Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON THE RESPONDENT'S MOTION TO STRIKE

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. On 31 May 2011, the Applicant, a staff member of the United Nations Economic Commission for Africa ("ECA"), filed an application for suspension of action on the following decisions that had been issued by the Executive Secretary, ECA:

a) The decision not to advertise the post of Director, Office of Strategic Planning and Programme Management ("OPM"), which is due to become vacant on 1 June 2011;

b) The decision to fill the soon-to-be vacant post of Director, OPM through lateral transfer;

c) The decision to transfer a vacancy in OPM to the Regional Integration and Trade Division ("RITD");

d) The decision to advertise de novo the post of Director, RITD, given that the August 2010 selection decision in respect of that case is sub-judice before the UNDT as case No. UNDT/NBI/2011/008; and

e) The decision not to either appoint an Officer-in-Charge ("OIC") for RITD and/or issue a temporary vacancy announcement ("TVA") for the post since it takes an average of 120 days to fill a post in the Secretariat.

2. The application was served on the Respondent on 2 June 2011 with an opportunity to file a response by 6 June 2011. On 3 June 2011, the Applicant submitted a narrative in support of his application for suspension of action, which was served on the Respondent the same day. In addition to providing further elaboration on the initial application for suspension of action, this submission also amended his application to reflect the fact that an OIC had been designated for the vacant Director, RITD post by the Executive Secretary of ECA on 31 May 2011.

3. The Respondent submitted a reply to the application on 6 June 2011. On 7 June 2011, the Applicant filed additional comments on the Respondent's reply.

4. The Tribunal held an oral hearing on 8 June 2011 and at the end of the hearing, the Respondent was instructed to submit additional documents relating to the lateral transfer of the Director, RITD to the vacant post of Director, OPM and the appointment of an OIC to RITD.

5. On the same day the Applicant submitted a written response to submissions made by the Respondent's counsel during the hearing. He also submitted the terms of a settlement agreement that had been offered to him by the Management Evaluation Unit ("MEU") prior to his filing Case No. UNDT/NBI/2011/008.

6. On 9 June 2011, the following occurred:

a) The Applicant submitted additional comments and documents on the submissions made by the Respondent during the oral hearing.

b) The Respondent sent an email to the Registry requesting that the Tribunal strike the additional submissions and documents that were filed by the Applicant subsequent to the hearing. The Respondent also informed the Registry of his intention to file a formal Motion to Strike.

c) The Applicant submitted preliminary comments on the Respondent's request to strike his additional submissions and documents.

d) The Respondent filed a Motion to Strike the additional submissions and documents that were filed by the Applicant subsequent to the hearing.

e) The Applicant was given the opportunity to provide comments on the Respondent's motion to strike by 1200 hours on 10 June 2011.

7. On 10 May 2011, the Applicant submitted his comments on the motion to strike.

Respondent's submissions

8. The Respondent requests that the Tribunal immediately strike out from the record in this case: (i) all filings submitted by the Applicant on or after 8 June 2011, which includes all argumentative text contained in his emails; and (ii) all documents related to settlement negotiation between the parties.

9. In support of his motion to strike, the Respondent submits that:

a) The Rules of Procedure of the Dispute Tribunal ("the Rules of Procedure") do not provide for filings in addition to an application and a reply.

b) The Applicant has abused the judicial process by filing inappropriate submissions by email without any guidance from the Tribunal and that this has resulted in the non-expeditious disposal of the application for suspension of action;

c) The Applicant was given an opportunity by the Tribunal during the oral hearing to provide his comments on the Respondent's submissions, which he did.

d) The Applicant, who was not granted leave by the Tribunal, has proceeded to place inaccurate and misleading statements on the record;

e) The Applicant inappropriately submitted the settlement proposal from MEU, which is a confidential and privileged document; and

f) The Tribunal did not request any further assistance from the Applicant while it reviews his application for suspension of action.

Applicant's submissions

10. The Applicant requests that the motion to strike be dismissed because it lacks merit, is frivolous and is an abuse of judicial process. The Applicant submits the following in support of his request to dismiss the motion:

a) He is not a trained lawyer and as such, it is possible that he has made mistakes that a trained lawyer would not have made. He has done his utmost to act in strict conformity with the provisions of the "Information Note to Parties appearing before the United Nations Dispute Tribunal";
b) By permitting self-representation, the General Assembly implicitly admitted the possibility of errors by staff untrained in the law and in courtroom procedures and accepted that it was not too high a price to pay for improving management performance in the United Nations;
c) There are no provisions in either the Tribunal's Statute or its Rules of Procedure barring submission of additional information by either party after a hearing has been held. Further, at no point during the hearing – either at the beginning or at the end – were parties advised that no further submissions would be accepted by the Tribunal "after the closure of the proceedings";
d) It is the prerogative of the Tribunal to determine what is and what is not admissible and to advise parties on restrictions regarding the filing of submissions. It is not for the Respondent or his counsel to usurp or appropriate the responsibility of the Tribunal;
e) He was unable to fully respond to all the averments of the Respondent's counsel during the hearing because of the Tribunal's concern about time;
f) The Respondent's counsel is making a deliberate effort to paint him in unfavorable colors before the Tribunal;
g) Efforts undertaken in the context of management evaluation to assist the Administration to resolve an improper decision are not negotiations or an attempt at informal settlement;

h) MEU does not have the authority to engage in informal resolution; this authority belongs solely to the Office of the Ombudsman;

i) Article 15.7 of the Tribunal's Rules of Procedure is not applicable because: (i) the Tribunal has not referred the case to mediation and suspended the proceedings; (ii) the Applicant has not initiated any informal resolution; (iii) and the Administration has not initiated any informal resolution mechanism. Article 15.7 does not apply to efforts initiated or undertaken in the context of management evaluation by MEU;

j) There is nothing in article 15.7 barring the use of evidence from a previous (even though live) case to support contentions in a new case if that evidence can be helpful to the judicial review of the new case. Article 15.7 does not apply to all cases, and especially does not apply in the current case, which is a new one.

Considerations

11. Under article 19 of the Rules of Procedure the Tribunal "may 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." Additionally, article 36.1 of the Rules of Procedure provides that:

> "All matters that are 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."

12. The Rules of Procedure of the Tribunal do not specifically provide for any other filings apart from an application and a reply and also do not specifically prohibit a party from filing further submissions after a hearing has been conducted into the matter. The Tribunal considers that based on articles 19 and 36.1, a possibility exists for a party to file other submissions in addition to the application or

the reply and to make additional submissions subsequent to a hearing. However, in the Tribunal's view, these possibilities exists only in those cases where either the Tribunal orders such submissions or a party has applied or sought leave/permission of the Tribunal to do so and the Tribunal has granted leave/permission for the party to proceed. Thus, before a party may proceed to file any additional submissions on his or her own initiative, two elements must be satisfied. One, there must be an application by the party seeking leave to file the additional documents and two, permission must be granted by the Tribunal. Consequently, a party may proceed to file additional submissions only if permission is granted by the Tribunal. The additional submissions should not be attached to or form part of the request or application for leave to file.

13. In the current case, the Applicant filed an application for suspension of action on 31 May 2011. On 3 June 2011, he submitted a 7-page "supporting narrative" that elaborated on and slightly amended his 31 May 2011 application. He did not seek leave of the Tribunal to file this document.

14. On 6 June 2011, the Respondent submitted his reply and on the same day, the Tribunal directed him to provide additional documentation and clarifications by 16:30 hours on 7 June 2011. The Respondent complied. Later that day, the Registry informed the parties that the Tribunal had decided to hold a hearing. At 16:22 hours on 7 June 2011, the Applicant provided a telephone number for the hearing and informed the Registry that he was going to send to the Tribunal "in the next half hour evidence that the appointment of [Mr. S. K.] OiC of RIITD was submitted to the MEU for evaluation. I will send the letter of acknowledgement from the MEU as well as the email forwarding the request to Ms. Angela Kane, USG/DM with copy to the MEU." The Registry acknowledged receipt of his email at 16:44 hours.

15. At 17:16 hours on 7 June 2011, the Applicant submitted not only his request for management evaluation but also a lengthy response to the Respondent's reply. The Tribunal notes that the Applicant's email of 16:22 hours made no mention of his

submitting a response to the Respondent's reply. He subsequently submitted said response without seeking permission to do so.

16. On 8 June 2011, the Tribunal held an oral hearing on the application for suspension of action. Subsequent to the hearing, the Applicant sent the Registry an email to which he attached a written response to the submissions made by the Respondent at the hearing. He explained that he was submitting a written response because he was unable to respond at the hearing "due to lack of time". Additionally, he attached the terms of settlement that MEU had offered him in an effort to mediate his claims in what is now Case No. UNDT/NBI/2011/008, which is pending before the Tribunal.

17. On 9 June 2011, the Applicant submitted additional documents along with an explanation. On the same day, the Respondent sent an email to the Registry requesting that the Tribunal strike the additional submissions and documents filed by the Applicant subsequent to the hearing. An hour later, the Applicant communicated the following to the Registry via email:

> "Dear Registry,
>
> This is a response to email – reproduced hereunder – from counsel to Respondent.
>
> While awaiting Respondent's motion to strike, I would like to submit as follows:
>
> a. The Tribunal did rule at the end of yesterday's hearing that it will not admit additional/supporting documents. Indeed, the Tribunal specifically requested counsel for Respondent to submit additional documents (I believe by close of day yesterday). My assumption is that that leave extends to Applicant too – according to the equality of arms principle.
>
> b. There are many instances – as a quick read of the Tribunal's decisions will show – that Respondent has submitted additional documents to the Tribunal after the close of hearing.
>
> c. I asked leave of Tribunal to submit detailed responses to the averments of counsel to Respondent at yesterday's hearing – which lack of time as decided by the Tribunal – did not allow me to.

> d. None of the additional documents that I have submitted is confidential. The OiC announcements were sent to all ECA staff members and posted on iSeek, the UN intranet. I found most of them on iSeek. Respondent's counsel can find them if he visits the ECA intranet through iSeek.
>
> e. The proposal for informal settlement that I had received from MEU is already at the UNDT (and Respondent's counsel) among the documents submitted in support of UNDT/NBI/2011/008.
>
> f. My understanding is that a major objective of the new system of justice in the UN is to improve management and the way the UN works. It follows, in my view, that anything/action that could assist the Tribunal to help the Organization improve its management should be applauded. It is my hope that counsel for Respondent and the Respondent share this view […]"

18. The Applicant has submitted additional documents and observations without requesting leave to do so or he requests leave but does not bother to wait for a decision from the Tribunal. The Tribunal notes his submission that he is not a trained lawyer and will therefore make certain mistakes with respect to procedure. In this regard, the Tribunal wishes to reiterate the reasoning set out in paragraph 17 above as a guideline in the event that the Applicant wishes to continue representing himself in the future.

19. However, with respect to the substantive aspects of this matter, the Tribunal is truly puzzled by some of Applicant's assertions, which are contradictory on the one hand and quite fallacious on the other hand. In the Applicant's email reproduced at paragraph 17, he asserts that "The Tribunal did rule at the end of yesterday's hearing that it will not admit additional/supporting documents". The Tribunal however did not make any such ruling at the end of the hearing. Strangely, at paragraph 15 of his response to the motion to strike, the Applicant states that "it is important to note that at no point during the hearing – either at the beginning or at the end – were parties advised that no further submissions will be accepted by the Tribunal 'after the closure of the proceedings'".

20. Further, the Applicant's assumption that the Tribunal's instruction to the Respondent to submit additional documents automatically granted him leave to also

submit additional documents and comments is simply erroneous. The Tribunal's instructions at the hearing were unequivocal and did not leave room for assumptions.

21. Further, the Applicant's assertion that he asked leave of the Tribunal to submit detailed responses to the submissions made by the Respondent at the hearing is derisory in light of the fact that his request for a rejoinder was part and parcel of his written response of 8 June 2011. The manner in which he decided to present his request and rejoinder did not give the Tribunal the option of deciding whether or not to grant his request for rejoinder. In effect, he made a request and then took it upon himself in the next paragraph to grant his own request.

22. The Tribunal is also flummoxed and quite affronted by the Applicant's assertion in his email that he was unable to make submissions at the hearing because the Tribunal "decided" there was not time for him to do so. He subsequently reinforced this inaccurate depiction of events by stating in his response that "[a]t the end of the questioning of counsel for Respondent, the bench gave me the opportunity to response (sic) while also informing me that 'we have run out of the time allotted for the hearing'. And as I began to respond to the counsel's submission, there was a brief interruption. But more importantly, I could not fully respond to all the averments of counsel for Respondent during his questioning by the bench because of the bench's concern about time."

23. While the Tribunal may, under article 18.5 of the Rules of Procedure, "limit oral testimony as it deems appropriate", this was not what happened in the present matter. The Tribunal did not make any "decision" or ruling that there was not enough time for the Applicant to make his submissions at the hearing. At the commencement of the hearing, the Tribunal informed the parties that it would start by asking the Respondent a few questions relating to certain submissions in his reply and that thereafter, the Applicant would be given an opportunity to seek further clarifications or make submissions, as he deemed appropriate. After the Tribunal had obtained clarifications from the Respondent, the Applicant was given the opportunity to comment on the explanations/submissions made by the Respondent during the

hearing and he took advantage of this opportunity to make submissions. During the Applicant's submissions, the Tribunal sought clarification from him briefly on a premise he had presented. After the clarification had been sought, the Applicant was allowed to continue with his submission and the Respondent was subsequently allowed to provide a brief response. It is noteworthy that apart from the Registry informing the parties of the time the hearing would commence, no actual time allocation was provided for its duration. The Applicant's assertion that "the bench gave me the opportunity to response (sic) **while also informing** (*emphasis added*) me that 'we have run out of the time allotted for the hearing" is not only inaccurate but also mischievous.

24. Since the Applicant filed his application for suspension of action, the Tribunal, in the interest of justice, has allowed him a good amount of latitude by not rejecting his multiple filings. It is apparent that the Applicant has taken the Tribunal's permissiveness to be a lack of vigilance. He is flooding the Tribunal with submissions that have not been called for. The Tribunal cannot and will not condone such behavior as it tends to serve as an impediment to justice.

In light of the foregoing;

IT IS HEREBY ORDERED THAT:

25. The Respondent's motion to strike is granted.

26. All additional filings submitted by the Applicant on or after 8 June 2011 are stricken from the records of this current case.

27. The Respondent's request to respond to the Applicant's additional submissions filed with the Registry on or after 8 June 2011 is rejected.

(*Signed*)

Judge Vinod Boolell

Dated this 10th day of June 2011

Entered in the Register on this 10th day of June 2011

(*Signed*)

Jean-Pelé Fomété, Registrar, Nairobi