



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/057  
Order No.: 131 (NY/2023)  
Date: 21 November 2023  
Original: English

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**Before:** Judge Rachel Sophie Sikwese

**Registry:** New York

**Registrar:** Isaac Endeley

SCHIFFERLING

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**  
**ON CASE MANAGEMENT**

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**Counsel for Applicant:**

Cristian Gimenez Corte

**Counsel for Respondent:**

Kong Leong Toh, UNOPS  
Tiffany Henderson, UNOPS

## **Introduction**

1. By Order No. 117 (NY/2023) dated 26 October 2023, following a Case Management Discussion (“CMD”) on the same date, the Tribunal ordered (a) the Applicant to submit a list of witnesses whom he proposes to call to provide testimony and the points of disputed facts that the testimony of each proposed witness would possibly cover by 2 November 2023, and (b) the Respondent to provide his comments thereon by 9 November 2023.
2. The parties duly complied with Order No. 117 (NY/2023).

## **Consideration**

3. The Tribunal notes that art. 16.1 of the Rules of Procedure provides that “[t]he judge hearing a case may hold oral hearings”. The oral hearing, or the trial, is the mechanism whereby the factual truth might be discovered by the apposite. Oral evidence may therefore prove necessary where a relevant fact is disputed and the record of the documentary evidence is deemed inadequate to resolve the discrepancy. (See *AAO UNAT-2023-1361*, para. 52).
4. It is not the role of the Tribunal to hold an oral hearing where the facts are “not pointedly disputed” (see *El-Awar 2019-UNAT-931*, para. 27).
5. Accordingly, where the Applicant wishes to present the facts of the case in person to the Tribunal, this request shall be allowed if the Tribunal is satisfied that the evidence will require fuller examination for the purpose of assessing the credibility and reliability of the witnesses in order to reach sustainable findings on the probabilities (See *AAO*, para. 52).
6. This case does not concern a disciplinary measure but an administrative discretion involving fixed-term appointment (“FTA”) non-renewal, where the standard of proof required of an applicant is as high as that required of the Administration to prove misconduct that leads to termination, i.e., of clear and convincing evidence. In such a case, as observed by the Appeals Tribunal in a

minority concurring opinion made as *obiter dictum*, in *Icha* 2021-UNAT-1077 (paras. 2 – 4) that:

... [...] The principles at issue include the “presumption of regularity” of administrative decisions; the imposition of an onus of proof resting on an affected staff member of establishing irregularity or other unlawfulness once the Organisation has met a very low threshold of regularity; and then that the burden of that proof carried by the staff member is to the high standard of a “clear and convincing” case, the same standard of evidential proof as the Organisation is expected to show in its investigation of allegations of serious misconduct against staff members that may result in their summary dismissal from service.

... In such situations, the Organisation almost always holds most, if not all, of the information and therefore the evidence relevant to the grounds for its decision. At best, the staff member holds relatively little. The information power imbalance is pronounced. Yet the jurisprudence expects the staff member to make out a case to a high standard against the Organisation that holds unilaterally the relevant information and may naturally be reluct[a]nt to divulge it all. It is little wonder that such cases fail for want of proof. It is difficult, if not impossible, to prove what one may be unaware of.

... [...] [I]nformed and detailed consideration needs to be given to whether a more just regime may be one in which adversarialism and strict rules of proof yield to one in which the UNDT’s task is to ensure that all relevant information is gathered and assessed in a balanced way so that just outcomes can be achieved in cases and the current marked imbalance of power becomes less determinative of the outcome.

7. In view of the above persuasive observations, and recognizing the presumption of regularity that official functions in cases of organizational restructuring are properly performed, and refraining from interfering with any genuine restructuring unless the presumption is successfully rebutted by an applicant (*Nastase* 2023-UNAT-1367, para. 25); in order to do justice to the parties, the legal playing field must be level and balanced.

8. The Applicant requested calling nine witnesses from the Administration to be confronted on the allegation that the impugned decision was unreasonable, unlawful and improperly motivated.

9. Upon reviewing the nature of the facts purported to be examined in full, and upon reading the submissions of the Respondent that most of the facts are not in dispute or are irrelevant to the issue in contention, the Tribunal finds that at least one witness from the requested list may be relevant to provide clarification on the disputed facts relating to the abolition of the Applicant's post leading to non-renewal of his contract and the current status of the two programs that were managed by the Applicant.

10. The rest of the witnesses seem to be either repetitive or irrelevant. The nature of the material evidence attributed to them relates to the same material issue of non-renewal of the FTA due to abolition of post. Therefore, their attendance is not necessary for a fair, expeditious and just disposal of the case.

IT IS ORDERED THAT:

11. The hearing shall be held on **14 and 15 December 2023, from 9:00 a.m. to 10:30 a.m., New York time**, via MS Teams at which the Applicant and a witness from the Administration will provide testimonies. By **4:00 p.m. on Friday, 8**

**December 2023**, the Respondent is to file a witness statement, and so should the Applicant file his witness statement.

12. By **4:00 p.m. on Tuesday, 12 December 2023**, the parties shall file a joint chronologically paginated trial bundle which shall comprise of pleadings and attachments, witnesses' statements and other relevant documents.

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 21<sup>st</sup> day of November 2023

Entered in the Register on this 21<sup>st</sup> day of November 2023

*(Signed)*

Isaac Endeley, Registrar, New York