



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

**Mahdi
(Appellant)**

v.

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

JUDGMENT

[No. 2010-UNAT-018]

Before: Judge Inés Weinberg de Roca, Presiding

Judge Sophia Adinyira

Judge Luis María Simón

Case No.: 2010-023

Date: 30 March 2010

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: W. Thomas Markuszewski

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. This Court affirms the decision to dismiss the Appellant, Sameh Mahdi (Mahdi), who granted unauthorized access to the telephone line of his employer, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and tampered with the billing system.

Facts and Procedure

2. The decision to summarily dismiss Mahdi was taken by the UNRWA administration on 27 July 2003. At the time of his dismissal, Mahdi was a Communications Technical Assistant (CTA) on a fixed-term appointment stationed in UNRWA's Gaza Field Office.

3. At the end of November 2002, after it had been tipped off by an outside telecommunications company about the on-going misuse of UNRWA telecommunications system, UNRWA established a Board of Inquiry (BoI) to investigate the allegation of the unauthorized access from telephones outside the Gaza Field Office to an UNRWA telephone extension to make international calls and the tampering with UNRWA's telephone billing system. Mahdi was soon thereafter suspended from duty without pay pending the outcome of the investigation.

4. On 4 May 2003, the BoI issued its report, in which it determined that Mahdi and his colleague, Suheil Fasih, a Communications Technician (CT), were part of a telephone system fraud which enabled people outside the Gaza Field Office to access the UNRWA telephone extension for international calls; and that Madhi had "altered records in the UNWRA billing system with a view to obtain[ing] a reduced invoice and avert[ing] showing the numerous international calls made on [Suheil Fasih's] invoices". The BoI also established that Mahdi had failed to bring those issues to the attention of the UNRWA administration. The BoI concluded that "[s]ince the staff members did not come forward immediately to bring to the attention of the authority serious irregularities and wait[ed] until the situation [wa]s discovered before doing anything, such conduct *per se* constitutes intentional fraud warranting immediate disciplinary measures".

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5. The UNRWA administration provided Mahdi with the excerpts of BoI's report that related to him for comments. Mahdi submitted his comments on 18 May 2003.

6. Mahdi was summarily dismissed effective 27 July 2003.

7. On 2 August 2003, Mahdi addressed a memorandum to the Director of UNRWA Operations, Gaza (DUO/G) requesting that the DUO/G "review [his] case".

8. On 8 September 2003, Mahdi appealed to the UNRWA Joint Appeals Board (JAB) against the decision to summarily dismiss him. On 25 May 2006, the UNRWA administration submitted a consolidated Respondent's Reply to the separate appeals from Mahdi and Suheil Fasih, who had also been summarily dismissed.

9. Under cover of a memorandum dated 16 April 2008, the UNRWA JAB submitted a report to the Commissioner-General of UNRWA. The JAB recommended that the Commissioner-General "consider reviewing the decision to summarily dismiss the Appellant". It found that it was normal for Mahdi to have given Suheil Fasih the authorization code to make international calls, and that Mahdi had deleted international calls from Suheil Fasih's October 2002 bill upon request from the Field Administration Services Officer (FASO), his superior, and that "the Appellant was not a beneficiary of the reduced bill/invoice". In addition, the JAB panel was "unable to find a clear policy or instruction that would prevent the Appellant from giving [Suheil Fasih] the authorization to use the DISA [Direct Inward System Access] Facility". It noted that Mahdi had accumulated "very good performance records." In its view, the dismissal decision was "too severe in the circumstances". The JAB noted the "delay in the Administration's reply and the consideration of the case (almost 4.5 years)". Recalling the statutory time limit of 60 days within which the UNRWA administration should have submitted a reply, the JAB panel considered that "such delay is unacceptable especially in Summary Dismissal cases that [affect] the staff member's reputation, dignity and benefits".

10. In a letter dated 28 May 2008, the Commissioner-General of UNRWA informed Mahdi that she had decided to reject the JAB recommendation and uphold the decision of summary dismissal. The Commissioner-General stated that her decision was based on "clear evidence establishing [Mahdi's] knowing participation in a scheme involving the improper use of UNRWA's telephone system to make private calls from telephones outside UNRWA premises, while enabling the cost of these calls to be charged to an UNRWA extension and to then cover up the misuse, including by both failure to alert [his] supervisors and alteration of bills, records and back-up archives". In her view,

Mahdi's conduct "amounted to wil[il]ful and serious misuse of the UNRWA's assets... and rendered [him] liable to disciplinary measures, including summary dismissal". She maintained that the broad discretion accorded to UNRWA with regard to the disciplinary action, including summary dismissal, had been "fairly, correctly and responsibly exercised in [his] case".

11. On 23 September 2008, the secretariat of the former United Nations Administrative Tribunal (Administrative Tribunal) received an appeal from Mahdi against the decision to summarily dismiss him for serious misconduct. It returned the filing to Mahdi for corrections because they failed to meet with the filing requirements. The secretariat of the Administrative Tribunal received an amended appeal from Mahdi on 2 December 2008, within the new deadline of 16 December 2008. The filings were completed on 9 October 2009. However, the Administrative Tribunal did not have an opportunity to review this case before its abolition on 31 December 2009. The appeal was subsequently transferred to this Court pursuant to the General Assembly Resolution A/RES/63/253 of 17 March 2009.

Submissions

Mahdi' Appeal

12. The appeal was timely filed.

13. The decision of summary dismissal was too severe.

14. The FASO extorted and manipulated Suheil Fasih, after a bill of Suheil Fasih's telephone extension with many international calls was produced. The FASO admitted that he had told and convinced Suheil Fasih to prepare a reduced bill.

15. The BoI was confused between an authorization code and the Direct Inward System Access (DISA) facility.

16. The authorization code was given to any staff member upon request.

17. Suheil Fasih had an authorization code. On the other hand, the DISA facility was used by a limited number of staff members. Mahdi had access to the DISA facility. During his long time of sharing the same computer and telephone extension, it was possible for Suheil Fasih to learn from Mahdi how to use the DISA facility. Mahdi should not be held accountable for Suheil Fasih's misuse of that facility.

18. Mahdi voluntarily produced the bill of the telephone extension and sent it to the FASO. He would not have done so if he had had any bad intention or any prior knowledge about the misuse of the telephone system.

19. Mahdi had no benefit from the deletion of calls from the billing system. It was Suheil Fasih who had provided to the third party the DISA number and authorization code to make profits. UNRWA took action to recover the financial loss caused by Suheil Fasih only from Suheil Fasih's separation benefits, and not from Mahdi's.

20. Mahdi did not conceal any information as alleged, because the UNRWA administration knew about the misuse before Mahdi did and none of his supervisors was available, since they were in Amman, Jordan, attending a training course.

UNRWA's Answer

21. The present appeal is not receivable because Mahdi lodged his appeal with the former Administrative Tribunal on 2 December 2008, more than two months beyond the 90-day statutory time limit. He received the decision of the Commissioner-General of UNRWA rejecting the JAB's recommendation and upholding the decision of summary dismissal on 24 June 2008. In accordance with article 7(4) of the Statute of the former Administrative Tribunal, Mahdi should have appealed on or about 24 September 2008.

22. The UNRWA administration recalls the broad discretionary power of the Commissioner-General of UNRWA in relation to disciplinary matters. The decision to summarily dismiss Mahdi represented a valid exercise of that discretionary authority. That discretionary authority will not normally be interfered with unless the Tribunal is satisfied that the decision was exercised arbitrarily or capriciously; was motivated by prejudice or other extraneous factors; was flawed by procedural irregularity or error of law; or was so disproportionate or unwarranted as to amount to injustice.

23. The facts on which the questioned decision was based were established. The BoI found that Mahdi had illegally enabled the DISA for use by Suheil Fasih; had altered records in the UNRWA billing system in such a manner as to obtain a reduced invoice and avert showing the numerous international calls; had failed to bring those issues to the attention of his supervisors; and had breached the fiduciary obligation entrusted to him.

24. Mahdi has failed to carry the burden of proving that the questioned decision was arbitrary or capricious, or was motivated by prejudice or other extraneous factors, or was flawed by procedural irregularity or error of law. Nor has he shown that the decision was disproportionate to the seriousness of his misconduct.

Considerations

25. The UNRWA administration alleged that the appeal was time-barred.

26. The secretariat of the former Administrative Tribunal received Mahdi's appeal on 7 September 2008, before the deadline of 24 September 2008.¹ However, the Secretariat returned the communication and attachments to Mahdi as the appeal did not meet the filing requirements, and set a new deadline of 16 December 2008. The amended appeal was received on 2 December 2008, again within the new time-limit.

27. In reviewing disciplinary cases this Court has to examine the following:

- i. Whether the facts on which the disciplinary measure was based have been established;
- ii. Whether the established facts legally amount to misconduct under the Regulations and Rules; and
- iii. Whether the disciplinary measure applied is proportionate to the offence.

28. The BoI found that the facts that amounted to serious misconduct were established.

29. The JAB confirmed that the facts amounted to misconduct. However, considered the sanction too severe. To reach this conclusion it examined the BoI file and took note of the testimony of Abdel Hakim Abu-Houli, Field Administration Services Officer (FASO).

30. Mahdi requests that FASO's undated Note for the Record and his testimony before the BoI on 15 December 2002 be stricken from records, because FASO was an "untrustworthy person". Mahdi explained that FASO was involved in a large scheme of embezzlement.

¹ According to the date stamp on the cover page of the appeal, the secretariat of the former Administrative Tribunal received the appeal on 23 September 2008.

31. This challenged testimony is the one relied on by the JAB to disagree with the sanction, but it does not provide evidence contrary to the findings of the BoI. When interviewed by the BoI, Abdel Hakim Abu-Houli testified on 15 December 2002 that when Suheil Fasih requested him to reduce a bill from the billing system related to his extension, Abu-Houli asked Suheil Fasih to provide him with the bill. ("I asked him to provide me with this bill, he came to me with a three-paged bill. I told it is too much and he responded no I can decrease the three pages bill.")

32. Moreover, whereas the JAB did not find evidence that Mahdi had deleted calls before, Mahdi, before the BoI, expressly admitted to this for the purpose of work requirements and because calls appeared against non-existing extensions.

33. Mahdi also testified before the BoI regarding the raw data, an archive of all invoices before they were altered, that he "touched them later on".

34. The Head of Technical and Telecommunication Section (TSS), when interviewed on 4 February 2003, testified that Mahdi "would have to either get the authority in writing to give the DISA access to [Suheil Fasih]. This authority should either come through the Administration to approve in giving the DISA access to him as a user, or he should be technically in need of this facility... [Suheil Fasih] does not need it."

35. The Head of TSS declared that any request for an access in the system had to be submitted in writing by e-mail or by memo via the administration.

36. Before the BoI, Mahdi admitted reluctantly that Suheil Fasih, who was part of the fraud scheme, received the authorization code to use DISA facility from him. Mahdi also admitted that he did not inform his supervisors that he had granted Suheil Fasih the access code.

37. For this reason, the JAB's recommendation that no clear policy or instruction prevented Mahdi from giving Suheil Fasih the authorization to use the DSA Facility did not take into account that there was a clear policy to inform his supervisors, which Mahdi failed to do.

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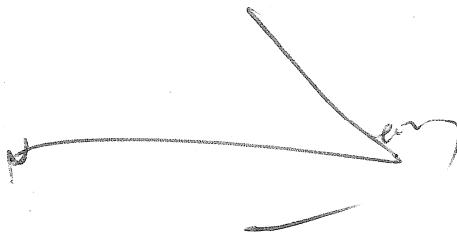
38. Thus, the JAB, when making its recommendation, did not assess the totality of the evidence. The Commissioner-General did not err .

Judgment

39. For the foregoing reasons, the appeal is dismissed.

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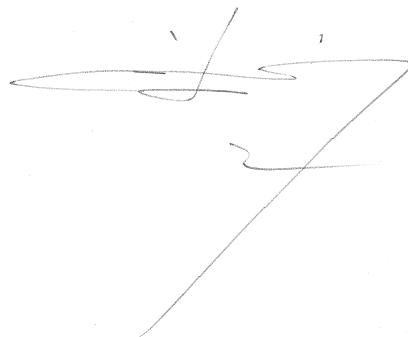
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Judge Weinberg de Roca, Presiding



Judge Adinyira



Judge Simón

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT