



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/WBFO/2008/09

Judgment No.: UNRWA/DT/2011/011

Date: 31 October 2011

Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

HABASH

v.

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

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
W. Thomas Markushewski

Introduction

1. This is an application by Jalil Habash (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 appointment in the interest of the Agency.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board 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 judgments on cases filed prior to the establishment of the Tribunal and in respect of which no report of the Joint Appeals Board (JAB) has been submitted to the Commissioner-General.

Facts

4. Effective 11 October 1985, the Applicant was employed by the Agency as Clerk in the Department of Human Resources in the West Bank. At the time material to the events, he occupied the post of Cashier “A”.

5. On 23 April 2008, the Applicant was reportedly robbed while sitting in an UNRWA car in the parking lot of a mini-market, in the course of transporting cash from the bank to the West Bank Field Office, in the company of a **daily paid** driver. The

Agency's direct financial loss was over US \$40,000. Six international staff members were affected by the apparent robbery.

6. The Applicant notified the Field Finance Officer (the "FFO"), who in turn informed the Field Administrative Officer (the "FAO"), the Field Legal Officer (the "FLO") and the Director of UNRWA Operations, West Bank (the "DUO/WB"). A meeting was held between the Administration and the Applicant to assess the incident.

7. By memorandum dated 24 April 2008, the DUO/WB constituted a Board of Inquiry (the "BoI") which was requested to "provide an accurate and detailed description of all relevant facts related to the incident in question".

8. By letter dated 5 May 2008, the DUO/WB informed the Applicant that he would be suspended with full pay effective 6 May 2008 until further notice.

9. The BoI, having reviewed numerous documents and interviewed twelve people including the Applicant, issued its report on 6 June 2008, concluding that "[his] acts and judgment . . . left much to be desired and, in the opinion of the Board, collectively represented a level of gross negligence directly responsible for ensuing events." (Emphasis in original)

10. By letter dated 17 June 2008, the DUO/WB informed the Applicant of the findings of the investigation and invited him to provide his response.

11. By letter dated 30 June 2008, the Applicant addressed several of the BoI's findings, attributed the robbery to lack of regulations or directives for handling bank runs and cash as well as to the absence of insurance. On 14 July 2008, he submitted a supplementary response, attributing the loss to the "reckless driver" and careless supervisors.

12. By letter dated 13 August 2008, the DUO/WB informed the Applicant essentially that his actions represented a level of gross negligence directly responsible for the ensuing events, that he had an ongoing pattern of regular detours while on duty trips to the bank, while acknowledging evidence pointing to some systemic and procedural flaws in the Finance Department operations regarding bank runs. The DUO/WB ended her letter informing the Applicant that his employment was terminated in the interest of the Agency pursuant to Staff Regulation 9.1.

13. By letter dated 19 August 2008, the Applicant requested the DUO/WB to reconsider her decision.

14. On 2 September 2008, the Officer-in-Charge of UNRWA Operations informed the Applicant that the decision to terminate his appointment in the interest of the Agency was confirmed.

15. On 22 September 2008, the Applicant submitted an application.

Applicant's contentions

16. The Applicant essentially contends that:

- (i) the BoI's findings "are a cover-up for major faults in the Agency's conduct and handling of issues relevant or related to this incident";
- (ii) his conduct did not violate any written rules of the Agency;
- (iii) the decision to terminate his employment was "unfair and excessively severe".

The Applicant requests that the Tribunal order the Respondent to reinstate him.

17. By e-mail dated 24 August 2011, the Applicant noted that the Counsel for the Respondent was one of the six international staff members to be affected by the apparent robbery. The Tribunal notes the Applicant's comment. However, it does not see a conflict of interest as the Counsel for the Respondent was not involved in any of the Administrative measures taken against the Applicant.

Respondent's contentions

18. The Respondent essentially submits that the termination of the Applicant's appointment was properly made, and requests that the Tribunal dismiss the application.

Considerations

Main Issues

Was the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency properly made?

19. It is important to look at the legal and administrative framework applicable in the case at bar. Area Staff Regulation 9.1 provides:

The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency.

20. Area Staff Regulation 10.2, in effect at the material time, provides:

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

21. In relation to what is "unsatisfactory" for the purposes of Area Staff Regulation 10.2, Area Staff Personnel Directive A/10, paragraph 4, provides:

4. Policy

- 4.1 Disciplinary measures will normally be imposed for willful misconduct, irresponsible conduct, or willful failure to perform assigned duties or to carry out specific instructions.

* * *

- 4.3 ... the following are examples of instances where disciplinary measures would normally be imposed:

- A. Refusal to carry out and discharge the basic duties and obligations specified in the Staff Regulations, Rules, and Directives of the Agency, and in particular, departures from the standards of conduct specified in Chapter I of the Staff Regulations;
- B. willful or irresponsible failure to comply with contractual obligations;
- C. willful or irresponsible failure to comply with written or oral instructions of supervisors;
- D. repeated minor infractions.

22. The disciplinary measures to be taken against staff whose conduct is unsatisfactory are provided in Area Staff Rule 110.1, paragraph 1:

Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct, provided that suspension pending investigation under staff regulation 10.4 or under rule 110.2 shall not be considered a disciplinary measure.

23. On 6 May 2008, the Applicant was suspended with full pay pending the investigation. Upon the outcome of the BoI investigation on 13 August 2008, the Applicant's appointment was terminated in the interest of the Agency, pursuant to Area Staff Regulation 9.1.

24. When termination of a staff member's appointment is connected to misconduct, even if the means of separation is termination in the interest of the Agency, as in the present case, the termination has been treated by the United Nations Appeals Tribunal (the "UNAT") as a disciplinary measure, and the UNAT 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, while recognizing that disciplinary matters are within the discretion and authority of the Commissioner-General, as held in *Abu Hamda* 2010-UNAT-022, paragraphs 25 and 37.

25. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based were reasonably established, noting that the former United Nations Administrative Tribunal in Judgment No. 1022, *Araim* (2001), paragraph V, held that:

The Administration is not required to prove its case beyond reasonable doubt. It has only to present adequate evidence in support of its conclusions and recommendations.

26. Indeed, the BoI was properly established, it conducted interviews with twelve witnesses including the Applicant and the driver, and it examined a range of documents and other evidence. It found evidence of "gross negligence" by the Applicant - who among other things took a detour on the day of the robbery to a mini-market and sat in the car in its parking lot with the windows rolled down - directly resulting in a financial loss to the Agency. It also found evidence of the Applicant's regular practice of taking detours while on duty trips to the bank, including checking his blood pressure, going to restaurants and occasionally being dropped off at a location where he kept his private business, as well as a failure to maintain confidentiality regarding the amount of money handled on cash runs. This is all the more careless on the part of the Applicant as he has admitted to having specific knowledge that previous staff members of UNRWA had been the victims of similar robberies as well as attempted robberies.

27. While blaming the driver and his supervisors, the Applicant nevertheless wrote on 19 August 2008 in connection with the robbery that “I admit that I did a mistake”, and later on 22 September 2008 that “I acknowledge the problematic nature of my behavior and I am sorry for it, ... I am willing to take responsibility for my actions ...” It is important to point out that the Applicant was made fully aware of the allegations and evidence against him, and was accorded the opportunity to rebut those allegations and to produce evidence in his defence.

28. The Tribunal takes note that the FFO affirmed to the BoI that the Inter Office Memorandum (the “IOM”) on Security Measures was still in force in his office, adding that he had never distributed it to his staff. While this is irresponsible and inexcusable on the part of the FFO and reflects a lax management style on the part of the Administration given that there had been previous robberies, the Tribunal is taking into account the fact that the FFO gave verbal instructions to the Applicant and “those who go to the bank” which reflect those contained in the IOM, and this piece of information has not been contradicted by the Applicant.

29. The Tribunal finds that the Applicant’s actions, as established by the investigation and admitted by the Applicant, constituted misconduct. The Tribunal also finds that in line with the broad discretionary authority accorded to the Respondent in relation to disciplinary matters, the Respondent fully complied with the applicable above mentioned Regulations, Rule and Area Staff Personnel Directive when terminating the Applicant’s employment in the interest of the Agency.

30. Looking at the record in the file, the Tribunal finds that the Applicant has not provided any evidence that the investigation by which the facts were established or the decision to terminate his appointment in the interest of the Agency, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law. Rather, the Applicant claims that the robbery happened because there are no regulations or directives for handling bank runs and money and he is a victim of the

Agency's lack of security procedures, and he has not violated any written rules of the Agency.

31. The Tribunal notes that an investigation was conducted with objectivity and thoroughness, the Applicant was made fully aware of its findings, and accorded the opportunity to rebut them and produce evidence. The BoI's conclusion was that although the robbery "was considerably enabled by the existence of a number of systemic failures", the Applicant's acts and judgment "collectively represent a level of gross negligence directly responsible for ensuing events." [Emphasis in original]

32. Regardless of the purported lack of any explicit written prohibition against making detours while transporting cash, "[i]t is the duty of every staff member to safeguard the property of his or her organisation", as held by the United Nations Appeals Tribunal in *Abu Hamda* 2010-UNAT-022, paragraph 35. The Tribunal finds that the Applicant failed in his duty to protect the Agency assets under his care and responsibility.

33. The question to ask now is whether the Respondent's decision to terminate the Applicant's appointment in the interest of the Agency was so disproportionate or unwarranted as to amount to an injustice.

34. As noted above, the Tribunal determined that the findings of the BoI after a two-week investigation, established the facts, and the characterization of these facts as gross negligence and misconduct was appropriate. When considering proportionality, the United Nations Appeals Tribunal in *Maslamani* 2010-UNAT-028 has taken special note of the nature of an appellant's post. In the case at bar, the Applicant was a cashier and as such, he was entrusted with a duty of care demanding conscientiousness and trustworthiness, and his failure to safeguard the Agency's assets through "gross negligence" and "serious misconduct" resulted in the loss of Agency assets in his custody.

35. The Commissioner-General's broad discretionary power to determine the appropriate sanction is limited only if it is proved that the sanction is so disproportionate as to amount to an injustice. In the case at bar, the Respondent could have summarily dismissed the Applicant, as per Area Staff Regulation 10.3. Instead, the termination of the Applicant's appointment in the interest of the Agency under Area Staff Regulation 9.1 was less severe than termination for misconduct or summary dismissal as provided for in respectively, Area Staff Personnel Directive No. A/10, and Area Staff Regulation 10.3. Rather, the Respondent took into consideration the "undoubted trauma [the Applicant had] experienced", and "[his] long years of service to the Agency." Indeed, termination in the interest of the Agency preserves certain (primarily financial) termination benefits not payable if termination is for misconduct or if a staff member is summarily dismissed for serious misconduct. In addition, termination in the interest of the Agency is often seen as avoiding public perceptions (and the impediment to future employment) associated with termination as a disciplinary measure.

Is there any legal basis for the remedy sought by the Applicant?

36. Considering that:

- (i) the facts on which the Respondent's decision was made have been reasonably established;
- (ii) the Respondent determined within the proper exercise of his discretion that the Applicant's gross negligence on 23 April 2008, which was part of an ongoing pattern, directly led to the robbery and amounted to misconduct;
- (iii) the sanction of termination in the interest of the Agency, which is a less harsh sanction than termination for misconduct or summary dismissal, was proportionate to the offence;

the Tribunal finds that there is no legal basis for the remedy sought by the Applicant.

Conclusion

37. Given all the above, the application is dismissed.

(Signed)

Judge Bana Barazi

Dated this 31st day of October 2011

Entered in the Register on this 31st day of October 2011

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman