AL BAWAB

v.

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

JUDGMENT

Counsel for Applicant:
Nihad Maswadeh

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Rawhi Al Bawab (the “Applicant”), a staff member at the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the “Respondent”), against a decision to terminate his employment for misconduct. The Applicant filed an appeal with the UNRWA Dispute Tribunal (the “Tribunal”) on 14 June 2010.

Facts

2. On 1 April 2000 the Applicant commenced employment with the Respondent as a Labourer on a two-year fixed-term appointment at Level 1/A, Step 1. On 1 September 2000 the Applicant was transferred and promoted to the position of Panel Beater, Level 1/B.

3. By letter dated 16 March 2010 the Applicant was informed by the Director of UNRWA Operations, West Bank (“DUO/WB”) that an investigation was being conducted into an allegation that he was alleged to have stolen money from a colleague. He was suspended without pay pending the outcome of the investigation. He was informed that if the investigation found that he disregarded Agency rules and regulations, he may be subjected to disciplinary measures in accordance with those rules and regulations, up to and including dismissal.

4. On 16 March 2010 the DUO/WB constituted an investigation committee comprised of the Field Legal Officer, the Assistant Field Legal Officer and the Field Administration Officer (the “Investigation Committee”) to conduct an investigation into the allegation that the Applicant stole property belonging to his colleague, Mr. Rami Azar (the “Complainant”).

5. The Complainant provided the Investigation Committee with an undated video clip, which according to the Complainant was filmed on 15 March 2010. The video clip, which is 28 minutes and 39 seconds long, shows a man entering a locker, taking items from a wallet in the locker, placing the items in his pocket,
and closing the locker. The Complainant alleged that the locker was his and that the man in the video clip was the Applicant.

6. The Investigation Committee interviewed the Complainant on 16 March 2010 and, on the same day, interviewed the Applicant and asked for his response to the allegations. During both interviews the Complainant and the Applicant were shown the video and asked to answer questions relating to the footage. On 17 March 2010 the Complainant was interviewed for a second time to clarify questions arising from the first two interviews.

7. The results of the investigation were submitted to the DUO/WB in an Investigation Report dated 29 March 2010. The findings were as follows:

…we find the evidence of Mr. Azar far more credible than that of Mr. Bawab. Mr. Bawab’s interview was marked with repeated inconsistencies which, when coupled with the video evidence, render his credibility and explanation of events severely problematic. There is no question that he is the person in the video rummaging around in the locker, including in Mr. Azar’s wallet. While it is possible that he was in the locker at the request of Mr. Azar, we find the likelihood of this extremely low given Mr. Azar’s flat denial of this and Mr. Bawab’s inconsistent responses and implausible assertions. These include Mr. Bawab’s changes in his testimony regarding who the locker belonged to (Azar/Bawab?), what he was doing in the locker (getting food/Mr. Azar’s UNRWA drivers license?), and finally what he was putting in his pocket (cigarettes/responding to an itch?). Of critical import is Mr. Bawab’s final assertion, namely that the only reason he entered Mr. Azar’s locker on 15 March 2010 was to retrieve Mr. Azar’s UNRWA drivers license upon his request, and that he was not placing anything in his pocket but rather scratching an itch on his leg. In view of the fact that the video evidence clearly indicates that Mr. Bawab is removing what appears to be money from the wallet (particularly apparent through the audio representation) and placing it in his pocket, this final assertion is so far-fetched that, coupled with the repeated pattern of inconsistent and implausible responses offered, we are of the strong opinion that Mr. Bawab was not being truthful with us, and was likely stealing money from Mr. Azar […] Finally, while one might view the unpaid debt apparently owed by Mr. Bawab to Mr. Awad as providing the latter with some motivation to do the former harm by entrapping him on camera, we do not find this a likely possibility given Mr. Bawab’s pattern of inconsistent and implausible responses offered to our questions, in addition to his apparent untruthfulness.
8. By letter dated 1 April 2010 the DUO/WB advised the Applicant of the findings of the Investigation Committee, noting that:

During your interview on 16 March 2010, you confirmed that you were the person in the film; however, you were unable to provide a satisfactory explanation as to your reason for entering the locker or why you had removed items from it.

The investigating team is of the view that these incidents are a serious breach of UNRWA rules and regulations […]

[…] according to the principles of administrative fairness and the rules of natural justice, you are offered this opportunity to present your comments with respect to the conclusions of the investigative report within 7 days from the date of receipt of this letter.

9. By letter dated 13 April 2010, the Applicant’s legal counsel wrote to the DUO/WB informing the Agency of his representation. Attached to the letter was a declaration from the Applicant stating that Mr. Azar gave the Applicant the key to his locker to enable him to retrieve items for him, that the accusation stemmed from a private dispute, and noting his good record with UNRWA, including an instance where he found NIS 8,000 belonging to a colleague and returned it.

10. On 29 April 2010, the Applicant provided a further response to the findings of the investigation. In essence he was asserting his innocence and stating that it was common practice for colleagues to give each other keys to their lockers and suggesting that he was a victim of entrapment.

11. By letter dated 14 May 2010 the DUA/WB wrote to the Applicant informing him that she had considered the Applicant’s assertions in the letter from his counsel dated 13 April 2010, and noting:

- As to the first and second assertions, you have already made these assertions to the investigation team. In brief, the investigation team found it “extremely” unlikely that you were in Mr. Azar’s locker at his request given Mr. Azar’s adamant denial of this and, more importantly, your inconsistent responses and implausible assertions given to the investigation team […]
As to the third assertion, I note your good record with UNRWA and assure you that I have taken it into account in my assessment of the serious issue at hand.

In response to the Applicant’s claim in the fax dated 29 April 2010 that the investigation was “pre-staged” and that he did not have a fair chance to “present and clarify [his] innocence”, the DUO/WB stated:

- From my review of the investigation report, I have every reason to believe that you were afforded ample opportunity to respond to questions arising out of the events in question. You were given an opportunity to review your answers given. When inconsistencies were pointed out to you in the answers you gave, you were given multiple opportunities to clarify.

The DUO/WB concluded:

In light of the foregoing, I have lost confidence in your ability to conduct yourself in a manner befitting the status of an employee of the Agency. I have therefore decided to terminate your employment with UNRWA for misconduct.

12. By letter dated 1 June 2010, the Applicant’s legal counsel wrote to the DUO/WB requesting a review of the decision to terminate the Applicant’s appointment for misconduct and stating that “the evidence provided against him is insufficient; illegal and non-existent”.

13. On 14 June 2010 the Applicant filed his appeal with the Tribunal. The Applicant included in his appeal three signed witness statements from colleagues stating that he was a good employee who was respected by his colleagues. The statements also confirmed the Applicant’s account of the practice of employees in the garage sharing keys to their “closets”.

14. By letter dated 15 June 2010 the Applicant granted advocates Nihad Maswadeh and Yazan Maswadeh “Special Power of Attorney” to manage all aspects of his case before the Tribunal.

15. By Order 018 dated 12 July 2012, the Tribunal requested that the Respondent include in its reply to the appeal answers to specific questions contained in the Order and various other items of information to assist the Tribunal to effect a just and expeditious disposal of the case.
16. The Tribunal received the Respondent’s Reply to the application on 27 July 2012. The Reply and annexes were forwarded to the Applicant by the Registrar on 29 July 2012.

17. On 22 August 2012 a Case Management Discussion took place before Judge Goolam Meeran in order to clarify certain aspects of the case. In attendance were UNRWA Tribunal Registrar, Ms. Laurie McNabb; counsel for the Applicant, Mr. Nihad; counsel for the Respondent, Mr. Ojakel; and a translator/interpreter, Mr. Masri. The call commenced at 2:20pm and concluded at 3:06 pm Amman time. Counsel for the Applicant noted that he and the Applicant were not yet in receipt of the Respondent’s Reply (the email address supplied by the Applicant had not been monitored) or a copy of the video evidence. The Applicant was granted seven days from the date of receipt of the Reply and video evidence to provide any additional submissions. The Registrar forwarded the Respondent’s Reply and annexes to the Applicant’s counsel again at the conclusion of the call.

18. On 23 August 2012, counsel for the Applicant signed an acknowledgement of receipt to confirm that he had received a DVD of the video evidence in the case.


**Applicant’s contentions**

20. The Applicant contends that:

   (i) There are no contradictions in the story the Applicant provided to the Investigation Committee. The locker was opened with a key given to the Applicant by the Complainant so that the Applicant could retrieve the Complainant’s license and/or money for him.

   (ii) The Complainant has plotted and conspired to entrap the Applicant through providing him with the key to his locker and then asking the Applicant to retrieve his license/money.
(iii) The investigation did not consider the appropriateness of an employee setting up a camera in the workplace without the appropriate authorization.

(iv) The Investigation Committee did not interview the Applicant and the Complainant at the same time or bring them together before a physician with knowledge of “psychological matters”. “Therefore, the accused Rawhi Albawab was prohibited from an important component in the investigation procedures”.

(v) There are witnesses that can testify that they overheard the Complainant stating that he would take revenge on the Applicant and cause him legal trouble.

(vi) All evidence shows that the Applicant is an ideal employee, respected and has not violated any regulations and laws in his work. He is transparent, clean and appreciated by his colleagues.

21. The Applicant requests the Tribunal to order recission of the decision to terminate his appointment and to reinstate him in his former post.

Respondent’s contentions

22. The Respondent contends that:

   (i) the decision to terminate the Applicant’s appointment was properly effected; and

   (ii) the relief sought by the Applicant has no legal basis.

23. The Respondent requests the Tribunal to dismiss the application.

The applicable law

Law on misconduct and disciplinary measures

24. The legal and policy framework governing misconduct and disciplinary procedures within the Agency is set out below.

Area Staff Regulation 1.4 provides 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 […]
Area Staff Regulation 10.2 provides that:

The Commissioner-General may impose disciplinary measures on staff members who engage in misconduct.

Area Staff Rule 110.1 provides:

Disciplinary measures under staff regulation 10.2 shall consist of written censure, suspension without pay, demotion, or termination for misconduct […]

25. Pursuant to Area Staff Personnel Directive No. A/10, 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. Terminations for disciplinary reasons must be coordinated with the Legal Advisor and/or Director of Personnel.

26. The United Nations Appeals Tribunal held, in Abu Hamda, Judgment No. 2010-UNAT-022, at paragraph 37:

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

27. This brief statement of general principle applies to all administrative actions and decisions including those taken in the context of employment relations. They have been given effect in this case by an examination of the following issues and questions:

(i) Was it reasonable to conduct an investigation into the allegations made against the Applicant?

(ii) Was the Applicant given sufficient particulars of the allegation and was he given an adequate and fair opportunity to defend himself and to say whatever he wished to say in his defence?

(iii) Were the requirements of natural justice complied with?

(iv) Have the facts in support of a finding of misconduct been established by a fair and transparent process?
(v) Were all relevant and significant facts taken into consideration when making the decision?

(vi) Has there been any material irregularity in the proceedings, including any evidence of improper motive or abuse of process?

(vii) Did the Agency, in any way, act in an arbitrary or oppressive manner?

(viii) Did the Agency follow its own Rules, Regulations and procedures?

(ix) Was there sufficient material before the DUO/WB to justify a finding that the Applicant was in serious breach of UNRWA Rules and Regulations?

(x) Did the Applicant advance any credible argument, justification or mitigation and, if so, were these given appropriate weight and consideration in arriving at a decision as to penalty?

(xi) Is the disciplinary measure imposed proportionate to the misconduct as found?

(xii) If it is not, what would, in the circumstances, have constituted a fair and reasonable penalty?

Considerations

28. As noted by the United Nations Appeals Tribunal in Molari 2011-UNAT-164:

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

29. The Tribunal has had an opportunity to view the video record of the incident and has taken into account the unsatisfactory and contradictory responses of the Applicant in the course of the investigation. The evidence pointing to guilt was clear and convincing. The conclusion that the Applicant was guilty of serious misconduct was supported by the evidence.

30. The Applicant knew the nature of the allegations and he was given ample opportunity to say whatever he wished to by way of explanation in his defence.
His due process rights were observed. He was treated fairly at every stage of the disciplinary process. The respondent gave effect to its own procedures and applied the appropriate rules. There is no evidence of improper considerations having been applied or material facts being overlooked. The Agency is entitled to, and should be expected to, take a serious view of dishonesty, especially where the staff member steadfastly protests his innocence and does not show any remorse or offer any mitigation which could, in an exceptional case, have conceivably resulted in a lesser penalty.

31. The Tribunal is concerned about the Applicant’s complaint of entrapment and wishes to make it clear that if the Agency had carried out secret surveillance of its staff it would have constituted a fundamental breach of the right to privacy and the outcome might well have been different. However, in this case a fellow staff member, claiming that he had apparently lost money from his locker, took it upon himself to place a secret camera in the expectation of catching the culprit. The Agency took no part in this activity but could not ignore the evidence of misconduct which they were presented with.

32. It is always a matter of regret when any person, particularly one of limited means, loses a valued job but the Tribunal cannot find fault with the manner in which the investigation was conducted or the evidence which was obtained. The extreme sanction of dismissal was not, in the circumstances, disproportionate.
Judgment

33. The application is dismissed.

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(Signed)_____________________

Judge Goolam Meeran
Dated this 18th day of September 2012

Entered in the Register on this 18th day of September 2012

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(Signed)_____________________

Laurie McNabb, Registrar, UNRWA DT, Amman