ADMINISTRATIVE TRIBUNAL

Judgement No. 939

Case No. 1033: SHAHROUR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Ghassan Mohammed Shahrour, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 November 1997, 28 February and 31 October 1998 the time-limit for the filing of an application to the Tribunal;

Whereas, on 23 July 1998, the Applicant filed an application requesting the Tribunal to order:

"i. Rescission of the contested decision of termination.

ii. Considering period of cessation as special leave with full pay, and payment of respective salaries and indemnities in US dollars at the exchange rate prevailing at the date of termination.

iii. Payment of compensation for the moral and material injury, including premeditated delay in process, Applicant sustained, to comprise salaries during cessation and until the time of judgement, should Respondent elect not to reinstate the Applicant.

iv. Payment of legal counseling and secretarial fees estimated at US$ 1,500."

Whereas the Respondent filed his answer on 31 January 1999;

Whereas the Applicant filed written observations on 27 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 July 1990 on a temporary indefinite appointment as an Area staff member in the capacity of Disability Programme Officer, in the Relief and Social Services Office, UNRWA, Syrian Arab Republic (SAR). As a condition of this appointment, the Director of UNRWA Affairs, SAR, had stipulated that the Applicant would be required to give up his private clinic for the complete duration of his employment with UNRWA. The Applicant had accepted this condition in writing on 11 June 1990.

On 17 February 1991, the Acting Field Administration Officer issued Field Staff Circular No. 1/91, informing all Area staff members, in particular medical officers and dentists, of the conditions under which they may engage in outside employment, including self-employment. The first of these conditions was that the prior approval of the Field Director must be obtained. Those staff members already engaged in outside employment were required by the Staff Circular to request the permission of the Field Director to continue.

On 9 October 1994, the Director of UNRWA Affairs convened a Board of Inquiry (BOI) to investigate several allegations of improper conduct on the part of the Applicant, as follows:

(a) That he had been involved in receiving from a non-governmental organization (NGO), money that might have been donated for the benefit of the Agency;

(b) That he had made statements to the press possibly in violation of Area Staff Regulations and Rules; and

(c) That he still continued his medical practice in violation of his written statement to the contrary.

On 12 November 1994, the BOI submitted its report to the Director of UNRWA Affairs. In the report it concluded that it was "satisfied that its investigation ... was fair and objective and that the testimony of the Applicant [before the BOI] invite[d] a reasonable inference that his conduct in all parts of the case demonstrate[d] a clear and convincing course of confusion, obfuscation and dereliction as a staff member of the United Nations." It further concluded that "[the Applicant was] guilty of issues two [making statements to the press possibly in violation of staff rules] and three [continuing his medical practice despite his written statement to the contrary] and with respect to the NGO, whilst his conduct caused no direct financial loss to UNRWA, it was a direct violation of staff regulations 1.2, 1.3, 1.4, and 1.5".

In a letter dated 23 November 1994, the Director of UNRWA Affairs advised the Applicant that, in view of the findings of the BOI, his "conduct was incompatible with the status of an UNRWA staff member, and [that he had therefore] decided to terminate [the Applicant's] appointment in the interest of the Agency under staff regulation No. 9.1 and Area staff rule No. 109.1, effective close of business on 24 November 1994."

On 19 December 1994, the Applicant wrote to the Director of UNRWA Affairs, requesting a review of the decision to terminate his appointment.

On 4 January 1995, the Applicant again wrote to the Director of UNRWA Affairs, bringing forward what he claimed was new information that he said he had received.

On 8 January 1995, the Director of UNRWA Affairs replied to the Applicant's letter of 19 December 1994, informing him that, having reviewed the report of the BOI, the Applicant's personnel file, and the decision taken in his case, he was unable to rescind the administrative decision to terminate the Applicant's appointment in the interest of the Agency.

On 23 January 1995, the Director of UNRWA Affairs again wrote a letter informing

the Applicant that the information set forth in his letter of 4 January 1995 did not allow him to rescind the administrative decision taken in the Applicant's case, and that, therefore, the Agency's position contained in his letter of 8 January 1995 to the Applicant remained unchanged.

On 2 February 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board submitted its report on 14 April 1997. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

17. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file, and came out with the following:

(a) By reference to the appeal, the Board noted the Appellant's contention that the termination of his appointment in the interest of the Agency was considered as arbitrary termination.

(b) By reference to the Administration's reply, the Board noted the Administration's contention that the decision to terminate the Appellant's services in the interest of the Agency was made in exercise of valid marginal [sic] discretion.

(c) By reference to the report of the Board of Inquiry submitted on 12 November 1994, the Board noted that the said report states "*that the testimony of the Appellant invites a reasonable inference that his conduct in all parts of the case demonstrates a clear and convincing cause of confusion, obfuscation ...*"

(d) The Board noted that based on the evidence submitted by the Board of Inquiry that the Appellant had breached his contract with the

Agency and violated the Agency Rules and Regulations (paragraph 1 of Area staff rule 101.4).

(e) The Board also believes that the Appellant had made statements to the press and accordingly violated Area staff regulation 1.4 and 1.5.

(f) The Board here notes that the Administration's decision was utterly based on the findings of the report of the Board of Inquiry dated 12 November 1995.

(g) In this context, the Board is of the opinion that the Administration has dealt within the framework of standing rules and regulations governing disciplinary measures and termination of staff members and, accordingly, the Board could not establish that the Administration's decision to terminate the Appellant's appointment was motivated by prejudice or any other extraneous factors.

IV. RECOMMENDATION

18. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision and that the case be dismissed."

On 29 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board found that the administrative decision to terminate your appointment was based on the findings of the Board of Inquiry, which were in turn supported by evidence. In the absence of proof that the decision had been motivated by prejudice or any other extraneous factors, the Joint Appeals Board recommended that your appeal be dismissed.

I agree with the Board's conclusions and I have therefore accepted its recommendation. Your appeal is dismissed.

..."

On 23 July 1998, the Applicant filed with the Tribunal the application referred to

earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant never failed to advise his supervisors of his outside activities at all levels.

2. The fact that the Applicant maintained an outside private clinic did not adversely affect his performance or the integrity of the Agency. In addition, many other staff members engaged in outside activities with impunity.

3. The charge that the Applicant intentionally misled the public in a published interview was imaginary and was created to serve the purpose of terminating him.

4. The Applicant informed the women of the non-governmental organization from the very beginning that he was a staff member of UNRWA and he never demanded cash when donations were made to him.

Whereas the Respondent's principal contentions are:

1. The Applicant's conduct, with regard to the charges made, was incompatible with the status of a staff member of the Agency.

2. The Applicant did not prove by convincing evidence that the decision to terminate his services was procedurally defective or tainted by improper motive or abuse.

3. The Respondent acted properly in the exercise of his managerial discretion.

The Tribunal, having deliberated from 29 October to 19 November 1999, now pronounces the following judgement:

I. The Applicant's employment was terminated by UNRWA in the interest of the Agency, under Area staff regulation 9.1 and Area staff rule 109.1. Area staff regulation 9.1 states: "The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency." On appeal to the JAB, the JAB found that the Administration had acted pursuant to the "rules and

regulations governing disciplinary measures and termination of staff members" and that it could not be established that the Administration's decision was "motivated by prejudice or any other extraneous factors".

II. It emerges from the record that the decision to terminate the Applicant's employment was based on a finding of misconduct and was a disciplinary measure.

III. There can be no doubt that under Area staff regulation 9.1, the Administration exercises a discretionary power (cf. Judgement No. 117, *van der Valk*, para. II, (1998)). The fundamental question raised, however, is the nature of this discretion under Area staff regulation 9.1, or, indeed, any discretion to act in the interests of the Agency in terminating employment.

IV. The Tribunal has held in earlier cases that the discretion under a provision empowering an organization to act in its interests must not be abused. In Judgement No. 18, *Crawford* (1953), the earliest case in which such a provision was in issue, the Tribunal held that the Administration had acted unlawfully in dismissing a staff member in the interests of the United Nations because she had failed to answer questions before a US Senate Subcommittee and had been a member of the Communist Party. The Tribunal found that there had been an abuse of discretion. In *van der Valk*, the Tribunal found that the termination of the Applicant's services in the interests of UNRWA, on account of abolition of post, was in order, as there was no provision in the Staff Rules of UNRWA that would require that senior staff be preferred to others in the case of abolition of post. There was no abuse of discretion. In Judgement No. 682, *Dabit* (1994), the termination of employment in the interest of UNRWA on the basis of unsatisfactory performance was found not to be an abuse of discretion.

V. The discretion of the Agency to terminate employment in its interest is not unlimited or unfettered. Its exercise is subject to review by the Tribunal and can be declared invalid

because it has been abused. The abuse may arise not only from improper motive, prejudice or improper purpose but also from any substantive irregularity such as error of fact or *erreur d'appréciation* (mistaken conclusions), or procedural irregularity. In *van der Valk* and *Dabit*, for instance, there were in effect found to be no such irregularities.

VI. The Administration clearly cannot terminate a staff member's employment in the interest of the Agency without having reasons for doing so and without stating those reasons. If it did so it would be abusing its discretion. When the reason for termination is given, the exercise of the discretion becomes subject to review by application of the general principles of law pertinent to the particular grounds for termination. Thus, if the reason for the termination is unsatisfactory performance or abolition of post, the decision taken by the Administration would be tested by the application of the general principles of law relating to dismissal for unsatisfactory performance or abolition of post, respectively. In these cases the general principles would pertain to substantive and procedural irregularity and abuse of purpose or motive.

VII. The Tribunal has recently dealt with several cases where the applicants have been dismissed from service in the interest of the Agency. In most of these cases, the grounds stated were misconduct or serious misconduct (cf. Judgements No. 926, *Al Ansari* (1999), (gross negligence amounting to misconduct); No. 927, *Abdul Halim et al.* (1999) (serious misconduct); and No. 928, *Abdulhadi et al.* (1999), No. 929, *Zarra and Khalil* (1999) (misconduct)). The issues were generally whether misconduct or serious misconduct had been proven. The Tribunal considered that the issues presented concerned disciplinary measures and applied the law relating to the imposition of disciplinary sanctions. In Judgement No. 927, the Applicant Husary's termination was for what was initially described as misconduct and later found to be a serious error of judgement with resulting loss of confidence on the part of the Respondent. The Tribunal decided that the termination of service for misconduct was improper because, in its opinion, there was no misconduct. The matter should have been viewed as a performance matter, appropriately dealt with by

administrative action. In effect, there had been a *détournement de procédure* as a result of which the termination of service could not be upheld. The point being made is that in general termination in the interest of the Agency can be traced to a particular narrow ground which is identifiable, as stated earlier.

VIII. Where the grounds for the dismissal are patently misconduct, as in this case, and the Tribunal is confronted with a case of imposition of disciplinary measures, the general principles of law pertaining to disciplinary measures become applicable, together with any provisions of written law.

IX. In general, administrative decisions (as contrasted with obligations of the Administration arising from terms of appointment and conditions of employment) involve the exercise of a discretion, the abuse of such discretion being actionable before the Tribunal. Thus, the decision, for example, to terminate employment for unsatisfactory service is an exercise of discretionary power subject to review by the Tribunal. However, starting with Judgement No. 18, *Crawford* and No. 29, *Gordon* (1953), the Tribunal has treated decisions to impose disciplinary measures somewhat differently because, while they are similar in some respects to decisions such as those terminating employment for unsatisfactory service, they also involve the exercise of a quasi-judicial power to impose sanctions for offences rather than the exercise of pure executive discretion (see e.g., most recently, Judgement No. 890, *Augustine* (1998)).

X. The jurisprudence of the Tribunal in disciplinary cases may be generally explained as follows: the Tribunal examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts) ; (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is within the power of the Respondent; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general,

whether there has been arbitrariness. (Cf. Judgement No. 897, *Jhuthi*, para. II, (1998)). This listing is not intended to be exhaustive.

XI. In this case, the issues raised are:

(i) Whether the evidence warranted the finding of misconduct upon which the decision to terminate employment was based;

(ii) Whether there was an improper motive or prejudice on the part of the Administration; and

(iii) Whether the sanction of dismissal was disproportionate to the misconduct.

XII. In regard to the first issue, there were three grounds on which the Administration based its finding that misconduct had been proven: (i) the Applicant engaged, without permission, in private medical practice and thus violated the Staff Regulations; (ii) the Applicant violated the Staff Regulations and Staff Rules by arranging without prior approval a written interview which resulted in a publication in a local magazine, ostensibly describing voluntary activities of a local charitable organization in Syria of which he was a member but focussing to a great extent on services rendered by UNRWA without proper acknowledgement; and (iii) the Applicant had been involved in receiving money from a

non-governmental organization, which was questionable conduct and a violation of the Staff Regulations and Rules, although there was no financial loss caused to UNRWA.

XIII. In regard to the above grounds, the Tribunal finds that the conclusions upon which the decision to terminate the Applicant's employment was based, were supported by the evidence on record. There was ample evidence that the Applicant was maintaining without permission an outside activity which was prohibited by the Staff Regulations. The Applicant admits this. There was in addition evidence, particularly in the light of the Applicant's own written undertaking to discontinue his private practice at the time he took up employment, that he knew that he was carrying on a prohibited outside activity. The Applicant does not deny knowledge of wrongdoing. This evidence was sufficient ground, in the opinion of the Tribunal, for terminating the Applicant's employment. In this connection the claim that the Applicant's superior was aware of the Applicant's misconduct for some time has no relevance to either the finding that he had engaged in the conduct or to the illegality of such conduct.

The Tribunal also concludes that there is sufficient evidence in the record to establish the other two grounds on which the termination decision was based. The evidence established that the Applicant gave an unauthorized interview and that he dealt with a non-governmental organization improperly. Both actions constituted conduct not in keeping with the status of a staff member of the Agency and violated the Staff Regulations and Rules.

XIV. The Applicant also alleges prejudice against him on the part of the Administration. It is in this regard that account must be taken of the Applicant's claims that his superior knew for some time that he was running a private clinic without permission and that other officers in UNRWA were also carrying on outside activities of a like nature. Neither fact, if true, would conclusively establish that there was prejudice against the Applicant. The Tribunal would point out, particularly, that by itself the fact that others engaged in similar conduct but were not investigated does not exonerate the Applicant by rendering the action taken against him as motivated by prejudice. Nor does it prove that the Applicant was investigated and found at fault because the Agency was acting in a discriminatory manner.

XV. The Tribunal finds that the sanction of termination of employment is not disproportionate in the light of the misconduct of which the Applicant was found guilty. As already stated, the Applicant's violation of the law by engaging in unauthorized outside activity was serious enough to warrant dismissal. The other two grounds for the sanction only served to compound the seriousness of the Applicant's offences.

XVI. For the foregoing reasons, the Tribunal dismisses the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary