



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/03/
UNAT/1565
Judgment No.: UNDT/2010/209
Date: 03 December 2010
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

OGÉ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
François Lorient

Counsel for Respondent:
David Browne, ALS/OHRM, UN Secretariat

Introduction

1. By decision of the Secretary-General dated 16 March 2005, the Applicant was summarily dismissed from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), for serious misconduct and separated from the Organization on 18 March 2005.

2. The Applicant appealed his dismissal before the Joint Disciplinary Committee (“JDC”) and requested to be physically present with his counsel at the hearing in Geneva.

3. By letter dated 25 October 2005, Counsel for the Applicant requested the Administration to pay the travel expenses of the Applicant and himself from New York to Geneva in order for them to attend the hearing scheduled in November 2005. On 8 November 2005, the then Under-Secretary-General (“USG”) for Management denied his request on the ground that he had not received a formal request from the JDC as provided in the Rules of Procedure of the Committee. He further stressed that the Applicant and his counsel could appear before the JDC via video-conference from the Headquarters. Subsequently, at the request of the Counsel for the Applicant the JDC urged the Respondent by a memorandum dated 14 November 2005 to bear their travel expenses. The USG denied the JDC’s request on 15 November 2005 and reiterated that the Applicant and his counsel could present their case via video-conferencing from the Headquarters. The Applicant and his counsel undertook their travel without any official communication authorizing their travel and received notification of the USG’s negative decision upon their arrival in Geneva.

4. On 8 January 2006, the Applicant requested the Secretary-General to re-examine the USG’s decision of 15 November 2005 refusing to pay travel expenses and claimed reimbursement of his expenses in the amount of USD4,020. He subsequently filed an appeal with the Joint Appeals Board (“JAB”), which unanimously recommended that payment be made to the Applicant. However, the Secretary-General decided not to follow the JAB’s recommendation. On 8 January 2008, the

Applicant appealed the decision of the Secretary-General before the former United Nations Administrative Tribunal. The case was transferred to the United Nations Dispute Tribunal (“UNDT”) on 1 January 2010, in accordance with the United Nations General Assembly Resolution 63/253 and ST/SGB/2009/11 on the *Transitional measures related to the introduction of the new system of administration of justice*.

5. The Applicant requests the rescission of the decision of the Secretary-General refusing the funding of the Applicant and his counsel’s travel expenses to attend the JDC hearing in November 2005. He submits that he had a legitimate expectation based upon the exchange between the USG and himself that the Organization would bear the travel and daily subsistence expenses upon request from the JDC. The Applicant therefore requests USD4,020 to cover the travel expenses of his counsel and himself, and USD5,000 for legal fees.

Employment History

6. The Applicant joined the United Nations in 1985 at the G-2 level in the Department of Conference Services, on a temporary short-term appointment. After a series of fixed-term appointments, he was granted a permanent contract in 1992. The Applicant was then deployed to MONUC in Kisangani, from the Headquarters in New York (“UNHQ”) on 23 March 2000 as a Supply Assistant at the G-4/XII level.

Facts

7. Following the Applicant’s summary dismissal, the Applicant’s counsel wrote to the Secretary-General on 28 March 2005 requesting the establishment of an Ad Hoc Disciplinary Committee, with French-speaking panel members, in MONUC-Kisangani where most of the witnesses were located.

8. On 4 May 2005, the Officer-in-charge of the Department of Management denied the Applicant’s request and proposed a change of venue from New York to Geneva

where a French-speaking JDC panel could be constituted. Counsel agreed on 16 May 2005 to the proposed change of venue.

9. On 21 October 2005, the JDC met with the parties to discuss the modalities for the hearing of the case. The parties were informed that the hearing would require conducting an audio/video conference in order to collect evidence from witnesses located in the Democratic Republic of the Congo and in New York. The Applicant insisted to be physically present with his counsel throughout the hearing in Geneva. The hearing was scheduled for late November 2005.

10. By letter dated 25 October 2005, Counsel for the Applicant wrote to the then USG for Management, Mr. Christopher Burnham, requesting the Respondent to bear the costs of travel and daily subsistence expenses for the Applicant and his counsel to attend the JDC hearing in Geneva.

11. In his reply dated 8 November 2005, the USG denied Counsel's request referring to staff rule 110.7¹ and Article 29 of the Rules of Procedure of the Geneva JDC. The USG further advised that the JDC had not requested the physical presence of the Applicant and the availability of video-conferencing facilities would assure a full and fair opportunity to have his case presented before the Panel. He finally added that this would be the means by which a representative of the Secretary-General from the Office of Human Resources Management at UNHQ and various witnesses in the Democratic Republic of the Congo would participate in the hearing.

12. On 14 November 2005, the Secretary of the JDC on behalf of the Chairperson wrote to the USG for Management, urging the Secretary-General to make the physical presence of the Applicant possible at the hearing scheduled in Geneva from 21 to 23 November 2005.

13. In a reply dated 15 November 2005, the USG denied the JDC's request, stating that the video-conferencing facilities at UNHQ would allow the Applicant a full and fair opportunity to have his case presented before the Panel. He reiterated the fact that

¹ ST/SGB/2005/1

the representative of the Secretary-General would also participate from UNHQ through the same means of communication.

14. On 18 November 2005, the Applicant and his counsel travelled to Geneva to attend the hearing and were informed upon their arrival by the Secretary of the JDC of the Respondent's decision not to bear their travel expenses. The Applicant participated in the hearing from 19 to 22 November 2005 while his counsel remained up to 23 November 2005 until all the witnesses were heard and cross-examined.

15. On 8 January 2006, the Applicant requested an administrative review of the USG's decision not to bear the cost of travel of the Applicant and his counsel in the amount of USD4,020. The Applicant then filed an appeal with the JAB in New York, requesting the JAB to recommend the reimbursement of the travel expenses in the amount of USD4,020.

Review by the Joint Appeals Board

16. The JAB considered the appeal on 10 April 2007 and adopted its report on 13 April 2007. Its considerations and conclusions were that the nature of the USG's first reply of 8 November 2005 created a legitimate "expectation" that the travel costs of the Applicant and his counsel would be covered by the Administration provided that the JDC made such a request. The Panel was of the opinion that the USG's letter of 8 November 2005 was ambiguous and if it had been his intention to reject the request for funding, he should have done so in a clearer way.

17. For the foregoing reasons, the JDC concluded that the departure of the Applicant and his counsel for Geneva on 18 November 2005 had been justified, given the fact that they had not been informed of the USG's decision and as the hearing was to commence a few days later, on 21 November 2005. Further, the Panel was of the view that it was unlikely that the Applicant and his counsel would have traveled to Geneva had they known that it was at their own expense. The Panel therefore unanimously recommended to the Secretary-General the reimbursement of the Applicant and his counsel's expenses in the amount of USD4,020.

Secretary-General's Final Decision

18. In a letter dated 20 August 2007, the new USG for Management, Ms. Alicia Bárcena, informed the Applicant that the Secretary-General did not accept the JAB's recommendation, on the ground that, based upon Article 29 of the Geneva JDC's Rules of Procedure, the former USG for Management's letter of 8 November 2005 did not create a reasonable expectation that the Secretary-General would automatically bear the Applicant's travel expenses at the JDC's request. The USG stressed that the request would be given consideration and that the Applicant had been informed of the availability of video-conferencing facilities at UNHQ allowing a full and fair opportunity to present his case before the JDC.

19. On 8 January 2008, the Applicant lodged an appeal before the former United Nations Administrative Tribunal. The case was transferred to the UNDT on 1 January 2010, in accordance with the United Nations General Assembly Resolution 63/253 and ST/SGB/2009/11 on the *Transitional measures related to the introduction of the new system of administration of justice*.

20. UNDT Proceedings

21. On 19 July 2010, the parties were directed to submit their reply to case management Order No. 135 (NBI/2010) of the Tribunal by 30 August 2010. The Applicant filed his reply on 26 August 2010 followed by the Respondent on 27 August 2010. The parties did not consider necessary to hold a hearing in this matter. The Tribunal agreed with this procedure.

Applicant's submissions

22. The Applicant moves the Tribunal to find that the Administration's position in this case was improper, vexatious, without merit and inconsistent, in violation of "Article X of the Staff Regulations", staff rule 110, Document A/62/294 entitled *Report of the Secretary-General on the Administration of justice* adopted on 23 August 2007, as well as civil and common law of obligations and contracts.

23. He submits that the Respondent's communication of 8 November 2005 held promises that his request would be satisfied at the request of the JDC. In his view, the Administration had created a legitimate expectation on the Applicant for which it should be made accountable.

24. The JDC did make such a request and it was denied by the USG on "purely arbitrary and capricious reasons". Furthermore, the Respondent's decision was taken in violation of the Applicant's due process rights, insofar as he had a right to appear in person at the hearing, particularly that his physical presence had been requested by the JDC.

25. The Applicant further submits that they had not been informed of the USG's negative decision before travelling to Geneva. He believes that the then Secretary of the JDC withheld the decision on purpose.

26. Referring to the report of the Redesign Panel on the UN system of administration of justice (A/62/294) the Applicant submits that the practice of giving staff members "little or no opportunity to present their case and answer questions in person ... is only a few degrees removed from trials in absentia" (A/61/205, para. 24)

27. The Applicant seeks compensation in the amount of USD4,020 and to award the Applicant's counsel compensation in the amount of USD5,000 for legal and representation fees on account of the frivolous and vexatious positions and procedures adopted by the Respondent.

Respondent's reply

28. The Respondent submits that the USG's letter of 8 November 2005 was not a commitment by the Administration to bear the travel expenses of the Applicant and his counsel at the request of the JDC nor did it create any reasonable expectation. The Respondent argues that it was rather a statement of the conditions to be met before such a request could be considered by the Administration. This letter also indicated that the video-conferencing facilities allowed the Applicant a full and fair opportunity

to have his case presented before the JDC. The Respondent is therefore of the view that the Applicant erroneously interpreted the spirit of the letter of 8 November 2005.

29. Additionally, the Applicant has not demonstrated the existence of a right that his travel expenses should be borne by the Administration in the name of due process. Pursuant to the provisions of former staff rule 110.7 (b), paragraph 17 of ST/AI/371 (Revised Disciplinary measures and procedures) and Article 29 of the Geneva JDC Rules of Procedure, it is not implied that the Administration shall bear the travel costs or the daily subsistence allowance of the staff member. It merely requests the Administration to authorize the staff member to be present, i.e. physically present or by any other suitable means such as video-conferencing.

30. The Respondent finally submits that the Administration could not be requested to have a former staff member physically present when such a hearing was not indispensable. Indeed, as a matter of practice, the JDC heard parties and witnesses by using means of communications such as video-conference when it was not possible or practical for them to be physically present at the hearing. In the present case the Respondent avers that the proposed video-conference would have been sufficient for the Applicant to fairly present his case before the JDC. The Respondent argues that video-conference is a reliable and efficient means for hearing oral testimony and it allows staff members and the Administration to fully and fairly present their case.

31. He further notes that the Administration had also decided to attend the hearing via video-conference. In accordance with the jurisprudence of the former UN Administrative Tribunal and under the former system of administration of justice, applicable at the time the JDC heard the case in November 2005, the Tribunal awarded costs only in “exceptional circumstances” (see Judgments No. 1323, [Anonymous] (2007) and No. 237, *Powell* (1979)). The Respondent submits that in the present case there are no exceptional circumstances.

32. In the light of the above, the Respondent submits that the Applicant has not provided any evidence that the Administration acted in a discriminatory, arbitrary, capricious or abusive manner but rather, as demonstrated by the correspondence

dated 8 and 15 November 2005, the Administration provided the Applicant with detailed reasons as to why it could not bear the travel expenses of the Applicant and his counsel. The Respondent therefore requests the Tribunal to dismiss the application in its entirety.

Considerations

33. Staff rule 110.7 (b) reads as follows:

Proceedings before the JDC shall normally be limited to the original written presentation of the case, together with brief statements and rebuttal, which may be made orally or in writing, but without delay. If the Committee considers that it requires the testimony of the staff member concerned or of other witnesses, it may, at its sole discretion, obtain such testimony by written deposition, by personal appearance before the Committee, before one of its members or before another staff member acting as a special master, or by telephone, or other means of communication

34. Staff rule 110.7 (d) provides that,

A Joint disciplinary Committee shall permit a staff member to arrange to have his or her case presented before it by counsel, at his or her own expense, at the duty station where the Committee is established

35. Paragraph 3 of Article 21 (Hearings) of the Geneva JDC Rules of Procedure²,

If a hearing is to be held both parties must be invited to attend and to participate ...

36. Article 21 further provides in its subparagraph 4 that,

If the Panel considers that it should secure the testimony of other witnesses or experts, it may at its sole discretion, obtain such testimony by (a) direct interview conducted by itself, one of its members or any other person acting as its delegate; (b) telephone or other means of communications; or (c) written interrogatory

37. With regards to the travelling of the concerned staff member to attend the hearing in person, Article 29 (Travel) provides that,

² Adopted on 1 July 2005

When the Panel considers it to be essential for the staff member to be present at a hearing, the Secretary-General shall be urged to make that presence possible

Findings

38. The Applicant was afforded a hearing in regard to the charges alleged against him. The JDC made all the arrangements for such a hearing to take place in Geneva whereas the Applicant and his counsel were based outside the location where the JDC would hold a hearing. Following this, the Applicant made the request that both he and his counsel should be physically present in Geneva for the hearing. To this end, he sent a letter dated 25 October 2005 to the USG for Management requesting that all the travel expenses be borne by the Administration. That request was turned down. The concluding paragraph of the then USG's letter to Counsel for the Applicant reads as follows:

In the absence of a request from the Geneva JDC to the Secretary-General for Mr. Ogé's and your presence in person, I am unable to accede to your request for the Organization to bear the cost of your travel expenses to Geneva

39. Unfortunately the Tribunal has to record that the language used in that last paragraph would seem to suggest that if the JDC made a request for the physical presence of the Applicant in Geneva such a request would be acceded to. Following this, the JDC did send a letter to the USG urging the Secretary-General pursuant to Article 29 of the JDC's Rules of Procedure to ensure the physical presence of the Applicant in Geneva. The JDC specifically referred to the fact that this presence would be more consonant with due process requirements in view of potential technological failings and flaws that might hamper a proper conduct of the hearing. The USG was not convinced by this request and noted in particular that the JDC had not raised any cogent reason to justify how a hearing through technological means would not satisfy the proper test of due process.

40. The Tribunal agrees with this conclusion the more so that the JDC did not indicate in clear terms that the presence of the Applicant would be essential, the word used in Rule 29. The Tribunal notes that hearings are frequently conducted through

the medium of technology. It should be emphasised that even in the context of the new justice system that came into force on 1 July 2009 it is expressly provided that hearings through such medium can and should be resorted to for the timely expedition of cases. Given the nature of the set up of the Organization and given the financial constraints that the Organization has to meet, to insist on the physical presence of parties in each and every case where a hearing is held might bring the whole Organization and the justice system to a stand-still.

41. True it is that a hearing where parties are physically present makes it easier for a panel or for a court of law to conduct its business. But this should not exclude, on a mere request by parties to be physically present at the Organization's expenses, the use of appropriate technological means. The very fundamental of a hearing is that it should respect all due process requirements, the component of which is fairness and the strict adherence of the rule of law. The Applicant has not satisfied the Tribunal in what way a hearing whereby he would have been able to present his case through appropriate technological means would have defeated his rights. By taking upon himself to travel to Geneva without getting a clear authorization from the Organization that his expenses and those of his counsel would be borne by the United Nations he took a misguided risk.

42. The argument that the letter of the USG and the request of the JDC created a legitimate expectation that the expenses would be borne is not and cannot be justified by the evidence contained on file. At no moment did any responsible officer of the Organization make any firm commitment that the expenses would be borne by the United Nations. At best what should be read in the various exchanges of correspondence is that there would be a willingness to consider the request and take a decision accordingly. The Organization did consider the request in the light of the JDC letter and came to the conclusion that the hearing by video conferencing would in no way be inimical to due process requirements.

Judgment

43. In the light of the above, the Tribunal decides to reject the application in its entirety.



Judge Vinod Boolell

Dated this 3rd day of December 2010

Entered in the Register on this 3rd day of December 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi