



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/67
Order No.: UNDT/NBI/O/2010/025
Date: 16 February 2010
Original: English

Before: Judge Boolell (Presiding)
Judge Izuako
Judge Meeran

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KASMANI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**DECISION ON THE APPLICANT'S
EX PARTE APPLICATION FOR
PROTECTIVE MEASURES FOR
WITNESSES**

Counsel for applicant:
Katya Melluish

Counsel for respondent:
ALU
Joerg Weich

The Application

1. The present application was filed on 23 December 2009, moving the court for a judicial order of protection pursuant to Article 7 of the Statute of the United Nations Dispute Tribunal (UNDT), and Articles 19 and 36 of the Rules of Procedure.
2. The Applicant is moving the court to order protective measures to ensure that his witnesses are not prejudiced, intimidated or retaliated against for testifying in the present case. It is submitted that *prima facie* there exists a real danger that the witnesses the Applicant intends to call during the trial of this matter will suffer further intimidation, harassment, and obstruction to their career development.

Background

3. The Applicant joined the United Nations on 4 June 2009, as a Procurement Assistant within the Procurement, Travel and Shipping Section in the United Nations Office at Nairobi (UNON) at the G-4 level on a 3-month fixed-term appointment against a General Temporary Assistance (GTA) post.
4. On 28 August 2009, the Applicant moved the Tribunal to suspend the implementation of an administrative decision of the Chief of the Procurement, Travel and Shipping Section (the Section/PTSS), not to renew his fixed-term appointment beyond 3 September 2009. The renewal of his contract was recommended by the staff member's immediate supervisor acting, at the time, as Officer-in-Charge (OiC) of the Section.

5. On 2 September 2009, UNDT Nairobi heard the matter. The Applicant and a witness called on his behalf were heard and cross-examined by the Respondent.
6. At the crux of the matter was the contention by the Applicant that he is being victimised because of a clash of personalities between his immediate supervisor and the Chief of Section. His immediate supervisor testified to the circumstances surrounding the Applicant's non-renewal.
7. On 3 September 2009, Judge Boolell granted the Applicant's motion and suspended the decision not to renew the Applicant. The Tribunal held that the applicant had made out a case of *prima facie* unlawfulness, urgency and irreparable damage as required by Rule 13 of the Rules of Procedure.
8. On 9 October 2009, the Applicant received an interoffice memorandum from the Under-Secretary-General for Management advising him that the Secretary-General has decided to compensate him in the amount of three months' net base salary for having detrimentally relied upon an express promise of renewal.
9. On 15 of October 2009, the Applicant was notified by UNON that he was to be separated from the United Nations as of close of business on 16 October 2009. It is worth noting that 16 October was a Friday, so that close of business in UNON is at 2pm.
10. On the morning of 16 October 2009, the Registry received an urgent application for suspension of action in respect of the administrative decision which was to be effected that afternoon. The Applicant's motion for suspension of action was also copied to the Respondent. Separately, the Applicant filed *ex parte* submissions of evidence in support of his application.

11. On 16 October 2009, the Tribunal granted the applicant's motion *without* considering the *ex parte* submissions and ordered an *interim* suspension of the decision of 15 October 2009 "until further notice."
12. The exigencies of the circumstances at the time made it necessary for the Tribunal to rule on the Applicant's motion without hearing the Respondent. It was a matter of hours between the receipt and registration of the application by the Tribunal and the end of the Applicant's contract. The urgency was compounded by the fact that, at the time, the Respondent was still being represented solely by Counsel from the Administrative Law Unit in New York.
13. On 21 October 2009, the Respondent filed its Reply to the Application for Suspension of Action.
14. On 28 October 2009, the Applicant filed his substantive application, which contained a number of *ex parte* annexes, requesting that the witnesses named therein be heard by the Tribunal *in camera*.
15. On 30 October 2009, the Registry received from the Applicant an Application for Interpretation of the order of 16 October 2009, asking the Tribunal what it meant by "until further notice" given that the Applicant's contract was due to expire on 3 November 2009. The Respondent's Reply to this Application for Interpretation was filed on 2 November 2009.
16. On 3 November 2009, the Tribunal rendered its reasoned decision on the Application for Suspension of Action Filed on 15 October 2009 and the Application for Interpretation Filed on 30 October 2009. It is important to point out that the Tribunal's decision was rendered on the basis of the *inter partes* submissions of the Parties only.

17. The Tribunal granted the Applicant's Motion for Suspension of Action; ordered the suspension of the Respondent's decision not to renew the Applicant's appointment until the *substantive application is heard* and ordered that the Respondent file his Reply to the *substantive application by 30 November 2009*. In light of the Tribunal's reasoning, the Application for Interpretation was also held to be moot.

18. Pursuant to article 10.9 of the Statute, on 3 November 2009, the President of the Tribunal issued an Order referring the present matter to a panel of three judges composed of Judge Vinod Boolell (presiding), Judge Goolam Meeran and Judge Nkemdilim Izuako.

Submissions

19. The Applicant avers that one of his witnesses has already been threatened following the hearing of the Application for Suspension of Action on 2 September 2009. The other witness the Applicant would wish to call also fears that she will be retaliated against should she testify for the Applicant.

20. The Applicant submits that *prima facie* there exists a real danger that the witnesses the Applicant intends to call during the trial of this matter will suffer further intimidation, harassment, and obstruction to their career development.

21. Against the stated circumstances facing these witnesses, the Applicant is moving the court to order that these witnesses be protected against
 - a. intimidation or threats against them, either physical or verbal, before testifying before the Tribunal;
 - b. intimidation or threats against them, either physical or verbal, after testifying before the Tribunal;
 - c. threats to the security of their employment with the United Nations; and

- d. retaliation of any sort as a result of testifying before the Tribunal, and in particular against prejudice to their career development as a result.

Should a breach of any of these orders be brought to the attention of the Tribunal, the Applicant will oversee an investigation into the issue.

- 22. The Tribunal is also being moved to order that testifying before the Dispute Tribunal amounts to a ‘protected activity’ within the scope of ST/SGB/2005/21 and that it is therefore within the remit of the Organisation’s Ethics Office to receive complaints of retaliation or threats of retaliation based on a staff member’s proposed or actual testimony before the Dispute Tribunal.

Deliberations

- 23. The present Application raises a fundamental question of what protection may be afforded to witnesses who fear retaliation for the provision of testimony before the Dispute Tribunal.

- 24. As it is, the United Nations system has in place a mechanism for the protection against retaliation for those *who report misconduct and for cooperating with duly authorised audits or investigation*.¹ The Ethics Office is charged with administering the mechanism, which function entails i) receiving complaints of retaliation or threats of retaliation ii) keeping a confidential record of all complaints received and iii) conducting a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.²

¹ ST/SGB/2005/21 – Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorised Audits or Investigations (19 December 2005).

² Section 5.2 ST/SGB/2005/21.

25. Having been promulgated in 2005, the Secretary-General's Bulletin (SGB) naturally does not make reference to the Dispute Tribunal; in other words, it expressly covers those who *report* misconduct or *cooperate* with authorized audits or investigations, but is silent in respect of those who testify before this court.

26. Whereas the SGB makes it a *duty* of staff members to report any breach of the Organisation's regulations and rules, and to cooperate with duly authorized audits and investigations,³ the internal justice mechanism is established to ensure "respect for the rights and *obligations* of staff members and the accountability of managers and staff members alike."⁴ Read together, the relevance of the Ethics Office in respect of the protection of witnesses who testify before the UNDT seems to the Tribunal to be obvious.

27. The Tribunal notes that the Statute and Rules of Procedure of the Dispute Tribunal are silent on the protective measures which may be ordered for the purposes of witness protection. The Rules do however, give the court the broad power to

at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.⁵

28. Acknowledging that there may indeed be matters of crucial importance on which the Rules are silent, Article 36 states that all matters

not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.

³ Section 1.1 and 1.2 ST/SGB/2005/21.

⁴ General Assembly Resolution 63/253 – Administration of Justice at the United Nations – 17 March 2009 (A/RES/63/253).

⁵ Article 19 Rules of Procedure

29. It cannot be disputed that a hearing of a case and all procedural and evidentiary matters must comply with the principles of a fair trial according to international norms. One of the core principles in an oral hearing is that a court of law relies on the testimony of witnesses if and when available.
30. The issue of witness protection has been raised at international level mostly in the context of criminal trials. The European Court of Human Rights has held that it is true that Article 6 of the European Convention on Human Rights does not require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of the Convention. Such interests of witnesses and victims are in principle protected by other substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled.⁶
31. In many national jurisdictions the intimidation or victimisation of witnesses either before or after they have given evidence amounts to a punishable contempt of court. Reference is made to the punishable contempt because it emphasises the importance that witnesses assume in a trial and equally the necessity to enable them to testify freely and fearlessly.
32. The protection being requested in the instant motion is very different from that usually afforded in national jurisdictions, particularly in criminal proceedings. In the latter situation, witnesses fear being identified. There is often a threat to the life or security of the witness, so that anonymity is required if the witness is to testify fearlessly.

⁶ *Doorson v Netherlands*, 1996 22 EHRR 330.

33. The fears of witnesses testifying before this Tribunal are very different. Witnesses appearing before this court will, most always, fear for their livelihood; they will fear intimidation and retaliation in the exercise of their functions, and to the very security of their jobs. In these cases, it is not the public that these witnesses will fear; rather, it is the Secretary-General or agents acting under his authority.

34. It is imperative therefore that staff members can be confident that it is safe for them to testify before the Dispute Tribunal. In the absence of such an assurance, it is most unlikely that witnesses will come forward.

35. As Adams J recently held in the case of *Wasserstrom* ,

retaliation against a staff member for the performance of his or her duty by another staff member is a violation of the retaliator's fundamental obligations towards the Organization and constitutes an abuse of power requiring a stern response if the integrity of the Organization is to be maintained.⁷

36. A staff member has the right to enjoy the protection conferred upon him by his contract of employment and by the Rules and Regulations that govern the Organisation.

37. Having considered the facts as presented in the Application, the Tribunal grants the Applicant's motion and

ORDERS that witnesses testifying before the Tribunal in the instant case not be subject to

- a. intimidation or threats, either physical or verbal, prior to or after testifying before the Tribunal;

⁷ UNDT/NY/2009/044/JAB/2008/087 - *Wasserstom v Secretary General of the United Nations*, Orders on Receivability and Production of Documents, 3 February 2010, at para. 25.

- b. threats to the security of their employment, or development of their career, with the United Nations; and
- c. retaliation of any other sort as a result of testifying before the Tribunal;

ORDERS that the Ethics Office be seized of the matter and monitor the situation for further action should there arise allegations of violation of this Order;

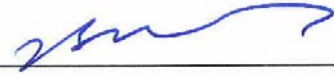
ORDERS that material submitted to the Registry *ex parte* as part of the substantive Application of 28 October 2009 be disclosed by Counsel for the Applicant **UNDER SEAL** to Counsel for the Respondent;

ORDERS that any access to the material so disclosed be strictly restricted to Counsel for both Parties; further disclosure of this material is subject to the need for Counsel to take instructions on the matters raised therein for the purposes of this litigation or as allowed by further Order of this Tribunal;

DIRECTS the Registrar to serve a copy of this Order on the Ethics Office; and

REMINDS the Parties of the seriousness of this matter so that any breach of this Order by either the Parties or the Ethics Office may trigger the application of the accountability provision in Article 10 (8) of the Statute.⁸

⁸Article 10(8) of the Statute is contained in A/RES/62/253 and provides “The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.”



Judge Boolell

Dated this 16th day of February 2010

Entered in the Register on this 16th day of February 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi