



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

SEALES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON CASE MANAGEMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Albert Angeles, DAS/ALD/OHR, UN Secretariat

Miryoung An, DAS/ALD/OHR, UN Secretariat

Introduction

1. On 30 March 2023, via Order No. 25 (NY/2023), the Tribunal instructed the Applicant to file a rejoinder to the Respondent's reply and state whether he wished to adduce any further evidence.

2. The Applicant complied with the instruction and filed his rejoinder on 21 April 2023 stating that he did not wish to adduce any further evidence. He also argued that since the contested decision concerned "a private transaction, not involving any [United Nations] funds and in the absence of any independent finding of wrongdoing, by the Staff Union, the local authorities or anyone else", there was no justification for the Respondent's involvement. He maintained that this was strictly a matter for the Staff Union and that the Respondent's "interference" was unwarranted.

Considerations

3. The Appeals Tribunal has stated that in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine i) whether the facts on which the disciplinary measure is based have been established; ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177, para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further stated that clear and convincing proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable" (see para. 30 of *Molari* 2011-UNAT-164). In this regard, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (see para. 32 of *Turkey* 2019-UNAT-955).

4. The Tribunal has examined the parties' submissions and notes that they have different interpretations of the facts of the case. In this connection, the Appeals Tribunal has held that where the parties have agreed on certain facts, there is no need for the Dispute Tribunal to make its own factual findings (see *Ogorodnikov* 2015-UNAT-549, para. 28). Accordingly, the Tribunal will order the parties to produce consolidated lists of agreed and disputed facts to assist with the adjudication of the case.

5. Moreover, the Tribunal observes that in the rejoinder, the Applicant asserts that the Respondent has failed to take into account "the central role" of another staff member, "who was alone responsible" for the alleged misappropriation of funds and that the Applicant's only error "was in not keeping proper accounting records of the disbursements". Although the Applicant has already stated that he does not wish to adduce any further written evidence, the Tribunal finds that in order for it to have a better understanding the case, all relevant materials will need to be submitted by the parties. In that regard, the Tribunal will instruct the parties to produce any further evidence in support of their respective claims. (See, for instance, *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27.)

6. Pursuant to arts. 16.1 and 16.2 of its Rules of Procedure, the Tribunal "may hold oral hearings", and a hearing "shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". As the present case is a disciplinary matter, the Tribunal will determine in due course whether a hearing is necessary.

7. In the event that the parties do not seek to produce any oral evidence, the Tribunal may still request them to state whether they find that an oral hearing is necessary and indicate the purported objective of such a hearing (see, also *Nadasan* 2019-UNAT-918, para. 39, as affirmed in *Ganbold* 2019-UNAT-976, para. 28). For instance, the parties may choose to use it as an opportunity to present their legal arguments directly to the Tribunal. However, that the parties will still be required to file written closing statements summarizing all their submissions.

8. In light of the above,

IT IS ORDERED THAT:

9. By **4:00 p.m. on 24 August 2023**, the parties are to file a jointly signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph, in square brackets, the party contesting the disputed fact shall set out the reason(s);

10. By **4:00 p.m. on 31 August 2023**, each party is to submit whether it requests to adduce any additional evidence, and if so, state:

a. What additional documentation it requests to be disclosed, also indicating what fact(s) this is intended to substantiate; and/or

b. The identity of the witness(es) the party wishes to call, and what disputed fact(s) each of these witnesses is to give testimony about, also setting out the proposed witness's testimony in writing. This written witness statement may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so.

11. Upon receipt of the above-referred submissions, the Tribunal will issue the relevant instructions for further case management.

(Signed)

Judge Joelle Adda

Dated this 1st day of August 2023

Case No. UNDT/NY/2022/046

Order No. 66 (NY/2023)

Entered in the Register on this 1st day of August 2023

(Signed)

Isaac Endeley, Registrar, New York