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

ABU GHALI

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 Adel Ali Abu Ghali ("Applicant") against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA ("Respondent"), to impose on him the disciplinary measure of separation from service without termination indemnity.

Facts

2. Effective 8 October 1984, the Applicant was employed by the Agency, as Practical Nurse at Bureij Health Centre, Grade 4, Step 1, Gaza Field Office ("GFO"). At the time material to the events of the present application, the Applicant was employed as Practical Nurse, Grade HL2, Step 14, at Tal El Sultan Health Centre, Rafah Area, GFO.

3. On 6 October 2016, allegations of improper conduct committed by the Applicant against a beneficiary ("Complainant") were reported to the Field Legal Office, GFO ("FLO/GFO").

4. On 16 October 2016, the Applicant was temporarily transferred to another Health Centre.

5. On 6 November 2016, the Director of UNRWA Operations, Gaza ("DUO/G") issued the terms of reference for an investigation to be conducted into the allegations raised against the Applicant.

6. On 26 March 2017, the investigation was concluded, followed by the Report of Investigation.

7. On 28 November 2017, the DUO/G issued the Applicant a due process letter, informing him of the findings of the investigation and inviting him to respond to the allegations.

8. On 11 December 2017, the Applicant responded to the due process letter and rejected the allegations against him.
9. On 11 February 2018, the DUO/G sought the agreement of the Director of Human Resources (“DHR”) and Director of Legal Affairs (“DLA”) to impose on the Applicant the disciplinary measure of separation from service with termination indemnity, in accordance with paragraph 23(b) of Area Personnel Directive No. A/10/Rev.3 on Disciplinary Measures and Procedures (“PD A/10”).

10. On 16 April 2018, the DHR and DLA agreed with the disciplinary measure of separation from service; however, they recommended that separation be without termination indemnity.

11. On 16 May 2018, the DUO/G imposed on the Applicant the disciplinary measure of separation from service without termination indemnity.

12. On 24 June 2018, the Applicant submitted a request for decision review.

13. On 28 August 2018, the present application was filed with the UNRWA Dispute Tribunal (“Tribunal”). The application was transmitted to the Respondent on 4 September 2018.

14. On 4 October 2018, the Respondent filed a motion for an extension of time to file his reply. The motion was transmitted to the Applicant on the same day.

15. By Order No. 176 (UNRWA/DT/2018) dated 15 October 2018, the Tribunal granted the Respondent’s motion for an extension of time to file his reply.

16. On 22 November 2018, the Respondent filed his reply. The reply was transmitted to the Applicant on 29 November 2018.

17. On 6 December 2018, the Respondent filed a motion for an extension of time to translate his reply. The motion was transmitted to the Applicant on 9 December 2018.


19. On 21 February 2019, the Respondent filed the Arabic translation of his reply. The translation was transmitted to the Applicant on the same day.
Applicant’s contentions

20. The Applicant contends:

i) The allegations against him are extremely offending, given the fact that he is 56 years old and has grandchildren;

ii) The Investigator did not take the statements of the witnesses he had proposed;

iii) He has certificates of “good character” from relevant authorities; and

iv) No criminal investigation was initiated against him by local authorities regarding the allegations in question.

21. The Applicant requests rescission of the disciplinary measure and to be reinstated.

Respondent’s contentions

22. The Respondent contends:

i) The disciplinary measure was properly effected in accordance with the Agency’s relevant regulatory framework;

ii) The facts upon which the disciplinary measure was based were established by clear and convincing evidence given the high credibility of the Complainant;

iii) The Complainant provided a consistent and detailed account of events; first, in the form of oral accounts provided to three family members immediately after the incident; second, with a written complaint to the Applicant’s supervisor two days after the incident; and third, by her statements made during an interview with the Investigator;

iv) There is no evidence that the Complainant would have had a malicious motive to file such a complaint against the Applicant;
v) The lack of eyewitness does not affect the Complainant’s credibility, as she claimed that the incident took place behind closed doors;

vi) The Applicant’s witnesses would not have been relevant, as they were only going to testify about the Applicant’s “good character”;

vii) The facts upon which the disciplinary measure was based constituted serious misconduct;

viii) The disciplinary measure imposed was proportionate to the severity of the serious misconduct committed by the Applicant;

ix) The Applicant has failed to provide any evidence that the impugned decision was arbitrary or capricious, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law; and

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

23. The Respondent requests the Tribunal to dismiss the application in its entirety.

Considerations

24. The Applicant contests the decision to impose on him the disciplinary measure of separation from service without termination indemnity. The Applicant denies the allegations.

25. With respect to the standard of review in disciplinary cases, the United Nations Appeals Tribunal (“UNAT”) held in Negussie 2016-UNAT-700, paragraph 18, as follows:

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”.

26. Therefore, the Tribunal must first ascertain whether the facts on which the sanction is based have been established by clear and convincing evidence before determining whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

Establishment of facts

27. Following allegations of misconduct against the Applicant for sexually exploiting and abusing a beneficiary, on 6 November 2016, the DUO/G issued the terms of reference for an investigation. On 26 March 2017, the investigation was concluded.

28. The facts obtained during the investigation show that on 3 October 2016, the Complainant visited the Health Centre for medical tests in order to be provided with the necessary prescription for her insulin medications, as she had run out of medications. The Applicant asked the Complainant to wait until the end of working hours; however, the Complainant left and came back early the following morning.

29. The Report of Investigation concludes that, on 4 October 2016, the Applicant sexually abused and exploited the Complainant when he conducted, on his own, a medical examination of the Complainant in his office. It was determined that the Applicant had closed and locked the door of his office, requested the Complainant to remove her hijab and tried to massage her neck on the pretext of the tightness in her neck muscles. Later, the Applicant told the Complainant that the tightness in her neck was related to her legs and asked her to raise her dress. When the Complainant refused, the Applicant yelled at her saying that this was his job, used unbecoming language, grabbed her, kissed her hands, forced her pants down, rubbed her legs and touched her inappropriately.
30. Based on the Report of Investigation and the recommendations of the DHR and DLA, on 16 May 2018, the DUO/G imposed on the Applicant the contested disciplinary measure.

31. The Applicant does not deny the fact of the Complainant’s visit to the Health Centre. However, he asserts that the door to his office is always open and that the area outside of his office is always crowded, indicating that it would have been impossible for him to have committed the acts he has been accused of.

32. It is not contested that there were no eyewitnesses to the incident. The Tribunal must therefore assess the credibility of the Complainant. First, immediately after the incident, the Complainant provided an account of the incident to her husband and two members of her family. Second, two days after the incident, she submitted a written complaint to the Applicant’s supervisor. Third, there is no evidence that the Complainant had or would have had a reason for a malicious motive to file such a complaint against the Applicant. In addition, it is clear from the case record, including her statement during the interview with the Investigator, that the Complainant has always provided a consistent and detailed account of the incident.

33. The Applicant’s implied contention that this incident could not have happened because of the crowded area outside his office is contradicted by his colleague, who was in charge of the Health Centre on the day of the incident. This witness indicated that, at the alleged time of the incident, the Health Centre was not crowded. The Applicant’s claim that it would have been impossible for him to keep the Complainant in his office for a long time is also contradicted by the Complainant’s account. The Complainant stated that she, in fact, had stayed for a brief time in the Applicant’s office, that the incident had happened abruptly and that she had left the office immediately. Consequently, the Tribunal holds that, in the present case, there exists no material facts that would render the Complainant’s allegations doubtful.

34. The Applicant also contends that the investigation was flawed, as the Investigator did not interview the witnesses he had proposed, namely the Complainant’s mother and sister. In this regard, the Tribunal agrees with the
Respondent that these witnesses would not have been relevant as they were only going to testify about the Applicant’s “good character”.

35. In accordance with the above-quoted UNAT’s jurisprudence with respect to the standard of proof in termination cases, the Tribunal needs to determine whether it is highly probable that the Applicant sexually abused and exploited the Complainant.

36. In a recent case of sexual harassment and the concerned staff member’s termination, the UNAT held in *Mbaigolmem* 2018-UNAT-819, that:

31. [...] [W]e are satisfied on the evidence that the Secretary-General discharged his overall onus before the UNDT. It is common cause that the complainant visited the room of Mr. Mbaigolmem on the evening in question. It is equally not disputed that the complainant made a first report about the incident at the first reasonable opportunity in the immediate aftermath of the event. That report is a previous consistent statement of the kind exceptionally admissible in cases involving sexual harassment or assault and is of considerable evidentiary weight. The credibility of it has not been damaged by any countervailing evidence. Additionally, other participants at the WEM gave statements, admittedly hearsay, alleging like conduct by Mr. Mbaigolmem, such also being exceptionally admissible as similar fact evidence signifying a propensity or impulsive behavioural pattern on the part of Mr. Mbaigolmem. Moreover, as the UNDT itself held, the various evidentiary statements relayed the version of the complainant with a conspicuous consistency that added to their credibility. By contrast, the statement of Mr. Mbaigolmem revealed that he was vague, elusive and contradictory in his account. Added to that, as the UNDT also acknowledged, it is objectively unlikely that the various witnesses against Mr. Mbaigolmem, who came from different countries to attend the WEM, and appeared to have no prior association with each other, would have colluded or conspired with the complainant to falsely incriminate Mr. Mbaigolmem. They had no reason to do that.

32. [...] The undisputed facts, the evidence of the first report, the coherent hearsay evidence pointing to a pattern of behaviour, the internal consistency of the witness statements, the unsatisfactory statement of Mr. Mbaigolmem and the inherent probabilities of the situation, taken cumulatively, constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.
37. Similarly to the aforementioned case, in the case at bar, the undisputed facts, the Complainant’s report about the incident at the first reasonable opportunity in the immediate aftermath of the event, as well as her consistent and detailed account of the incident on two other occasions, the Applicant’s failure to provide any explanation or material facts that would render the Complainant’s allegations doubtful, and the inherent probabilities of the situation given the potential harm the Complainant could suffer as a result of her reporting this incident, taken cumulatively, constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred.

38. In view of the foregoing, given the fact that the present case is not a criminal case and the Applicant’s liberty is not at stake (Molari 2011-UNAT-164, paragraph 30), and in light of the UNAT’s jurisprudence on the standard of proof and the above considerations, the Tribunal holds that it is highly probable that the Applicant sexually abused and exploited the Complainant when he conducted, on his own, a medical examination of the Complainant in his office on 4 October 2016. Consequently, the Tribunal concludes that the facts on which the impugned disciplinary measure was based are established by clear and convincing evidence.

Misconduct

39. The Tribunal now needs to consider whether the established facts qualify as misconduct. The following provides the Agency’s regulatory framework applicable in this case.

40. Area Staff Regulations provides:

**REGULATION 1.1**

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

[...]

**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.

[…]

REGULATION 10.2

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

41. Area Staff Rule 110.1 stipulates:

1. Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the UNRWA Area Staff Regulations and UNRWA Area Staff Rules or 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 disciplinary measures for misconduct.

42. PD A/10 provides:

10. Sexual Exploitation and Sexual Abuse is always serious misconduct.

[…]

43. General Staff Circular No. 07/2010 on “Sexual Exploitation and Abuse Complaints Procedure” ("GSC No. 07/2010") specifies:

3. The present Circular addresses complaints of sexual exploitation and abuse made by Agency beneficiaries against persons employed by the Agency in a working capacity. The Agency will apply the following definitions of the terms “sexual exploitation” and “sexual abuse”:

(a) “Sexual Exploitation” means any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

(b) “Sexual Abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.
4. In order to further protect the most vulnerable populations, especially women, children, and persons with disabilities, the following specific standards which reiterate existing general obligations under UNRWA’s Staff Regulations and Rules, are promulgated:

(a) Sexual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal[.]

[...]

44. In view of the foregoing provisions of the Agency’s applicable regulatory framework, the Tribunal holds that the Applicant’s actions were in clear violation of the above-quoted provisions and that he did not at all conduct himself in a manner befitting his status as an employee of the Agency. Thus, the Tribunal has no doubt that such actions by a Practical Nurse while providing medical services to a beneficiary constitute serious misconduct.

Proportionality

45. Having qualified the Applicant’s actions as serious misconduct, the Tribunal, as a third step, has to review whether the disciplinary measure imposed on him was proportionate to the offence.

46. At the outset, PD A/10 provides:

11. Serious misconduct constitutes ground for the most severe disciplinary measures, up to and including summary dismissal.

47. It has to be further recalled that, pursuant to Area Staff Rule 110.1, paragraph 4, the decision to impose a disciplinary measure is within “the discretionary authority of the Commissioner-General”. In addition, as it has been held by the UNAT in Mousa 2014-UNAT-431, paragraph 30, the Tribunal’s review of the proportionality of a disciplinary sanction is limited to cases in which such sanction appears to be “absurd, arbitrary or tainted by extraneous reasons or bias”.

48. In the case at bar, first, the Tribunal agrees entirely with the letter dated 16 April 2018 of the DHR and DLA, in which they noted that they could not find any mitigating factors which would have applied to the Applicant’s case. In fact, they
referred to several aggravating factors in determining the proportionality of the disciplinary measure. These factors included the Applicant’s seniority with more than 30 years of practice in the service of the Agency and his position of trust as a Practical Nurse, which involved daily interactions with physically vulnerable beneficiaries.

49. Second, as a woman, the Complainant falls within the category of people who have a “most vulnerable” status in accordance with GSC No. 07/2010. In this respect, the DHR and DLA rightly stated that “[b]y exploiting this status, the [Applicant] placed the Complainant in a potentially harmful position where she could suffer from retaliation in the community for the incident which occurred, and for having made a complaint. We consider this to be a significant aggravating factor in assessing the misconduct in question”.

50. Third, the nature of the misconduct, considered and qualified as serious misconduct by the Agency, and the reputational harm to the Agency caused by such serious misconduct, are other factors that were taken into consideration by the Agency in determining the proportionality of the sanction.

51. Therefore, although the disciplinary measure of separation from service without termination indemnity is a severe sanction, the Tribunal holds that, in the present case, it was proportionate to the nature and gravity of the Applicant’s serious misconduct.

52. Consequently, having determined that (1) the facts on which the disciplinary measure, *i.e.*, separation from service without termination indemnity, was based have been established by clear and convincing evidence; (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 present application must be dismissed.
Conclusion

53. In view of all the foregoing, the Tribunal DECIDES:

The application is dismissed.

Judge Jean-François Cousin

Dated this 14th day of April 2020

Entered in the Register on this 14th day of April 2020

Laurie McNabb, Registrar, UNRWA DT, Amman