



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/049
Order No.: 188 (NBI/2014)
Date: 24 July 2014
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

WAMALALA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a staff member with the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUSCO”). He filed an Application with the United Nations Dispute Tribunal (the Dispute Tribunal) appealing the decision by the Advisory Board on Compensation Claims (ABCC) to award him \$49,114.03 for permanent loss of function of his right leg as a result of injuries sustained in a road accident. The Applicant further asserted a claim for gross negligence against the Secretary-General for failing to adequately ensure his safety and security in connection with the accident. The negligence claim was dismissed by the United Nations Appeals Tribunal in Judgment No. 2013-UNAT-300.

2. On 15 May 2014, the Applicant sought leave to file the following additional documents into the record:

- a) The signed witness statement of his dentist;
- b) An email from the then Medical Services Director “refusing to provide to the Applicant and his counsel the *AMA Guides to the Evaluation of Permanent Impairment*; and
- c) Chapters 1, 2, 11 and the Appendix from the *AMA Guides to the Evaluation of Permanent Impairment*.

3. By Order No. 140 (NBI/2014) dated 28 May 2014, the Tribunal informed the Parties that the matter had been set down for hearing from 15 – 16 July 2014 and that closing submissions would be heard on 17 July 2014.

4. By Order No. 161 dated 19 June 2014, the Respondent was directed to provide his comments on or before 27 June 2014 on the documents the Applicant was seeking to adduce into the record.

5. The Respondent submitted his views on 27 June 2014 and moved the Tribunal to reject the Applicant's Motion.

6. The Tribunal, by Order No. 174 (NBI/2014) dated 2 July 2014, granted the Applicant's Motion pursuant to article 18.1 of the UNDT Rules of Procedure.

7. The Tribunal held hearings in this matter from 15 to 16 July 2014. On 16 July Counsel for the Respondent, Ms. Wynn, informed the Tribunal that she would like to examine Counsel for the Applicant, Mr. Hastie, on the email from the then Medical Services Director "refusing to provide to the Applicant and his counsel the *AMA Guides to the Evaluation of Permanent Impairment*".

8. On 17 July 2014, the Parties were scheduled to provide their closing submissions before the Tribunal. Ms. Wynn renewed her oral request to examine Mr. Hastie on the email he had submitted into evidence. Thereafter the following exchange of views took place between the Tribunal and Ms. Wynn.

Tribunal:

There are two things. First of all, is there a formal motion to examine Mr. Hastie?

Ms. Wynn:

Your Honor, do you mean a written motion?

Tribunal:

No, even verbal. I need to put something on record.

Ms. Wynn:

There is a formal request, yes, to examine Mr. Hastie.

Tribunal:

Okay and what is the justification for this?

Ms. Wynn:

The justification for this is that there is an issue in the case with respect to whether Dr. Brian Davey's refusal to provide Mr. Hastie copies of the *AMA Guides* constituted a procedural violation and the only evidence on record is email correspondence between Mr. Hastie and Mr. Davey.

9. Ms. Wynn indicated that since Mr. Hastie had made the request, she wanted to examine him on the reasonableness and purpose of the request.

10. Mr. Hastie's response to the request/motion was the following:

Your Honor, I've read my friend's closing submission on this point or in relation to the email exchange and I'm not sure whether the suggestion is that somehow this email exchange did not occur. That this was a forgery and I didn't send the email and that was not the response received by OSLA. It seems to me those would be fairly extraordinary allegations. These are factual allegations and if my friend wants to make those allegations, then perhaps I do need to get someone to take over the case. Otherwise it seems to me that my friend's arguments are based upon the substance of those emails and the refusal. Well, the email such as it is being in the record, if my friend had other evidence that she wanted to adduce, obviously that was her entitlement but there hasn't been any. My friend has not introduced any evidence on this point and as I said Your Honor, it seems to me that the submissions are really about the Organization's obligation to provide this information and not whether or not this correspondence actually occurred and my friend can make legal submissions on that point.

11. In light of the fact that Ms. Wynn's request raised a novel legal issue in that it sought to examine counsel appearing for an applicant without any indication whether counsel should be disqualified first from continued representation, the Tribunal decided to postpone hearing the Parties' closing submissions until it had made a ruling on the request.

12. By Order No. 181 (NBI/2014) dated 18 July 2014, the Respondent was directed to file, by 21 July 2014, a formal written motion including reasons, regarding the request to examine Counsel for the Applicant. Mr. Hastie was then directed to file his comments on the Motion by 24 July 2014.

13. On 21 July 2014, the Counsel for the Respondent sought leave to withdraw her request to examine Mr. Hastie. No reasons were provided for the withdrawal.

However, given the rather extraordinary turn that the proceedings took, the Tribunal would have expected some reasons for the withdrawal.

14. In response to the withdrawal of the request/motion, Mr. Hastie expressed “some consternation that the (only) effect of the Respondent’s last minute motion and its withdrawal was to delay and prolong the proceedings”. He also submitted that “a short schedule be set to bring proceedings to a close” and moved for costs for any ensuing delay in the proceedings.

Considerations

15. Notwithstanding the withdrawal of the request/motion, the Tribunal is of the considered view that a ruling is called for in view of the novelty of the situation that was brought about by the said request/motion.

16. The Tribunal notes that the comments provided by Counsel for the Respondent on 27 June in relation to the Applicant’s request to include the email correspondence between his Counsel and the former Director of the Medical Services Division made no mention of Mr. Hastie being called as a witness but merely relied on the relevance of the evidence. The submission was as follows:

[...], the Respondent objects to the production of the email from the then Medical Director on the basis it is not relevant to the Applicant’s assertions of breach of procedural fairness. The e-mail correspondence is not relevant to the Dispute Tribunal’s determination of any of the issues as canvassed by the Dispute Tribunal in paragraph 7 of Order No. 041 (NBI/2014). Accordingly, there is no basis for an order for disclosure under Article 18(2) of the Rules.

17. It is a matter of grave concern to the Tribunal that although the Respondent was given ample time, from 19 to 27 June 2014, to provide comments on the evidence the Applicant sought to adduce into evidence, Ms. Wynn did not deem it necessary to raise the issue of Mr. Hastie appearing as a witness at any time during this period but rather waited until 16 July 2014 to raise such a sensitive matter,

which, may have had dire implications for the expeditious disposal of this case and on Counsel.

18. When counsel is appearing for a party in a case, his or her duty as an officer of the court is towards the party he/she is representing. As such counsel should not, unless there are compelling reasons for doing so, be hampered in fulfilling his/her duty to the party and to the court. In all countries with a strong bar and a scrupulous independent judiciary the legal profession is governed by a code of ethics. Unfortunately this is not currently the case for lawyers appearing before the Tribunal but so far the Tribunal has not experienced any major concerns with counsel appearing for parties.

19. As a matter of ethics therefore counsel appearing in a case cannot at the same time give evidence as a witness on behalf of either party. There is no absolute prohibition on a lawyer from calling another party's counsel as a witness, but care must be taken not to elicit from the counsel privileged information as counsel acts on the instructions of a party. Additionally, there must be a compelling need for such evidence and said evidence cannot be obtained by some other source or means. Any request/motion to call counsel as a witness or to cross examine counsel must be preceded by a motion for the counsel to be disqualified from further representation. There are two basic reasons for this: first the party should be allowed time to seek the assistance of other counsel and cannot lightly be deprived of such assistance by a motion to cross examine; secondly it would be most inappropriate for counsel to be examined and continue representing a party as that would greatly undermine the overriding duty of counsel to act with independence and in the interests of justice¹. Additionally there is always a risk of conflict of interest when a lawyer is not disqualified from appearing for a party as a witness in the same proceedings².

20. What the request of Ms. Wynn attempted to achieve was to obtain testimony from Mr. Hastie that the refusal of Dr. Davey to hand over a copy of the AMA guide

¹ See for example the Codes of Conduct of International Tribunals, namely ICC, ICTY and ICTR.

² See for example *Kennedy v. Eldridge*, 201 Cal. App. 4th 1197 (2011)

to him was reasonable and did not constitute a violation of the rights of the Applicant. Indeed Ms. Wynn even went as far as stating that “if Mr. Hastie is willing to stipulate that it was reasonable for the Respondent to refuse the request, we would accept that stipulation in lieu of his testimony”. This Mr. Hastie steadfastly refused to do.

21. In view of the fact that Ms. Wynn decided to withdraw her request/motion without providing any reasons for her abrupt turnaround, the Tribunal concludes that she has, quite regrettably, prevented the expeditious hearing of this case and wasted the resources of the Tribunal. Additionally, the Tribunal finds that the request/motion was misconceived and Respondent was well advised to withdraw it.

It is hereby ORDERED that:

22. Counsel for the Respondent’s request to withdraw her motion to examine Counsel for the Applicant is granted subject to the observations above.

23. The Tribunal will inform the parties whether it will require them to make any oral submissions in addition to the written synopsis of their closing statements.

(Signed)

Judge Vinod Boolell

Dated this 24th day of July 2014

Entered in the Register on this 24th day of July 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi