UNRWA DISPUTE TRIBUNAL

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

ABU AL HASAN

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 Ahmad Yousef Abu Al Hasan (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 demote and transfer him from the post of Branch Manager, Grade 14, to the post of Credit Extension Assistant, Grade 9, with grade protection at Grade 12.

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 Area 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 has been submitted to the Commissioner-General.

Facts

4. Effective 1 February 2003, the Applicant was engaged by the Agency as a Credit Extension Assistant with the Microfinance and Microenterprise Programme at level 3A, step 1 in Damascus, Syria, on a fixed-term category "Z" contract. The Applicant was promoted several times. Effective 1 February 2007, he was promoted to the post of Branch Manager Al-Yarmouk Branch Office at Grade 14.

5. On 5 October 2008, an internal investigation was conducted with regard to alleged acts of misconduct at the Al-Yarmouk Branch Office committed by one of the Applicant's subordinates, a Lending Officer ("LO"). The investigation was conducted by the Applicant's supervisor, the Field Microfinance and Microenterprise Officer ("FMMO"), and two other staff members. The investigation found that the LO had engaged in a number of acts of misconduct.
Although the Applicant was not the subject of the investigation, the investigation revealed possible knowledge of the Applicant into the LO’s acts of misconduct.

6. On 8 October 2008, based on the investigation's findings, the Director of the Microfinance and Microenterprise Department ("DMMD"), together with the Chief Microfinance Operations ("CMO") and the FMMO, interviewed the Applicant about his knowledge of the misconduct committed by the LO. The Applicant denied knowledge of any of the LO’s alleged misconduct. Towards the end of the meeting, the DMMD informed the Applicant that:

   Based on what we have, it is not recommended that you continue as a manager, we will ask UNRWA's administration to establish a Board of Inquiry, even although we have facts. If the BOI proves that you know about [LO]'s misbehavior, I will recommend that you terminated [sic] as you are accountable. If you know that there is something else will be revealed [sic], you have to choose between disclosing it or facing disciplinary action.

7. On 9 October 2008, upon the Applicant's request, the DMMD, the CMO and the FMMO met again with him. During the interview, the Applicant admitted to knowing prior to the investigation about some of the acts of misconduct committed by the LO. The Applicant also admitted to having committed mistakes as supervisor of the LO and requested another opportunity to correct his mistakes while keeping his functions as a manager. He acknowledged *inter alia* to have instructed the cashier to receive payments from the LO without a temporary receipt voucher ("TCR")\(^1\) although he explained that this happened only in a few cases. At the end of the meeting, the DMMD advised the Applicant as follows:

   [Y]ou did not protect the department and conduct the work in a correct way, so we as managers will not support your continuation as a branch manger [sic], but at the same time we would like to give you a new chance. I will recommend that you be demoted and that you be moved to work in either Al-Ameen or Al-Saidah Zeinab.

\(^1\) The standing instruction stipulates that Cashiers shall only take client payments from staff if accompanied by a temporary receipt voucher ("TCR"). The TCR is a cash transit and fraud control document that is issued to clients when cash is collected in the field.
8. By email dated 17 October 2008, the DMMD advised the Director of UNRWA Affairs Syria ("DUA/SAR") of the outcome of the investigation. He stated the following:

The team met with various concerned staff, took their information and written statements and produced a report outlining their findings […]. The report was presented to the s/m for him to respond to […] His response largely confirms the findings of the committee that he conducted fraud by falsifying information in a used receipt voucher; that he was in significant breach of the rules concerning fraud control, i.e. taking money from clients … without issuing temporary receipt vouchers (TCRs); that he coerced one cashier (with the support of his manager) to take direct payments from him without a TCR; that he withheld cash received from clients and kept it at home (or in his own possession) instead of paying it directly to the Cashier; that he used unacceptable methods to threaten and coerce clients, including holding on to a clients ID for nine months and not releasing notarial [sic] deeds after clients had repaid their loans. All of this constitutes gross misconduct.

The s/m justifies this by claiming that this was all done in the interest of the department and UNRWA, with the knowledge of his manager, i.e. [the Applicant]. The investigation also shows that the [Applicant] did know about much of this behaviour and did not report to his supervisor or take individual corrective action against the staff member. The claim that this was done in the interest of the department is not credible, nor is such threatening practices acceptable [sic].

**Recommendations**

[The Applicant]: Given that he was aware of the majority of these incidents and did not act, he was derelict in his duty and his inaction allowed such incidents to continue. The fact that he did not act nor report these incidents to his superior indicates that he is not able to carry out the responsibilities placed upon him in his work. I considered recommending his demotion by one grade to an AS/13 ALS, but consider this too lenient. I recommend that he be demoted to a grade AS/09 Credit Extension Officer (without grade protection) and transferred to the al-Amin Branch Office.

[The LO]: This staff member resigned and so no further action may be required.

9. By letter dated 21 October 2008 to the DUA/SAR, the Applicant rejected the findings of the investigation stating that he was not in a position to give
appropriate answers during the investigation because he was facing a difficult situation as his son was hospitalised.

10. By letter dated 5 November 2008, the DUA/SAR informed the Applicant of the decision to demote him from his current post of Branch Manager Grade 14 to the post of Credit Extension Assistant with grade protection at Grade 12 at Al Ameen Branch with effect from 16 November 2008. The letter reads *inter alia* as follows:

   The fact that you had knowledge of your subordinate's misconduct and you neither reported nor took corrective action against him constitutes misconduct subject to disciplinary measures.

   In view of this and on the recommendation of the [DMMD], I have decided to demote you from your current post….

11. By letter dated 12 November 2008 to the DUA/SAR, the Applicant requested an administrative review of the decision and requested "the minutes and testimonies by the [Board of Inquiry]".

12. By letter dated 30 November 2008, the DUA/SAR responded to the Applicant's request for review by affirming the decision and denying his request for the minutes of the investigation.

13. By memorandum dated 6 December 2008, the Applicant filed an appeal with the JAB.


Applicant’s contentions

15. The Applicant contends that:

   (i) no concrete evidence or any document have been produced to support the decision taken against him;
   (ii) despite his requests, he has been denied access to the Board of Inquiry report upon which the decision to take disciplinary action against him in this matter was based. He has not received the investigation minutes so he has not had the opportunity to review their accuracy and sign in conformity;
(iii) he was not engaged in any misconduct himself and in fact, several months before the investigation, he informed his supervisor about the misconduct committed by his subordinate. Given this fact, it was up to his supervisor to take corrective actions, not the Applicant.

The Applicant requests the Tribunal to order the rescission of the Respondent’s decision to demote and transfer him and to have him re-instated to his previous post.

**Respondent’s contentions**

16. The Respondent contends that:

   (i) the demotion for misconduct was properly effected;
   (ii) the relief sought by the Applicant has no legal basis.

The Respondent requests the Tribunal to dismiss the application.

**Considerations**

*Main Issues*

*Was the Respondent's decision to demote and transfer the Applicant properly made?*

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

18. Area Staff Regulation 1.4 provides in relevant part that:

   Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency.

19. Area Staff Regulation 10.2 in force at the time of the facts provides that:

   The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.
20. Pursuant to Area Staff Personnel Directive No. A/10/Rev.1, paragraph 3.2, the Commissioner-General has delegated to Field Office Directors the authority to impose disciplinary measures on area staff serving in the Field.

21. With regard to what is “unsatisfactory” for the purpose of Area Staff Regulation 10.2, Area Staff Personnel Directive No. A/10/Rev.1 provides:

4. Policy

4.1 Disciplinary measures will normally be imposed for wilful misconduct, irresponsible conduct, or wilful 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 the Directives of the Agency, and in particular, departures from the standards of conduct specified in Chapter I of the Staff Regulations;

B. wilful or irresponsible failure to comply with contractual obligations…

22. The disciplinary measures which may be taken against staff members 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…

23. With regard to demotion, Area Staff Personnel Directive No. A/10/Rev.1 provides:

9.1 Demotion is the transfer of a staff member from his/her post to another post at a lower grade. This can arise either because of inadequate performance on the part of the staff member or as a disciplinary measure. Demotion should involve a loss of salary, but the loss may be minimised at discretion.

9.2 A staff member may also be downgraded as a disciplinary measure while continuing to occupy the same post.
9.3 When a staff member is demoted or downgraded for disciplinary reasons for the period of service to qualify for the annual increments provided for under Area Staff Rule 103.2 [sic] shall begin on the date of demotion. A staff member who has been demoted will not subsequently be promoted without the authority of the Director of Personnel at Headquarters and of the Field Office Directors in the Fields, who will personally review each case.

24. Accordingly, while recognising that disciplinary matters are within the discretionary authority of the Commissioner-General, the Tribunal will follow 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.

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

25. An internal investigation was conducted into wrongdoings at the Yarmouk Branch of Microfinance and Microenterprise Department. The Tribunal notes that the investigation was focused on the LO, the Applicant's subordinate, who resigned after the investigation.

26. In his interviews with the investigation team on 8 and 9 October 2008, the Applicant gave contradictory testimony. While he initially denied having knowledge of any of the acts of misconduct committed by the LO, the Applicant admitted on 9 October 2008, to having known about some of the acts prior to the investigation. His testimonies at the first interview on 8 October 2008 and at the second interview on 9 October 2008 indicate the following:

- **TCR issue.** During the first meeting, the Applicant stated that his instructions were not to receive any payments without TCRs and denied
knowing that his staff received money without TCRs. During the second meeting, the Applicant was confronted with the Cashier's testimony according to which the Applicant instructed him to receive money without TCRs. The Applicant then admitted that he had instructed the Cashier to receive money without TCRs in special cases when the Cashier and the LO collected money and did not have TCRs.

- **Transfers from one client account to another.** During the first meeting, the Applicant denied having any information in this regard. During the second meeting, the Applicant admitted that he became aware of the transfer after it was done and that he had told the LO that he "refuse[d] th[ose] kind of actions". The Applicant further added that the LO told him that the Applicant's supervisor knew about the incident.

- **Other instances of misconduct.** During the first meeting, the Applicant denied knowledge of the other acts of misconduct committed by the LO. However, during the second meeting, the Applicant was confronted with the LO's testimony stating that the Applicant was aware and even approved some of the acts of misconduct. The Applicant then admitted having had knowledge of some of the acts of misconduct after they had been committed, i.e. transfers from one client account to another, reception of payments without issuing TCRs, use of unacceptable methods to threaten and coerce clients, including the non-release of notarial deeds after clients had paid their loans, etc.

27. The evidence in the file indicates that the Applicant attempted to mislead the Agency by providing contradictory testimonies, in clear contravention of his obligation as staff member, under Area Staff Regulation 1.4, to conduct himself at all times in a manner befitting his status as employee of the Agency. The Applicant's explanation that he "could not think correctly" and give appropriate answers to the investigation team during the first meeting because of his personal situation is not an excuse for such behaviour.

28. Based on the Applicant's own admissions in his testimonies as well as the evidence gathered during the investigation from the LO and other witnesses, the
Tribunal is satisfied that the facts on which the disciplinary measure was based were reasonably established, and would like to refer to the United Nations Administrative Tribunal Judgment No. 1022, *Araim* (2001), holding that:

[T]he 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. Adequate means "reasonably sufficient for legal action" ... in other words sufficient facts to permit a reasonable inference that a violation of law had occurred.

*Do the facts amount to misconduct?*

29. The Tribunal further finds that the Applicant’s failure to properly report the LO's misconduct and to take appropriate action to correct such conduct once aware of it, is in contravention of his role as Branch Manager and amounts to what the Tribunal considers as managerial negligence. While there is no evidence that the Applicant directly participated in the illegal acts committed by the LO, the established facts show that the Applicant’s irresponsible conduct as Branch Manager facilitated some of the acts of misconduct committed by the LO. The Applicant’s wilful failure to carry out required procedures was evidenced by the fact that he allowed his subordinate to receive cash payments without issuing TCRs to clients. Accordingly, the clear failure of the Applicant in his duties legally supports the characterisation of misconduct as established by the investigation and unchallenged by clear and convincing evidence.

30. The Tribunal finds that when exercising the Commissioner-General’s delegated authority under Area Staff Personnel Directive No. A/10/Rev.1 regarding disciplinary measures, the DUA/SAR did not err as a matter of law when concluding that:

The fact that [the Applicant] had knowledge of [his] subordinate's misconduct and [he] neither reported nor took corrective action against him constitutes misconduct subject to disciplinary measures.

31. The Tribunal is of the opinion that in deciding to demote the Applicant pursuant to the authority delegated to him under Area Staff Personnel Directive
No. A/10/Rev.1, the DUA/SAR complied in all respects with the requirements of applicable Area Staff Regulation 10.2 and Area Staff Rule 110.1. The Tribunal considers that the Applicant's transfer, in itself, did not constitute a disciplinary sanction, but rather was a natural consequence of his demotion.

**Was the Respondent's discretionary authority tainted by procedural irregularities, prejudice or other extraneous factors, or error of law?**

32. The Applicant's contention that no concrete evidence or any document has been produced to support the decision taken against him is misguided. The record shows that the decision was mainly based on the Applicant's own testimonies collected during the investigation. The Applicant was invited to an interview with the investigation panel and, upon his request, he was granted a second opportunity to complete his initial testimony. Indeed, according to the record of the second interview, the Applicant admitted to having general knowledge of the LO’s misconduct and to have instructed him, in specific cases, to collect money without issuing a TCR. The Tribunal considers that the Applicant’s own admission of the facts is enough evidence to support the contested decision.

33. The Applicant claims that he has been denied access to the Board of Inquiry report upon which the decision was based and that he has not received the investigation minutes, thus he did not have the opportunity to review their accuracy and sign in conformity. In this respect, the Tribunal notes that the investigation report was prepared in the context of an internal investigation about the LO – the Applicant’s subordinate – not about the Applicant and that it was only when the evidence showed that the Applicant had knowledge of the LO’s acts that he became part of the investigation.

34. Considering that the Applicant admitted in his testimonies that he knew about the LO’s acts, the investigation panel considered that there was no need to request another investigation to be done by the Board of Inquiry, as such discretionary authority lies with the DUA/SAR. It was deemed that the Applicant’s own testimonies and additional evidence gathered during the internal investigation were sufficient to substantiate the decision. When reviewing this...
application, the Tribunal has relied essentially on the Applicant’s admission of his prior knowledge of the acts of misconduct and his failure to act on them.

35. The Tribunal notes, however, that the Applicant's testimonies do not contain any signature of either the interviewing panel or of the Applicant. The Tribunal also notes that there is no evidence in the file to determine whether or not the Applicant received a copy of the transcription of his testimonies prior to the Respondent's reply dated 6 July 2012. In this respect, the Tribunal wishes to express its concern about the Agency's *modus operandi* in conducting this investigation as well as the Agency's inconsistency in supplying applicants the basic documentation on which it has based its decision. The Tribunal notes that in December 2010, the Department of Internal Oversight Services issued a guide to conducting misconduct investigations – available on intranet – which, although does not have a regulatory power, should be a valuable resource for the Agency in conducting investigations.

36. In the case at hand and noting the above, the Tribunal finds that the Applicant was informed about the allegations against him and about the findings of the panel during his interviews on 8 and 9 October 2008. Furthermore, the Tribunal notes that by letter dated 21 October 2008 to the DUA/SAR, the Applicant challenged the findings of the investigation panel and attempted to justify himself by stating that he "was not in a suitable position to give the appropriate answers" as his son was allegedly in a critical health situation. However, the Applicant did not produce any evidence in support of this allegation and the Tribunal cannot give it any credence. The Tribunal finds that the mere fact that the Applicant wrote this letter serves to prove that he had been informed about the allegations against him and that he was aware that his replies were used by the investigation panel in its findings.

37. The Tribunal finds that the Applicant has failed to provide evidence to substantiate his allegations that he informed his own supervisor about some of the acts committed by the LO. The Tribunal held in *Diab* UNRWA DT/2012/030 that "in order for the Tribunal to consider any allegation, by either side, documentary
evidence is required. The Tribunal will not take into account mere statements by
the parties, as they do not constitute probative evidence”.

38. The Applicant is reminded that, as held by the former United Nations
Administrative Tribunal and the United Nations Appeals Tribunal, the burden of
proof rests on him when he alleges that the exercise of the Respondent’s
discretionary authority was arbitrary or capricious, motivated by prejudice or
extraneous factors, or flawed by procedural irregularity or error of law, and that he
must adduce convincing evidence to substantiate his allegations.

39. Accordingly, the Tribunal finds that the Applicant has not provided any
convincing evidence to demonstrate that the decision to demote and transfer him
was exercised arbitrarily or capriciously, motivated by prejudice or extraneous
factors, or flawed by procedural irregularity or error of law.

40. In light of the above, the Tribunal concludes that the Respondent’s
decision to demote the Applicant was properly made, in line with his broad
discretionary power relating to disciplinary matters and pursuant to the applicable
Area Staff Regulations, Rules and other related issuances. Furthermore, the
Tribunal is of the opinion that in line with the Respondent’s broad discretionary
authority to manage and administer his staff, the transfer of the Applicant - which
was linked to his demotion - was a proper exercise of this authority in line with
the applicable Regulations, Rules and other related issuances.

Was the Respondent’s decision to demote the Applicant so disproportionate or
unwarranted as to amount to an injustice?

41. As determined by the United Nations Appeals Tribunal in Agel 2010-
UNAT-040, the level of the sanction falls within the remit of the Administration
and can only be reviewed in cases of "obvious absurdity or flagrant arbitrariness".

42. When considering proportionality, and while recognising the
Commissioner-General’s broad discretionary power in relation to disciplinary
matters including the proper sanction for misconduct, the Tribunal takes special
note of the nature of an applicant’s post. Referring to the United Nations Appeals Tribunal in Haniya 2010-UNAT-024, paragraph 34:

His misconduct is particularly grave in light of the position he held [i.e., a position of trust that he failed to respect], and the responsibilities he was entrusted with…

43. The Tribunal finds that the DUA/SAR was justified in his letter dated 5 November 2008 to the Applicant, in which he stated that:

The fact that you had knowledge of your subordinate's misconduct and you neither reported nor took corrective action against him constitutes misconduct subject to disciplinary measures.

44. The Tribunal finds that the removal of supervisory duties from the Applicant as well as his transfer are a logical and proportionate decision for the Applicant’s failure in his duties as a Branch manager. As a result, the Applicant was demoted from the post of Branch Manager Grade 14, to the post of Credit Extension Assistant, Grade 9, with grade protection at Grade 12 which means, in practical terms, that the Applicant lost two grades in the Salary Scale for Area Staff, and he was transferred to Al-Ameen Branch.

45. Having determined that the facts on which the sanction was based have been properly established, and that they legally support the characterisation of misconduct on the part of the Applicant in relation to his duties as a supervisor, the Tribunal finds that the sanction of demoting the Applicant was proportionate to the characterisation of misconduct.

Is there any legal basis to the remedies sought by the Applicant?

46. Having determined that:

(i) the facts on which the disciplinary measure was based have been reasonably established;
(ii) the facts legally supported the characterisation of misconduct;
(iii) the disciplinary measure was proportionate to the offence;
(iv) the Respondent’s discretionary authority was not tainted by evidence of procedural irregularity, prejudice or other extraneous factors, or error of law;
the Tribunal finds that the Applicant’s requests for rescission of the Respondent’s decision to demote and transfer him and for reinstatement to his former post have no basis in fact or in law.

**Conclusion**

47. Given all of the above, the Tribunal finds no merit to this application and dismisses it in its entirety.

(Signed)

Judge Bana Barazi
Dated this 26th day of July 2012

Entered in the Register on this 26th day of July 2012

(Signed)

Laurie McNabb, Registrar, UNRWA DT, Amman