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Judgment No. 2013-UNAT-292

7. On 18 March 2007, Mr. Abu Jarbou sent a letter to the DUO/G, requesting review of the termination decision and responding to each of the charges.
  
8. On 15 May 2007, Mr. Abu Jarbou appealed to the UNRWA Area Staff Joint Appeals Board (AJAB) challenging his termination and seeking to “[p]ro v[e] [his] innocence” so he can “get ... back to [his] work at UNRWA”. The AJAB was abolished 1 July 2009, and Mr. Abu Jarbou’s case was tr

Submissions

Mr. Abu Jarbou's Appeal

13. The UNRWA DT erred procedurally when it allowed the Respondent to participate in the proceedings and when it relied on Respondent's reply in making its decision. The Appellant filed his appeal before the AJAB on 15 May 2007, and the Respondent, in violation of Article 6 of UNRWA DT's Rules of Procedure (Rules), filed his reply more than four and a half years later on 16 January 2012. The record does not show that the UNRWA DT ever granted the Respondent the right to participate in the proceedings and to file a tardy reply. Thus, the Respondent should not have been party to the UNRWA DT proceeding and the UNRWA DT should not have relied on Respondent's reply in making its decision.

14. The UNRWA DT erred procedurally when it failed to exercise its discretion under Article 32 of the Rules to allow Mr. Abu Jarbou to file a rejoinder to Respondent's tardy reply. In light of the passage of time since filing his application before the AJAB, the interests of justice required that the UNRWA DT allow the Appellant to file a rejoinder, and it was manifestly unfair and prejudicial for it not to allow him to do so.

15. The UNRWA DT erred on a matter of law when it determined that termination was a proportionate sanction for Appellant's offenses. Assuming UNRWA's objective in terminating the Appellant was the smooth operations of the Center, the more than three-year delay between the issuance of the BOI's report and his termination is not rationally related to that objective since the Appellant continued to act as Principal of RCVI during that period.

16. Termination under Area Staff Regulation 9.1 is to ensure the Agency's maximum efficiency of staff; it is not a catch-all to terminate staff when other methods of termination, such as summary dismissal for serious misconduct, are not available or sufficient. Since the Appellant was not suspended and continued to act as Principal of RCVI for more than three years after the BOI report, his termination is not rationally related to the objectives of Regulation 9.1, *i.e.*, to ensure the maximum efficiency of UNRWA's staff.

17. The UNRWA DT failed to exercise its jurisdiction when it did not compensate the Appellant for UNRWA's more than three-year delay in making the final determination to separate him from service, despite noting that the delay was "totally inappropriate and unjustified ... [and] surely must have caused severe uncertainty". Under Article 10 of the

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to allow the Commissioner-General to participate in the proceedings and to file a late reply without a written order, but Mr. Abu Jarbou was not prejudiced by this error and the error did not violate his due process rights.

28. The record shows that Mr. Abu Jarbou filed his application before the AJAB on 15 May 2007 and the Commissioner-General submitted his reply on



Transparency is essential for any system of administration of justice that embraces the principles of the rule of law and due process. And transparency requires the issuance of a written order when leave of the Tribunal is granted.

31. Generally, a party who fails to raise an issue before the trial court cannot later raise that issue on appeal.<sup>4</sup> Here, Mr. Abu Jarbou did not object to the untimely submission of the Respondent's reply. But in reality, he had no advance notice that the UNRWA DT was considering allowing the Respondent to submit a late reply and he did not learn of the reply until he received it from the UNRWA DT Registry. Thus, the only objection Mr. Abu Jarbou could have made would have been a motion to strike the reply as untimely and/or as not authorized by a written order. In light of the nature of the response Mr. Abu Jarbou received from the UNRWA DT Registry when he inquired about filing an opposition to the reply, discussed below, a motion to strike the reply does not seem to have been a realistic procedure for Mr. Abu Jarbou. In these circumstances, this Tribunal concludes that Mr. Abu Jarbou's failure to object to the submission of the Respondent's late reply before the UNRWA DT does not prevent him from raising on appeal the question of procedural error stemming from the absence of an order authorizing the reply.

32. This Tribunal stated in *Bertucci*:<sup>5</sup>

[T]he Statute of the [United Nations Dispute Tribunal] does not provide for any sanction comprising the exclusion of one party from the proceedings ... Neither the principle of respect for the right to a defence nor the right to an effective remedy before a judge, recognized by Article 8 of the Universal Declaration of Human Rights, imply any recognition that the Tribunal has the power to impose such a sanction in the case of "disobedience".

The rationale of *Bertucci* applies to the present case. Since the Respondent has the right to participate in the proceedings, the UNRWA DT on its own motion could have issued an order allowing the Respondent to file a late reply. Thus, Mr. Abu Jarbou cannot show how he has been prejudiced or harmed by the submission of the late reply without an order authorizing it. Without a doubt, filing the late reply without a written order is a procedural error by the UNRWA DT. But not all procedural errors are prejudicial and not all procedural errors

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<sup>4</sup> See *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056.

<sup>5</sup> *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121 (full bench), para. 51.

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the Agency.” Pursuant to Area Staff Personnel Directive No.A/10/Rev.1, paragraph 3.2,<sup>7</sup> the Commissioner-General has delegated the authority to terminate staff to the Field Director, who, at the time the termination letter was sent to Mr. Abu Jarbou, was Mr. Ging.

35. Area Staff Regulation 1.1 provides that UNRWA “[s]taff members, by accepting appointment, pledge themselves to discharge their functions with the interests of the Agency only in view”. Area Staff Regulation 1.4 imposes, in part, the following additional duties, responsibilities and privileges on UNRWA staff members: “Staff members shall conduct themselves at all times in a manner befitting their status as employees of the Agency. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Agency.”

36. As of 27 January 2003, the UNRWA Commissioner-General promulgated the International Civil Service Commission’s 2001 Standards of Conduct for the International Civil Service (Standards of Conduct), which includes several pertinent provisions. Paragraphs 15 and 16 of the Standards of Conduct provide:

Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect. ... Managers are also responsible for guiding and motivating their staff . . . . It is natural for managers to be seen as role models and they have therefore a special obligation to uphold the highest standards of conduct. It would be quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without intimidation and favouritism.

Paragraph 19 also provides:

It must be the duty of international civil servants to report any breach of the organization’s rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions.

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<sup>7</sup> Paragraph 3.2 of UNRWA Personnel Directive No. A/10/Rev. 1 reads, in part, that “[a]uthority to impose disciplinary measures other than summary dismissal is delegated to the Chief Personnel Services Division in Headquarters and to Field Office Directors in their Fields”.

37. Mr. Abu Jarbou had held the position of Principal of the Center since 1990. The job description for Principal of RCVI states that the Principal:

Is responsible for the administration and operation of the re habilitation centre, and in particular: ... Supervises and guides the teaching and administrative staff of the centre. ... Prepares and controls the budget for the centre. ... Ensures that the administrative functions of the centre are properly implemented and in particular ensures the security and proper maintenance and use of the centre's premises, equipment, cash and supplies. ... Develops and implements income-generating projects related to the centre with the dual aim of providing employment to the visually impaired and promoting the financial sustainability of the centre.

38. When a termination of service under Area Staff Regulation 9.1 "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".<sup>8</sup> Generally, "[d]isciplinary matters are within the discretion and authority of the Commissioner-General of UNRWA".<sup>9</sup> However, the Commissioner-General "shall act fairly and reasonably and comply with the requirements imposed ... by law".<sup>10</sup> To judicially review a disciplinary sanction imposed on a staff member, the Tribunal should "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".<sup>11</sup>

39. On appeal, Mr. Abu Jarbou does not claim that the facts on which his termination was based have not been established, that his acts or omissions might not be the basis for sanctions of some sort, or that the Respondent's decision to terminate him was arbitrary, motivated by prejudice or flawed by procedural irregularity. He complains only that the sanction of termination is not proportionate to the established facts, as required to terminate a staff member from service under UNRWA Area Staff Regulation 9.1.<sup>12</sup>

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<sup>8</sup> *Haniya v. Commissioner-General of the United Nations Works and Relief Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-024, para. 30.

<sup>9</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-280, at para. 120; *Abu Hamda v. Commissioner-General of the United Nations Works and Relief Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-022, para. 37.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Haniya; Mahdi v. Commissioner-General of the United Nations Works and Relief Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27.

<sup>12</sup> Cf. *Doleh v. Commissioner-General of the United Nations Works and Relief Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-025; See *Haniya*.

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schedule each week while he was improperly, in violation of UNRWA Regulations and Rules, also working part-time at Al-Aqsa University. Additionally, Mr. Abu Jarbou improperly used both Ms. Amna Abu Jasser and Ms. Latifa Obeid, who were employed and paid as cleaners at a minimum salary level, to perform other duties with excess of 8 (or 18) hours per week (and 2 he) eewhoco plakined ttpressdu plakiatt1( i

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Mr. Abu Jarbou's termination. It is not necessary for any court, whether a trial or appellate court, to address each and every claim made by a litigant, especially when a claim has no merit. <sup>17</sup>

Judgment

48. The appeal of Mr. Abu Jarbou is dismissed.



Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York, United States.

*(Signed)*

Judge Chapman, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Faherty

Entered in the Register on 24<sup>th</sup> of May 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar