



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-442

El-Khalek
(Respondent/Applicant)

v.

Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Appellant/Respondent)

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Mary Faherty
Judge Rosalyn Chapman

Case No.: 2013-508

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Lance Bartholomeusz

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency) against Judgment No. UNRWA/DT/2013/022, rendered by the UNRWA Dispute Tribunal (UNRWA DT) on 29 May 2013, in the case of *Abdel Khaleq v. Commissioner-General of UNRWA*. The Commissioner-General submitted his appeal on 4 September 2013, and Mr. Ahmad Ali Abdel El-Khaleq filed his answer on 8 October 2013.

Facts and Procedure

2. The UNRWA DT made the following findings of fact:¹

... [Mr. Abdel Khaleq] appealed against the decision ... to terminate his appointment for misconduct.

...

... On 6 December 1976 the Applicant commenced employment with the [Agency] as a Teacher 'D', grade 6, step 1. Immediately prior to the termination of his appointment the Applicant was employed as a Teacher, grade 10, step 21.

... On 7 March 2009 the Applicant was detained for questioning by the Jordanian authorities in connection with an allegation that he sexually exploited a first grade student – Student A – in the school year 2006/2007. The allegations arose after a friend of Student A – Student B – informed his parents that Student A had been sexually exploited by the Applicant in the 2006/2007 school year.

... The Applicant was released from custody on 10 March 2009. At some point, either while the Applicant was in custody, or shortly after he was released, the father of Student A dropped his personal complaint against the Applicant. However, the case proceeded to Jordan's Grand Criminal Court as a public case. As set out in the judgment of the court, the Applicant was charged with:

1. The felony of sexual molestation in violation of Article 296/2 of the Penal Code, and further to Article 300 of the said Code. The Accused has reportedly committed this felony ten times.
2. The misdemeanour of soliciting, on two occasions, an act that contravenes public decency in violation of Article 306 of the Penal Code. [[UNRWA DT] translation from the Arabic original.]

¹ The following text is taken from Judgment No. UNRWA/DT/2013/022, paras. 1, 5– 30 (internal footnotes omitted).

... On 23 March 2009, Mr. Richard Cook, the Director of UNRWA Operations, Jordan (“DUO/J”) established a fact finding committee composed of the Deputy Chief, Field Health Programme; Deputy Principal, Amman Training Centre; and Area Officer, South Amman (the “Fact Finding Committee”). The mandate of the Fact Finding Committee was:

... to look into this matter [a complaint regarding potential sexual exploitation at an UNRWA school] with a view to establishing the facts ...

Any recommendation may also include suggestion for corrective measures, which might be instituted by the Agency to prevent future occurrences.

... On 25 March 2009 the Applicant submitted to the Field Personnel Officer (“FPO”) a request for early voluntary retirement, requesting that his last day with the Agency be 31 March 2009. He subsequently submitted a second request for early voluntary retirement on 6 April 2009, requesting that his last day with the Agency be 15 April 2009. According to the Report of the Investigation Committee the requests were rejected because of the allegation against the Applicant.

... In a report dated 6 April 2009, the Fact Finding Committee summarized the information that it had gathered through interviews conducted with the Applicant, teaching staff, and students, including the complainants. The allegation of Student A as recounted by the Fact Finding Committee was that:

... during the scholastic year 2006/2007 when the student was in the first class at [the school], two brothers students [sic] one a classmate [to be referred to in this judgment as Student C] and another older student [to be referred to as Student D], used to pull down his trousers and underwear, and put him into his teacher’s lap while the teacher’s garment were pulled up. When they try to force him to sit in his teacher’s lap, the student used to escape over benches but can not leave the classroom as it was locked from inside. The student added that this used to happen after duty hours, while the curtains were closed.

... In his statement to the Committee, the Applicant suggested that Student B had a motive for seeking to damage him because he had administered corporal punishment to Student B in the past. After setting out the statements of a number of other witnesses the report concluded by noting a series of inconsistencies between the testimony of the complainant – Student A – and the testimonies of the teachers interviewed by the Committee. These inconsistencies related to the presence of curtains in the relevant classroom, the ability to lock the classroom from the inside, and whether or not the Applicant wore Arabic robes during the school term. *The Fact Finding Committee also noted that it had checked the Registration Office at the*

South Amman Area Office and could find no record of the two students who Student A identified as having aided the Applicant in the alleged misconduct. [UNRWA DT emphasis.]

... After pointing out inconsistencies in the evidence, the Fact Finding Committee made a number of recommendations of a generalized nature regarding the issue of sexual misconduct and exploitation in schools. Given the absence of any indication of possible guilt at this stage of fact finding there did not appear to be any reasonable grounds to suppose that the alleged misconduct in question may have occurred, thereby justifying the next step of setting up an investigation committee.

... However, on 26 May 2009, Mr. Richard Cook, the DUO/J, established an investigation committee (also referred to in some documents as a Board of Inquiry) comprising the Deputy Chief, Field Relief and Social Services Programme; Human Resources Officer; and Deputy Field Administration Officer (the "Investigation Committee"). The DUO/J directed the Investigation Committee to:

... undertake an examination into the complaint of alleged sexual exploitation and abuse by an UNRWA Teacher at [the school], using his position authority and power, to sexually exploit one of his students, taking into account, as appropriate, the attached Preliminary Assessment Report dated 6 April 2009.

...

Your investigation should establish the following:

- 1- The circumstances giving rise to allegations, and whether evidence exists substantiating the veracity of the allegation of sexual exploitation and abuse.
- 2- Whether evidence exists to suggest a pattern of misconduct by the alleged perpetrator in respect of similar activities with other school students.

... The Investigation Committee conducted its investigation between 31 May 2009 and 5 July 2009.

... By memorandum dated 5 July 2009 the Investigation Committee recommended to the DUO/J that the Applicant be suspended pending finalization of the investigation because his "access to students and UNRWA staff has impacted the work of the Board of Inquiry and jeopardized the investigation."

... The Investigation Committee interviewed 37 people, including members of the Fact Finding Committee, the Applicant's current and former colleagues (head teachers, teachers, and school attendants), and the Applicant's students and their families. The Applicant was interviewed last and was questioned about the allegations against him.

... The Investigation Committee produced its Report dated 23 July 2009. On the key issue of the alleged accomplices, Students C and D, the Investigation Committee report found:

... The Board reviewed the school records and identified 3 different [persons with the name of Student C]. Attempts were made to visit all three. One of the [persons with the name of Student C] is currently a classmate of the Complainant and has a cousin by the name of [same name as Student D]. Both students were interviewed separately and both displayed a high level of discomfort. [Witness D] confirmed occasionally having picked up his cousin from school (in the year of the incident). [Witness C] stated that the Defendant had recently stopped him during the exam period at school (June 2009) to ask him whether or not he had seen the Complainant. When asked by the Board what he, the Defendant, wanted from the Complainant, [the witness] continued to say that the Defendant had told him, "I need to see him (Complainant) because he is doing dirty things with other boys including [Witness D]". The Board believes that this interview is key because [Witness C] was not approached by any other interviewing body. As such his testimony is untainted as he has not been prepped by previous questioning.

...

... The Investigation Committee summarized its findings as follows:

... The Board found that there was direct and incontroverted evidence provided by the Complainant whom the Board found to be a consistent and credible witness. The Board found the Defendant [i.e. the Applicant] to be a deliberately untruthful witness. Other circumstantial evidence also supported the allegations of the Complainant that he was exposed to sexual exploitation. The sexual indicators exhibited and further supported by parent and teacher statements as well as the expert psychologist. Sexual indicators include cases of nightmares, heightened awareness of sexual activities, advanced sexual language, aggressiveness, etc. ... On balance, the Board found that the weight of evidence tended to support a finding that the Complainant was sexually abused by the Defendant in the school year 2006-2007 on several occasions in the classroom after school hours, and that the Defendant approached the Complainant in the school year 2008-2009 to re-initiate the sexual abuse.

The evidence was comprised of the credibility of the Complainant and [Student B's] testimonies, as well as the demeanour of the Defendant,

in addition to circumstantial evidence that supports that the Defendant has engaged in misconduct.

... *RECOMMENDATIONS AND CONCLUSION:*

1. The Board found that there was evidence to substantiate that the Complainant was in all likelihood, exposed to sexual exploitation as evidenced by the sexual indicators exhibited and further supported by the parent and teacher statements as well as the expert psychologist, as well as established evidence to suggest a pattern of misconduct by the Defendant in respect of similar activities with other school students especially his brutal use of corporal punishment in disciplining school children.

2. The Board recommends taking immediate appropriate disciplinary measures against the Defendant but also ensuring the protection of the students identified in this case.

... By letter dated 9 July 2009, Mr. Richard Cook, the DUO/J, informed the Applicant that he would be suspended with pay pending the outcome of the investigation, stating:

You are hereby informed that charges of serious misconduct have been made against you. Specifically it is alleged that during the school year 2006/2007 you abused your position, authority and power as a School teacher in [the school] by sexually exploiting a male student in addition to deliberately hitting students in the classroom.

...

At this stage of the investigation, there is prima facie evidence to support the cha[r]ges that misconduct has occurred. It has been noted that on three separate occasions following the charges, you have attempted to submit your Letter of Resignation. Furthermore, your demeanor with the official Board of Inquiry established by the Agency was aggressive and uncooperative. As of today, you are suspended with pay and until further notice, pending the outcome of the investigation in accordance with the provisions of Area Staff Rule 110.2 and Area Staff Personnel Directive A/10 Part II. This suspension is without prejudice to your rights.

... On 10 September 2009 the Grand Criminal Court of Jordan issued its verdict in the Applicant's case, acquitting him of all charges.

... By letter dated 28 September 2009, Mr. Jamal Kasem, the FPO, informed the Applicant of the conclusion of the Investigation Committee, quoting the first

paragraph of the Investigation Committee's "Recommendation and Conclusion" set out at [above]. *The letter gave the Applicant one day to respond to this conclusion.* [UNDT emphasis.]

... The [UNRWA DT] discovered, at the Case Management Discussion ("CMD") held on 19 September 2012, that this letter was in English and the Applicant had not been provided with an Arabic translation of this important letter. Far more disturbing was the *failure on the part of the Respondent to provide the Applicant with the Report of the Investigation Committee or to give him sufficient particulars of the evidence against him* so as to enable him to mount a proper challenge in his own defence. [UNRWA DT emphasis.]

... By undated letter the Applicant responded to the conclusion of the Investigation Committee, listing 11 points of contention, including the acquittal by the Grand Criminal Court of Jordan (an uncertified copy of the judgment was attached).

... By letter to the FPO dated 13 October 2009, the Applicant attached a certified copy of the Judgment of the Grand Criminal Court of Jordan. Based on the judgment of acquittal, the Applicant requested a return to his duty station so that he could submit a request for early voluntary retirement "according to usual procedures".

... By letter dated 8 November 2009, Mr. Richard Cook, the DUO/J, informed the Applicant that his appointment would be terminated for misconduct, effective 8 November 2009, noting:

... management has concluded, based on the report presented by the Investigation Committee formed by the Agency on 26 May 2009, and ... your responses to the charges [leveled] against you, that your explanations are not acceptable. You are hereby found guilty of misconduct. Specifically, there are strong indicators that during the school year 2006/2007, you have abused your position, authority and power as a school teacher in [the school] by sexually exploiting a male student.

... By undated letter, the Applicant requested administrative review of the decision to terminate his appointment. In support of his request the Applicant noted his acquittal by the Grand Criminal Court of Jordan on 10 September 2009, and argued that the Investigation Committee had disregarded the Court's decision; argued that the Investigation Committee ignored key arguments that he presented in his interview and was generally unreceptive to his defence; stated that "the student at last confessed in the presence of his father in front of the court judges that his accusation and allegation against me was false and untrue..."; and noted that the judicial medical report showed no sign that sexual actions had occurred with the student.

... By letter dated 13 December 2009, the DUO/J responded to the Applicant's request for decision review by confirming the decision to terminate the Applicant's appointment, stating:

Your case was thoroughly reviewed in the light of your appeal letter mentioned above and I have come to the conclusion that there are no new facts justifying a change in the decision taken against you. Therefore, the decision remains.

...

... On 30 December 2009 the Applicant filed a submission and annexes to the [former Joint Appeals Board (JAB)] appealing the decision to terminate his employment. By Interoffice Memorandum dated the same day, the Officer-in-Charge, JAB transmitted the appeal to the Director of Human Resources.

... On 5 January 2010, the Applicant submitted an official JAB appeal form and annexes.

3. The case was subsequently transferred from the JAB to the newly-created UNRWA Dispute Tribunal. On 31 August 2012, UNRWA filed its reply before the UNRWA DT. It was transmitted to Mr. El-Khalek in English on 2 September 2012. Pursuant to Order No. 045 (2012), the reply was translated into Arabic, together with the Report of the Investigation Committee, the UNRWA DT having registered its concern that Mr. El-Khalek was not provided with essential documents in the process or was unable to fully understand them, “his command of English [being] rudimentary”. Both translations were provided to Mr. El-Khalek on 6 December 2012.

4. In its decision, the UNRWA DT considered first the receivability of the Agency’s reply, which was submitted more than two years after the applicable deadline without leave to file a late reply or participate in the proceedings. Finding that it was in the interests of justice for UNRWA to be permitted to participate in the case, the UNRWA DT then reviewed its merits.

5. The UNRWA Dispute Tribunal concluded that it was not clear that the report of the initial Fact Finding Committee justified the establishment of an Investigation Committee. Moreover, it held that the findings and conclusions of the Investigation Committee were not well-supported and that UNRWA had failed to meet the *Molari* test,² the Agency having “failed to establish by clear and convincing evidence that the alleged misconduct took place”.³ Moreover, the UNRWA DT found that Mr. El-Khalek “was treated appallingly, in breach of due process and it would not be overstating the case to say that the treatment accorded to

² *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

³ Impugned Judgment, para. 57.

him has all the hallmarks of a prejudgment”.⁴ In particular, the UNRWA Dispute Tribunal noted that Mr. El-Khalek ought to have been provided with the documentary evidence against him, including the reports of the Fact Finding Committee and the Investigation Committee, in Arabic; that he should have been communicated with in a language he could understand; and, that he should have been granted a reasonable period of time to respond to the Investigation Committee’s conclusions (rather than one day) and advised that he could request assistance from a current or former staff member or legal counsel in so doing.

6. Ultimately, the UNRWA DT held that:⁵

In view of the serious due process breaches identified ..., the Tribunal considers that the conclusion reached by the Investigation Committee and its uncritical acceptance by Mr. Richard Cook, the DUO/J, is fundamentally flawed. The Administration has not established by clear and convincing evidence that the Applicant committed the misconduct in question. The Applicant had been charged with and, in the view of the Tribunal, wrongly sanctioned for an extremely serious offence of sexual exploitation of a minor. Not only was his reputation damaged in the community but the Tribunal takes judicial notice of the fact that the status and standing of the Applicant and his family would undoubtedly have suffered serious harm in the community.

7. Finding that the “gross violations of due process identified in this case are exceptional”, that Mr. El-Khalek’s reputation had “arguably [been] damaged ... irretrievably and [his standing] diminished ... in the eyes of his community” and that “[t]he prospect of him being employed elsewhere in his profession as a teacher [is] likely to be remote or non-existent”,⁶ the UNRWA Dispute Tribunal found that the case was exceptional, within the meaning of Article 10(5) of the Statute of the UNRWA DT, and compensated Mr. El-Khalek accordingly. It rescinded the impugned decision, ordering Mr. El-Khalek to be retroactively reinstated and then offered the early voluntary retirement he had requested, with related rights and entitlements, or, in the alternative, compensation in the amount of four years’ net base salary. In addition, the UNRWA DT awarded moral damages of USD 20,000.

8. On 24 July 2013, the Commissioner-General filed a Motion with the Appeals Tribunal, seeking leave to file an appeal of up to 25 pages. This Motion was rejected

⁴ *Ibid.*, para. 75.

⁵ *Ibid.*, para. 79.

⁶ *Ibid.*, para. 87.

in Order No. 155 (2013), the Duty Judge of the Appeals Tribunal considering it feasible to appeal the UNRWA DT Judgment within the statutorily prescribed 15 pages.

Submissions

The Commissioner-General's Appeal

9. The Commissioner-General contends that the UNRWA DT erred on a question of law in failing to conduct judicial review of the case before it and in substituting itself for the decision-maker.

10. The Commissioner-General submits that the UNRWA DT erred in fact, resulting in a manifestly unreasonable decision, when it held, *inter alia*, that the investigation was flawed and inadequate, that the Fact Finding Committee found “an absence of any indication of possible guilt”, and that due process was not afforded to Mr. El-Khalek.

11. He further submits that the UNRWA DT erred on a question of law in finding that the Investigation Committee should never have been formed, as the DUO/J was under a duty to investigate the allegations of sexual exploitation.

12. The Commissioner-General contends that the UNRWA DT erred on a question of law in “importing additional due process requirements into UNRWA’s regulatory framework” and applying them with retroactive effect. In particular, he protests the findings that Mr. El-Khalek was entitled to the report of the Investigation Committee, rather than simply its findings.

13. With respect to remedies, the Commissioner-General argues that the UNRWA DT also erred in law in awarding moral damages and, in any event, with respect to the levels of compensation ordered under both headings.

14. The Commissioner-General requests that the Judgment be set aside or, in the alternative, that the remedies be vacated or significantly reduced.

Mr. El-Khalek's Answer

15. Mr. El-Khalek argues that the UNRWA DT correctly conducted judicial review and properly found that the Agency had failed to establish by clear and convincing evidence his misconduct.

16. Mr. El-Khalek submits that the UNRWA DT's findings of fact were correct and that its Judgment was fair. There was no reason for the DUO/J to establish an Investigation Committee, given the conclusions of the Fact Finding Committee.

17. He further submits that the UNRWA DT was equally sound in its legal reasoning and that the Commissioner-General has failed to discharge the burden upon him to prove that the first instance court erred.

18. With respect to his rights of due process, Mr. El-Khalek contends that the UNRWA Dispute Tribunal was correct in finding his rights to have been violated, in particular as he was not permitted sufficient time to respond to the allegations against him or the required documentary evidence to defend himself. Moreover, UNRWA never advised him of his right to assistance or representation.

19. Mr. El-Khalek submits that the UNRWA DT correctly established the Agency's wrongdoing and the appropriate remedies, including the level of compensation. He asks the Appeals Tribunal to dismiss the appeal in its entirety.

Considerations

20. An appeal before this Tribunal does not constitute an opportunity to retry the case: the function of the Appeals Tribunal involves the task of determining if the Dispute Tribunal has made any errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. The Appeals Tribunal has consistently held that:⁷

⁷ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29 (internal citations omitted), quoting *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123; *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098; *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084; *Haniya v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024; *Mahdi v. Commissioner-General of the United Nations*

Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the [DT] is “to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence”. And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

21. The appellant bears the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective.

22. This Court finds that the UNRWA DT did not err in fact or in law such as to vitiate its Judgment, except with regard to the award of compensation.

23. In particular, the UNRWA DT did not overstep its role to judicially review the administrative decision imposing a disciplinary measure on the staff member and terminating his appointment. Neither did it substitute itself for the Administration, as argued by the Commissioner-General.

24. Certainly, the Administration failed to demonstrate that Mr. El-Khalek had committed the serious misconduct he had been charged with, because not only did the proceedings fail to provide him with an adequate opportunity to defend himself breaching his right to due process, but also there was not enough evidence supporting the accusation.

25. The administrative investigation was flawed because it did not rely on trustworthy evidence; the second report appears to be based mostly on hearsay or inconsistent testimonies not subject to cross-examination. Moreover, it did not explain why the acquittal from the national judicial system was not even considered. As a consequence, it deserves the criticism made by the UNRWA Dispute Tribunal.

26. The Administration did not establish by clear and convincing evidence the facts on which the sanction was based.

Relief and Works Agency for Palestine Refugees in the Near East, Judgment No. 2010-UNAT-018; *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087; *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164.

27. The administrative decision to terminate the staff member's appointment did not have any other support. The investigation did not actually establish the facts. Hence, no disciplinary measure should have been lawfully taken.

28. Moreover, the UNRWA DT correctly concluded that there was a breach of due process. When a staff member is offered only 24 hours to defend himself against a very serious accusation and not even provided with details of the charges and the supporting evidence, the procedure becomes a parody of due process, and cannot be considered lawful.

29. Thus, the illegality of the termination stemmed from two different sources and the rescission of the administrative decision ordered by the UNRWA DT must be affirmed.

30. The compensation in lieu of reinstatement, established at four years' net base salary, will be partially vacated, because the UNRWA DT did not have sufficient reason to exceed the average statutory limit of two years. The arguments developed in the impugned Judgment about this matter are in fact related to moral damages, and not to the value of the performance ordered when compensation is set as an alternative for the Administration.

31. On the other hand, the compensation for moral damages seems adequate, given the well founded reasoning of the UNRWA DT about the important negative consequences created by a serious sanction as the one illegally suffered by the staff member in the present case.

32. Therefore, the appeal on the remedies will be allowed in part, reducing the compensation in lieu of reinstatement.

Judgment

33. The UNRWA DT's Judgment is affirmed in part and the compensation in lieu of reinstatement is reduced to two years' net base salary.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar