



Before: Judge Ebrahim-Carstens
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

LADU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CHANGE OF VENUE

Counsel for Applicant:
Sètondji Roland Adjovi

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat
Adrien Meubus, ALS/OHRM, UN Secretariat

Introduction

1. On 20 July 2016, the Applicant, a former Security Assistant at the G-3 level with the United Nations Mission in South Sudan (“UNMISS”), filed an application contesting the decision to summarily dismiss him for misconduct, namely for: (a) participating in an attempt to take, without authorization, building materials belonging to the Organization; and (b) being reckless or grossly negligent in the execution of his duties as a Security Assistant, in that he assisted another individual to load UNMISS building materials onto a private truck, when the Applicant either knew or ought to have known that there was no authorization to do so.

2. The application was registered with the Dispute Tribunal in Nairobi as Case No. UNDT/NBI/2016/052.

3. On 17 August 2016, the Respondent filed his reply, requesting that the Tribunal dismiss the application.

4. By Order No. 430 (NBI/2016) dated 9 September 2016, the Tribunal informed the parties that following the resolution of the Plenary of the United Nations Dispute Tribunal Judges held in May 2016, the case had been selected for transfer to the Tribunal in New York as a matter of balancing overall case load. The parties were invited to express their views on the transfer of the case to New York.

5. On 15 September 2016, the Applicant filed his response to Order No. 430 (NBI/2016) informing the Tribunal that he did not, in principle, object to the transfer, but noted that the Applicant and his witnesses may not have the same physical access to the Tribunal in New York since they are located closer to Nairobi. The Applicant therefore requested that the Tribunal “take all necessary measures to facilitate the appearance of the Applicant and his witnesses each time they would need to”.

6. On 21 September 2016, by Order No. 439 (NBI/2016), the Tribunal ordered that the case be transferred to the Tribunal’s Registry in New York. Upon receipt in New York the case was registered under Case No. UNDT/NY/2016/044.

7. On 11 April 2017, by Order No. 73 (NY/2017) the Tribunal instructed the parties' counsel to participate in a Case Management Discussion ("CMD") in New York set down for 20 April 2017.

8. On 20 April 2017, Counsel for both parties participated in a CMD, with the Applicant's Counsel participating remotely from Geneva, and discussed the logistical aspects such as communication technology, the number and location of witnesses, the time difference between New York and Juba, the respective locations of the Applicant and both Counsel, and the impact of these and other matters on conducting a hearing in New York. In facilitating the selection of the most appropriate venue, the parties agreed to confer and prepare a jointly-signed submission setting forth their view as to whether a hearing was required, or whether the Tribunal could decide the matters in issue on the papers, supplemented where necessary by witness statements and agreed facts.

9. On 8 May 2017, pursuant to Order No. 80 (NY/2017), the parties filed a joint submission which was signed only by Counsel for the Respondent.

10. On 17 July 2017, pursuant to Order No. 122 (NY/2017), each party filed a full list of proposed witnesses and resubmitted their joint submission, duly signed by both parties. The Applicant proposed two witnesses who could testify from Juba, South Sudan and provided the Tribunal with signed statements for each witness. The Respondent proposed ten witnesses who are based in South Sudan and provided a brief summary of the evidence of each witness, noting that the statements of each witness are contained in the investigation report.

11. In their joint submission, the parties indicated, inter alia, that the legal issues for determination by the Tribunal are as follows: (a) whether the established facts legally amount to misconduct; (b) whether the disciplinary measure applied is disproportionate to the misconduct; and (c) whether the Applicant's procedural fairness rights were respected throughout the investigation and disciplinary process. The parties informed the Tribunal that they would not make requests for disclosure of documents. The Respondent, however, stated that:

[...] given that the Applicant has indicated in his communications to the Respondent that he is possession of additional evidence that he may eventually produce, the nature of which remains unknown to the Respondent, the Respondent requests that the Tribunal order communication of any documentation on which the Applicant intends to rely as to avoid taking the Respondent by surprise in the course of the proceedings before the Tribunal, if any. In addition, the Respondent submits that failure to allege or disclose such evidence in the Applicant's application and subsequent proceedings precludes the Applicant from invoking additional evidence at this stage.

12. In regard to the parties' views on whether a hearing is necessary and whether the case may be decided on the papers, the Applicant indicated that he requested a hearing only if the Respondent would wish to cross-examine the Applicant's witnesses. The Respondent submitted that all relevant information was contained on the record, and that "insofar as a hearing may be deemed necessary by the Tribunal [...] the Applicant's testimony should be limited to matters pertaining to the proportionality of the sanction. The Respondent does not know, at this time, to what the Applicant would testify that is different from what is already on the record".

13. On 29 September 2017, by Order No. 215 (NY/2017) the Tribunal instructed the parties' counsel to participate in a CMD in New York set down for 12 October 2017.

14. At the CMD on 12 October 2017, the Applicant was represented by his Counsel, Mr. Sètondji Adjovi, together with Mr. Ryan Mills, and the Respondent was represented by his Counsel, Mr. Meubus. The Tribunal recalled that the case was transferred to the Tribunal's Registry in New York on the basis that the case concerned matters of procedure and proportionality of the disciplinary measure applied. However, having reviewed the parties' joint submission, the Tribunal noted that it appeared that the scope of the case had expanded with the Applicant now challenging the substance of the matter. Additionally, there appeared to be substantial dispute of fact between the parties. The Applicant's counsel confirmed that the Tribunal's observation was correct. The Tribunal further noted that the shift of issues in the case could give rise to the possibility of hearing further evidence and enquired about the logistical aspects of such a hearing, noting the seven-hour time difference

between New York and Juba, the respective locations of the Applicant and both counsel, the poor internet connectivity and curfew in Juba and the impact of these and other matters on conducting a hearing in New York.

15. The Tribunal explained that access to justice was paramount, noting also the Secretary-General's request to decentralize services within the Organization, echoing the proposal by the Redesign Panel for the creation of a "new, decentralized, independent and streamlined system" of justice (para 14 of the Report of the Redesign Panel on the United Nations system of administration of justice, A/61/205, dated 28 July 2006 ("Report of the Redesign Panel") thereafter adopted by the General Assembly in its resolution number A/RES/63/253 dated 17 March 2009 in establishing,

[...] a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.

16. The Tribunal informed the parties that it was therefore minded to order a change of venue of the proceedings to Geneva or Nairobi, particularly as the Registries in these locations were within the same time zone as Juba, and having regard to the location of the Applicant and his witnesses, and for the other logistical reasons discussed. The Applicant's counsel stated that his client would prefer the case to be resolved as expeditiously as possible and suggested that if the proceedings were to be conducted at a different venue of the Tribunal, Nairobi was the closest location to the Applicant and his witnesses, who could readily travel from Juba to Nairobi. Additionally, the Applicant's counsel informed the Tribunal that it would be difficult for him to attend a hearing in Geneva, given his workload in that location. The Respondent stated he had no objections to a transfer of the proceedings to Geneva or Nairobi.

Consideration: Change of venue of Proceedings

17. Article 6 (Filing of cases) of the Tribunal's Rules of Procedure provides:

1. An application shall be filed at a Registry of the Dispute Tribunal, taking into account geographical proximity and any other relevant material considerations.
 2. The Dispute Tribunal shall assign cases to the appropriate Registry. A party may apply for a change of venue.
18. Pursuant to art. 19 of its 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.
19. Pursuant to art. 16.1 of its Rules of Procedure, “the judge hearing a case may hold oral hearings. Pursuant to art. 16.2 of its Rules of Procedure, “a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure”.
20. In the Report of the Redesign Panel, the Panel of external and independent experts noted that (see at para. 24):
- [...] There are particular problems with respect to misconduct and disciplinary cases, which constitute the bulk of cases in peacekeeping missions. In disciplinary cases, physical distance between field duty stations and Headquarters results in substandard justice. Staff members in field offices and peacekeeping missions who are the subject of disciplinary proceedings before JDCs [Joint Disciplinary Committees] at Headquarters are frequently interviewed by telephone. They have little or no opportunity to present their case and answer questions in person. This practice is only a few degrees removed from trials in absentia.
21. The Panel further noted that “[h]earings, too, are a clear requirement in international standards whenever there are disputed issues of fact. To guarantee due process and to facilitate decisions, oral hearings should be promoted and accepted” (see at para. 10).
22. In the case of *Kashala* UNDT/2014/023, the Tribunal emphasized a staff member’s right to adjudication of an appeal on a disciplinary matter, particularly one which is quasi-criminal in nature and stated:

31. In the preamble to General Assembly resolution 66/106 (Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal), specific reference is made to the principle of access to justice. The second paragraph of the preamble reads:

Whereas the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations.

32. Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) is couched in similar terms and reads: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...]”.

23. In the instant case, the Applicant does not simply contest whether the established facts legally amount to misconduct, but has indicated that he strongly opposes the finding of guilt for attempting to steal the Organization’s property. This necessitates a contestation of the facts upon which the disciplinary measure for an infraction of a criminal or quasi criminal nature was based, and also of the alleged procedural violations during the disciplinary process; making this case clearly distinguishable from that of *Nzegoco* UNDT/2017/020. Moreover, the Applicant has indicated that he is in possession of additional evidence, the nature of which remains unknown at this stage, and which may require rebuttal by the Respondent at some stage. The admissibility and weight thereof, are matters to be determined by the Judge who will ultimately preside over this case.

24. It has also transpired from the case management discussions to date that there may be contested material facts in this case. In the matter of *He* 2016-UNAT-686, the Appeals Tribunal stated that (see at para. 41):

[...] submissions, allegations and indications are exactly that: submissions, allegations and indications. They are not proven facts. The proof of contested material facts, points of difference, requires evidence subjected to examination, cross-examination and re-examination, which can then be assessed or evaluated on the basis of the credibility and reliability of the witness, in the light of their bias,

demeanor and relationship to the parties; the probabilities attending their versions as tested by contemporaneous evidence of another kind; and ultimately the inherent probabilities [...]”.

25. Albeit the latter case concerned what the Appeals Tribunal termed an “incomplete documentary record” in the instant case, whilst the Respondent contends the facts are established from a complete record, the Applicant clearly disputes several facts and refutes the charge of attempting to steal.

26. Accordingly, pursuant to arts. 6.2 and 19 of the Rules of Procedures of the Dispute Tribunal, taking into account all the above and other relevant material considerations and the submissions of the parties, for a fair and expeditious disposal of the case,

IT IS ORDERED THAT:

27. By consent, and with leave of the Tribunal, Case No. UNDT/NY/2016/044 is hereby transferred from the Registry in New York to the Registry in Nairobi, at which venue all further filings shall be made and all pending motions and matters dealt with, including consideration and determination of the case by the Judge assigned thereat.

Signed)

Judge Ebrahim-Carstens

Dated this 1st day of November 2017