MOHAMMAD

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 Samer Mohammad ("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 summary dismissal.

Facts

2. Effective 26 February 2001, the Applicant was employed by the Agency as Teacher at Husn Camp Preparatory Boys School No. 1, Grade 6C, Step 1, Jordan Field Office ("JFO").

3. Effective 1 January 2012, the Applicant’s appointment was converted from “X” category fixed-term appointment to “A” category temporary indefinite appointment.

4. At the time material to the events of the present application, the Applicant was employed by the Agency as Teacher, Grade 11, Step 3, at Irbid Preparatory Boys School No. 1, JFO ("Irbid School").

5. On 3 May 2016, a teacher at Irbid School reported to an UNRWA Education Officer that the Applicant had allegedly engaged in sexual exploitation and abuse ("SEA") against an 8th grade student at Irbid School ("Student A"). On the same day, this report was forwarded to the Field Legal Office, Jordan ("FLO/J").

6. On 4 May 2016, the father of another 8th grade student at Irbid School ("Student B") submitted a written complaint to the FLO/J, alleging that during the scholastic year 2015/2016, his son had been exposed to indecent and sexual pestering by the Applicant.

7. On 4 May 2016, the Officer-in-Charge, ("OiC"), Director of UNRWA Operations, Jordan ("DUO/J") authorised the Field Investigation Officer, JFO ("FIO/J") to conduct an investigation into the reported allegations against the Applicant.
8. On 10 May 2016, the DUO/J placed the Applicant on administrative leave with pay, effective immediately, pending the outcome of the investigation.

9. On 10 July 2016, the investigation was concluded and followed by the Investigation Report.

10. On 6 October 2016, the Head, Field Legal Office, Jordan (“H/FLO/J”) issued the Applicant a due process letter (“DPL”), informing him of the findings of the investigation and inviting him to respond to the allegations.

11. On 24 October 2016, the Applicant responded to the DPL and denied the allegations.

12. On 22 December 2016, the H/FLO/J recommended to the Head, Field Human Resources Office, Jordan (“H/FHRO/J”) that a proportionate disciplinary measure be imposed on the Applicant.

13. On 1 February 2017, the DUO/J sought the agreement of the Director of Human Resources (“DHR”) and the 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”).

14. On 26 July 2017, the DHR and the DLA informed the DUO/J that they did not agree with his recommendation. The DHR and the DLA underlined that neither the H/FLO/J nor the DUO/J had been provided with the translation of the Applicant’s response to the DPL. In addition, the DHR and the DLA noted that “in the absence of testimony from the mother of [Student B], […] the evidence does not clearly and convincingly support a finding that the phone provided by the [Applicant] contained pornographic content”. Therefore, in their opinion “no decision/action should be taken on this case before the decision maker is provided with an opportunity to review all the evidence and due process response in English”.

15. On 23 January 2018, the H/FLO/J requested the Department of Internal Oversight Services (“DIOS”) to consider to re-open the investigation that had been conducted by the FIO/J into the allegations against the Applicant.
16. On 31 January 2018, the DIOS decided to re-open the investigation for the limited purpose of interviewing the mother of Student B with respect to whether she had seen any pornographic material on the mobile phone that the Applicant had given to her son. Student B was also re-interviewed.

17. By interoffice memorandum ("IOM") to the DOU/J dated 19 March 2018, the Director, DIOS submitted the DIOS’ findings with respect to these two interviews.

18. By IOM dated 3 April 2018 to the DOU/J through the H/FHRO/J, the H/FLO/J recommended that the disciplinary measure of summary dismissal be imposed on the Applicant.

19. On 15 April 2018, the Commissioner-General ("CG") informed the staff members that “[t]hose reasonably believed to have committed SEA may be placed on administrative leave without pay during investigation and if found to have committed SEA will receive the maximum possible disciplinary sanction according to our regulatory framework”.

20. In June 2018, the DUO/J sought anew the agreement of the DHR and the DLA to impose on the Applicant the disciplinary measure of summary dismissal, in accordance with paragraph 23(b) of PD A/10.

21. On 1 October 2018, the DHR and the DLA agreed with the DUO/J’s recommendation, and they requested the DUO/J to refer the matter to the CG for his decision, pursuant to paragraph 25 of PD A/10.

22. By IOM dated 11 October 2018, the DUO/J sought the approval of the CG to impose on the Applicant the disciplinary measure of summary dismissal. The CG approved the DUO/J’s request on 4 November 2018.

23. On 8 November 2018, the Deputy, DUO/J ("D/DUO/J") informed the Applicant of his summary dismissal.

24. On 22 November 2018, the Applicant submitted a request for decision review.
25. On 20 February 2019, the application was filed with the UNRWA Dispute Tribunal (“Tribunal”). The application was transmitted to the Respondent on 24 February 2019.

26. On 26 March 2019, the Applicant filed a motion for expedited consideration. The Applicant’s motion was transmitted to the Respondent on the same day.

27. On 27 March 2019, the Respondent filed a motion for leave to participate in the proceedings and an extension of time to file his reply. The motion was transmitted to the Applicant on 28 March 2019.

28. By Order No. 068 (UNRWA/DT/2019) dated 7 April 2019, the Tribunal denied the Applicant’s motion for expedited consideration and granted the Respondent’s motion for leave to participate in the proceedings and an extension of time to file his reply.

29. On 12 April 2019, the Respondent submitted his reply. The reply was transmitted to the Applicant on 16 April 2019.

30. On 2 May 2019, the Respondent filed a motion for an extension of time to translate his reply. The motion was transmitted to the Applicant on 5 May 2019.

31. By Order No. 103 (UNRWA/DT/2019) dated 15 May 2019, the Tribunal granted the Respondent’s motion for an extension of time to translate his reply.

32. On 15 July 2020, the Respondent filed a motion for a further extension of time to translate his reply. The motion was transmitted to the Applicant on the same day.

33. On 22 July 2019, the Respondent filed the Arabic translation of his reply. The translation was transmitted to the Applicant on the same day.

34. By Order No. 235 (UNRWA/DT/2020) dated 19 November 2020 (“Order No. 235”), the Tribunal: 1) allowed the Applicant to produce written testimonies from individuals whom he contended the Investigator had not interviewed and from any other individuals; 2) ordered the Respondent to submit to the Tribunal all the annexes to the 10 July 2016 Investigation Report; and 3) informed the parties about
its decision to adjudicate the present case on the papers and ordered the parties to provide to the Tribunal acceptable reasons and arguments for the conduct of an oral hearing, if they did not agree with the Tribunal’s decision to adjudicate the case on the papers.

35. On 1 December 2020, the Applicant submitted his written testimonies in accordance with Order No. 235. The Applicant’s submission was transmitted to the Respondent on the same day.

36. On 3 December 2020, the Respondent submitted all the annexes of the 10 July 2016 Investigation Report in accordance with Order No. 235. The Respondent’s submission was transmitted to the Applicant on 6 December 2020.

37. On 2 January 2021, the Applicant submitted additional evidence without requesting leave of the Tribunal. The Applicant’s submission was transmitted to the Respondent on 4 January 2021. The Tribunal accepted the additional evidence into the record.

**Applicant’s contentions**

38. The Applicant contends:

   i) No clear and convincing evidence has been adduced to establish the conclusions reached by the Investigator, and therefore, the investigation did not lead to a reasonable inference that the allegations were substantiated;

   ii) The complaint is the result of family disputes between him and his brother-in-law, who was divorced from the Applicant’s sister. His brother-in-law is the uncle of Student B’s father, and he wanted to retaliate against him and the Applicant’s sister in order to tarnish their reputations;

   iii) The Investigator did not act in a fair and just manner but instead intimidated him and encouraged him to resign;

   iv) The Investigator’s and the Student B’s families visit each other’s homes;
The Investigator leaked the details of the investigation to the family of Student B’s family;

vi) He was informed by the Chairperson of the Staff Union that he would return to his job;

vii) His proposed witnesses were not interviewed by the Investigator;

viii) He was deprived of the right to consult an Agency lawyer or a colleague to assist him during the interviews with the Investigator;

ix) He is innocent of all accusations; there is no witness who saw him kissing the student;

x) The student is the one who stole the mobile phone from his locker at the school;

xi) He had a talk with a group of students about sexual matters and this was his duty as a teacher; and

xii) The student never came to his home.

39. The Applicant requests:

i) The rescission of the disciplinary measure and to be reinstated;

ii) The Agency to hold the Investigator accountable for breaching his due process rights;

iii) To be provided with all the evidence, including all the witness statements, mobile phone and alleged pornographic videos; and

iv) To be compensated for the material and moral damages he sustained.

**Respondent’s contentions**

40. The Respondent contends:

i) The summary dismissal of the Applicant was properly effected;
ii) The facts upon which the disciplinary measure was based were established by clear and convincing evidence;

iii) Student B categorically stated that the Applicant kissed him on the mouth and attempted to do so on other occasions;

iv) The mother of Student B confirmed that she had seen pornographic material on her son’s mobile phone, and Student B confirmed that the material was sent by the Applicant through WhatsApp;

v) Witness 2’s statement that on more than one occasion, he had seen the Applicant and Student B alone in an empty classroom with the door closed corroborates the allegations;

vi) The Applicant had pursued several opportunities to be alone with student B, and he gave him a mobile phone;

vii) The Applicant had a sexually themed conversation with Student B;

viii) The relationship between the sister of Student B’s father and the Investigator’s daughter is not a familial relationship;

ix) During their interviews with the Investigator, several witnesses commented on the quality of the Applicant as a teacher; this demonstrates that the Investigator was not biased and that the Applicant’s witnesses were not ignored;

x) 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

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

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

Decision-making process for the Applicant’s summary dismissal

42. Area Staff Rule 110.1, paragraph 4, provides as follows:

The decision to impose a disciplinary measure shall be within the discretionary authority of the Commissioner-General. For the imposition of disciplinary measures other than summary dismissal, such authority is delegated to the Director of Human Resources for Headquarters staff and Field Office Directors for Field staff.

43. Accordingly, it is clear that only the CG is authorised to impose on staff members the disciplinary measure of summary dismissal. In the present case, it is clear that the impugned decision was made by the CG on 4 November 2018. However, the Applicant was informed of the CG’s decision to summarily dismiss him only through a letter dated 8 November 2018 from the D/DUO/J.

44. In this 8 November 2018 letter, the D/DUO/J states, inter alia; “we agree that the cumulative…”; “I find your actions…”; “DLA, HRD and the [CG] agree with my recommendation”; “We consider that the acts…”; “in addition to my [sic] message to all staff (dated 15 April 2018)”; “[i]n imposing this disciplinary measure […] I have taken into account”. The Tribunal holds that the nature and quantity of these mistakes, with respect to the identity of the decision-maker of the impugned disciplinary measure, contained in a letter that informs a staff member about his summary dismissal, is not acceptable.

45. The Tribunal is cognisant of the UNAT’s jurisprudence that “only substantial procedural irregularities will render a disciplinary measure unlawful” and that “[e]ven a very severe disciplinary measure like separation from service can be regarded as lawful if, despite some procedural irregularities, there is clear and convincing evidence of grave misconduct, especially if the misconduct consists of a physical or sexual assault” (Sall 2018-UNAT-889, para. 33). Accordingly, the Tribunal holds that, in the present case, these mistakes are not significant enough to render the imposition of the disciplinary measure of the summary dismissal unlawful. Nevertheless, the Tribunal urges the Agency to adopt a procedure where
the letters imposing the disciplinary measure of summary dismissal are signed and issued by the CG himself.

**Due process rights**

**Investigative process**

46. The Applicant alleges that 1) the Investigator was biased and determined to sanction him; 2) he was not allowed to be assisted by a lawyer or a legal representative during the interview with the Investigator; 3) his witnesses were ignored by the Investigator, and as such, his due process rights were violated.

47. In this regard, the relevant provisions of the DIOS Technical Instruction 02/2016 on UNRWA’s Investigation Policy (“DTI 02/2016”), provide as follows:

25. The subject of investigation shall be given a full and fair opportunity to respond to the allegations against him/her.

[...]

29. The subject of investigation has no right to the presence of Counsel during interviews. However, the subject may be accompanied to the interview by a third party observer to provide emotional support to the subject. The observer shall be there strictly in a personal capacity, shall not be allowed to intervene or interrupt the interview, and may be asked to leave the interview if s/he does. The observer must undertake, prior to the interview and in writing, to not disclose the contents of the interview, must be available at the time scheduled for the interview, and should not be connected to the investigation. The presence of a third-party observer to any interview remains at the discretion of the investigator.

48. First, while noting that there is no provision in the Agency’s regulatory framework obliging the Agency to assign more than one investigator to an investigation into serious allegations, such as sexual abuse, the Tribunal considers that it would have been more prudent to have assigned two investigators to investigate the allegations against the Applicant. This type of practice would avoid any accusations of bias on the part of the investigator, as each would be a check on the other. However, as the Applicant failed to provide any convincing evidence with
respect to the absence of neutrality and impartiality in the investigative process, his allegations in this regard are without merit.

49. Second, as it is clear from the above provisions, the subject of an investigation has no right to the presence of Counsel during interviews. Thus, this contention of the Applicant is also without merit.

50. Third, in accordance with aforementioned paragraph 25 of DTI 02/2016 and the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), due process may require that the parties shall be permitted to call witnesses/experts to testify on the issue at stake (Hepworth 2011-UNAT-178, paras. 30-31; Landgraf 2014-UNAT-471, para. 30; Flores 2015-UNAT-525, para. 24).

51. As it is clear from the facts of the present case, the DUO/J’s initial intent to terminate the Applicant with termination indemnity was not supported by the DLA and the DHR, based on their view of the Applicant’s due process rights and the lack of clear and convincing evidence. Following additional interviews conducted by the DIOS, namely of Student B and his mother, the Agency decided to summarily dismiss the Applicant. In that sense, the Tribunal notes that any shortfall in the initial investigation was offset by further investigation and interviews that were conducted by the DIOS. Moreover, during the proceedings before the Tribunal, the Applicant was invited to produce written testimonies from individuals whom he contended the Investigator had not interviewed or from any other individuals. The Applicant submitted five written testimonies, namely from the Chairperson of the Staff Union, his former supervisor, his own wife, brother-in-law and a former colleague.

52. Consequently, the Tribunal concludes that the Applicant’s due process rights were amply observed during the investigative process and during the proceedings before the Tribunal. Accordingly, the Applicant’s contention that the impugned disciplinary measure should be nullified on the basis that the Agency violated his due process rights during the investigative process is without merit.
Proceedings before the Tribunal

53. “As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established” (Applicant 2013-UNAT-302, para. 33). That said, “[d]isciplinary cases are not criminal. Liberty is not at stake” (Molari 2011-UNAT-164, para. 30). Therefore, “due process does not always require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers” (Applicant 2013-UNAT-302, para. 33). This is because “there are […] cases in which it is impossible, or inadvisable, for such confrontation to occur”, “[as] long as it is established to the Tribunal’s satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position” (Applicant 2013-UNAT-302, para. 36).

54. The Tribunal further notes that it has wide discretion in matters of case management in accordance with Article 11(1) of the Tribunal’s Rules of Procedure (Nimer 2018-UNAT-879, para. 33) and that its Rules of Procedure do not provide that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.

55. During the proceedings of the present case, the Tribunal considered that the record before the Tribunal was sufficient for the Tribunal to render a decision without the need for an oral hearing (Mbaigolmem 2018-UNAT-819, paragraph 28). By Order No. 235, the Tribunal informed the parties about its decision to adjudicate the present case on the papers and ordered the parties to provide to the Tribunal acceptable reasons and arguments for holding an oral hearing, if they did not agree with the Tribunal’s decision (Abu Hweidi et al. 2017-UNAT-779, para. 18). As the parties did not file any objections to the Tribunal’s decision to adjudicate the present case on the papers, the present case is decided on the papers.

56. In terms of the Applicant’s access to documentary evidence, at the beginning of the proceedings, the Applicant was provided with a redacted version of the Investigation Report. Further, on 6 December 2020, the Applicant received the unredacted version of the Investigation Report, along with its annexes. Accordingly, the Tribunal holds that the Applicant’s due process rights were amply observed and that he was entirely able to mount a proper defence based on the
documentary evidence. Furthermore, the Tribunal underscores that the present Judgment is based solely on the evidence that was entirely available to both parties.

**Judicial review of the impugned disciplinary measure**

57. The Applicant contests the decision to impose on him the disciplinary measure of summary dismissal. The Applicant denies the allegations of misconduct.

58. 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”.

59. 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**

60. The Applicant admits that he gave a mobile phone to Student B and that he had a sexually themed conversation with him. Other facts upon which the Applicant was admonished in the contested disciplinary measure are that: 1) he had kissed Student B on the mouth and attempted to do so on other occasions; 2) he had sent pornographic materials to Student B’s phone through WhatsApp and these materials had been seen by Student B’s mother; 3) he had been seen alone in an empty classroom with Student B on more than one occasion; 4) he pursued several
opportunities to be alone with Student B; and 5) he had paid for Student B’s attendance at a school picnic without informing his parents.

61. The Applicant categorically denies the allegations and contends that the complaint submitted by Student B’s father was malicious and motivated by disputes between the families.

62. At the outset, given the statement of one witness and the Applicant’s failure to support his contention with evidence, the Tribunal considers that the Applicant’s claim that the allegations against him were malicious and motivated by family disputes is without merit.

63. It is clear from the statements of two witnesses and two students that the Applicant was considered to be a good teacher dedicated to his work. As noted above, the Applicant admitted having given a mobile phone to Student B. The Tribunal notes that no valid reason exists for a teacher to give a mobile phone to a student. The Applicant’s explanation that Student B is his relative and that he had asked the Applicant to give him a mobile phone is not at all convincing. The only reasonable explanation behind this action of the Applicant is that he intended to have private conversations and interactions with Student B. Given Student B’s statements, the Applicant actually provided Student B with a mobile phone after his parents had confiscated his phone when they had discovered pornographic materials in it. Accordingly, it is evident that the Applicant’s intention behind his action to provide Student B with a mobile phone was to be able to stay in touch with him in a private manner.

64. As previously noted, the Applicant, who is an Arabic Language Teacher, also admits that he had a sexually themed conversation with Student B. The Applicant’s explanation for this conversation, that he intended to give advice because of the blemishes/acnes on Student B’s face, is not acceptable. As an Arabic Language Teacher, it was not appropriate, nor part of the Applicant’s duties, to have had such a conversation with Student B.

65. It is also clear that the Applicant pursued several opportunities to be alone with Student B. First, given the statements of Student B and his father, the Tribunal
considers that it is established that the Applicant had invited Student B to his home to help him read his examination paper. Second, based on the same statements, it is also established that the Applicant, as an organiser of a school picnic, attempted to ensure Student B’s presence at the picnic in order to have an opportunity to be alone with him after the end of the picnic. Third, based on the same statements and the statement of one witness, it is also established that the Applicant had been seen alone in an empty classroom with Student B on more than one occasion. The Tribunal notes that these facts, examined separately, would not be sufficient to constitute, *ipso facto*, an engagement in SEA. Nevertheless, the Tribunal emphasises that it is important to take into account these facts as corroborating evidence with respect to allegations against the Applicant.

66. There is also no evidence in the case record that casts doubts on Student B’s and his father’s allegations against the Applicant. Moreover, the statement of Student B’s mother significantly supports the allegations against the Applicant, as she confirmed having seen pornographic materials in her son’s phone. Furthermore, Student B stated that he usually deleted pornographic materials sent by the Applicant via WhatsApp. However, he had failed to notice that the pornographic videos were automatically downloaded to his phone gallery, which his mother had discovered. The Tribunal finds this statement sincere, convincing and strongly supportive of Student B’s credibility, as WhatsApp’s feature of automatically saving media files to the phone’s gallery is an option turned on by default.¹

67. The Tribunal emphasises that the fact that Student B’s statements are supported by his mother’s and father’s statements does not undermine the credibility and probative value of each of these statements. In a similar context, in *Wishah 2015-UNAT-537*, paras. 25-26, the UNAT also held as follows:

> It must be taken into account that the alleged misconduct was committed in a domestic context against the relatives of the staff member. In that context, the testimonies obtained usually come from persons directly affected by the event or closely related to Ms. As and/or offenders. Consequently, their subjective character cannot be disregarded, nor can the investigation avoid interviewing these persons, since they are the “necessary”

witnesses to the facts under investigation. […] This context is particularly common in cases that involve gender violence.[…]

68. Consequently, the Tribunal considers that there is no convincing evidence in support of the Applicant’s credibility, and the Applicant’s explanations with respect to the allegations against him are not credible. On the other hand, the statements of Student B, his mother and his father are entirely persuasive and credible.

69. In view of the foregoing, in particular: 1) the lack of sufficient evidence in support of the Applicant’s credibility; 2) the Applicant’s unconvincing explanations with respect to the allegations against him; 3) the Applicant’s evident intention to stay in touch with Student B in a private manner by providing him with a mobile phone; 4) the Applicant’s inappropriate and sexually themed conversation with Student B, as an Arabic Language Teacher; 5) the Applicant’s several attempts to be alone with Student B; 6) Student B’s and his parents’ consistent accounts about the allegations; 7) the mother’s testimony about her discovery of pornographic materials in her son’s phone; 8) Student B’s sincere and convincing statement about the source of the pornographic materials and his failure to hide these materials from the routine checks of his parents; 9) the lack of any motive on the part of Student B and his parents to report such a fabricated incident; and 10) the inherent probabilities of the situation given the harm Student B and his family suffered as a result of reporting such an incident, taken cumulatively, constitute a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct had, in fact, occurred.

**Misconduct**

70. 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.
71. 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.

72. 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.

73. PD A/10 provides:

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

[…]

74. 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
Agencies 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[.]

75. 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. As a teacher, it was seriously inappropriate and egregious for the Applicant to engage in SEA against one of his students. In this regard, not only were the Applicant’s actions a manifest abuse of his functions and authority upon a vulnerable student and an UNRWA beneficiary, but they were also deliberate acts of SEA. Thus, the Tribunal has no doubt that such actions by a teacher constitute serious misconduct.

Proportionality

76. 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.

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

11. Serious misconduct constitutes ground for the most severe disciplinary measures, up to and including summary dismissal.
78. 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 determining whether such sanction appears to be “absurd, arbitrary or tainted by extraneous reasons or bias”.

79. The Tribunal takes note that the CG emphasised, in a message to staff members dated 15 April 2018, that “[t]hose reasonably believed to have committed SEA may be placed on administrative leave without pay during investigation and if found to have committed SEA will receive the maximum possible disciplinary sanction according to our regulatory framework”.

80. Moreover, as a child, Student B falls within the category of people who have a “most vulnerable” status in accordance with GSC No. 07/2010. In this respect, by exploiting this status, the Applicant placed Student B and his family in an extremely harmful position in their community because of such an incident, and for disclosing it.

81. Therefore, although the disciplinary measure of summary dismissal is the most severe measure that the Agency can impose on a staff member, the Tribunal holds that, in cases of SEA against minors, it is proportionate to the nature and gravity of such a serious misconduct. In the present case, there is no reason to consider this measure as absurd, arbitrary or tainted by extraneous reasons or bias.

82. Consequently, having determined that 1) the facts on which the disciplinary measure, *i.e.*, summary dismissal, was based have been established by clear and convincing evidence, 2) the facts legally support the conclusion of serious 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

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

i) The application is dismissed; and

ii) The Tribunal urges the Agency to adopt a procedure where the letters imposing the disciplinary measure of summary dismissal are signed and issued by the CG himself.

____________________________________
Judge Jean-François Cousin

Dated this 18th day of January 2021

Entered in the Register on this 18th day of January 2021

____________________________________
Laurie McNabb, Registrar, UNRWA DT, Amman