UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2018/087
Order No.:	160/Corr.1 (NY/2020)
Date:	20 October 2020
Original:	English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

KENNEDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Lucienne Pierre, ALD/OHR, UN Secretariat
Isavela Vasilogeorgi, ALD/OHR, UN Secretariat

Note: This order has been corrected.

Introduction

1. By Order No. 146 (NY/2020) dated 1 October 2020, the Tribunal ordered each of the parties to file a submission by 14 October 2020 indicating if they wished the Tribunal to hold a hearing, and if so, stating what the purported objective would be. The parties duly responded. In response to the Applicant's request for a hearing, the Respondent filed a submission objecting to this request on 16 October 2020.

Consideration

2. In response to Order No. 146 (NY/2020), the Respondent indicates that he "does not request that an oral hearing be held in the instant case" as he "concurs with the Dispute Tribunal's findings … that the facts of the case are not in dispute and that no further evidence is necessary, as the record is complete".

3. The Applicant, on the other hand, requests that a hearing be held. The purpose would be to obtain the testimony from Mr. KR (name redacted), which the Applicant submits would be "directly relevant to the question of how the Respondent reached the contested decision" and some other circumstances that mostly appear to concern the proportionality of the sanction rather than the facts on which it was based. The Applicant also wishes to testify himself regarding "the incident and its effects, including relevant information that was not included in his application".

4. The Tribunal observes that the Applicant has not specified what disputed and relevant facts the testimonies of Mr. KR and himself would establish. Both proposed witnesses were interviewed as part of this Office of Internal Oversight Services ("OIOS") investigation, and the Applicant indicates in the application that "[w]hile the underlying facts in this case are not in dispute, the interpretation given by the Administration appears contrived and retaliatory". In the Respondent's objection to the Applicant's hearing request, he submits that Mr. KR's proposed testimony is not relevant, and that the Applicant has failed to present what he wishes to disclose in his own proposed testimony.

5. The issues presented by the Applicant, as outlined in para. 5 of Order No. 146 (NY/2020), therefore continue to be of a legal nature not requiring additional evidence to be presented. In line herewith, the Appeals Tribunal has consistently held that the scope of the Dispute Tribunal's judicial review in disciplinary cases is to examine "whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence" (see, for instance, *Turkey* 2019-UNAT-955 , para. 32).

6. In this regard, the Tribunal observes that arts. 16.1. and 2 of its Rules of Procedure provide that "[t]he judge hearing a case may hold oral hearings" and that "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". It therefore follows that it is for the assigned judge to determine whether a hearing is necessary and that in a disciplinary case like the present one, this should be done.

7. At the same time, the Appeals Tribunal has held that the Dispute Tribunal is not to make its own factual findings if the parties have agreed on certain facts (see, *Ogorodnikov* 2015-UNAT-549, para. 28). In this regard, the Tribunal notes that the very purpose of producing evidence—written or oral—is to establish specific facts, which are relevant to the issue(s) at stake and which the parties disagree about. Accordingly, there is, in essence, only a need for evidence if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27). Similarly, see the Dispute Tribunal's findings in the *Padula* Order No. 138 (NY/2020) dated 15 September 2020.

8. The Tribunal further notes that the Appeals Tribunal held in *Nadasan* 2019-UNAT-918, para. 39 (affirmed in *Ganbold* 2019-UNAT-976, para. 28), that "[t]here may be instances, where [the Dispute Tribunal] will come to the conclusion that the facts on which the disciplinary measure was based have been established, where necessary by clear and convincing evidence, during the investigation proceedings". The Appeals Tribunal added that "[i]n such cases, [the Dispute Tribunal]

will normally undertake an oral hearing as provided for in disciplinary cases under Article 16 of [the Dispute Tribunal's] Rules of Procedure, but the Tribunal may decide not to (re)hear witnesses or gather additional evidence" (in line herewith, see also *Mansour* 2020-UNAT-1036, paras. 41, in which the Appeals Tribunal stated that before a first instance tribunal "the usual expectation is that there will be an in-person hearing, even if not of evidence, then at which a party or that party's representative has an opportunity to make submissions and answer questions from the Tribunal arising from their submissions").

9. In the present case, for the Tribunal to allow Mr. KR and the Applicant to testify, the Applicant must specify, with a certain degree of certainty and specificity, what relevant and disputed facts the proposed testimonies are to establish. In this regard, the Tribunal emphasizes that simply having these proposed witnesses restate their statements to OIOS would be a waste of valuable judicial resources. Instead, the Applicant should explicitly point to a factual mistake or omission in the contested decision, which the relevant testimony corroborates, and then show how this mistake or omission would render the decision unlawful. Also, should the Respondent subsequently agree to the Applicant's new factual assertion(s), the Tribunal is not to rehear the witnesses (see, for instance, *Ogorodnikov*).

10. Alternatively, as per *Nadasan,* the Tribunal will allow the Applicant to have a hearing, which would be limited in scope to his presentation of his case orally to the Tribunal within a given timeframe. In this case, the Applicant will need to specify how long his testimony and that of his witness would take for this purpose. Following the Applicant's written statement(s), the Respondent would be allowed to respond to these submissions, after which the Applicant would be granted the final word. The parties would subsequently be instructed to summarize all their submissions in written closing statements.

IT IS ORDERED THAT:

11. By **4:00 p.m. on Thursday, 29 October 2020**, the Applicant is to file a submission in which he indicates:

a. Whether he wishes to call Mr. KR and himself as witnesses. If so, he is to submit a succinct written witness statement from each of the proposed witnesses, which, if necessary, can also be adopted as the examination-in-chief;

b. Should the Applicant not request any oral evidence to be adduced, he is to indicate (i) if he wishes to orally present his case to the Tribunal in line with the instructions given in the present Order, and (ii) in the affirmative, how long he would need for this purpose.

12. By **4:00 p.m. on Wednesday, 4 November 2020**, the Respondent is to provide his comments, if any, to the Applicant's submission. The Tribunal will thereafter issue its further directions to the parties.

(Signed)
Judge Alexander W. Hunter, Jr.
Dated this 20th day of October 2020