

**Administrative Tribunal**

Distr.: Limited
30 January 2003
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1095

Case No. 1154: PLASA

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

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas at the request of Wolfgang Plasa, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees (hereinafter referred to as UNRWA), the President of the Tribunal, with the agreement of the Respondent, extended until 31 May 2000, and subsequently until 31 August 2000, the time-limit for the filing of an application with the Tribunal;

Whereas on 31 July 2000 the Applicant filed an application requesting the Tribunal to order the following measures:

“... to agree to the holding of oral proceedings in the present case.

...

3. To rescind the final decision of the Commissioner-General of 29 November 1999 and to draw all the legal consequences thereof, i.e. to award the Applicant compensation in the amount of two years' net base salary for the material and moral injury suffered;

4. To award the Applicant expenses, payable by the Respondent, in an amount to be determined at the conclusion of the proceedings.”

Whereas at the request of the Respondent the President of the Tribunal extended until 30 December 2000, and subsequently five times thereafter, until 31 May 2002, the time-limit for filing his answer;

Whereas the Respondent filed his answer on 30 May 2002;

Whereas the Applicant filed written observations on 10 October 2002;

Whereas the Tribunal decided, on 15 November 2002, that no oral proceedings would be held in the case;

Whereas on 31 October 2002 the Respondent filed written comments on the written observations;

Whereas on 12 November 2002 the Applicant filed additional material;

Whereas the facts of the case are as follows:

The Applicant entered the service of UNRWA on 15 October 1997 as Director of the UNRWA Field Office in Lebanon on a temporary fixed-term appointment at the level of D1, step VII. He remained in the service of the Office until 3 September 1998, when he was placed on special leave with full pay. On 15 September 1998 the Applicant was summarily dismissed for serious misconduct, with immediate effect.

At the end of 1997 UNRWA became involved in a personal problem of the Applicant's concerning custody of his son. The Applicant, after explaining himself and offering his apologies in the matter, accused the Agency of having interfered in his personal affairs.

During his visit to Lebanon from 11 to 13 March 1998, the Commissioner-General spoke to the Applicant about complaints received from staff who accused him of being too authoritarian and about the custody arrangements for the Applicant's son.

On subsequent visits the Commissioner-General again spoke to the Applicant about his performance and the deterioration in his relations with the staff of the Lebanon Field Office.

In a telephone conversation on 6 August 1998 the Commissioner-General told the Applicant that his appointment would not be renewed when it expired on 14 October 1998 for the aforementioned reasons. That information was confirmed in a letter dated 11 August 1998.

On 25 August the Applicant engaged an auditing company to check the materials used and compliance with building specifications in the construction of buildings financed by UNRWA in Lebanon.

In a letter to the Commissioner-General dated 27 August 1998 the Applicant observed that the former's decision not to renew his appointment was not convenient and asked him to reconsider his decision.

On 1 September 1998 the Commissioner-General replied that he stood by his decision and that the Applicant would be placed on special leave with full pay from 3 September until his appointment expired on 14 October 1998.

On 2 September 1998 the consultant contracted to carry out the inspection was denied access to the premises.

Subsequent to that date the Lebanese press published a number of articles on serious charges of corruption in the Lebanon Field Office and indicated that the Applicant had been dismissed to cover up the corruption.

In a fax dated 10 September 1998 addressed to the Applicant, the Commissioner-General indicated his surprise to the former, noting that the Applicant had never mentioned his suspicions to him, even though certain statements had been attributed to him in the press. The Commissioner-General requested the Applicant to provide him with a full explanation of each allegation by Sunday, 13 September, and to tell him the source of the information reported in the press. He also told the Applicant that an independent investigation would be conducted.

Having received no reply concerning the allegations and having learned that the Applicant might have contacts with certain political factions in Lebanon, the Commissioner-General set the evening of Monday, 14 September 1998, as the deadline for the Applicant's reply. The Applicant did not meet this deadline.

On 15 September 1998 the Applicant issued a press release discussing the problems of corruption in UNRWA in Lebanon.

In a fax dated 15 September 1998 the Applicant informed the Commissioner-General that he was not the source of the articles published in the Lebanese press and that he questioned the integrity of his deputy and the finance officer.

Also on 15 September 1998 the Applicant received notification of his summary dismissal, which was effective immediately.

In a letter to the Commissioner-General dated 25 September 1998 the Applicant said that his letter seemed not to have been taken into consideration. With

regard to the allegations, he replied that he had never spoken of UNRWA matters in his private dealings with the persons in question, whom he considered to be his friends. He also asked the Commissioner-General to reinstate him.

On 8 October 1998 the Applicant was informed that the Commissioner-General's decision would be maintained because his fax had not constituted a timely response.

On 11 November 1998 the Applicant filed an appeal with the Joint Appeals Board contesting his summary dismissal. On 10 November 1999 the Board adopted its report, which included the following conclusions and recommendations:

“Findings of the Board

34. ... [T]he Board requested that the Administration provide it with strictly confidential documents referred to in the Administration's submission [which were not attached to the submission] ... The Chairman of the Board received these documents from the Legal Adviser on condition that they be treated as strictly confidential and be returned to him immediately after use ...

35. With the benefit of hindsight, the Board found that the Administration acted judiciously and within its prerogatives in its actions toward the Appellant ... The Board believes that there is ample evidence of the Appellant's poor management, lack of judgement, highhandedness and lack of reasonableness toward his most senior subordinates.

...

37. There is clear evidence that the Appellant failed in his managerial duties by not informing the Administration of his concerns of corruption or invoking proper institutional procedures to investigate it. The Appellant was clearly disloyal and undermined the credibility of the Agency in relaying these charges within the diplomatic community and political factions in the camp. The Appellant was insubordinate in not replying in a timely manner to the requests of the Commissioner-General in view of the seriousness of allegations being made in the Lebanese press. While there is no evidence that the Appellant went to the press, there is evidence that the Appellant prompted members of the popular committees to maintain a hostile press campaign against the Agency. Thus, the Board concludes that the Administration acted correctly in summarily dismissing the Appellant for serious misconduct.

Conclusions

38. The Board also concludes that there is no substance to the Appellant's claims of abuse of power and lack of proportionality. On the contrary, the Board believes that the Administration wielded its power wisely and fittingly.

Recommendations

39. The Board recommends that the Appellant's appeal be dismissed in its entirety."

On 31 July 2000 the Applicant filed the aforementioned application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Whereas the Commissioner-General cited grounds different from the original grounds for his decision to impose the most serious disciplinary action possible, summary dismissal, on the Applicant, the Respondent made a mistake of fact by arbitrarily discounting the attenuating circumstances and thus applying a more serious penalty.

2. The penalty of summary dismissal is out of proportion to the conduct with which the Applicant is charged.

3. The decision constituted an abuse of power.

Whereas the Respondent's principal contentions are:

1. The Commissioner-General has broad discretionary powers in the matter of disciplinary measures, and these discretionary powers extend to the determination of serious misconduct sanctionable by summary dismissal. The decision to summarily dismiss the Applicant was taken legitimately in the exercise of these powers and is not flawed by any impropriety.

2. The Respondent maintains that the Applicant's summary dismissal was the disciplinary measure called for by the Applicant's misconduct.

The Tribunal, having deliberated from 7 to 26 November 2002, now pronounces the following judgement:

I. The Applicant, after having worked from 1976 to 1997 as a senior staff member of the European Union, was recruited in 1997 to assume the functions of Director of the UNRWA Field Office in Lebanon, a country he knew well, having since 1996 been a member and subsequently chargé d'affaires of the European Commission Delegation in Beirut. After his entry on duty on 15 October 1997, various actions were taken with regard to the Applicant prior to the expiry of his one-year fixed-term appointment, scheduled for 14 October 1998, in somewhat confused circumstances. The only issue now before the Tribunal is the most recent

of these decisions, namely the Applicant's summary dismissal for serious misconduct.

II. Some aspects of the situation obtaining prior to the Applicant's arrival are worth noting, as they explain the context in which the case took place. In 1995 and 1996 serious malfunctioning was discovered in the UNRWA Field Office in Lebanon which gave rise to a report by the Office of Internal Oversight Services (OIOS) that was highly critical of the Field Office. Before his recruitment to Lebanon, the Applicant had worked for the European Commission, where he was given special leave without pay so that he could join UNRWA (occasionally referred to as either "the Office" or "the Agency"). The Tribunal notes that documents in the file indicate that the Applicant's performance evaluations while he was posted in Europe were excellent.

III. As soon as the Applicant arrived at UNRWA, problems of a personal nature interfered with his professional life. His former wife, a Mexican national, had had the Mexican Ambassador contact UNRWA in the course of divorce proceedings; UNRWA first claimed, in a letter dated 11 January 1998 from the Office's Legal Adviser, that it had no jurisdiction in the matter, stating: "The differences between [the Applicant] and his former wife over the custody of their children are outside of UNRWA's jurisdiction, these being essentially of a private nature to be resolved by the parties themselves utilizing all appropriate channels". Oddly enough, and without any apparent explanation for this reversal, the same Legal Adviser subsequently revised his assessment of the situation completely; on 17 June 1998 he addressed a threatening letter to the Applicant in which UNRWA, notwithstanding the absence of any judicial decision in the matter, exerted pressure on the Applicant to allow custody of his 12-year-old son to revert to his mother, going so far as to threaten him with summary dismissal:

"The New York Secretariat is of the view that you should be instructed to make arrangements for the return of your son to his mother within the next ten days or face possible disciplinary action, including, but not limited to, summary dismissal, for failure to act in accordance with the high standards of conduct expected of international civil servants."

This matter was finally settled by an arrangement between the parties involved in this family dispute, but the Tribunal considers that it may be relevant to note that a first threat of dismissal, for reasons totally unrelated to those cited subsequently, was issued in respect of the Applicant as early as 17 June 1998.

IV. On 11 August 1998 the Applicant received a letter informing him that his fixed-term appointment would not be renewed, with no grounds for the decision provided. On 25 August 1998 the Applicant signed a contract with an independent consultant to inspect certain projects carried out in the Ein el-Hilweh and Mieh Mieh camps to determine whether building standards had been met, as he had received a number of complaints that the projects had led to instances of corruption. The consultant commenced work on 29 August 1998. The Applicant also protested against the non-renewal of his fixed-term appointment, in a letter dated 27 August 1998, in which he cited the rules in force to stress that, in his view, a decision concerning a fixed-term appointment against an indefinite post must be based on an assessment of his work:

“... I do not believe that [your decision] is legally sound. Paragraph 2 of the International Staff Circular No. I/4/97 of September 4, 1997 on the Policy on Renewal and Duration of Fixed-Term Contracts of International Staff states that, ‘the initial fixed-term appointment against an indefinite post is for one year, extendable to two years’.

Since my appointment is for a fixed term of one year, and since the post of Field Director is an indefinite one, the question of extending my contract is an issue of substance. Thus, your decision must be based on an assessment of my performance.”

Several days later, in a letter dated 1 September 1998, the Commissioner-General informed the Applicant that the decision had in fact been taken owing to the unsatisfactory nature of his work:

“On my earlier visits to Beirut, I had occasion to inform you that I had serious doubts regarding your performance ... Unfortunately, recent events have only confirmed my reservations and subsequent decision. I have already explained in particular my dissatisfaction over your relations with senior colleagues at HQs and your dealings with Field staff, on which I had earlier expressed my doubts. In addition, it appears that some of your initiatives in the past few days, departing from Agency policies and procedures, have been taken without seeking guidance from or even advising Headquarters.”

Moreover, the Administration informed him that, in order to prevent any deterioration in working relations, he was being placed on special leave with full pay as from 3 September until the expiry of his appointment on 14 October 1998. The Tribunal understands that the Administration, by referring to recent events, is in essence criticizing the Applicant for having initiated a project audit without having consulted his hierarchical superiors in the matter. The Tribunal notes, however, that during the emergency meeting of donor countries convened by the Commissioner-General, the latter had indicated that the signing of the agreement in question fell

within the Applicant's competence: "... the contract for ten days for \$14,850 was within the authority of the Director ...".

V. The pace of events, however, quickened. On 2 September 1998 the consultant hired by the Applicant to conduct the project audit was prevented from entering the premises where the inspections were to take place. It was in fact the Applicant's Deputy, who had been appointed over the Applicant's objections, which he had raised with the Commissioner-General and which had to do in part with a bribery scandal that had taken place in the department headed by the appointee, who had prevented the consultant from entering the camps. These incidents were reported in the local press, which stated that acts of corruption by UNRWA staff lay behind these incidents.

VI. The Commissioner-General reacted strongly, sending the Applicant two faxes in succession. In the first, dated 10 September 1998, the Commissioner-General accused the Applicant of being the source of the information reported in the press and ordered him to provide all necessary clarifications by 13 September 1998. In the second fax, dated 13 September 1998, additional accusations were made:

"Further, it has been reported that subsequent to your placement on special leave, you have engaged in unauthorized contacts with Palestinian political factions in Lebanon and in communications with donors involving serious allegations concerning the Agency."

The Applicant was told to reply to all the allegations made against him by 14 September 1998, "no later than the close of business". The Applicant replied in a fax sent on 15 September 1998 at 2.30 p.m., saying that he was not the source of the accusations printed in the local press and was consequently unable to provide any indication who it might be.

VII. Having received no response by the evening of 14 September 1998, the Administration drafted a letter dated 15 September 1998 to the Applicant, summarily dismissing him for serious misconduct, the serious misconduct being his failure to reply by the prescribed deadline to the two faxes sent by the Commissioner-General:

"On the basis of the foregoing and taking into account the very serious character of your conduct which constitutes insubordination and defiance with regard to the Commissioner-General and his specific instructions to you, he has determined that you are to be summarily dismissed for serious misconduct pursuant to Staff Regulation 10.2."

This letter was delivered to the Applicant on 15 September 1998 at 8.35 p.m., and the summary dismissal took effect that same day. While the Applicant requested that his dismissal should be rescinded, since he had replied to the Commissioner-General, the Administration refused to reconsider the Commissioner-General's decision, stating in a letter to the Applicant dated 8 October 1998: "Your fax to the Commissioner-General, sent to the Lebanon Field Office on 15 September, did not constitute a timely response."

VIII. The Applicant contested this decision to dismiss him before the Joint Appeals Board, which submitted its report on 10 November 1999. Basing itself on the confidential documents provided to it, but with no further explanation, the Board upheld the Administration's decision in the following terms: "... the Board believes that the Administration wielded its power wisely and fittingly".

IX. The question of the Applicant's placement on special leave without pay, like that of the non-renewal of his appointment, were not brought before the Joint Appeals Board and are not being contested before this Tribunal. More precisely, the decision not to renew the Applicant's fixed-term appointment was the subject of an initial appeal before the Joint Appeals Board, but the Applicant subsequently decided not to pursue this appeal further. The Applicant never brought the matter of his being placed on special leave with full pay before the Joint Appeals Board. Thus it is only the decision upholding his summary dismissal that is now being contested before the Tribunal.

X. The Applicant is requesting the Tribunal to rescind the decision to dismiss him and to draw all resulting consequences as regards his personal situation. He points out that summary dismissal is the most serious disciplinary sanction that exists and that for it to be valid, the Administration must show that he had engaged in serious misconduct justifying such an extreme measure. In the Applicant's view, such misconduct has not been proved. The only misconduct that can be attributed to him is his having replied with a very slight delay to certain requests for explanations on the part of the Administration. The Applicant claims in his application that this fact, which is insignificant, cannot serve as the grounds for a decision of summary dismissal:

"... it is clear that the Applicant was not dismissed on account of the delay in his reply to the Commissioner-General, as stated in the initial decision, but because the Agency considered him to be the source of the series of articles

that appeared in the press in September 1998, during which time the Agency's reputation was once again sullied".

Yet he has always denied and continues to deny that he was the source of this campaign in the press, and the Administration has in fact been unable to furnish any evidence to support its accusations. In the conclusions set out in his application to the Tribunal, the Applicant states that he:

"... has ultimately come to believe that he was only recruited for the purpose of reassuring certain donor countries, and that it was never the intention of the Agency to allow him to discharge properly the functions he had been hired to carry out".

In other words, the Applicant feels that the true reason for his dismissal was his opening of an investigation and his desire to fight corruption.

XI. The Applicant first accuses the Administration of a breach of due process, by making use of confidential documents in the decisions it took in respect of the Applicant, documents that remained confidential in the Joint Appeals Board, which meant that they could not then be challenged by the Applicant. Secondly, he maintains that the Administration committed a serious abuse of power by citing grounds — his delayed reply to the Commissioner-General's faxes — that were not the real grounds for his dismissal, whereas the real grounds — the accusation that he had been the source of the articles in the press — had never been proved.

XII. The Administration contends in its memorandum that "the summary termination of the Applicant's appointment was the appropriate disciplinary response to the Applicant's serious misconduct". The Respondent does not deny that there had been problems of corruption in Lebanon prior to the Applicant's appointment. In his memorandum he states:

"For several years prior to the Applicant's appointment, there had unfortunately been some instances of corruption in the Agency's operations in Lebanon; however, investigations by Boards of Inquiry, which led to the termination of the appointments of a number of staff members in 1995 and 1996, had addressed all such problems."

The Administration denies, however, that the Applicant was recruited to stop corruption and that his dismissal was linked to his readiness to do so.

XIII. The Tribunal will begin by considering the breach of due process alleged by the Applicant against the Respondent. He accuses the Administration of basing its decision to dismiss him on confidential documents. This same lack of transparency obtained in the Joint Appeals Board, since the Board based its decision in part on

documents that were not transmitted to the Applicant, as noted in the following extract from the Board's report:

“During the course of its deliberations the Board requested that the Administration provide it with strictly confidential documents referred to in the Administration's submission but which the Administration chose not to include in its submission to the Board. On seeing them the Board discovered that a number of these documents [were] already included in the Appellant's submission. The Chairman of the Board received these documents from the Legal Advisor on condition that they be treated as strictly confidential and be returned to him immediately after use. These documents were materially relevant in assisting the Board to reach its conclusions.”

XIV. Some of these documents — but only some — have been identified and are to be found in the annexes submitted by the Applicant. The Tribunal has examined them and considers them to contain accusations and slander based not on any specific evidence but solely on allegations and inferences. Such documents, especially when they cannot be discussed by the principal party concerned, may not be used by the Administration in effecting a dismissal. The Tribunal is therefore satisfied that the guarantee of due process was not respected in the case of the Applicant.

XV. The Tribunal next considers the decision of summary dismissal for serious misconduct. The Tribunal recalls its constant jurisprudence regarding dismissals. The Applicant seeks rescission of the Secretary-General's decision to summarily dismiss him for serious misconduct. Regulation 10.2 of the UNRWA International Staff Regulations reads as follows:

“(a) The Commissioner-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

(b) The Commissioner-General may summarily dismiss a staff member for serious misconduct.”

The aforementioned provisions do not give the Secretary-General unlimited and unspecified discretionary powers to take disciplinary action arbitrarily, thereby sidestepping the protection which all staff members should enjoy. In accordance with the Tribunal's firm and consistent jurisprudence, the Secretary-General ought, in the exercise of his discretionary powers in disciplinary matters, to act without any bias and without considering any extraneous factors, without committing major procedural irregularities or significant mistakes of fact. In other words, the Tribunal recognizes that the Secretary-General enjoys broad discretionary powers in determining what shall constitute misconduct in the sense of the Staff Rules and

Regulations and in determining appropriate sanctions for such misconduct (see Judgements No. 479, *Caine* (1990), and No. 582, *Neuman* (1992)). When the Secretary-General has exercised this discretionary power, the Tribunal limits its consideration to decisions flawed by bias or other extraneous considerations, mistakes of fact or failure to observe due process (see Judgements No. 436, *Wiedl* (1988); No. 510, *Camara* (1991); and No. 563, *Khan* (1992)).

XVI. The Tribunal contends that the Administration provided clear grounds for its decision to dismiss the Applicant. The letter addressed to the Applicant on 15 September 1998 clearly states that it is the Applicant's failure to reply to the Commissioner-General's requests that constitutes the serious misconduct. This view is reiterated in the Administration's memorandum:

“The Respondent submits that the Applicant's defiant behaviour, in failing to acknowledge, let alone comply with, the Commissioner-General's two facsimiles of 10 and 13 September 1998 amounted, under the circumstances existing at the time, to serious misconduct, which amply justified the disciplinary action taken, namely the immediate termination of the Applicant's appointment.”

The seriousness of these acts seems extreme to the Administration, which is quick to point out that “the Applicant failed to even acknowledge receipt of the requests, let alone ask for addition[al] time or attempt to respond, until after both of the Commissioner-General's deadlines had passed”. It seems likely that the application of such criteria would strip international organizations of all their staff members at once, since they would be summarily dismissed if they did not respond to requests from their hierarchical superiors within three days!

XVII. The Tribunal, having considered all aspects of the case and convinced that a delay of less than 24 hours in the sending of a response for which a deadline of a few days has been set cannot constitute valid grounds for summary dismissal. The Applicant's dismissal must therefore be considered arbitrary, whatever its true motivation may be. Even though it is quite likely that concrete proof of the underlying grounds for the dismissal cannot be found, the Tribunal believes that the grounds that have been cited cannot properly motivate a summary dismissal, and that the Administration's decision constitutes an abuse of power and as such may be considered to be legally unfounded. Given, however, that the Applicant's fixed-term appointment expired on 14 October 1998, there are no grounds for ordering his reinstatement (see, in a similar vein, Judgement No. 1058, *Ch'ng* (2002)).

Nevertheless restitution must be made so that the Applicant may be treated as though his dismissal had not taken place.

XVIII. The Applicant further contends that the considerable publicity given to his dismissal by the Administration seriously undermined his reputation and his career prospects, and accordingly requests damages and interest. He cites in particular a press release dated 13 September 1998 and a letter addressed to the press by the UNRWA Legal Adviser on 1 October 1998. The Tribunal is convinced that the publicity surrounding the Applicant's summary dismissal, one month prior to the expiry of his fixed-term appointment, could not but be seriously damaging to him.

XIX. For the foregoing reasons, the Tribunal:

1. Declares the decision to summarily dismiss the Applicant, being legally unfounded, to constitute an abuse of power;

2. Decides that reinstatement of the Applicant would be pointless, since his appointment expired one month after his dismissal, and that consequently the Applicant should receive all the benefits and advantages he would have enjoyed until the termination of his fixed-term appointment, i.e. until 14 October 1998, as compensation;

3. Awards the Applicant one year's salary for breach of due process and the attacks on his reputation occasioned by the publicity given, particularly in the press, by the Administration to his summary dismissal;

4. Rejects all other pleas.

(Signatures)

Julio Barboza
Vice-President, presiding

Spyridon Flogaitis
Member

Brigitte Stern
Member

New York, 26 November 2002

Maritza Struyvenberg
Secretary