



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/031

Order No.: 148 (NBI/2022)

Date: 10 October 2022

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NDAMBUKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE RESPONDENT'S
MOTION FOR LEAVE TO SUBMIT
ADDITIONAL EVIDENCE**

Counsel for the Applicant:
Kenneth Wilson

Counsel for the Respondent:
Rebecca Britnell, UNHCR
Francisco Navarro, UNHCR

Introduction

1. During the case management discussion (“CMD”) on 29 September 2022, the Respondent made an oral submission relating to the production of additional evidence.

2. On 30 September 2022, he filed written submissions supplementing his oral submissions and submitted that following the imposition of the disciplinary measure on the Applicant on 21 December 2021 and the filing of his reply on 19 April 2022, new evidence has come to light demonstrating a pattern of fraudulent behaviour on the Applicant’s part or, in other words, his propensity to engage in fraud. He thus requests to file new evidence, including: (i) the Applicant’s personal history form (“P.11 form”) dated 13 March 2011; (ii) the Judgment from the Industrial Court of Kenya at Nairobi issued on 25 April 2021; (iii) the Inspector General’s Office’s investigation report dated 17 December 2021 in case INV/2021/049-C; (iv) the letter dated 27 January 2022 from the Director of Human Resources (“DHR”), UNCHR, to the Applicant sharing the investigation report in case INV/2021/049-C; (v) the Applicant’s comments dated 7 February 2022; and (vi) the letter dated 8 June 2022 from DHR to the Applicant with the finding that the Applicant had submitted a fraudulent claim for rental subsidy, a fraudulent claim for the reimbursement of real estate agent fees, and the decision to recover the financial loss to UNHCR.

3. The motion was served on the Applicant on 3 October 2022, and he filed his response on 7 October 2022. The Applicant opposed the motion on the ground that the Respondent is relying on art. 19 of the Tribunal’s Rules of Procedure in isolation of art. 18 of the Rules of Procedure. In his view, art. 18 does not provide for additional evidence. He further contends that the Tribunal lacks jurisdiction to grant leave to submit additional evidence that did not form part of the disciplinary process against him.

Deliberations

4. In *Bertucci* 2010-UNAT-062, paras. 22 and 23, the United Nations Appeals Tribunal (“UNAT”) held that,

under the new system of administration of justice, the Dispute Tribunal (“UNDT”) has broad discretion with respect to case management. As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties.

5. Considering that the Respondent’s motion falls squarely within the case management authority of this Tribunal regarding evidence, procedure and trial conduct, the motion is denied. The role of the Tribunal in judicial review of a decision made by the Respondent should, in fairness to all parties, be based solely, on information that was available to the decision maker at the time when the decision was made. That includes similar fact evidence. This similar fact evidence that the Respondent seeks to introduce was secured long after the decision maker decided on the Applicant’s dismissal, and it does not meet the usual admissibility test of relevance to the function of the Tribunal in reviewing what the decision maker would have taken into account. Further, the Respondent had the information since June 2022, but only raised it at the CMD in September 2022, which put the Applicant in an embarrassing situation of being required to address it in a short time.

ORDER

6. In view of the above, the Respondent’s motion for leave to submit additional evidence is rejected.

(Signed)

Judge Eleanor Donaldson-Honeywell
Dated this 10th day of October 2022

Entered in the Register on this 10th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi