Before: Judge Bana Barazi
Registry: Amman
Registrar: Laurie McNabb

WALDEN

v.

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

JUDGMENT

Counsel for Applicant: Self-represented

Counsel for Respondent: Anna Segall
Introduction

1. This is an application by Bryan Walde (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), to terminate his employment for misconduct.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (the “JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in International Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB had been submitted to the Commissioner-General.

Facts

4. On 14 March 2000, in reply to a vacancy notice for a post of Senior Procurement Officer (“SPO”) at Headquarters Amman, Jordan, the Applicant submitted a Personal History Form (“PHF”) and a curriculum vitae (“CV”) which indicated, inter alia, that he had a Master of Business Administration (“MBA”) from Trinity College & University (“TC&U”), South Dakota, USA.

5. The Applicant was short-listed for a personal interview by the hiring department and by the Recruitment Section. Following personal interviews, the interview board unanimously recommended the appointment of the Applicant to the SPO post.

6. On 2 July 2000, the Director of Administration and Human Resources offered the Applicant a one year fixed-term appointment.
7. On 20 July 2000, the Applicant entered the service of the Agency at HQ Amman as a SPO, P4, on a fixed-term appointment for one year. His appointment was subsequently extended.

8. On 19 March 2005, he was transferred to the post of Field Procurement and Logistics Officer, P4, in the West Bank.

9. On 5 April 2007, the Applicant applied for the post of Deputy Director of UNRWA Affairs, Syria, a P5 post. His application included a PHF and a CV.

10. By letter dated 16 October 2007, the Director of Human Resources (“DHR”) referred the Applicant to a 2006 report by the United Nations Office for Human Resources Management (“OHRM”) titled “Diploma Mills: A Report on Detection and Prevention of Diploma Fraud” in which reference was made to TC&U, South Dakota. The DHR asked the Applicant to respond to a list of questions about his MBA.

11. By memorandum dated 24 October 2007, the Applicant responded at length to the questions about his MBA stating, *inter alia*:

    Your letter is a complete shock to me and I have never doubted the credentials of Trinity College and University as it was recommended to me by UN employees before I joined the UN. In this IOM I have endeavoured to answer all your questions with as much detail as possible and to the best of my knowledge.

12. By letter dated 21 November 2007, the DHR acknowledged receipt of the Applicant’s responses to her questions and informed him that she would be seeking advice from OHRM, New York and respond in due course.

13. On 27 January 2008, the Agency sought guidance from OHRM on an appropriate response to the Applicant’s case.

14. On 27 February 2008, OHRM responded and stated *inter alia*:

    Our policy is that degrees obtained from diploma mills and unaccredited universities are not acceptable. Each case is analyzed on its merits. There have been several other cases involving degrees from diploma mills with varying outcomes, as the circumstances in each case were different. In some cases this was because countries have different accreditation regimes. Some principles we applied to such
cases were whether a staff member appeared to have acted in good faith in obtaining the degree, and whether there was an intent to deceive. Some staff did not appear to realize that the university was not accredited, especially as they had submitted coursework rather than just paying for a diploma that is awarded for “life experience”. Another principle is whether the person would still be qualified for the functions if we were not to consider the diploma mill degree. In 2006 we had a JAB case that was based on the fact that a staff member had degrees from a diploma mill. The Staff member was separated from the Organization.

15. On 13 March 2008, the Chief Personnel Services Division (“CPSD”) met with the Applicant to discuss the department’s position in light of OHRM’s advice.

16. By email dated 27 March 2008, the CPSD informed the Applicant that the Agency would conduct a formal investigation of his case.

17. By email dated 12 May 2008, OHRM advised the Agency inter alia that:

OHRM conducts a two-prong test to determine how to handle the case of a staff member (or prospective staff member) who claims a diploma obtained from a non-accredited institution: (i) whether the post for which the staff member was selected required the degree claimed, and (ii) whether the degree was claimed in good faith.

18. By memorandum dated 1 August 2008, the Commissioner-General instructed the Acting Director, UNRWA Operations, Jordan (“A/DUO/J”) “… to conduct the investigation into the facts related to Mr. Walden’s submission of a Master’s Degree in Business Administration from Trinity College and University, South Dakota, USA, in support of his applications for the posts of Senior Procurement Officer, General Stores, P4 and Deputy Director of UNRWA Affairs, P5, Syria Field Office.”

19. By memorandum dated 31 August 2008, the A/DUO/J after having interviewed the Applicant and one panel member from the 2000 recruitment board set out his findings to the Commissioner-General.

20. Having reviewed the investigation report, the Commissioner-General then decided that:

The findings set out in the investigation report indicate that you have engaged in misconduct, and have failed to meet the standard of conduct and integrity expected of an international civil servant.
pursuant to International Staff Regulation 1.4, by submitting a non-accredited degree in support of your successful application for the post of Senior Procurement Officer, General Stores, P4. By submitting a non-accredited degree, you misrepresented your academic qualifications to the Agency, in direct violation of the statement you signed under paragraph 33 of your Personal History Form dated 14 March 2000.

21. By letter dated 20 October 2008, the Applicant responded to the investigation’s findings in a 10-page memorandum alleging that the investigation report misrepresented facts and that evidence used in the investigation was being withheld from him. He further alleged procedural irregularities and time delay. The Applicant concluded by denying that he had committed misconduct or violated any rules or ethical standards.

22. By letter dated 14 November 2008, the Commissioner-General advised the Applicant that, having carefully considered his response of 20 October 2008, she believed that his response did not negate the findings set out in the investigation report, and she answered the Applicant’s specific inquiries and allegations. The Commissioner-General also advised the Applicant of her decision to refer the matter to the International Staff Joint Disciplinary Committee (“JDC”).

23. By memorandum dated 22 January 2009, the DHR on behalf of the Commissioner-General referred the Applicant’s case to the JDC requesting advice on the misconduct of the Applicant:

…including the appropriate disciplinary measure(s) for having knowingly misrepresented his academic qualifications by submitting a non-accredited degree in support of applications for employment with the Agency.

24. On the same day, the Secretary of the JDC forwarded by email to the Applicant a copy of the Agency’s referral of his case and requested his reply to the Agency’s submission by 15 February 2009.

---

1 Specifically, with regard to the CPSD’s email dated 13 March 2008 to the DHR. This email was written following a meeting between the CPSD and the Applicant prior to the Agency’s formal investigation. As per the investigation report, the email was discussed with the Applicant on 20 August 2008 in the West Bank Field Office by the A/DUO/J, but no copy was furnished to the Applicant.

2 The Tribunal notes that it was not until this date that the term “knowingly” misrepresented was used to qualify the alleged misrepresentation as the standard to be applied.
25. Also on the same day, i.e. on 22 January 2009, the CPSD by email provided the Applicant with copies of various documents the Applicant had requested, explaining that where a document was not produced or produced in part, it was because internal correspondence was confidential. However, the CPSD explained that, to the extent the Agency relied upon a document in its submissions to the JDC, such document would be disclosed to the Applicant through the Secretary of the JDC in due course.

26. By email dated 29 January 2009, the Applicant confirmed his acceptance of the proposed JDC panel composition and requested an extension of the deadline for his reply.

27. By email dated 9 February 2009, the Secretary of the JDC informed the Applicant that the JDC Chairperson agreed to extend the deadline for the Applicant’s reply to 11 May 2009 and that the JDC was scheduled to convene on 18 May 2009.

28. By email dated 10 February 2009, the Applicant contested the Respondent’s non-disclosure of confidential documents and objected to the deadline of 11 May 2009 for his reply to the JDC.

29. Following several exchanges between the Applicant and the Secretary of the JDC about the extension of the deadline, the Applicant asked for the JDC’s rules of procedure.

30. By email dated 26 February 2009, the Secretary of the JDC reiterated the JDC’s deadlines and referred the Applicant to International Staff Rule 110.5 “Joint Disciplinary Committee Procedure”.

31. By email dated 1 March 2009, the Applicant requested the JDC to order production, *inter alia*, of the full email of 13 March 2008 from the CPSD to the DHR and again requested a copy of the rules of procedure of the JDC in view of the hearing.

32. Following several consultations with the Chief, General Legal Division (“CGLD”) and the Secretary of the United Nations Joint Appeals Board/Joint Disciplinary Committee in Geneva, on 11 March 2009, the Secretary of the JDC, on
behalf of the Chair of the JDC, requested the JDC to convene on 16 March 2009 to adopt the Rules of Procedure.

33. By emails dated 17 March 2009, the Secretary of the JDC provided the JDC’s Rules of Procedure to the Applicant and confirmed the 11 May 2009 deadline for the Applicant’s reply and the date of 18 May 2009 for the JDC hearing.

34. By email on 23 March 2009, the Applicant wrote to the JAB Secretary reiterating his request for documents, and noting inter alia his objections to the JDC’s procedures.

35. In response to the Applicant’s 23 March 2009 objections to the JDC’s procedures, the Secretary of the JDC informed the Applicant by email dated 30 March 2009 that the Chair of the JDC:

    […] will continue to ensure that no material documents on the specific case are being withheld from either party.

36. By email dated 2 April 2009, the Secretary of the JDC set a deadline and provided a summary of the documents which the JDC would consider, all being available to the Applicant. The Applicant and the Secretary of the JDC continued to exchange emails regarding documents and scheduling up to and including 17 May 2009.

37. On 18 and 19 May 2009, the JDC convened a meeting in camera and later provided its report dated 20 May 2009 to the Commissioner-General. Given the absence of the Applicant’s reply due on 11 May 2009, the JDC considered the Applicant’s written submissions to the DHR and the Commissioner-General on the matter since 16 October 2007 as the written submissions of the Applicant.

38. In review of the evidence the JDC noted that it “was not satisfied with the thoroughness of the investigation report” dated 31 August 2008, namely with respect to contacting members of the Applicant’s interview panel from the 2000 selection process. The JDC contacted a member of the interview panel whom the investigator had been unable to reach in August 2008. Based on the facts it found:
The Respondent [Mr. Walden] was fully aware at the time of his initial and subsequent applications to the Agency for employment that the Masters Degree he had obtained from Trinity College and University, South Dakota, USA, was not a genuine degree on par with such degrees obtained through real study and course work…By knowingly misrepresenting his academic qualifications by submitting a non-accredited degree in support of applications for employment with the Agency the Respondent [Applicant] gained employment with the Agency in a non-ethical manner.

39. The JDC recommended the Commissioner-General to:

- take disciplinary measures against the Applicant as per International Staff Rule 110.3 and to dismiss him;
- consider to effect the dismissal by non-extension of his present employment contract with the Agency.

40. By letter dated 27 May 2009, the Commissioner-General informed the Applicant that she agreed with the JDC’s findings and that his appointment would be terminated for misconduct effective 1 June 2009. The Applicant was further advised that his separation entitlements would be withheld pending the outcome of an ongoing investigation into charges of procurement irregularities. If these charges were substantiated, they could warrant summary dismissal instead of termination for misconduct.

41. By letter dated 28 May 2009, the Applicant requested administrative review of the decision to terminate his appointment.

42. By letter dated 23 June 2009, the Applicant filed a notification of appeal to the JAB against the decision to terminate his appointment, and on 10 January 2010, he filed the statement of appeal to the JAB.

43. On 11 June 2012, the Applicant requested leave to file new evidence. His request was granted on 25 June 2012.

44. On 18 July 2012, the Respondent filed his reply.
Applicant’s contentions

45. The Applicant contends that:

1. he was unaware that his MBA was from a non-accredited university prior to the DHR’s 16 October 2007 letter and all use of the non-accredited MBA prior to that date was made in good faith and in the belief that the qualification was legitimate and therefore he could not have knowingly misrepresented this fact;

2. that during his interview with the Selection Board in the year 2000, he fully disclosed that his MBA qualification was based on prior experience and not on campus studies;

3. his Graduate Diploma from the University of Auckland is his principal qualification and was used to meet the academic requirement of the post he was awarded;

4. the Agency is retroactively applying a policy that did not exist at the time relevant to his application;

5. the investigation conducted by the Agency did not provide any proof that he knowingly submitted a non-accredited degree and read like a personal vendetta;

6. the Agency misrepresented facts in its submissions to the JDC;

7. the JDC’s disciplinary review was substantively and procedurally flawed, tainted by prejudice and violated his rights to due process;

8. the JDC erred in fact and law in reaching its conclusions;

9. the termination of his appointment for misconduct was heavily influenced by an investigation into procurement irregularities, none of which had been proven;

10. the termination of his appointment for misconduct and the conditions of termination were illegal and against UN principles.
46. The Applicant seeks the following relief:

(i) reinstatement to the post of Field Procurement & Logistics Officer, West Bank or another post equivalent in status and remuneration;

(ii) payment equivalent to ten years full pensionable remuneration at the level P4, step 9;

(iii) damages in the amount of US$50,000 for harm to his dignity and reputation;

(iv) damages in the amount of US$50,000 for moral and financial injury;

(v) prejudgment interest at a rate of 5% per annum, plus penalty interest at a rate of 5% per annum from 1 July 2009.

Respondent’s contentions

47. The Respondent contends that:

(i) the termination of the Applicant’s appointment was properly made;

(ii) the remedies sought by the Applicant have no legal basis.

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

Considerations

Preliminary Issues

Respondent’s objections to Applicant’s request for leave to submit new evidence

49. On 11 June 2012, the Applicant requested leave to submit evidence *inter alia* to:
a) show the double standards being applied in the Agency’s acceptance of qualifications;

b) the Joint Disciplinary Committee (“JDC”) Advisor colluded with the Applicant’s ex-wife.

50. The Respondent submits that the new evidence the Applicant sought to include is not relevant to the application as it was not the basis for the decision to terminate his appointment. The Respondent further submits that the Applicant’s motion to file new evidence is in fact new pleadings not made in his original application and that any additional pleadings may be filed only when exceptional circumstances are demonstrated.

51. In Order No. 014 (UNRWA/DT/2012), the Tribunal granted the Applicant leave to submit new and relevant evidence noting:

the academic qualification of the staff member currently holding the post of FPLO was not available to the Applicant at the time he filed his application in January 2010. Although in his appeal to the JAB the Applicant mentioned an “undeclared conflict of interest” vis-à-vis the friendship between the CGLD and the Applicant’s ex-wife, the extent of the communications between the two were not known to the Applicant at the time he filed his application. Therefore, the Tribunal finds that the evidence is new, i.e. not known to the Applicant at the time he filed his application.

Under Article 13 of the Tribunal’s Rules of Procedure, the Tribunal has the authority to rule on the admissibility of evidence and is not held to the so-called “exceptional circumstances” test. As a first instance fact-finding Tribunal, it may accept any evidence that it deems relevant and should apply a less stringent standard for accepting evidence. In the case at hand, the Tribunal accepted the newly proffered evidence as it found the evidence to be relevant to the Applicant’s claim of bias and procedural irregularity.

---

3 The Applicant specifically notes that the new appointee to the post of Field Procurement and Logistics Officer, West Bank Field (“FPLO/WB”) also holds the same degree that was noted as being “not acceptable” in the Agency’s submission to the JDC, i.e. a Graduate Diploma in Business.

4 The Tribunal notes that when the Applicant references the JDC Advisor, he is in fact referring to the CGLD.
Respondent’s late submissions

52. As stated above, the Respondent submitted his reply on 18 July 2012.5

53. Article 30 of the Rules gives the authority to the Tribunal to shorten or extend a time limit fixed by the Rules or waive any rule6 when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties. It is the Tribunal’s belief that submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. Therefore, the Tribunal finds it is in the interests of justice – and that it would be appropriate for a fair and expeditious disposal of the case and would do justice to the parties – for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s reply. Therefore, the Tribunal accepts the Respondent’s reply.

Case Management Hearing

54. On 27 September 2012, the Tribunal held a Case Management Hearing (“CMH”) in Headquarters Amman, specifically to ask the parties if they had any new relevant evidence to submit in this case and to clarify some issues which the Tribunal had noted while preparing the case.

55. Questions were addressed to the parties at the CMH. Their explanations and answers, some of which were filed after the CMH, were duly noted and have been taken into consideration.

Respondent’s objections to admissibility of non-redacted email

56. Upon request of the Tribunal, the Respondent produced ex parte on 17 January 2013, the CPSD’s non-redacted email dated 13 March 2008.7 The Tribunal subsequently notified the Respondent that it intended to disclose the email to the

---

5 The Tribunal notes that the appeal was filed under the former UNRWA JAB system which did not set out any time limits for the Agency to file a reply.
6 With the exception of decision review per Article 8 of the Statute of the UNRWA Dispute Tribunal which states: “The Dispute Tribunal shall not suspend, waive or extend the deadlines for decision review”.
7 The Tribunal notes that the email was already part of the original record, however in a redacted form.
Applicant and gave the Respondent until 21 January 2013 to make submissions on the issue.

57. By memorandum dated 21 January 2013, the Respondent objected, noting:

7. The role of this Tribunal, in reviewing the propriety of disciplinary sanction, is not to substitute itself for the JDC or the Field Office Director; judicial review of administrative decisions is limited to abuse of such discretionary authority.  

8. The Respondent submits that since the JDC had access only to redacted version of the Email, any errors by the JDC would have been limited to its consideration of the redacted version. Accordingly, the Respondent submits that the unredacted portions of the Email lack probative value vis-à-vis the Tribunal’s examination of whether the JDC erred.

58. The Tribunal rejects the Respondent’s argument. Upon review of the non-redacted email, the Tribunal ruled that in the interest of fairness and justice the email should be disclosed to the Applicant in its non-redacted form. Such disclosure is in line with the jurisprudence of the United Nations Appeals Tribunal in Bertucci 2011-UNAT-121, which held that “the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him”.

59. The authority referred to by the UNAT is the Respondent, not the JDC, so the fact that the JDC did not use the document is inconsequential. This is not a matter of the Tribunal substituting itself for the JDC, but rather the Tribunal reviewing the propriety of the disciplinary sanction, i.e. an action taken by the Respondent. The Tribunal is a fact-finding entity and can use any document not found to be privileged for the purposes of judicial review.

---

8 See, for example, United Nations Appeals Tribunal in Sanwidi 2010-UNAT-084, paragraph 38, where the tribunal held:

…There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.

The Tribunal notes that this is a footnote from the Respondent’s submission and not from the Tribunal.

9 The Tribunal notes that it did not find any privilege of confidentiality.
Main Issues

Was the termination of the Applicant’s appointment properly made?

The Law

60. It is important to refer to the legal and administrative framework applicable in the case at bar and to the existing jurisprudence.

61. International Staff Regulation 1.4 provides the following:

**Regulation 1.4:** Staff members shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status or integrity, independence or impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.

62. With respect to disciplinary sanctions, International Staff Regulation 10.2, in force at the material time, provides that:

**Regulation 10.2:**

(a) The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

(b) The Commissioner-General may summarily dismiss a staff member for serious misconduct.

63. International Staff Rule 110.3, repealed on 1 June 2010, provides for a Joint Disciplinary Committee to advise the Commissioner-General on disciplinary measures:
Rule 110.3

Disciplinary Measures

(a) Except in cases of summary dismissal, no staff member shall be subject to disciplinary measures until the matter has been referred for advice to the Joint Disciplinary Committee, provided that referral to the Joint Disciplinary Committee may be waived by mutual agreement of the staff member concerned and the Commissioner-General.

*   *   *

(b) Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure.

64. By memorandum dated 27 January 2003, the Commissioner-General promulgated the International Civil Service Commission’s 2001 “Standards of conduct for the international civil service” providing, with regard to the standard of conduct expected of UN staff, that:

5. The concept of integrity enshrined in the Charter of the United Nations embraces all aspects of behaviour of an international civil servant, including such qualities as honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competence and efficiency, also enshrined in the Charter.

65. General Staff Circular No. 5/2007 regarding “Allegations and complaints procedures and protection against retaliation for reporting misconduct and cooperating with audits or investigations” defines misconduct as follows:

“Misconduct” includes any failure [by a staff member] to comply with [his or her] obligations under the Charter of the United Nations, UNRWA Staff Regulations and Staff Rules or other relevant administrative issuances …

66. Accordingly, while recognising that disciplinary matters are within the discretionary authority of the Commissioner-General, the Tribunal remains guided by the United Nations Appeals Tribunal in Haniya 2010-UNAT-024 and Maslamani 2010-UNAT-028 when reviewing a disciplinary measure. That is, the Tribunal will consider (i) whether the facts on which the sanction is based have been established,
(ii) whether the established facts qualify as misconduct, and (iii) whether the sanction imposed is proportionate to the offence. Noting however, as held by the United Nations Appeals Tribunal in *Abu Hamda* 2010-UNAT-022:

As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.

67. Finally, The Tribunal recalls the jurisprudence of the United Nations Appeals Tribunal in *Molari* 2011-UNAT-164, where it stated:

Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

*Have the facts on which the sanction was based been reasonably established?*

68. At the outset, it is important to specify that this application is about the termination of the Applicant’s appointment for the alleged misrepresentation of his academic qualifications. The Tribunal understands the Agency’s allegation of misrepresentation to be comprised of the two sub-issues of: (i) the non-accredited status of TC&U and (ii) the circumstances surrounding the award of the MBA, i.e. recognition of prior learning. The Tribunal notes that in reviewing the alleged misrepresentation it is important to determine whether the elements of knowing misrepresentation have been established by clear and convincing evidence. In particular the relevant elements include: whether the Applicant: 1) had knowledge that TC&U was a non-accredited institution; 2) misrepresented its accredited status; and 3) misrepresented to the 2000 recruitment panel the basis on which his MBA from TC&U was awarded.
69. Given that the alleged misrepresentation occurred during the P4 SPO recruitment stage, it is important to look at the recruitment and selection procedures leading up to the appointment of the Applicant to the SPO post.

70. The vacancy announcement listing the requirements of the SPO post is the following:

**Essential requirements:** advanced university degree in business administration or related field. Additional coursework or training in procurement/supply management. Coursework or training in general accounting and supply computerized systems. **Experience:** eight years’ experience in a large governmental, international or commercial organization in procurement, supply and materials management, commercial shipping practices and negotiation of sale/purchase contracts, as well as three years related experience at a senior level in developing countries. Computer literacy in software applications and excellent command of written and spoken English are critical.

71. The Tribunal notes that the essential requirements do not specify that the advanced university degree in business administration or related field be from an accredited university.\(^\text{10}\) Indeed, in later vacancy notices, the following clause has been added:

Kindly note that UNRWA only accepts degrees from accredited universities/colleges.\(^\text{11}\)

72. In his letter dated 24 October 2007 to the DHR, the Applicant stated:

Your letter\(^\text{12}\) is a complete shock to me and I have never doubted the credentials of Trinity College [&#] University as it was recommended to me by UN employees before I joined the UN. In this IOM I have endeavoured to answer all your questions with as much detail as possible and to the best of my knowledge.

\(^{10}\) It is not the Tribunal’s intent to suggest that the inquiry into the alleged misrepresentation should stop here on the grounds that the Agency failed to mention the issue of accreditation. Instead, the Tribunal would simply like to point out the vacancy notice’s silence on the accreditation issue which is a focal issue in this case.

\(^{11}\) As cited by the Report of the JDC dated 20 May 2009, the JDC noted that the Agency was compelled as of October 2007 to add this clause to all vacancy notices in response to the possible submission by staff members and/or candidates of non-accredited degrees.

\(^{12}\) Referring to the DHR’s letter of 16 October 2007 to the Applicant with which she transmitted a copy of the OHRM report on Diploma Mills and asked the Applicant to respond to a list of questions about his MBA.
I first learned about [TC&U) whilst serving in Croatia with the New Zealand Army as part of the UN Peacekeeping mission, UNPROFOR,\textsuperscript{13} in 1996. A number of UN civilian employees whom I had contact with advised that this university was awarding legitimate qualifications based on work experience, especially for ex military personnel who had completed formal military courses, and that the UN was accepting such qualifications.

Furthermore, in the last paragraph of his CV submitted in support of his application for the SPO post, the Applicant stated:

I certify that all information stated in this resume is true and complete to the best of my knowledge. \textit{I authorized the United Nations to verify the information provided in this resume} (emphasis added).

\textit{A/DUO/J’s Investigation}

73. Here are, in relevant part, the findings of the A/DUO/J’s investigation:

1. Mr. Walden has stated that he had declared the background\textsuperscript{14} to his Masters degree to the Interview Board for the post of Senior Procurement Officer (General Stores) P-4, and the subject was discussed at length during that interview. Upon interviewing the only member of that Interview Board that I could contact, I was advised by Mr. [X] that he could not recall any such discussion having taken place. This could not be verified by the other four members of the Interview Board as I was unable to contact them.

   *   *   *

3. At the same time in the report prepared by the Board for the post of Chief Supply Division, mention is made that candidate (No. 5) held a university degree, but that it was not advanced nor in the desired field and the candidate was not selected for the post. This statement presumably infers that the Board held some value to the possession of a University degree. However the recommended

\textsuperscript{13}The United Nations Protection Force.

\textsuperscript{14}The Applicant’s 24 October 2007 letter to the DHR further states:

Please kindly note that during my initial UNRWA interview in Amman in June 2000, for the position of Supply Officer, General Supplies, HQ Amman, I advised the Selection Board then that the MBA Qualification was base[d] on “recognition of learning” with no on campus study etc [sic] being completed.
candidate (No. 4) for the post of Chief Supply Division [P5] did not possess an advanced university degree (emphasis added).

4. An advanced university degree was required for both posts, Chief Supply Division and Senior Procurement Officer (General Stores).

74. The Tribunal finds that the investigator’s conclusions throughout the report are based on presumptions rather than actual facts - especially in light of the fact that only one member (Mr. X) of the recruitment board was interviewed and he could not recall any discussion taking place. In his report of investigation, the A/DUO/J briefly explained that he was unable to contact another member from the Applicant’s 2000 recruitment board because he was advised that:

Dr. [Y]…was traveling and would not be back in Amman until September 2008 at the earliest (i.e. after the 31st August 2008 deadline for me to submit this report). I tried to call Dr. [Y’s] Amman residence and Jordanian mobile phone number, but was unable to reach him on either numbers.

75. The Tribunal finds the A/DUO/J’s explanation of why he could not interview a material witness to be unacceptable, i.e. he could not interview the witness because he had a 31 August 2008 deadline to submit his report. Given the time taken by the Agency to examine the case (the Tribunal recalls that the DHR first wrote a letter to the Applicant regarding this matter on 16 October 2007), it does not seem unreasonable that the Agency could have granted an extension for the report in order to ensure that all available witnesses were interviewed. The Tribunal is not alone in viewing the Agency’s report of investigation as weak, as the JDC also noted that it “was not satisfied with the thoroughness of the investigation report” dated 31 August 2008, namely with respect to contacting members of the Applicant’s interview panel from the 2000 selection process. In fact, on 18 May 2009, the JDC itself contacted Dr. Y, a second member of the recruitment panel, by telephone. During the discussion, Dr. Y noted “to the best of his recollection” that “he recalls Mr. Walden stating that his Master’s degree was based on prior experience”.

76. The Tribunal refers to Judgment No. 1454 (2009) of the former United Nations Administrative Tribunal (“UN Administrative Tribunal”) which held that “in the absence of a verified record of the interviews with the Applicant, it had not been established that the Applicant gave evasive and untruthful answers…”. Similarly, in
the case at hand, the Agency did not contact all the members of the interview board; the one person the investigator contacted (Mr. X) could not recollect what had been said or explained by the Applicant about his MBA at the interview, and the one person the JDC did contact (Dr. Y) corroborated the Applicant’s statements as he “recall[ed] Mr. Walden stating that his Master’s degree was based on prior experience”. The Tribunal finds it odd that after receiving the information from Dr. Y, there is no indication that any further attempts were made by the Agency to locate and contact the other members of the recruitment panel to determine whether they had the same recollection as Dr Y. Rather the Agency chose at that point just to disregard the statement of Dr. Y. In a matter as serious as accusing a staff member of dishonesty, the Tribunal finds it inexcusable that there was no further follow-up; rather there was a summary dismissal of one panel member’s recollection.

77. The Tribunal finds that the Agency failed to keep a complete verifiable recruitment interview with the Applicant, either by not taking or keeping accurate notes, or by not taping the interview. As the Respondent has failed to provide evidence challenging the Applicant’s statements or the memory of Dr. Y, the Tribunal considers that the Applicant’s statements, which he reiterated in his written communications to the DHR, the Commissioner-General and other relevant authorities, stand unchallenged.

JDC Committee Report

78. The 20 May 2009 JDC Committee Report notes, inter alia:

The mention by the Respondent at the year 2000 interview for his initial employment with the Agency, that the Masters Degree was obtained on the basis of prior learning and/or work experience, and the fact that the Agency did not investigate the educational institution and determine its un-accredited status does not exonerate the Respondent from his failure to display the standards of integrity expected from an international civil servant…

By knowingly misrepresenting his academic qualification by submitting a non-accredited degree in support of applications for employment with the Agency the Respondent gained employment with the Agency in a nonethical manner.
The Tribunal recalls the relevant elements of knowing misrepresentation as articulated in paragraph 68 above. In order to establish knowing misrepresentation the Respondent had to establish that all elements had been met. The Tribunal finds that the JDC’s finding, just like the ADUO/J’s investigation, did not establish the elements of knowing misrepresentation by clear and convincing evidence. Indeed, the Tribunal is under the impression that because the JDC could not prove that the Applicant had not disclosed to the 2000 recruitment panel that his MBA was awarded based on prior experience, it instead based its finding on the fact that the degree was from a non-accredited institution, yet without proving that the Applicant had knowledge of the institution’s non-accredited status.

79. In view of the above, the Tribunal finds that the facts on which the decision to terminate the Applicant’s employment for “knowingly” misrepresenting his academic qualifications were not established by clear and convincing evidence. The Tribunal does not find persuasive the Respondent’s argument that circumstantial evidence allows for a negative inference to be drawn, i.e. since the recruitment report is silent on the issue of the background for the awarding of the MBA, the Applicant must have misled the panel about his qualifications. In fact, it is also reasonable to infer that because nothing was written on the record then his qualifications, as explained by the Applicant in his interview, were accepted by the panel and were not an issue. Moreover given the Agency’s failure to specify that the advanced university degree had to be from an accredited institution and the Applicant’s lack of knowledge of TC&U’s non-accredited status, the Tribunal finds that the Respondent cannot, seven years later, add retroactively a requirement that did not exist in the vacancy notice and blame the Applicant for knowingly misrepresenting that his degree was from an accredited university.

_Do the facts amount to misconduct?_

80. The Tribunal would like to distinguish the case at hand from the former United Nations Administrative Tribunal’s Judgment AT/DEC/1454. In that case the Applicant was summarily dismissed for misrepresenting his academic qualifications based on circumstantial evidence. One circumstance was that the Applicant did not
want his employer at the time, WIPO\textsuperscript{15} (who had questioned him about his degrees both before and after he submitted his P11 form to OHRM) to be contacted by OHRM during his recruitment process.\textsuperscript{16} The other circumstance was that the Applicant had given two Agencies (OHRM and WIPO) different contact details of the university for degree verification purposes; he gave the OHRM a London address and WIPO a Ilkeston, Derbyshire, UK address. The Tribunal distinguishes the above facts from the case at bar as the Applicant never objected to the Agency verifying the nature of his degree or the institution itself and in the last paragraph of his CV submitted in support of his application for the SPO post, the Applicant stated:

\begin{quote}
I certify that all information stated in this resume is true and complete to the best of my knowledge. I authorized the United Nations to verify the information provided in this resume (emphasis added).
\end{quote}

81. Moreover, the Applicant in this case never tried to dissuade the Agency from contacting his previous employer;\textsuperscript{17} nor did he mislead the Agency as to the proper contact information of TC\&U. He consistently gave the same contact information of the University\textsuperscript{18} and he was never questioned by the Agency regarding the legitimacy of his degree prior to the DHR’s letter of 16 October 2007. Indeed, in response to the DHR’s questions about his degree, the Applicant responded in detail that he was unaware of TC\&U’s non-accredited status and further explained that he had disclosed to the 2000 recruitment board that his degree was based on recognition of prior experience. The Applicant also insisted that the DHR contact the recruitment board, particularly Dr. Y, to verify this information – which in fact was verified by the JDC when it interviewed Dr. Y in May 2009. Accordingly, the Tribunal finds that the Applicant’s evidence stands unchallenged and dismisses any claims of misrepresentation based on circumstantial evidence.

82. As stated above, the Tribunal does not find that the Agency established by clear and convincing evidence that the Applicant misrepresented his academic qualifications when he disclosed to the 2000 recruitment board that his MBA had

\textsuperscript{15} The World Intellectual Property Organization.
\textsuperscript{16} In section 28 of the P.11 the Applicant stated his objection to OHRM’s making inquiries of his then employer (WIPO) by ticking the “YES” box on the form.
\textsuperscript{17} The Tribunal notes that per question 28 on his P.11 form the Applicant ticked “NO”, therefore making no objections to contacting his previous employer.
\textsuperscript{18} TC\&U, Sioux Falls, South Dakota, United States.
been awarded for recognition of prior experience. Moreover, given the Applicant’s testimony that he was unaware of the non-accredited status of TC&U and the Agency’s silence on the issue of university accreditation, both in the vacancy announcement as well as in the interview, the Tribunal does not find that the Applicant was dishonest, untruthful, lacking in integrity or that he failed to comply with his obligations under the United Nations, UNRWA Staff Regulations and Staff Rules or other relevant administrative issuance. Accordingly the Tribunal finds that the facts as established by the Agency do not lawfully amount to misconduct.

83. Although the Tribunal’s decision may conclude at this point as a finding has been made that the facts did not establish misconduct, given the irregular circumstances surrounding the decision to terminate the Applicant, the Tribunal believes that it would be in the interests of justice to comment on the issues of proportionality and bias and prejudice.

Was the sanction imposed proportionate to the offence?

84. The JDC’s recommendation to the Commissioner-General was as follows:

- Take disciplinary measures against Mr. Bryan Walden as per IS Rule 110.3 and to dismiss the staff member;
- Consider to effect the dismissal by non-extension of his present employment contract with the Agency.

Despite the fact that the Agency chose to assemble a JDC -- the first in 15 years -- it then dismissed out of hand the recommendations of the JDC. The Tribunal recognises that the former UN Administrative Tribunal held in Judgment No. 1454 (2009) that:

Moreover, the Tribunal has emphasized that the recommendations and conclusions of the JDC are advisory and are not binding on the Administration. The Respondent has discretion to reach a different conclusion after consideration of all the facts and circumstances of the case.

However, the Respondent could have taken into consideration all the facts and circumstances of the case, including the good faith of the Applicant, and followed the recommendation of the JDC to not extend the contract of the Applicant. Surely, the Respondent knew how devastating to a person’s career and moral
reputation a termination based on an intentional misrepresentation in a job application would be to the Applicant or any staff member for that matter. The Respondent could have applied a less harsh measure yet the Respondent chose to terminate the Applicant’s appointment for misconduct only six weeks before the expiry of his contract, as if to inflict maximum damage.

The OHRM Two-Prong Test

85. The Tribunal recalls that the Agency sought the advice from OHRM in handling the Applicant’s case. In response to the inquiry, OHRM articulated that a two-prong test is applied to determine how to handle the case of a staff member (or prospective staff member) who claims a diploma obtained from a non-accredited institution. The test examines:

(1) whether the post for which the staff member was selected required the degree claimed, and

(2) whether the degree was claimed in good faith.

Despite the advice of OHRM, neither the terms of reference for the Agency’s investigation nor the report itself mentions the factors outlined by OHRM. The Tribunal finds it peculiar that the Agency would seek out the advice of OHRM then completely disregard it.19 The Tribunal will now apply the two-prong test to the facts of the case in review of proportionality.

Did the post for which the staff member was selected require the degree claimed?

86. The Applicant listed not only the contested MBA in support of his application to the SPO post but also his Graduate Diploma in Business (Operations Management) from the Graduate School of Business, University of Auckland, New Zealand. The Tribunal recalls that the Graduate Diploma was confirmed by the University of Auckland as an advanced qualification. The SPO post required one advanced university qualification, not two. It follows, as noted above, that even without the

19 That is not to say that the Agency is bound by such advice, as it is advice. However it is disconcerting that the Agency would terminate the Applicant on the basis of knowing misrepresentation without ever addressing the issue of good faith.
MBA at the heart of the allegation of misrepresentation, the Applicant would have met the academic qualification requirements for the post.

Was the degree claimed in good faith

87. In his letter dated 24 October 2007 to the DHR, the Applicant stated:

Your letter\(^{20}\) is a complete shock to me and I have never doubted the credentials of Trinity College [\&] University as it was recommended to me by UN employees before I joined the UN.

This letter predates OHRM’s advice to the DHR by three months. The Tribunal finds such evidence compelling of the Applicant’s genuine lack of knowledge of TC\&U’s non-accredited status and of his good faith.\(^{21}\) Furthermore, in the last paragraph of his CV submitted in support of his application for the SPO post, the Applicant stated:

I certify that all information stated in this resume is true and complete to the best of my knowledge. I authorized the United Nations to verify the information provided in this resume (emphasis added).

The Tribunal considers the Applicant’s aforementioned statements credible and believes that had he been aware of the non-accredited status of TC\&U, South Dakota, he would not have made such a statement. It is the Tribunal’s belief that the Applicant acted in good faith with no intention to deceive or misrepresent the basis for receiving his degree.\(^{22}\) The Agency cannot hold him accountable for its own failure to verify information it had at its disposal.

88. Based on the above and the evidence in the record, the Tribunal finds that the Applicant met both prongs of the OHRM test as:

\(^{20}\) Referring to the DHR’s letter of 16 October 2007 to the Applicant with which she transmitted a copy of the OHRM report on Diploma Mills and asked the Applicant to respond to a list of questions about his MBA.

\(^{21}\) The Tribunal notes that the Applicant again addressed the issue of good faith in his 20 October 2008, when the Applicant responded to the investigation’s findings that:

At the time of submitting my P11, neither UNRWA nor I was aware of the fact that there were non-accredited degrees available. My P11 was submitted with the utmost completeness and correctness to the best of my knowledge and belief at that time…

\(^{22}\) The UN’s report on diploma mills was issued six years after the Applicant’s initial recruitment interview with the Agency. The Tribunal is wondering how the Applicant was supposed to know of a UN policy six years before it was introduced.
(1) the Applicant has an advanced qualification— as required—from an accredited university (the University of Auckland, New Zealand);

(2) the Applicant has submitted the contested MBA from a non-accredited university in good faith with no intent to deceive, as he indicated at the interview in 2000 and later reiterated to the DHR in writing that the degree was awarded for prior experience.

89. Moreover, the Respondent has not given any consideration to the Applicant’s dedication to his work in the Agency during nine years and his “very good performance” as shown in his Performance Evaluation Reports during six successive years (2001 to 2007), or his contribution to the UNRWA community and his colleagues when serving as a member of the JAB for two years from 2005 to 2007, or as Chair of the International Staff Association.

Was the Respondent’s decision to terminate the Applicant’s appointment tainted by procedural irregularities, prejudice or other extraneous factors, or error of law?

90. The Tribunal also considers whether the Respondent’s decision to terminate the Applicant’s appointment for misconduct was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law, as held in Assad 2010-UNAT-021. As the United Nations Appeals Tribunal noted in Abu Hamda 2010-UNAT-022:

Disciplinary matters are within the discretion and authority of the Commissioner-General of UNRWA. It is however a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule Courts/Tribunals do not interfere in the exercise of a discretionary authority unless there is evidence of illegality, irrationality and procedural impropriety.

Bias and Prejudice

91. The Tribunal finds a number of factors, which in the Tribunal’s opinion, show bias on the part of the Respondent and prejudice in the proceedings. Indeed, it appears from the record that the decision to terminate the Applicant for intentionally misrepresenting his academic qualifications was a foregone conclusion despite any
evidence to the contrary. It appears to the Tribunal that the Respondent chose to cherry-pick the evidence -- using the inculpatory evidence against the Applicant and ignoring the exculpatory evidence\(^{23}\) that could have cast doubt on the conclusion or at the very least provided mitigating circumstances. In this case, to have ignored the exculpatory evidence and the advice of OHRM to impose a less harsh sanction based on the Applicant’s claim of good faith is simply unwarranted and shows bias and prejudice against the Applicant.

\emph{The collusion between the Legal Adviser to the JDC and the Applicant’s wife resulted in bias and prejudice}

92. The record indicates that the CGLD who was advising the JDC in the Applicant’s case had a friendly relationship with the Applicant’s ex-wife and had been exchanging communications with her about the Applicant’s case. One such email from the Applicant’s ex-wife to the CGLD dated 12 May 2009, states:

\begin{quote}
Can I please ask that if you are going to use the information I am giving you, to let me know as I may have to move quickly. I told Bryan several times that I was going to give you the information, but he never believed that I would actually do it, and neither did I…Is it at all possible for you to use the information without him ever knowing that you have? That would be better for me, I’m sure you understand.
\end{quote}

\begin{quote}
* * *
\end{quote}

He is planning to delay the proceedings with his Masters problem, by accusing UNRWA of not providing him with all the written information he has requested…he wants to delay things until July so that he has to be given another contract. I hope he is not allowed to wiggle out of facing what he has done to UNRWA. It’s my greatest hope that he will never be allowed to be part of another UN organisation.

93. The Respondent argues that the communication between the CGLD and the Applicant’s ex-wife is not relevant because there is no mention of the issue of the Applicant misrepresenting his academic qualification. Rather the communication was about information that the Applicant’s ex-wife was planning to give to the CGLD with regard to procurement irregularities. The Tribunal acknowledges that while the

\(^{23}\) For example the testimony of Dr. Y who specifically recalled that the Applicant disclosed that his MBA was awarded on the basis of recognition of prior experience to the 2000 recruitment board.
email did not contain explicit reference to the issue of misrepresentation it is nonetheless relevant to the case at hand.

94. Indeed, in the Commissioner-General’s letter of 27 May 2009 to the Applicant terminating his employment with the Agency, the Commissioner-General makes explicit reference to the withholding of the Applicant’s separation entitlements pending the outcome of an ongoing investigation into the charges of procurement irregularities. It is evident that the CGLD had informed the Commissioner-General of the facts surrounding the second investigation prior to the conclusion of the investigation of misrepresentation. In the interests of justice and fairness, the two issues should have been handled separately. However, as they were lumped together, it is the Tribunal’s finding that such modus operandi tainted the proceedings and violated the Applicant’s due process rights to a fair and independent decision. Moreover, the Tribunal finds that the appearance of collusion between the CGLD (the legal advisor to the Commissioner-General) and the Applicant’s ex-wife taints the Agency’s decision with bias and prejudice.

The A/DUO/J’s investigation demonstrated bias and prejudice

95. As noted above, the Tribunal finds that the A/DUO/J’s 31 August 2008 investigation report relied on presumptions rather than on facts. The Tribunal further notes that there is no actual record of the interview between the Applicant and the investigator. Instead, the report is a summary of the interview with comments such as “this statement presumably infers that the fact that [the Applicant] held a Master had some influence on the [interviewing] Board’s recommendation” or “this statement presumably infers that the [interviewing] Board held some value to the possession of a University degree”. The Tribunal finds that the A/DUO/J’s presumptions and inferences are not based on concrete and credible facts but on his own interpretation which reflects bias and prejudice against the Applicant.24

24 For example the A/DUO/J noted that “Mr. Walden further re-confirmed that he could not re-collect who had advised him from UN HQ that he should buy a degree which would be accepted by the UN based upon his previous experience”. The Tribunal notes that nowhere in the record does the Applicant state that he was given advice to “buy” a degree. This is the language of the investigator.
96. The Tribunal finds that the speculative comments made by the A/DUO/J may have unduly and unfairly influenced the Commissioner-General in deciding to terminate the Applicant for misconduct resulting in bias and prejudice to the Applicant.

Rejection of the Applicant’s Graduate Diploma as an advanced degree

97. In the Agency’s submissions to the JDC the Agency rejected the Applicant’s suggestion that his Graduate Diploma in Business, Operations Management from the University of Auckland met the requirements of an “advanced degree” for the P4 SPO/WB post. The Tribunal notes however that the current incumbent of the SPO post, i.e. the Applicant’s successor, holds only one listed qualification, a Graduate Diploma, yet was appointed to the post.\(^{25}\) The Tribunal finds that this unequal treatment demonstrates arbitrary and capricious treatment resulting in bias and prejudice to the Applicant.

JDC Time limits

98. The Applicant claims that the deadline he was given by the JDC to file his submissions was unfair because his professional responsibilities did not allow him to be ready for the deadline. The Tribunal finds that, as evidenced in the record, the JDC gave the Applicant ample time, i.e. four months, to file his submissions and be ready for the hearing. Although the Applicant decided not to file anything, the JDC considered the Applicant’s submissions to the DHR and to the Commissioner-General since 16 October 2007 as submissions to the JDC. The Tribunal finds nothing unfair or arbitrary in the JDC’s handling of this specific issue.

99. Given all the above, the Tribunal finds that the Respondent failed to establish by clear and convincing evidence misconduct warranting termination and therefore the sanction was disproportionate. The Tribunal also finds that the Respondent has demonstrated bias and prejudice against the Applicant and that the decision was tainted and prejudiced. The Tribunal therefore holds that the Applicant was denied due process.

\(^{25}\) The information was verified by the Tribunal per Staff Bulletin No. 3/2012 announcing Agency appointments.
Obiter Dicta

100. The Tribunal wishes to make the following observations on what appear to be irregularities in the Agency’s handling of the case. While the Tribunal cannot draw inferences of bias and prejudice from the below examples, it nevertheless would like to take note of how the Applicant was treated in *obiter dicta*.

*Applicant’s case was first in 15 years to be referred to the JDC*

101. The Tribunal is astounded by the fact that in 2009, the JDC had no Rules of Procedure when it received a query from the Applicant for information on the Rules of Procedure of the JDC in order to prepare his submissions. The JDC then scrambled to adopt its Rules of Procedure, receiving extensive feedback and guidance from the Agency’s CGLD and the Secretary of the Joint Disciplinary Committee of the United Nations Office at Geneva on the procedural aspects of the JDC proceedings before adopting and communicating them to the parties. As it came out later at the CMH, *no JDC had been convened since 1994*. In other words, the Applicant’s case was the first to be referred to the JDC in 15 years. The Tribunal finds that the Applicant was singled out by the Agency for referral to the JDC.

*Disregarding the manner in which a similar situation was handled at another UN entity*

102. The Applicant informed the Respondent that the United Nations Department of Safety and Security (“UNDSS”) employed a staff member -- a former UNRWA employee (“Mr. Z”) --, who had listed on his PHF the same non-accredited MBA

---

26 The Tribunal refers to Rules of Procedure beyond Rule 110.5 which states:

(a) In considering a case, the Joint Disciplinary Committee shall act with maximum dispatch. Normally, proceedings before the Committee shall be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing, but without delay. The Joint Disciplinary Committee shall make every effort to send its report to the Commissioner-General within two weeks after being convened.

(b) The Joint Disciplinary Committee shall permit a staff member to arrange to have his or her case presented before it by any other staff member.

27 International Staff Rule 110.3, in force at the material time states that “no staff member shall be subject to disciplinary measures until the matter has been referred for advice to the Joint Disciplinary Committee provided that referral to the JDC may be waived by mutual agreement of the staff member concerned and the Commissioner-General”.
from TC&U as the Applicant’s. The Applicant first heard about this from the CPSD during their meeting on 13 March 2008. The Applicant subsequently learned that Mr. Z was promoted from P4 to P5 after the UNDSS became aware of the non-accredited qualification and that Mr. Z was given time and opportunity to earn a degree. The Applicant shared this information with the DHR by letter dated 23 June 2008 and to the Commissioner-General by memorandum dated 20 October 2008. On 14 November 2008 the Commissioner-General replied to the Applicant stating:

The Agency is obliged to consider this case on its own merit, although other practices in the UN common system will be taken into account.

103. There is no evidence in the record to indicate what, if any, actual consideration was given by the Respondent to the manner in which the UNDSS handled this matter. The Tribunal recognises that the UNDSS is a separate UN entity and that their practices and procedures, while not binding on UNRWA, are of persuasive value. Such a concrete example of how another UN entity handled the problem might have had an impact on the JDC’s decision.28 A key principle in the administration of justice is complete and full disclosure of all the facts and jurisprudence, not just those that are helpful to one position. By omitting such an example of another UN entity dealing with a similar issue, the Agency failed to demonstrate a balanced approach and give the Applicant the benefit of the doubt.

Relief

104. The Tribunal is vested with the statutory power to determine, in the circumstances of each case, the remedy it deems appropriate to rectify the wrong suffered by the staff member whose rights have been breached (Frohler 2011-UNAT-141, Appellant 2011-UNAT-143, Kaddoura 2011-UNAT-151).

105. For the reasons stated above, the Tribunal sets aside the decision of the Respondent. The Tribunal orders the Respondent to re-instate the Applicant in his post with the same grade and administrative entitlements, and to pay to the Applicant his financial entitlements.

28 The Tribunal notes that the Agency, in its 22 January 2009 submission to the JDC, merely presented this issue in passing as something the Applicant had alleged but never gave it full consideration.
106. Pursuant to Article 10 of the Statute of the Tribunal, “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 […]”.

The Statute also provides that compensation shall normally not exceed the equivalent of two years’ net base salary, and the United Nations Appeals Tribunal has consistently held the United Nations Dispute Tribunals to this statutory limit; however, in exceptional cases the Tribunal may order the payment of a higher compensation and shall provide the reasons for that decision.

107. Mindful of the fact that the jurisprudence of the United Nations Appeals Tribunal is binding on this Tribunal, after careful consideration of the matter of remuneration and taking guidance from the United Nations Appeals Tribunal’s Judgments in Mwamsaku 2012-UNAT-246, Harding 2011-UNAT-188 and Cohen 2011-UNAT-131, the Tribunal accordingly sets an amount of compensation that the Respondent may elect to pay as an alternative to the reinstatement of the Applicant. This compensation shall be two years’ net base salary unless exceptional circumstances arise. In this case, the exceptional circumstance found by the Tribunal is the Agency’s violation of the Applicant’s due process rights. Therefore, the Tribunal sets the amount of compensation at two years’ net base salary plus six months’ net base salary as adequate compensation. This is what the UNAT jurisprudence allows, and the Tribunal is aware that moral and financial injury and harm to the dignity and reputation of the Applicant are more than what monetary compensation can repair.

108. The Tribunal hereby orders that the payment of these sums shall be made within 60 days from the date the Judgment becomes executable, during which period interest at the US prime rate applicable as at 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 from the date of expiry of the 60-day period to the date of payment of the compensation.
Conclusion

109. The application is allowed.

Signed

Judge Bana Barazi
Dated this 18th day of April 2013

Entered in the Register on this 18th day of April 2013

Signed

Laurie McNabb, Registrar, UNRWA DT, Amman