



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/084/
JAB/2009/048
Order No.: 47 (NY/2011)
Date: 16 February 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

SIMMONS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. In their responses to the Judge's inquiry, included in email from the Registry of 28 January 2010, the parties confirmed that the case may be handled on the papers.

2. After handling the matter of receivability and other preliminary issues in its prior orders and emails, in Order No. 3 (NY/2011) of 12 January 2011, the Tribunal instructed the parties to file and serve their closing statements.

3. The closing statements were to include "all the contentions which the Applicant intends to submit and not make any references to any previous written submissions", and be filed and served in the following order: first, the Applicant was to submit her statement; then, the Respondent was to submit his statement; and, finally, the Applicant was to provide her comments to the Respondent's closing statement.

4. By email of 31 January 2011, the Applicant filed and served her closing statement (after submitting a wrong attachment on 29 January 2011).

5. After being granted a time extension in Order No. 28 (NY/2011) of 1 February 2011, the Respondent by email of 8 February 2011 filed and served his closing statement.

6. By email of 9 February 2011, the Applicant filed and served a "Motion to strike out portions of the Respondent's closing statement". In this motion the Applicant, *inter alia*, stated as follows:

1. I hereby object to the conduct of Counsel for the Respondent and hereby move the Tribunal to strike out from the pleadings in this matter all references in the closing statement of the Respondent relating to alleged abuse of my supervisor [name of the Applicant's supervisor] during the preparation of my e-PAS and attacks on my professional integrity for the following reasons.

...

3. The Respondent has ... misused his closing statement to introduce new evidence, which were not previously discussed or disclosed in this case and which now warrants a new a debate and presentation of fresh counter-evidence and cross-examination. The fresh allegation of the Respondent that I abused my supervisor is a matter of grave concern to me, which I am learning about for the first time in the Respondent's closing statement. These are damaging allegations which could have serious implications to my future career development if left unanswered. However, I doubt that this is the function of the closing statement.

7. By email of 11 February 2011, the Respondent filed and served a response to the Applicant's motion in which his Counsel stated, *inter alia*, that:

In response to the Applicant's allegations, the Respondent contends that: (1) [the Applicant's supervisor]'s statement is directly relevant to the issues for determination in this proceeding and is responsive to the Applicant' closing statement. As such, it has been properly produced to the Tribunal; and (2) the record demonstrates that the Applicant has attacked [the Applicant's supervisor] in a rude, derisory and offensive manner and it is appropriate to characterize her actions and statements as they have been characterized in the Respondent's closing statement.

8. By email of 14 February 2011, the Applicant filed and served a request to extend her time limit according to Order No. 28 (NY/2011). In Order No. 42 of 14 February 2011, the Tribunal instructed the Applicant that the time limit for her "to file and serve a response to the Respondent's closing statement [was] extended until further notice".

Consideration

9. A closing statement (or argument) is: "a lawyer's final statement to the judge ... before deliberation begins, in which the lawyer requests the judge ... to consider the evidence and to apply the law in his or her client's favour" (*Black's Law Dictionary Third Pocket Edition* (Thomson West, 2006).

10. Accordingly, to ensure due process and fairness, a party is precluded or estopped from introducing new facts and evidence into the closing statement, as the

Respondent has essentially admitted it has done in the present case; if the situation were otherwise, the opposing party would be denied the opportunity to appropriately challenge the said facts and evidence.

11. The Dispute Tribunal's legal authority to decide on such matters derives from its Statute and Rules of Procedure. Pursuant to art. 18.1 of the Rules of Procedure, the Tribunal is obliged to "determine the admissibility of any evidence". Furthermore, art. 19 of the Rules of Procedure permits the Tribunal 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". Finally, art. 36.1 of the Rules of Procedure outlines that "[all procedural] 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. In the present case, Counsel for the Respondent has not requested leave to introduce any new facts and evidence in the closing statement; nor has he provided any proper explanation why this is being done so late in the process, e.g., that the said evidence was only recently discovered. According to his 11 February 2011 submission, the only explanation advanced by the Respondent is that these new facts and evidence are "responsive" to some of the contentions made by the Applicant in her closing statement, which, however, does not, in effect, appear different from those made by her throughout the entire proceedings of the case. In line herewith, the Respondent has not objected to any of the contentions included in the Applicant's closing statement. Furthermore, the submission demonstrates that the Respondent himself is of the view that, if introduced, these facts and evidence could potentially be determinative of the case, and therefore also prejudicial to the Applicant.

13. The Tribunal further observes that, during these proceedings, the Respondent has had ample opportunity to introduce the relevant facts and evidence at an earlier stage—the Applicant's statement of appeal to the Joint Appeals Board ("JAB") was

filed on 15 June 2009 and Counsel for the Respondent filed his reply on 25 August 2009, i.e. about a year and a half before the date of the present Order. After the case was transferred to the Dispute Tribunal on 31 June 2009, both parties have additionally filed numerous submissions with the Tribunal regarding both the substantive and procedural matters of the case. It is worth noting that the Respondent himself agreed to handle the case on the papers.

14. The Tribunal is concerned over the manner in which new facts have been presented to it. The Tribunal construes this effort to be an attempt to place potentially prejudicial material before the Tribunal with a view towards influencing its ultimate decision on the case. The Tribunal does not condone such manoeuvring, and instructs Counsel for the Respondent to refrain from doing so in the future.

15. Thus, the Tribunal will not allow any new facts and evidence introduced by the Respondent in his closing statement.

IT IS ORDERED THAT—

1. Any new facts and evidence introduced in the Respondent's closing statement are to be stricken from the record in this case.

2. By 23 February 2011, the Applicant is to file and serve her observations to the Respondent's closing statement, omitting any reference or argument—direct or indirect—based on the facts that have been stricken from the record.

(Signed)

Judge Marilyn J. Kaman

Dated this 16th day of February 2011