



Administrative Tribunal

Distr.
LIMITED

AT/DEC/989
22 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 989

Case No. 1082: AKKAWI

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;
Ms. Marsha A. Echols;

Whereas, on 27 April 1999, Hassan Ahmed Akkawi, 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), filed an application containing pleas which read as follows:

"SECTION II. PLEAS

Applicant prays the Tribunal to order ...

- a. Rescission of the decision of the FOD [Field Office Director]/Lebanon, not to reinstate Applicant to service.
- b. [Reinstatement of] the Applicant to his previous post or any other post commensurate with his qualifications and experience.

- c. [Consideration of] the period between 12 November 1996, and the date of the Applicant's reinstatement as ordered by the Tribunal, as special leave with full pay.
- d. [Compensation of] the Applicant for the moral and material injury caused to him by the unlawful decisions of the Respondent, including obstruction of justice.
- e. Payment of counseling fees and secretarial expenses."

Whereas the Respondent filed his answer on 31 January 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 20 November 1980, as a Civil Engineer, on a fixed-term appointment at grade 14 in Lebanon. His appointment was extended several times, and he was granted an indefinite appointment, effective 1 January 1985. On 1 January 1992, the Applicant's post was reclassified to Deputy Field Technical Officer, grade 16. On 1 December 1992, the post of Deputy Field Technical Officer was abolished.

On 14 November 1992, the Field Personnel Officer, Lebanon, informed the Applicant that his post would be abolished with effect from 1 December 1992, and that he was "hereby declared redundant". As an alternative, the Applicant was offered the post of Area Officer, Beqa'a, at grade 12, with grade protection at grade 14. The Field Personnel Officer further advised the Applicant that this was the only suitable post available, and that if he did not accept it he would be separated on redundancy as of 9 December 1992.

In a memorandum to the Field Director, Lebanon, dated 11 December 1992, the Applicant rejected the offer of alternative employment and requested that the decision to eliminate his post be rescinded and that he be considered on special leave with full pay pending a decision on his request. In his reply of the same date, the Field Director urged the Applicant to accept the alternative post, or face separation under the redundancy rules. On 16 December 1992, after receiving the Applicant's rejection of the alternative post, the Field Director notified the Applicant that his service with the Agency would be terminated effective 17 December 1992. On 17 December 1992, the Applicant was separated from service.

On 17 December 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB recommended a review of the Applicant's case with a view to reinstatement in a post commensurate with the Applicant's qualifications, experience and previous remuneration, and that the period between the Applicant's termination and his reinstatement be considered special leave with full pay.

On 1 June 1994, the Commissioner-General informed the Applicant that it could not accept the JAB's recommendation and dismissed his appeal.

On 10 July 1994, the Applicant filed an appeal with the Tribunal.

On 2 September 1995, charges appeared in a local Lebanese newspaper alleging that UNRWA staff in the Technical and Sanitation Division had received bribes from contractors. An initial investigation by the Director of UNRWA Affairs, Lebanon (the Director), was undertaken on 6 September 1995. On 18 September 1995, the Director convened a Board of Inquiry (BOI) to investigate allegations of misappropriation of funds and non-adherence to Agency regulations and rules by certain staff members in the Technical and Sanitation Division.

On 25 October 1995, the BOI submitted its report to the Director and found that certain staff, including the Applicant, had been advising contractors selected by them in advance of the Agency cost estimates for tendered projects, and the figure to be quoted in the chosen contractor's offer in order to render the lowest quotation and receive the assignment. In return, a fee from 5 per cent to 20 per cent was imposed on the value of the project and paid by the Contractor in cash to the Applicant and others involved in the scheme.

On 21 November 1995, without knowledge of the BOI report, the Tribunal rendered Judgement No. 732 and ordered that the Applicant be given priority consideration for any post for which he applied and qualified as well as payment to the Applicant of six months net base salary.

On 18 December 1995, the Applicant applied for the post of Assistant Field Technical Officer, Lebanon. On 12 June 1996, the Director, in a letter to the Applicant, advised him of the allegations levelled against him by the BOI, which seriously impugned his integrity and reliability. The Director requested the Applicant, in view of the Tribunal's order that he be given priority consideration, to respond to the charges against him, which were attached to the Director's letter. On 28 June 1996, the Applicant submitted his reply.

On 9 August 1996, the Applicant filed an application with the Tribunal requesting revision

of Judgement No. 732.

On 12 November 1996, the Director advised the Applicant that on the basis of the allegations against him in the report of the BOI, and his response thereto, "there was no vacant post in the Agency for which the Applicant was qualified".

On 23 November 1996, the Applicant requested the Director to review his decision.

On 6 January 1997, the Applicant again lodged an appeal with the JAB.

On 25 July 1997, the Tribunal rendered Judgement No. 821 and held that "the Applicant may not assert that the Respondent failed to comply with Judgement No. 732, unless he successfully refutes the accusations of misconduct made against him."

The JAB submitted its report on 1 July 1998. Its evaluation, judgement and recommendation read as follows:

"III. EVALUATION AND JUDGEMENT

25. In its deliberations the Board dwelt on the preliminary issue of jurisdiction and decided to declare that it has no jurisdiction to hear the case because a lower tribunal always awaits the finalization of a higher tribunal's[sic] proceedings before hearing the case before it.

It is also illogical for the Board to seek to recommend the enforcement of a UNAT [United Nations Administrative Tribunal] order when the order itself is subject to revision.

The Appellant has in the past been employed, but his contract has been already the subject of a hearing by the JAB and UNAT, the Board can only accept a case based on a contract which was in existence at the time of the decision complained of.

IV. RECOMMENDATION

26. In view of the foregoing, the Board unanimously declares that it lacks jurisdiction to hear the case."

On 6 August 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him that he agreed with the determination of the Board.

On 27 April 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's failure "to reinstate the Applicant to his previous post" or to appoint him to any post commensurate with his qualifications for which he applied was motivated by prejudice and bias.
2. The serious allegations were a mere fabrication by the Respondent meant to deter the reinstatement of the Applicant.
3. The Respondent violated the Applicant's due process rights by its premeditated delay in processing the Applicant's claim for a period of three years.

Whereas the Respondent's principal contentions are:

1. The Tribunal may consider that it has no jurisdiction to hear this case since it is based on alleged non-implementation of a prior judgement.
2. The Respondent complied with the prior judgement which required that the Applicant be granted priority consideration for positions for which he was qualified.
3. The finding by the Respondent that the Applicant was not qualified for any position was properly made in light of serious charges of misconduct, unrefuted by the Applicant which would have resulted in summary dismissal if the Applicant had still been employed at the time.

The Tribunal, having deliberated from 27 October to 22 November 2000, now pronounces the following judgement:

- I. This application is the latest in a series of disputes between the Applicant and Respondent that center around the abolition of his post as Deputy Field Technical Officer and the Applicant's separation from service in 1992. The disputes were addressed in two earlier rulings by the Tribunal. In Judgement No. 732, *Akkawi* (1995) the Respondent, having failed to offer the Applicant a suitable post after the Deputy Field Technical Officer position was abolished and to give adequate notice, was ordered to pay compensation and to "give the Applicant priority consideration for any post for which

he applies and for which he is qualified". A request for the revision of that judgement (and an indirect challenge to the 1992 abolition of post) was denied in 1996 in the second *Akkawi* case (Judgement No. 821). In that case the Tribunal found that the establishment of the BOI in 1995 to investigate allegations of fraud involving the Applicant among others - the claimed, newly discovered "decisive factor" - was irrelevant to the 1992 actions by the Respondent. The Tribunal also denied the Applicant's request for measures of inquiry under article 17 of the Rules.

II. The current matter is a direct challenge to the failure of the Respondent to "reinstate" the Applicant and, as a consequence, is related to Judgement No. 732. The Respondent offers as a reason for its decision the allegations contained in the BOI report, which the Applicant failed to contest or deny although the opportunity was offered by the Respondent. The Applicant claims that the establishment of the BOI was an excuse not to fulfill the November 1995 order of the Tribunal in Judgement No. 732. He characterized it as intentional non-compliance with the order of the Tribunal.

Consequently, the Tribunal must consider whether the Respondent has properly executed the order to give the Applicant "priority consideration".

III. The opinion in Judgement No. 732 contains an order with no explanation or guidance regarding the meaning of the ruling or the manner in which the Respondent was expected to implement it. There is a statement about the matter in Judgement No. 821. However, since that case was only a request for revision, the statement was not pertinent to the issue that was before the Tribunal. The Tribunal said in paragraph VII:

"As to the issue of the Respondent's compliance with the Tribunal's order to give the Applicant priority consideration for posts for which he applies and is qualified, the Tribunal finds that the Applicant may not assert that the Respondent failed to comply with Judgement No. 732, unless he successfully refutes the accusations of misconduct made against him. To accomplish this, the Applicant must follow the applicable procedures and take his case before the appropriate bodies."

This statement, linked to the Tribunal's refusal to grant the request for an article 17 inquiry,

concerns the procedure for a challenge by the Applicant to the execution of the order by the Respondent. The Tribunal commented that internal procedures - during which the Applicant refutes allegations of misconduct - must be exhausted before the matter is ripe for action by this body. The more contentious phrase is that the refutation must be successful. However, the statement was not necessary to the judgement on the request for revision. As noted by the Tribunal, its jurisdiction was limited to the request for revision, which was rejected. As a consequence, the Tribunal finds that there is no guidance in Judgement No. 821 concerning the execution of Judgement No. 732 or the conduct expected from the Respondent.

IV. The order to give a successful applicant "priority consideration" for re-employment is not an order to reinstate, obviously.

Likewise, the Tribunal will not substitute its assessment for that of the Respondent in the exercise of the latter's discretionary authority, since "the selection of a staff member for a particular post ... rests within the discretionary authority of the Secretary-General." (Judgement No. 554, *Fagan* (1992), para. VIII). The exercise of discretion will be upheld so long as it is exercised lawfully, that is, according to the rules and with respect for the rights of the Applicant. The Tribunal has recognized this discretionary authority in numerous cases involving, for example, discipline (Judgement No. 515, *Khan* (1991)), non-renewal of a fixed-term contract (Judgement No. 553, *Abrah* (1992)) and summary dismissal (Judgement No. 927, *Abdul Halim* (1999)).

Finally, such an order also is not intended to conflict with or diminish the authority of the Secretary-General under Article 101 of the United Nations Charter to appoint staff members.

An order to give priority consideration is a positive order. It implicitly requires the Respondent to act in good faith and in the spirit of fulfilling the order. Priority consideration can be likened to the sort of positive discrimination and sympathetic consideration for the benefit of an Applicant who has been wronged by the Respondent.

More specifically, when the review of the qualifications for a vacant post or promotion leads to the conclusion that the Applicant possesses the necessary qualifications, the Administration must consider the Applicant first and give priority to that person over others who have the same or lesser qualifications. The Respondent may consider other candidates for the same position. However, when the Applicant has the same or better qualifications as the other candidates, the

Applicant must be given preference in hiring. Any question concerning qualification should be decided in favor of the Applicant, since the "priority consideration" is a means of compensating the Applicant for a wrong or error on the part of the Respondent. In effect the Respondent must exhibit a sympathetic spirit toward the Applicant and, in a sense, look after him. This may include notifying the Applicant of the vacancy.

V. It is not clear whether the Respondent afforded the Applicant "priority" consideration. The ruling in Judgement No. 732 mentions two conditions: the Applicant had to apply and be qualified. The Applicant applied for several posts, including the post of Assistant Field Technical Officer, Lebanon in December 1995. This application was subsequent to the October 1995 report of the BOI. It is not clear from the record how the Applicant learned of the vacancy or whether the Respondent assessed the qualifications of the Applicant before considering other applicants.

The Respondent considered the application of the Applicant but concluded that he was not qualified and, consequently, failed to meet the second condition of Judgement No. 732. It said it gave "fair" consideration to the Applicant but considered him to be not qualified for the post. The Director considered the "apparent" involvement of the Applicant in a bribery scheme and the failure of the latter to rebut the allegations in the BOI report as grounds for its refusal to employ him for the post at issue.

In *Abdul Halim*, the Tribunal allowed the Respondent to use a BOI finding that the Applicant had accepted bribes as a proper basis for the conclusion that an Applicant was guilty of serious misconduct and so subject to summary dismissal. There is not such a clear finding against the Applicant in this case, although obviously the fact of the BOI investigation was known. Nevertheless, the Tribunal cannot conclude that the failure to employ someone under a cloud of grave suspicion lacks the good faith and spirit of assistance required by an order to give "priority consideration". In this case the Tribunal agrees with the Respondent that the Applicant was not morally qualified for any position with the Agency.

VI. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

New York, 22 November 2000

Maritza STRUYVENBERG
Executive Secretary