



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

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**Doleh  
(Appellant)**

**v.**

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

**JUDGMENT**

**[No. 2010-UNAT-025]**

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Before:	Judge Kamaljit Singh Garewal, Presiding Judge Sophia Adinyira Judge Rose Boyko
Case No.:	2010-030
Date:	30 March 2010
Registrar:	Weicheng Lin

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Counsel for Appellant:	Self-Represented
Counsel for Respondent:	W. Thomas Markushewski

**JUDGE KAMALJIT SINGH GAREWAL**, Presiding.

**Synopsis**

1. The appointment of the Appellant, Sabah Basem Doleh (Doleh), was terminated under Article 9.1 of the Regulations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) after she was found to have changed the medical records of a patient. The patient later died but her death was unrelated to Doleh's act. The termination order though legally passed was disproportionately harsh. Doleh is to be re-instated in service.

**Facts and Procedure**

2. UNRWA employed Doleh, a Jordanian national, as Medical Officer "B". Her appointment was a fixed-term one at Suf Camp Health Centre from 22 April 1997 and was subsequently extended for varying durations. At the relevant time, Doleh was working as Medical Officer "B" at the Marka Camp Health Centre.

3. On 27 December 2005 a second-time pregnant woman patient named Tahrir Khalil unfortunately died. Somehow in the entire record the date of death has been incorrectly mentioned as 7 January 2006. Be that as it may, death was not reported for many weeks.

4. When the patient's death finally came to light, a Fact Finding Committee (FFC) was constituted by the Officer-in-Charge, UNRWA Operations, Jordan, on 18 April 2006. This Committee consisted of three members. It was headed by Mousa Bashir, Deputy Chief, Field Health Programme. The other members were Ali Khader, Reproductive Health Officer, and Ismail Saleh, Area Officer. The Committee was asked "to look into this matter with a view to establishing the facts".

5. The FFC examined three nurses, a midwife, Doleh, and a senior medical officer. FFC adopted its unanimous report on 8 May 2006, finding that there were obvious changes introduced in the medical records either in order to correct oversight, or due to carelessness or lack of accuracy:

While others were intentionally made to cover certain defects in performance...the treating medical officer doesn't document in the record any data about her treatment with insulin but she gave her treatment for hypertension ... The occurrence of the tragic maternal death was independent

from these defects detected in service provision. It is most probably linked to the nature of DM [diabetes mellitus] type I and the dose of insulin administered which caused long standing hypoglycemic coma and death as per hospital report... Dr. Dolleh [sic] admitted that she did many of the changes noticed in the maternal health record and the ante-natal record but failed to give convincing and acceptable justification for her practice by stating unacceptable reasons. This practice revealed negligence [and] carelessness.

6. Subsequently, on 28 May 2006, Mousa Bashir, FFC Chairperson, submitted a second report by himself after conducting further interviews. The report was not signed by the other two members of the FFC. In the report, Mousa Bashir also recorded as one of his conclusions that “Dr. Sabah Dowleh [sic] dealt with the health records of this case in a way different from her practice with all other files reviewed, and she failed to give a convincing justification for this issue”. It is important to record that neither report found that Doleh was responsible for the death of Tahrir Khalil.

7. The two reports were examined by Chief, Field Health Programme, who addressed a memorandum to the UNRWA Director on 4 June 2006 sending the reports with his comments and recommendations for remedial action against Doleh “to terminate the service of both Dr. S. Doleh and Midwife Ms. Maqarneh for forging the information and changing the data on the Ante Natal Record and Maternal Health Record”.

8. On 22 June 2006, the UNRWA Director invoked the provisions of UNRWA Area Staff Regulation 9.1, UNRWA Area Staff Rule 109.1, and ordered termination of services of Doleh, with immediate effect, on the basis that Doleh was involved in forging the information and changing the data of ante-natal and maternal health records. This, according to the decision-maker, constituted serious misconduct and reflected carelessness in dealing with the case.

9. Doleh’s request for review of the above decision was dismissed on 5 July 2006. She then filed an appeal before the UNRWA Joint Appeals Board (JAB). Various pleadings were exchanged between Doleh and the UNRWA Administration. On the basis of FFC’s report of 8 May 2006, the JAB found that Doleh had made changes in the Maternal Records at Marka Health Centre, but that there was no evidence showing that Doleh made those changes before or after the maternal death. The JAB also found that the supplementary report of 28 May 2006 was irregular as it was not signed by the other members of the FFC. The JAB therefore concluded that, although the facts upon which the impugned decision was based had been established, yet in light of certain findings of the FFC, the decision to terminate Doleh’s services was disproportionate.

10. The JAB's report was reviewed by the Commissioner-General, who notified Doleh on 28 May 2008 that "after carefully weighing the material facts and relevant regulations, I have decided to reject the recommendation of the JAB and dismiss your appeal, upholding the termination, in the interests of the Agency".

Doleh presented her appeal before the former United Nations Administrative Tribunal on 24 September 2008 but the appeal was returned to her as it did not fulfill certain formal requirements. She was advised to re-file her appeal by 29 May 2009. The appeal was in fact re-filed on 27 May 2009. The case was subsequently transferred to the United Nations Appeals Tribunal following the abolition of the Administrative Tribunal at the end of 2009.

### **Submissions**

#### **Doleh's Appeal**

12. Doleh has sought judicial review of the administrative action taken against her and asked to be re-instated to her post. She also sought forms of ancillary relief. Doleh's case is that after the impugned decision of 22 June 2006 had been communicated to her, she filed an appeal before the JAB, which unanimously recommended to the Commissioner-General that the decision to terminate her services be reviewed. However, the Commissioner-General rejected the JAB's recommendation and upheld the termination order. Doleh concedes that she had made corrections due to double-checking of the blood pressure of the deceased during her first and last visit, but she had no more access to the deceased's file after her death. Doleh sought to bolster her arguments by submitting that the JAB report was in her favour.

#### **UNRWA's Answer**

13. UNRWA claims that the appeal being time-barred. In the alternative, argues that under UNRWA Area Staff Regulation 9.1, the Commissioner-General enjoys broad discretionary powers, though they are not unfettered and cannot be exercised arbitrarily or capriciously, or be motivated by prejudice or extraneous factors. When a staff member seeks to challenge the decision of the Administration on the basis of prejudice, improper motive, or extraneous factors, the burden of proof is on him or her to adduce convincing evidence. In the present case Doleh has failed to establish any factor which would vitiate the decision of termination.

14. UNRWA recalls that Doleh was not accused of, or investigated for, causing the maternal death of a patient. However, the decision to terminate her services was based on identified deficiencies in patient management and negligent record keeping. The decision was performance based and did not constitute a disciplinary measure. Doleh had been careless in the performance of her duties and had changed the patient's medical records to cover up certain defects in her poor patient management. UNRWA acknowledges that while the death was caused by factors other than Doleh's flawed performance, her acts had posed a risk to the health of pregnant women treated by the Agency's Health Programme.

#### **Issues**

15. The issues which arise in this appeal are: firstly, whether the appeal is time-barred and therefore not receivable; secondly, whether the FFC's findings were flawed; thirdly, whether the Commissioner-General erred in rejecting the JAB's recommendation; and lastly, whether the Commissioner-General erred in exercising her discretion in upholding Doleh's termination.

#### **Considerations**

16. We hold that the appeal was receivable as it was filed within the time granted for re-filing. We fail to understand why this objection was at all taken by UNRWA. The appeal was originally filed on 24 September 2008, but was returned to Doleh for re-filing by 29 May 2009. Doleh re-filed the appeal on 27 May 2009. Therefore, UNRWA's plea that the filing of the appeal, which was lodged with the former Administrative Tribunal on 27 May 2009, constituted a delay of nearly eight months is baseless. It was UNRWA's duty to check when the appeal was first filed, when it was returned for re-filing, and whether it was re-filed within the time granted. We find that it is fairly common for the Administration to raise pleas of appeals being time-barred without verifying the facts. This practice deserves to be deprecated in the strongest possible terms.

17. We shall now proceed to decide the questions regarding the validity of the decision of termination. The decision was said to be based on the UNRWA Area Staff Regulation 9.1 and the UNRWA Area Staff Rule 109.1, which are reproduced below:

Regulation 9.1

The Commissioner-General may at any time terminate the appointment of any staff member, if, in his opinion, such action would be in the interest of the Agency.

Rule 109.1: Termination

1. Termination is a separation initiated by the Agency under staff regulation 9.1, by giving to a staff member a written notice of termination as required under staff regulation 9.3; but provided that a staff member's probationary appointment may be terminated without advance notice at any time prior to its written confirmation.

2. Staff members shall continue to perform their duties during the period of notice of termination, unless they are on authorized leave of absence, or have been released by the Commissioner-General from such duties.

18. The decision taken by the Director and affirmed by the Commissioner-General was based on the FFC reports and the JAB report. This was the only instance of misconduct established against Doleh. No reference was made to the general performance of Doleh, to her annual reports, to her work appraisals, or such other material which should have been seen before services were terminated "in the interest of the Agency".

19. This Court is fully empowered to undertake judicial review of an administrative action. Lord Diplock in *Council of Civil Service Unions and Others v. Minister for Civil Service* [1985] AC 374 at 408 said:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

20. UNRWA's decision is legal, rational, procedurally proper and, therefore, not covered by any of the above grounds for judicial review. However, this is an exceptional case where the doctrine of proportionality should be invoked. With due deference to the Commissioner-General, the decision to terminate Doleh's services is altogether disproportionate. The decision is more drastic than necessary. It is like taking a

sledgehammer to crack a nut. Decision-makers enjoy a wide discretionary area of judgment. Into this area a court applying the test of proportionality will never intrude. We are not undertaking a merits review of Doleh's case. We have shown due deference to the decision taken by UNRWA, but we strongly feel that the decision is, on the facts of the case, disproportionate. An innocuous act of indiscretion shall leave a huge impact on the reputation and livelihood of Doleh, if the decision is not reversed.

21. Under the wide power granted by Area Staff Regulation 9.1, inefficient staff members, or persons who are corrupt and do not possess the required high level of integrity, or are simply dead wood, must be sent home. But Doleh's case does not fall in any of the above categories.

22. The changes in the records that were made by Doleh showed that she had originally not reflected that the patient suffered from DM type I and hypertension. The deceased is stated to have died of a hypoglycemic shock, a condition of dangerously low levels of blood sugar. The evidence is that the deceased received an overdose of insulin. Blood tests had revealed DM type I after which the dose of insulin was determined but not properly monitored, leading to overdose. This aspect was not explored by the FFC. No autopsy was conducted. The Medical Officers who treated the patient or who fixed the insulin dose were not examined by the FFC. Doleh was never involved in the actual treatment of the deceased; she was not the one who had prescribed insulin which caused the death. She had merely made some changes in the records which had no connection with the death of Tahrir Khalil.

23. There are substantial reasons in this case to hold that the decision to terminate Doleh's service under Regulation 9.1 was disproportionate.

#### **Judgment**

24. For the foregoing reasons, the decision of the Commissioner-General is set aside and Doleh is re-instated in service. She should be warned to be careful in the future. An entry shall be made in her service record about the warning given to her. Furthermore, under Article 9(1)(a) of the Statute of the United Nations Appeals Tribunal, UNRWA may elect to pay as an alternative to the specific performance ordered, compensation

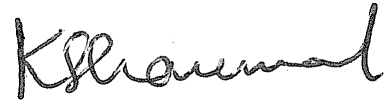
equivalent to two years net base pay. The appeal is allowed in the above terms, and all other forms of relief are denied.



**THE UNITED NATIONS APPEALS TRIBUNAL**

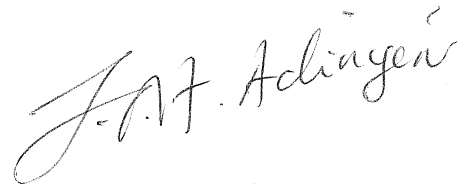
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Case No. 2010-030



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Judge Garewal, Presiding



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Judge Adinyira



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Judge Boyko

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.



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Weicheng Lin, Registrar, UNAT