United Nations AT/DEC/1498

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1498

Case No. 1621 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 Sir Bob Hepple, First Vice-President, presiding; Mr. Goh Joon Seng, Second Vice-President; Ms. Brigitte Stern;

Whereas, on 18 December 2007, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal granted an extension of the time limit for filing an application until 31 July 2008;

Whereas, on 13 July 2008, the Applicant, after making the necessary corrections, filed an Application containing pleas which read, in part, as follows:

"PLEAS

[1] [The Applicant is innocent of the charges filed against him in the Palestinian Courts.]

[2] [UNRWA did not investigate the allegations against the Applicant, instead, it] depended on the investigation of the Palestinian Courts' decision.

[3] [UNRWA did not follow Palestinian law or await the final decision of the Palestinian Courts before it decided to summarily dismiss the Applicant. Nonetheless, the Palestinian Courts are in disarray. Therefore, the Applicant does not believe there was a final verdict in his case.]

[4] [The Applicant suffers from heart attacks and other illnesses as a result of this case.]

[5] [The injury to the Applicant's warfare and career warrant compensation.]

[6] [The Applicant requests the Tribunal to rescind the decision to summarily dismiss him from service.]

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 March 2009;

Whereas the Respondent filed his Answer on 26 March 2009;

Whereas the Applicant filed Written Observations on 5 July 2009;

Whereas the Applicant filed an additional communication on 5 October 2009;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"**SUMMARY OF FACTS**

… On 25 January 1989, the [Applicant] accepted an offer of temporary employment on a daily basis as a Casual Distribution Labourer.

… By letter dated 25 September 1993 the [Applicant] was served with a letter of censure.

… By letter dated 13 December 1994, the [Applicant] was censured and suspended for one day without pay.

… Effective 1 October 1998, the [Applicant] was transferred to the Jabalia Elementary 'D' Boys School, as a School Attendant.

… The [Applicant] was arrested on 29 May 1999. The Agency was informed of the charges by the Palestinian Authority, Office of the Attorney General (the 'Attorney General') in a letter dated 9 June 1999.

… On 7 December 2000, the Magistrates Court acquitted the [Applicant] of the charges brought against him in Case 262/99.

… By letter dated 23 May 2001, the Attorney-General informed the DUO [Director of UNWRA Operations]/G [Gaza] that the Central Court in Gaza rendered its judgement in Case 261/99.

… By memorandum dated 28 October 2001, the Legal Aid Assistant informed the FAQ that the High Criminal Court had rendered its judgment in Case 263/99 on 20 October 2001.

... The [Applicant] subsequently filed an appeal with the High Appeal Court. The High Appeal Court considered the appeal on 11 May 2002.

… By letter dated 11 September 2002, the Officer-in-Charge, Administration Department, Gaza Field Office, invited the [Applicant] to comment on the charges against him.

… The DUO/G offered the [Applicant] 15 days in which to provide his comments on the

court's findings, to rebut the allegations and to present any countervailing evidence and any mitigating factors in writing.

… The [Applicant] replied by letter dated 3 June 2003.

… By letter dated 8 December 2003, the DUO/G informed the [Applicant] of the decision to summarily dismiss the [Applicant] effective on the date of his suspension pending investigation on 8 April 1999.

… The [Applicant] filed an appeal with the Secretary of the Area Staff Joint Appeals Board (ASJAB) by letter dated 16 February 2004.

… By letter to the Secretary of the Area Staff Joint Appeals Board dated 21 February 2005, the [Applicant] submitted an addendum to his appeal."

The JAB adopted its report in July 2007. Its considerations and recommendation read, in part, as follows:

III. EVALUATION AND JUDGMENT

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

a- The Board noted that the Appellant worked from 1989 to 1999, and was censured twice;

b- The Board believes that the Administration acted within the framework of standing Rules and Regulations regarding the suspension without pay and the termination of the Appellant;

c- Although the Board believes that the Appeal is not receivable as it is time barred, the Board is of the opinion that such delay (19 days) is regrettable, particularly in cases involving summary dismissal together with the loss of benefits of the Appellant that will harm the Appellant's family especially, in their current difficult personal situation;

d- The Agency's interest and reputation will still be maintained without the summary dismissal of the Appellant for serious misconduct; which results in penalizing not only the Appellant but also his family members who are part of the refugees that the Agency is there to support;

IV. RECOMMENDATION

The Board makes its recommendation that the Appeal is dismissed in respect of suspension without pay and termination of the Appellant's services.

However, the Board recommends that the decision of Summary Dismissal be reviewed for the sake of the Appellant's family."

On 25 September 2007, the Commissioner-General for UNRWA transmitted a copy of the report to the Applicant and informed him as follows:

> "In its report, the Board recommended that your appeal be dismissed in respect of the suspension without pay and the termination of your services. However, the Board recommended that the Agency review the decision to summarily dismiss you.
>
> While I agree with the Board's recommendation with respect to your suspension without pay and the termination of your services, I do not agree with the recommendation to review the decision to summarily dismiss you. In this regard, it is important to note that the Board did not find that the decision to summarily dismiss you was exercised arbitrarily or capriciously, was motivated by prejudice or other extraneous factors, was flawed by procedural irregularity or error of law; unfair or biased or that it was disproportionate which would be their role in reviewing such an appeal. Instead, the Board focused solely on the effects the decision would have on your family.
>
> While sympathetic to the effect of the decision on your family, given the seriousness of the convictions against you and the clear and convincing evidence on which the Agency acted - verdicts by two national courts, upheld on appeal, that you forcibly sodomized, on four occasions, a minor who was a student at an UNRWA school - I believe the Agency acted in a proper manner by summarily dismissing you in accordance with Area Staff Regulation 10.3. I also believe the responsibility for the effects of your behavior is solely yours, which should well have been considered before victimizing a minor student of an UNRWA school where you were entrusted with the care of such children.
>
> In light of the above, I have dismissed your appeal in its entirety."

On 13 July 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Application is receivable.
2. The Respondent violated the Applicant's rights in relation to both the decision to suspend him without pay and the decision to summarily dismiss him.
3. The Respondent violated Palestinian Law requiring that an employee be paid his wages while being investigated.
4. He should be compensated for the harm caused to his health and career.

Whereas the Respondent's principal contentions are:

1. The Application is irreceivable.
2. The appeal before the Area JAB was not receivable
3. The decision to suspend the Applicant without pay was properly effected.
4. The decision to summarily dismiss the Applicant was properly taken.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

I. The Applicant, a Palestinian national, joined the United Nations on 26 January 1989 as a Casual Distribution Labourer with UNRWA. Over several years, he occupied several posts in succession and, at

the time of the alleged acts, he occupied, since 1 January 1999, the post of School Attendant at Jabalia Elementary Boys School.

II. On 29 May 1999, the Applicant was arrested by the Palestinian authorities because the families of three students had accused him of immoral sexual behaviour towards the students (three charges), which is punishable under Palestinian penal law. The hearings in the Applicant's trial were held from 9 May 2000 to 4 July 2001, during which the High Criminal Court of Gaza had the opportunity to hear several witnesses, including the Applicant. On 7 December 2000, the Magistrate Court acquitted the Applicant on one of the charges; the remaining two charges were still pending before the High Criminal Court. The High Criminal Court rendered its judgement on 20 October 2001 finding the Applicant guilty on the two remaining charges and sentenced him to seven years' imprisonment. The Applicant appealed that decision to the High Appeal Court, which in a decision of 11 May 2002 confirmed the conviction but reduced the prison sentence to four years. Finally, the Court of Cassation, in a decision of 14 April 2003, rejected the Applicant's request for review.

III. As soon as the Administration was informed of the charges against the Applicant, it decided on 10 June 1999 to suspend the Applicant from duty without pay pending a disciplinary investigation by the Administration, in accordance with staff rule 110.2. After waiting until the Applicant had exhausted all avenues of appeal before the Palestinian Courts, the Director of UNRWA Operations informed the Applicant that there was sufficient evidence showing that he was guilty of serious misconduct and gave the Applicant 15 days to provide his comments to the Administration before it would take the measures it deemed appropriate, in the interest of the Organization. Finally, by letter dated 8 December 2003, the Director of UNRWA Operations informed the Applicant that he was summarily dismissed.

IV. By letter dated 23 December 2003, the Applicant requested an administrative review of that decision, which request was reviewed and denied by the Officer-in-Charge, UNRWA Operations, in a letter dated 29 December 2003. The Applicant then filed an appeal against the decision with the JAB, on 16 February 2004. Before the JAB, the Applicant contested the decision to suspend him without pay pending the disciplinary investigation and stated that the Administration had summarily dismissed him without having properly conducted the disciplinary investigation initiated against him.

V. The JAB submitted its report on 9 July 2007 and found, firstly, that in adopting disciplinary measures the Administration had acted in accordance with the provisions of the Staff Rules. Although the JAB recognized that the appeal was time-barred it recommended that the summary dismissal decision should be reviewed for the sake of the Applicant's family, who would as a result of the decision find themselves in a particularly difficult financial situation.

VI. In a letter dated 25 September 2007, the Commissioner-General of UNRWA informed the Applicant that she agreed with the Board's recommendation with respect to the suspension without pay during the disciplinary investigation and that she maintained the summary dismissal decision, since the JAB's recommendation was motivated solely by humanitarian reasons and not by any finding that the disciplinary sanction was arbitrary or disproportionate to the charges against the Applicant.

VII. In a letter dated 16 December 2007, the Applicant asked the Commissioner-General of UNRWA to reconsider her decision. The Commissioner-General informed the Applicant that he should address any further concerns to the Administrative Tribunal. The Tribunal received on 7 February 2008 an application dated 18 December 2007. Since the application did not meet the formal requirements of article 7 of the Rules of the Tribunal, the Secretariat of the Tribunal asked the Applicant to submit a new application by 31 July 2008. The new Application was transmitted to the Tribunal on 13 July 2008.

VIII. The Applicant requests the Tribunal, firstly, to order payment of his salary from 29 May 1999 to 8 December 2003, since he considers that the Administration did not act lawfully in suspending him from duty without pay. Secondly, the Applicant requests the Tribunal to reinstate him in his post, since his dismissal placed him and his family in an extremely difficult financial situation. In support of his first request, the Applicant states in particular that the Administration discriminated against him by suspending him without pay, claiming that in comparable situations it suspended certain staff members with pay. The Applicant also states that the Administration was bound by Palestinian law, which in case of suspension on disciplinary grounds requires that pay should be continued. In support of his second request, the Applicant stresses that, in his view, the Administration did not conduct the disciplinary investigation properly and that he was the victim of a "plot" instigated against him not only by certain staff members of the Organization but also by the Palestinian judicial authorities.

IX. For its part, the Respondent first contests the receivability of the Application. It states that, in the light of article 7, paragraph 4, of the Statute of the Tribunal allowing 90 days between the adoption of the contested decision - in this case the UNRWA Commissioner-General's decision of 25 September 2007, received by the Applicant on 3 October 2007, to follow only some of the JAB's recommendations - and the deadline for the Applicant to file an appeal with the Tribunal, the Application was transmitted to the Tribunal several months late, since the first application could not be considered because it did not meet the formal requirements.

X. The Respondent then states that the Applicant's request concerning the withholding of his salary during the disciplinary investigation is not receivable by the Tribunal *ratione materiae*: the JAB, having itself found that the appeal was time barred, should never have agreed to make any recommendation on that issue, even a finding that the Administration had acted properly. The Respondent emphasizes that the

Tribunal has consistently recognized the importance of adhering to the time limits set in the various appeals procedures, as a guarantee of security for the Organization itself. In this case, since the Applicant did not meet the deadline of 30 days time-limit set in UNRWA's Area staff rule 111.3, paragraph 3, of the UNRWA Area Staff Regulations, the request concerning the suspension without pay is not within the competence of the Tribunal.

XI. Lastly, assuming that the Tribunal were to consider that the Applicant's requests were receivable, the Respondent states that they cannot be granted, since the suspension without pay and then the summary dismissal were decided in accordance with the rules concerning disciplinary proceedings against staff members of the Organization.

XII. The Tribunal will consider the issues submitted to it in the order in which they are listed by the Respondent.

XIII. With regard to the receivability *ratione temporis* of the Applicant's requests, the Tribunal finds that the circumstances in which the two successive applications were submitted to the Tribunal are unclear. The Tribunal first recalls that, in accordance with article 7, paragraph 4, of its Statute:

> "[a]n application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 above, or within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant ..."

The Tribunal first received an initial application which was dated 18 December 2007, less than three months after the contested decision, but which did not reach the Tribunal until 7 February 2008, long after the deadline. In the opinion of the Tribunal, it is pointless to speculate on the reasons for the considerable time lag between the date given on the Application and the date on which it reached the Tribunal. Being in doubt, and desiring to ensure the effectiveness of the mechanisms to protect staff members' rights, it therefore prefers to refer to the date given on the Application.

XIV. The situation is further complicated by the fact that the Application currently being considered by the Tribunal was in fact transmitted to it on 13 July 2008, since the first application was not formally receivable. However, this delay was not solely the fault of the Applicant: upon receipt of the first request, the Executive Secretary of the Tribunal informed the Applicant of the defects in form and told him, without even raising the issue of time limits, that he had until 31 July 2008 to submit a new application.

XV. This being so, since it appears that there is no definite indication that the Applicant deliberately delayed in filing his applications, the Tribunal must reject the Respondent's request that its competence should be rejected *ratione temporis*. In addition, in the light of the facts in the case, the Applicant's

allegations and the recommendations made by the JAB on the basis of considerations that should not be taken into account in a system of amicable settlement of disputes, the Tribunal sees a need to respond to the merits of the Applicant's requests in order to dispel certain doubts that may have arisen, particularly in view of the ambiguous JAB's recommendations. For these reasons, the Tribunal therefore accepts the receivability *ratione temporis* of the Applicant's requests.

XVI. However, there is a second objection raised by the Respondent concerning the fact that the Tribunal could not consider *ratione materiae* a request that was not within the competence of the JAB. Here, the Tribunal finds that the facts are clearer. Before considering them, the Tribunal must recall that article 111.3, paragraph 3, of the UNRWA Area Staff Rules states:

> "A staff member who wishes to appeal under the terms of staff regulation 11.1, after having sent a letter to the Agency's administration in accordance with the foregoing provisions of this rule, shall submit a written appeal, specifying his/her allegations, to the Secretary of the Joint Appeals Board within the following time limits:
>
> (A) In the case of staff members of Headquarters, within thirty days from the date of the receipt of a reply from the Director of Administration and Human Resources, or, if no reply has been received from the latter within thirty days of the date of the staff member's letter, then within the next thirty days;
> (B) In the case of staff members of Field Offices, within thirty days from the date of the receipt of a reply from the UNRWA Field Office Director, or, if no reply has been received from the latter within thirty days of the date of the staff member's letter, then within the next thirty days."

In addition, article 7 of the Statute of the Tribunal makes receivability of applications to the Tribunal conditional on receivability of applications to the joint body previously seized of the matter.

XVII. In this case, the decision to suspend the Applicant without pay was taken by the UNRWA Administration on 10 June 1999 and the Applicant never requested administrative review of that decision. Consequently, the request to rescind the suspension without pay could not be receivable by the JAB. In such circumstances, the Tribunal must systematically declare the application non-receivable (see, in this regard, Judgement No. 571, *Noble* (1992), para. V).

XVIII. In this connection, the Tribunal regrets the attitude of the JAB, which explicitly found that the application was not receivable by it, since it was time barred, but failed to draw the relevant conclusions. Instead of recommending that the decision should be maintained, which did nothing to alter the legal effects of the decision, the JAB should have declared the application non-receivable. Whatever the humanitarian considerations that may have motivated the Board members when they made their recommendations, such recommendations must be made solely in the light of the applicable law. The JAB did not strictly adhere to this role. The Application required a clear response of non-receivability, but instead, the JAB submitted a report which further complicated an already complex situation. Such interpretations are most undesirable, as the goal in the settlement of disputes is the predictability of the law.

XIX. Consequently, the Tribunal must find, as the Respondent invites it to do, that the Application concerning the suspension without pay is not receivable. However, in order to dispel any doubts that might persist about the legality of this measure, adopted by the Administration while the disciplinary investigation was processed and until it was concluded, one way or another, the Tribunal recalls that in this area the Administration has the discretion to adopt the measures it deems necessary to protect the interests of the Organization. As stated in UNRWA Area staff rule 110.2:

> "If a charge of misconduct is made against a staff member (for the purposes of paragraph 1 of rule 110.1) and the Commissioner-General considers that the charge is 'prima facie' well founded or that the staff member's continuance in office pending an investigation of the charge would prejudice the interests of the Agency, then the staff member may be suspended from duty, *with or without pay*, pending investigation, the suspension being without prejudice to the rights of the staff member." [Emphasis added].

Contrary to what the Applicant is claiming, the Administration in its dealings with its staff is in no way bound by the local law applicable in the headquarters State. Thus, the Administration should not refer to Palestinian law in order to decide whether or not it could suspend the Applicant without pay. Here, the Tribunal must recall that it has already decided that:

> "[i]n the absence of any stipulation regarding the applicability of the local law in the letter of appointment or in the Staff Regulations and Rules or in pertinent administrative instructions creating a contractual obligation between the Administration and the staff, the Tribunal holds that the Applicant's claim for termination indemnity based on local law fails." (Judgement No. 145, *De Bonel* (1971), para. VI).

In this case, the decision had to be taken solely in light of the Organization's own statutory rules. This is what the Administration has done.

XX. It remains for the Tribunal to consider the Applicant's request that he should be reinstated in the post which he occupied before his summary dismissal. Although the Applicant's legal grounds are not clearly set out in his submissions, the Tribunal understands that he is claiming, firstly, that the Administration summarily dismissed him under conditions which did not fulfil the conditions of an adversarial disciplinary investigation respecting the rights of the staff member concerned and, secondly, that this sanction was disproportionate to the acts of which the Applicant stands accused.

XXI. On the subject of the summary dismissal, the Tribunal notes that this decision had been taken following judicial proceedings before Palestinian Courts. Whereas, the Administration had initially planned to proceed with the summary dismissal following the judgement in first instance, the Field Legal Officer in Gaza advised that the decision should not be taken until all avenues of appeal had been exhausted. This is indeed what the Administration did. The Tribunal also finds that the disciplinary proceedings respected the Applicant's rights, since he was given 15 days to reply to the letter from the

Director of UNRWA Operations informing him that, in view of his conduct, he was guilty of serious misconduct requiring that disciplinary measures be taken against him.

XXII. The Applicant appears to be criticizing the Administration for not having conducted a specific investigation concerning him and for having merely referred to the decisions of the Palestinian courts. In this connection, the Tribunal must stress that the acts of which the Applicant was found guilty are serious enough to constitute serious misconduct, since they occurred in the context of his mission. Without considering in detail the Applicant's confused and clearly unsubstantiated allegations that the Palestinian courts were arbitrary in rendering their judgements, the Tribunal finds that the Applicant had the benefit of adequate guarantees: one of the charges was dismissed and the two remaining charges were considered in first instance, on appeal, and on review. Moreover, the prison sentence was reduced by three years. This being so, the Administration had sufficient and more than credible evidence for concluding that the Applicant had committed serious misconduct in the performance of his duties.

XXIII. The Tribunal has recalled on many occasions that the adoption of disciplinary measures, which is similar to a "quasi-judicial" power, is within the discretion of the Administration (see, Judgement No. 1274 (2005), para. V and see also, Judgements No. 897, *Jhuthi* (1998) and No. 941, *Kiwanuka* (1999)) but that, without substituting its own evaluation for that of the Administration, the Tribunal may evaluate the proportionality between the sanction imposed and the acts of which the staff member is accused (see Judgement No. 1187, *Igwebe* (2004), para. VI). Adopting the same approach in this case, the Tribunal finds that the summary dismissal of the Applicant was entirely proportionate, as his reprehensible behaviour towards a minor whom he was responsible for supervising at the Jabalia School was inconsistent with the standard of integrity required of all staff members.

XXIV. In this connection, the Tribunal shares the views of the UNRWA Commissioner-General, who refused to accept the JAB's request to reverse the summary dismissal decision, and the views of the Respondent that, unless that decision was found to be arbitrary or disproportionate, the JAB could not make such a recommendation. However legitimate, or at least understandable, the humanitarian considerations invoked by the JAB to justify this recommendation may have been, they probably had the effect of leading the Applicant to believe that a different outcome was possible, whereas that was not the case. In view of the seriousness of the acts concerned, the needs of the Applicant's family could not justify the adoption by the Administration of a different decision, which might have jeopardized its own credibility and its own probity.

XXV. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Bob **Hepple**
First Vice-President

Goh Joon Seng
Second Vice-President

Brigitte **Stern**
Member

New York, 25 November 2009

Tamara **Shockley**
Executive Secretary