



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

NAVAS CASTILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON CASE MANAGEMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 019 (NY/2024) dated 16 February 2024, the Tribunal issued a number of orders to each of the parties regarding the need for hearing witnesses and art. 9.4 of the Dispute Tribunal's Statute.
2. In response to Order No. 019 (NY/2024), the parties duly filed their submissions on 23 and 28 February 2024.

Consideration

The necessity of hearing witnesses

3. Article 9.4 of the Dispute Tribunal's Statute, as introduced by the General Assembly on 22 December 2023, limits the extent to which the Dispute Tribunal needs to admit evidence in disciplinary cases as follows (emphasis added):

... In hearing an application to appeal an administrative decision imposing a disciplinary measure, the Dispute Tribunal *shall pass judgment on the application by conducting a judicial review*. In conducting a judicial review, the Dispute Tribunal *shall* consider the record assembled by the Secretary-General and *may* admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

4. Concerning the meaning of what constitutes a "judicial review" the Appeals Tribunal in its seminal judgment, *Sanwidi* 2010-UNAT-084, para. 42, held that:

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more

concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

5. At the same time, it is provided in art. 16.2 of the Dispute Tribunal's Rules of Procedure that a "hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure" like the present one.

6. The very purpose of producing evidence—written or oral—is to substantiate the specific relevant facts on which the parties disagree. Accordingly, there is, in essence, only a need for evidence if a fact is disputed and relevant (in line herewith, see para. 29 of *Abdellaoui* 2019-UNAT-929, and para. 27 of *El-Awar* 2019-UNAT-931).

7. Specifically regarding the necessity of hearing witnesses, the Appeals Tribunal has held that this is only necessary if the relevant facts are unclear or the dispute of facts is irreconcilable (see, for instance, para. 19 of *Abdellaoui* 2019-UNAT-928, para. 40 of *AAC* 2023-UNAT-1370, and para. 52 of *AAO* 2023-UNAT-1361). The Tribunal notes that the Appeals Tribunal has highlighted the importance of allowing an applicant before the Dispute Tribunal, who as the alleged offender is contesting an administrative decision following a disciplinary process, the opportunity to cross-examine any witness whose interview statement from the investigation he is challenging on the basis of its veracity, since the applicant was not present during this interview (see, for instance, *Appellant* 2022-UNAT-1210, para. 38, and *Applicant* 2022-UNAT-1187).

The Applicant's witness requests: JF, MA and PS

8. In the Applicant's 23 February 2024 submission, he reiterated his 16 October 2023 request to hear JF, MA and PS as witnesses.

9. Regarding JF, the Applicant submits that the proposed witness would “testify to his respective knowledge of the [Field Technology Service (“FTS”)] chain of command before and after the recruitment of [ME]; as well as the recruitment of other staff with zero knowledge of English and the recruitment from IC to Trygin process”. The Applicant adds that the “disputed fact related to testify is based on the Joint Submission of agreed and Disputed Facts submitted on Sept. 26, 2023, pp. 2-4,7 (paragraph 2-3)”.

10. The Tribunal notes that there is no lack of clarity or irreconcilable dispute regarding the relevant facts mentioned by the Applicant concerning the chain of command of FTS, which is, as relevant, already clearly set out the agreed facts, as per the parties’ 26 September 2023 joint submission, and the written evidence on record.

11. Regarding the recruitment of other staff with no knowledge of English, the Respondent states in his 28 February 2024 submission that “ME’s lack of English knowledge is not in dispute; the possible recruitment of other, equally unqualified personnel does not excuse ME’s recruitment or absolve the Applicant of his responsibilities for it”. The Tribunal reads this as an admission that others may indeed have been recruited to FTS even if they did not possess the required knowledge of English. It is therefore not necessary to hear any oral testimony on this point.

12. The Applicant submits that “the proposed witness MA would testify to her respective knowledge in regards to clarify that [the Applicant] was not aware of [ME’s] behaviour until September 2019 where some colleagues including Ms. [MA] told [him] about this issue”. The Applicant states that he has “shared accommodation with other females that does not [implicate] that [he] was having precisely a romantic relationship as per indicated by respondent and the fact that many other staff in FTS did not have knowledge of English and experience in some areas in FTS at all but still they were recruited”. The Applicant indicates that the “disputed fact related to testify is based on the Joint Submission of agreed and Disputed Facts submitted on Sept. 26, 2023, pp. 3-4,7,9 (paragraph 2,4,6)”.

13. The Tribunal observes that, as stated above, no lack of clarity or irreconcilable dispute exists concerning lack of English knowledge in FTS as per the Respondent's 28 February 2024 submission. Regarding the other facts concerning which the Applicant propose MA to testify, none of these are relevant to the adjudication of the present case.

14. As for PS, the Applicant states that she "would testify to her respective knowledge of [his] Sick Leave and Mental Health during the period of February 2022 up to July 2022". The Applicant submits that the "disputed fact related to testify is based on the Joint Submission of agreed and Disputed Facts submitted on Sept. 26, 2023, pp. 16 (paragraph 9), which is the consequence of falsely accusing [him] with lack of evidence and unfounded arguments since 2019 and Applicant's sick leave was not taken in consideration and respected by respondent".

15. The Tribunal notes that the facts referred to by the Applicant regarding PS's testimony are not relevant to the adjudication of the present case.

16. In conclusion, under the referenced jurisprudence of the Appeals Tribunal, the Tribunal finds that there is no reason to call JF, MA or PS to provide testimony as witnesses before the Tribunal. The Applicant's requests for hearing any of these witnesses are therefore rejected.

The Respondent's witness requests: BP and SL

17. In the Respondent's 16 October 2023 submission, he recalled from his 26 September 2023 submission that the "relevant witnesses that the Tribunal could hear in the event of an oral hearing" were BP and SL. In the Respondent's 23 February 2024 submission, he, however, adjusted this position by stating that "in view of Article 9.4 of the [Dispute Tribunal's] Statute, the testimony of BP and SL at an oral hearing is not required". The Tribunal interprets this as meaning that the Respondent retracts his wish to call BP and SL as witnesses before the Tribunal, since he rather finds that the interview statements of BP and SL, which are appended to the investigation report, fully cover the oral evidence they were otherwise to provide in the present case.

18. In the Applicant's submissions of 23 and 28 February 2024, he makes no requests to cross-examine either BP or SL.

19. Accordingly, under art. 9.4 of the Statute of the Dispute Tribunal and the referenced jurisprudence of the Appeals Tribunal, the Tribunal will not call BP and SL to provide testimony as witnesses before it.

ME as a witness

20. Neither the Applicant nor the Respondent has requested ME to be heard as a witness. As a comprehensive interview statement of ME is appended to the investigation report, in accordance with art. 9.4 of the Dispute Tribunal's Statute, the Tribunal will therefore not call her as a witness to provide testimony before the Tribunal.

Adjudication of the present case on the papers before the Tribunal

21. Other than hearing JF, MA and PS as witnesses, the Applicant has not expressed any other wish to appear before the Tribunal to present his submissions (see para. 17 of Order No. 060 (NY/2023) dated 25 July 2023). The Tribunal therefore finds that the present case is ready for adjudication on the papers before it in accordance with the schedule of closing statements set out below.

22. In light of the above,

IT IS ORDERED THAT:

23. The Applicant's request to call JF, MA and PS to provide testimony as witnesses before the Tribunal is rejected.

24. By **4:00 p.m. on Friday, 15 March 2024**, the Applicant is to file his closing statement, which is to be seven pages maximum, using font Times New Roman, font size 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

25. By **4:00 p.m. on Friday, 29 March 2024**, the Respondent is to file his closing statement responding to the Applicant's closing statement at a maximum length of seven pages, using font Times New Roman, font size 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

26. By **4:00 p.m. on Wednesday, 3 April 2024** the Applicant may file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages, using font Times New Roman, font size 12 and 1.5 line spacing. It must be solely based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

27. Unless otherwise ordered, on receipt of the latest of the aforementioned statements or at the expiration of the provided time limits, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

(Signed)

Judge Joelle Adda

Dated this 1st day of March 2024

Entered in the Register on this 1st day of March 2024

(Signed)

Isaac Endeley, Registrar, New York