



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

**Haniya
(Appellant)**

v.

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

JUDGMENT

[No. 2010-UNAT-024]

Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Sophia Adinyira
Case No.:	2010-029
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Jalal Yusif al-Halaq

Counsel for Respondent: W. Thomas Markushewski

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. This is an appeal against the decision taken by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) to separate Muhsen Said Abdulla Haniya (Haniya) “in the interest of the Agency” under UNRWA Area Staff Regulation 9.1. The circumstances surrounding the administrative decision reveal that Haniya’s separation was in fact a disciplinary measure and consequently needs to be reviewed as such. We hold that Haniya’s misconduct is established, that the imposed sanction is proportionate, and that Haniya’s due process rights were respected. We therefore affirm the decision to separate Haniya from UNRWA.

Facts and Procedure

2. Haniya joined UNRWA effective 1 February 2000, on a category “T” (daily-paid) appointment as a School Attendant. He continued working as a School Attendant and Cleaner until he accepted a category “Z” fixed-term appointment, effective 1 October 2000. Effective 1 August 2004, Haniya’s appointment was converted from a “Z” to an “X” fixed-term appointment as a Guard B. At the relevant time, Haniya was serving as a Guard at UNRWA’s Microfinance and Micro-enterprise Programme (MMP).

3. By memorandum dated 20 October 2005, the Administrative Officer of the MMP notified the Officer-in-Charge, Administration Department, Gaza (OiC/AD/G) that a large number of telephone calls had been made after duty hours from one of its telephone lines to a telephone number in Morocco and to the Jawwal mobile phone network. The Administrative Officer, MMP, requested that the OiC/AD/G establish a joint investigation committee consisting of the Administration Department and the MMP “to look into a possible theft of the MMP international and Jawwal phone line”.

4. By memorandum dated 25 October 2005, the OiC/AD/G established an investigation committee (IC). In its report dated 8 November 2005, the IC stated that during the investigation, one receptionist and five guards, including Haniya, had been interviewed. Haniya admitted that he had used the MMP telephone line to make private calls. Based on his admissions, it was calculated that Haniya had made unauthorized telephone calls between May and October 2005 amounting to 502.66 New Israeli Shekels (NIS).

5. By letter dated 5 December 2005, the Director of UNRWA Operations, Gaza (DUO/G) advised Haniya of the IC's findings and asked him to respond to the allegations within 15 days.

6. By an undated letter, Haniya responded to the DUO/G. Haniya stated that he had used the MMP telephone line because he needed to reach his family who was experiencing problems, and that he thought that he would subsequently be charged for those calls. He averted that he had been under the impression that he could leave the Agency when he handed the shift over to his colleague, and accordingly he would leave early if his colleague arrived in the office early.

7. By letter dated 28 February 2006, the DUO/G informed Haniya that his response to the allegations had "not satisfactorily addressed the very fundamental issues of confidence in [his] professional integrity". Haniya was informed that his actions constituted serious misconduct for which he deserved termination, but that "the Agency ha[d] decided to take a more lenient action and separate [him] in the interest of the Agency under Staff Regulation 9.1 effective close of business 28 February 2006". Haniya was further informed that he would be paid one-month salary in lieu of the notice period, and that his separation benefits would be reduced by the amount of 502.66 NIS which represented the cost of the telephone calls he had illegally made.

8. By letters to the DUO/G dated 12 March 2006, and to the Commissioner-General dated 26 March 2006, Haniya requested review of the decision to terminate his appointment. He explained that he had used the telephone line to make calls to his ill mother and stressed the impact that the termination of his appointment and the resulting financial distress had on his family. On 28 March 2006, the DUO/G responded to Haniya's letters confirming that the decision would not be changed.

9. On 4 April 2006, Haniya filed an appeal with the UNRWA Area Staff Joint Appeals Board (JAB) against the decision to terminate him. The JAB adopted its report on 4 June 2008. It concluded that the UNRWA administration had "dealt with the matter within the framework of the standing rules, regulations and directives" and recommended that the Commissioner-General dismiss the appeal. The Commissioner-General approved the JAB's recommendation on 21 June 2008.

10. On 14 September 2008, Haniya appealed to the former United Nations Administrative Tribunal. The appeal was transmitted by a letter dated 15 May 2009. UNRWA filed its Answer on 14 October 2009. The case was subsequently transferred to

the United Nations Appeals Tribunal (UNAT or Tribunal) upon the abolishment of the Administrative Tribunal at the end of 2009.

Submissions

Haniya's Appeal

11. Haniya alleges that he was arbitrarily terminated.
12. Haniya states that he had received no instructions regarding his post at MMP and had therefore been ignorant of the relevant rules.
13. Haniya submits that the IC failed to advise him that his statements could be used against him before the Agency's administrative or judicial authorities; and that he had not been given the opportunity to seek the assistance of a lawyer. This he argues led to a deficiency in his arguments before the IC and in his correspondence with Agency officials.
14. Haniya contends that the IC covered up several matters, including the fact that he had been threatened during the investigation by another staff member of the Agency, and that he made his statements under threats of death and termination from work. Moreover, the IC added and deleted elements from the investigation records after Haniya had been questioned.
15. Haniya claims that UNRWA treats employees differently according to their power and influence. In this regard, he purports that it was established that other employees who had also committed major violations were not terminated, but were transferred to another Agency department in Gaza.
16. Haniya maintains that termination from employment is the most severe penalty and, in his case, was disproportionate to the offence committed.
17. Haniya finally argues that his family lives below the poverty line, that he is the sole supporter of a family of approximately ten people, and that his separation is "contrary to the purpose for which the Agency was established".
18. Haniya requests his reinstatement; payment of retroactive salary and compensation in the amount of \$ 50,000 for psychological damages owing to social stigmatization and for loss of future income; and payment of \$ 10,000 for legal fees.

UNRWA's Answer

19. UNRWA argues that the sanction was legally imposed in accordance with Area Staff Regulation 10.2, Area Staff Rule 110.1, and Area Staff Personal Directive No. A/10.

20. UNRWA recalls that Area Staff Regulation 9.1 confers upon the Commissioner-General broad discretion to terminate at any time the appointment of a staff member if he considers such action in the interest of the Agency. It submits that the former Administrative Tribunal consistently held that the Commissioner-General's broad authority will normally not be interfered with unless it is satisfied that the decision was exercised arbitrarily or capriciously, was motivated by procedural irregularity or error of law, or was so disproportionate or unwarranted as to amount to an injustice.

21. UNRWA submits that the Administrative Tribunal further held that when an appellant alleges that the exercise of a discretionary power was flawed by procedural irregularity or error of law, was arbitrary or motivated by prejudice or extraneous factors, the burden of proof rests with the appellant, who must adduce convincing evidence that a discretionary administrative decision was tainted.

22. With respect to the first criterion, i.e. whether the facts on which the disciplinary measures were based had been established, UNRWA submits that Haniya has not disputed the IC's findings and his explanations do not justify his actions.

23. UNRWA submits that the broad discretionary power vested in the Commissioner-General in relation to disciplinary matters includes the determination of what constitutes "misconduct". UNRWA maintains that Haniya's actions, including the willful use of the Agency's property to make unauthorized calls and the breach of fiduciary obligations entrusted in him as a Guard, constitute unsatisfactory conduct warranting the imposition of disciplinary action.

24. UNRWA further submits that the DUO/G's decision to terminate Haniya's appointment in the interest of the Agency pursuant to Area Staff Regulation 9.1 was appropriate as his behavior had been properly determined to constitute misconduct warranting termination.

25. UNRWA submits that the investigation was conducted with objectivity and thoroughness; that Haniya was made aware of the allegations and the evidence against him; and that he was accorded the full opportunity to rebut those allegations and to

produce evidence in his defense. Moreover, he did not request nor was he denied the opportunity to have counsel present during his interview before the IC.

26. UNRWA contends that Haniya provided no evidence to support his allegations that he had been subject to “abuse” and “threats” by colleagues at the MMP. And Haniya has not demonstrated how such alleged abuse and threats changed the established facts.

27. Pointing to the other guard who was terminated in the interest of the Agency, UNRWA rejects Haniya’s allegations that others were treated more leniently.

28. UNRWA maintains that Haniya has not shown that the decision to terminate him was disproportionate. It was less severe than it could have been, since the DUO/G decided that Haniya’s appointment would be terminated in the interest of the Agency pursuant to Area Staff Regulation 9.1 and Area Staff Rule 109.1.

29. UNRWA contends that the humanitarian reasons put forward by Haniya should have no impact on the sanction.

Considerations

30. In the present case, UNRWA terminated Haniya’s service in the interest of the Agency, under Staff Regulation 9.1. But where a termination of service is connected to any type of investigation of a staff member’s possible misconduct, it must be reviewed as a disciplinary measure, because that is what it in reality is.

31. When reviewing a sanction imposed by the Administration, the Tribunal will examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence.

32. In the present case, both parties agreed on the facts on which Haniya’s separation from service was based: Over an extended period of time, Haniya made unauthorized private phone calls during his duty hours as a guard, using UNRWA’s telephone line; and he left his post during duty hours without prior authorization.

33. The Tribunal is not persuaded by the reasons given by Haniya for his acts. Haniya merely stated that he encountered family problems. But this does not justify his leaving the work place without previous authorization, taking a device from one office to connect it in another office, and to make private phone calls, again without prior authorization of

his employer. In light of the circumstances surrounding his conduct, this Court cannot find Haniya's claim credible that he had acted in good faith, expecting that he would be charged for his private calls. Similarly, it is unacceptable that Haniya repeatedly left his post before the end of his duty hours. Haniya's acts therefore clearly constitute misconduct warranting a disciplinary measure.

34. Turning to the question of whether or not the imposed sanction is proportionate to the offence, it is important to note that Haniya was a guard and therefore held a position of trust that he failed to respect. His misconduct is particularly grave in light of the position he held, and the responsibilities he was entrusted with. In light of Haniya's acts and the position he held, the sanction imposed is not disproportionate to the offence.

35. The Tribunal further holds that Haniya has not demonstrated any violation of his due process rights.

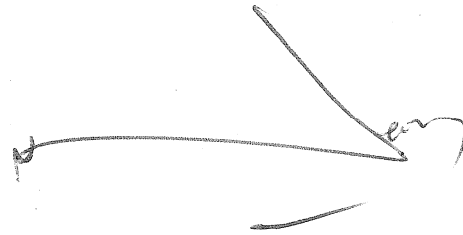
36. The Tribunal finds no error in the contested decision to terminate Haniya's appointment. His misconduct was established, the imposed sanction is proportionate, and his due process rights were respected. We therefore affirm UNRWA's decision to separate Haniya from the Organization.

Judgment

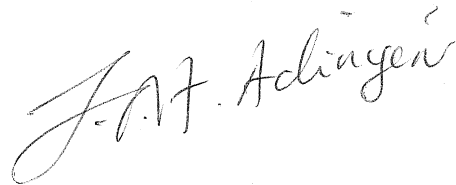
37. In view of the foregoing, the appeal is dismissed.



Judge Simón, Presiding



Judge Weinberg de Roca



Judge Adinyira

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