HAMDAN

v.

COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSA)

Counsel for Respondent:
Rachel Evers (DLA)
Introduction

1. This is an application by Jihad Mohammad Hamdan (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 impose on him the disciplinary measure of a fine equivalent of two months’ net salary.

Facts

2. Effective 1 July 2013, the Applicant was employed by the Agency on a fixed-term appointment as Chief Field Education Programme (“CFEP”), Grade 20, in the Jordan Field Office. Following his request, the Applicant’s fixed-term appointment was extended beyond the age of 60 for a period of two years.

3. Subsequent to a number of earlier emails sent by the Applicant to Ms. A.A., the Head, Education Development Centre (“H/EDC”), the Applicant wrote on 16 May 2015 the following to her by email:

   Making excuses is not the way to move forward. This is only just one example. I look forward to a more effective management of the EDC.

4. In her response dated 16 May 2015, the H/EDC complained to the Applicant that she was suffering severe stress from his constant questioning and criticism.

5. On 17 May 2015, the H/EDC submitted a complaint of harassment to the Director of UNRWA Operations, Jordan (“DUO/J) against the Applicant, in which she elaborated on several problems and incidents. The H/EDC referred to one incident in particular where she had been excluded from the interviews of the Heads of the Education Units. The H/EDC further mentioned an incident that occurred during a meeting on 4 May 2015, with Ms. N.K., Head, Field Human
Resources Office ("H/FHRO"), regarding the interview process for the posts of Coordinators of the Education Units. The H/EDC claimed that, during this meeting, she had expressed different points of view from the CFEP, who then had used disrespectful language towards her. She complained that she had been exposed to great pressure to change her opinion concerning the interview process for the Coordinators posts.

6. On 6 June 2015, the Applicant sent an email to the Deputy Director of UNRWA Operations, Jordan ("D/DUO/J"), in which he alleged that the H/EDC was having someone edit her emails before sending them, thus giving a third person access to confidential information. He requested this to be investigated.

7. By two Terms of Reference ("ToR"), dated 10 June 2015 and 30 July 2015, the DUO/J authorised investigation INV 15-112 ("INV 15-112") regarding the H/EDC’s complaint against the CFEP for abuse of power, impartiality, and improper interference in the management of the EDC. Furthermore, the DUO/J authorised to investigate the alleged wrongdoing by the H/EDC in having someone edit her English emails, thus allowing someone inappropriate access to confidential information. The investigation was also to include determining whether the allegation against the H/EDC was retaliatory.

8. On 22 September 2015, the DUO/J received a second complaint against the Applicant submitted by the H/EDC joined by a group of Education Specialists.

9. On 10 December 2015, an Education Specialist submitted another complaint against the Applicant.

10. On 17 December 2015, the Department of Internal Oversight Services ("DIOS") referred a complaint to the DUO/J that had been submitted by Ms. G.S, Head, Professional Development and Curriculum Unit ("H/PDCU") against the H/EDC. On 23 December 2015, the DUO/J added this complaint to the ToR of INV 15-112.
11. On 7 January 2016, another complaint was submitted against the Applicant. An Education Specialist claimed that the Applicant had refused to let her sit for an interview for a vacant post at the PDCU. On 20 January 2016, the DUO/J added this complaint to the ToR of INV 15-112.

12. On 9 February 2016, an Education Specialist at EDC submitted a complaint through the H/EDC to the DUO/J alleging job harassment by the Applicant. This complaint was added by the DUO/J to the ToR of INV 15-112 on 16 February 2016.

13. By email dated 13 April 2016, the Applicant recommended the composition of an interview panel for Education Specialist positions at the EDC. In his recommendation for the panel, he did not include the H/EDC. By email dated 13 April 2016, Ms. N.K., the H/FHRO, reminded the Applicant that the H/EDC could not be excluded from the panel as Education Specialist positions fell under her supervision. By email dated 13 April 2016, the Applicant proposed that the H/EDC be a panel member, but not the Chair of the panel.

14. On 17 May 2016, the Panel of Investigators (“PoI”) submitted its final report on INV 15-112 to the DUO/J.

15. By letter delivered to the Applicant on 8 June 2016, the Head, Field Legal Office Jordan (“H/FLO/J”) informed him that the Agency’s investigation, through documentary and witness evidence, found that he had committed the following acts of misconduct:

- Retaliating against the H/EDC for having expressed her opinion contrary to his with regard to the Unit Coordinator Interviews and in following meetings at the Field Human Resources Office (“FHRO”);
- Humiliating the H/EDC in a meeting held at the FHRO and displaying an abusive attitude towards her in a subsequent meeting;
- Negatively affecting the career of the H/EDC by “beginning to pay close negative attention to work” and “placing unreasonable deadlines”;
- Attempting to undermine the H/EDC, as demonstrated in an email dated 13 April 2016, excluding her from serving on the interview panel for the recruitment of Education Specialists at the EDC.
- Failing to discourage the Area Education Officer, Zarqa from putting pressure on the H/EDC; and
- Ridiculing the Education Specialists by stating that they have a poor level of English.

The letter indicated that the Applicant had the opportunity to respond to the findings of the PoI.

16. By letter dated 5 July 2015, the Applicant was informed by the Human Resources Services Officer, Jordan that his separation from the Agency’s service would be effective as of the close of business on 30 July 2016.

17. By email dated 22 July 2016, the Applicant responded to the 8 June 2016 letter informing him of the charges of misconduct.

18. By email dated 31 July 2016, the DUO/J informed the Applicant that a fine would be deducted from his final payment due upon his retirement from UNRWA. The DUO/J indicated that the determined amount of the fine would be confirmed within 30 days; however, that it would not be less than “30 days’ salary”.

19. By letter dated 24 August 2016, a fine equivalent to two months’ net salary was imposed on the Applicant as a disciplinary measure. The following allegations of misconduct were found established:

- Abuse of power with respect to the H/EDC;
- Retaliation against the H/EDC; and
- Harassment of several other Education Specialists.
20. On 12 September 2016, the Applicant requested decision review of the decision to impose on him the disciplinary measure of a fine of two months’ net salary.

21. On 24 November 2016, the application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). The application was transmitted to the Respondent on 27 November 2016.

22. On 11 January 2017, the Respondent filed a “Motion for Extension of Time” to file his Reply outside the 30 calendar day time limit set out in Article 6(1) of the Rules of Procedure of the Tribunal. On the same day, the motion was transmitted to the Applicant.

23. On 22 January 2017, by Order No. 018 (UNRWA/DT/2017), the Respondent’s motion for an extension of time was granted.

24. On 26 January 2017, the Respondent filed his reply. The reply was transmitted to the Applicant on 29 January 2017.

25. On 2 February 2017, the Applicant filed a “Motion for Leave to Submit Observations and Supplementary Evidence on the Reply of the Respondent”. On the same day, the Applicant’s motion was transmitted to the Respondent.

26. On 13 February 2017, by Order No. 026 (UNRWA/DT/2017) (“Order No. 026”), the Applicant’s motion was granted. Furthermore, in Order No. 026, the Tribunal requested both parties to comment on the issue that some of the incidents underlying the fine seem to have taken place before 1 May 2015, the date of the promulgation of the rule establishing a fine as a disciplinary measure.

27. On 20 February 2017, the Applicant submitted his observations, supplementary evidence and comments pursuant to Order No. 026. The submissions were transmitted to the Respondent on the same day.

28. On 1 March 2017, the Respondent submitted comments pursuant to Order No. 026. On 2 March 2017, the comments were transmitted to the Applicant.
29. On 18 June 2017, by Order No. 077 (UNRWA/DT/2017) ("Order No. 077"), the Respondent was requested to produce to the Tribunal, on an *ex parte* basis, all the exhibits that are listed in the PoI’s report of INV 15-112, which was submitted as an annex to the Respondent’s reply.

30. On 30 June 2017, the Respondent submitted his response to Order No. 077. On 18 July 2017, the Respondent submitted exhibit 5, which was missing from the batch that had been filed on 30 June 2017. On 20 July 2017, the Respondent submitted that there was a mix-up in exhibits 30-32 and that consequently the PoI was asked to prepare a correctly numbered exhibit list, which would then be transmitted to the Tribunal.

31. On 18 July 2017, by Order No. 093 (UNRWA/DT/2017) ("Order No. 093"), the Respondent was requested to produce, on or before 27 July 2017, the decisions of the DUO/J to add to INV 15-112 the complaints against the Applicant which were filed after 30 July 2015. The Respondent submitted his response to this Order on 28 July 2017. The Tribunal accepted the Respondent’s late filing of his response.

32. On 30 July 2017, by Order No. 101 (UNRWA/DT/2017) ("Order No. 101"), the Respondent was requested to inform the Tribunal, on an *ex parte* basis, about certain employment details of the H/EDC. In particular, the Tribunal requested documentation and details of her current position and whether or not she had been confirmed in it. In the event the H/EDC had not been confirmed in the position of H/EDC, the Tribunal requested the reasons therefor and in what position she currently serves. On 3 August 2017, the Respondent submitted his response to Order No. 101.

33. On 11 September 2017, by Order No. 124 (UNRWA/DT/2017), the Tribunal transmitted to the Applicant a redacted copy of INV 15-112, three witness statements and the Respondent’s response to Order No. 093 in redacted form.
34. On 24 September 2017, by Order No. 133 (UNRWA/DT/2017), the Tribunal transmitted to the Applicant exhibit 35 of INV 15-112.

Applicant’s contentions

35. The Applicant contends:

   i) The disciplinary measure is not applicable to him because he had been separated from service and was no longer a staff member. When he initially learned about the decision on 31 July 2016, he was already retired from service;

   ii) The investigation report does not provide concrete evidence to support the allegations made by the H/EDC and the unidentified Education Specialists;

   iii) There is no evidence that the H/EDC “stood against the Applicant’s wishes” in the Unit Coordinator interviews;

   iv) He and the H/FHRO never had a “convenient” working relationship;

   v) The Applicant did not support H/EDC in her dispute with Ms. S.D., who was selected as Head of the Assessment Unit, and for this reason, the H/EDC tried to retaliate against him;

   vi) The report of the PoI fails to explain with concrete examples, the reasons why he suddenly began to scrutinise the work of the H/EDC. Furthermore, the report fails to provide illustrative examples of his micro-management and of him imposing unreasonable deadlines;

   vii) Basing allegations on anonymous witness statements is not acceptable; he should have the right to know the names of the witnesses;
viii) The D/DUO/J and the DUO/J were copied on the email exchanges between him and the H/EDC over a period of a couple of months. They never objected to any of the exchanges;

ix) He never spoke to H/EDC in an unpleasant and humiliating tone. He strongly denies that he ever referred to the H/EDC as “hebleh” [insane];

x) Excluding the H/EDC from the composition of the interview panel was not meant to undermine her. This allegation was not raised by the H/EDC but by the H/FHRO and only after the completion of the investigation;

xi) The nine Education Specialists whom he supposedly had ridiculed are unidentified. Their harassment complaint was not brought to his attention during his interview in the investigation;

xii) The DUO/J deliberately decided to impose a fine of two months’ net salary as he wanted to recover a sum of JOD9,137.380, which the Agency had paid to the University of Jordan on his behalf on the basis of an earlier agreement;

xiii) Investigators are not authorised to investigate beyond the ToR. The evaluation report of the H/EDC was submitted by the Applicant in early December 2015 and, consequently, could not be investigated. The complaint from the EDC Education Specialists was not included in the ToR thus the investigators were not authorised to investigate this complaint;

xiv) He assessed the H/EDC’s performance and rated her as “does not fully meet expectations”, and the H/EDC’s other supervisors all agreed to this rating. There was also an agreement on extending the H/EDC’s probationary period for six months.
After the Applicant’s retirement, the D/DUO/J continued to assess the H/EDC’s performance as poor;

xv) According to his knowledge, the H/EDC had not been confirmed in her post a year after the extension of her probation. The issue of the performance evaluation was not raised by H/EDC and was not included in the ToR issued by the DUO/J;

xvi) In late November 2015, he recommended that the H/EDC’s probationary period be extended until June 2016 on the basis of poor performance. This recommendation was endorsed by the Agency. The decision to extend her probation for another six months after that – until December 2016 – was probably made on the basis of the H/EDC’s poor performance. She was then transferred or seconded to the Faculty of Educational Sciences and Arts (“FESA”), and her post remains vacant; and

xvii) THE H/EDC admits in her complaint that the problems between them are old and go back to a time prior to the selection of the Heads of the Education Units.

36. The Applicant requests:

   i) The reversal of the disciplinary measure and to be repaid the fine; and
   ii) Compensation in the amount of JOD50,000 for moral and reputational damage.

Respondent’s contentions

37. The Respondent contends:

   (i) The issue whether a disciplinary measure can be lawfully issued after the expiry of a contract was settled by the United
Nations Appeals Tribunal ("UNAT") decision in *Gallo* 2016-UNAT-706;

(ii) The Applicant’s contract extension of 20 July 2014 clearly stipulated that this fixed-term contract was extended for two years; starting 1 August 2014 through 31 July 2016;

(iii) The Applicant’s misconduct was established. The PoI established that there was sufficient evidence in support of the allegations against the Applicant;

(iv) The Applicant’s actions, as established by the investigation, constitute misconduct. In imposing the fine, the DUO/J had taken special note of the nature of the Applicant’s post, i.e. a high managerial position and one of particular trust; and

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

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

**Considerations**

*Preliminary issue*

39. On 13 February 2017, by Order No. 026, the Tribunal raised on its own motion the issue of whether or not the fine imposed on the Applicant could be based on incidents that had taken place before 1 May 2015, the date of the promulgation of the rule establishing a fine as a disciplinary measure. After carefully reviewing the submissions of the parties in the case file, the Tribunal concludes that all of the incidents underlying the fine occurred after 1 May 2015. This means that the Tribunal does not need to preclude certain alleged incidents from the case record on the premise of that issue.
40. Furthermore, the Applicant claims that on the date he was fined for misconduct, he, in fact, no longer was a staff member. The Applicant submitted an Agency letter dated 5 July 2016, indicating that his appointment had expired on 30 July 2016. However, as the Respondent has noted, and the Tribunal agrees, that the UNAT in *Gallo* 2016-UNAT-706, has provided a foundation for an answer to the question of whether a disciplinary measure can be imposed after the expiry of the staff member’s employment contract:

17. First, there is no requirement in the Staff Regulations or Rules that provides that the Secretary-General’s discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to Staff Rule 10.2(b)(i) is predicated upon and limited to the existence of an ongoing employment contract. Nor is there any jurisprudence from this Tribunal requiring such an existing employment relationship in order to issue administrative non-disciplinary measures.

18. Second, we agree with the Secretary-General that this reasoning, were it to prevail, would render nugatory those standards of conduct (e.g., confidentiality obligations pursuant to Staff Regulation 1.2(i), amongst others) that survive active service. More importantly, from a practical perspective, it would also stymie the Secretary-General’s ability and discretionary authority to properly manage investigations and discipline staff. The Secretary-General clearly has the authority to administer the Organization’s records, including those of former staff members, and to ensure they reflect the staff member’s performance and conduct during his or her period of employment (footnote omitted). This authority does not lapse upon the staff member’s separation from service. In this regard, we are persuaded by the Secretary-General’s submission that to conclude otherwise would mean that the conduct by a staff member in his or her last days of service could not be recorded in the Organization’s files if the staff member separated prior to such conduct being recorded. As the Secretary-General argued, a staff member could
essentially obviate the Administration’s broad discretion and authority in administrative matters by simply resigning or otherwise separating from the Organization.

41. While noting that this jurisprudence concerns a written reprimand, which is not a disciplinary measure, the Tribunal holds that the reasoning can be applied, *mutatis mutandis*, to circumstances where a fine is imposed as a disciplinary measure. The Tribunal finds that the above-mentioned jurisprudence is applicable and holds that the Agency, as the Secretary-General, was entitled to impose on the Applicant the disciplinary measure of a fine, irrespective of the end date of his contract.

42. It is evident that it does not make sense to impose on a former staff member a disciplinary measure such as suspension or termination. In the case at hand, however, the Agency had not yet paid the Applicant all what was owed according to his employment contract. Imposing a fine in such a case is pragmatic and reasonable.

*ToR of the Investigation*

43. The Applicant claims that multiple issues were investigated without the proper authorisation according to the *ToR* of the investigation. The Tribunal recalls that, according to the contested decision of 24 August 2016, the Applicant was only charged with the following acts of misconduct:

a. Abuse of power and retaliation against the H/EDC; and
b. Harassment of several other staff members serving as Education Specialists at the EDC.

44. The DUO/J’s letter dated 10 June 2015 authorised the PoI to conduct an investigation into allegations of abuse of power and retaliation against the H/EDC. The second letter, dated 30 July 2015, has the same content. The letters are part of the Tribunal’s case file, and the Applicant received both of them. It was only in response to the Tribunal’s Order No. 093 (UNRWA/DT/2017) that the Respondent submitted the DUO/J’s decisions authorising to include other
complaints to INV 15-112. However, the DUO/J’s authorisation to investigate the allegation of harassment of the H/EDC and nine Education Specialists was not provided by the Respondent. Furthermore, the investigators did not interview the Applicant with respect to this matter either. Accordingly, the Tribunal holds that the Applicant cannot be charged with this allegation, which is charge (ii) in the contested decision of 24 August 2016.

Merits

45. In *Jahnsen Lecca* 2014-UNAT-408, the UNAT held:

22. In disciplinary cases, the role of the Dispute Tribunal is established by the consistent jurisprudence of the Appeals Tribunal. As set out in *Applicant*:

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”.

46. By letter dated 8 June 2016, the Applicant was informed by the HFLO/J of the charges rendered against him; furthermore, he was invited to respond to the charges. By letter dated 24 August 2016, the Applicant was informed that only some of the allegations had been established and that the disciplinary measure was based on these established facts.
47. As mentioned above, the Tribunal will only consider the evidence in the case file with respect to the first charge of misconduct in the contested decision of 24 August 2016: abuse of power and retaliation against the H/EDC. The Tribunal will consider whether the facts on which the sanction is based have been established by the evidence, whether these facts constitute misconduct, and whether the imposed fine is proportionate to the misconduct.

Context

48. Following the implementation of the Educational Reform at the EDC in the years 2014-2015, the post of the H/EDC was upgraded from Grade 15 to Grade 17. The H/EDC was automatically promoted to Grade 17. Furthermore, three Education Units were created. The Assessment Unit (“AU”) and the PDCU reported directly to the H/EDC. The School Quality Insurance Unit reported directly to the CFEP, who was also H/EDC’s first supervisor. In November 2014, the selection processes had been conducted for the Head of the AU and the Head of the PDCU, and the H/EDC had not been part of the selection panel.

49. In April 2015, interviews for the selection of the Coordinators of the Education Units were conducted. The selection panel was composed of the Applicant, the H/EDC, the Chief Area Office, Zarqa, and a representative of the HR Department. Following this selection process, several meetings were held with the CFEP, H/EDC and the H/FHRO about irregularities in the candidates’ interviews. Also the H/EDC’s earlier exclusion from the selection panels for the Head of the AU and the Head of the PDCU recruitments was a topic of discussion in these meetings. It is not contested that there had been conflicts between the H/EDC and the Applicant and that this had resulted in more complaints being raised within the EDC.

Abuse of power and retaliation against the H/EDC

50. Paragraph 6 of General Staff Circular (“GSC”) No. 06/2010 provides the definition of “abuse of power”:
(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”. (Emphasis in original)

51. Paragraph 5 of GSC No. 5/2007 provides:

   “Retaliation” means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged or was thought to have engaged or be about to engage in a protected activity.

   “Protected activity” means the action of an individual who –

   (i) reports, in good faith or on reasonable grounds, allegations or complaints of misconduct, misappropriation of Agency assets, fraud, corruption or abuse of authority; or

   (ii) cooperates in good faith with duly authorized audits or investigations.

52. The Agency reproached the Applicant for abuse of power and retaliating against the H/EDC as she did not agree with the Applicant’s introduced selection procedures with respect to the Unit Coordinators, which were in breach of UNRWA rules. Furthermore, the Agency claims that the Applicant abused his power and retaliated against the H/EDC in meetings following the selection procedure of the Unit Coordinators at the FHRO.

53. The first specific act substantiating the charges against the Applicant was that the Applicant started to follow up on the *minutiae* of EDC day-to-day management and copying senior management in related email correspondence.
The Agency concluded that the manner in which this was performed was designed to intimidate and humiliate the H/EDC and create a hostile work environment.

54. The second act substantiating the charges against the Applicant was that he had been attempting to negatively affect the career of the H/EDC by starting to negatively scrutinise her work. The Applicant was also charged with trying to remove the H/EDC from her post by using the performance evaluation system in an unfair manner.

55. The Applicant claims that he did not talk to the H/EDC in an unpleasant and unprofessional tone and that he never stated that she was “hebleh” [insane]. The Applicant submits that there is no concrete evidence to support the allegations of the H/EDC, and he indicates that it is unacceptable that he does not know the names of the witnesses. Furthermore, the Applicant submits that the H/EDC’s poor performance evaluation was agreed to by her other supervisors.

56. The Tribunal notes that it transmitted to the Applicant a copy of all the testimonies and interviews on which this Judgment is based. Therefore, the Applicant cannot claim that the charges against him were based on anonymous witness statements.

57. After reviewing the case file, the Tribunal finds the following. Subsequent to the interviews for the Unit Coordinators positions, several meetings took place between the H/FHRO, the Applicant and other attendees. In her witness statement before the investigators, the H/FHRO stated about the Applicant:

    [h]e said very sarcastically to [the H/EDC] “we explained it in Arabic to you so you can’t pretend you didn’t understand”.

Furthermore, the H/FHRO stated that, in a subsequent meeting between herself, the Applicant and other staff members present, he had stated:

    [The H/EDC] is stupid and totally incompetent… I am her supervisor. She should know better than to go against my ratings. She should not do so in the future.
58. In her witness statement before the investigators, Ms. M.A. declared that the H/EDC was scared to say anything in meetings with the Applicant. Ms. M.A. stated that:

[i]t was clear that there was a conflict between Jihad Hamdan but Ms. A.A. was not able to vocalise because she was so afraid.

59. In the case record, there are copies of several emails sent by the Applicant to the H/EDC, about day to day work without any specific importance, all the while copying the D/DUO/J on the emails. These emails, which were sent from May 2015 onwards, were mostly negative for the H/EDC. In her witness statement, the D/DUO/J declared:

I noticed an accelerated exchange of emails on petty issues that could have been easily resolved between CFEP and AA if they had good working relations. I was copied deliberately as each one was trying to make a case against the other with me as a witness.

* * *

CFEP is arrogant and dismissive to staff. He couldn’t forgive A.A. for undermining his recruitment preferences in the Unit Coordinator interviews.

60. After reviewing the multiple emails and the above-mentioned witness statements, the Tribunal concludes that the Applicant indeed was intimidating and humiliating the H/EDC. The Tribunal finds that the above-mentioned statements clearly establish that the Applicant was speaking negatively to and about the H/EDC in front of other staff members. Furthermore, it is clear from the evidence in the case file that the H/EDC was terrified of the Applicant.

61. In the H/EDC’s 2014 Performance Evaluation Report (“PER”), the Applicant gave her an overall rating of “fully meets expectations”, and in the comments section, he described her as a hard working colleague. However, in the first draft of her 2015 PER, the Applicant rated her as “not meeting expectations” on nine out of 12 competencies. With the intervention of the Executive Office in
the Jordan Field Office, the ratings in her 2015 PER were adjusted to reflect that seven out of 12 competencies were rated as “not meeting expectations”. The DUO/J decided to extend the probationary period of the H/EDC for six months. These facts are not contested.

62. As the Tribunal learned that the H/EDC was confirmed in her position after the extension of the probationary period, the Tribunal concludes that the Applicant’s evaluation of her performance was either an act of retaliation or at the very least abuse of power.

63. The Tribunal finds that retaliation has also been established in the Applicant’s attempts to exclude the H/EDC from the selection panel for the recruitment of the Unit Coordinators positions. The Tribunal holds that there is no doubt about the Applicant’s wish to exclude the H/EDC from that selection panel, and that she was later recommended by him only following requests from the Department of HR.

64. The Tribunal’s view is that it is established that the Applicant engaged in actions in violation of the Agency’s regulatory framework and committed acts as retaliation and abuse of power against the H/EDC, and that these actions constitute misconduct.

65. Under Area Staff Regulation 10.2:

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

66. Area Staff Rule 110.1 provides that:

   1. Failure by a staff member to comply with his or her obligation under the Charter of the United Nations, the UNRWA Area Staff Regulations and UNRWA Area Staff Rules to other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process
and the imposition of a disciplinary measure for misconduct.

* * *

67. Disciplinary measures under Area Staff Regulation10.2 may take one or more of the following forms only:

* * *

e. fine;

68. Area Personnel Directive A/10/Rev.2 effective 1 May 2015 provides as forms of disciplinary measure as follows:

17. Fine: A fine is imposed on a staff member by deducting the amount from the staff member’s net monthly salary, including allowances, or, in the alternative, the official imposing such measure may agree with the staff member on alternative means of payment, such as by bank cheque or personal cheque from the staff member.

69. Now the Tribunal has to decide if the disciplinary measure of a fine in the amount of two months’ net salary is proportionate to the acts regarded as misconduct by the Tribunal.

Proportionality

70. As the disciplinary measure was taken at the same time as the end of the Applicant’s appointment, the only disciplinary measure that could be imposed was, in fact, a fine. As discussed above, the Tribunal has found that only the Applicant’s harassment and retaliation of the H/EDC are established and constitute misconduct. The role of the Tribunal now is to review whether the Commissioner-General would have imposed the same disciplinary measure, had he only considered as misconduct the same facts as the Tribunal.

71. 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.

72. When considering proportionality, the Tribunal takes special note of the nature of an applicant’s post, as held by the UNAT in Haniya 2010-UNAT-024. The Respondent submitted that the DUO/J in imposing the fine took into account the high managerial position of the Applicant. It is therefore evident to the Tribunal that the severity of the sanction imposed on the Applicant was linked to his senior position in the Agency. Once it has been established that the facts amount to abuse of power and harassment, the offender must be sanctioned. As the Respondent notes, and the Tribunal agrees, the misconduct is particularly serious when it involves a senior manager as the CFEP.

73. In the present case, the Tribunal cannot find that the contested sanction was absurd or perverse and the Tribunal recalls that the fine was the only appropriate disciplinary measure.
Conclusion

74. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 10th day of October 2017

Entered in the Register on this 10th day of October 2017

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman