BAGOT

v.

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

JUDGMENT

Counsel for Applicant:
Mathis Kern

Counsel for Respondent:
Lance Bartholomeusz (DLA)
Introduction

1. This is an application by Christopher Bagot (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. As the present case relates to an incident that occurred on 10 January 2014, and some facts of this incident are contested, the contested facts will be addressed in the considerations section of this Judgment.

3. Effective 19 October 2013, the Applicant was employed by the Agency as the Director, Department of Internal Oversight Services (“D/DIOS”) on a fixed-term appointment of two years.

4. By email dated 7 January 2014 to the Applicant, the Director of Enterprise Resource Planning Department (“D/ERP”) requested urgent feedback on a draft paper on “ERP Roles and Access” (“ERP Paper”) that would be submitted to an Implementation Management Group (“IMG”), of which the Applicant was a member, on 16 January 2014. The draft had been prepared by Ms. L, a contractor in the Enterprise Resource Planning Department (“ERP”).

5. By email dated 8 January 2014, the Applicant advised the D/ERP to seek formal input by contacting directly two other colleagues in DIOS. The Applicant provided some informal input after a “quick scan” of the ERP paper and proposed to meet on Sunday afternoon in relation to the informal input.

6. By email dated 8 January 2014 addressed to three persons including the Applicant, Ms. L requested comments from DIOS in relation to the ERP paper.

7. By email dated 8 January 2014, the Applicant forwarded to Ms. L the “quick scan” feedback he had provided to the D/ERP.
8. By email dated 9 January 2014 (5:22 a.m.), the Applicant forwarded to Ms. L the preliminary feedback from his colleagues in DIOS.

9. By email dated 9 January 2014 (12:50 p.m.), a Senior Auditor from DIOS provided feedback to Ms. L in relation to the ERP paper.

10. On Friday, 10 January 2014 (Friday is not a working day), the Applicant met with Ms. L at a local restaurant for lunch. After lunch, they stopped by a nearby liquor store, and then went to the Applicant’s apartment, which was within walking distance from the restaurant. At the Applicant’s apartment they had a discussion about personal matters, followed by physical contact on the part of the Applicant with Ms. L.

11. On 20 January 2014, Ms. L filed a formal complaint of prohibited conduct against the Applicant with the Deputy-Commissioner General. The complaint was forwarded to the Director of Human Resources (“DHR”).

12. On 3 February 2014, the DHR requested the Investigations Division of the United Nations Office of Internal Oversight Services (“OIOS”) to undertake an investigation of Ms. L’s complaint.

13. OIOS conducted an investigation from 3 February to 11 March 2014.

14. Ms. L was interviewed by the OIOS’ investigators on 7 February 2014.

15. Ms. H was interviewed by the OIOS’ investigators on 14 February 2014.

16. The D/ERP was interviewed by the OIOS’ investigators on 16 February 2014.

17. By Notice of Investigation dated 16 February 2014, OIOS notified the Applicant that:

   … (OIOS) is conducting an investigation into allegations that you may have engaged in misconduct as defined in General Staff Circular (GSC) No. 5/2007.

   OIOS has received information alleging that on 10 January 2014 you engaged in prohibited conduct, during a meeting with Ms. [L.]
at a restaurant, [...] and later at your own residence. If found to be true, this would constitute a violation of the UNRWA International Staff Rules and Regulations, which in turn, may amount to misconduct within the meaning of GSC 5/2007.

18. OIOS advised the Applicant that the interview would take place the following day. However, the Applicant requested the interview to start immediately. The Applicant informed OIOS that he “waived the right to 24 hrs”. The Applicant was interviewed by OIOS investigators on the same day.

19. The Senior Auditor, DIOS was interviewed by the OIOS investigators on 17 February 2014.


21. By letter dated 20 March 2014, the DHR summarised the findings of OIOS and provided the Applicant with a redacted OIOS report dated 11 March 2014. The Applicant was later provided with an unredacted version of the report and all the exhibits thereto.

22. On 11 May 2014, the Applicant provided a response to the due process letter dated 20 March 2014 and the investigation report.

23. Following the Applicant’s response, OIOS conducted further interviews with Ms. L and the D/ERP. OIOS then issued a final report dated 23 June 2014.

24. By letter dated 26 June 2014, the DHR summarised the findings of OIOS and provided the Applicant with the final investigation report and additional exhibits.

25. On 21 July 2014, the Applicant provided a response to the final investigation report.

26. On 12 September 2014, the Advisory Committee on Internal Oversight (“ACIO”) convened a special meeting at the request of the Commissioner-General, to review the Applicant’s case. Considering the circumstances, the ACIO appointed the Chief of Staff as Secretary of the special meeting, in lieu of the Applicant who, in his position as the D/DIOS, would otherwise have served as
Secretary pursuant to Article 10, Organization Directive No. 24 ("OD 24") dated 5 October 2012. The minutes of the meeting stated that:

12. The ACIO advised that, when considering the weight of the evidence, the Com-Gen should consider whether there is clear and convincing evidence, considering the totality of the evidence, that there has been prohibited conduct by D/DIOS. The ACIO advised that due attention should be given to areas where there are similarities and discrepancies in the positions set forth by the complainant and D/DIOS, as well as consistencies in the testimony with the behavior of the complainant in the aftermath of the critical incident.

[…]

14. The ACIO advised that the Com-Gen might wish to consider whether, the seniority of the position and the nature of his work and responsibilities, including the code of ethics expected from a professional with the stature of D/DIOS, are relevant to evaluating the complainant’s perceptions.

[…]

16. The ACIO advised the Com-Gen to review the evidence, in its totally, that may support the conclusion that prohibited conduct, in one or more ways, may have occurred. It further advised the Com-Gen to also review the evidence that may support a conclusion that prohibited conduct may not have occurred.

17. The ACIO advised the Com-Gen to consider whether, separate from prohibited conduct, there was evidence of a breach of trust and professional code of ethics by D/DIOS, who is one of UNRWA’s key senior managers.

27. On 15 October 2014, the Commissioner-General and the DHR met with the Applicant to inform him of the Commissioner-General’s decision to terminate the Applicant’s appointment for misconduct effective 18 October 2014. The Commissioner-General’s decision was set out in the letter of the same date, which was given to the Applicant at the meeting.

28. By email dated 15 October 2014 to the DHR, the Applicant “confirmed [his] willingness to offer [his] resignation with immediate effect”.

29. By email dated 16 October 2014, the DHR acknowledged receipt of the Applicant’s email in relation to his resignation and stated that he would need to
tender a formal letter of resignation to the Commissioner-General, latest by close of business 16 October 2014, to which the Agency would commit to reply. The DHR pointed out that by submitting his resignation he would “accept that the Agency [would] communicate to appropriate stakeholders about [his] separation, including text along the following lines:

Following the receipt of a complaint from a member of the Agency’s workforce an independent investigation was conducted by OIOS. Taking into account the evidence, findings and recommendations of that investigation and the advice of the ACIO, the Commissioner-General considered that the allegations were properly made out and the staff member concerned was separated from the Agency”.

30. By email dated 16 October 2014 in response to the DHR’s email, the Applicant withdrew his offer of resignation, and the withdrawal was acknowledged by the DHR.

31. The Applicant’s appointment was terminated for misconduct effective 18 October 2014.

32. On 14 December 2014, the Applicant submitted a request for decision review to the DHR. No response was provided.

33. On 13 April 2015, the Applicant filed an application with the UNRWA Dispute Tribunal (“Tribunal”). The application was transmitted to the Respondent on 14 April 2015.

34. On 14 May 2015, the Respondent filed his reply to the application.

35. On 12 June 2015, the Applicant filed a motion entitled “Request for a Hearing and Calling of Witnesses” (“motion”).

36. On 24 June 2015, the Respondent filed a response to the motion, opposing the request for an oral hearing.

37. On 6 August 2015, the Applicant filed a “Request for Leave to Submit Comments” on the Respondent’s response to his motion.
38. On 14 August 2015, the Respondent filed his “Response to Request for Leave to Submit Comments”, in which he opposed the Applicant’s request to submit comments on his response.

39. By Order No. 103 (UNRWA/DT/2015) dated 21 September 2015, the Applicant’s motion requesting an oral hearing was granted. The Tribunal considered that no further comments were necessary.

40. By Order No. 002 (UNRWA/DT/2016) (“Order No. 002”) dated 17 January 2016, the Tribunal informed the parties that a hearing was scheduled on 22 March 2016 at 10 a.m. at UNRWA Headquarters, Amman. The Tribunal requested the presence of the Applicant, his Counsel and Counsel for the Respondent as well as the Complainant Ms. L, witness Ms. H and the D/ERP.

41. On 25 January 2016, the Respondent filed a response to Order No. 002.

42. On 5 February 2016, the Applicant filed his observations on Order No. 002 and on the Respondent’s response dated 25 January 2016.

43. By Order No. 010 (UNRWA/DT/2016) (“Order No. 010”) dated 8 February 2016, the Tribunal, *inter alia*, granted the Respondent’s request for additional time to finalise his witness list.

44. On 17 February 2016, the Respondent provided his comments on Order No. 010. He reiterated that Ms. L could not give testimony “if she [saw] the Applicant, as seeing him would cause her emotional and physical distress” and proposed that either Ms. L or the Applicant participate in the hearing by video-link. The Respondent advised that the Commissioner-General would testify as a witness.

45. By Order No. 013 (UNRWA/DT/2016) (“Order No. 013”) dated 18 February 2016, the Tribunal accepted that the Commissioner-General would provide in-person testimony at the hearing and transmitted the Respondent’s comments dated 17 February 2016 to the Applicant for his final observations.
46. On 26 February 2016, the Applicant provided his observations as indicated in Order No. 013. He opposed the Respondent’s proposal that either the Applicant or Ms. L participate in the hearing by video-link. The Applicant’s submission was transmitted to the Respondent.

47. By Order No. 017 (UNRWA/DT/2016) dated 1 March 2016, the Tribunal ordered that Ms. L provide testimony in the presence of the parties, including the Applicant, and be cross-examined.

48. By Order No. 019 (UNRWA/DT/2016) dated 14 March 2016, the Tribunal ordered the Applicant to inform the Tribunal whether or not he would participate in the hearing as a witness and be available for cross-examination or only as a party represented by counsel.

49. On 16 March 2016, the Applicant informed the Tribunal that he “will participate as a witness and will be available for cross-examination”.

50. By Order No. 021 (UNRWA/DT/2016) dated 16 March 2016, the Tribunal informed the parties of the final organization and conduct of the hearing.

51. On 22 March 2016, a hearing was conducted in the presence of the Applicant, his Counsel and Counsel for the Respondent. The Commissioner-General, the Applicant, Ms. L, Ms. H and the D/ERP, participated as witnesses. At the close of the hearing, the Tribunal ordered the parties to provide their final submissions in writing within a three-week period.

52. By Order No. 022 (UNRWA/DT/2016) dated 24 March 2016, the Tribunal ordered the parties to file their final submissions by 12 April 2016.

53. On 24 March 2016, the Applicant requested that the three-week period start to run as of “the first working day after they are provided with the recording of the hearing, i.e. on 29 March 2016”.

54. By Order No. 023 (UNRWA/DT/2016) (“Order No. 023”) dated 28 March 2016, the Tribunal rejected the Applicant’s request and ordered the parties to file their final submissions by 12 April 2016.
55. On 12 April 2016, the parties filed their final submissions to the Tribunal as indicated in Order No. 023. The submissions were transmitted to the opposing party, respectively, on 27 April 2016.

Applicant’s contentions

56. The Applicant contends:

i) The contested decision was based on an incorrect standard of proof. OIOS, as well as the Commissioner-General, determined the facts based on a “preponderance of the evidence”, not on “clear and convincing evidence” as required in misconduct cases;

ii) OIOS failed to take the evidence into account properly. The investigation report categorically concludes that Ms. L’s account of the events is correct. OIOS drew incorrect conclusions from the evidence;

iii) The investigation was marred by grave procedural flaws. The Applicant was not informed of the substance of the allegations against him so he was not able to defend himself properly during the investigation;

iv) The Commissioner-General failed to ensure absence of conflict of interest on the part of OIOS and to take measures to mitigate the effect of bias;

v) He was not given the opportunity to respond to the “draft investigative details” contrary to the provisions of the March 2009 OIOS Investigations Manual. The investigation report was finalised without seeking any comment from him. He was not given the opportunity to comment on the documents presented to the ACIO, nor to explain himself before the ACIO. He was not given the opportunity to comment on the recommendations that the ACIO transmitted to the Commissioner-General;
vi) The evidence shows that the charges are unsubstantiated. The meeting between the Applicant and Ms. L on 10 January 2014 was social and not work-related. There was no prohibited conduct because Ms. L consented to having lunch with the Applicant and to going to his apartment to continue drinking after lunch. Ms. L also consented to physical contact, and no force or constraints were applied to her. There was no harassment, sexual or otherwise, and no abuse of power;

vii) The Commissioner-General did not consider exculpatory evidence; and

viii) Agency staff improperly influenced the witnesses called by the Applicant. The purported victim and the only corroborating witness have lied under oath.

57. The Applicant requests:

i) Rescission of the contested decision and reinstatement in his former post;

ii) In the alternative, payment of compensation equal to the full amount of salary and benefits that would have been paid had he remained as the D/DIOS until the ordinary retirement age, or in the further alternative, payment of two years net base salary;

iii) An order to expunge the investigation report and all related material, the due process letters and all related material, and the impugned decision from his personnel file;

iv) If he is not reinstated in his former post, the Agency issue a factually correct certificate of employment mentioning the quality of his work and recommending him to future employers; and

v) Payment of moral damages in the amount of USD50,000 and legal fees in the amount of USD35,000.
Respondent’s contentions

58. The Respondent contends:

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

ii) The facts on which the disciplinary decision was based were established by clear and convincing evidence, obtained through the OIOS investigation. It is clear from the documentary evidence and the testimony of the Commissioner-General at the hearing that the standard of proof applied to the evidence by the decision-maker was “clear and convincing”;

iii) Given the Applicant’s position as the D/DIOS and his previous employment with OIOS/Nairobi and OIOS/Geneva, the Agency chose OIOS/Vienna as the investigating entity specifically to avoid a conflict of interest;

iv) The Applicant’s actions on and around 10 January 2014 towards the Complainant constituted harassment, sexual harassment and abuse of power, which amount to prohibited conduct, thereby misconduct;

v) A proper investigation was carried out by impartial investigators from OIOS;

vi) The Applicant has not provided any convincing evidence that the OIOS investigation was flawed or that the decision to terminate his appointment was made arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or were flawed by procedural irregularity or error of law;

vii) Due process was followed. The Applicant was provided with copies of the OIOS investigation reports dated 11 March 2013 and dated 23 June 2014 and exhibits thereto. The Applicant was provided with opportunities to respond to each of the investigation reports. He also
had ample time to respond to the due process letters, with the assistance of his legal counsel;

viii) The Commissioner-General consulted with the ACIO, pursuant to paragraph 27(c) of the Organization Directive No. 24 (“OD 24”), for an external and independent review of the case;

ix) The sanction of termination for misconduct is proportionate to the serious, compound nature of the conduct and in light of the Applicant’s senior position as the D/DIOS;

x) There is no evidence to support the due process violations raised by the Applicant at the hearing; and

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

59. The Respondent requests:

i) Confidentiality in respect of the Complainant;

ii) Denial of the relief sought by the Applicant; and

iii) Dismissal of the application in its entirety.

Considerations

Preliminary issues

60. The Tribunal held an oral hearing on 22 March 2016 in the presence of the Applicant, his Counsel and Counsel for the Respondent. The UNRWA Commissioner-General, the Applicant, Ms. L, Ms. H and the D/ERP participated as witnesses.

61. While the hearing was recorded, the last part of it, including the D/ERP’s testimony, was not properly recorded due to a technical problem. However, the Tribunal affirms that, in his oral testimony, the D/ERP did not modify his interview statement.
Merits

62. The Applicant contests the UNRWA Commissioner-General’s decision to terminate his appointment for misconduct. The disciplinary measure is based on harassment, sexual harassment and abuse of power. The Applicant claims that the facts on which the sanction is based are not established by clear and convincing evidence and that the alleged facts cannot be qualified as misconduct.

63. The applicable Regulations, Rules and other administrative issuances are the following:

64. International Staff Regulation 10.2 (a) provides:

   The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

65. International Staff Rule 110.3 (b), in effect at the time, provided:

   Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure.

66. General Staff Circular No. 06/2010 on PROHIBITION OF DISCRIMINATION, HARASSMENT – INCLUDING SEXUAL HARASSMENT – AND ABUSE OF POWER (“GSC 06/2010”) provides in paragraph 6 that:

   (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.

   (c) Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern
of behaviour, it can take the form of a single incident. Both males and females can be victims or offenders.

(d) Abuse of power is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his/her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of power may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of power.

67. In disciplinary cases, the role of the Tribunal is determined by the consistent jurisprudence of the United Nations Appeals Tribunal (“UNAT”). In Applicant 2013-UNAT-302, the UNAT held that:

29. Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable” (footnotes omitted).

68. In Messinger 2011-UNAT-123, the UNAT held:

25. 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.

69. The Applicant claims that the Commissioner-General used an incorrect standard of proof in making his decision. It is evident from the decision itself that the Commissioner-General was well aware of the standard of proof required in a
case of termination for misconduct. The Tribunal has to review whether or not the Commissioner-General correctly applied the required standard of proof in the present case.

70. Taking into account that several of the alleged facts are contested by the Applicant and that the required standard of proof is clear and convincing evidence, the Tribunal will base its decision first on non-contested facts, second on material evidence such as emails and text messages and third on testimony where the witness’s credibility is highly probable. Some facts or contentions alleged by the parties are not mentioned in this Judgment because the Tribunal has considered that they are not supported by any evidence and that, for this reason, it is not useful for the Tribunal to address them. Where the Tribunal considers that a fact has been established, and such fact is only supported by oral testimony, this will be indicated.

The facts

71. The Commissioner-General decided to terminate the Applicant’s appointment for misconduct effective 18 October 2014. The Commissioner-General found that the Applicant had engaged in prohibited conduct, specifically harassment, sexual harassment and abuse of power against Ms. L who, at the material time, was a contractor in the ERP Department. The alleged facts occurred on Friday, 10 January 2014, when Ms. L met the Applicant at a restaurant for lunch (Friday is not a working day at UNRWA). After the lunch, they went to the Applicant’s apartment. When Ms. L left the Applicant’s apartment, he drove to her apartment and called her a number of times.

- Purpose of the lunch

72. In his decision, the Commissioner-General considered that the purpose of the lunch was to discuss the ERP paper on which Ms. L was then working. This finding is strongly disputed by the Applicant who claims that the purpose of the lunch was only social. Consequently, the Tribunal has to review whether or not the Commissioner-General’s finding was based on clear and convincing evidence.
73. It is not contested that the Applicant and Ms. L shared a social relationship as part of a group of colleagues who used to meet on Thursday evenings for “happy hours”. By an email dated 26 November 2013, the Applicant invited Ms. L and Ms. H to attend his residence for wine testing during the week of 8 December 2013. Ms. L replied on 11 December 2013 suggesting that they postpone the gathering until “early next year”. On 15 December 2013, Ms. L invited the Applicant and his children, who were visiting him, for lunch at her place. It is also not contested that the Applicant and Ms. L interacted at work with respect to her duties in the ERP Department. At the time of the facts, Ms. L was working on the ERP paper that was going to be presented for discussion at the IMG meeting of 16 January 2014, which the Applicant would attend as the D/DIOS.

74. The evidence shows that Ms. L was very concerned about the ERP paper and eager to obtain DIOS’ comments on the paper before the IMG meeting. She was particularly interested in obtaining the Applicant’s comments as he had extensive expertise in similar issues. Ms. L’s concerns about the ERP paper were confirmed by all witnesses, including the Applicant.

75. Ms. L claims that the purpose of the lunch was to discuss the ERP paper. The Applicant contests the purpose of the lunch and claims that it was only a social event.

76. In order to establish the truth, the Tribunal has to review the chronology of the relevant events and determine first when Ms. L and the Applicant decided to meet for lunch. On 8 January 2014, several emails were exchanged between the Applicant, the D/ERP and Ms. L about the ERP paper and the planned IMG meeting. Although the Applicant and the D/ERP tried to find a suitable time to discuss the ERP paper, this did not materialise. The Applicant had suggested to the D/ERP that they meet on Sunday, 12 January 2014, to discuss the ERP paper. Sunday is a normal working day at UNRWA; however, Sunday 12 January 2014 was a holiday.

77. The evidence shows that upon the D/ERP request, by email dated 8 January 2014 (07:47 a.m.), the Applicant provided some “informal input” to the
D/ERP after a “quick scan” of the ERP paper. The Applicant also advised the D/ERP to seek “formal DIOS input” by contacting directly two other colleagues in DIOS. By email dated 8 January 2014 (11:12 a.m.), the Applicant transmitted to Ms. L the email exchanges that he had with the D/ERP including his “quick scan” comments. By email dated 8 January 2014 (10:31 a.m.), Ms. L sent the draft ERP paper to three colleagues in DIOS, including the Applicant, requesting their feedback by 14 January 2014. By email dated 9 January 2014 (05:22 a.m.), the Applicant transmitted “in confidence” to Ms. L the draft feedback of his colleagues in DIOS in relation to the ERP paper.

78. It is evident from the file, and it has not been contested by Ms. L or the Applicant, that during a telephone call on Wednesday, 8 January 2014, they agreed to have lunch on Friday, 10 January 2014. There is no transcript of the content of their conversation. However, it is clear that Ms. L had an interest in having lunch with the Applicant in order to obtain his complete feedback on the ERP paper. Ms. L’s interest in getting feedback does not necessarily mean that this was her only motive for having lunch with the Applicant.

79. The Tribunal has to review if on the morning of 10 January 2014, Ms. L still had a genuine reason for discussing the ERP paper with the Applicant. The lunch had been decided by a telephone call on 8 January 2014. By email dated 9 January 2014 (05:22 a.m.), the Applicant transmitted “in confidence” to Ms. L the draft feedback of his colleagues in DIOS in relation to the ERP paper. Therefore, the evidence shows that although Ms. L had received the draft feedback of DIOS staff, she did not cancel the lunch meeting. On 9 January 2014 (09:11 a.m.), Ms. L replied to the Applicant by a text message saying “Good morning, thanks for the email. For Friday, shall we lunch at Paul’s in city mall first?? – cannot drink on empty stomach”. In her message to the Applicant, Ms. L did not make any reference to the ERP paper. Furthermore, the phrase “shall we lunch at Paul’s in city mall first” implies that something else had been planned after lunch, and the phrase “cannot drink on empty stomach” can be reasonably understood as if part of the plan was to have alcoholic drinks after lunch.
80. The Tribunal notes that on 11 May 2014, it was the Applicant who brought to the attention of the DHR the existence of the 9 January 2014 text message, which was still recorded on his mobile. The investigators then questioned Ms. L about the content of this message and asked whether she still had a copy of this message in her telephone. Ms. L responded that “I think it’s [sic] been purged . . . I definitely have not deleted anything”. At the hearing, the Applicant claimed that Ms. L had deliberately erased this message from her mobile.

81. In response to Ms. L’s message, on 9 January 2014, the Applicant sent her a text message saying “Thanks for message. As paul’s is opposite end of town from my apartment would it not work better to meet at caspers and gambini in abdoun? The other advantage is you could then help me choose the sparkling wine from my local of licence [sic] for talking [sic] to new year brunch on [S]aturday”. Ms. L replied to the Applicant by another text message saying “Sure, that’s a nice place too. How does 1 o’clock sound? Are you coming tonight?” At this point, it is evident that the Applicant and Ms. L have decided on the venue and the time of their lunch appointment.

82. During her interview and at the hearing, Ms. L repeated that she was hoping to meet the Applicant at the evening gathering of 9 January 2014 and have the opportunity to discuss the ERP paper. However, the evidence shows that the Applicant had already provided some preliminary feedback on 8 January 2014 and had transmitted to Ms. L the feedback of his DIOS’ colleagues on the morning of 9 January 2014. Therefore, there is no material evidence to find that the lunch was only work-related. On the contrary, the text messages that had been exchanged between Ms. L and the Applicant in relation to the lunch of 10 January 2014 have a social context rather than a working framework.

83. The only evidence, other than Ms. L’s testimony, that the lunch of 10 January 2014 had a working purpose is Ms. H’s testimony. In her interview of 14 February 2014, Ms. H stated that she had called the Applicant on 9 January 2014 following a working meeting. According to Ms. H, the Applicant informed her that he was going to meet with Ms. L on 10 January 2014 because “he had concerns about the paper [that Ms. L] had written” and that he “thought that it was
too complicated for the senior management, which is the level of the IMG group that it was going to” and that it “needed … some simpler language”. Ms. H confirmed this in her testimony at the hearing. In his interview of 16 February 2014, the Applicant stated that he did not “recall the conversation at all”. At the hearing, the Applicant testified that he had never discussed the draft ERP paper with Ms. H as it was not of her concern. He pointed out that it is unlikely that Ms. H remembers the content of a telephone call that took place a month prior to her interview with the investigators. The Applicant added that Ms. L and Ms. H were close friends and that Ms. H’s testimony had been fabricated to support Ms. L’s allegations. Even if Ms. L and Ms. H were close friends, the Tribunal notes that Ms. H was also a friend of the Applicant. The Applicant has not alleged, nor is there any evidence in the case file, indicating that Ms. H had a reason to harm the Applicant or that she felt any ill-will towards him. Therefore, the Tribunal considers that Ms. H’s testimony is deemed credible.

84. In light of the above, the Tribunal finds that there is clear and convincing evidence that the purpose of the lunch of 10 January 2014 was, according to the participants, either a social and working event or only a social gathering. Indeed, the Applicant could not have ignored the fact that Ms. L was interested in discussing with him the ERP paper even if the lunch was an informal social gathering. On the other hand, Ms. L could not have ignored the indications that the Applicant was much more interested in having a social engagement with her, including wine tasting and a visit to his apartment, than a discussion about the ERP paper. Therefore, there is no clear and convincing evidence that the Applicant enticed Ms. L to have lunch with him under the pretence that it would be a working lunch to discuss the ERP paper.

85. By a text message sent on 10 January 2014 at 2:44 p.m., Ms. L requested Ms. H to call her at 5:00 p.m. In her interview, Ms. L explained that her intention was to have an excuse to leave if the Applicant prolonged their conversation. The Tribunal does not agree with the finding of the Commissioner-General that this request to Ms. H “is not consistent with an understanding of a social meeting”. The evidence shows that by the time that Ms. L sent the text message to Ms. H, the lunch was over, they had not discussed the ERP paper and they had just
arrived at the Applicant’s apartment. The text message only shows that Ms. L wished to end the gathering at 5:00 p.m. but this is not clear and convincing evidence that she still hoped to discuss the ERP paper with the Applicant. On the contrary, it is equally plausible that her text message could be considered as evidence of Ms. L’s understanding that, from that point on, the conversation would only be social and that she was not willing to stay past 5:00 p.m. at the Applicant’s apartment.

86. In light of the above, the Tribunal holds that the Commissioner-General’s finding in the decision letter dated 15 October 2014 that:

“I agree with OIOS’ conclusion that [the Applicant’s] indication to [Ms. L] that [he] had serious concerns with the ERP paper was ‘only to give cause for meeting [Ms. L] on 10 January 2014’”

is not supported by clear and convincing evidence. This holding is supported by the facts at the restaurant and at the Applicant’s apartment. The Tribunal notes that Ms. L drank two glasses of wine at the restaurant and accepted several alcoholic drinks at the Applicant’s apartment. Her consumption of alcohol was indeed not in accordance with her expectations of a working meeting.

87. In summary, the Tribunal holds that there is no clear and convincing evidence that the discussion of the ERP paper was only an excuse by the Applicant to meet Ms. L on 10 January 2014.

- The lunch

88. Ms. L’s and the Applicant’s versions of the facts at the restaurant on 10 January 2014 are similar. They had lunch and shared a bottle of wine, and the Applicant then ordered another glass of wine for himself. Ms. L claims that she attempted to engage the Applicant in a conversation related to the ERP paper during the time they spent at the restaurant but that he proposed to work on the ERP paper at his apartment. The Applicant denies Ms. L’s contention. There is no evidence of their conversation. However, it has not been contested by Ms. L that she accepted, without hesitation, to go to the Applicant’s apartment after lunch.
89. On the way to the Applicant’s apartment, they stopped at a liquor store. The Applicant bought wine and other alcoholic beverages in preparation for a cocktail night that both would be attending, and as such, he asked Ms. L if he could prepare some cocktail recipes for her to try, to which she agreed.

- The apartment

90. There are not many discrepancies between the Applicant’s and Ms. L’s statements about what occurred at the apartment. It is not contested that they did not discuss the ERP paper, even if Ms. L claims that she tried to do so and the Applicant denies her attempts. The Applicant prepared two cocktails for each, and it is obvious at this stage that Ms. L’s opportunity to discuss the ERP paper had evaporated.

91. It is not contested that Ms. L and the Applicant engaged in discussion of a personal nature at his apartment and that the Applicant explained to her the meaning of some Tarot cards that she had chosen. It has not been contested that there was physical contact between the Applicant and Ms. L. The Applicant massaged her hand and foot and touched her shoulder. Ms. L did not object to the physical contact except when the Applicant put her toe in his mouth and bit it causing her pain. Ms. L also objected when the Applicant put her thumb in his mouth and used the same method apparently to “unblock” barriers. That was the end of the physical contact.

92. It is not contested by Ms. L that she did not answer Ms. H’s calls at 5:00 p.m. and 5:30 p.m. It is established that at 5:55 p.m. Ms. L called Ms. H in order to fabricate an excuse to leave the Applicant’s apartment by feigning a household emergency involving her domestic employee. Ms. L then informed the Applicant that she had to leave immediately due to this emergency. Ms. L called Ms. H again at 6:00 p.m. and continued to feign an emergency situation. The Applicant proposed to drive her home; however, Ms. L left the apartment without giving any further explanation to the Applicant.
- **Following events**

93. After leaving the Applicant’s apartment, Ms. L took a taxi on the street. Ms. L directed the driver to her apartment and called Ms. H at 6:05 p.m. asking her to come to her residence as she was not feeling well. At 6:06 p.m., the Applicant called Ms. L to ascertain what the emergency was and to inform her that he was driving to her house. Ms. L then instructed the taxi driver to go directly to Ms. H’s residence.

94. While waiting at the front of Ms. H’s building to be let in, Ms. L sent the Applicant a text message at 6:21 p.m. telling him that she was with her building’s guard and not to trouble himself. In the meantime, it is not contested that the Applicant drove to Ms. L’s apartment and did not find her there. The Applicant then called Ms. L three times at 6:23 p.m., 6:24 p.m. and 6:26 p.m., but she did not answer. At 6:26 p.m., the Applicant sent a text message to Ms. L informing her that he was outside her building and asking whether she wanted him to “stay or drive back”. The Applicant called Ms. L again at 6:27 p.m., but she did not answer.

95. Ms. H testified that when Ms. L arrived at her apartment, she smelled of alcohol, felt nauseous and vomited twice. At 6:29 p.m., the Applicant called Ms. L, and the duration of the conversation was 17 minutes. During the call, Ms. L put the telephone on speaker and part of the conversation was overheard by Ms. H. The Applicant then returned to his apartment. He sent a text message to Ms. L at 7:12 p.m. and another at 9:20 p.m. to which she did not reply. Ms. L returned to her apartment at about 11:30 p.m. that night.

96. On 11 January 2014 at 5:47 a.m., the Applicant sent a text message to Ms. L in which he apologised for his “options approach” and thanked her for “listening” and giving him “the chance to help”. He also promised to say nothing further on the matter. The same day at 3:26 p.m., the Applicant attempted to call Ms. L but she did not answer.

97. On 12 January 2014, Ms. L forwarded a final draft of the ERP paper to the D/ERP noting that she had not yet received the Applicant’s feedback.
98. On Monday, 13 January 2014, the Applicant provided his feedback on the paper to the D/ERP and separately transmitted the same e-email to Ms. L. In his email to the D/ERP, the Applicant apologised “for not getting comments to [him] yesterday” explaining that he had “no power [in] [his] building most of Saturday” and that the “oil decided to run out sometime during Saturday night”. He added that he “[d]id not have therefore as much time as expected to go through but wanted to get some thoughts to [him]”.

99. On 15 January 2014, Ms. L informed the D/ERP that she could not present the ERP paper at the IMG meeting as an incident had occurred with a “member of senior staff” and that she did not feel safe in Amman. Ms. L did not present the ERP paper at the IMG meeting of 16 January 2014.

100. Following discussions with the D/ERP and the DHR, Ms. L returned to her home in the United Kingdom. On 20 January 2014, Ms. L filed a formal complaint of prohibited conduct with the Deputy-Commissioner General against the Applicant.

101. As stated above, the Tribunal has only included the facts that are supported by clear and convincing evidence. The Tribunal finds that the above-mentioned facts have been established. The Tribunal now has to review whether the established facts qualify as misconduct, in particular, harassment, sexual harassment or abuse of power.

**Misconduct**

- *The lunch*

102. Regardless of who had first proposed to meet on 10 January 2014, it is clear that the Applicant did not put any pressure on Ms. L to have lunch with him on 10 January 2014. As already stated above, the Commissioner-General’s finding that the Applicant’s “indication to [Ms. L] that [he] had serious concerns with the ERP paper was ‘only to give cause for meeting [Ms. L] on 10 January 2014’” is not supported by clear and convincing evidence.
103. At the lunch, it was clear for Ms. L that the Applicant did not want to discuss the ERP paper. Ms. L, who was 40 years old, does not contend that the Applicant had forced her to drink alcohol. Therefore, the Tribunal considers that the Applicant’s actions, prior to and during the lunch, do not qualify as misconduct. Therefore, the established facts in relation to the Applicant’s actions prior to and during the lunch do not constitute harassment, sexual harassment or abuse of power.

- The apartment

104. The Tribunal has no doubt that Ms. L willingly agreed to go to the Applicant’s apartment. The established facts show that Ms. L even helped the Applicant to prepare at least one cocktail at his apartment. Furthermore, the Applicant did not force her to drink the cocktails.

105. There is clear and convincing evidence that the Applicant and Ms. L engaged in a discussion of a personal nature and that there was physical contact between them. The events occurred approximately between 3:00 p.m. and 6:00 p.m. The Tribunal considers that a discussion of a personal nature between two adults, who had previously socialised as part of the same group of friends, cannot be considered as harassment. Ms. L has not alleged that she rejected the physical contact except when the Applicant bit her toe and thumb. It is not contested that the Applicant ended the physical contact at that point.

106. The issue for the Tribunal is to determine whether these facts constitute sexual harassment. The GSC 06/2010 provides that “sexual harassment is any unwelcome sexual advance”. Could the Applicant have been aware that his actions were unwelcome? In the present case, Ms. L is a professional, married woman of around 40 years old who lives in London. The evidence shows that Ms. L and the Applicant had consumed a considerable amount of alcohol and that she did not indicate in any way to the Applicant that she objected to his behaviour until the Applicant bit her toe and thumb. By that time, they had spent almost four hours together, two of which were at the Applicant’s apartment.
107. The Applicant is 55 years old and, as the D/DIOS, he is not the direct supervisor of Ms. L. The evidence shows that they interacted at work in relation to the ERP paper and that they were part of the same group of friends who had organized and attended social events and after work drinks. The Tribunal wonders why Ms. L did not express her disapproval of the Applicant’s behaviour as soon as she felt uncomfortable, or why she did not leave the apartment once the discussion became personal and certainly once the physical contact had started.

108. The Tribunal considers that there was no reason preventing Ms. L from telling the Applicant to stop physical contact. In fact, the evidence shows that he did stop when she clearly told him to do so. Ms. L claims that at around 4:30 p.m., she felt very uncomfortable and at risk but that she did not dare to tell him to stop as he was the D/DIOS. However, there is no evidence of this.

109. The GSC 06/2010 provides that the sexual advances must be “unwelcome”. This means that the alleged offender should reasonably be able to understand that his advances are not welcome. The Applicant and Ms. L did not have an intimate relationship; rather they had a friendly relationship. He invited her to his apartment after lunch, she accepted the invitation and they drank a couple of cocktails. They then engaged in a personal conversation and there was physical contact by the Applicant with Ms. L. The evidence shows that at the beginning of the physical contact, she did not ask him to stop and that when she did, he stopped.

110. In the decision letter dated 15 October 2014, the Commissioner-General states that “the Complainant made reasonable efforts to indicate her lack of consent”. However, there is no clear and convincing evidence to support this finding, except when the Applicant bit her toe and thumb. At that point, Ms. L expressed pain and the Applicant ended the physical contact. The Tribunal finds that up to that point, the Applicant could reasonably consider that his behaviour was not “unwelcome”. Therefore, there is no clear and convincing evidence of sexual harassment at the apartment. This finding is supported by Ms. L’s own statement at the hearing. The Tribunal asked her “in your view, could you say that
you were sexually harassed by the Applicant” and her response was that she did not know.

- **Following events**

111. The events that took place after Ms. L left the Applicant’s apartment are quite different. When Ms. L fabricated an excuse to leave the Applicant’s apartment at around 5:55 p.m. and told him that she had to go immediately due to an emergency, the Applicant proposed to drive her home. She declined his offer. Ms. L then took the opportunity to suddenly leave the apartment when the Applicant had left the room. At this point, the Applicant could have had a reasonable doubt about the alleged emergency situation. Even assuming that the Applicant believed Ms. L’s explanation about the emergency situation, and he wanted to help her, at 6:21 p.m., Ms. L sent him a text message telling him that she was with her building’s guard and not to trouble himself. Nevertheless, he drove to her apartment and did not find her there. The Applicant then called Ms. L three times at 6:23 p.m., 6:24 p.m. and 6:26 p.m. She did not answer the calls. At 6:26 p.m., the Applicant sent a text message to Ms. L informing her that he was outside her building and asking whether she wanted him “to stay or drive back”. The Applicant attempted to call Ms. L again at 6:27 p.m.; however, she did not answer the call.

112. In light of the established facts as mentioned in the paragraph above, the Applicant should have been reasonably aware that, contrary to what Ms. L had mentioned, there was no emergency situation and that she had wanted to leave his company. It was evident that Ms. L was either not at her apartment or she did not want to open the door for him. At this point, no reasonable person could have doubted that the emergency situation was only an excuse to leave his apartment, and that any other action on his part would be unwelcome. However, at 6:29 p.m. the Applicant called Ms. L, she answered the call and they had a conversation for about 17 minutes. Ms. L, who was at Ms. H’s apartment, put the telephone on speaker so that Ms. H could hear the conversation.

113. Ms. H testified that she heard part of the conversation between Ms. L and the Applicant. According to Ms. H, the Applicant talked about “the universe” and
told Ms. L that “we are meant to be together, this is just the universe’s way of giving you a choice”. He went on to say “I am outside your house and I’ll stay here for 2, 3, 4 hours, however long it takes”. According to Ms. H’s testimony, Ms. L told him “no, please don’t concern yourself, please go home, don’t trouble yourself, I’m ok”; however, he responded:

but […] we are meant to be together, we are soul mates, we are destined to be together, the universe had this plan, I understand the universe better than you do, you think that this means that the universe thinks that we shouldn’t be together but I understand this is the way the universe is giving you a choice and the choice is yours but you have to make the choice tonight.

114. In view of the manner in which the meeting at the apartment had ended, the Tribunal finds that it was obvious that Ms. L did not want to talk to the Applicant any further. Therefore, the Applicant’s actions in calling Ms. L six times between 6:06 p.m. and 6:29 p.m. and sending her three text messages between 6:26 p.m. and 9:20 p.m. certainly constituted unwelcome conduct. Furthermore, the content of the 17-minute conversation, as described by Ms. L and Ms. H in their respective testimony, does constitute sexual harassment. The sexual harassment continued on 11 January 2014 when the Applicant sent a text message to Ms. L at 5:47 a.m. and attempted to call her at 3:26 p.m.

115. GSC 06/2010 provides that in order to constitute sexual harassment, apart from an “unwelcome sexual advance”, the behaviour in question “might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, […] or creates an intimidating, hostile or offensive work environment” and that “[w]hile typically involving a pattern of behaviour, it can take the form of a single incident”.

116. In the present case, it has been established in both the statement and the testimony of the D/ERP, who was the Applicant’s supervisor, that Ms. L was very disturbed after the incident. According to the D/ERP, Ms. L did not feel safe in Amman, and she was not able to present the ERP paper at the IMG meeting of 16 January 2014.
117. A few days after the incident and following discussions with the D/ERP and the DHR, Ms. L returned to her home in the United Kingdom.

118. It is highly probable that Ms. L’s reaction was due to her very sensitive nature. However, it is evident that she considered that the Applicant’s actions had caused her “offence or humiliation” and that her work environment had become “hostile” after the incident. Therefore, even if the Tribunal has held above that it has not been established that the purpose of the lunch of 10 January 2014 was a working meeting, the sexual harassment that occurred after Ms. L left the Applicant’s apartment had direct consequences on Ms. L’s work environment, and as such, the requirements imposed by the relevant GSC 06/2010 are met.

**Proportionality**

119. As discussed above, the Tribunal has found that only the Applicant’s actions after Ms. L left his apartment on 10 January 2014 constitute sexual harassment, and as such, misconduct. When misconduct is found to have been committed by a staff member, the Commissioner-General has broad discretionary authority to impose disciplinary measures, and the role of the Tribunal in reviewing his decision is limited.

120. In *Ogorodnikov* 2015-UNAT-549, the UNAT referred in paragraph 30 to *Sanwidi* 2010-UNAT-084 and *Cobarrubias* 2015-UNAT-510, in which it was clearly enunciated that:

... The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:

[w]hen judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
121. In the present case, the Commissioner-General imposed the most severe sanction provided by International Staff Rule 110.3(b), which is dismissal for misconduct. International Staff Rule 110.3 provides in relevant part as follows:

(b) Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure.

122. As the Tribunal has found that only the Applicant’s actions following Ms. L’s departure from his apartment constitute misconduct, the role of the Tribunal now is to review whether the Commissioner-General would have imposed the same disciplinary measure, namely termination for misconduct, had he only considered as misconduct the same facts as the Tribunal.

123. At the hearing, the Commissioner-General explained in detail the reasons for his decision pointing out the advice that he had received from the DHR, the then Acting Director of Legal Affairs and the ACIO. In terms of proportionality of the disciplinary measure imposed, the Commissioner-General noted, *inter alia*, in the decision letter dated 15 October 2014, the following:

- Position (function and seniority) – The perpetration of prohibited conduct by senior management and, in this case, one who has overall responsibility for ethics, investigations, and generally the internal oversight of the Agency, is extremely serious. You held a position of trust that you failed to respect. I further find that your misconduct has undermined my confidence in your ability to carry out the responsibilities of your post and my trust in you as a senior manager.

It is therefore evident that the severity of the sanction imposed to the Applicant was linked to his senior position in the Agency.

124. Once it has been established that the facts amount to sexual harassment, the offender must be sanctioned for misconduct. The Tribunal finds that the misconduct is particularly serious when it involves a senior manager as the D/DIOS. DIOS’ mission is to provide internal oversight services that add value to and support the Agency in achieving its mission. The Applicant, as the D/DIOS, was in charge of supervising the Investigations Division, the Assurance and
Advisory Services Division and the Evaluation Division. The Ethics Office was also administratively attached to DIOS.

125. The Tribunal recalls that its review of the proportionality of a disciplinary measure is limited and that it can only reverse such a sanction if it is absurd or perverse. It is not the role of the Tribunal to consider the correctness of the choice made by the Commissioner-General amongst the various courses of action open to him. In the present case, the Tribunal cannot find that the contested sanction was absurd or perverse even taking into account only the acts committed by the Applicant after Ms. L had left his apartment. Therefore, the Tribunal finds that the Applicant has not established that the contested disciplinary measure was disproportionate.

**Due process**

- **Conflict of interest**

126. At the hearing, the Applicant claimed that the Head of OIOS in the Vienna Office had a conflict of interest. However, he did not provide any specific details in this regard, and he did not explain how the specific investigators in question had a conflict of interest in the present case or were biased against him. The Tribunal considers that if there was a risk of a conflict of interest on the part of the investigators or OIOS Vienna, the Applicant should have made a request for the recusal of the investigators as soon as he knew their names or informed the Agency about a potential conflict of interest on the part of OIOS Vienna.

127. The Tribunal notes that the Applicant did not make any such request during the investigation and that he only raised this issue for the first time, and in very vague terms, in his response dated 21 July 2014 to the final investigation report. Specifically, he pointed out, in relevant part, the following:

> [UNRWA] failed to check whether the multiple indications of bias and unprofessionalism on the part of the investigation team required that the matter be transferred to another investigation body, especially considering that I was employed by OIOS prior to joining UNRWA;
128. Contrary to the Applicant’s claim, the evidence in the case file and the testimony of the Commissioner-General at the hearing show that the Agency took into account the Applicant’s position as the D/DIOS and his previous working experience in OIOS, when the Agency requested the Investigations Division of OIOS, Vienna to conduct an investigation in relation to Ms. L’s complaint. Therefore, the Tribunal considers that the Applicant has not established that there was any conflict of interest on the part of the investigators or OIOS Vienna.

- Failure to inform him of the allegations against him

129. GSC 06/2010 provides in relevant part as follows:

In cases in which the Field Director or DHR decides to proceed with a formal investigation, the alleged offender shall be informed of the allegation(s).

130. UNRWA’s guide to conducting misconduct investigations provides in relation to the Standard of Investigations at page 18, that:

The subject [of an investigation] is entitled to know the substance of the allegations that have been made against him or her and / or the grounds for any adverse comments.

131. By Notice of Investigation dated 16 February 2014, OIOS notified the Applicant that:

The purpose of this memorandum is to inform you that … (OIOS) is conducting an investigation into allegations that you may have engaged in misconduct as defined in General Staff Circular (GSC) No. 5/2007.

OIOS has received information alleging that on 10 January 2014 you engaged in prohibited conduct, during a meeting with Ms. [L] at a restaurant, […] and later at your own residence. If found to be true, this would constitute a violation of the UNRWA International Staff Rules and Regulations, which in turn, may amount to misconduct within the meaning of GSC 5/2007.

132. In Flores 2015-UNAT-525, the UNAT held that:

23. […] The Secretary-General argues that the questions asked during the interview were sufficient for Ms. Flores to understand the allegations against her. However, he does not contradict the
fact that she was not informed prior to the interview what the allegations were. Questioning is not informing. The Appeals Tribunal notes that the jurisprudence cited by the Secretary-General regarding the obligation of the Administration to inform staff members of the charges only when the disciplinary proceedings have been initiated, but not during the preliminary investigation, is immaterial to this case.

133. The record of the Applicant’s interview with the investigators dated 16 February 2014 provides in relevant part the following:

27. [Applicant] do you agree that this morning I served you with a notice of investigation?

28. Yes.

29. And do you agree that within that notice you were informed that we had received a report of misconduct implicating you in relation to a meeting that occurred on the 10th of January 2014 with Ms.[L].

30. Yes (emphasis in the original).

134. The Tribunal notes that the Applicant was informed by Notice of Investigation dated 16 February 2014 that OIOS had received information alleging that on 10 January 2014 he had “engaged in prohibited conduct, during a meeting with Ms. [L] at a restaurant, […] and later at [his] own residence”. The Notice of Investigation refers to possible misconduct within the meaning of the General Staff Circular No. 5/2007 (“GSC 5/2007”) which refers to “Allegations and complaints procedures and protection against retaliation for reporting misconduct and cooperating with audits or investigations”.

135. The Commissioner-General noted in his decision letter dated 15 October 2014 that:

Until OIOS had assessed all of the evidence, it would not have been reasonable or responsible for OIOS to identify specifically which types of prohibited conduct were under investigation. The definition of prohibited conduct under General Staff Circular No. 06/2010, has four elements, three of which are harassment, sexual harassment, and abuse of power. I am of the view that you had sufficient information, at the time of your interview, to discern that you were the subject of an investigation into an allegation that you had perpetrated harassment, sexual harassment, and/or abuse of
power vis-à-vis the Complainant at the meeting on 10 January 2014.

136. Contrary to the Commissioner-General’s finding above, the Applicant was not given any information in relation to allegations of harassment, sexual harassment or abuse of power against him. GSC 5/2007 refers to allegations and complaints procedures and protection against retaliation for reporting misconduct and cooperating with audits or investigations. GSC 06/2010, which refers to the prohibition of discrimination, harassment – including sexual harassment – and abuse of power, was not mentioned in the Notice of Investigation dated 16 February 2014 or by the investigators during the Applicant’s interview.

137. Assuming that the Applicant did not consider that he had been involved in harassment, sexual harassment or abuse of power, he might not have been able to understand the specific allegations raised against him. Furthermore, the reference in the Notice of Investigation to prohibited conduct during a meeting with Ms. L at a restaurant and later at his residence could have led to confusion as in any event, the facts at the restaurant cannot be considered as harassment, sexual harassment or abuse of power.

138. It is clear that the Applicant was not fully aware of the allegations against him during a large part of his interview. According to the transcript of his interview, it was only at paragraph number 746 out of 835 paragraphs in total that he seemed to realise the substance of the allegations that had been made against him. The transcript of his interview provides, in relevant part, the following:

740. And I have been told that subsequent to that, you called her and engaged in quite a lengthy conversation, over a period of 15 minutes?

741. Yes the 17 minute one, yes.

742. Where you told her that you had to come back, that this was the only opportunity to be together, words to the effect that you were soul mates it was the universe giving you a choice?

743. No.

744. And you were destined to be together?
745. No. My conversation was in relation to whether she wanted to come around to continue the conversation or … and also finding out what was going on. No I never, no I have absolutely … I can I have absolutely no recollection at all of any conversation of that type.

746. Wow, well I can understand why I am here (emphasis in the original).

139. The Tribunal notes that during a large part of the interview, the investigators only questioned the Applicant about his role in providing formal or informal feedback in relation to the ERP paper and that they did not address Ms. L’s allegations until the last part of the interview.

140. GSC 06/2010 clearly provides that “the alleged offender shall be informed of the allegations”. It is evident that the Applicant was not properly informed of the allegations against him. The Respondent claims that the Applicant, as the D/DIOS, could not have been unaware that the allegations against him were harassment, sexual harassment and abuse of power. However, as mentioned above, misconduct is a large concept in terms of GSC 5/2007, the only circular that was quoted. The Respondent argues that at his interview, the Applicant was aware of the allegations against him because the Notice of Investigation refers to misconduct and prohibited conduct. However, the interview transcript shows clearly that the Applicant, at least during the main part of the interview, was unaware of the specific allegations against him. The transcript shows that his answers were not clear and that he hesitated in his answers.

141. In any case, GSC 06/2010 clearly provides that the alleged offender shall be informed of the allegations against him and this must be done before the interview. Therefore, the Respondent’s claim that the Applicant could not have been unaware of the allegations against him following the first interview is without any merit.

142. In the present case, there was no reason for the investigators not to inform the Applicant of the specific allegations made against him by Ms. L and that these allegations could be considered as harassment, sexual harassment and abuse of power. The Tribunal notes that by the time the investigators interviewed the
Applicant, they had already interviewed Ms. L, Ms. H and the D/ERP. Ms. L had already left Amman; therefore, there was no fear of any retaliation against Ms. L, who, in any case, was not under the Applicant’s supervision.

143. Therefore, the Tribunal finds that the Applicant’s right to due process was not respected. However, not every irregularity in the process necessarily leads to the annulment of the disciplinary measure. The Tribunal may only annul a disciplinary measure for non-respect of due process when this violation has had grave consequences on the establishment of the facts.

144. As stated above, the Tribunal has decided that only the facts that occurred after Ms. L had left the Applicant’s apartment constitute sexual harassment, and, in particular, the 17-minute call. Therefore, the failure to inform the Applicant about Ms. L’s allegations does not have any consequence on the establishment of the facts as the most relevant evidence in this regard is Ms. H’s testimony and not the Applicant’s interview.

- **Failure to give him the opportunity to respond to the investigative report**

145. The Applicant claims that he did not have the opportunity to reply to the investigation report delivered to him on 9 April 2014 in unredacted form. Page 83 of the March 2009 OIOS Investigations Manual states that:

>[f]airness during the report writing stage means that the United Nations staff members interviewed as subjects are offered the opportunity to respond within a stipulated timeframe on the draft investigation details which support conclusions of possible wrongdoing . . . Specifically, subjects are invited to provide additional information or evidence they deem relevant, and are also afforded the opportunity to comment on the accuracy of facts in the draft investigation details. If a staff member chooses to comment, OIOS will consider the response before finalizing the investigation report. Such responses are annexed to investigation reports.

146. The evidence shows that on 20 March 2014, the Agency provided the Applicant with a redacted OIOS report dated 11 March 2014 and instructed him to submit a response within 14 days. On 30 March 2014, the Applicant requested additional time to respond and further requested that he be provided with the
exhibits referred to in the OIOS report. On 1 April 2014, the Agency agreed to the Applicant’s request for additional time to respond, giving him four weeks from the date he received the exhibits; he received the redacted exhibits on 3 April 2014. On 8 April 2014, the Applicant requested unredacted exhibits and an unredacted OIOS report and further requested that he be permitted to submit his response four weeks after receiving the unredacted documents. On 9 April 2014, the Agency provided the Applicant with the unredacted OIOS report and exhibits and granted the Applicant’s request for an extension of time to respond to 11 May 2014.

147. The Applicant submitted his response to the OIOS report and exhibits by letter dated 11 May 2014. In response to the Applicant’s submission, the investigators conducted additional interviews and reviewed electronic records, which were provided to the Applicant on 26 June 2014. On 2 July 2014, in response to a request from the Applicant, the Agency provided legible copies of specific documents. The Applicant had two weeks from then to submit his final comments. He submitted his final comments on 21 July 2014.

148. The Applicant had been aware of the allegations of misconduct and the details thereof since the date of his interview on 16 February 2014, or at the very least since 9 April 2014 when he was provided with the unredacted versions of the OIOS report and exhibits. His first submission was made more than one month after he received the unredacted report and exhibits, and his final submission was more than two months after that. The Tribunal notes that the evidence consisted of the interviews of four individuals, including the Applicant, and telephone records and emails from a limited time period. The Applicant was well aware of the basis of the allegation, which was his conduct with Ms. L one afternoon and early evening in January 2014 and a few text messages thereafter. The evidence was not so voluminous or complicated that the Applicant, who has counsel, could not submit a response within the time given. Therefore, the Tribunal holds that the Applicant had sufficient opportunity and time to submit his comments on these reports.
• Failure to allow the Applicant an opportunity to comment on the ACIO recommendation

149. As he was entitled to do by OD 24, the Commissioner-General requested advice from the ACIO on the alleged misconduct. The advice of the ACIO is not binding on the Commissioner-General, i.e. he is not required to follow its advice. There is no International Staff Regulation or Rule or other administrative issuance which provides that a staff member subject to a disciplinary process has the right to be heard by the ACIO. Therefore, the Applicant’s contention is without any merit.

150. Therefore, it follows from all that has been said above that only some alleged facts against the Applicant are established by clear and convincing evidence and that these facts constitute sexual harassment and misconduct. The sanction of termination is not disproportionate, and the failure to respect due process did not have consequences on the establishment of the facts.

Conclusion

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

The application is dismissed.

(Signed)________________________
Judge Jean-François Cousin
Dated this 19th day of May 2016

Entered in the Register on this 19th day of May 2016

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