



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/047/
JAB/2008/091
Judgment No.: UNDT/2009/024
Date: 30 September 2009
Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

KODA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON PRODUCTION OF
DOCUMENTS**

Counsel for Applicant:
George Irving

Counsel for Respondent:
Susan Maddox, ALU

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The applicant was recruited as a senior manager in an office operated by the United Nations Information Centre. After some months complaints were made about her conduct by members of staff. A panel was constituted by the relevant manager under ST/AI/371 (the disciplinary process) to inquire into those complaints. In due course the panel submitted a confidential report in which the applicant was cleared of misconduct but adverse findings were made concerning what were called “management deficiencies”, accompanied by a number of recommendations as to behaviour that the applicant should be instructed to adopt. Amongst other things, a recommendation was also made as to conditions that should be attached to the extension of her contract. This report was never shown to the applicant for her to be given an opportunity to respond. The relevant USG in a letter to the applicant appears to have accepted the criticisms at face value, leveled them at the Applicant, stated his requirements as to her future management and expressly took the criticisms into account in dealing with the prospects for a future contract. Again she was not given any opportunity for a response nor was she, despite repeated requests, provided with a copy of the report which had had such a devastating consequence for her professional standing.

2. There is a live question whether the panel was properly constituted, since many of the “complaints” did not and could not amount to conduct warranting a disciplinary measure, and whether it had any power to make recommendations not related to misconduct. The applicant complained also about procedural unfairness and being denied due process. She raised questions of apprehended and actual bias. The report (which I have read – see below) exhibits several apparent and potentially serious shortcomings.

3. Sometime after delivery of the panel report, an audit requested by the applicant of alleged financial irregularities was conducted. The audit report, on the

face of it, was less than a thorough investigation of the issues raised by the Applicant, but it contained the panel's criticisms of her competence, with the consequence that what was hitherto a confidential matter became public. Although the applicant was given an opportunity to comment on the audit report, this was done in such a way, it is alleged, as to deny her the opportunity to comment on the adverse panel findings.

4. There are a number of other attacks made by the applicant concerning other managerial conduct towards her but it is not necessary to refer to those for present purposes.

5. The applicant resigned shortly before her contract expired, claiming, in effect, that she had been constructively dismissed.

The production of documents

6. Article 18 of the Tribunal's Rules of Procedure deals with evidence. Art. 18.2 empowers the Tribunal to order production of evidence for either party at any time and require any person to disclose any document which appears to the Tribunal to be necessary for a fair and expeditious disposal of the proceeding. Art. 18.3 permits a party to request the Tribunal to order production of evidence and Art. 18.4 empowers the Tribunal to take steps to preserve confidentiality where that is warranted "by security interests or other exceptional circumstances".

7. Whether the staff member is entitled to production of a document by virtue of some independent legal right, eg under a Staff Rule or Administrative Instruction is irrelevant. If there were such an entitlement, he or she would not need to request the Tribunal to order production and could simply rely on the legal right. The purpose of the RoP is to facilitate a fair trial of the issues between the parties and for that purpose to require them to produce, amongst other things, documents that might assist a fair trial. Such a power is typically found in legal tribunals of all kinds charged with the duty of determining disputes and, in principle, it cannot depend upon any legal right that a party might have outside the tribunal to obtain possession.

The submission made on behalf of the Secretary-General in this respect is therefore completely misconceived.

8. The test for requiring production of documents is undemanding. It is clear that a document that is relevant to any fact in issue must be produced. Sometimes the party seeking production will not know its contents though it appears to belong to a class of documents likely to be relevant. In such a case it will very likely be “fair” to require production. In cases of sensitivity it may be that production in the first instance is made to the Tribunal and the judge order access to be given or refused after he or she has inspected the document. A document might disclose matters that are embarrassing to third parties or invade their privacy and a Judge might well wish to ensure that fairness indeed required production; in some cases a document might only be partly forensically useful and a Judge might wish to give access only to that part. These are only examples of the ways in which a Judge might approach the question of access. However, if the document is one that fairness requires to be produced, confidentiality will only be preserved in “exceptional circumstances”.

9. Generally speaking, in my view, any document which is sought for a legitimate forensic purpose will be required to be produced. Such a purpose will be demonstrated where there is a reasonable possibility that it will contain material relevant to the issues in the case in the sense of casting light on them or assisting, as a matter of reason, in their determination. The link can be indirect in the sense of leading to relevant information or being potentially useful to test credit or reliability. It is not essential that the document itself be admissible. Admissibility or direct relevance are not criteria specified by the RoP: the question is fairness and expedition. As a general rule, in my view, the Tribunal should lean in favour of the discovery rather than the concealment of truth.

10. At a Directions hearing I ordered the respondent to produce to the Tribunal the panel’s report and notes made at its hearing, reserving the question of access for

later decision, and directing the parties make written submission in respect of the objection to access. I have considered the report and its annexures carefully for the purposes of this judgment. The notes have not yet been filed and this judgment is confined to whether the applicant should have access to the report. I will deal with access to the notes when they have been filed.

The Respondent's objection

11. The principal objection to access proffered by the respondent is that the applicant is not entitled under the Staff Regulations, Rules or administrative issuances to receive a copy of the Report. The respondent also points to the need to maintain harmonious working relationships which might be adversely affected by the disclosure of complaints of harassment and the like. However, since the applicant has left the service of the organization, the respondent has agreed, without prejudice, that access to the report can be given to the applicant subject to arrangement – as I understand it by way of confidentiality undertakings – to protect the interests of staff members.

12. The Respondent also argues that, there being a preliminary question of time-bar, it is premature to provide disclosure and that the question of access should await determination of the time-bar point.

The time-bar issue

13. On 10 May 2007 the applicant was informed of the outcome of the panel's enquiry: she was cleared of misconduct but adverse findings were made of her managerial competence.

14. The audit report to which I have referred was published in March 2008. On 26 May 2008 the Applicant sought a review of the "outcome" of the preliminary investigation. On 23 July 2008 the then Officer-in-Charge of the Administrative Law Unit responded to the Applicant's request. The OIC pointed out that the request did

not comply with the two month time limit but undertook the review nonetheless. The applicant was informed that the response of the Executive Officer of the Department of Public Information, attached to the OIC's letter appropriately answered the issues raised by the applicant. In terms, this appears to have amounted to a waiver of the two months time limit to which the OIC had earlier referred, although it appears that only the Joint Appeals Board constituted for the appeal can do so under Staff Rule 111.2(f). It may be of course that consent to waiver by the Administration is an exceptional circumstance; certainly it is very rare. The OIC went on to inform the applicant that if she were not satisfied with the review, she could appeal "against the answer within one month of receipt of this letter pursuant to staff rule 111.2(a)(i)". This information will be seen, confirms the position taken by the Administration not to take up the objection that the applicant's request for review was out of time. An incomplete statement of appeal was submitted on 22 August 2008, complying with the time limit in Staff Rule 111.2(a)(i).

15. The Administration has now changed its ground and wishes to contend that the appeal is not receivable having regard to time when the request for review was made. The status of this objection is uncertain for several reasons, the most obvious of which is that the applicant has acted in reliance on the waiver stated in the letter of review and the invitation to appeal that outcome providing she did so within a month. Having invited that reliance it is a live question whether the Administration is now estopped from making its objection. This question depends on legal issues of some difficulty, including whether staff Rule 111.2(f) is jurisdictional or procedural in character. At all events, the applicant may be entitled to seek waiver on the ground of exceptional circumstances, though the nature of the Tribunal's jurisdiction in this regard is somewhat unclear, since the power to waive is reposed in the now non-existent Joint Appeals Board. The strength of the Administration's submission on the time-bar point is very much less than overwhelming.

16. It is worth noting that another possible complication in this case is that it may be that the applicant will seek to identify additional decisions connected with those already identified in her complete statement of appeal, but not the subject of the letter of review. I have ordered that the applicant is to clarify this aspect of her case in due course.

17. I emphasize that I have not determined or even considered, except tentatively for the purposes of this judgment, whether the applicant's case is time barred. The purpose of this discussion is to consider whether, in the circumstances, access to the preliminary investigation report should be given to the applicant.

Conclusion

18. In the result, I consider that access to the panel's report should be given, subject to the applicant making an appropriate confidentiality undertaking. In my view it is fair and expeditious to do so. I have already required the applicant to submit a list of the allegations of fact relied on in support of her application. The material will, in my view, inform such a document and permit a more comprehensive definition of issues. It will also be useful in defining the legal issues raised by the application. It provides an important context for considering the time-bar question and the discretionary factors which it raises.

Order

19. The applicant and respondent are to agree within 7 days on a mutually acceptable written undertaking as to confidentiality, on provision of which the respondent is to provide a copy of the investigation report together with all notes of the proceedings to the applicant's counsel within three days.

(Signed)

Judge Michael Adams

Dated this 30th day of September 2009

Entered in the Register on this 30th day of September 2009

(Signed)

Hafida Lahiouel, Registrar, New York