI did not try to summon witnesses;

   ii) On 25 January 2014, he had an argument with his wife, but it was not intense and he did not beat her with a stick. Moreover, there were no witnesses to this argument. Throughout eight years of marriage, he has only had two arguments with his wife and they currently reside together;

   iii) There is no Agency Regulation or Rule that “authorises” punishing a staff member for family problems that take place in the family home and not at work;

   iv) There is no national law that “authorises” the interference with family disputes where there is no complaint or crime alleged by the spouse;

   v) Through its investigation the Agency has tarnished his reputation by disclosing private family issues; and

   vi) His entire family is under psychological pressure due to the instability in Syria and the imposed sanctions were too severe.

20. The Applicant requests:

   i) To be reinstated to his former position and at his former grade;

   ii) An Agency-issued official apology;

   iii) To be granted four months’ compensation for the time he was suspended without pay, including the “Provident fund and end of service benefits”;

   iv) Payment for the expenses he has incurred to solve the domestic dispute caused by the Agency; and
v) An Agency-issued “thank you letter” and “recommendation” for his work performance.

Respondent’s contentions

21. The Respondent contends:

i) The decisions to demote and suspend the Applicant without pay were properly effected;

ii) The facts on which the disciplinary measures were based have been established and are supported by evidence, including the Applicant’s admission that he struck his wife;

iii) The POI’s conclusions are supported by witness statements;

iv) The Applicant’s actions constitute misconduct even if they were committed in a private place as UN staff members are obligated to observe standards of conduct at all times and in all places; and

v) The disciplinary measures are not disproportionate as the Commissioner-General has broad discretionary authority.

22. The Respondent requests that the Tribunal dismiss the application in its entirety.

Considerations

23. The Applicant contests the disciplinary measures imposed on him for the incidents that occurred in his family home. The Respondent contends that staff members are obligated to observe standards of conduct at all times and places and therefore the disciplinary measures were properly effected.

24. 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 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.

Facts

25. In late January 2014, the DUA/SAR received allegations that the Applicant had seriously assaulted his wife on 25 January 2014 at the UNRWA DTC. By letter dated 28 January 2014, the DUA/SAR informed the Applicant that a POI had been tasked to investigate the allegations that he had possibly engaged in misconduct. The Applicant was suspended with pay pending the conclusion of the investigation.

26. From 2 to 4 February 2014, the POI interviewed five witnesses, including the Applicant. Three of the witnesses stated that on 25 January 2014, they saw the Applicant’s wife leave her home distraught, dressed in casual house clothes (unveiled) and nursing a bruised and possibly broken hand. According to the Applicant’s neighbours, the Applicant’s wife knocked at their door wailing that she had just had a fight with her husband and that he had beaten her with a stick on the hand. The neighbours called an UNRWA driver and the Applicant’s wife was taken in an UNRWA vehicle to the Jaffa Hospital for medical treatment.

27. In his 4 February 2014 interview, the Applicant admitted that on 25 January 2014 he struck his wife during an argument. Several witnesses also recalled a separate incident on or about 6 November 2013 where the Applicant’s wife suffered a severe head wound that required stitches. One witness recollected that the Applicant called him late one night to come over and watch his children, explaining that he had to take his wife to the hospital. When the witness arrived, he noticed that the Applicant’s wife had “a severe wound on her head and [had] blood all over her face”. Another witness recalled that the Applicant hit his wife on the head with a dish and that “[t]here was blood on her face”. When the Applicant was asked by the POI about his wife’s head wound, he explained that on a separate occasion he and his wife were arguing when he pushed her against a wall and she hit her head. He further noted that he took her to the hospital where she received stitches on the head wound.

28. Based on the above testimonies and the Applicant’s own statements, the Tribunal finds that the facts on which the sanctions are based have been established.
Misconduct

29. The Applicant contests the DUA/SAR’s conclusion that his actions constitute misconduct and contests the imposed disciplinary measures on the following grounds: 1) there is no Agency Regulation or Rule that authorises the Agency to punish him for family problems that take place in the family home and not at work; and 2) because his wife has not filed a complaint in a national court, he has not broken any national law.

30. Area Staff Regulation 1.4 states:

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.

31. In Toukolon 2014-UNAT-407, the Applicant physically assaulted a non-UN staff member at an after-hours gathering at the United Nations Mission in Sudan Log Base. The United Nations Dispute Tribunal (“UNDT”) found that the jurisdictional competence of the Organization did not extend to the physical assault of a non-UN staff member by a staff member. On appeal, the UNAT vacated the UNDT’s ruling holding:

Nowhere in the written law of the Organization is misconduct defined solely in terms of acts committed by staff members against other staff members, and nor could such a proposition be countenanced [.]”

32. The UNDT also reasoned that the Organization should not discipline a staff member suspected of committing misconduct until the case had been dealt with by the national justice system. Rejecting this reasoning the UNAT stated:

Contrary to the UNDT’s reasoning, the United Nations, like intergovernmental organizations world-wide, is empowered by its written law to take disciplinary measures against its staff members in cases of misconduct, irrespective of whether the misconduct is referred to a local court or the accused person is convicted in such proceedings.

33. The UNAT upheld the Administration’s decision to separate the staff member from service for misconduct given that he had assaulted a non-UN staff member on UN property. In the case at hand, the Applicant was found to have committed misconduct when an investigation confirmed that he had assaulted his wife, a non-staff member, at his family home located on UN property. In light of the UNAT’s holding in Toukolon, a physical
assault of a non-staff member by a staff member is considered misconduct as this action is in contravention of UNRWA Area Staff Regulation 1.4. With regard to the Applicant’s second contention, as noted above in Toukolon and in Abu Ghali 2013-UNAT-366 at paragraph 43, the Applicant’s wife does not need to file a complaint nor does he have to be convicted of a crime in the national court for the Agency to impose a disciplinary measure. Furthermore, and contrary to the Applicant’s contention that the Agency has no authority to interfere in his family matters, the Tribunal notes that the assault against the Applicant’s wife on 25 January 2014, happened on UNRWA property and required that an UNRWA Driver, in an UNRWA vehicle, transport the Applicant’s wife to the Jaffa Hospital to treat her injuries.

34. Moreover, domestic violence is contrary to the UN core values as specified in the preamble of the UN Charter:

- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
  * * *

- to promote social progress and better standards of life in the larger freedom.[

35. Based on the above, the Tribunal finds that the established facts qualify as misconduct.

Proportionality

36. The Applicant contests the seriousness of the assaults and claims that the sanctions imposed were too severe. The Applicant also cites to the psychological pressures of living in a conflict zone as a mitigating factor.

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

38. 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 [.]
39. 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”.

40. The imposed disciplinary measures for the Applicant’s misconduct included: 1) suspension without pay for a four-month period; and 2) demotion of one full grade. Considering that the facts have been established that the Applicant committed two serious assaults against his wife on UNRWA property, the Tribunal finds the imposed disciplinary measures to be very mild, recalling that the Applicant in *Toukolon* was separated from service. Moreover, at the material time, the Applicant was a Senior Safety Officer whose mandate was to safeguard and protect staff members and UNRWA property. Given that the disciplinary measures imposed are not the most severe, it is obvious that the DUA/SAR’s decision took into account the mitigating factor of the Applicant’s strained psychological state of living in a conflict zone.

41. Based on the above, the Tribunal finds that the disciplinary measures imposed on the Applicant were not disproportionate to the established misconduct.

42. Lastly, the Applicant also contests the decision to transfer him outside of the Department of Safety and Security and requests to be reinstated to his former position. Area Staff Regulation 4.3 states:

> Due regard shall be paid in the appointment, transfer and promotion of staff to the necessity for securing the highest standards of efficiency, competence and integrity.

43. The UNAT in *Rolland* 2011-UNAT-122, at paragraph 26 has stated that:

> There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one.

44. The Tribunal notes that the Applicant has not provided any evidence or legal reasons why he should not have been transferred outside of Safety and Security or why he should be reinstated to his former post. Therefore, the Tribunal will dismiss this contention.
Conclusion

45. In view of the foregoing, the Tribunal hereby DECIDES:

The application is dismissed.

_______(Signed)_____________
Judge Jean-François Cousin
Dated this 16th day of March 2016

Entered in the Register on this 16th day of March 2016

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