



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/JFO/2008/18
Judgment No.: UNRWA/DT/2011/009
Date: 19 October 2011
Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

KHARROUSHEH

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 Mohammad Hamdi Kharrousheh (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 during his probationary period.

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 judgment 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. On 11 December 2007, the Applicant was employed in Jorday by the Agency as the Branch Manager of the Microenterprise & Microfinance Department, on a fixed-term appointment. The Applicant’s appointment was subject to a probationary period of twelve months, until 11 December 2008. By letter dated 30 March 2008, the Applicant’s appointment was extended until 31 December 2008.

5. On April 1 2008, the Applicant was assigned as the Branch Manager at the Zarqa Branch.

6. On 15-16 April 2008, at the request of the Field Microfinance and Microenterprise Programme Officer, Jordan (the "FMMO/J") an audit was conducted at the Zarqa Branch. The report dated 17 April 2008 revealed several irregularities, errors, omissions, and failings.

7. During another visit to "check up on the Branch Safe", on 24 April 2008 it was determined that the Applicant had ordered the safe to be open in violation of operational instructions and refused to account for its contents.

8. Other violations of operational rules, mistakes and irregularities of the Applicant followed between April and August 2008 and were conveyed to him via e-mail.

9. By letter dated 9 July 2008, the FMMO/J reprimanded the Applicant concerning his "accuracy/conduct". In a Special Periodic Report (the "S/PER"), on 14 August 2008 the Applicant was given an overall rating as "[a] staff member who maintains only a minimum standard of efficiency."

10. By letter dated 22 September 2008, the Director of UNRWA Operations, Jordan (the "DUO/J") informed the Applicant that due to his poor performance, his service with the Agency would be terminated effective 30 September 2008.

11. By letter dated 7 October 2008, the Applicant requested a review of the decision to terminate his appointment, asserting among other things that termination should only be imposed gradually and that his misbehaviour was the result of either a misunderstanding of the Regulations and the Rules or the absence of clear instructions.

12. By letter dated 30 November 2008, the DUO/J informed the Applicant that the decision to terminate his appointment during the probationary period "is justified and should stand."

13. On 27 January 2009, the Applicant filed an application.

Applicant's contentions

14. The Applicant challenges the decision to terminate his appointment during the probationary period and contends that:

- (i) following his assignment as Branch Manager at Zarqa on 1 April until August 2008, he had to perform in addition to his duties those of the Area Loan Supervisor;
- (ii) that he was not informed about the basis for the evaluation of his performance;
- (iii) that he performed well and the Zarqa Branch results were "the best";
- (iv) and after receiving the letter of reprimand, he was not given any written or verbal comments about his performance.

The Applicant seeks reinstatement and payment of his salary and Provident Fund entitlements.

Respondent's contentions

15. The Respondent essentially contends that the decision to terminate the Applicant's appointment was properly made, and that the remedy sought by the Applicant has no legal basis.

Considerations

Main Issues

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

16. Looking at the legal and administrative framework in this case, the Tribunal refers to Area Staff Regulation 4.2 which provides that:

Appointments shall be subject to the satisfactory completion of not less than one month's probationary service.

17. As for termination, Area Staff Rule 109.1, paragraph 1, defines it as follows:

Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member's probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

18. The Applicant was well aware of the fact that he was under probation. Indeed, his Letter of Appointment specifies in paragraph 4 that:

This appointment shall be subject to probationary service of **twelve months** effective **11.12.2007** and may be terminated by the Agency at its sole discretion and without notice at any time during this probationary period. Subject to your satisfactory work performance during this probationary period, this appointment shall be confirmed by the Agency in writing." [Emphasis in the original]

19. The purpose of probation is made clear in Area Staff Personnel Directive A/4/Part VII:

3. The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance.

20. Although the United Nations Appeals Tribunal gives the Agency and the Commissioner-General broad discretionary authority in the application of the Agency's Staff Regulations, Rules and other issuances, it provides that this authority will not be disturbed unless the decision was arbitrary or capricious, was motivated by prejudice or

extraneous factors, or was flawed by procedural irregularity or error of law. More specifically, with respect to the authority to terminate an appointment during the probationary period, the United Nations Appeals Tribunal in its Judgment No. 2010-UNAT-021 *Assad*, paragraphs 10 and 11, provides that:

The Staff Rules applicable to staff members on probation provide that the Administration has broad discretionary authority to terminate the appointments of such staff during the probationary period. They provide that a probationary appointment may be terminated without advance notice at any time.

Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration. We would add that its decisions must not be based on erroneous, fallacious, or improper motivation.

21. The Applicant is reminded that the burden of proof rests on his shoulders 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 allegation. The Tribunal takes note of the fact that no evidence - convincing or otherwise - has been brought forward by the Applicant to support his allegation in this matter.

22. Rather, the record in the file shows that the decision to terminate the Applicant's probationary appointment was based on the Applicant's shortcomings, properly documented through numerous e-mails and correspondence relating to the overall managerial performance of the Applicant and his potential as a Branch Manager. Indeed, the picture emerging from the evidence is that of the Applicant's inadequacy in relation to the implementation of the Microfinance and Microenterprise Programme's operational procedures, his inefficiency and poor judgment, despite having had his attention drawn to his failings regularly and consistently (including a letter of reprimand) between April and August 2008. The Audit Report dated 17 April 2008 revealed among other things an open cashier room and safe (which contained the Branch's cheques as well as loan

proceeds), 13 loans disbursed over a two-week period referencing the wrong borrower name, loan cheques improperly completed, to cite a few examples.

23. The evidence also indicates that many steps were taken to help the Applicant in applying the department standards on loan applications and official forms, in addition to training courses on effective monitoring, and that his superiors were directly involved in training, coaching, advising and supervising him throughout the reporting period. However, the Applicant continued to perform at less than a satisfactory level, failing to meet the requirements for the post during the probationary period. In the S/PER, dated 14 August 2008, it is noted that no improvement in his performance - quality or quantity wise - had been observed, in addition to his lack of supervisory skills. Accordingly, a recommendation was made to terminate the Applicant's contract.

24. As for the Applicant's allegation that the letter of reprimand was not deserved because he had been burdened with additional tasks, the Tribunal notes that he had not previously taken issue with additional tasks to justify shortcomings in his performance. With respect to the Applicant's allegation that he had not received any written or verbal communication from his supervisors in connection with his poor performance after the letter of reprimand and prior to the termination of his appointment, the Applicant is reminded that he signed the S/PER which sets out his shortcomings and failings, and cannot claim that he received no communication about his performance. Further, the numerous e-mails between him and his supervisors, from April through August 2008, point out to his errors, omissions, irregularities and failures to adhere to operational instructions. The Applicant's claim that he was unaware of his unsatisfactory performance or that he was left in the dark through lack of communication, is not credible.

25. The Tribunal finds that the Applicant was given a fair and adequate consideration both in being assisted in his work, in being regularly informed about his performance and, when no improvement of the situation occurred, in having his appointment terminated.

26. Finally, the record of the Applicant's performance, appropriately evaluated and reported, establishes that the broad discretionary authority accorded to the Agency in respect of termination of appointments during probationary periods was properly exercised. The Tribunal finds that the Applicant has failed to provide any evidence of prejudice or improper motivation on the part of the Respondent.

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

27. With respect to the Applicant's request to be reinstated the Tribunal finds that there is no basis for his claim as the decision to terminate his probationary appointment was properly made, it complied with the applicable Area Staff Regulations, Rules and other issuances, and the Applicant was accorded fair and adequate consideration. The decision to terminate his appointment during the probationary period was based on the properly formed conclusion that he failed to demonstrate his overall performance and potential as Branch Manager.

28. In the application the Applicant also asked for payment of his salary as well as Provident Fund entitlements. The Tribunal has understood this to mean that if the Applicant was unsuccessful in his request for reinstatement, he is asking for a termination indemnity and Provident Fund entitlements. Unfortunately, as the Applicant was only in the Agency's employ for nine months, he is not eligible under Area Staff Rule 109.9 for a termination indemnity, which requires one year of qualifying service.

29. With regard to payment of Provident Fund entitlements the Tribunal would like to note that in the file there is only one reference to Provident Fund entitlements in a letter from the DUO/J to the Applicant on 22 September 2008 providing, "[y]our dues and provident fund entitlements will be paid through a Personnel Action Form." The Tribunal does not have any additional information indicating the Applicant's participation in the fund or evidence of any payment by the Administration. It is in the Tribunal's view that if the Applicant is eligible per Staff Rule 109.10 and has not yet been paid, it is in the

interest of justice that the Respondent should now pay with interest those funds, if any, that are owed.

Conclusion

30. There is no merit to this application and it is dismissed in its entirety.

(Signed)
Judge Bana Barazi

Dated this 19th day of October 2011

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

(Signed)
Laurie McNabb, Registrar, Amman