Before: Judge Jean-François Cousin

Registry: Amman

Registrar: Laurie McNabb

ATAYA

v.

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

JUDGMENT

Counsel for Applicant: Self-represented

Counsel for Respondent: Rachel Evers (DLA)
Introduction

1. This is an application by Hisham Ataya (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” or the “Agency”), to impose on him the disciplinary measure of one month suspension from duty without pay for breaching the Agency’s neutrality principles.

Facts

2. On 12 December 2010, the Applicant entered the service of the Agency as Trade Instructor at UNRWA’s Wadi Al Seer Training Centre.

3. On 16 December 2015, the Director of UNRWA Operations, Jordan (“DUO/J”) authorised an investigation into allegations of misconduct against the Applicant. As part of the investigation, a screenshot of a Facebook page was taken which contained, inter alia, a picture of a faction leader and a comment supporting martyrdom operations and vengeance.

4. On 14 March 2016, the Agency sent a due process letter to the Applicant containing a summary of the findings of the investigation.

5. On 21 March 2016, the Applicant responded to the due process letter.

6. By letter dated 21 May 2017, the DUO/J informed the Applicant that he had decided to suspend him for one month without pay for misconduct, i.e. breaching the Agency’s neutrality principles. The letter recalled that it had been established that he had made a comment on the “timeline” of the Facebook account of another individual, which included content that is offensive, incompatible with his neutrality obligations, and not befitting the status of a United Nations staff member.
7. On 4 June 2017, the Applicant requested decision review.

8. On 21 September 2017, the application was filed with the UNRWA Dispute Tribunal (the “Tribunal”). It was transmitted to the Respondent on 28 September 2017.

9. On 27 October 2017, the Respondent filed a “Motion for Extension of Time to File a Reply” outside the 30-day time limit set out in Article 6(1) of the Rules of Procedure of the Tribunal (“motion”). On 29 October 2017, the motion was transmitted to the Applicant.

10. By Order No. 156 (UNRWA/DT/2017) dated 8 November 2017, the Respondent’s motion was granted.

11. On 22 November 2017, the Respondent filed his reply. The Reply was transmitted to the Applicant on 23 November 2017.

12. On 6 December 2017, the Respondent filed a “Motion for Extension of Time to Translate a Reply”. On the same day the motion was transmitted to the Applicant.

13. By Order No. 182 (UNRWA/DT/2017) dated 17 December 2017, the Respondent’s motion was granted.

14. On 21 December 2017, the Respondent filed the Arabic translation of his reply. The translation was transmitted to the Applicant on the same day.

15. By Order No. 187 (UNRWA/DT/2018) dated 23 October 2018, the Tribunal ordered the Respondent to provide the investigation report and other documents.

16. On 29 October 2018, the Respondent filed the requested documents. The Respondent’s submission was transmitted to the Applicant on 30 October 2018.
Applicant’s contentions

17. The Applicant contends:

   i) His rights as an UNRWA staff member were violated;

   ii) He was sanctioned for something he did not do; he was not the author of the comment. Even if he had posted the picture and comment, he should not be blamed as he is a refugee and Palestine is his homeland;

   iii) He had not received any instructions or training on neutrality; and

   iv) Freedom of expression is one of the Agency’s principles.

18. The Applicant requests:

   i) Cancellation of the disciplinary measure and its removal from all his files; and

   ii) Compensation for the psychological and moral consequences he sustained due to the Agency’s decision.

Respondent’s contentions

19. The Respondent contends:

   i) The disciplinary measure was properly taken in accordance with the relevant regulatory framework;

   ii) Failure to secure the Applicant’s account does not justify his misconduct;

   iii) Ignorance of the regulatory framework is no excuse for misconduct;

   iv) The Applicant has failed to identify any relevant legal provision justifying his misconduct; and

   v) The compensation sought by the Applicant has no legal basis.
20. The Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

21. The Applicant challenges the decision of the Respondent to impose on him the disciplinary measure of one month’s suspension without pay. The Respondent submits that the Applicant breached the Agency’s neutrality principles and therefore the disciplinary measure was properly effected. The following provides the Agency’s regulatory framework applicable in this case.

22. Area Staff Regulation 1.1:

Staff members, by accepting appointment, pledge themselves to discharge their functions with the interests of the Agency only in view.

23. Area Staff Regulation 1.4:

Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their employment with the Agency.

24. Area Staff Regulation 1.7:

Staff members may exercise the right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status.

25. Area Staff Personnel Directive A/1/Part V (1) (“PD A/1”), effective 1 July 2007:

In accordance with the established principles and practice of the United Nations, staff members are required to maintain at
all times, in both their official and their private conduct, the
independence and impartiality which is implicit in their status
as Agency staff […]

26. The Tribunal recalls that, on 22 June 2012, the Commissioner-General
issued a four page letter (“C-G 2012 Letter”) to staff reminding them of the four
universal principles that serve as the foundation for all humanitarian action
worldwide, including UNRWA’s: humanity, neutrality, impartiality and
operational independence. The letter also sets out, inter alia, the general conduct
that is expected of UNRWA staff members and addresses how their involvement
in political activities could jeopardise the independence and impartiality that all
must maintain as UNRWA staff members. Indeed, the general conduct
specifically states that “[s]taff cannot make any action or public statements that
may negatively reflect on UNRWA and the UN, or call into question their
adherence to the universal humanitarian principles of humanity, neutrality,
independence and impartiality”.

27. The Tribunal refers to parts of the Jordan Field Staff Circular on Neutrality
No. J/13/2014 (“2014 Circular”), dated 22 April 2014, which are of particular
relevance:

You must refrain at all times from words or actions that are
political in nature or could be perceived as such.

[…]

The Agency appreciates that social media platforms create
dynamic new opportunities for communications, and
recognizes the benefits of these tools while acknowledging
associated risks and challenges that may have serious and
harmful impact on the Agency’s reputation and/or future
funding.

Being public platforms, UNRWA personnel’s use of websites
and social media may be subject to UNRWA’s rules and
regulations. In this context, UNRWA personnel, including
staff unions, are reminded to conform at all times to
UNRWA’s rules and regulations pertaining to neutrality and
impartiality, and that their engagement in social media remain
subject to the Agency’s regulatory framework regarding staff
conduct including UNRWA staff Relations [sic], Rules,
Personnel Directives, other administrative issuances and the
Standards of Conduct for the International Civil Service. Therefore, any staff participation on websites or social media that can be perceived in breach of the regulatory framework may constitute misconduct and consequently may warrant the imposition of disciplinary measure(s).

Where staff are in doubt of their obligations or require further clarification or interpretation of the rules, they should contact the Human Resource Department [...] who will be happy to provide advice.

28. Furthermore, the Respondent submitted to the Tribunal a “Neutrality Factsheet” dated March 2011. The Respondent also refers to the “Agency-wide online Ethics e-learning course” launched in January 2013, which addressed the principle of neutrality.

29. As held by the former United Nations Administrative Tribunal in Judgement No. 1321, Derecha (2007), at paragraph IX:

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

30. Guided by the jurisprudence of the United Nations Appeals Tribunal (the “UNAT”) in Haniya 2010-UNAT-024 and Maslamani 2010-UNAT-028, when reviewing a disciplinary measure the Tribunal will consider (i) whether the facts on which the sanction is based have been established, (ii) whether the established facts qualify as misconduct, and (iii) whether the sanction imposed is proportionate to the offence. However, as held by the UNAT in Abu Hamda 2010-UNAT-022, at paragraph 37, the Tribunal notes that:

   […] [a]s a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety […]
The facts

31. On 16 December 2015, the DUO/J authorised an investigation into allegations of misconduct by the Applicant.

32. The Agency sent a due process letter on 14 March 2016. The Applicant responded on 21 March 2016. He contested that he wrote the statement, claiming that his family and friends also knew the password for his Facebook account. Assuming that this is true, the Tribunal considers that it is still the Applicant’s responsibility to ensure that his Facebook account is used in accordance with the UNRWA regulatory framework.

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

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

34. Based on the above, the Tribunal concludes that the facts on which the contested decision was based are established. The Applicant is responsible to ensure that his Facebook account is used in accordance with the UNRWA regulatory framework. In the case at hand, the Applicant failed to do so.

Misconduct

35. The applicable regulatory and administrative framework was in effect at the time the Applicant’s posting was still on Facebook. Therefore, the Applicant cannot claim that he was unaware of the Agency’s neutrality principles and the fact that publishing non-neutral material was prohibited. It is clear that the Applicant breached the Agency’s neutrality principles as enunciated in the aforementioned Regulations, Circulars and other relevant administrative issuances, and consequently engaged in misconduct. Indeed, PD A/1, dating back
to July 2007, requires staff to maintain at all times in both their official and their private conduct the impartiality implicit in their status as staff of a UN Agency. The 2014 Circular stipulates that any staff participation on websites or social media that can be perceived in breach of the regulatory framework may constitute misconduct and consequently may warrant the imposition of disciplinary measure(s). The Applicant, as an Instructor, should have known that the images he posted on Facebook were in violation of the Agency’s neutrality principles.

36. The Respondent rightly submits that it is critical for UNRWA, as a UN Agency seeking to assist and protect refugees, to vigorously safeguard the trust it has gained from beneficiaries, donors, host nations, parties to the conflict and other stakeholders. To maintain this trust and secure donor funding, the Agency must adhere to core humanitarian principles, neutrality being one of them. Moreover, it is indispensable for the safety and security of UNRWA personnel and property as well as for the ability of its staff to deliver services to the refugees effectively.

37. With respect to the Applicant’s other contentions, the Tribunal finds that they are without merit. The Tribunal emphasises that it is important for the Applicant to distinguish between his right to have an opinion and his conduct as an Agency staff member. His conduct must reflect at all times the “impartiality”, “reserve” and “tact” referred to in the regulatory and administrative framework of the Agency. Indeed, General Staff Circular No. 07/2014 on the Revised Standards of Conduct for International Civil Service states in paragraph 9:

[…] While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters, either individually or as members of a group, irrespective of the medium used. This can mean that, in certain situations, personal views should be expressed only with tact and discretion.

38. As long as he is employed by the Agency, the Applicant must adhere to those principles.
Proportionality

39. As determined by the UNAT in Aqel 2010-UNAT-040, paragraph 35, the level of sanction falls within the ambit of the Administration and can only be reviewed in cases of obvious absurdity or flagrant arbitrariness.

40. When considering proportionality, and while recognizing the Commissioner-General’s broad discretionary power in relation to disciplinary matters, including the proper sanction for misconduct, the Tribunal takes special note of the nature of an applicant’s post. Referring to the conduct of a staff member, the UNAT in Haniya 2010-UNAT-024 held at paragraph 34:

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

41. In the case at bar, the Applicant is an Instructor at UNRWA’s Wadi Al Seer Training center, and, as such, his conduct was all the more serious, as he is well educated and has the duty to show regard for UN values and to act in line with the standards of conduct expected of a UN civil servant. The Tribunal would like to recall that the imposed disciplinary measure of one month’s suspension without pay is not the most severe measure that the Agency can impose on a staff member.

42. Having determined that (1) the facts on which the disciplinary measure, i.e. one month’s suspension without pay, was based have been reasonably established; (2) the facts legally support the conclusion of misconduct; (3) the disciplinary measure was proportionate to the offence; and (4) the Respondent’s discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law, the Tribunal finds that the Applicant’s request for relief has no basis in fact or in law.
Conclusion

43. Given all of the above, the application is dismissed.

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Judge Jean-François Cousin

Dated this 14th day of November 2018

Entered in the Register on this 14th day of November 2018

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Laurie McNabb, Registrar, UNRWA DT, Amman