



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/071
Order No.: 205 (NBI/2015)
Date: 28 April 2016
Original: English

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

HASHIM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for the Applicant:
Ochieng' Ogutu

Counsel for the Respondent:
Robert Nadelson, UNDP
Thomas Jacob, UNDP

Introduction

1. On 3 November 2015, the United Nations Dispute Tribunal issued Order No. 352 (NBI/2015). Paragraph 6 of that Order stated that the parties should:

- a. Provide a joint statement identifying the agreed facts and the issue(s) to be determined by the Tribunal;
- b. Advise the Tribunal if they intend to make any interlocutory applications to be decided before the decision on the merits is made by the Tribunal;
- c. Provide their views on whether there should be an oral hearing or whether the matter can be decided on the papers; if they wish an oral hearing, the parties shall:
 - i. Submit a list of witnesses they propose to call at the hearing with a synopsis of the evidence to be given by each witness and the amount of time to be allocated for the testimony of each witness; and
 - ii. Indicate the dates of their availability and that of their witnesses for an oral hearing during the months of April and May 2016.

2. On 20 November 2015, the parties submitted a Joint Statement in response to Order No. 352 in which the Respondent advised the Tribunal that the case could be determined on the papers. The Applicant requested an oral hearing. The Applicant did not at that time submit the list of witnesses she proposed to call at the hearing, as ordered.

3. On 6 April 2016, the Tribunal held a case management discussion (CMD) to prepare the matter for an oral hearing to be held from 3 to 5 May 2016. In attendance were the Applicant, her Counsel and Counsel for the Respondent

4. During the CMD, the Tribunal clarified with Counsel the disputed facts in the case and asked the parties if they intended to call any witnesses in relation to those disputed facts. The Applicant told the Tribunal she would call three witnesses: Ms. Mariam Kirollous, Mr. Christopher Opar and Mr. Mudathir Ali. She provided some limited information about the matters on which these witnesses were to provide evidence. In light of the contested facts and the witnesses put forward by the Applicant, the Respondent proposed that the Tribunal hear evidence from Mr. Jorg Kuhnel.

5. By Order No. 187 (NBI/2016), dated 7 April 2016, the Tribunal identified the issues to be determined and listed the witnesses who were to give evidence as Ms. Kiroullous, Mr. Opar and Mr. Ali for the Applicant; and Mr. Kuhnel for the Respondent.

6. The Tribunal also ordered “that the Applicant will immediately provide the Respondent with the full names and a brief synopsis of the topics that these three witnesses will speak to”. The Tribunal also ordered that the parties submit through CCMS full statements of evidence of each witness including the Applicant, no later than 27 April 2016.

7. On 15 April 2016, the Respondent filed a motion with the Tribunal stating that “[a]bsent the Applicant’s compliance with the Dispute Tribunal’s order [that she produce a brief synopsis of the topics her three witnesses will speak to], the Respondent is unable to properly prepare for the upcoming hearing”. The Respondent requested that the Tribunal order that the Applicant comply with Order No. 187.

8. On 27 April 2016 at approximately 11:30 pm the Applicant submitted her response to Order No. 187 in which she stated:

In light of the Dispute Tribunal’s order that the parties provide evidence to address the contested facts, the Applicant respectfully seeks leave to introduce the following evidence:

The Applicant hereby submits to the Dispute Tribunal, three full statements of evidence provided by three witnesses; Mr. Christopher Opar, Ms. Reem Bilal, and Mr. Faisal Abdallah, respectively. Other two additional witnesses are expected to provide their testimonials by end of today.

9. The Applicant attached a number of annexes to the motion. These comprised her own statement of evidence, a statement of evidence by Ms. Kiroullous and a witness statement by Christopher Opar.

10. As Annex 30 she added her “feedback” in answer to the evidence submitted by the Respondent.

11. She attached G-mail correspondence between her and Ms. Reem Bilal¹ and her and Mr. Faisal Abdallah² concerning their reasons for leaving UNDP Sudan. The Applicant attached to her motion a copy of an undated email sent from her entitled ‘Farewell thoughts-Message to UNDP Senior Management’. She also attached an email which purported to be from a Mr. Getachew to All UNDP Sudan but made no reference to the relevance of this evidence to the case.

12. In addition the Applicant submitted a document entitled: “Applicant’s list of witnesses” which listed the names, job title and contact details for Christopher Opar, Reem Bilal, Faisal Abdallah, Getachew Tahir and Mariam Kirollous.

13. The Applicant did not submit statements of evidence for Ms. Bilal³, Mr. Abdallah⁴, Mr. Ali or Mr. Getachew.

³ Applicant Annex 24.

⁴ Applicant Annex 22.

Motion to exclude evidence

14. The Respondent objects to the inclusion of Ms. Bilal's and Mr. Abdallah's statements of evidence in the proceedings and the proposed future inclusion of a statement of evidence for Mr. Getachew. The Respondent further objects to Ms. Bilal, Mr. Abdallah and Mr. Getachew being heard during the proceedings.

15. The Respondent submits that the Applicant, who is represented by Counsel, had ample time to propose these additional witnesses in response to the Tribunal's orders or, alternatively seek leave from the Tribunal to consider hearing from additional witnesses. The addition of new witnesses three business days prior to the scheduled hearing would be unfair to the Respondent as it would not allow sufficient time for him to identify rebuttal evidence.

Admission of additional documentary evidence

16. The Respondent also sought leave to introduce the following additional evidence:

- a. Letter, and email in support of, the non-renewal of Mr. Christopher Opar⁵.
- b. Decision by the Office of Human Resources to classify the External Relations Specialist at the P-4 level⁶.

17. The Respondent submits that this evidence is necessary pursuant to the Tribunal's order that the parties provide evidence to address the contested facts, and in view of the statements of evidence submitted by the Applicant.

⁵ Respondent Annex 14.

⁶ Respondent Annex 15.

Considerations

18. In light of the comprehensive CMD on 6 April 2016 between the Tribunal, Counsel for the Respondent, Counsel for the Applicant and the Applicant and the subsequent case management order dated 7 April 2016 which reflected the outcome of that discussion, the Tribunal expresses its deep concern at the motion filed by the Applicant late on 27 April 2016 which sought to admit additional evidence and witnesses for a hearing scheduled to commence on 3 May 2016, which is only two working days away⁷.

19. The Tribunal has the following powers pursuant to the Rules of Procedure of the UNDT:

Article 18 Evidence

1. The Dispute Tribunal shall determine the admissibility of any evidence.

2. The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

....

5. The Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. The Dispute Tribunal may also limit oral testimony as it deems appropriate.

Article 19 Case management

The Dispute 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.

⁷ Monday, 2 May 2016 is an official United Nations holiday in the Nairobi duty station where the Tribunal is sitting.

20. As recorded in Order No. 187 (NBI/2016), the oral evidence at the hearing will be limited to the facts which are in dispute and which were set out in the Order.

21. Although the Applicant has not identified the areas of dispute that she intends to cover by way of additional evidence, it appears from the documents submitted that it relates to the evidence in paras 47 and 48 of the Joint Statement of Facts concerning the effects of the UNDP realignment plan on other staff members who have left the Organization. The Applicant wishes to introduce additional evidence by two witnesses who were not included in her previous list of witnesses and states that two other witnesses are expected to provide their testimonials by the end of the day 28 April 2016.

22. The evidence attached to the Applicant's motion is relevant to the issues in the case to the extent that they relate to the question of whether her position was the only one affected by the realignment. The Tribunal therefore finds that the exchanges of correspondence between the Applicant and Ms. Bilal and Mr. Abdallah which concern the reasons for the ending of their terms of employment at UNDP Sudan are admissible. However the Tribunal does not find it necessary for the authors of that evidence to be called to give oral testimony. It is sufficient that the correspondence referred to is able to be put to the sole witness for the Respondent to give him the opportunity to answer it.

23. The Respondent has also filed a motion seeking leave to file additional evidence to answer the statements of evidence submitted by the Applicant. The Tribunal finds that this additional evidence is relevant to the issues in the case and necessary to rebut the most recent evidence filed by the Applicant. The motion to allow that evidence to be introduced is granted.

24. All additional documents found to be admissible by this Order are to be included in the Joint bundle of documents which pursuant to Order No. 187 must be filed no later than 29 April 2016.

25. As the deadline for providing statements of evidence has expired, no further witnesses will be admitted to give evidence other than those identified and confirmed by the parties at the CMD.

26. Finally, the statements of evidence and the proposed additional documents proposed by the Applicant have been filed in a form that renders them virtually illegible to the Tribunal. They must be submitted again through CCMS in a legible manner. In addition, all statements of evidence are to include the following declaration: “This statement that it is true to the best of my knowledge and belief”.

27. No further interlocutory Applications will be entertained by the Tribunal before the commencement of the oral hearing on 3 May 2016.

Orders

28. The Applicant’s motion to admit the additional undated document “subject Farewell thoughts-Message to UNDP senior management” is refused.

29. The Applicant’s motion to admit the G-mail correspondence between her and Reem Bilal dated 23 April 2016 and 25 April 2016 respectively as well as a letter from Ms. Bilal addressed to All UNDP Compound Sudan et al. dated 28 January 2014 is granted.

30. The Applicant’s motion to admit the G-mail correspondence between her and Faisal Abdallah dated 20 April 2016 and 26 April 2016 respectively as well as the letter dated 17 April 2014 from Mr. Abdallah addressed to All UNDP Compound Sudan et al. is granted.

31. The Applicant’s motion to admit a letter from Getachew Aden Tahir is refused.

32. The Respondent’s motion to admit the following additional evidence is granted:

a. Letter, and email in support of, the non-renewal of Mr. Christopher Opar.

b. Decision by the Office of Human Resources to classify the External Relations Specialist at the P-4 level.

33. **By 11 a.m. on 29 April 2016**, the Applicant is to file with the Tribunal the following:

a. A fully legible copy of the Applicant's statement of evidence which incorporates her additional evidence set out in Annex 30 to her motion to admit additional evidence dated 27 April 2016. The Applicant's statement of evidence must contain a statement that it is true to the best of her knowledge and belief.

b. A fully legible copy of the statement of evidence of Ms. Mariam Kirollous. This statement of evidence must contain a statement that it is true to the best of her knowledge and belief.

c. A fully legible copy of the statement of evidence of Christopher Opar. This statement of evidence must contain a statement that it is true to the best of his knowledge and belief.

d. A fully legible copy of the statement of evidence of Mr. Mudathir Ali. This statement of evidence must contain a statement that it is true to the best of his knowledge and belief.

(Signed)

Judge Coral Shaw

Dated this 28th day of April 2016

Entered in the Register on this 28th day of April 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi