



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/087
Order No.: 174 (NY/2020)
Date: 6 November 2020
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

KENNEDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Lucienne Pierre, ALD/OHR, UN Secretariat

Isavella Vasilogeorgi, ALD/OHR, UN Secretariat

Introduction

1. By Order No. 160 (NY/2020) dated 20 October 2020, the Tribunal provided the following orders (paras. 11 and 12):

... By **4:00 p.m. on Thursday, 29 October 2020**, the Applicant is to file a submission in which he indicates:

a. Whether he wishes to call Mr. KR and himself as witnesses. If so, he is to submit a succinct written witness statement from each of the proposed witnesses, which, if necessary, can also be adopted as the examination-in-chief;

b. Should the Applicant not request any oral evidence to be adduced, he is to indicate (i) if he wishes to orally present his case to the Tribunal in line with the instructions given in the present Order, and (ii) if in the affirmative, how long he would need for this purpose.

... By **4:00 p.m. on Wednesday, 4 November 2020**, the Respondent is to provide his comments, if any, to the Applicant's submission. The Tribunal will thereafter issue its further directions to the parties.

2. On 29 October 2020, the Applicant filed his submissions in which he requests that both Mr. KR and himself be called as witnesses, and appended the corresponding written witness statements. He also requests that "should the witness statements not need to be subjected to cross-examination, they [should] be adopted in lieu of oral evidence", and if so, he requests, "leave to present his case orally to the Tribunal ... in order to address the legal issues of the case, which should not require more than one hour".

3. On 4 November 2020, the Respondent filed his response in which he requests the Tribunal to deny the Applicant's requests for a hearing and for the written witness statements to be admitted into evidence. The Respondent, in essence, argues that all provided information is irrelevant to the case.

Consideration

The basic requirements for adducing evidence in a disciplinary case

4. With reference to para. 7 of Order No. 160 (NY/2020), the Tribunal reiterates that the very purpose of producing evidence—written or oral—is to establish specific facts, which are relevant to the issue(s) at stake and which the parties disagree about. Accordingly, there is, in essence, only a need for evidence if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

5. In a disciplinary case like the present one, the Appeals Tribunal has consistently held that the scope of the Dispute Tribunal’s judicial review is to examine “whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence” (see, for instance, *Turkey* 2019-UNAT-955, para. 32).

6. In a disciplinary case, it is therefore only necessary to adduce evidence if the factual basis for the sanction is questioned since the review of the other two issues is of a purely legal nature.

Mr. KR’s proposed testimony

7. The Tribunal notes that Mr. KR’s statement mostly concerns his own affairs, which, as such, are not relevant to the Applicant’s disciplinary case, and that the Applicant has made no submissions to explain their relevance. These parts of the Mr. KR’s proposed testimony are therefore rejected as irrelevant.

8. Of possible relevance to the case, Mr. KR, however, also suggests that “[t]he correspondence reproduced by [Inner City Press (“ICP”)] consisted solely [of] staff union exchanges, which [he] indicated were confidential for those who might take the matter up” and that “[n]o other internal [United Nations Department for Safety and Security] documents or confidential material was involved including the noted Security

Assessment Report produced in France, which was referenced in the correspondence, which was never leaked”.

9. Essentially, this could imply that the Applicant is now intending to take issue with whether the facts on which the sanction was based have lawfully been established, as per *Turkey* above. Throughout the impugned decision of the Under-Secretary-General for Management dated 1 October 2018, it is stated that the documents that were lost by the Applicant were indeed confidential, which then also formed part of the factual basis for the disciplinary sanctions, and it is also indicated that the Applicant had admitted that “the emails contained confidential information”. In line herewith, in the Applicant’s application to the Dispute Tribunal, the confidential nature of the relevant documents is not questioned; rather, it is stated that “the underlying facts in this case are not in dispute”.

10. The Tribunal is therefore now uncertain if the Applicant, by Mr. KR’s proposed witness testimony, is trying to amend his previous statement to the disciplinary investigation and his submissions to the Dispute Tribunal regarding the confidentiality of the lost documents. If the Applicant wishes to amend his submissions, he should then have sought proper leave from the Tribunal to do so. Considering the seriousness of the matter, the Tribunal will, however, allow the Applicant to clarify, and possibly amend, these submissions. Should the Applicant opt to do so, Mr. KR is to provide oral testimony strictly limited to the question of whether the relevant documents were of a confidential nature as stipulated in the impugned decision.

The Applicant’s proposed testimony

11. The Applicant’s proposed written witness testimony concerns his current job situation, which is not relevant to the impugned disciplinary decision, and an account of his possible pecuniary losses, which is phrased as a legal submission and not as evidence. The proposed evidence is therefore rejected.

Hearing of the parties' legal arguments

12. As per Order No. 160 (NY/2020) and with reference to *Nadasan* 2019-UNAT-918, the Tribunal will, in any event, allow the Applicant to have a hearing at which he can present his case orally to the Tribunal. Should the Applicant opt to do so, the Tribunal will allow each party a maximum of 30 minutes to present their case and notes that they would subsequently be instructed to summarize their final submissions in written closing statements.

IT IS ORDERED THAT:

13. By **4:00 p.m. on Tuesday, 10 November 2020**, the Applicant is to file a submission in which:

- a. He clarifies, and possibly amends, his submissions regarding the confidential nature of the lost documents;
- b. He states whether he wishes to call Mr. KR as a witness on the limited question of confidentiality;
- c. He indicates whether he wants 30 minutes to present his legal submissions to the Tribunal at a hearing.

14. In case the Applicant wishes a hearing to take place, by **4:00 p.m. on Thursday, 12 November 2020**, the parties are to propose a date and time for a hearing of a maximum of 2½ hours to take place either from 11:00 a.m. to 1:30 p.m. or 1:00 to 2:30 p.m. during the week of 16 to 20 November 2020 except for 19 November.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 6th day of November 2020