



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/044
UNDT/NBI/2010/045
UNDT/NBI/2010/077
Order No.: 199 (NBI/2013)
Date: 4 September 2013
Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON CASE MANAGEMENT
HEARING**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat
Bérenghère Neyroud, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is currently serving as Chief of the New Technologies and Innovation Section in the Special Initiatives Division (SID) at the United Nations Economic Commission for Africa (ECA).

2. He filed three applications with the Dispute Tribunal on 8 September 2009, 8 February 2010 and 11 December 2010, which were registered as case nos.: UNDT/NBI/2009/044, UNDT/NBI/2010/045 and UNDT/NBI/2010/077 respectively in the Tribunal's records.

Procedural history

3. On 3 September 2013, a case management hearing was held under art. 19 of the Rules of Procedure of the Tribunal (the Rules) with the objective of resolving any outstanding procedural issues prior to the commencement of the substantive hearings on 9 September 2013. The Tribunal canvassed the following during the case management hearing:

Applicant's motions

Change of date for the substantive hearing

4. The Applicant requested, via an email dated 2 September and an oral motion that the merits hearings commence on 10 September instead of on 9 September 2013 as stipulated in Order No. 172 (NBI/2013) dated 14 August 2013 in light of the fact that he would not be able to arrive in Nairobi until 10 September 2013.

5. The Tribunal rejected this motion. The reasons for the rejection were sent to the Applicant by the Registry by an email dated 2 September 2013 on the instruction of the Presiding Judge. The Tribunal reiterated that the merits hearings in this matter would commence **on 9 September 2013 at 0900 hours (Nairobi time)**.

Respondent's counsel

6. The Applicant confirmed that he is no longer questioning the appearance of Ms. Bérengère Neyroud, Legal Officer, Administrative Law Section (ALS) as co-counsel for the Respondent in light of formal notification from ALS to this effect. He did however question correspondence being copied to two other ALS counsel.

7. The Tribunal ruled that this is an issue internal to ALS.

Application for leave to submit additional documents

8. The Applicant filed a request on 14 August 2013 seeking leave to submit a Management Evaluation Unit (MEU) decision dated 15 November 2012 regarding the GPAD post and Judgment No. UNDT/2012/116 of 1 August 2012 into evidence.

9. Noting that the Applicant is seeking to submit these documents to reflect “subsequent developments” to establish a pattern of conduct by the Respondent, the Tribunal rejected this motion for lack of relevance.

Application for production of documents: Report of Investigation panel into Allegations of Prohibited Conduct under ST/SGB/2008/5 (Steven Allen/Anastasia Wilson Panel, 2013)

10. The Applicant filed an application dated 14 August 2013 requesting the Tribunal to order the Respondent to make the 2013 Report of the Investigation Panel into allegations of prohibited conduct under ST/SGB/2008/5 (IP2) available to him to assist with his preparation for the merits hearings. The Applicant explained that he was questioned by the Investigation Panel members about facts which pre-date his first application (UNDT/NBI/200/044) and as such the 2013 investigation report will be relevant to establish a pattern of discriminatory conduct by the Respondent.

11. Noting that IP2 pertains to a selection decision that is not currently before the Tribunal for adjudication and to enable a determination to be made as to the document's relevance to the current proceedings, the Tribunal requested that:

- a. Respondent's counsel is to make inquiries with the Office of Human Resources Management (OHRM) as to whether or not the report has been finalized. and inform the Tribunal;
- b. In the event that IP2 has been finalized, the Respondent is to provide the Tribunal with a copy on a confidential basis (for the Tribunal's eyes only) for its review no later than tomorrow morning, 4 September 2013. When the Tribunal has reviewed the finalized report, it will provide a ruling on the Applicant's motion prior to the commencement of the merits hearing.

Respondent's motions

Communication with Mr. Amareswara Rao, Chief of Human Resources Services Section, ECA

12. On 29 August 2013, Respondent's counsel sought guidance from the Tribunal as to the appropriate way of communicating with ECA through its senior administrative officer, Mr. Amareswara Rao, who was designated as an expert witness of the Tribunal in Order No. 194 (NBI/2013). Respondent's Counsel submitted that it is necessary for him to maintain contact with Mr. Rao in order to receive instructions from ECA about the handling of all the applications filed by the Applicant with the Tribunal.

13. Noting that there is no property in witnesses, the Tribunal ruled that either party is entitled to speak with witnesses if they so wish. The Tribunal however cautioned the parties to be respectful in their contact with witnesses and directed that they should not in any way attempt to coerce or influence the evidence that the witness will be giving.

14. The Tribunal confirmed that Respondent's counsel and the Applicant are both entitled to contact Mr. Rao and the other witnesses identified in the Respondent's communication of 29 August 2013 as deemed necessary.

Motion objecting to the appearance of the Applicant's proposed witness, Melissa Bullen

15. The Respondent filed a motion dated 22 August 2013 requesting that the Tribunal preclude the Applicant from calling Ms. Melissa Bullen as a witness.

16. The Applicant informed the Tribunal that he no longer wishes to call Ms. Bullen (in Case No. UNDT/NBI/2010/077) or Mr. Christian Rohde, Chief of MEU (in Case No. UNDT/NBI/2011/060) as witnesses and asked that their names be withdrawn from his witness lists.

Release of Applicant's ex parte filing of 20 September 2011 in relation to Case Nos. UNDT/NBI/2009/044 and UNDT/NBI/2010/077

17. The Respondent sought disclosure of the documents filed by the Applicant on 20 September 2011 on an *ex parte* basis to the Tribunal.

18. The Applicant indicated that he had no objection with the documents being disclosed.

19. The Tribunal ordered the Registry to serve the documents, consisting of emails between the Applicant and a member of the first Investigation Panel, on the Respondent for inclusion in the trial bundle.

Motion for inclusion of additional documents in the trial bundle

20. The Respondent made a motion for inclusion in the trial bundle of the Galaxy snapshot of the Applicant's 2008/2009 roster status and the terms of reference/job description (TOR) for the vacancy against which he was rostered in 2008 (Chief,

Policy Development and Coordination Monitoring and Reporting Unit, D-1, Office of High Representative for the Least Developed Countries in New York). The Respondent submitted that these documents would be relevant to Case Nos. 2009/044 and 2010/045.

21. The Respondent to email the Galaxy snapshot to the Applicant immediately after the case management hearing for his review. The Applicant to advise the Tribunal at the case management hearing on 4 September 2013 on his views to the snapshot being included in the bundle.

22. The Tribunal deemed the TOR for the Chief, Policy Development and Coordination Monitoring and Reporting Unit, D-1, to be relevant to the proceedings and granted the Respondents motion in this respect.

Conduct of the Applicant

23. Respondent's counsel requested that the Tribunal address the allegations of impropriety that have been made against him by the Applicant in the emails that have been sent to the Registry in the past couple of weeks.

24. The Tribunal made the following oral ruling:

If you were legal counsel in this matter, I would be very strongly tempted to take some form of action against you for treating your co-counsel with disrespect and making allegations of the sort you did. I do appreciate you are not a lawyer but I know that you are a senior member of staff at the United Nations and you are bound by a code of conduct which requires staff members to treat each other with respect and that applies even when you are in conflict with someone. It particularly applies when you are in this Tribunal where there is a high standard of conduct expected first from the Tribunal to counsel and the parties and a high standard of respect, tolerance and good manners that is equally required between the parties. After having read some of your emails if not all of them, I think that the standard of your conduct towards Mr. Dietrich, no matter how justified you feel, breaches the standard of conduct that is expected of you.

Because you are not a lawyer, I will not take any action against you but I will say to you now that you must not make any further derogatory comments about counsel in this case to him directly or to the Tribunal. Whatever the basis, whether you think you are right or wrong, you keep those allegations to yourself when you are dealing with Tribunal matters and should you raise those issues again, then I will have to seriously consider your role in continuing to represent yourself in this case because it is simply inappropriate and wrong.

I rule that you will not conduct yourself in a manner that is disrespectful, insulting and scandalous towards counsel for the Respondent.

Witnesses being called by the Tribunal

25. The Applicant is to contact Ms. Mokonyana and confirm her availability to give evidence on 9 September 2013. If she is available, the Applicant is to provide a synopsis of her evidence **by Friday, 6 September 2013**.

26. The Applicant is to provide the Tribunal with a list of questions that he wants the Tribunal to ask Mr. Rao. The parties will then be entitled to ask the witness additional questions. The Applicant's questions are to relate solely to the issues arising in Case No. UNDT/NBI/2011/082.

Case No. UNDT/NBI/2009/044

27. The Respondent confirmed that he intends to rely on the summary of facts contained at pages 1-3 of the MEU letter dated 3 August 2009.

28. The Applicant informed the Tribunal that he does not agree with the summary of facts in the MEU letter. He will call Mr. Abraham Azubuike to give evidence in this case.

29. The Tribunal instructed the parties to provide synopses of the evidence to be given by the witnesses they intend to call in this case. The synopses are to refer to all the areas that the parties intend to cover with the witnesses.

Case No. UNDT/NBI/2010/045

30. The Applicant confirmed that he would call Mr. Abraham Azubuike and Dr. Monique Rakotomalala to give evidence in this matter. The Applicant is to provide synopses of the evidence to be given by Mr. Abraham Azubuike and Dr. Monique Rakotomalala. The synopses are to relate to the areas that the Applicant intends to cover with the witnesses.

31. The Applicant requested that Mr. Urbain Zadi be removed from his list of witnesses.

32. Mr. Hachim Koumare – the Tribunal cautioned the Applicant against this witness providing any evidence about the details of the mediation process.

33. Mr. Adeyemi Dipleou – the Respondent clarified that he is relying on the synopses annexed to the submission by Ms. Susan Maddox, former counsel of Respondent, in response to Order No. 227 (NBI/2010).

Issues relating to the bundle of hearing documents

34. The Respondent clarified that the amended application filed in Case No. UNDT/NBI/2009/044 was erroneously included in the initial Index to the Joint Trial Bundle (the Index) and had been removed from the final Index.

35. The Tribunal clarified that General Assembly resolutions, rules, regulations and other administrative issuances of the Organization listed in the Index need not be physically included in the bundle in light of the fact that they are readily available.

36. Page 3 of the Index – the Applicant's response to the Respondent's response: the Applicant explained that this was a surrejoinder to the Respondent's reply in Case No. UNDT/NBI/2009/044 which had been filed with the Tribunal. Registry to search

for this document in its records. Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

37. Page 3 of the Index – rebuttal to MEU letter: the Applicant clarified that this was an annex to the original application. Respondent has no objection to the letter dated 12 August 2009 being included in the bundle.

38. Page 4 of the Index – the Applicant’s rebuttal of ECA response to MEU response for comments letter: the Applicant explained that this was annex 6 to the original application. The Registry to review the annexes to the original application filed on 8 September 2009 to determine whether annex 6 was filed. Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

39. Page 6 of the Index - email to Mr. Dipeolu expressing concerns about the transfer for TFED: Applicant to provide the Tribunal with a copy.

40. Page 6 of the Index – request for comments letter to Mr. Janneh from MEU: Applicant to provide the Tribunal with a copy.

41. Page 6 of the Index – ECA Staff Union letter dated 7 October 2009 signed by Mr. Azubuike to the Executive Secretary/ECA: Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

42. Page 7 of the Index – email from Ms. Aster Gebremariam dated 08/10/2009 to the Executive Secretary/ECA: Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

43. Page 7 of the Index – ECA: Report of the meeting of the Committee on Human and Social Development: Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

44. Page 7 of the Index – Note to file of 19/03/2010: meeting between the Applicant and ECA administration represented by the Director of Administration and the OiC/Human Resources Services Section: Applicant to make best efforts to find this document and to provide the Tribunal with a copy.

45. Page 8 of the Index – Letter from the Investigation Panel to the Applicant advising him of their appointment: Respondent’s counsel clarified that this is included at page 17 of the bundle.

46. Page 8 of the Index – the Applicant’s response to the ASG/OHRM’s letter of 08/09/2009: This should actually be the letter dated 5/9/2009 instead of 15/9/2009. The Applicant explained that there were errors in the dates of some of the letters from OHRM.

47. Page 8 of the Index – the Applicant’s response to Order No. 181 (NBI/2010): To be provided by the Registry and discussed at the 4 September 2013 case management hearing.

48. Page 9 of the Index – report of the OHRM Management Support Mission to ECA in October 2009: Respondent’s counsel to make best efforts to find this document and to provide the Tribunal with a copy if there is no objection from the Administration. If there is an objection, Respondent’s counsel is to inform the Tribunal immediately and provide reasons to enable the Tribunal to make a ruling.

Matters of general application

49. The Tribunal ruled that the following would apply to all of the Applicant’s cases (Case Nos. UNDT/NBI/2009/044, 2010/045, 2010/077, 2011/001, 2011/008, 2011/060 and 2011/082) currently pending before the Tribunal.

- a. The cases comprising the Trio will be heard together during the first three days of the merits hearings. All evidence relating to these three cases will be heard at the same time. One judgment will be rendered for the Trio.
- b. The other cases will be heard separately. If a witness is relevant to more than one case, he/she will have to give evidence twice. Separate judgments will be rendered for each of these cases.
- c. The Tribunal is mindful of the Applicant's contention that apart from the specific issues in each of the individual cases, he alleges that there were systemic abuses of him throughout and that each of the cases represent examples of a pattern of behavior that occurred throughout the relevant period. To ensure that these allegations are fully canvassed, and to avoid duplication of evidence in its deliberations of Case Nos. UNDT/2011/001, 2011/008, 2011/060 and 2011/082, the Tribunal will make its determination in the Trio first and refer in the subsequent judgments to any relevant findings of fact and law made in the Trio.
- d. The Tribunal explained the hearing procedure for the benefit of the Applicant who is not represented by counsel. In particular, the Tribunal explained the difference between evidence which is given on oath and submissions. At the commencement of each case the parties are requested to give brief submissions of no more than 5 minutes to explain what the case is about. The Applicant will then go to the witness box, take the oath and as a witness, tell the Tribunal any facts that he deems relevant to the case being heard. After the Applicant has given his evidence, Respondent's counsel will be entitled to cross examine him and the Tribunal will ask questions as needed. When this is completed, the Applicant will be allowed to make any further statements of facts that he deems necessary to conclude his evidence. Once this process is completed, the Applicant will leave the witness box and then take up the role of advocate in his own case by calling his witnesses. The Applicant will be entitled to cross-examine the Respondent's witnesses as well.

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- e. At the conclusion of each case, the parties will be required to make closing submissions. These will comprise a list of the main points that the parties want the Tribunal to consider when reaching its decision. These submissions should be submitted in writing to the Registry beforehand.

(Signed)

Judge Coral Shaw

Dated this 4th day of September 2013

Entered in the Register on this 4th day of September 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi