



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/LFO/2008/20

Judgment No.: UNRWA/DT/2011/008

Date: 19 October 2011

Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

AL-JISHI

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 Awad Muhyiddin Al-Jishi (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 for misconduct.

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 1 December 1998, the Applicant was engaged by the Agency as a Distribution Team Leader in Tyrc, Lebanon, on a daily-paid appointment. On 1 May 2000, he became employed on a fixed-term full-time appointment. On 1 August 2004, his contract was converted from category “Z” to “X” and subsequently extended.

5. On 30 May 2008, a preliminary internal investigation was conducted with the Applicant following reports of discrepancies in food ration distributions. The investigation report concluded that the Applicant was involved with the 23 May 2008 losses and recommended the establishment of a Board of Inquiry. On the same date, the Applicant was informed that, in accordance with the provisions of Staff Rule 110.2, he was suspended from duty without pay pending the investigation into these losses.

6. By memorandum dated 4 June 2008, the Applicant objected to the suspension.
7. In August 2008, the Internal Investigation Team (the "IIT") conducted an official investigation into the 23 May 2008 ration discrepancies found in the distribution process.
8. By memorandum dated 30 August 2008, the Applicant complained that his 1 June 2008 suspension was not based on evidence.
9. On 6-7 October 2008, the report of the IIT was submitted to the Director of Human Resources and the Department of Legal Affairs.
10. On 8 October 2008, the Field Administration Officer, Lebanon, (the "FAO/L") responded to the Applicant's 30 August 2008 memorandum confirming that his suspension thus far was an administrative measure and not a disciplinary measure, pending the outcome of the investigation.
11. On 14 October 2008, the Applicant was informed that the IIT concluded that he had been involved in embezzlement of Agency food parcels. He was invited to comment on the IIT's conclusion by 24 October 2008.
12. By letter dated 16 October 2008, the Applicant responded, rejecting the allegations which he described as "fabricated".
13. By letter dated 13 November 2008, the Applicant was informed that due to his involvement in the above-mentioned embezzlement, his appointment was terminated for misconduct under Area Staff Regulation 10.2 and Area Staff Rule 110.1 from the date of his suspension on 1 June 2008.

14. On 14 November 2008, the Applicant requested a review of the decision. On 27 November 2008, the Director of UNRWA Affairs, Lebanon (the "DUA/L") responded that he was confirming the decision of 13 November 2008, to terminate the Applicant's appointment for misconduct.

15. On 23 December 2008, the Applicant submitted his application.

Applicant's contentions

16. The Applicant essentially contends that the whole case is a plot against him by his supervisors, and that his meeting in the office of the Deputy Field Procurement and Logistic Officer (the "D/FPLO"), lasting "6 minutes", was just to fabricate a confession.

17. The Applicant requests that the Tribunal order the Respondent:

- (i) to reinstate him to his post and pay him all salaries and indemnities which he stopped receiving from the date of his suspension;
- (ii) to have a letter signed by the DUA/L declaring his innocence;
- (iii) to reimburse him for the expenses paid to his lawyer.

Respondent's contentions

18. The Respondent essentially submits that the decision to terminate the Applicant's appointment was properly made, and that the remedies sought by the Applicant have no legal basis.

19. The Respondent requests that the Tribunal dismiss the application.

Considerations

Main Issues

Was the Respondent's decision to terminate the Applicant's appointment properly made?

20. It is important to look at the legal and administrative framework applicable in the case at bar. Area Staff Regulation 10.2, in effect during the material time, provides that:

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, 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 be normally 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 8 October 2008, the Respondent suspended the Applicant without pay pending the investigation, noting that such procedure is without prejudice to his rights, and is a customary administrative measure whenever there is a charge of misconduct that is *prima facie* well founded. Upon the outcome of the ITT investigation on 13 November 2008, the Applicant's appointment was terminated for misconduct under Regulation 10.2 and Staff Rule 110.1 with effect from the date of his suspension on 1 June 2008.

24. In reviewing a disciplinary measure to terminate a staff member's appointment for misconduct, the United Nations Appeals Tribunal in *Haniya* 2010-UNAT-024, paragraph 31, 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.

25. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based were reasonably established. Indeed, on May 30, 2008, in a preliminary internal investigation, a meeting was held with the Applicant in the presence of the Distribution Officer, the Supply Control Officer and the D/FPLO. The Note in the Record, dated 30 May 2008, signed by the three above officers, indicates that the attendees were briefed about the purpose of the meeting, a somewhat different version from what the Applicant describes as "chatting" for six minutes. According to this Note, the Applicant (i) confirmed that Distribution Team Leader Qinawi had requested that the Applicant load 50 extra parcels; (ii) that this was not the first time it happened; and (iii) that the driver Al-Najjar was the link with the merchant who bought the stolen merchandise. While the Applicant did not sign this statement, the three officers did,

recommending among other things for a Board of Inquiry to be set up. The Tribunal finds it implausible that - and sees no reason why - three officers would “fabricate” these statements while recommending that an additional investigation be conducted.

26. The record in the file also shows that in August 2008, the IIT conducted an investigation composed of a panel of four, interviewed 13 staff members including the three accused of embezzlement and examined the documentary evidence. The investigation found that on 23 May 2008, the Applicant and two other staff members overloaded 50 parcels of food which were unaccounted for in the distribution. The Agency - suspecting previous fraud in the distribution of food rations and having been provided with credible evidence that the Applicant was about to misappropriate Agency assets - had set in motion on 25 May 2008 a “sting” operation, unsealing the truck loaded by the Applicant and recounting the contents, finding 50 additional ration parcels unrecorded, resealing the truck and awaiting the distribution reports, which failed to account for the extra parcels.

27. Noting that the “Administration is not required to prove its case beyond reasonable doubt” as affirmed by the former UN Administrative Tribunal in Judgment No. 1022, *Araim* (2001), paragraph V, the Tribunal finds that the Respondent duly exercised his broad discretionary authority, that the facts of termination were reasonably established and such facts amount to serious misconduct in accordance with Area Staff Regulation 10.2, Area Staff Rule 110.1 and Area Staff Personnel Directive No. A/10 as held in *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028 and *Masri* 2010-UNAT-098. Furthermore, when serious misconduct has been established as in the case at bar, the Commissioner-General, under Area Staff Regulation 10.3, may summarily dismiss a staff member. Despite the Applicant’s confession of 30 May 2008, the Respondent chose not to invoke this disciplinary provision and instead initiated a formal investigation. The Tribunal notes however, that the Applicant’s admission of complicity in an embezzlement scheme to defraud the beneficiaries of food is the very definition of serious misconduct, and summary dismissal in the Tribunal’s opinion would not have exceeded the Respondent’s authority.

28. The issue to look at now is whether the decision to terminate the Applicant's appointment was so disproportionate or unwarranted, as to amount to an injustice. When considering proportionality, the United Nations Appeals Tribunal has taken special note of the nature of an appellant's post as it held in *Haniya* 2010-UNAT-024 paragraph 34:

His misconduct is particularly grave in light of the position held and the responsibilities he was entrusted with.

29. In a Note for the Record dated 12 April 2007, copied to all Distribution Team Leaders, regarding distribution and loading/offloading of trucks at packing stores and points of distribution, the Distribution Officer, Lebanon set out the policy to be implemented by all distribution staff. The Note for the Record also contained a handwritten comment at the top left side, specifically addressed to the Applicant, calling for his efforts to implement the policy. As Distribution Team Leader, the Applicant was well aware of the policy in effect. Furthermore, he was entrusted with a heightened duty of care to safeguard the Agency's assets, but instead used his position of trust to actively engage in a scheme to embezzle Agency assets intended for its refugee beneficiaries.

30. The Tribunal finds that the Respondent's decision to terminate his services was not disproportionate or unwarranted as to amount to an injustice.

31. The question to ask at this stage is whether the Respondent's decision to terminate the Applicant's appointment for misconduct was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law, as held in *Assad* UNAT-2010-021. The Tribunal notes that a preliminary internal investigation was conducted, followed by a properly constituted IIT, which duly submitted an investigation report and recommendations after interviewing 13 members and examining the relevant documentation. The Tribunal fails to see any improper motivation or procedural error in this sequence of events. The Tribunal is reminded of the jurisprudence of the former UN Administrative Tribunal Judgment No.

834, *Kumar* (1997) clearly stating that the Applicant bears the burden of proof and must produce convincing evidence that the contested decision was tainted, and that his allegations of conspiracies, plots and fabricated evidence are substantiated.

32. The record in the file indicates that the Applicant confessed several facts during the investigation, which he later contradicted in his application. He was also given the opportunity to rebut the findings of the IIT, but failed to provide convincing evidence to substantiate his allegations of prejudice, arbitrariness, procedural irregularity or error of law with respect to the investigation or with regard to the Respondent's decision to terminate his appointment for misconduct.

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

33. Considering that:

- (i) the facts on which the disciplinary measure was based have been established;
- (ii) these facts legally amounted to misconduct;
- (iii) the disciplinary measure applied was not disproportionate to the offence;
- (iv) the discretionary authority of the Respondent was not tainted by evidence of procedural irregularity or prejudice;

the Tribunal finds no legal basis to award payment of "all salaries and indemnities" to the Applicant since the date of his suspension, or the "reimbursement for all the expenses he had paid to his lawyer" for which he has provided no evidence, or to consider any other remedy the Applicant is seeking.

Conclusion

34. Given the above, the Tribunal finds no merit to this application. The application is dismissed in its entirety.

(Signed)
Judge Bana Barazi

Dated this 19th day of October 2011

Entered in the Register on this 19th day of October 2011

(Signed)
Laurie McNabb, Registrar, Amman