



Before: Judge Jean-François Cousin

Registry: Amman

Registrar: Laurie McNabb

KADDOURA

v.

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

JUDGMENT

Counsel for Applicant:

Neil Macaulay

Counsel for Respondent:

Yuki Daijo, Department of Legal Affairs

Introduction

1. This is an application by Nadine Kaddoura (“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 separate her from service for misconduct with termination indemnity.

Facts

2. Effective 7 October 2014, the Applicant was employed by the Agency under a fixed-term appointment as Head, Field Human Resources Office, Grade P-4, Step 3, Jordan Field Office.

3. Effective 1 February 2017, after a competitive recruitment process, the Applicant was promoted to the post of Chief, Human Resources Operational Services Division, Grade P-5, Step 1, Headquarters, Amman (“HQA”).

4. By email dated 23 July 2017, the Applicant instructed the then Head International Personnel Services Section (“former H/IPSS”) to verify whether the university degrees of all international staff members were filed in their Official Status File (“OSF”).

5. From 30 July to 5 August 2017, the Applicant was designated as Officer-in-Charge (“OiC”) of the Human Resources Department (“HRD”), in the absence of Mr. B. G., the then Director of Human Resources, HQA (“former DHR”).

6. By email dated 2 August 2017 to Ms. S. M., the then Deputy Commissioner-General (“former DCG”), the Applicant presented the case of Mr. D. P. (“Complainant”), including a list of alleged discrepancies in his Personal History Profiles (“PHPs”) that he submitted to the Agency for various job openings.

7. On 6 August 2017, a meeting was held between the former DCG, the then Director of UNRWA Operations, Jordan (“former DUO/J”) and the Applicant. During the meeting, it was agreed that the former DUO/J, who was the Complainant’s direct supervisor at that time, should meet with the Complainant, in

the presence of a representative from the HRD, to discuss with him directly the alleged discrepancies in his PHPs.

8. On 6 August 2017, following the meeting with the DCG, the Applicant sent an email to the former DUO/J and provided him with further information about the case of the Complainant, including the details of the alleged discrepancies in his PHPs.

9. On 9 August 2017, in the presence of the former H/IPSS, the former DUO/J met with the Complainant with respect to his professional and educational backgrounds that he had listed in his PHPs.

10. By letter to the Complainant dated 10 August 2017, the former H/IPSS requested him to provide by close of business, on 14 August 2017, his comments on and clarifications to the alleged discrepancies in his PHPs.

11. Similarly, by letter to Ms. C. K. dated 10 August 2017, the former DHR confronted her with the fact that she did not possess a first level university degree, despite the Agency's regulatory framework in that respect, and that she was required to obtain a university degree before her contract expiry date.

12. By email to the former DHR dated 13 August 2017, Mr. N. K., the then Director, Department of Internal Oversight Services ("former D/DIOS") requested that the HRD cease immediately all actions with respect to the auditing of staff files.

13. By email to the former D/DIOS dated 13 August 2017, the former DHR responded that the actions with respect to the auditing of staff files were ceased.

14. On 15 September 2017, the Applicant submitted a complaint of harassment, abuse of authority, gender discrimination and retaliation against the former DHR and former D/DIOS and requested protection against retaliation.

15. By email to the former D/DIOS dated 7 October 2017, the Complainant submitted a formal complaint containing allegations of retaliation against him by the Applicant.

16. On 27 October 2017, the Investigations Division of the United Nations Office of Internal Oversight Services (“OIOS”) received a request from the DIOS to investigate a report of possible misconduct implicating the Applicant.

17. By email dated 12 December 2017, the then Chief, Investigations Division, DIOS, informed the Applicant that the OIOS was conducting an investigation on the DIOS’ behalf and that the OIOS wanted to speak with her.

18. On 13 December 2017, following the Applicant’s email, the Investigations Team Leader, Investigations Division, OIOS formally notified the Applicant of an investigation into the allegations of misconduct against her and informed her that she was going to be interviewed as a subject of the investigation.

19. On 18 January 2018, the Applicant was interviewed by the OIOS.

20. By letter dated 13 November 2018, the Applicant’s appointment was extended from 1 February 2019 to 31 January 2022.

21. On 12 December 2018, the investigation was concluded, followed by the Investigation Report. The OIOS recommended that the Agency take appropriate action against the Applicant.

22. On 19 December 2018, Mr. Pierre Krähenbühl, the then Commissioner-General (“former CG”), informed the Applicant about the outcome of her complaint of harassment, abuse of authority, gender discrimination and retaliation against the former DHR and former D/DIOS.

23. By email dated 2 April 2019, the former CG issued the Applicant an Opportunity to Respond (“OTR”) letter, informing her of the findings of the OIOS investigation and inviting her to respond to the allegations.

24. On 25 April 2019, the Applicant met with the former CG. A note for the record describing what had transpired during the meeting was later signed by the Applicant on 12 June 2019.

25. By letter dated 30 April 2019, the Applicant submitted her response to the OTR letter.

26. In response to an email from the former CG dated 9 May 2019, the Applicant, on 16 May 2019, provided her supplementary response to the OTR letter with additional documentary evidence.

27. On 9 July 2019, the former CG imposed on the Applicant the disciplinary measure of separation from service “with compensation in lieu of notice and with termination indemnity in accordance with International Staff Rule 10.2(a)(viii)”, effective immediately.

28. On 10 July 2019, while the Applicant was addressing her staff about her termination, the OiC, HRD, on behalf of the former CG, served the Applicant with a letter instructing her to immediately leave the Agency’s premises.

29. On 11 July 2019, the Arabic Spokesperson & Director of Communications, (“AS/DC”) posted on Facebook a statement with respect to the Applicant’s separation from the Agency.

30. By letter to the Applicant dated 15 July 2019, the OiC, HRD noted that the Applicant’s actions in the context of her termination were damaging the reputation of the Agency.

31. On 28 July 2019, following the Applicant’s inquiry, the Acting H/IPSS, informed the Applicant that, as part of her termination indemnity, she was entitled to one-month salary in lieu of notice and “one half of the [termination] indemnity of the maximum as per Annex II (c)”.

32. Following emails from the Applicant requesting clarification with respect to her termination indemnity, on 13 August 2019, the Director of Human Resources (“DHR”), informed the Applicant that, “based on the consultations with the Department of Legal Affairs and the [former] CG [...] the calculation for reduced termination indemnity applies”.

33. On 4 September 2019, the Applicant submitted her request for decision review to the Deputy-Commissioner General (“DCG”).

34. On 4 November 2019, the DCG informed the Applicant that he did not have the authority to review decisions made by the Commissioner-General and advised her to proceed with the filing of her application to the Tribunal.

35. On 29 December 2019, the application was filed with the UNRWA Dispute Tribunal (“Tribunal”). The Applicant also filed a motion for anonymity. The application and motion for anonymity were transmitted to the Respondent on 30 December 2019.

36. On 9 January 2020, the Respondent filed a motion for an extension of time to respond to the Applicant’s motion for anonymity. The Respondent’s motion was transmitted to the Applicant on 12 January 2020.

37. On 16 January 2020, the Applicant filed her response to the Respondent’s motion for an extension of time to respond to the Applicant’s motion for anonymity. The Applicant’s response was transmitted to the Respondent on 19 January 2020.

38. By Order No. 005 (UNRWA/DT/2020) dated 23 January 2020, the Tribunal granted the Respondent’s motion for an extension of time to respond to the Applicant’s motion for anonymity.

39. On 28 January 2020, the Respondent filed a motion for an extension of time to submit his reply. The motion was transmitted to the Applicant on the same day.

40. On 3 February 2020, the Applicant objected to the Respondent’s motion for an extension of time to submit his reply. The Applicant’s objection was transmitted to the Respondent on 4 February 2020.

41. On 9 February 2020, the Respondent filed his objection to the Applicant’s motion for anonymity. The Respondent’s submission was transmitted to the Applicant on 10 February 2020.

42. By Order No. 022 (UNRWA/DT/2020) dated 10 February 2020, the Tribunal granted the Respondent’s motion for an extension of time to submit his reply.

43. On 17 February 2020, the Applicant filed a motion to file comments on the Respondent's objection to her motion for anonymity. The motion was transmitted to the Respondent on 18 February 2020.

44. On 28 February 2020, the Respondent objected to the Applicant's motion to file comments on the Respondent's objection to the Applicant's motion for anonymity. The Respondent's submission was transmitted to the Applicant on 1 March 2020.

45. By Order No. 031 (UNRWA/DT/2020) dated 5 March 2020, the Tribunal denied the Applicant's motion to file comments on the Respondent's objection to the Applicant's motion for anonymity. The Tribunal further held that the Applicant's request for anonymity would be addressed in the Judgment.

46. On 19 March 2020, the Respondent filed a consolidated motion for exceptional extensions of deadlines in 18 applications, including the present application, based on his inability to access information and conduct other necessary tasks, due to the COVID-19 pandemic and lockdowns across the Agency's areas of operations. Due to the exceptional circumstances, and in order to protect the confidentiality of the various Applicants, this motion was not transmitted to the concerned Applicants.

47. By Order No. 046 (UNRWA/DT/2020) dated 29 March 2020, the Tribunal granted, *inter alia*, the Respondent's motion for an exceptional extension of time to file his reply in the present case.

48. On 28 April 2020, the Respondent filed his reply. The reply was transmitted to the Applicant on 3 May 2020.

49. On 7 May 2020, the Applicant filed a motion for leave to file observations on the Respondent's reply and requested the Tribunal to order the Respondent to produce additional evidence. The motion was transmitted to the Respondent on 10 May 2020.

50. By Order No. 070 (UNRWA/DT/2020) dated 20 May 2020 (“Order No. 070”), the Tribunal granted the Applicant’s motion to file her observations on the Respondent’s reply.

51. On 20 May 2020, the Respondent objected to the Applicant’s motion for leave to file observations on the Respondent’s reply and for the production of documents. The Respondent’s submission was transmitted to the Applicant on 21 May 2020.

52. By Order No. 083 (UNRWA/DT/2020) dated 4 June 2020 (“Order No. 083”), the Tribunal ordered the Respondent to produce the annexes to the Investigation Report dated 12 December 2018. Also in Order No. 083, the Tribunal denied the Applicant’s motion for production of other documents and ordered the Respondent to clarify who his Counsel of record is in the present case.

53. On 4 July 2020, the Respondent clarified that Ms. Yuki Daijo, Principal Legal Officer, General Law is Counsel of record for the Respondent in the present case and filed a motion for an extension of time to comply with Order No. 083. The Respondent’s motion for an extension of time to comply with Order No. 083 was transmitted to the Applicant on 5 July 2020.

54. On 6 July 2020, the Applicant objected to the Respondent’s motion for an extension of time to comply with Order No. 083. The Applicant’s objection was transmitted to the Respondent on 7 July 2020.

55. By Order No. 109 (UNRWA/DT/2020) dated 16 July 2020 (“Order No. 109”), the Tribunal granted the Respondent’s motion for an extension of time to comply with Order No. 083.

56. By Order No. 114 (UNRWA/DT/2020) dated 22 July 2020, the Tribunal granted the Applicant an extension of time to submit her observations on the Respondent’s reply following Order No. 109, and informed the parties that it intended to hold an oral hearing in September 2020.

57. On 28 July 2020, the Tribunal issued a Notice of Hearing convoking the parties to a hearing on 3 September 2020.

58. On 2 August 2020, the Applicant filed her response to the Notice of Hearing. The Applicant's response was transmitted to the Respondent on 4 August 2020.

59. On 3 August 2020, the Respondent submitted his response to Order No. 083. The Respondent's submission was transmitted to the Applicant on 5 August 2020.

60. On 6 August 2020, the Respondent filed his response to the Notice of Hearing. The Respondent's response was transmitted to the Applicant on the same day.

61. By Order No. 127 (UNRWA/DT/2020) dated 9 August 2020 ("Order No. 127"), the Tribunal decided not to transmit to the Applicant the annexes of the Investigation Report dated 12 December 2018. Also in Order No. 127, the Tribunal allowed one of the Applicant's proposed witnesses to be heard *viva voce* by the Tribunal and permitted the Applicant to submit written testimonies of the remainder of her proposed witnesses. The Tribunal also ordered the Respondent to provide precise indications of the subject and relevance of the contribution of his proposed witness.

62. By email dated 24 August 2020, the Respondent informed the Tribunal that he dispensed with the participation of his proposed witness. The Respondent's submission was transmitted to the Applicant on the same day.

63. On 28 August 2020, the Applicant submitted her observations on the Respondent's reply, as well as written testimonies of her witnesses. Four of the Applicant's annexes were submitted on an *ex parte* basis.

64. By Order No. 149 (UNRWA/DT/2020) dated 30 August 2020, the Tribunal ordered the transmittal of the Applicant's *ex parte* submissions to the Respondent, along with the Applicant's observations on the Respondent's reply.

65. On 31 August 2020, the Respondent submitted a motion for the postponement of the hearing for one month in order to allow him time to consider his response to the Applicant's observations on the Respondent's reply. The Respondent's motion was transmitted to the Applicant on the same day.

66. By Order No. 155 (UNRWA/DT/2020) dated 31 August 2020, the Tribunal denied the Respondent's motion for the postponement of the hearing.

67. On 1 September 2020, the Applicant submitted her response to the Respondent's motion for the postponement of the hearing. The Applicant's submission was transmitted to the Respondent on the same day.

68. On 3 September 2020, the scheduled hearing took place. The Tribunal heard from the Applicant, the Respondent and one witness.

69. By Order No. 167 (UNRWA/DT/2020) dated 8 September 2020 ("Order No. 167"), the Tribunal granted the Respondent's request to submit his comments on the Applicant's observations and his closing arguments. The Tribunal also granted the Applicant's request to submit her eventual comments on the Respondent's comments and her closing arguments.

70. On 18 September 2020, the Respondent submitted his comments on the Applicant's observations and his closing arguments, including evidence submitted on an *ex parte* basis, as well as a motion to submit written testimony from one witness. The Respondent's comments, motion and closing arguments were transmitted to the Applicant on 20 September 2020.

71. By Order No. 174 (UNRWA/DT/2020) dated 20 September 2020 ("Order No. 174"), the Tribunal decided to transmit the Respondent's *ex parte* evidence to the Applicant, granted the Respondent's motion to submit the written testimony of one witness and ordered the Applicant to submit her comments on the Respondent's latest submissions, as well as her closing arguments.

72. On 23 September 2020, the Respondent submitted the written testimony. The Respondent's submission was transmitted to the Applicant on 24 September 2020.

73. On 25 September 2020, the Applicant submitted her comments on the Respondent's latest submissions and her closing arguments. The Applicant's submission was transmitted to the Respondent on 27 September 2020.

Applicant's contentions

74. The Applicant contends:

- i) The contested decision was ill-motivated and taken in bad faith and constitutes an abuse of authority;
- ii) The contested decision is unlawful for reasons of procedural irregularity, bias and lack of due process;
- iii) She was separated because she was the only staff member who dared to object and document in writing the gross violations of the Agency's regulatory framework by senior management, including the former DCG, the former DHR and the DHR;
- iv) The former CG ignored the fact that she was subjected to abuse, harassment and intimidation by the former DCG, the former D/DIOS and her supervisors, the former DHR and the DHR;
- v) Her separation was calculated in a disingenuous manner to mislead the public into believing that she was separated as a result of the larger OIOS investigation into the allegations of serious misconduct of senior management;
- vi) The OIOS investigation into the Complainant's complaint was maliciously exploited as a punishment tool against her. The whole scenario was fabricated by staff members who were proven beyond any doubt to be engaged in acts of collusion against her with the intent to cause her personal harm;
- vii) In November 2018, she objected to the direct appointment of a senior staff member, *i.e.*, without any recruitment process, from a P-5 to a D-1 post in violation of the Agency's regulatory framework. Since that time, she was subjected to further harassment and intimidation by the former DCG and the DHR;

viii) The OIOS investigation into the allegations against her was instigated by the former D/DIOS, with the assistance of the former DHR, against whom her allegations of harassment and abuse of authority were substantiated. Therefore, the OIOS investigation into the allegations against her was tainted by a clear conflict of interest;

ix) The allegations with respect to her relationship with the Complainant are speculative, misconstrued, partial, mischaracterised and are maliciously intended to build a case of personal animosity between her and the Complainant;

x) The former CG unlawfully introduced new elements into the disciplinary process, which had not been part of the OIOS investigation, in order to use these elements as aggravating factors to support the decision to terminate her. She was never given any chance at any point to respond to these additional allegations against her;

xi) The former DUO/J was present in the meeting with the former DCG, and he clearly instructed the former DUO/J to confront the Complainant with respect to the alleged discrepancies in his PHPs;

xii) The former DCG's credibility and integrity is questionable given the Tribunal's Judgment in *Dawas* UNRWA/DT/2015/009, in which it was established by the Tribunal that the former DCG, in her previous position, had abused her power;

xiii) The Applicant's integrity and credibility was recorded, *inter alia*, by the United Nations Dispute Tribunal ("UNDT")'s Judgments in *Neocleous* UNDT/2015/042 and *Cicek* UNDT/2015/043, which were both upheld by the United Nations Appeals Tribunal ("UNAT");

xiv) The former CG caused her severe prejudice when he presented her with an offer of blackmail and bribery to coerce her into resigning;

xv) The former CG caused her direct harm by means of defamation via public forums in order to ruin her personal and professional reputation and to

prejudice any future employment opportunity for her. The former CG instructed his official spokesperson, the AS/DC, to post a letter on a social media platform clarifying the circumstances of her termination;

xvi) The former CG evicted her from the Agency's premises in a humiliating manner and seized her entire equipment;

xvii) Her access to her email was not granted after her separation in order to allow her to obtain documentary evidence to be presented before the Tribunal. As such, the former CG deprived her of her basic right to appeal the contested decision;

xviii) The former CG implemented an illegal *post facto* reduction of her termination indemnity as a disguised disciplinary measure;

xix) It would have been a breach of her duty to ignore the alleged discrepancies that had been brought to her notice;

xx) The resignation of the Complainant is an additional support for the legitimacy of her actions of bringing the discrepancies into the light;

xxi) Given the reputational harm she sustained as a result of the impugned decision, it is highly unlikely that she will be able to find suitable alternative employment in the future; and

xxii) The former CG's and other Agency's officials' conduct jeopardised her and her family's safety, as she was publicly associated with corruption allegations against the senior management at the Agency.

75. The Applicant requests:

- i) The rescission of the disciplinary measure and to be reinstated;
- ii) The removal of any reference to the impugned decision from her OSF;
- iii) To be compensated for the material and moral damages she sustained, including for reputational harm, future loss of earnings and entitlements to Education Grant;

- iv) To be paid in full her termination indemnity;
- v) To be paid for legal costs for her representation before the Tribunal; and
- vi) The Tribunal to refer the DHR, the Director of Department of Legal Affairs (“D/DLA”), the Deputy, DHR (“D/DHR”), the AS/DC and the former CG for accountability.

Respondent’s contentions

76. The Respondent contends:

- i) There was no need to hold an oral hearing;
- ii) The Applicant’s due process rights were respected, and a comprehensive fact-finding investigation into the allegations raised against the Applicant was conducted;
- iii) The disciplinary measure was properly effected in accordance with the Agency’s relevant regulatory framework;
- iv) The facts upon which the disciplinary measure was based were established by clear and convincing evidence;
- v) The Applicant was sanctioned for abuse of authority and misrepresentation. With respect to the former, it was established that during her appointment as OiC, HRD, the Applicant abused her authority for an improper purpose by auditing the Complainant’s PHPs, as she had no authority to initiate such an audit;
- vi) The alleged discrepancies in the Complainant’s PHPs do not appear to be serious and cannot amount to misrepresentation;
- vii) The investigation found the existence of “bad blood” between the Applicant and the Complainant;

- viii) There was clear and convincing evidence that the Applicant committed misrepresentations in connection with her statements about the existence of a Human Resources (“HR”) auditing process;
- ix) The Applicant pursued the matter with respect to the Complainant during the absence of the former DHR, despite the fact that she had engaged with him in a similar issue involving another staff member;
- x) The former DCG denied having instructed anyone to instigate any formal process against the Complainant. The former DCG considered the matter “routine” and therefore not worthy of much attention;
- xi) Given the language used in the letter issued to the Complainant, the matter was more akin to a formal misconduct investigation than an HR verification process;
- xii) The facts upon which the disciplinary measure was based constituted serious misconduct;
- xiii) The disciplinary measure imposed was proportionate to the severity of the serious misconduct committed by the Applicant;
- xiv) 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;
- xv) The Applicant was not engaged in a “protected activity” in the sense of paragraph 5 of the General Staff Circular No. 07/2010 on “Sexual Exploitation and Abuse Complaints Procedure” (“GSC No. 07/2010”), as she had not reported her concerns;
- xvi) There is no causal link between the alleged “protected activity” and the impugned decision;
- xvii) Given the fact that the OIOS investigation into the allegations against the Applicant was initiated following the Complainant’s complaint, that the Applicant’s appointment was extended for three years in November 2018, and

that the former DCG was complimentary of the Applicant on several occasions, it is clear that the senior managers at the Agency were not retaliatory with respect to the Applicant;

xviii) The DIOS was cognisant of a perception of conflict of interest and accordingly sought to have the allegations against the Applicant investigated by the OIOS;

xix) The Applicant's evidence at the hearing should be stricken from the record; and

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

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

Considerations

Preliminary issues

Applicant's motion for anonymity

78. The Applicant claims that her name should not be included in the Judgment due to the risk of further harm to her and her family. The Respondent contends that the Applicant's motion for anonymity should be dismissed in its entirety.

79. The Tribunal's Statute provides in Article 11(6) as follows:

The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.

80. The Tribunal recalls that, in accordance with the UNAT's jurisprudence, the names of litigants are routinely included in the Judgments in the interests of transparency and accountability (*Lee* 2014-UNAT-481, para. 23). In addition, the UNAT held that an applicant must demonstrate a "greater need than any other litigant for confidentiality" in order not to include his/her name in the Judgment (*Pirnea* 2014-UNAT-456, para. 20; *Charot* 2017-UNAT-715, paras. 37-38).

81. Exceptional circumstances are needed to support an application for the redaction of the name of a litigant from a judgment. A request for redaction can only be permitted where it is necessary to protect information of a confidential and sensitive nature (*Utkina* 2015-UNAT-524, paras. 17-18).

82. In the present case, the Tribunal does not consider that the Applicant's situation represents an exceptional circumstance warranting the redaction of her name or that there is sensitive and confidential information to be protected concerning the Applicant. On the contrary, the present case requires transparency and the inclusion of the Applicant's name in the Judgment, as the impugned decision was brought to the public's attention via mainstream and social media coverage. Consequently, the Applicant's motion for anonymity is denied.

Evidence

83. The Applicant requested the Tribunal to obtain the Investigation Report pertaining to her complaint of harassment, abuse of authority, gender discrimination and retaliation against the former DHR and former D/DIOS. By Order No. 083, the Tribunal denied this request of the Applicant.

84. The Applicant also requested to be provided with the annexes of the 12 December 2018 Investigation Report concerning her alleged misconduct. Following the Tribunal's Order No. 083, the Respondent provided to the Tribunal the annexes of the said Investigation Report. By Order No. 127, the Tribunal decided not to transmit to the Applicant the annexes of the 12 December 2018 Investigation Report. By Order No. 083, the Tribunal also denied the Applicant's other requests for production of documents.

85. The Tribunal recalls that it has broad discretionary authority in case management issues and the production of evidence (*Wu* 2015-UNAT-597, paras. 34-35; *Uwais* 2016-UNAT-675, para. 27) and that it is "best placed to assess the nature and probative value of the evidence placed before [it] by the parties to justify [its] findings" (*Nyawa* 2020-UNAT-1024, para. 80). As held by the UNAT, an initial and essential test for the admissibility of additional evidence is that such

evidence must be relevant to the issue or issues to be decided (*Barud* 2020-UNAT-998, para. 24).

86. In the present case, the Tribunal deemed it unnecessary to include in the case record, and to rely upon, the Investigation Report pertaining to the Applicant's complaint of harassment, abuse of authority, gender discrimination and retaliation against the former DHR and former D/DIOS and the annexes of the 12 December 2018 Investigation Report, in order to render the present Judgment. In this regard, the annexes of the 12 December 2018 Investigation Report are hereby stricken from the case record, and the Tribunal underscores that the present Judgment is based solely on the evidence that was entirely available to both parties.

Context

87. The Tribunal must emphasise the unique context in which the events leading to the Applicant's termination occurred. The facts upon which the Applicant was admonished in the contested disciplinary measure took place in July-August 2017. Since then, the Tribunal notes that the individuals and most of the senior managers, who were directly or indirectly involved in the present case, have left the Agency. The Tribunal also notes that, *inter alia*, Ms. C. K. resigned effective 1 October 2017; the Complainant resigned effective 10 September 2018; the former DHR left the Agency effective 1 January 2018; the former D/DIOS left the Agency effective 18 May 2018; the former DCG left the Agency on 25 July 2019 and the former CG resigned on 6 November 2019.

88. Given the documentary evidence in the case record, it clearly appears to the Tribunal that several irregularities were committed for at least two to three years by certain senior managers of the Agency. Without a doubt, these irregularities cannot, in any case, exonerate the Applicant from any alleged misconduct she might have committed. Nevertheless, this context obliged the Tribunal to have serious doubts about the veracity of statements and testimonies. The Tribunal therefore decided to hear from only one witness, namely the former DUO/J.

Hearing

89. Per its consistent practice in conducting hearings, the Applicant was not sworn in as a witness and the Respondent was invited to ask questions of the Applicant. During the hearing, the Judge reminded Counsel who were present for the Respondent that, as in all hearings in the past, the Respondent had routinely asked questions of applicants who were not sworn in. However, Counsel declined the Judge's offer to ask questions of the Applicant. He argued that the Applicant was not listed as a witness in the Tribunal's Notice of Hearing and, as a result, he had not prepared for her cross-examination.

90. With respect to an applicant's testimony as a witness during a hearing, the UNAT held in *Landgraf* 2014-UNAT-471, as follows:

25. [Articles 9, 17, 18 and 19 of the UNDT's Rules of Procedures] are sufficiently comprehensive to give the UNDT the discretion to allow a party to the proceedings to give oral evidence as it deems necessary. If a party is permitted by the UNDT to give oral evidence, then that party becomes a witness in the case and must make the declaration prescribed in Article 17(3) of the UNDT Rules.

26. In the present case, it was within the discretion of the UNDT to refuse to allow Ms. Landgraf and the DIST Director to testify as witnesses. However, the UNDT did in fact take evidence from both of them and then relied on the evidence given by the latter. In our view, this procedure qualified both of them as witnesses and, as such, they were required to make the declaration prescribed in Article 17(3) of the UNDT Rules. We find that the UNDT erred in failing to administer this declaration. However, in the instant case, it is our view that this error would not, of itself, be of such seriousness as to affect the decision of the case.

91. In the present case, the Tribunal notes that, in her response to the Tribunal's Notice of Hearing, the Applicant listed herself as a witness. The Tribunal recalls that, following the said response, only one of the Applicant's proposed witnesses was permitted by the Tribunal to testify at the hearing. Stated another way, in accordance with the UNAT's jurisprudence in *Landgraf* and its discretionary powers, the Tribunal did not allow the Applicant "to give oral evidence" during the hearing.

92. Consequently, in accordance with the UNAT's aforementioned jurisprudence in *Landgraf*, the Tribunal emphasises that the Tribunal asked questions of the Applicant, and the Applicant was allowed to argue her case. Notwithstanding, in rendering the present Judgment, the Tribunal has not relied on any "oral evidence" given by the Applicant. Therefore, the Applicant was not required to make the declaration prescribed in Article 17(3) of the Tribunal's Rules of Procedures. Accordingly, the Respondent's request to strike from the record the Applicant's "oral evidence" is granted, and the Applicant's "oral evidence" is stricken from the record.

Judicial review of the impugned disciplinary measure

93. The Applicant contests the decision to impose on her the disciplinary measure of separation from service for misconduct with termination indemnity. The Applicant was disciplined for the following: 1) abuse of power, 2) misrepresentation, and 3) serious disruptive and obstructive behaviours that were considered as aggravating factors.

94. With respect to the standard of review in disciplinary cases, the 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".

95. 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 the sanction is proportionate to the offence.

Establishment of facts

96. The Tribunal will now examine the establishment of facts with respect to the allegations of misconduct, namely abuse of power and misrepresentation, and of the aggravating factors of serious disruptive and obstructive behaviours.

➤ **Abuse of power**

97. The former CG considered that there was clear and convincing evidence that the Applicant, during the time she was designated as OiC, HRD, on her own accord, took the time and effort to examine the Complainant's various PHPs, compare them in search of discrepancies and prepare a detailed list of such perceived discrepancies. The former CG considered the fact that the Applicant did not inform her direct supervisor about these perceived issues relating to the Complainant, but rather she initiated a formal process against the Complainant by raising the matter with the former DCG on 2 August 2017.

98. The Applicant was further accused of misleading the former DCG, the former DUO/J and the former Head, Recruitment Section ("former H/RS") into believing that there was an ongoing HR auditing process. She was accused of falsely representing that she had been deliberately instructed by the former DCG to exclude the former DHR on the Complainant's matter and that she had instructed the former H/RS to send to the Complainant the letter dated 10 August 2017. In overall terms, the Applicant was reproached for using her role as OiC, HRD to "strike a blow" against the Complainant, given the alleged existence of "bad blood" between her and the Complainant.

The existence of an internal HR auditing process

99. As early as 17 June 2017, the Applicant sent an email to her direct supervisor, the former DHR that she had "come to know" that Ms. C. K. did not possess a first level university degree. Later, by email dated 23 July 2017, the Applicant instructed the former H/IPSS as follows:

As discussed last week, please initiate a check for all international staff on board to verify that copies of their university degrees are filed in their OSF.

100. On the same day, the former H/IPSS responded to the Applicant's email as follows:

In addition to the two cases discussed last week where it is known that they did not have the required university degree at the time of joining the Agency [...], we will initiate the verification of all international staff members' files after [...] [and] we anticipate to begin with this task in the beginning of October and finalize before mid[-]November.

101. Furthermore, in his letter dated 10 August 2017, which had been sent to one of the aforementioned two "cases", namely C.K., the former DHR indicated as follows:

This refers to our meeting on 23 July 2017 which was also attended by the Chief, Human Resources Operational Services Division [the Applicant].

As part of an internal UNRWA HR auditing process, we are required to verify the educational qualifications of candidates. While conducting the verification of your educational qualifications, we discovered an issue regarding your academic degrees.

The verification has a dual purpose of:

I. Substantiating the information listed on your P-11; and

II. Confirming your eligibility for the position you have been selected for by comparing the verified information to the requirements of the job opening.

102. Accordingly, it is clear to the Tribunal that the former DHR decided to initiate an internal HR auditing process in and around July 2017, and that he, together with the Applicant, had a meeting with a staff member who was determined not to possess a first level university degree. It is also clear that this auditing process was intended to substantiate the information listed in staff members' PHPs, as well as confirm their eligibility for the positions they held.

103. After the former D/DIOS became aware of this internal HR auditing process, by email to the former DHR dated 13 August 2017, the former D/DIOS raised several concerns about the extent of the auditing process and asked that all activity on this process be ceased immediately.

104. On 14 and 15 August 2017, as a result of several exchanges of emails between the Applicant and the former DHR, a response to the former D/DIOS' request for clarifications was prepared and sent by the former DHR by email dated 15 August 2017. In relevant parts, this email reads as follows:

1. The rationale for this process, and aims and objectives

This process is aimed at substantiating the information listed in P-11s of all international staff (including experience and academic qualifications), and confirming that international staff are eligible for the position they have been selected for by comparing the verified information to the requirements of the job opening. I understand that this practice follows the exact procedure of the United Nations Secretariat where all International Staff have been subject to this review.

2. What advice may have been received from DLA

None at this stage. This is a standard HR verification and compliance process which we understood to be within our mandate. Should we reach a stage where a full investigation is required, it will be referred to DIOS and subsequently to DLA, as necessary.

[...]

4. How staff have been prioritized, is there a formula

All international staff are subject to this review.

5. Advice as to how those already in the process were selected

This came to the HRD's attention and given the seriousness of the allegations, HRD proceeded to verify and substantiate the information.

[...]

9. An overview of the 'birth' of this project, who initiated it, and whatever consultations or discussions led to it being commenced.

This is a standard HRD verification process and consultations occurred within HRD (DHR/HROSD) to commence the verification process.

105. The Tribunal thus concludes that it is not established that the Applicant misled the former DCG, the former DUO/J and the former H/RS into believing that there

was an internal HR auditing process. On the contrary, the evidence clearly shows that there was a legitimate ongoing auditing process.

106. In the impugned decision, the former CG reproved the Applicant for verifying the Complainant's professional/work experience whereas, according to the Applicant's email to the former H/IPSS dated 23 July 2017, the said verification and auditing process was limited to the verification of academic degrees.

107. The Tribunal does not give credit to this fact for which the Applicant was admonished in light of the former DHR's letter of 10 August 2017, and his email dated 15 August 2017. From this evidence, it is clear to the Tribunal that the auditing process included substantiating the information listed in staff members' PHPs, including professional experiences and academic qualifications, as well as confirming their eligibility for the positions they held. The Tribunal therefore has no doubt that the verification of professional/work experience would have been necessary, as part of the auditing process, in order to substantiate all the information in the staff members' PHPs and confirm their eligibility for their positions. Therefore, the Tribunal holds that the allegation that the Applicant extended the scope of the auditing process in the Complainant's case by verifying his work experience is not established.

Verification of the Complainant's PHPs by the Applicant

108. The Applicant, in her capacity as OiC, HRD, reported to the former DCG the irregularities in the Complainant's appointment as Deputy Director of UNRWA Operations, Jordan based on the discrepancies in his various PHPs. This is clear from the Applicant's 2 August 2017 email to the former DCG. The Tribunal notes that the former DHR was not copied on this email. The former DCG acknowledged receipt of the Applicant's 2 August 2017 email and indicated that she would raise this matter directly with the former DUO/J, who was the Complainant's direct supervisor at that time.

109. Consequently, the Tribunal concludes that it is established that the Applicant had reviewed the Complainant's PHPs and reported the irregularities to the former DCG, without informing her direct supervisor, the former DHR.

Letter to the Complainant dated 10 August 2017

110. The former CG accused the Applicant of violating the Complainant's due process rights by giving him only two working days to respond to the allegations of misrepresentations in his PHPs. In addition, he states that the Applicant gave false reasons to the former H/RS about the internal HR auditing process in order to get her to sign the 10 August 2017 letter. He also concludes that by making a "veiled threat" of dismissal to the Complainant and giving him an unreasonably short deadline for responding to the letter, the Applicant turned the Complainant's matter into something more akin to a formal misconduct investigation, thus violating the Complainant's due process rights.

111. First, as the Tribunal ruled above, there was clear evidence that an internal HR auditing process was being conducted; therefore, it is not established that the Applicant gave false reasons to the former H/RS in order to get her to sign the 10 August 2017 letter.

112. Second, it is clear from the Complainant's 9 August 2017 email to his direct supervisor and former H/RS that, during his meeting with them, the Complainant had confirmed that he would be able to provide his answers by 13 August 2017. In this regard, not only was the Applicant not involved at any stage with respect to the deadline set for the Complainant to respond to the discrepancies discovered in his PHPs, but the Complainant himself had agreed to provide his response within a short period of time. Therefore, the Tribunal holds that the allegations against the Applicant with respect to the deadline set for the Complainant to respond to the discrepancies in his PHPs are not established.

113. Third, it is undisputed that the 10 August 2017 letter was signed by the former H/RS, whose direct supervisor at the time of the events was the Applicant. Given the former H/RS' statements during her interview with the Investigators, it is clear to the Tribunal that the letter was, in fact, drafted by the Applicant. Therefore, the Tribunal concludes that it is established that the Applicant played a primary role in informing the Complainant that "any misrepresentation or material omission made on a Personal History Form renders one liable to termination".

114. Fourth, with respect to the allegation that the Applicant turned the Complainant's matter into something more akin to a formal misconduct investigation and violated the Complainant's due process rights, the Tribunal considers that this allegation is without merit. To recall, the Applicant discovered the discrepancies in the Complainant's PHPs and informed the former DCG. Later, the former DCG discussed the issue with the Applicant and the former DUO/J. As the former DUO/J testified at the hearing, the former DCG refused the advice of the Applicant and the former DUO/J to refer the matter to the DIOS for a formal investigation, and instead she instructed the former DUO/J to confront the Complainant with the discrepancies, in the presence of the former H/RS.

115. It is clear that the 10 August 2017 letter, as such, would not lead to any legal consequence for the Complainant. The Tribunal agrees that the content of the letter was not appropriate to address the concerns with respect to the discovered discrepancies in the Complainant's PHPs. However, the Tribunal doubts that the Complainant could have seriously considered this letter to be the beginning of a formal investigation. Notwithstanding, the Tribunal does not comprehend why the Complainant, who was at a high level in management as the Deputy Director of UNRWA Operations, Jordan, did not bring this matter to the attention of the former DHR. Consequently, the Tribunal holds that the allegation that the Applicant turned the Complainant's matter into something more akin to a formal misconduct investigation is not established.

Applicant's alleged ill-intent to cause harm to the Complainant

116. The Tribunal emphasises that its role is not to make a determination with respect to the Applicant's intentions against the Complainant. Rather, its role is to judicially review whether or not the Agency established the facts underlying the alleged misconduct of abuse of power by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (*Diabagate* 2014-UNAT-403, para. 30; *Mobanga* 2017-UNAT-741, para. 24).

117. Recently, in *Negussie* 2020-UNAT-1033, para. 45, the UNAT further elucidated the nature of "clear and convincing evidence" as follows:

“Clear and convincing evidence of misconduct [...] imports two high evidential standards. The first (“clear”) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (“convincing”) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence”.

118. In the present case, the evidence regarding the Applicant’s alleged ill-intent to cause harm to the Complainant is not “unequivocal and manifest” and “persuasive” enough to constitute abuse of power. Rather, it seems to the Tribunal that, after having learned that the Complainant had moved from a P-2 to a P-5 post in less than 18 months, the Applicant was reasonable in suspecting that the Complainant might not have been eligible for the position he held. Consequently, in view of the foregoing, the Tribunal holds that the Agency failed to establish by clear and convincing evidence the Applicant’s alleged ill-intent to cause harm to the Complainant.

➤ **Misrepresentation**

119. The former CG considered that there was clear and convincing evidence that the Applicant had made misrepresentations in her statements relating to the existence of an ongoing internal HR auditing process. The Tribunal concluded above that there was clear evidence of an auditing process. Consequently, the Tribunal holds that the allegation that the Applicant committed misrepresentations is not established.

Misconduct

120. The Tribunal determined above that it is established that: 1) the Applicant reviewed the Complainant’s PHPs, 2) she reported the irregularities in the PHPs to the former DCG without informing her direct supervisor, and 3) she played a primary role in including a paragraph in the 10 August 2017 letter to the Complainant, informing him that “any misrepresentation or material omission made

on a Personal History Form renders one liable to termination”. The Tribunal will now consider whether the established facts qualify as misconduct.

➤ **Reviewing the Complainant’s PHPs**

Does the established fact that the Applicant reviewed the Complainant’s PHPs constitute abuse of power and, as such, misconduct?

121. International Staff Regulations, in relevant parts, provides:

Regulation 1.6: Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

[...]

Regulation 1.9: By accepting appointment, staff members pledge themselves to discharge their functions and to regulate their conduct with the interest of the Agency only in view. Loyalty to the aims, principles and purposes of the Agency is a fundamental obligation of all staff members by virtue of their status as international civil servants

Regulation 1.10: While staff members’ personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the Agency. They shall conduct themselves at all times in a manner befitting their status as international civil servants and 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 that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

122. International Staff Rule 1.2(c) and 1.2(f) stipulate as follows:

(c) Staff members have the duty to report any breach of the Agency’s regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties.

(f) Any form of discrimination or harassment, including sexual or gender harassment, as well as abuse in any form at the workplace or in connection with work, is prohibited.

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

6. The Agency defines [...] abuse of power, as follows:

[...]

(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.

124. Regardless of her motivation and the timing of her actions, the Applicant, in her capacity as OiC, HRD had the authority to verify the Complainant’s PHPs within the previously mentioned objectives of the ongoing internal HR auditing process. The Tribunal considers that, regardless of the existence of an ongoing internal HR auditing process and irrespective of her capacity as OiC, HRD, as the Chief of the Human Resources Operational Services Division, the Applicant would also have been entitled to verify, by substantiating the information listed in the Complainant’s PHPs, the Complainant’s eligibility for the position for which he had been selected. The Tribunal recalls that the UNAT has consistently held that “where the eligibility criteria have been wrongly applied, the Administration has a duty and is entitled to rectify its own error” (*Neocleous* 2016-UNAT-635, para. 32; *Cicek* 2016-UNAT-636, para. 32). Therefore, the Applicant’s conduct cannot be considered as abuse of power. Rather, the Applicant’s actions were part of her duties. Consequently, the Tribunal concludes that the established fact that the Applicant reviewed the Complainant’s PHPs is not misconduct.

➤ **The Applicant's failure to inform her direct supervisor about the discrepancies in the Complainant's PHPs**

Did the Applicant's failure to inform her direct supervisor about the discrepancies in the Complainant's PHPs constitute misconduct?

125. It is reasonable to assume that the Applicant was required to keep her direct supervisor informed about the alleged discrepancies in the Complainant's PHPs. In this respect, the question before the Tribunal is whether the Applicant's failure to inform her direct supervisor about the alleged discrepancies in the Complainant's PHPs constitutes misconduct in the context of the present case.

126. The Tribunal recalls that, effective 1 February 2017, the Applicant was promoted to the post of Chief, Human Resources Operational Services Division, within the HRD. Soon after, on 20 March 2017, she sent the following email to the former DCG, which reads, in relevant part, as follows:

[...] I feel it's important to request an urgent meeting with you at your earliest convenience. Having taken on this position, I have observed a pattern of unethical conduct and arbitrary decision-making on the part of the DHR and I believe I should bring this to your attention given the far-reaching impact of the HRD's work on the Agency.

127. On 23 March 2017, the former DCG responded as follows:

[...] I have asked for a meeting with you and [...] next week ([the former DHR] is aware). I suggest we find some time to meet separately when I am in Amman[.]

128. Therefore, it is clear that the former DCG, who was the Applicant's second supervisor, agreed to meet with the Applicant alone to discuss her concerns about the conduct of the former DHR.

129. Approximately three months later, by an email dated 18 June 2017, the Applicant directly and openly accused the former DHR of promoting, from P-3 to P-4 level by direct appointment, a staff member who did not possess a first level university degree. She stated the following:

On record, there is a business case prepared by [...] and submitted to you for approval for a direct appointment of [...] from P3 to P4 which you had approved. The case was never routed through recruitment or any other section staff and was only between you and [...]. [The H/RS] was not involved at any stage.

At the time, all the IPS staff has submitted a collective complaint about [...] to you and [...] was leading the section which was significantly responsible for [...]. [...] yet a direct appointment and a promotion for a candidate who doesn't have a bachelors degree was approved??

[...]

Unfortunately all the HRD staff are aware of these sad facts and the morale of the staff is at a low point but no one dares talks about it because they are scared and you are the DHR.

130. After the events of July/August 2017, on 15 September 2017, the Applicant sent another email to the former DHR and copied the former DCG, as well as the former CG. The email reads, in relevant parts, as follows:

This is to put on record that you are subjecting me to an environment of intimidation and direct and indirect threats to prevent me from fulfilling my duties[.]

[...]

As you are well aware, in the context of an HR verification process, it was uncovered that one candidate was recruited and later promoted to a professional post without holding a Bachelor's degree and another was recruited and promoted from a P-2 to a P-5 in 18 months and where the candidate had made serious material omissions in his P-11. DIOS had requested to put on hold this process even though it is well within the mandate of HRD to verify HR information at any stage of any process [...] and it is our duty and obligation to act swiftly when alerted to any kind of mistake, unlawful act or erroneous decision.

Despite this, we agreed to respond to all of DIOS' concerns and I repeatedly asked you for a meeting with our DIOS colleagues to clarify our mandates, our processes and agree on a collegial manner to address any concerns. [...] [I]t is now clear to me that you are trying to instigate DIOS against me (which in itself is misconduct) in obstruction of my work and the integrity of this Agency and the United Nations' principles and rules and regulations.

[...]

The interests of justice require[] us (HRD and this Agency) to retain the discretion to correct erroneous decisions and all the efforts that you have been leading and continue to lead against me from the outset run counter this direction.

131. In addition, on the same day, the Applicant submitted a complaint of harassment, abuse of authority, gender discrimination and retaliation against the former DHR and former D/DIOS and requested protection against retaliation. With respect to her complaint, on 19 December 2018, the former CG informed the Applicant that the investigation had substantiated her allegations of harassment and conflict of interest against the former DHR and former D/DIOS and that they had created a hostile working environment towards the Applicant, including acts intended to isolate the Applicant from the rest of senior management members. The CG also noted that the former DHR and former D/DIOS had demonstrated an unwelcoming attitude towards her and engaged in other intimidating acts such as making belittling comments, unwelcome jokes and defamatory comments.

132. In view of the foregoing, it is clear that the Applicant repeatedly accused the former DHR of committing and/or covering up irregularities and that she had informed the former DCG and former CG about these matters. Consequently, the Applicant could have legitimately thought that she had their assent, especially the former DCG's, for excluding the former DHR with respect to certain issues.

133. Therefore, the Applicant cannot be considered as having committed misconduct when she failed to inform her direct supervisor about the discrepancies she had discovered in the Complainant's PHPs. It is undisputed that on 6 August 2017, the former DHR was back on duty, and given the record in the case file, it was the former DCG who had convened the meeting with the former DUO/J and the Applicant. The former DCG could have simply required the presence of the former DHR with respect to the discussion about the discrepancies in the Complainant's PHPs. However, she did not do so. Accordingly, the Tribunal holds that the Applicant's failure to inform her direct supervisor about the discrepancies in the Complainant's PHPs does not constitute misconduct in the context of the present case.

➤ **The Applicant's inclusion of the statement of certification in the 10 August 2017 letter to the Complainant**

134. The said paragraph reads as follows:

As part of the application process, you have in each case certified in Section 27 of the Personal History Form that the statements made by you are true, complete and correct in all respects to the best of your knowledge and belief. In the same section, applicants are also asked to confirm their understanding that any misrepresentation or material omission made on a Personal History Form renders one liable to termination.

135. The Tribunal recalls that, at the end of the application for every job opening, there is an attestation that the applicant's statements are true, complete and correct in all respects to the best of his/her knowledge and belief, and that any misrepresentation or material omission may render him/her open to termination. Such a request for an attestation is not a "veiled threat of dismissal" and therefore the Tribunal cannot accept such a conclusion.

136. As previously mentioned, it is clear that the 10 August 2017 letter, as such, would not lead to any legal consequence for the Complainant and that he could not have seriously considered this letter to be the beginning of a formal investigation. Thus, the Tribunal holds that the fact that the Applicant played a primary role in including the aforementioned paragraph in the 10 August 2017 letter does not constitute misconduct.

Proportionality

137. The Tribunal recalls that, among the various allegations against the Applicant, only three allegations were considered to be established by clear and convincing evidence. With respect to these three established facts, the Tribunal held above that none of these facts constituted misconduct in view of the Agency's regulatory framework. Consequently, as there is no misconduct, the Tribunal will not review whether or not the disciplinary measure imposed on the Applicant was proportionate to her alleged conduct.

Due process rights

Aggravating factors

138. By email dated 2 April 2019, the former CG issued the Applicant an OTR letter, informing her of the findings of the OIOS investigation and inviting her to respond to the allegations. In addition, the former CG added as follows:

I draw your attention to the fact that a theme running through the evidence produced by OIOS suggests that staff members may fear reprisals from you. During this stage of the due process phase I count on the fact and expect you to continue to behave professionally and in line with the UNRWA Regulatory Framework, including the Standards of Conduct expected of senior UN officials.

Any behavior found not to be in line with the UNRWA Regulatory Framework, would be considered as an aggravating factor for purposes of determining the proportionate disciplinary measure, should I decide that such a measure is called for after I have considered the totality of evidence, including your response to the attached letter.

139. On 25 April 2019, the Applicant met with the former CG to engage in an open dialogue during the OTR process. A note for the record describing what had transpired during the meeting was later signed by the Applicant. By letter dated 30 April 2019, the Applicant submitted her response to the OTR letter. In response to an email from the former CG dated 9 May 2019, the Applicant, on 16 May 2019, provided her supplementary response to the OTR letter with additional documentary evidence.

140. On 9 July 2019, the former CG imposed on the Applicant the disciplinary measure of separation from service and added the following with regard to aggravating factors:

Furthermore, the presence of the following aggravating factors warrant[s] a disciplinary measure in the upper range:

- When I issued the OTR letter, I drew your attention to the fact that a theme running through the evidence produced by OIOS suggests that staff members may fear reprisals from you and I emphasized that I expected you to continue to behave professionally and in line with the UNRWA Regulatory

Framework, including the Standards of Conduct expected of senior United Nations officials. However, based on reports provided by [...], the Director of Human Resources who is your direct supervisor, and other colleagues, including an exchange of emails you yourself forwarded to me, you failed to comply with my instruction and instead exhibited serious disruptive and obstructive behavior, which constitutes conduct unbecoming of an international civil servant.

- Your behavior after I issued the OTR letter also violated your duty, as a senior UNRWA official, “to take all appropriate measures to promote a harmonious work environment, free of any form of prohibited conduct” and to act as a role model by upholding the highest standards of conduct.

- In your role as Chief, Human Resources Operational Services Division, in charge of four human resources sections, namely: recruitment, international personnel, area personnel and policy development, and having the custody of applications and personnel records of every individual who has applied or been employed at UNRWA, you are in a high position of trust and a special position to affect the employment of any staff member and the evidence shows that you have weaponized this role to attack at least one colleague.

- I also take cognizance of the pattern of insubordination and difficult relationships with many of your colleagues -- superiors, peers and subordinates alike, as revealed by the evidence gathered in the investigation and your statements after I issued the OTR letter, including disparaging remarks you make with respect to many colleagues without tact and without basis.

Having carefully weighed all relevant considerations, I have reached the conclusion that my trust and confidence in your ability to continue in your role has been lost making the employment relationship so irreparably damaged as to render its continuation intolerable.

141. The Tribunal recalls that International Staff Rule 10.3(a) on due process in the disciplinary process stipulates as follows:

The Commissioner-General may initiate the disciplinary process where the facts that have been established indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right

to seek the assistance of counsel in his or her defence through the Legal Office (Staff Assistance), or from outside counsel at his or her own expense.

142. With respect to disciplinary measures that are based on aggravating factors in addition to other grounds, the UNAT has held that it is the task of the Tribunal to examine whether there is clear and convincing evidence for all the identified facts or elements (*Neguissie* 2016-UNAT-700, para. 23; *Neguissie* 2020-UNAT-1033, para. 11). Specifically, in *Neguissie* 2020-UNAT-1033, para. 37, the UNAT held as follows:

37. Finally, the UNDT correctly found that the Administration had unlawfully relied, as an aggravating factor, upon Mr. Negussie's alleged conduct during an incident in April 2013 which had never been reported, investigated or established. The intention of the reference in the investigation report that "[h]aving information of a similar incident that occurred inside Gambella Sub-Office where [Mr. Negussie] manhandled a driver, [makes] it more likely that [Mr. Negussie] did the same with [M]", served to undermine Mr. Negussie's character. Similar fact evidence may be considered in disciplinary matters if the evidence is probative of the matter in question and relevant or significant to the facts of a case. In the present case, however, allegations of unsubstantiated misconduct on the part of Mr. Negussie should have played no part in an investigation report or conclusion, primarily because they did not prove that Mr. Negussie assaulted M.

143. In the present case, it is clear that the Applicant was disciplined with a higher sanction based on certain alleged aggravating factors. However, these factors are vague and unsubstantiated. There is no indication as to what acts were committed by the Applicant, for example, what constituted "the pattern of insubordination and difficult relationships with many of [her] colleagues -- superiors, peers and subordinates" or what "disparaging remarks" she made "with respect to many colleagues without tact and without basis". Nor is there any evidence as to when these acts were committed and against whom. Moreover, the Applicant was given no opportunity to rebut these allegations.

144. It is also undisputed that these allegations refer to the Applicant's behaviour after she had received the OTR letter and they were not investigated. They were firstly communicated to the Applicant through the former CG's email dated 2 April

2019. Consequently, the Tribunal holds that these allegations of unsubstantiated misconduct on the part of the Applicant should not have been considered in the former CG's email dated 2 April 2019 nor in the impugned decision. They are not related to the other facts upon which the Applicant was admonished. The Tribunal adds that the former CG's reliance on these alleged factors in deciding to impose a disciplinary measure "in the upper range" was a clear and significant breach of the Applicant's due process right.

145. In view of all the foregoing, either the facts upon which the disciplinary measure was imposed are not established by clear and convincing evidence or the established facts do not constitute misconduct. Moreover, the aggravating factors were not specified in the OTR letter. Thus, the contested disciplinary measure must be rescinded.

Remedies

146. The UNAT has consistently held that the Tribunal may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury (*Faraj* 2015-UNAT-587, para. 26). Likewise, according to the jurisprudence, the Tribunal must set the amount of compensation following a principled approach and on a case by case basis, and the Tribunal is in the best position to decide on the level of compensation given its appreciation of the case (*Krioutchkov* 2017-UNAT-712, para. 16; *Sarrouh* 2017-UNAT-783, para. 25).

147. In the present case, the Applicant requests compensation for: 1) moral harm, 2) Education Grant, 3) legal representation fees and to be paid her termination indemnity in full. In view of the Applicant's various requests for compensation, the Tribunal deems it necessary to make certain clarifications prior to addressing each of the Applicant's requests.

148. The UNAT has held that "the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations" (*El-Kholy* 2017-UNAT-730 para. 38; *Ho* 2017-UNAT-791 para. 30). Nevertheless, a distinction must be

made between various allowances that a staff member is entitled to as part of his/her appointment and his/her entitlements following his/her termination. Given Article 10(5)(a) of the Tribunal's Statute, as long as the Applicant is not reinstated, it is a legal fact that she has been terminated and that she is not a staff member anymore. In that sense, the Applicant, as of 9 July 2019, is not entitled to any allowance, such as Education Grant.

149. In the present case, given the fact that the Applicant's termination was unlawful, she is entitled to be compensated for any loss of her entitlement to Education Grant, as part of the compensation ordered by the Tribunal under Article 10(5) of its Statute. However, the Tribunal recalls that "[a]rticle 10(5) [...] limits the total of all compensation ordered under subparagraphs (a), (b), or both, to the equivalent of two years' net base salary of the applicant, unless higher compensation is warranted and reasons are given to explain what makes the case exceptional" (*Kasmani* 2013-UNAT-305, para. 27).

150. Termination indemnity, however, is different because, as noted above, it is a legal fact that the Applicant has been terminated. Therefore, the Applicant is entitled to termination indemnity under the International Staff Regulations and International Staff Rules and this is not an award of compensation under Article 10(5) of the Tribunal Statute. In fact, with this perspective, the UNAT has consistently held that there is no reason to reduce in-lieu compensation by the amount of termination indemnity (*Robinson* 2020-UNAT-1040, para. 23; *Zachariah* 2017-UNAT-764, para. 3).

151. In light of the above clarifications, the Tribunal will now review each of the Applicant's requests for remedies.

Compensation in lieu of rescission

152. Article 10(5) of the Tribunal's Statute provides:

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested

administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph[.]

153. Accordingly, as the rescinded decision concerns a termination, the Tribunal must determine an amount of compensation that the Agency may elect to pay as an alternative to the rescission of the contested decision. The Tribunal recalls that an award under Article 10(5)(a) of its Statute is alternative compensation in lieu of rescission. It is not an award of moral damages (*Elayyan* 2018-UNAT-887, paragraphs 30-31).

154. In the Tribunal's view, the present case does not represent any distinguishing feature warranting more than two years' net base salary as compensation in lieu of rescission. Consequently, taking into account the fact that the Applicant's fixed-term appointment was lastly extended until 31 January 2022, the Tribunal holds that it is appropriate to set the alternative compensation to the equivalent of two years' net base salary.

Termination indemnity

155. In terms of termination indemnity, Annex II of International Staff Rules provides as follows:

Staff members whose appointments are terminated shall be paid an indemnity in accordance with the following provisions:

(a) Except as provided in paragraphs (b), (c), and (d) below and in staff regulation 9.3, the termination indemnity shall be paid in accordance with the following schedule:

[...]

(c) A staff member whose appointment is terminated for unsatisfactory service or who for disciplinary reasons is separated from service for misconduct other than by summary dismissal or separation from service with no termination indemnity, may be paid, at the discretion of the Commissioner-General, an indemnity not exceeding one half of the indemnity provided under paragraph (a) of the present annex[.]

156. If the Applicant's termination had been lawful, the aforementioned paragraph (c) would have been applicable, and as her termination was with termination indemnity, she would have been entitled only to an indemnity not exceeding one half of the indemnity provided under the aforementioned paragraph (a). Therefore, the Applicant's allegation that the former CG implemented an illegal *post facto* reduction of her termination indemnity as a disguised disciplinary measure is without merit. Nevertheless, as the impugned decision is rescinded by the Tribunal, the Applicant has simply been terminated, and therefore, the Agency is to disburse to the Applicant the entirety of her termination indemnity in accordance with paragraph (a) of Annex II of International Staff Rules.

Education Grant

157. The Tribunal concluded above that the present case does not demonstrate any distinguishing feature warranting an award of compensation of more than two years' net base salary. Therefore, the Tribunal holds that the Applicant's request for compensation for Education Grant has already been included in the compensation of two years' net base salary and that there are no exceptional circumstances warranting exceeding the two-year cap of compensation.

Moral harm

158. Article 10(5) of the Tribunal's Statute provides:

5. As part of its judgement, the Dispute Tribunal may order one or both of the following:

[...]

(b) Compensation for harm supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

159. Accordingly, an award of compensation for harm must be supported by evidence. In the present case, the Tribunal notes that the Applicant, with respect to her request for compensation for moral damages, failed to provide sufficient evidence of harm in order to be awarded compensation in accordance with the

provisions of Article 10(5) of the Tribunal's Statute. Therefore, the Tribunal holds that it would not be appropriate to award the Applicant any compensation for her alleged moral damages.

Legal representation fees

160. With respect to legal representation fees, the Tribunal is cognisant of the UNAT's Judgment in *Delaunay* 2019-UNAT-939, which is only available in French, and reads, in relevant part, as follows:

63. Si le rapport de la Commission de conciliation a reconnu que Mme Delaunay a subi un préjudice résultant de mauvaise démarche de l'administration dans la maîtrise des accusations contre sa personne, il s'en suit que les frais d'avocat que Mme Delaunay a dû engager pour la défendre devant les autorités administratives ont également eu pour cause cette même mauvaise démarche. L'accessoire suivant le principal, l'appel doit donc être accueilli à ce sujet, puisque Mme Delaunay a apporté la preuve des dépenses encourues comme résultat de l'illégalité pratiquée par l'administration.

161. Accordingly, the Tribunal has no doubt that the Applicant is entitled to be compensated for her legal representation fees. Nevertheless, the Tribunal holds that the legal fees are included in the compensation of two years' net base salary and that there are no exceptional circumstances warranting exceeding the two-year cap on compensation.

Accountability

162. The Applicant requests the Tribunal to refer the DHR, the D/DLA, the D/DHR, the AS/DC and the former CG for accountability. In this respect, Article 10(8) of the Tribunal's Statute provides as follows:

8. The Dispute Tribunal may refer appropriate cases to the Commissioner-General for possible action to enforce accountability.

163. In accordance with the UNAT's jurisprudence, the exercise of the power of referral for accountability must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws (*Igbinedion* 2014-UNAT-410, paras.

37-39; *Cohen* 2017-UNAT-716, para. 46; *Gorelova* 2017-UNAT-805, paras. 50-51).

164. In the present case, it is apparent that the former CG offered the Applicant the option of resigning and receiving a positive recommendation instead of being terminated. If substantiated, such a practice is a blatant violation of the UN's core values. If a staff member has committed serious misconduct, he/she must be separated from the Agency in accordance with the Agency's regulatory framework. Under no circumstances should this staff member be provided with a positive recommendation, thus allowing him/her to pursue his/her international career within the United Nations system. The Tribunal is cognisant of a Commissioner-General's discretionary powers in disciplinary matters. However, this discretion must be exercised within the interests of the Agency and the larger United Nations system and within the regulatory framework. Consequently, the Tribunal refers Mr. Pierre Krähenbühl, the former CG, to the Commissioner-General for possible action to enforce accountability. The Applicant's request for the referral of other staff members is dismissed, as the rescinded decision was taken by the former CG.

Conclusion

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

- i) The impugned decision to impose on the Applicant the disciplinary measure of separation from service with termination indemnity is hereby rescinded;
- ii) Should the Respondent elect to pay financial compensation instead of effectively rescinding the impugned decision, he shall pay the Applicant the alternative compensation in lieu of rescission equivalent to the amount of two years' net base salary;
- iii) The Applicant is not awarded any additional compensation, as there are no exceptional circumstances warranting exceeding the two-year cap of compensation of Article 10(5) of the Tribunal's Statute;

- iv) The Agency is ordered to disburse to the Applicant the entirety of her termination indemnity in accordance with paragraph (a) of Annex II of International Staff Rules;
- v) The present Judgment is to be placed in the Applicant's OSF;
- vi) The Applicant's "oral evidence" is stricken from the record;
- vii) The Tribunal hereby refers Mr. Pierre Krähenbühl, the former CG, to the Commissioner-General for possible action to enforce accountability; and
- viii) The amount of two years' net base salary and the remainder of the Applicant's entitlement to termination indemnity are to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate, applicable as of that date, shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of the payment.

Judge Jean-François Cousin

Dated this 10th day of November 2020

Entered in the Register on this 10th day of November 2020

Laurie McNabb, Registrar, UNRWA DT, Amman