



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko

CHHIKARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON ADMISSIBILITY OF
AUDIO RECORDINGS**

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant has challenged a decision he received on or before 12 December 2014 not to roster or select him for the post of Senior Aviation Safety Officer in New York following an interview by a selection panel.

2. In paragraph 12 of his Application dated 13 July 2015 the Applicant stated that he had “recorded his answers to the interview questions (a practice he maintains for the purposes of self-improvement)”. He explained that the voices of the interviewers cannot be heard and are therefore not reflected in the transcript. Further he submitted that his answers provide clear evidence of the arbitrary, unfair and unreasonable decision by the panel members not to recommend him for the post on the basis of his purported failure to demonstrate “Professionalism”.

3. Among the annexes to the Application were Annex 7 entitled “Interview Transcript” and Annex 8, the original audio recording from which the transcript was purportedly made.

4. On 17 August 2015, the Respondent filed a reply which stated, inter alia,

The Applicant has recorded his interview without the consent or knowledge of the other participants. In the case of *Perez-Soto*¹, the Dispute Tribunal held that: “secretly recording a conversation without announcing this to the person to whom one is speaking is unethical and any such documents, or recordings, would generally be inadmissible before this Tribunal”.

The Respondent therefore moves the Dispute Tribunal to Strike Annexes A7 and A8, and the references to those annexes in the Application from the record.

¹ UNDT/2012/078.

5. By Order No. 376 (NBI/2015), the Tribunal granted leave for the Applicant to comment on the Respondent's motion.

6. In his response to Order No. 376, dated 12 February 2016, the Applicant strongly resisted the motion and made submissions which are summarized as follows:

- a. Annexes 7 and 8 do not constitute the recording of a conversation or an interview but only recorded his answers to the interview questions. He was careful not to record the voices of the panel members and only his voice can be heard.
- b. There is no rule of law or procedure which would or should exclude the Applicant from providing evidence that records only his voice or a transcription of such a recording.
- c. The finding in *Perez Soto*, which imposes a restriction on the admissibility of recordings, applies only the strictest "general principles of law recognized by civilized nations". Article 38 of the Statue of the International Court of Justice² should guide this Tribunal.
- d. Many countries do not take the approach in *Perez-Soto* and permit the recording of telephone calls and in-person conversations with the consent of at least one of the parties, although he accepts that not all jurisdictions contain similar rights.
- e. It would be manifestly disproportionate to exclude from evidence in these proceedings the Applicant's recordings of only his own voice,

² 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. International custom, as evidence of a general practice accepted as law;
 - c. The general principles of law recognized by civilized nations;
 - d. Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

especially given that key parts of his case require a review of that important evidence.

Considerations

7. Pursuant to art. 9 of the UNDT Statute, the Tribunal may order production of documents or such other evidence as it deems necessary.

8. Article 18 of the UNDT Rules of Procedure, which relates to evidence, provides:

1. The Dispute Tribunal shall determine the admissibility of any evidence.

2. The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

9. The Tribunal respectfully adopts the ruling of the UNWRA Tribunal in Judgment No. UNWRA/DT/2013/035 which stated that:

There is no universally accepted practice or legal principle against the admissibility of secret recordings of discussions so long as the information sought to be admitted is relevant and probative of the issues to be determined. Furthermore, the evidence must be necessary for a fair and just disposal of the proceedings. As a matter of good employment relations, the Tribunal considers that secret recordings in the workplace undermine the important relationship of trust and confidence and are to be strongly discouraged. Any motion to admit such material will be subject to utmost scrutiny. Nothing in this judgment should be taken as giving comfort to those who engage in the practice of clandestine recordings.

10. This Tribunal holds that the following general principles apply when considering whether such evidence should be produced to the Tribunal:

Is the evidence contained in the recording and its transcript prima facie admissible?

Is it relevant and probative of one or more of the issues in the case?

11. The Respondent does not allege that the recording is not authentic or that the transcript does not accurately reflect the recording. The following is predicated on that basis.

12. The main issues in this case are whether the applicable Regulations and Rules were applied during the impugned selection process and whether they were applied in a fair, transparent and non-discriminatory manner.³

13. The Applicant alleges that the decision that he was unsuccessful in the core value of “Professionalism and Judgment/Decision-making was arbitrary, unfair and unreasonable”. He alleges that the recording shows that there was no indication during his interview that he exhibited any of the negative indicators for these two core values. This is denied by the Respondent who relies on the summary of interview produced by the panel members as evidence of the Applicant’s answers to their questions.

14. The Applicant submits that the recording and its transcript are relevant to the issues in the case to the extent that they provide a verbatim rather than a summary of the answers he gave to the panel and are therefore necessary for the fair and expeditious disposal of the proceedings.

15. The Tribunal holds that the recordings are equivalent to contemporaneous notes of the interview by the Applicant to which he would normally be entitled to refer to refresh his memory, that they are relevant to the issues in the case and are therefore *prima facie* admissible in terms of the UNDT Statute and the Rules of procedure.

³ *Ljungdell* 2012-UNAT-265.

Is there any specific prohibition in the United Nations legal framework against recording conversations without the consent of one or more of the parties to that conversation?

16. The Tribunal has not found any reference in the United Nations Regulations and Rules, the Secretary-General's Bulletins' or Administrative Instructions which impose such a prohibition. Neither party drew any such prohibition to the attention of the Tribunal.

Was the recording an unreasonable intrusion into the privacy of the participants to the conversation?

17. Whether intentionally or not, the Applicant did not record the voices or anything said by the panel members. The transcript is limited to what he said in response to their questions during their interview of him. In these unusual circumstances, the Tribunal finds that the privacy of the panel members was not violated by the Applicant's secret recording.

If the evidence was wrongfully obtained, is it in the interests of justice to exclude it?

18. This question requires the balancing of the nature of the obtaining of the evidence against the consequences of excluding it from consideration by the Tribunal.

19. In this case, although clandestine, the recording by the Applicant was not specifically prohibited. While it may have breached the underpinning values of trust and confidence between employer and employee it did not breach the privacy of the other participants at the interview. It therefore cannot be said to have been wrongly obtained in the strictly legal sense.

20. The evidence provided by the recording is relevant to the issues. The Tribunal finds that it is necessary in the interest of justice that the recording and the transcript is considered by the Tribunal subject to the safeguard that the maker of the transcript is required to certify that it is a true and accurate record of the recording.

Decision

21. The Motion by the Respondent is rejected.

(Signed)

Judge Coral Shaw

Dated this 24th day of March 2016

Entered in the Register on this 24th day of March 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi