



Before: Judge Alexander W. Hunter, Jr.
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

CARUSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 9 January 2017, the Applicant, a Director at the D-2 level, step 3, with the Department of Political Affairs (“DPA”) in the United Nations Secretariat, contested the decision not to renew her fixed-term appointment. As relief, the Applicant seeks that the impugned decision be rescinded or, in the alternative, that she receive compensation of 24 months of net base salary.

2. On the same date (9 January 2017), the Registry acknowledged receipt of the application and, pursuant to art. 8.4 of the Rules of Procedure, transmitted it to the Respondent, instructing him to file a reply by 8 February 2017 in accordance with art. 10 of the Rules of Procedure.

3. On 8 February 2017, the Respondent filed his reply in which he contends that the application is without merit as the decision not to renew the Applicant’s appointment was lawful and fully complied with the provisions of ST/AI/2010/5 (Performance Management and Development System).

4. On 19 January 2018, the Dispute Tribunal ordered the parties, in Order No. 9 (NY/2018), to file a joint submission by 26 January 2018, in which they should identify, *inter alia*:

- a. A consolidated list of agreed facts;
- b. A list of agreed legal issues;
- c. A list of document(s) the parties sought disclosure of and establishing whether the parties were of the view that this case could be determined on the papers or a hearing on the merits was required; and
- d. In case a hearing on the merits is requested, *inter alia*, reasons why a hearing was required, produce a bundle of the evidence to be relied upon and provide a list of witnesses, their relevance and a proposed date for the hearing in the period from 5 to 26 February 2018 and availability of each witness.

5. On 26 January 2018, the parties filed a joint submission in which they provided the requested information. Further, the Applicant requested to have a hearing on the merits of the case, with a proposed date of 13 February 2018, with a possibility for one witness to be heard on 14 February 2018, while the Respondent submitted that such hearing would not be necessary.

6. On 2 February 2018, the Applicant filed a request seeking to withdraw Ms. Ghilani as a proposed witness to be replaced by Ms. Paola Serrano Emerson, Chief of the Middle East and North Africa Section, Office for the Coordination of Humanitarian Affairs (“OCHA”).

7. On 5 February, by Order No. 28 (NY/2018), the Tribunal ordered that:

... **By 5:00 p.m., Monday, 12 February 2018;**

a. The parties shall file a joint submission in which they will select an alternative proposed date or dates (consecutive, back-to-back dates) for the hearing on the merits, as the Tribunal is holding another hearing on 13 February 2018;

b. The Applicant will state the proposed testimony to be proffered by a person external to the Department of Political Affairs where the Applicant served and why it is relevant to the subject United Nations internal performance improvement plan [“PIP”] processes under consideration;

c. The Applicant shall file a submission in which she will provide certain enumerated background information.

8. On 7 February 2018, the Respondent filed a request for leave to submit additional documents, said documents being appended to the request.

9. On 7 February 2018, the parties responded to Order No. 28 (NY/2018) by proposing that a hearing, if required, be scheduled for the afternoon of 13 February 2018 and 14 February 2018 with the Tribunal permitting Ms. Paola Serrano to give evidence during the morning of 14 February 2018. The Respondent recalls his position in para. 51 of the joint submission dated 26 January 2018 that a hearing is not necessary and that the Tribunal may review the contested decision based on the papers before it.

10. On 8 February 2018 (incorrectly dated 12 February 2018), the Applicant responded to Order No. 28 (NY/2018) by providing additional background information and making the following offer of proof as to the relevancy of Ms. Paola Serrano's testimony:

Proposed Testimony of Ms Paola Serrano – The Applicant submits that the proposed testimony of Ms Serrano is relevant for the proceedings. Ms Serrano attended various meetings/working groups with the Applicant from June 2016 to December 2016 (the period of the Performance Improvement Plan). The meetings/working groups were related to the Middle East region and states that fell under the responsibility of the Applicant. Ms. Serrano would provide commentary on issues relating to the Applicant's communication and knowledge of the region that fell under her responsibility.

11. By Order No. 32 (NY/2018) dated 9 February 2018, the Tribunal rejected the Applicant's request for a hearing, indicating, *inter alia*, that

... The additional documents which were attached to the Respondent's request on 7 February 2018 will be received by the Tribunal.

... This Tribunal is firmly of the opinion that the testimony of Ms. Serrano is not relevant in this case since she is a person external to the DPA where the Applicant served and was not considered during the subject United Nations PIP.

... Similarly, considering the documentation on record, including the documents provided by the Respondent on 7 February 2018, the Tribunal does not find it necessary for the Applicant, Mr. Miroslav Jenča, Assistant Secretary-General for Political Affairs, or Mr. Jeffrey Feltman, the Under-Secretary-General for Political Affairs, to provide oral evidence.

... As such, there being no material issues of fact that would require an evidentiary hearing, this Tribunal will decide this case on the papers that have been submitted.

12. On 9 February 2018, by motion for reconsideration of Order No. 32 (NY/2018), the Applicant submits that:

1. On 9 February 2018, the Tribunal, in order no. 32 (NY/2018), directed that the Applicant's request for a hearing was denied. The

Applicant respectfully requests the Tribunal to reconsider this denial, for the reasons set forth below.

2. First, Ms. Caruso has had a legitimate expectation that a trial will be heard in this matter following order no. 28 dated 5 February 2018, in which the Tribunal directed the parties to seek back to back dates for a hearing on the merits. Ms. Caruso submits that to now deny her, at this late stage, the opportunity for a hearing would prevent her from fully challenging the evidence given by the Respondent.

3. Second, Ms. Caruso seeks to challenge the veracity of the evidence in relation to the meetings that took place during the period of the Performance Improvement Plan (PIP). Ms. Caruso challenges what was said during this period, what was done, and ultimately, what was evaluated. Ms. Caruso's contention is that the PIP was put in place, not to provide an opportunity for her to allegedly improve performance, but for the purpose of providing cover for separation. Applicant's counsel is of the view that the only way to challenge this contention is to put both the First Reporting Officer (FRO), the Second Reporting Officer (SRO), and Ms. Caruso on the stand to provide live testimony.

4. Third, Ms. Caruso also seeks to challenge the documents that were submitted by the Respondent to the Tribunal on 7 February 2018, particularly the alleged notes that were subsequently disclosed in relation to the meetings that took place between herself and her FRO, Mr. Miroslav Jenča, during the currency of the PIP. The Respondent seeks to adduce as evidence the alleged notes of a meeting which were recounted to a third party, who in turn typed up these notes and placed on file. These notes were not shared with Ms. Caruso, and indeed, were never shared with her until 7 February 2018, when the Respondent sought to disclose these documents to the Tribunal.

5. The Applicant highlights the UNAT case of Jean (2017-UNAT-743), in which alleged meeting minutes that were not shared and only became known during UNDT proceedings was held to be incompatible with the good practices of the Organization. For the Tribunal here to then rely on these statements as part of the basis upon which to conclude that the live testimony of Mr. Jenča and the Applicant's SRO, Mr. Feltman, are not necessary, reinforces bad practices of the Organization, and deprives Ms. Caruso of the opportunity to challenge what is alleged to have been said.

6. Finally, Ms. Caruso submits that the complexity of this case requires an oral hearing, in that what needs to be explored is the PIP – its creation, its assessment, and ultimately the decision to not renew based on it. All of this is made substantially more difficult in the event in which Ms. Caruso is unable to challenge the decision makers in oral hearing.

7. Accordingly, Ms. Caruso requests that the Tribunal's decision to deny a hearing be reconsidered. Additionally, [...] it is requested that the dates as proposed by both Respondent-Counsel and Ms. Caruso be maintained.

Consideration

13. In light of the Applicant's motion for reconsideration of Order No. 32 (NY/2018) and the explanations provided therein, the Tribunal finds it appropriate to reverse Order No. 32 (NY/2018) and grant the Applicant's request for a hearing at which the Applicant, Mr. Miroslav Jenča, and Mr. Jeffrey Feltman will provide oral evidence on the time and dates indicated in the parties' joint submission of 7 February 2018.

IT IS ORDERED THAT

14. A hearing is to be held on **13 and 14 February 2018** in the court room of the Dispute Tribunal in New York:

a. On 13 February 2018, at 2:30 p.m., the hearing will start and the Applicant will provide evidence. As skype is not available in the courtroom, the Applicant is to provide two telephone numbers at which she can be contacted (preferable a land line and a cellular number);

b. On 14 February 2018, the schedule will be that, at 2:00 p.m., Mr. Miroslav Jenča is to testify, and, at 4:00 p.m., Mr. Jeffrey Feltman is to testify.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 9th day of February 2018