



Administrative Tribunal

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LIMITED

AT/DEC/1088
30 January 2003

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1088

Case No. 1189: KHADER

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh,
Second Vice-President; Ms. Brigitte Stern;

Whereas at the request of Ahmed Khader, 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, extended to 30 June 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 29 April 2001, the Applicant filed an Application requesting the Tribunal to order:

- "a. Rescission of [the] contested decision.
- b. Reinstatement of [the] Applicant to his post, ... considering cessation as ... special leave with full pay.

- c. Payment of compensation for injury caused by [the] Respondent including a premeditated delay of process.
- d. Payment of secretarial expenses and counselling fees."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 31 May 2002;

Whereas the Respondent filed his Answer on 23 May 2002;

Whereas the Applicant filed Written Observations on 21 October 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on a temporary indefinite appointment on 1 March 1985, as an Area staff member with the title of Kitchen Worker, Grade 1, B'Shemali Camp Feeding Centre, Tyre Area, Lebanon. At the time of the events that gave rise to the present Application, the Applicant held the Grade 3 position of Distribution Team Leader. The Applicant was separated from service effective 12 May 1997.

On 5 February 1996, the Director, UNWRA Affairs, Lebanon, convened a Board of Inquiry (BOI) to investigate alleged irregularities in connection with the distribution of commodities at Jal El Bahr, Tyre Area. On 11 November, the BOI submitted its report, which included a number of allegations made against the Applicant. The BOI found, inter alia, that the Applicant was unsuitable for the position of Distribution Team Leader and had manipulated his records to cover up irregularities.

On 7 May 1997, the Director, UNRWA Affairs, Lebanon, informed the Applicant that he had decided to terminate the latter's services for misconduct pursuant to Area staff regulation 10.2, effective 12 May 1997. The Director enclosed extracts of the BOI report as well as the Applicant's testimony to the BOI.

On 27 May 1997, the Applicant wrote to the Director, UNWRA Affairs, requesting administrative review. On 3 July, the Director replied that his decision would not be changed.

On 11 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 26 October 1997, the Applicant requested a complete copy, including witness statements, of the BOI report. This request was denied on 27 April 1998, on the grounds that

"there [was] a real and apparent danger to the personal security of witnesses who gave testimony to the [BOI] should the transcripts of their testimonies be released".

The JAB adopted its report on 15 November 1999. Its evaluation and judgement, and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGEMENT

16. ...

(a) The Board noted that the termination of the [Applicant's] appointment was properly made in accordance with [the] Area Staff [Regulations and Rules].

(b) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

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

On 12 January 2000, the Commissioner-General transmitted a copy of the report to the Applicant and informed him that he had decided to accept the JAB's unanimous recommendation and to dismiss the Applicant's appeal.

On 29 April 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied documentation material to his case.
2. The BOI was not competent to determine performance matters.
3. The Applicant's rights of due process were violated by the JAB.

Whereas the Respondent's principal contentions are:

1. The BOI reached its conclusion on the basis of the Applicant's submissions. Accordingly, it is unnecessary for the Applicant, the JAB or the Tribunal to review the testimony of other witnesses.

2. Disciplinary action was not taken on the basis of the Applicant's incompetence: his misconduct was sufficiently serious to warrant the termination of his appointment.

3. The Respondent's decision to terminate the Applicant's services for misconduct was appropriate, and was not vitiated by prejudice or bias.

4. The Application should not be used as a vehicle to mount a challenge to other Judgements of the Tribunal.

The Tribunal, having deliberated from 4 to 25 November 2002, now pronounces the following Judgement:

I. The Applicant is one of a number of persons whose conduct and performance was investigated by a Board of Inquiry established by the Director, UNRWA Affairs, Lebanon, to enquire into allegations of irregularities regarding the distribution of rations and commodities to special hardship cases in the Tyre Area. This was the same BOI investigation that led to the Applications in Judgements No. 983, *Idriss* (2000); and No. 984, *Abu Ali* (2000), respectively.

II. The Applicant's Counsel in the course of this Application alleges that this Tribunal in other cases arising from the self-same BOI accepted and acted upon the findings of fact and conclusions drawn by the BOI "with full knowledge of the absence of adequate supporting evidence and documents". The Tribunal must conclude that these allegations refer to the Judgements of the Tribunal in *Idriss* and *Abu Ali*. Counsel further alleges that the Tribunal accepted the BOI's findings made against those Applicants "without examining the evidence". These criticisms are vehemently rejected by the Tribunal. Insofar as they may be construed as a submission that, rather than reviewing the report of the BOI with a view towards examining if its findings were adequately supported by cogent and on the face of it acceptable evidence, the Tribunal should have embarked in effect upon a fresh investigation of the facts and sought to substitute its own subjective findings in place of the findings which had been made by the BOI, the Tribunal repeats a portion of its Judgement in Judgement No. 1009, *Makil* (2001) in which it stated as follows:

"III. The Applicant submits that 'the hearing of the present appeal before the Tribunal is *de novo*, the so called findings of the JAB have no legal weight or priority' and submits that 'unless the Respondent is able to offer concrete, demonstrative facts to the contrary of those asserted in the application (which, in the Applicant's opinion the Respondent has failed to do in its [Answer]) the Tribunal has little choice but to accept the Applicant's factual assertions as controlling'.

The Tribunal rejects this submission and finds that it demonstrates a misunderstanding or misstatement as to the nature and extent of the Tribunal's jurisdiction. The Statute of the Tribunal does not envisage that findings of fact upon which a decision of the Tribunal is reached would ordinarily or usually be made following the Tribunal's own investigations or upon facts found by the Tribunal itself. This is so because matters coming before the Tribunal arrive almost invariably after a preliminary investigation by a [Joint Disciplinary Committee (JDC)] or a JAB or like body which carries out investigations and makes findings of facts and then reports thereon. The exception to this general rule arises when the parties have no dispute as to the facts and the matter can be referred to the Tribunal in the first instance on the basis of 'Agreed Facts', in accordance with article 7 of the Statute. Where an application is submitted on the basis of such agreed facts and it transpires that sufficient facts have not been agreed as would enable the Tribunal to embark on a hearing and the making of a decision, the Tribunal will ordinarily refer such a case back to the parties to see if they can agree on sufficient facts or, in default, refer the matter to a JAB for a further investigation or fact finding, as was done for example in Judgement No. 902, *MacNaughton-Jones et al.* (1998).

IV. Accordingly, the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently."

III. The primary purpose and objective of an Administrative Tribunal in reviewing the propriety and efficacy of a challenged administrative decision, is to determine if it was supported by adequate credible evidence and establish that it was made *intra vires* and in accordance with such Rules or Regulations as might apply and that the due process rights of the challenger (the person who has been affected by that decision) and his rights to fair procedures were vindicated in relation to the entire process. This brief description is not intended to be appropriate to all cases or to be exhaustive. In effecting the discharge of its said function, the Tribunal asks itself "was the decision maker entitled to make the decision under review, was he entitled to accept the evidence relied upon to support it, was he within his powers to make it and was it fair and just, in all of the circumstances?" It is not for the Tribunal to ordinarily embark upon fact finding *de novo* or to seek to substitute its subjective view of the facts in place of the view taken by the decision maker when it finds that the decision-making was *bona fide* and was made on adequate acceptable evidence.

IV. In the course of the said Application, the Applicant's Counsel makes a highly personalised and unwarranted attack on the character and integrity of a former member of this Tribunal who was concerned in the Judgements given in *Idriss* and *Abu Ali*. He seeks to argue that because those cases were decided on the principles outlined above, this indicated or demonstrated that that former member was "unable to apply terms of justice and equity in the case" and he asked that that member would "leave cases I represent for other [members] of the Tribunal". In the view of the Tribunal this was a wholly outrageous and scurrilous attack which was quite unsupported by any grounds and was quite without foundation. It deplores reckless and irresponsible attacks of this nature. It appears to the Tribunal that it arose from the said Counsel's misapprehension and misunderstanding as to the function and purpose of an Administrative Tribunal, in the manner already dealt with.

V. The BOI met more than thirty times and interviewed twenty-five people and submitted its report to the Director on 11 November 1996. In its report, the BOI concluded that the Applicant was unsuitable to be a Distribution Team Leader and concluded that the Applicant was weak as a personality and in his work; that he had manipulated his records to cover up irregularities; that he had requested the Supply Assistant to amend his documents so that he, the Applicant, might "fix" his monthly report; that he had sought to mislead the BOI as to the proper reconciliation of his

figures regarding the sale of flour; and, that his failure to reconcile some figures was not just due to incompetence but was in part wilful, so as to create confusion and obfuscation.

As various witnesses who had given evidence before the BOI had sought anonymity as they claimed to be fearful of reprisals should their identities be disclosed or should the detail of their evidence become known and the authorities perceived that there was a clear danger to the personal security of such witnesses if they were identified, neither the report of the BOI nor all extracts therefrom relevant to the Applicant were made available to him and, in lieu, he was merely given a synopsis of some of the evidence given by witnesses relevant to his situation, a transcript of his evidence before the BOI and the conclusions of the BOI in so far as they related to him. In the opinion of the Tribunal, the limitation on what was given to him was warranted in all of the circumstances and having regard to the security prevailing in South Lebanon at the time and the Tribunal is satisfied that the safeguards were no more than were reasonable and that they did not violate or constitute a denial of the Applicant's rights of due process because he had not been given all of the documents or information which had been sought by him.

The Tribunal is further satisfied that in the course of the BOI's investigations and proceedings the Applicant was given sufficient particulars of the allegations made against him and sufficient information as to the nature of the evidence which had been given against him by various witnesses, as afforded him a reasonable opportunity of answering the allegations and defending himself against the charges of misconduct which had been levelled against him. In the circumstances, the Tribunal is satisfied that the Applicant has not established a denial of due process as to the manner in which the BOI had carried out its work.

VI. The Applicant submits that the BOI's findings that he confessed that he had gone to the Supply Assistant's home to request that the Supply Assistant amend his documents to enable the Applicant to "fix" his monthly report could and should have been construed benignly, rather than construed as that he had made an admission of wrongdoing. He submits that the BOI finding was perhaps ambiguous or that the BOI misconstrued the situation and that it should be construed as an admission by the Applicant that he had asked the Supply Assistant to amend his documentation so as to enable the Applicant to "rectify" his monthly report rather than to falsely manipulate it. The Tribunal has considered the entire context in which the finding was set out. It reads as follows:

"[The Applicant] has manipulated his records to cover up for irregularities. He confessed that he went to the Supply Assistant's home on 1 November 1995 in the evening to request that the Supply Assistant amend his documentation to enable [the Applicant] to 'fix' his Monthly Supply Report (the Supply Assistant refused his request)."

It is clear from the said report and from the extracts of the evidence said to support those findings that the finding was clearly and unambiguously a finding that the Applicant had admitted to seeking that the Supply Assistant should amend his documentation so that the Applicant might make false records in a manner which undoubtedly amounted to misconduct, so that these grounds are likewise rejected.

VII. The report of the BOI was duly considered by the Director, UNRWA Affairs, Lebanon, who decided, in light of the findings made therein, that the Applicant should be dismissed for misconduct. The Applicant duly appealed against this decision to the JAB.

As in *Idriss* and *Abu Ali*, the content and format of the JAB's report is wholly unsatisfactory and the Tribunal again deprecates reports of this sort. The report failed to identify the nature of the issues arising on the appeal; it failed to adequately or appropriately identify what evidence was considered and what conclusions were reached on consideration of such evidence; it failed to set out any findings of fact; it failed to address itself to the matter of evidence in any detail or specific way; and, it merely reported in arid, formulaic and sterile fashion that the JAB had examined the documents submitted to it, that it noted the termination of the Applicant's appointment was properly made in accordance with the Area Staff Rules and Regulations, and that it believed the Administration had acted within the framework of standing Rules and Regulations without the interference of prejudice or other extraneous factor. It concluded by recommending that the appeal be dismissed. This was a report that singularly failed to address the specifics of the Applicant's appeal. A report of such nature so devoid of detail and so unspecific in relation to its content makes it appear that the JAB merely rendered lip service to its obligations and duties rather than that it fulfilled them and is of little greater value than a rubber stamp.

As in *Idriss* and *Abu Ali*, the Tribunal repeats that reports of this nature are of little value. If JAB reports are to be of any assistance or to serve any useful purpose they should indicate how and why various matters were decided in a particular way and it should be evident from the contents of

such reports that specific consideration was given to the facts of the actual case under review in a meaningful and a proper manner.

VIII. The Applicant further complains that by virtue of the dearth of information contained in those portions of the report of the BOI forwarded to him and because he was only given short extracts from the evidence and a summary or synopsis of the allegations which had been made against him by the witnesses, he was in any event denied an opportunity of making meaningful submissions to the JAB and of making a proper answer to the allegations which the BOI had made against him. Whilst it is impossible for the reasons already indicated by the Tribunal by way of criticism of the report of the JAB, to know how and to what extent the JAB went about its business, the Tribunal is satisfied that there was in fact sufficient material before the JAB as would have justified the conclusions which it reached in relation to the conduct of the Applicant.

This is because it is clear from the report of the BOI that the findings made against the Applicant which led to the decision to dismiss him, arose almost exclusively from the Applicant's own evidence given by him to the BOI on two different occasions, so that in these particular circumstances neither the Applicant nor the JAB were significantly disadvantaged by reason of the limited content of the documents placed before the JAB for its consideration on the appeal. The lack of detail regarding the evidence given by the various witnesses against the Applicant was relatively unimportant as the BOI did not make its decision because it had preferred the evidence given by any particular witness or witnesses to that which had been given by the Applicant. The BOI had based its findings adverse to the Applicant on admissions, expressed or implied, which had been made by the Applicant in his own evidence and on his inability (as found by the BOI) to provide satisfactory or acceptable answers to many matters which had been raised against him.

Accordingly, in the circumstances of this particular case, the Tribunal is satisfied, whilst accepting the sparsity of the information and documentation made available, that the Applicant was not disadvantaged in the conduct of the proceedings before the JAB to such an extent as constituted a denial of due process or fair procedure.

IX. As to the consequences of the unsatisfactory nature of the JAB's proceedings and its report, it must be emphasised that the Respondent's decision to dismiss the Applicant was made on the findings of the BOI rather than on the findings of the JAB. Neither the findings nor

recommendations of the JAB were influential in any way in the decision to dismiss the Applicant for misconduct. The only consequence of the JAB's findings was that the Respondent relied upon them when he determined to leave the decision already made to stand unaltered and to dismiss the Applicant's appeal.

Whilst there are and will be cases where demonstrable failure on the part of a JAB to adequately perform its functions will give rise to entitlement to compensation or to the granting to an Applicant of some other form of relief, the Tribunal is not satisfied that such an entitlement is established here. This is because of the peculiar circumstances of this particular case, being that the findings of misconduct arose almost exclusively by reason of the Applicant's own admissions, either expressed or implied. He had admitted to a number of matters which in the opinion of the Tribunal established misconduct on his part and he had not denied or refuted other matters of misconduct which had been alleged against him. In the circumstances, the shortcomings or criticisms of the JAB which the Tribunal feels have been adequately identified are of little consequence, as the basis for the findings of the BOI insofar as they were adverse to the Applicant were never going to be seriously undermined because they arose or flowed from the Applicant's own testimony. In the circumstances the Tribunal is satisfied that the findings and criticisms made by the Applicant and the Tribunal against the JAB have not resulted in the Applicant suffering any injury or prejudice so that the claims arising therefrom are likewise dismissed.

The Applicant, in his complaint about the Respondent's failure to produce statements of witnesses who had given evidence to the BOI, asserts that the only basis upon which those statements were withheld is that they support the Applicant's assertions of innocence. This is not borne out by the evidence. On the contrary, the evidence establishes that the statements were not disseminated because the witnesses had expressed a real fear of retribution and the Administration considered that it was proper in the interests of their safety that the statements should not be released. The Tribunal again repeats that the absence of those full statements is of little consequence in this particular case, seeing that the misconduct found against the Applicant was based on admissions contained in his own testimony.

X. The Applicant submits that such actions or conduct as found by the BOI against him should be construed as arising from "innate inefficiency or incapacity" rather than misconduct and that accordingly it should have been dealt with under the Rules and Regulations appropriate to

performance rather than misconduct, which is properly dealt with as a disciplinary matter. Again, the Tribunal is satisfied on a reading of the report that it is clear that the findings made by the BOI were findings of misconduct, that they were wilful, that he intentionally made false records and that he sought to wilfully engage in a cover-up, and that these findings and conclusions could not be reasonably construed as arising from incapacity or inefficiency.

XI. Finally, the Applicant failed to establish that the decision to terminate his appointment was influenced or motivated by bias, prejudice or any improper motive or that the decision was procedurally defective.

XII. In the circumstances, all claims are rejected and the Application is denied in its entirety.

(Signatures)

Julio BARBOZA
First Vice-President, presiding

Kevin HAUGH
Second Vice-President

Brigitte STERN
Member

New York, 25 November 2002

Maritza STRUYVENBERG
Executive Secretary