



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/051/
JAB/2008/098
Judgment No.: UNDT/2009/027
Date: 30 September 2009
Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

SINA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON APPLICATION FOR
SUMMARY DISMISSAL**

Counsel for Applicant:
George Irving

Counsel for Respondent:
Peri Johnson, UNDP

Introduction

1. This is an application by the respondent under Art 9 of the Rules of Procedure of the Tribunal for summary judgment. It is contended that the applicant cannot succeed as a matter of law, even accepting as true the allegations of fact upon which he relies. Accordingly, although there might be a dispute as to the facts if the matter eventually comes to trial, it is submitted that determination of this application does not involve any question of disputed facts.

2. The applicant was employed on a fixed term contract which was not renewed. Some months before the expiry of his contract he was seriously injured in an explosion. An investigation report suggested that he may have been to blame. Before the report was formally issued the applicant was informed that his contract would not be renewed. The applicant argued that the adverse findings of the investigation had influenced the decision not to renew his contract and that he had not had an opportunity to respond to those findings before they were taken into account. There was no direct evidence that the decision maker was aware of the conclusions of the investigators. Moreover, the report was dated some weeks later than the decision not to renew the applicant's contract had been made. The respondent contended that, as the primary facts were not in dispute and the applicant could not establish the alleged impropriety, he must fail as a matter of law. The applicant contended, amongst other things, that the question depended on the inferences that could fairly be drawn from the primary facts and, these being in dispute, this was not a case in which an order for summary dismissal could be made.

Facts

3. The Applicant was employed by the Kabul office on a 300 series appointment of limited duration, which was due to expire on 28 February 2007. He was a munitions expert whose job involved him in the programme for disbanding and disarming what was then called the "northern militias" and worked at a munitions storage facility in Kabul.

4. The applicant lived in a single room in a guesthouse in Kabul. On 12 October 2006, an explosion occurred in his room. He was seriously injured and required hospitalisation and extensive medical care. An investigation immediately proceeded involving members of the Afghan police and also, it appears, a number of persons employed by the UNDP whose precise role is unclear. There is no evidence that they took or were legally capable of taking primary responsibility for investigation of the explosion. Plainly that responsibility was in the hands of the Afghan authorities.

5. One of the UNDP officers, who was at the scene and took possession of a number of items, including shrapnel (later handed over to Kabul police) and as I understand it, either by himself or with others, searched for other relevant forensic material. It seems that this officer's primary responsibility was to check that the explosion had not been caused by the water heater in the room or a gas appliance malfunction. In due course, it was established, beyond question, that the source of the explosion was a mortar round which, in all likelihood, had only partially exploded, which was fortunate for the applicant because otherwise he would certainly have been killed.

6. The first report by UN authorities was made on 26 October 2006 by the Special Investigation Unit of the Department of Safety and Security. In substance, that report exonerated the applicant but implicated another employee of the UNDP, who was the Applicant's coworker. The investigation was handed over to the UNDP Office of Audit and Performance Review (OAPR) for further action on the following day. It is unnecessary to go into the details of that second investigation; it is sufficient to say that it appeared to be thorough, objective and careful, designed primarily, of course, to ascertain the actual circumstances of the incident of 12 October 2006. The investigators were critical of the initial investigation at the scene and detailed a number of respects in which the forensic examination departed from elementary appropriate practice.

7. It seems fair to say that the UN personnel who attended the scene had not complied with appropriate police methods but the circumstances were chaotic, the risk that this had been some kind of terrorist attack plainly serious and worrying and

immediate clarification of what had happened, if that were possible, was undoubtedly necessary. It is easy to understand how such considerations might have affected, in an adverse way, the kind of meticulous investigation that an ordinary crime scene should receive. Despite the entirely justified criticism by the investigators of the initial forensic examination, there is nothing in the report which suggests that the UN officers had acted carelessly or unprofessionally.

8. The investigators, in effect, concluded that the finger of suspicion which had pointed towards the applicant's coworker was wrongly directed and a substantial case appeared which implicated the applicant in the explosion, though the precise manner in which it occurred could not be ascertained, partly because of shortcomings in the initial forensic examination of the scene. Nevertheless, a great deal of useful forensic material was available and on the face of it justified, at the least, the reasonable suspicion that it was the applicant who was responsible one way or another for the explosion. One of the consequences of that suspicion was that it raised, in its turn, the reasonable suspicion that the applicant's first explanation for the events which fairly and squarely blamed his coworker was a lie, designed to enable him to avoid responsibility for what was a serious but could have been a catastrophic incident and one which inevitably reflected upon his professionalism.

The non-renewal of the applicant's contract

9. As I have mentioned, the applicant's contract was due to expire on 28 February 2007. On 21 December 2006, the then Programme Director for UNDP Kabul informed the applicant that, in accordance with the usual practice on notification, his contract was due to expire on 28 February 2007 and that it would not be renewed. As it happened, various extensions were later given to the applicant, arising from his medical condition and his sick leave entitlements. It seems clear, however, that those extensions simply delayed implementation of a decision that was in fact made in December 2006 and notified to the applicant as I have mentioned.

10. The applicant's case is that the decision not to renew his contract was affected by the adverse opinions of the investigators, whose opinions were embodied in a report dated January 2007, and certainly in existence on 18 January 2007 though

when, precisely, it was completed, is unknown. There is good reason for thinking that it had been substantially completed by mid-December 2006, certainly so far as its major conclusions were concerned.

Did the investigation influence the decision not to renew the contract?

11. It seems to me that it is reasonably possible, at least, that the Programme Director had, by the time of the decision not to renew the applicant's contract, been made aware of the investigators' conclusions that were critical of the applicant.

12. I have been informed from the bar table by Ms Johnson for the respondent, that the usual practice is that reports of the kind here would be provided to the legal office within the UNDP but that they would not be passed on to someone in the Programme Director's position. However, whether that happened in this case, of course, is not known. And there are good reasons for thinking that such a strict rule may not have been adhered to. Firstly, this was a matter of general controversy in Kabul and I would infer, within the staff of UNDP there. The investigators undoubtedly spoke to a number of relevant persons, some of whom, like the Programme Director, had been intimately involved in the first investigation and would naturally have a recurring interest in the course of proceedings. Quite apart from the protocol to which Ms Johnson has referred, on the face of it there would have been nothing improper with the investigators discussing with the Programme Director the applicant's position or, so far as I can see, the lines of enquiry which the investigation was taking. After all, he held a senior post in Kabul and whether or not the explosion had been caused by the unfortunate acts of a UNDP employee as opposed to a third person was of great significance, affecting, for obvious reasons, the reputation of the UNDP itself. The ability of someone in a Director's position to assure interested Afghan officials that proper enquiries were being made would also suggest that it was reasonable for him to be kept abreast of the investigation as it unfolded. These are, of course, merely common sense inferences, reasonably open, but they may be found to be incorrect in due course.

The submissions

13. Ms Johnson sought summary dismissal of the application on the basis, in substance, that no evidence exists capable of justifying the conclusion that the decision to not renew the applicant's contract was affected by the investigation. Ms Johnson does not accept, at all events, that it would have been improper for the Director to have given some weight to the risk that the applicant had acted unwisely (to use a neutral term) but that is not an argument that she needs to make at this point. She contends simply that, accepting the applicant's case at its highest, it cannot establish that the Director or any relevant person was affected by or took into account in any respect, the adverse findings about the applicant made by the investigators. Mr Irving, for the applicant, submitted in substance, amongst other things, that the question whether the Programme Director had been influenced by the opinions of the investigators was a live issue and there was an evidentiary basis for concluding that he was so influenced, even if the report itself was not finalized until after the decision was made. The arguments on both sides have ranged outside this crucial point, but it is not necessary to decide on other matters.

Conclusion

14. What I have already said is sufficient to demonstrate that the evidence is indeed capable of establishing a likelihood of a connection between the investigation's conclusions on the one hand and the applicant's failure to obtain a renewal of his contract on the other. Whether the evidence ultimately justifies such a conclusion will be matter for trial, but I am not convinced that this is case where the application for summary dismissal is justified.

15. It is worth making the point, I think, that where one party raises sufficient material suggesting a particular fact or facts and the other party has the sole means of refuting that inference, then an evidentiary burden to call that evidence will ordinarily arise so that a failure to do so will make it relatively more easy for the other party to treat the fact as proven.

16. There are various other aspects of the applicant's case which until now have not been adequately articulated, if they have been articulated at all. In respect of several of these, Ms Johnson fairly points to substantial legal obstacles which the applicant would need to overcome before he could succeed. However, I do not intend to deal with those matters at this stage.

Order

17. The motion for summary judgment is dismissed.

(Signed)

Judge Adams

Dated this 30th day of September 2009

Entered in the Register on this 5^h day of October 2009

(Signed)

Hafida Lahiouel, Registrar, New York