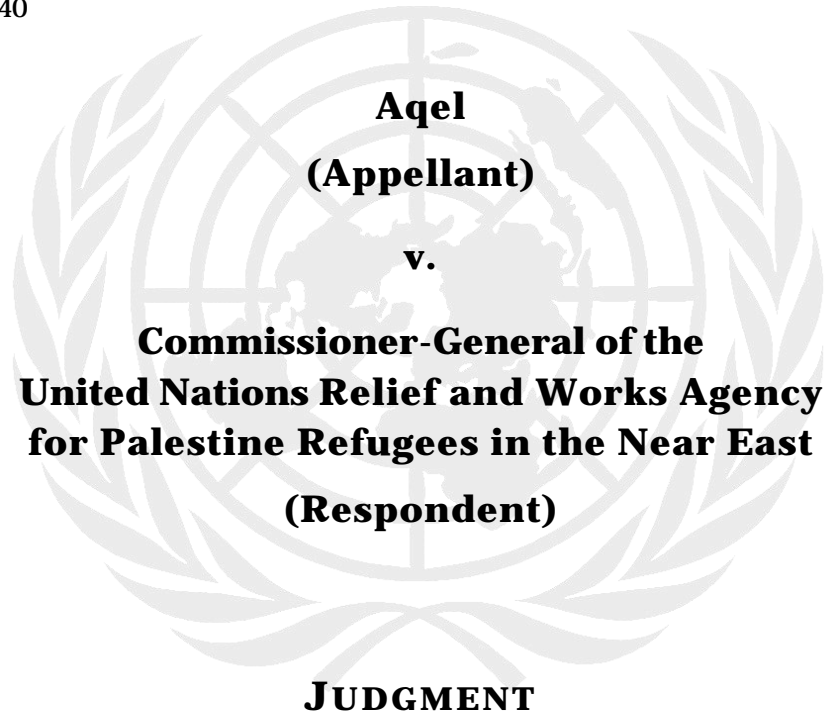




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-040



Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Mark P. Painter

Judgment No.: 2010-UNAT-040

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: W. Thomas Markuszewski

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. This is a disciplinary case. Jihad Badr Ibrahim Aqel (Aqel) appealed the administrative decision to terminate his appointment for misconduct. This Tribunal finds that the appeal is not time-barred. Further, this Tribunal finds that the disciplinary measure was adopted following due process, was consistent with the evidence of misconduct and was proportionate to the misconduct. Accordingly, the appeal is dismissed.

Facts and Procedure

2. Aqel joined the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as a dental surgeon in September 1996. He was working at the Zarqa Health Centre when his service was terminated on 3 June 2003 for misconduct.

3. The alleged misconduct took place at the Zarqa Health Centre on 28 August 2002. Around noon on that day, Aqel received a 17-year old female patient for a dental consultation. No nurse was present in the treatment room. The door was closed and the curtains were either closed, according to the victim, or half-closed, according to Aqel. Aqel explained that the windows of the treatment room were open due to the summer heat, and all patients had to go down a corridor that passed the clinic windows. The victim, who was seen leaving the treatment room weeping, went to Bayyari, Medical Officer at the Health Centre. The victim said to Bayyari that Aqel had molested her. Bayyari took the victim to the office of Yousef Shahin, Senior Medical Officer at the Health Centre. Shahin asked the Senior Staff Nurse to sit with the victim in private and hear her story. Later that day, the victim made a signed statement in Arabic in which she accused Aqel of touching her breasts, kissing or attempting to kiss her, forcing her to touch his exposed genitals, touching or attempting to touch the private parts of her body, and kissing or attempting to kiss her again when she was leaving the treating room. It should be noted that the victim had visited Aqel at the Health Centre on two previous occasions.

4. On 29 August 2002, Aqel was suspended from duty without pay pending further investigation. On 1 September 2002, a fact-finding committee (FFC) was established. During its investigation the FFC interviewed 14 individuals, including the victim and Aqel.

The FFC explored different issues including the relationship between Aqel and the victim, the possibility of blackmail by the victim, the credibility of the victim and Aqel, and similar accusations made in the past against Aqel. In its report of 13 October 2002, the FFC found that “(a) There are no eye-witnesses who can prove or disprove the claimed incident. (b) There are a considerable number of indications that the claimed incident did take place, albeit undecisive indications.”

5. The FFC conducted additional interviews on 12 March 2003 with three staff members of the Zarqa Health Centre. On 14 and 18 May 2003, the Officer-in-Charge (OIC) of UNRWA Operations, Jordan, interviewed Aqel.

6. On 3 June 2003, the OIC, UNRWA Operations, Jordan, informed Aqel of the decision to terminate his appointment, effective from the date of his suspension from duty without pay, on the grounds that he had molested a young female patient, violated a standing instruction to treat female patients only in the presence of a nurse, given inconsistent and misleading statements to the FFC, and made untrue statements regarding the payment of money to the family of a victim in a similar incident in 1999. Aqel requested reconsideration of the termination decision, but his request was rejected on 16 June 2003.

7. On 10 July 2003, Aqel appealed to the UNRWA Joint Appeals Board (JAB) from the termination decision. But the JAB did not complete its work until more than three and a half years later. In a report to the Commissioner-General dated 19 April 2007, the JAB unanimously recommended that the termination decision be reviewed. The JAB noted that the FFC did not find substantive evidence against Aqel, that the termination decision was not based on the victim’s allegations but on Aqel “not telling the truth about a 1999 incident, and not insuring the presence of a female nurse while treating a patient”, and that the nurse, who was supposed to stay with Aqel while he was treating the victim, had left with the permission of the Senior Medical Officer. The JAB did not accept the victim’s allegations because Aqel had seen her before, the door to the treatment room was unlocked, and Aqel knew that the victim’s sister was next to the door. The JAB noted the contradiction between the victim’s allegation and the nurse’s statement regarding the circumstances in which the nurse left the treatment room. The JAB believed that the FFC “was only interested in bringing anything against [Aqel], rather than revealing the truth”.

8. By letter dated 4 September 2007, the Commissioner-General advised Aqel of her decision not to accept the JAB's unanimous recommendation and to dismiss his appeal. She stated that the FFC had "clear and convincing" evidence to support its findings that Aqel had sexually molested the victim, violated the instructions regarding the treatment of female patients only in the presence of a nurse, and misled the FFC with false statements. On 16 October 2007, Aqel's sister-in-law acknowledged receipt of the Commissioner-General's letter.

9. On 13 January 2008, Aqel filed an application with the former Administrative Tribunal. By letter dated 31 January 2008, the Executive Secretary of the former Administrative Tribunal returned the application to Aqel for refileing. It appears from the case dossier that Aqel did not receive the letter from the Executive Secretary until 7 July 2008. On 4 August 2008, the former Administrative Tribunal received an application in Arabic from Aqel. Aqel's submission was again returned to him for correction and refileing no later than 30 June 2009. The Secretariat of the former Administrative Tribunal received Aqel's corrected application on 29 June 2009. Aqel's application was sent to UNRWA on 31 December 2009. The Commissioner-General was granted a two-week extension of time to file an answer to 14 April 2010, and subsequently filed the answer on 2 April 2010.

Submissions

Aqel's Appeal

10. Aqel submits that the termination decision was "wrongful and unjust", and refers to factual issues concerning the alleged misconduct. As no nurse was appointed to the dental clinic despite his repeated requests, Aqel should not be blamed for contravening the UNRWA rule that prohibits a male doctor from treating female patients in the absence of a nurse. Aqel had repeatedly attempted to refuse to treat female patients in such situations.

11. The surreptitious entry of the clerk, Abir, into the clinic and her stay for three minutes proves that the clinic door was open, contrary to the victim's assertion, and refutes the assertion of the victim that Aqel was exposing himself to her. The fact that the clerk noticed nothing out of the ordinary affirms his innocence.

12. The victim was not alone in the clinic. The centre was full of patients visiting the various departments. The victim was not the last patient Aqel treated that day. The victim did not make her allegations against Aqel until 40 minutes after the alleged incident. This indicates bad faith on her part and instigation on the part of some individual. The difficult economic circumstances facing the victim's family may have prompted her to bring a malicious complaint against Aqel.

13. After he was suspended from duty, Aqel's father-in-law volunteered as a mediator in an attempt to settle the matter in accordance with the normal practice in an Arab society, without Aqel asking him.

14. Aqel submits that the primary goal of the FFC was to establish his guilt and not the truth. It did not find material evidence against him, only oral allegations. Aqel argues that the JAB established his innocence and its recommendations should be reconsidered.

15. Aqel relies upon a conflict between the statement of the victim and that of the nurse with respect to the latter's departure. The victim claimed that Aqel had asked the nurse to leave the clinic, whereas the nurse stated that she had left with the permission of the Senior Medical Officer.

16. Aqel requests reinstatement, a written apology from the UNRWA Administration and USD 10 million in compensation for the distress that he and his family have suffered and his lost dignity.

Commissioner-General's Answer

17. The Commissioner-General submits that Aqel's appeal is time-barred. Aqel, through his sister-in-law, received the Commissioner-General's decision on 16 October 2007. Aqel was required to file his appeal within 90 days calculated from the date of receipt of the contested decision, that is, by 14 January 2008. The Secretariat of the former Administrative Tribunal did not receive Aqel's application until 4 August 2008, nearly seven months late. As Aqel failed to provide any explanation for his delay in lodging the application, Aqel's appeal should be declared non-receivable.

18. In the alternative, it is submitted that the Commissioner-General did not err as a matter of law in dismissing Aqel's appeal to the JAB. In disciplinary matters, the

Commissioner-General is accorded broad authority that this Tribunal should not normally interfere with unless it is satisfied that the decision was not supported by the facts; was exercised arbitrarily or capriciously; was motivated by prejudice or other extraordinary factors; was flawed by procedural irregularity or error of law; or was so disproportionate or unwarranted as to amount to an injustice.

19. The Commissioner-General submits that the facts on which the termination decision was based were sufficiently established by the FFC. While direct evidence was not available - and seldom is in cases of sexual harassment, exploitation or abuse - proof may be discerned by means of circumstantial evidence, and sufficient supporting indirect or circumstantial evidence should be recognized by the Appeals Tribunal. The FFC conducted an exhaustive investigation over the course of a month, interviewed 14 witnesses, including Aqel four times, and conducted additional interviews with three other witnesses.

20. In rejecting the JAB's conclusions, the Commissioner-General considered the JAB's substituted findings of fact to be flawed. It is not for the JAB or the Appeals Tribunal to determine the facts, but rather to consider whether the facts supported the decision taken. It was within the discretion of the Commissioner-General to reject the JAB's flawed conclusions.

21. Aqel has failed to present any evidence of prejudice, improper motivation, procedural irregularity, or error of law in connection with the contested decision. The Commissioner-General submits that the decision was taken with objectivity and thoroughness, after Aqel had been made fully aware of the allegations and evidence against him, and accorded opportunities to rebut those allegations and to produce evidence in his own defence.

22. The Commissioner-General submits that the disciplinary sanction of termination of service was proportionate to the seriousness of Aqel's misconduct. Sexual molestation of a young girl by a person in a position of power such as Aqel is a serious offence, and this misconduct was compounded by Aqel's attempt to conceal his conduct by intentionally misleading the FFC and providing false statements in the course of the FFC investigation. Moreover, Aqel's failure to comply with UNRWA's standing instruction regarding the treatment of female patients is a serious violation.

Considerations

23. The appeal should be regarded as timely because the initial submission of Aqel in Arabic was received within the prescribed time limit.

24. However, on the merits, the appeal must be denied as Aqel has failed to substantiate his claim. Accordingly, the contested decision is appropriate and must be confirmed.

25. Indeed, the outcome of this appeal depends on whether one agrees with the reasoning of the FFC, as reflected in the decision of the Commissioner-General, or the recommendation of the JAB.

26. In the opinion of this Tribunal, the facts supporting the termination decision were properly established by the FFC, which acted in an appropriate, careful, serious, and objective manner, affording due process to Aqel and the other persons interviewed. It is clear from an objective and dispassionate reading of the statements taken that they were untainted by any bias. Therefore, the claim that the FFC failed to act in the interest of the truth or was only interested in finding Aqel guilty is without merit. On the contrary, the detailed interviews and the substantiated findings of the FFC show that it acted in an objective and responsible manner in conducting its investigation and assessing the charges.

27. In addition to the contents of the statements, there has emerged clear and convincing evidence supporting a finding of misconduct which has not been successfully rebutted by Aqel. For example, as it has not been disputed that Aqel treated a patient without a nurse present, it is immaterial whether the nurse left at his request or upon permission from another senior official. The important thing is that there was misconduct and this fact alone is a sufficient basis for the decision.

28. Aqel was fully aware of the rule that female patients should be treated in the presence of a nurse. He took the risk of not complying with that rule, the specific purpose of which is to prevent situations such as the current one: incidents of inappropriate conduct, with conflicting claims.

29. His claim that there was no nurse at the clinic (which is not supported by the statements, as, while the nurse had other functions, she was also assigned to the clinic) is not valid. Nor has his claim that he repeatedly asked for a nurse to be assigned to the clinic been

proved. None of these contentions provide a sound reason for violating the aforementioned rule.

30. It is irrelevant that Aqel had treated the patient on two previous occasions without any problems, as that evidence is not clear enough to allow one to untangle the competing claims. Be that as it may, whether the doors and curtains were completely closed, ajar, or partially drawn, the important thing is that the incident occurred within the confines of a doctor's office, between a young patient of 17 years of age and a practitioner twice her age, in a doctor-patient relationship of trust, which is a typical situation in cases of sexual harassment.

31. Contrary to Aqel's contention, the investigation has not uncovered evidence to attribute any spurious claims to the victim. Poverty alone does not constitute such grounds and it is important to note that the victim and her family (who have an impeccable reputation, as the FFC was able to ascertain) rejected offers of financial compensation for them to drop the charges.

32. Aqel's claims that he was unaware of his father-in-law's attempt to mediate a settlement of the matter, and that he had nothing to do with the efforts to identify the victim, locate her family, or the attempts made when the investigation got under way to have the case dismissed, are not plausible.

33. Aqel's entire statement is full of hesitations, inconsistencies, and falsehoods that, read together with the other evidence, suggest that the events occurred as recounted by the FFC and reviewed by the Commissioner-General. Nor should it be forgotten that some years previously, Aqel encountered a similar problem that was settled through mediation. The direct and indirect evidence gathered support the factual findings that form the basis of the contested decision on the balance of probabilities.

34. Therefore, the Appeals Tribunal does not endorse the JAB recommendation which, for all intents and purposes, reads like a plea in defence of Aqel, going as far as asserting that the JAB was satisfied that the case against Aqel had been fabricated. Consequently, in rejecting the recommendation of the JAB, the Commissioner-General not only acted within her discretionary powers but also relied on the investigation conducted by the FFC.

35. Having established misconduct and the seriousness of the incident, the Appeals Tribunal cannot review the level of sanction imposed. Such a decision, which falls within the remit of the Commissioner-General, can only be reviewed by the Appeals Tribunal in cases of obvious absurdity or flagrant arbitrariness, which has not been established.

Judgment

36. In view of the foregoing, the Appeals Tribunal dismisses the appeal in its entirety and affirms the contested decision.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 19th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal