



UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/LFO/2008/19
Judgment No.: UNRWA/DT/2011/0010
Date: 25 October 2011
Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

KINAWI

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 Abed Ali Kinawi, also spelled Qannawi and Qinawi (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 suspend him from duty without pay pending an investigation and, subsequently, 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 Tyre, 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 following reports of discrepancies in food ration distributions. The investigation report concluded

that the Applicant was involved with the 23 May 2008 losses of food rations, and recommended the establishment of a Board of Inquiry. On the same date, the Applicant was informed that, in accordance with the provisions of Area 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. On 4 October 2008, in a joint memorandum with the two other area staff members who had similarly been suspended from duty in connection with the investigation into these losses, the Applicant complained that the 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 an 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 that he was not present when the alleged embezzlement took place as he was on leave to attend the funeral of his mother-in-law.

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 17 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 November 2008, the Applicant submitted an application.

Applicant's contentions

16. The Applicant contests:

- (i) the 30 May 2008 decision to suspend him from duty without pay pending an investigation, and asserts that he was not given a clear reason for the suspension;
- (ii) the 13 November 2008 decision to terminate his appointment for misconduct on the grounds that:
 - (a) on 26 May 2008, he was on leave to attend a funeral;
 - (b) he enjoyed a good reputation among his supervisors;
 - (c) he received an annual increment, proving that his performance was good;
 - (d) he is committed to his duties under difficult political conditions, including war;
 - (e) the investigation by the IIT was only for 20 minutes over a six-month period.

The Applicant requests that the Tribunal order the Respondent to establish a new IIT, and reinstate him.

Respondent's contentions

17. The Respondent essentially submits that:
- (i) the element of the application regarding the suspension without pay is time-barred;
 - (ii) the decision to suspend the Applicant from duty without pay was properly made;
 - (iii) the decision to terminate the Applicant's appointment was properly made.

Considerations

Main Issues

Is the element of the application regarding the Applicant's suspension from duty without pay time-barred?

18. Area Staff Rule 111.3, paragraphs 1 and 2, in effect at the time, provide that a staff member who wishes to contest a decision shall first address a letter to the administration requesting that the decision be reviewed within 30 days of receipt of written notification of the decision in question. Paragraph 3 of the above Rule requires that:

- 3. A staff member who wishes to appeal under the terms of staff regulation 11.1, after having sent a letter to the Agency's administration in accordance with the foregoing provisions of this rule, shall submit a written appeal, specifying his/her allegations, to the Secretary of the Joint Appeals Board within the following time limits:

* * *

- (B) In the case of staff members of Field Offices, within thirty days from the receipt of a reply from the UNRWA Field Office Director, or, if no reply has been received from the latter within thirty days of the date of the staff member's letter, then within the next thirty days.

19. In the case at bar, the Applicant contested the 30 May decision to suspend him from duty without pay pending an investigation into his involvement in losses in food ration distributions. He submitted his request for review on 4 June 2008. The FAO/L responded to the request for review on 17 July 2008. Even if the date of the FAO/L's reply (i.e. more than 30 days after the request for review) was used to calculate the date by which the Applicant was required to file an application, 30 days from 17 July 2008 would be 16 August 2008. The Applicant filed his application on 23 November 2008, a delay of over three months.

20. The former United Nations Administrative Tribunal has consistently reaffirmed the importance of observing the time limits prescribed for the various stages of the appeals process. In Judgment No. 1213, *Wyss* (2004), paragraph IV, it held that time limits are of utmost importance for the smooth functioning of any administration and must be interpreted restrictively. The United Nations Administrative Tribunal has also held that an applicant bears the burden of demonstrating that he was prevented from submitting his application in time due to "serious reasons", as affirmed in Judgment No. 359, *Gbikpi* (1985), or due to "circumstances beyond his control", as affirmed in Judgment No. 1054, *Obuyu* (2002). In this instance, the Applicant has failed to explain why he did not comply with the time limits established in former Area Staff Rule 111.3, paragraph 2.

21. Although the Applicant has not provided any explanation for his failure for the non-observance of the regulatory time limits, and presuming it was due to his being unaware of the provisions of the Area Staff Regulations and Rules, the Tribunal would

like to point out that ignorance of the law is no excuse and every staff member is deemed to be aware of the provisions of the Staff Rules, as affirmed by the United Nations Appeals Tribunal in *Diagne et al* 2010-UNAT-067.

22. The Tribunal determines that the element of the application relating to the 30 May 2008 administrative decision to suspend the Applicant from duty without pay pending an investigation is time-barred.

Was the element of the application regarding the suspension of the Applicant without pay pending an investigation properly made?

23. Having found that the element of the application relating to the 30 May 2008 administrative decision to suspend the Applicant from duty without pay pending investigation is time-barred, the Tribunal consequently determines that examination of the issue whether the suspension of the Applicant was properly made, is not relevant.

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

24. 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.

25. In relation to what is "unsatisfactory" for the purposes of Area Staff Regulation 10.2, Area Staff Personnel Directive No. 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.

26. 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.

27. 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 - although the Tribunal tends to view this as a disciplinary measure whenever there is a charge of misconduct that is *prima facie* well-founded. The Tribunal cites the United Nations Appeals Tribunal in *Haniya* 2010-UNAT-024 which held "where a termination of services is connected to any type of investigation of a staff member's possible misconduct, it must be reviewed as a disciplinary measure, because that is what it in reality is." 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.

28. Accordingly, following the United Nations Appeals Tribunal in *Haniya*, in reviewing the decision to terminate a staff member's appointment for misconduct, 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.

29. Looking at the record in the file, the Tribunal finds that the facts on which the disciplinary measure was based were reasonably established. Indeed, a preliminary internal investigation was held on 30 May 2008. Testimonies were taken, and recommendations were made to, among other things, set up a Board of Inquiry. The record in the file shows that in August 2008 the IIT, 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 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. Whether the Applicant was absent on 26 May 2008, as he alleges, i.e. the day the food rations were actually distributed by his colleague, to attend a funeral is irrelevant because it has been established that the Applicant was present on 23 May 2008 when the truck was loaded with 50 additional parcels of food, and this is confirmed by the signed statements of three other staff members confirming that 50 additional parcels of food were counted prior to their distribution, and later unaccounted for.

30. Noting that the “Administration is not required to prove its case beyond reasonable doubt” as affirmed by the United Nations 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. The Tribunal finds that the Applicant’s role in the embezzlement of food parcels, as established by the facts, legally supports the determination of misconduct and the Applicant has failed to provide evidence to the contrary.

31. 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. The Respondent chose not to invoke this disciplinary provision and instead initiated a formal investigation. The Tribunal notes however, that participation 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.

32. The Tribunal takes due note of the Applicant’s statements that he enjoyed a good reputation among his supervisors, that he had received an annual increment proving that his performance is good, and that he was committed to duty under the difficult political conditions in Lebanon, including war. However, these elements in his favour are all prior to the discovery of his misconduct, and they do not make up for or outweigh the fact that these 50 food rations were destined for utterly destitute refugees.

33. The question to ask now 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, was flawed by procedural irregularity or error of law, as held in *Asaad* 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 staff 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 United Nations 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 conspiracy are substantiated.

34. The Tribunal notes that the Applicant has not presented any convincing evidence substantiating his claim that he was the target of a conspiracy other than hearsay which in any event fails to explain for the 50 parcels which were loaded - but unaccounted for - by the Applicant on the day preceding the purported witness account.

35. The Tribunal also notes that the record indicates that in the course of the investigation of the IIT, the Applicant was made fully aware of the allegations and evidence against him, and he was accorded the opportunity to rebut those allegations and to produce evidence in his defence. The Applicant failed to provide any convincing evidence that the exercise of the Respondent's discretionary authority was arbitrary, motivated by prejudice or extraneous factor, or flawed by procedural irregularity or error of law.

36. 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.

37. As Distribution Team Leader, the Applicant was in a position of trust which he failed to respect, and he was entrusted with a heightened duty of care to safeguard the

Agency's assets but instead used his position of trust to engage in a scheme to embezzle Agency assets destined for its refugee beneficiaries.

38. The Tribunal finds that the Applicant's misconduct was particularly grave in light of the position he held and the responsibilities he was entrusted with and also finds that the Respondent's decision to terminate his service was not disproportionate or unwarranted as to amount to an injustice.

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

39. 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;
- (v) the Area Staff Regulations and Rules do not provide the Applicant with the right to compel the Respondent to conduct another investigation, notwithstanding the validity of the ITT, as affirmed by the United Nations Appeals Tribunal in *Nwuke* 2010-UNAT-099;

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

