



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

PORTILLO MOYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Marisa MacLennan, OSLA

Counsel for Respondent:
Bartolomeo Migone, WFP
Simone Parchment, WFP

Introduction

1. The Applicant contests the decision to separate her from service without termination indemnities from the World Food Programme (“WFP”) following the completion of an investigation by the Office of Inspections and Investigations (“OSDI”), WFP and requests the rescission of the decision and her reinstatement.

2. The Respondent contends that WFP acted lawfully and within its discretion when imposing the disciplinary measure of separation of service and requests that the application be dismissed in its entirety.

Issues

3. The main issue is whether the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities was proportionate to the Applicant’s conduct.

Facts

4. On 8 May 2000, the Applicant joined the Honduras Country Office, WFP, as a Logistics Assistant under Service Contract (local recruited staff). This contract was renewed on several occasions until July 2006, at which time she was appointed to a GS-5 fixed-term contract as a Logistics Assistant responsible for the supervision of WFP’s warehouses, including those located in Tegucigalpa.

5. On 10 October 2008, OSDI received a written complaint regarding the Applicant’s conduct which stated, *inter alia*, that she had insulted and threatened another staff member, distributed goods from the warehouses that were damaged and deviated from the Financial Regulations, Rule and Procedures of WFP.

6. On 12 November 2008, the Applicant was put on Special Leave with Pay pending the completion of an investigation into the above allegations.

7. On 20 November 2009, OSDI provided the Director, Human Resources Division, WFP, with its “Investigation Report on [the Applicant]: Investigation into alleged violation of WFP Policy on Harassment, Sexual Harassment and Abuse of Authority and allegations of Unsatisfactory Conduct”. The investigation report stated, *inter alia*, that (emphasis in original):

[The Applicant] admitted having used terms like “*penderja*” (dumb), and “*mierdosa*” (piece of shit) to address [the complainant] and to using nicknames or insults such as “*Nefertiti*” (neferty) and “*ojos de mapachin*” (eyes of raccoon) to address her other colleagues. [The Applicant] attempted to justify her actions by arguing that her behaviour was the product of the close friendship she had with [the complainant] and an environment of great trust and familiarity among herself and a few of her colleagues. [The Applicant] admitted having used expression like “*Hijueputa*” (shorter form of son of a bitch) and “*puta*” (fuck), but claimed that she did not direct them toward her colleagues and used them only to express frustration, i.e. at making a mistake.

[Finding] ... [the Applicant’s] justifications [are] unacceptable. ... [R]egardless of [the Applicant’s] personal relationships with the individuals to whom such offensive remarks were addressed, she was nonetheless required to adhere to the standards of conduct set out in the WFP [Harassment, Sexual Harassment and Abuse of Authority policy (“HSHAP”)] ...

...

... [The Applicant] admitted that she and [the complainant] assisted the transport companies by providing them with the correct final amount they needed to put on their invoices based on the information in the official records ... this was done due to the low level of education of the transport company owners.

...

[Finding] ... [The Applicant’s] deviation from WFP is not justified by her assertion ... [The Applicant] admitted knowing that the assistance she provided to the transport companies was not part of her work as a WFP staff member ... [which] proves that [the Applicant] knowingly circumvented the rules of the Organization.

...

... [The Applicant] claimed that she did not direct the distribution of damages beans. However, she admitted that she directed that the beans

be subjected to a drying process, reclassified (to sort out the good beans from the bad ones), repacked in new bags, and distributed.

...

... [The Applicant] admitted that she directed [two employees] to delete the expiration dates from the bottles containing expired vegetable oil so that food monitors and beneficiaries would not return the expired oil ... [she] also admitted that she directed the distribution of the expired oil without having performed any laboratory tests to ensure that the expired oil was still fit for human consumption.

[Finding] ... [The Applicant] violated the provisions of the WFP Transport manual ... [t]he aim of this exercise was to misrepresent the real expiration date of the oil so it could be distributed without arousing any suspicion.

8. On 29 December 2009, the Director, Human Resources Division, WFP, informed the Applicant that the OSDI investigation had found that she had “breached various WFP Staff Rules and Regulations and related issuance and ha[d] displayed a standard of conduct which is below that required in international civil service”. The memoranda stated that (emphasis in original):

12. [The Applicant’s] alleged conduct as described above is considered to be in breach of the following provisions:

- UN Staff Regulation 1.2(a): ...
- UN Staff Rule 1.1(e): ...
- Paragraph 6 of the Standards of Conduct for the International Civil Services: ...
- Paragraph 15 of the Standards of Conduct for the International Civil Services: ...
- Paragraph 20 of the Standards of Conduct for the International Civil Services: ...
- Paragraph 6 of WFP HSHAP Policy: ...
- Annex 1-b to the WFP HSHAP Policy: ...

...

B. Alleged Deviation from the Financial Regulations, Rules and Procedures

13. On 7 April 2009, ... you told [the complainant] to just do [the invoices] and do not let anyone outside of the Logistics Unit know about the practice. On the same day, [C] reported the matter to OSDI.

14. OSDI obtained physical evidence (transport company seals and invoices stored in the Logistics Unit) and testimonial evidence from staff in the Logistics Unit as well as your own acknowledgment that ... [you] provide assistance to the transport companies by providing them with the correct final amount they needed to put in their invoices in order to receive the payment. In your interview, you stated that this was due to the low level of education of the transport company owner, who sometimes did not even have primary education. However, the aforementioned practice differs from the procedures established in the WFP Consolidated Financial Manual. In OSDI's view, your deviation from WFP policy is not justified by your assertions. In addition, OSDI noted that the WFP Consolidated Financial Manual states that any material departure from the Manual should be approved by the Director of Finance and that the particulars of any such departure and the reasons for it should be fully documented.

...

16. The procedure that you followed for processing invoices clearly differs from that established in section 9.3 of the WFP Consolidated Financial Manual. Section 9.3 establishes that an invoice is a document through which a vendor/supplier requests payment from WFP. As such, it clearly must be completed before it being submitted to the WFP, and cannot be completed by WFP staff. To allow otherwise would contradict the verification role of WFP staff stipulated in section 9.3.1 and violate the principles of segregation of duties in the WFP business cycle.

C. Alleged Distribution of Damaged Beans, Expired Oil and Removal of Expiration Dates

17. On 27 May 2009, [a complainant] ... forwarded to OSDI a letter ... alleging that, during the course of 2008, [WF] and yourself directed ... Warehouse Manager[s], to distribute damaged beans (with fungus) and to use nail polish to remove expiration dates from the bottles containing vegetable oil. ...

18. When asked about the distribution of the damaged beans, you claimed that you did not direct distribution of the damaged beans. However, you admitted that you directed that beans be subjected to a drying process, reclassified (to sort out the good beans from the bad ones), repacked in new bags, and distributed. OSDI obtained testimonies that the beans remained damaged even after the drying process, and that you, despite being aware that the beans were damaged (through written complaints and returns from the food

monitors), nonetheless continued directing the distribution of the damaged beans. ...

19. Regarding the alleged distribution of expired oil, you admitted that you directed [two staff members] to delete the expiration dates from bottles containing expired vegetable oil so that food monitors and beneficiaries would not return the expired oil (29 MT – US\$29,725 CIF value) to WFP. You also admitted that you directed the distribution of the expired oil without having performed any laboratory tests to ensure that expired oil was still fit for human consumption. You admitted that you directed Logistics Unit staff to remove the expiration dates from the oil bottles. The aim of this exercise was to misrepresent the real expiration date of the oil so that it could be distributed without arousing any suspicion on the part of food monitors or beneficiaries.

...

22. Furthermore, because you took affirmative action to conceal the condition of the oil, with the intent to deceive others who might rely on your misrepresentation, OSDI found your behavior to amount to fraud.

23. OSDI also highlighted the seriousness of your actions with regard to your potential to negatively impact the Organization's reputation, which would suffer greatly if the public discovered that WFP officials were deleting the expiration dates of expired commodities and distributing them without performing laboratory tests. Likewise, your actions could have caused WFP to receive complaints about illnesses or even death caused by the consumption of expired oil.

...

28. Your alleged actions, as outlined above, are considered to amount to misconduct within the meaning of Staff Rule 10.1(a). ...

...

30. These findings are sufficiently serious to the initiation of disciplinary action against you under Article X of the Staff Regulations and Chapter X of the Staff Rules. Given the gravity of the charges and the resulting irretrievable breach of trust they should entail if confirmed, the measure that is proposed in connection with the charges is that of "*Separation from Service*", without notice and without termination indemnities, in accordance with UN Staff Rule 10.2(a)(viii).

9. On 26 March 2010, the Applicant provided WFP with her comments in response to the charges filed against her, including:

... I was living in a culture of behaviour where every colleagues [sic] were contributing or participating in a way that creates an impression that the alleged words used in informal official conversation are normal vocabulary. As the allegation was lodged against me, the OSDI definitely investigated about the vocabulary that I used in informal communication, but it could have conducted a comprehensive investigation as to find whether other colleagues in the office use the same vocabulary or not. The office has its own vocabulary and it was difficult for me to avoid those vocabularies without management support.

..

It is true that sometimes I said these expressions but I did not insult my colleagues, and as I had a close relationship with [the complainant], I never thought she feel offended by overhearing these.

...

... I never gave instructions for [the complainant] to ma[k]e, stamp and sign transport invoices. The instructions were given to avoid delays in payment, we were to collaborate in correcting such mistakes of the invoices like, quantities, measuring units and other data, if it was necessary.

...

...I've never collected Money from any of them and this was never done to harm WFP.

...

iii. Never I was informed that support given to the transporters was prohibited in which these procedures should be approved by the Director of Finance, I just know that it was approved by my supervisor and that was due because the transport company owners sometimes did not even have primary education.

10. On 24 June 2010, following a review of her responses to the findings of the investigation report, the Director, Human Resources Division, WFP, informed the Applicant that

The confirmed findings against you are of such serious nature that they entail the irretrievable breach of the trust on which your employment with the Programme is based.

Your actions ... had the potential to negatively impact the Organization's reputation ... [and] had a very serious risk to the health and/or lives of WHP beneficiaries ... [T]he findings against you

highlight a pattern of serious misconduct and a series of grave incidents protracted over a significant period of time, from 2007 to 2009. The gravity of your confirmed misconduct is compounded by your significant seniority and experience with the Programme. ...

In light of the foregoing ... this is to inform you of the decision to impose the proposed disciplinary measure of **“Separation from Service”** with no termination indemnities in accordance with UN Staff Rule 10.2(viii).

11. On 27 September 2010, the Applicant filed an application with the Dispute Tribunal contesting the decision to separate her from service. The Respondent’s reply was filed on 29 October 2010.

12. On 4 June 2012, the undersigned Judge was assigned to the present case.

13. On 9 August 2012, the Tribunal, by Order No. 165 (NY/2012), requested that the parties file a joint statement regarding the agreed and disputed facts and legal issues in this case as well as whether there were any reasons that the court should not hold a hearing.

14. Due to the parties not being able to come to terms with the Tribunal’s request in Order No. 165 (NY/2012), they filed separate statements on 26 September 2012 and 27 September 2012. Nevertheless, both parties agreed that a hearing was not required as all the relevant evidence had been provided by the parties as part of their submission. As part of her submission the Applicant stated that she regarded “the question whether the disciplinary measure of ‘separation from service’ was proportionate to the Applicant’s acts or omissions as the legal issue in this case”. Similarly, the Respondent stated in his submission that the legal issue before the Tribunal was “[w]hether the disciplinary measure of “separation from service” with compensation in lieu of notice and without termination indemnities was disproportionate to the Applicant’s misconduct”.

15. On 11 October 2013, by Order No. 249 (NY/2013), the Tribunal requested that the parties file closing submissions. As part of her closing submission the Applicant reiterated that “[t]he Parties agree that the sole issue for the Tribunal’s

consideration is whether the disciplinary sanction imposed by the WFP was proportionate to the Applicant's conduct".

Applicant's submissions

16. The Applicant's principal contentions may be summarized as follows:

a. The use of contested language was part of a collective pattern and the words used were part of a normal colloquial vocabulary. At no point prior to the written complaint that led to the investigation had her use of specific vocabulary been mentioned as a contentious issue, including the 2007 and 2008 verbal complaints which focused on the way she addressed other staff members;

b. The deviations from the financial regulations were approved by her supervisor. The purpose of these deviations was solely to avoid any delays in the payment process and did not result in any type of personal financial gains;

c. No damaged or expired goods were distributed by the Applicant. The damaged goods were separated from the others and, upon instructions from her supervisor, were sent to be destroyed or were dried to remove fungus in accordance with WFP procedures. Similarly, with regard to the expiration date that were removed from certain oil bottles, this was done by warehouse employees at the behest of her supervisor;

d. With regard to each of the above allegations, the decision to separate the Applicant from service was not proportionate to either the charges held against her or her actual involvement in the contested activities. As held by the former United Nations Administrative Tribunal in Judgment No. 1414, *Stephanides* (2008), termination "is invariably not imposed absent the presence of fraud or the motive of personal gain";

e. The Applicant highlighted “three points in her closing submissions regarding the lack of proportionality of the sanction: (1) the sanction is overreaching and disproportionate to the allegations proved; (2) the context in which the conduct occurred should be taken into account and (3) the totality of the circumstances dictate that the sanction was disproportionate”;

f. The Applicant filed two signed declarations, dated in 2012, from additional witnesses which described her as a good colleague and a hard working person who tried to avoid the occurrence of delays in delivery of food while also ensuring that there were always sufficient supplies;

g. The Applicant requests that she be reinstated or paid all salary and benefits retroactively until the date of the judgment as well as compensation for the moral and professional damage caused by her wrongful termination;

h. In her closing submissions the Applicant requested, as an alternative to the rescission of the initial disciplinary sanction, the imposition of a lesser sanction with the granting of termination indemnities.

Respondent’s submissions

17. The Respondent’s principal contentions may be summarized as follows:

a. There is clear and convincing evidence that the Applicant regularly used offensive language when talking, and referring, to her colleagues, thereby violating WFP’s Policy on Harassment, Sexual Harassment and Abuse of Authority;

b. The fact that other staff members, including her own supervisor, may have engaged in such activities does not absolve her own conduct, especially when taking into consideration that she had supervising responsibilities;

c. The Applicant knew that several shipments of beans had been damaged, yet she attempted to conceal those problems and distribute the beans;

d. The Applicant breached WFP's financial guidelines by assisting transport companies in preparing the invoices that were to be submitted to WFP;

e. The disciplinary sanction of separation from service was proportionate. Further, the Tribunal's jurisprudence clearly states that the application of a disciplinary measure falls within WFP's discretion and the Tribunal's review will limit itself to whether there is evidence of illegality, irrationality, procedural impropriety or a violation of the Applicant's due process rights;

f. The application should be dismissed in its entirety.

Consideration

18. In the present case the parties agreed as part of their separate statements on facts, issues and remedies, in response to Order No. 165 (NY/2012), that a hearing was not necessary. Consequently, the Tribunal considered that it was not necessary to hold a hearing and the case can be decided on the papers before it.

Receivability

19. By the application filed on 27 September 2010, the Applicant contests the disciplinary decision to separate her from service. The application was filed within 90 days from the date of 28 June 2010, when the decision was notified to her. The Tribunal considers that the application meets all the receivability requirements of art. 8 of the Dispute Tribunal's Statute and is receivable.

Applicable law

20. Staff Regulations of the United Nations and provisional Staff Rules (ST/SGB/2009/7) of 16 June 2009 state (emphasis in original):

Chapter X

Disciplinary measures and procedures

Rule 10.1

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and 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.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2(a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

(ii) Recovery of monies owed to the Organization;

(iii) Administrative leave with or without pay pursuant to staff rule 10.4.

Rule 10.3

Due process in the disciplinary process

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. In such cases, no disciplinary measure or non-disciplinary measure, except as provided under staff rule 10.2 (b)(iii), may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

Regulation 1.2

Basic Rights and Obligations of staff

Core values

(a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental rights, in the dignity and worth of the human person and in equal rights of men

and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them.

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;

...

Article X

Disciplinary measures

Regulation 10.1

(a) The Secretary-General may impose disciplinary measures on staff members who engage in misconduct;

(b) Sexual exploitation and sexual abuse constitute serious misconduct

21. WFP's Directive ED2007/003 (Policy on Harassment, Sexual Harassment and Abuse of Authority), dated 14 February 2007, states (emphasis in original):

Policy Statement

3. WFP is committed to ensuring that all its workplaces are free from abuse, offensive behaviour, harassment, abuse of authority and discrimination. WFP is also committed to promoting a work culture in which every member of staff understands, and is able to carry out, his/her personal responsibilities for maintaining the dignity of work colleagues.

4. Harassment and abuse of authority of any kind is never acceptable. WFP will not permit or condone such behaviour under any circumstances. It is against WFP policy for any employee to abuse the authority delegated to her/him or to harass or intimidate any individual in the workplace. WFP will not tolerate any form of harassment or abuse of authority, whether based on age, disability, ethnic origin, gender, marital status, race, religion, sexual orientation or any other personal characteristic. WFP will also not accept any conduct that is offensive, humiliating, embarrassing or intimidating to other members of staff.

5. Complaints of harassment or abuse of authority will be taken seriously by WFP. Any conduct that is found to constitute harassment or abuse will be dealt with in a manner consistent with the severity of

the infraction, including appropriate administrative or disciplinary measures.

Definitions

6. **Harassment** is any improper conduct by an individual that is directed at and offensive to another person in the workplace and that the individual knew, or reasonably ought to have known, would cause offence or harm to that person.

...

8. **Abuse of authority** is when an individual improperly uses the power and authority inherent in his/her given position to endanger another person's job, undermine the person's performance in that job, threaten the person's economic livelihood, or in any way maliciously interfere with or influence a person's career.

9. **Retaliation** is any behaviour or threatened behaviour against an individual or individuals for raising concerns, making a complaint under this procedure or supporting someone else in doing so, participating in an investigation, or challenging conduct that may be inappropriate.

...

Prevention

Role of employees

11. Employees are responsible for:

- treating all people in the workplace courteously and respectfully and not undermining their personal dignity;
- being mindful of their own personal behaviour at all times, and of how colleagues may perceive this;
- understanding the standards of behaviour that are required, and the kinds of behaviour that are potentially harassing, or that constitute an abuse of authority;
- reporting apparent breaches of this policy to a higher-level official, whose responsibility it is to take appropriate action;
- cooperating fully with those responsible for dealing with a complaint of harassment, ensuring that confidentiality is respected.

12. Employees must not:

- encourage or attempt to encourage other employees to harass colleagues or misuse their authority;

- participate or encourage others to participate in retaliation against an employee who has made, or has supported someone else making, a complaint under this procedure.

Role of managers and supervisors

13. Employees with supervisory and/or management responsibilities are responsible for:

- maintaining a high standard of personal conduct in dealing with all employees, and leading by example in maintaining the personal dignity of employees;
- ensuring that all employees are aware of their rights and responsibilities under this policy, and of the courses of action and sources of support that are available to them;
- intervening promptly when alerted to actual or potentially inappropriate or offensive conduct, and reiterating the required standards of conduct;
- taking prompt action to report, informally resolve, refer as appropriate or investigate, under the guidance of OSDI, alleged incidents of workplace harassment;
- ...
- attending any relevant training related to this policy;
- ...

Role of WFP

14. Under the overall leadership of the Executive Director, WFP is responsible for:

- providing leadership in the prevention of workplace harassment by fostering a climate of mutual respect and by providing role models of the required standards of behaviour;
- ensuring that all employees are informed of the required standards of conduct, informing them of this policy, and ensuring that all staff are aware of their responsibilities and rights, and of how to obtain support if needed;
- briefing new employees on this policy during orientation sessions, and providing ongoing training for all staff on preventing and managing harassment in the workplace;
- ensuring that timely and appropriate action is taken when workplace harassment is alleged, and that the confidentiality of individuals is reasonably protected;

- taking appropriate action to maintain the safety and well-being of relevant parties and to protect the interests and reputation of WFP;
- where necessary, taking disciplinary or other corrective measures to deal with breaches of this policy, including breaches made by perpetrators of harassment, managers who unreasonably fail to take proper action to deal with harassment or abuse of authority, and individuals who make frivolous or malicious complaints of harassment;
- monitoring the effectiveness of this policy's implementation.

15. The Human Resources Division (ADH) is responsible for the overall maintenance of this policy by:

- developing training and information material to inform employees, supervisors and managers about harassment, sexual harassment and abuse of power (SHAP) and measures for its prevention;
- advising employees, supervisors and managers concerning the informal resolution process and mediation, and taking all steps possible to resolve complaints informally;
- consulting with the Office of Inspections and Investigations (OSDI) to set a reasonable time frame for the completion of the investigation, and reviewing findings and recommendations;
- determining the outcome and appropriate action to be taken in responses to breaches of the policy, in consultation with the Legal Services Division (LEG) as appropriate;
- ensuring that the parties are informed of the outcome in a timely fashion;
- in consultation with the Ombudsman, making appropriate arrangements for dealing with requests for review of decisions or with complaints about how this policy was applied during a complaint;
- ensuring that appropriate and up-to-date information regarding this policy is provided on the Intranet.

Rights

...

17. *Alleged perpetrators* have the right to:

- be assured of due process during the handling of any complaint or the investigation into a complaint;
- be offered reasonable and appropriate support to deal with the impact of any harassment or abuse of authority;
- be accompanied during the key stages of this procedure—e.g., during interviews by a willing work colleague;
- be informed at the appropriate stage when a formal complaint has been made, and be informed of the allegations levelled against him/her;
- be assured of confidentiality and professional standards of conduct while the complaint is being investigated.

...

The formal process

26. The formal process consists of the following steps. A detailed description of the process to be followed appears in Annex II.

...

Step 3 – Preliminary review of the complaint

...

34. If ADH decides that a fuller investigation is warranted to obtain additional information, the complaint will be forwarded to OSDI for necessary action. The complaint will be registered by OSDI and the complainant will be notified of this.

Step 4 – Mediation

35. If the complainant and the alleged perpetrator agree to mediation, the Director ADH may obtain professional mediation services from outside WFP, or from any suitably experienced individual within WFP who is acceptable to both parties.

...

Step 6 – Conclusion of the investigation

41. The investigator(s) will review all the facts and evidence surrounding the complaint of harassment, and will prepare a written report containing the findings, conclusions and recommendations. The report of the investigator(s) investigating under the direction of OSDI will first be submitted to OSDI for review of completeness and consistency of investigation standards. After resolution of any concerns, the final investigation report will be submitted to the Executive Director and the Director ADH.

42. Malicious complaints are considered as misconduct, and if during the course of an investigation it is determined that the complaint was malicious, the complainant may be subject to administrative or disciplinary action.

Step 7 – Decision and disciplinary phase

43. On receipt of the investigation report, the Executive Director or the Director ADH, acting on the Executive Director’s behalf, will review the findings and recommendations and—after the alleged perpetrator has been afforded due process, and in consultation with LEG—make a decision regarding the administrative or disciplinary action that should be taken, if any.

44. The Executive Director or the Director ADH or her/his delegated representative will inform the complainant and the alleged perpetrator of the decision, in writing, within 30 working days of receipt of the investigation report and after completing all due process requirements. A summary of the reasons for the decision will be provided at the discretion of the Director ADH.

Request for review

45. Both the complainant and the alleged perpetrator may request a review of *either* the decision *or* any alleged failure to implement the procedures and principles of this policy fairly and reasonably. Reviews shall be conducted in accordance with the established internal mechanism applicable to the employee’s contract of employment.

46. Administrative/disciplinary action taken as a result of the original complaint may be implemented and enforced during the time of the appeal and review, with the consent of the Director ADH or his/her delegated representative.

22. WFP’s Directive states, amongst other, that the following behaviour constitutes harassment: verbal abuse, insults, name-calling, shouting and aggressive behaviour, and use of derogatory or offensive nicknames. Further, the policy also defines workplace as including any place where the harassment can “be identified or connected ... directly ... to working for WFP”.

23. WFP Consolidated Financial Manual states (emphasis added):

Section 9.3

The Invoice is the document through which a vendor/supplier requests payment from WFP after delivery of the goods and/or services specified in the contract. ...

Section 9.3.1

Receipt

It is the responsibility of the vendor/supplier to forward the invoice to WFP after having provided goods and/or services.

Verification

- The purpose of invoice verification is to ascertain that the goods and/or services contracted have been satisfactorily received;
- Vendor is the correct payee;
- Terms and conditions of the sale of goods and/or services have been adhered to

Scope of the review

24. When the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct, and whether the sanction imposed is proportionate to the misconduct committed (see *Mahdi* 2010-UNAT-018, *Masri* 2010-UNAT-098, *Yapa* UNDT/2010/169).

25. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of separation from service without termination indemnity and with payment of compensation in lieu of notice.

26. Article 9.2 of the International Labor Organization ("ILO") Convention on termination of employment (Convention No. 158) of 1982, which is applicable to all branches of economic activity and to all employed persons (art. 2), states that:

In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation ... shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of valid reason for the termination ... shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for

termination having regard to the evidence provided by the parties and according to procedures ... and practice.

27. Similarly to the principle of the burden of proof in disciplinary cases in the ILO Convention No. 158, the Tribunal held in *Hallal* UNDT/2011/046 that:

30. In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred. (see the former UN Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

28. The Tribunal notes that in the present case the Applicant is not contesting the disciplinary proceedings or its finding of facts, but only the proportionality of the sanction.

29. The Tribunal will consider each of the allegations in light of the Applicant's contentions regarding the proportionality of the procedure taking into account the uncontested procedures, facts and evidence presented in the present case.

30. The charges against the Applicant are as follows: (i) violations of WFP policy on harassment, sexual harassment and abuse of authority; (ii) deviation from the Financial Regulations; (iii) distribution of damaged beans and expired oil and removal of expiration dates.

31. The Tribunal finds that during the investigation, the Applicant declared that:

a. WF, her supervisor at WFP, and her knew each other since they were teenagers having gone to the same school, however they did not graduate together. WF told her to apply for the post with WFP;

b. She insulted one of the complainants in front of other colleagues, including her supervisor, WF, who never corrected her. She also recognized that there were a few incidents at work, including during an extended lunch break;

c. The working environment in the Unit was one of trust where anything out of the ordinary was always communicated to WF. The applicant also stated that her supervisor informed her that other staff members (RM and MO) had complained about her use of offensive language;

d. She received training on harassment in the workplace and she knows that offensive words, sexual jokes, swear words are not appropriate in the workplace; she recognized that she used nicknames and offensive words in the office, including during breaks, together with other staff members; finally, she recognized that she sent emails regarding the intimate life of another staff member;

e. She further stated that she helped transporters complete their invoices to speed up the process and that she had talked about it with WF, who had talked about it with the Country Director, Honduras. She further stated that seals and stamps for each of the transport companies were stored in the Unit;

f. When a product expires, it must be destroyed in the presence of a witness plus the person in charge of the warehouse where the product is located. The amounts to be destroyed or burned have to be tracked and the supervisors are always informed that this is being completed;

g. Damaged beans can be recovered if you put them under the sun to dry and then repack them; she explained that she was not directly involved in the process as the person in the warehouse is the first person responsible with completing this process; with regard to the allegation that damaged beans were being distributed, she explained that there were beans that had been damaged because of humidity following which they were dried with a dryer machine resulting in most of the beans being recovered; she considered that the beans had not expired and that they had an obligation to remove/change any product which was not in good condition. The Applicant declared: "I

always give [MO] instructions to open the bags, to check the beans and what is recovered can be sent”;

h. When an international oil shipment arrives they do not send boxes for repacking. In the present case the oil was about to expire, so she told a colleague “to distribute it fast”.

Key witness statements

32. The following statements were provided by some of the Applicant’s colleagues in support of the evidence that is not being contested in the present case:

Invoices

a. The invoices for one of the companies (Transport M.C.) were handled exclusively by the Applicant. Following the filing of complaints against the Applicant, WF asked one of the staff members, the complainant, to return the seals deposited in her drawer, and used by the Applicant, to the transporters. The witnesses explained that they saw the Applicant sign documents for the transporters on behalf of WF;

b. The Applicant helped the transporters create and correct invoices as a result of the persons at the transport companies responsible for dealing with the invoices not being educated. One of the witnesses, MS, once told WF that “it was not correct to give information to the supplier about the amount to be paid”.

Harassment

c. The Applicant insulted colleagues in front of one another, including in front of WF who never corrected her. One of the complainants explained that it was better to be insulted than to be the Applicant’s enemy because WF was protecting the Applicant due to their close friendship. Some of the witnesses

stated that they never went to complain to WF because they knew that she would tell the Applicant resulting in them getting in trouble;

d. Another colleague, MS, declared that she had respectful relations with the Applicant and each time they experienced differences with regard to the application of certain rules or regulations they would resolve them professionally and cordially.

Products

e. The Applicant was told about the damaged beans that smelled badly by the warehouse managers but she and her supervisor instructed them to use a drying machine to recover the beans and to, afterwards, distribute them. The Applicant stated that one of the warehouse managers told her and WF that the expiration date from the bottles could be removed with acetone and she accepted this solution; the witnesses however declared that they were directly instructed by WF and the Applicant to proceed this way. It was a well-known practice when the oil was about to expire to change the labels and delete the expiration date, based on information they had received from the Head of the Unit that oil remains viable for human consumption several months past the labels' expiry date.

33. The Tribunal considers that the facts were correctly established by the Respondent during its investigation and the ensuing disciplinary proceedings.

Disciplinary measures and disciplinary liability

34. As expressed by the Tribunal in *Khan* UNDT/2013/140, “the necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct”. The employer has the right to establish the requirements of the Organisation, including the duties of each staff member and the applicable regulations and rules. Staff members have the obligation to observe and respect not only general obligations specified in the individual contract and

the applicable regulations and rules, but also general principles of a moral conduct.

35. The Tribunal underlines that staff members entering service with the United Nations as international civil servants must always respect the following declaration:

I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization. I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules.

36. Similarly, all staff members must comply with general rules of conduct such as: the general principle of equal treatment, non-discrimination, respect of the dignity of each staff member. Otherwise staff members may commit misconduct resulting in disciplinary liability.

37. As discussed in *Khan* UNDT/2013/140, the existence of misconduct is determined by the meeting of four cumulative conditions, namely (1) the *objective element* (an illegal act and/or an omission); (2) the *subjective element* (negative mental attitude); (3) the *causal link* between the illegal act/omission and the harmful result; and (4) the *negative effect* on labour relations, order and discipline in the workplace.

Violations of WFP policies

38. During the course of the OSDI investigation, and as part of her submissions, the Applicant recognized that, together with one of the complainants, both in the office and during breaks, she made sexual jokes, used offensive words and nicknames which are not appropriate for use in the workplace. She further stated that she sent emails to MS about the intimate life of the complainant.

39. However, the Applicant stated that her use of nicknames was part of a collective pattern within the workplace and that she was never made aware that anyone resented her use of such language.

40. In accordance with the facts which are not contested, the Tribunal finds that the Applicant regularly used offensive terms to refer to her colleagues and subordinates. Further, the evidence shows that the Applicant's supervisor, WF, had received complaints regarding the Applicant's behaviour and had informed her orally of the verbal complaints and had discussed the fact that she needed to be more serious in the office and address her colleagues in a respectful manner. The Applicant was also approached by RM who told her that GA "doesn't like the way she expresses herself and that during lunch time [she] shouldn't tell jokes".

41. It results from the above that the Applicant's behavior in 2007 and 2008 was improper. The Applicant's use of words, gestures and actions and generally unwelcome conduct annoyed, alarmed, intimidated, humiliated and embarrassed some of her colleagues and her superiors. She created an offensive and intimidating work environment and despite the complaints that were brought to her attention by her supervisor she continued her improper conduct and harassment of her colleagues.

42. Consequently, the Applicant's statements that these issues were not raised by her manager and that her acts were part of a collective behavior, are unfounded.

43. The Applicant's conduct reflects a behavioral pattern consisting of continuous illegal acts which contravened her mandatory legal obligations as a supervisor and international civil servant of the United Nations. The Applicant committed these acts intentionally and there is a direct link between her actions and the negative impact on labor relations.

44. The Tribunal notes that the Appeals Tribunal and the Dispute Tribunal have affirmed the right of staff members to a harmonious work environment that protects their physical and psychological integrity (see *Nwuke* 2010-UNAT-099, *Corbett* UNDT/2011/195).

45. The Tribunal finds that taking into consideration the facts and evidence provided to the Tribunal, the Applicant was also in a breach of the financial provisions of WFP and the rules regarding the shipment and delivery of goods. The Applicants conduct affected WFP's reputation and potentially endangered the lives of the recipients of the assistance provided by WFP.

46. Since the cumulative elements of misconduct and the Applicant's disciplinary liability were properly established, the Tribunal finds that the Respondent lawfully exercised his right to charge and then sanction the Applicant with serious misconduct.

Proportionality of the sanction

47. The decision as to whether to impose a disciplinary measure falls within the discretion of WFP and the Tribunal will review whether the actual disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnities imposed on the Applicant was proportionate.

48. The Tribunal considers that the necessary and sufficient condition for the disciplinary liability to be determined by the employer is the existence of misconduct. However, a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but rather it must be based solely on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member while also preventing other staff members from acting in a similar way.

49. Staff rule 10.3(b) states that one of the rights afforded to staff members during the disciplinary process is that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct".

50. The Tribunal considers that the rule reflects not only the staff member's right to a proportionate sanction, but also the criteria used for the individualization of

the sanction. Further, the nature of the sanction is related to the finding of conduct which is in breach of the applicable rules.

51. The “gravity of misconduct” is related to the subjective element of misconduct (guilt) and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability. The Tribunal must therefore verify whether the staff member’s right to a proportionate sanction was respected and whether the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct. For such a review to be conducted, the Tribunal has to consider all of the existing circumstances that surround the contested behaviour as they are of equal importance, namely: the exonerating, aggravating and mitigating circumstances.

52. The Tribunal notes that there are some circumstances which can exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, force majeure, disability or error of fact.

53. As stated by the Dispute Tribunal in *Yisma* UNDT/2011/061:

Both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include long and satisfactory service with the Organisation; an unblemished disciplinary record; an employee’s personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one’s superiors; and cooperation with the investigation. Aggravating factors may include repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organisation and any of its entities; and the degree of financial loss and harm to the reputation of the Organisation. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

54. The sanctions which can be applied to the Applicant in the present case are listed under staff rule 10.2 from the lesser sanction to the most severe.

The consequences of the misconduct, previous behavior, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

55. As the Tribunal held in *Galbraith* UNDT/2013/102:

79. The Tribunal notes that Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

80. Staff regulation 9.3 and staff rule 9.6(c) contain the following provision: "the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the reasons (grounds) listed".

81. The Tribunal considers that the above-mentioned legal provisions applicable in the present case reflect the staff member's right to be informed about the reason and the explanation for it and the Secretary-General correlative obligation to give the reason and the explanation for the termination.

56. The present disciplinary decision is a termination decision which therefore must include the legal reason and the explanation for it. The Tribunal considers that the analysis of the exonerating, aggravating and mitigating circumstances are part of the mandatory justification (explanation) of the disciplinary decision in relation to the staff member's right to a proportionate sanction.

57. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction. Consequently, in the absence of such an analysis or in cases where these circumstances were partially observed by the Organization, the Tribunal

has to determine the relevance of any circumstances which may have been ignored previously.

58. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138,

31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [See *Sanwidi* 2010-UNAT-084, *Abu Hamda* 2010-UNAT-022.]

32. ... A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

59. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however, identify the following aggravating and mitigating circumstances.

Aggravating circumstances

60. The Tribunal notes that WFP, which is the United Nations agency mandated to combat global hunger, is funded mainly through grants. Honduras is the third poorest country in Latin America and the Caribbean and an estimated 1.5 million Hondurans face hunger and chronic malnutrition. The Applicant's illegal actions endangered both the health of the recipients of goods and the image of WFP.

61. The Applicant was a supervisor of the Logistics Unit and was the second most senior staff member in the Unit after WF. The Applicant, as an employee with supervisory and management responsibilities, and in accordance with art. 101 of the Charter of the United Nations, had the obligation to maintain a high standard of personal conduct in dealing with all employees, to lead by example in maintaining the personal dignity of employees, to ensure that everyone was provided with a harmonious work environment and to be tolerant, sensitive and respectful of everyone's differences. The evidence supports a finding that the Applicant did not properly assume or complete any of these obligations.

62. The Applicant appears to have intimidated and humiliated her colleagues on a daily basis, including during lunch breaks, thereby creating an offensive and hostile working environment. Further, even though her supervisor informed her that staff members were complaining of her actions, she continued acting in the same way. Additionally, she was aware that such conduct was prohibited since she had undertaken the WFP course on harassment, sexual harassment and abuse of authority.

63. The Applicant directly instructed two warehouse managers to distribute damaged and expired food. She also ordered that the expired oil be redistributed without conducting the required laboratory tests and without contacting the unit that provides guidance on such matters or following any of the applicable procedures to ensure the viability of the products being distributed. Such actions, without a prompt reaction from some of the recipients (school directors) and field monitors could have created serious medical problems for the beneficiaries of these products.

Mitigating circumstances

64. This was the Applicant's first offense since joining WFP in 2000. Furthermore, she cooperated with the investigators, did not contest the facts established by the investigation and there was no evidence that she obtained any financial gain from her activities.

65. The Tribunal considers that all staff members are expected to be tolerant and respectful of one another and have the right to work in an environment that is free from discrimination harassment and abuse, but they have the correlative obligations not to encourage or attempt to encourage other employees to harass colleagues, to address the issues with the offender and/or to report the misconduct. As stated in *Ishak* UNDT/2009/072, all staff members have the right and duty to report to management any misconduct that comes to their notice. The Organization has the obligation to implement appropriate measures to ensure that each staff member is provided with a harmonious work environment and is protected from being exposed to any form of prohibited activity. Training programmes focused on the prevention of

harassment, sexual harassment and abuse of power must be offered on an ongoing basis at all levels in an interactive way (coaching, counseling and facilitation) in order to ensure an effective understanding and implementation of such an important policies. Both contractual parties must unify their efforts in creating and preserving a harmonious working environment.

66. The Tribunal underlines that WFP's internal policies includes mandatory rules regarding the prevention of harassment, sexual harassment and abuse of power.

67. The majority of the staff in the Logistics Unit appears to have ignored their individual responsibilities to prevent harassment in the workplace and failed to contribute actively in stopping the Applicant's illegal acts. Further, the Applicant's supervisor, after receiving two complaints, considered that a personal discussion with the Applicant of this matter was enough and, possibly because of their friendship, she never referred to the complaints in the Applicant's evaluations for the periods 2007 to 2009.

68. In addition, one of the complainants started using similar inappropriate language in the office when addressing the Applicant thereby contributing to a working environment in which such offensive behaviour may have been considered acceptable.

69. The Tribunal observes that there is no clear evidence that during the disciplinary proceedings the Applicant's right to be offered reasonable support to deal with the impact of any harassment or abuse of authority and to be accompanied during the key stages of the procedure, e.g., during the interview, by a willing work colleague, were respected.

70. The Tribunal considers that, in the present case, the issues that arose in the Applicant's Unit resulted from a lack of understanding of the Programme's prevention policy on harassment and United Nations core values. The staff members supervised by the Applicant should have acted promptly when the contested behaviour started to discourage the Applicant's illegal practices. Subordination is an

essential element of the working relationship, but any instructions from a supervisor has to be in compliance with the applicable regulations, rules and internal procedures.

71. The Tribunal finds that the memorandum informing the Applicant of the contested decision does not identify and analyze the aggravating and mitigating circumstances and the decision-maker exercised his discretion to sanction the Applicant without looking at all these aspects. As stated in *Shanks* UNDT/2011/209, when making the decision, in the proper exercise of his discretion, the decision-maker must thereafter weigh up all of the relevant considerations in each particular case.

72. The appeal ground that the entire context in which the misconduct occurred was not correctly evaluated by the decision-maker is accepted. In light of all the particular circumstances of the case, the Tribunal considers that the disciplinary sanction applied to the Applicant for her serious misconduct, which irreversibly breached the trust between her and WFP, is disproportionate.

73. As stated in *Yisma* UNDT/2011/061, the Tribunal may order the imposition of a lesser sanction if it finds that the original disciplinary measure is disproportionate (see also *Abu Hamda* 2010-UNAT-022).

Conclusion

74. In accordance with art. 10.5(a) the Tribunal substitutes the disciplinary sanction of separation from service without termination indemnity with the lesser sanction of separation from service with termination indemnity and the Respondent is to remove any references to the original sanction from the Applicant's official status file. The Respondent is to pay to the Applicant termination indemnities in accordance with reg. 9.3, staff rule 9.8 and annex III, provision (c), of the Staff Rules and Regulations.

In the view of the foregoing, the Tribunal DECIDES

75. The disciplinary sanction of separation from service without termination indemnity is substituted with the lesser sanction of separation from service with termination indemnity and the Respondent is to pay to the Applicant the termination indemnities in accordance with reg. 9.3, staff rule 9.8 and annex III, provision (c), of the Staff Rules and Regulations.

(Signed)

Judge Alessandra Greceanu

Dated this 24th day February of 2014

Entered in the Register on this 24th day February of 2014

(Signed)

Hafida Lahiouel, Registrar, New York