



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/025

Order No.: 053 (NBI/2011)

Date: 10 June 2011

Original: English

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**Before:** Judge Vinod Boolell

**Registry:** Nairobi

**Registrar:**

Case No.

3. The Respondent submitted a reply to the application on 6 June 2011. On 7 June 2011, the Applicant filed additional comments on the Respondent's reply.
4. The Tribunal held an oral hearing on 8 June 2011 and at the end of the hearing, the Respondent was instructed to submit additional documents relating to the lateral transfer of the Director, RITD to the vacant post of Director, OPM and the appointment of an OIC to RITD.
5. On the same day the Applicant submitted a written response to submissions made by the Respondent's counsel during the hearing. He also submitted the terms of a settlement agreement that had been offered to him by the Management Evaluation Unit ("MEU") prior to his filing Case No. UNDT/NBI/2011/008.
6. On 9 June 2011, the following occurred:
  - a) The Applicant submitted additional comments and documents on the submissions made by the Respondent during the oral hearing.
  - b) The Respondent sent an email to the Registry requesting that the Tribunal strike the additional submissions and documents that were filed by the Applicant subsequent to the hearing. The Respondent also informed the Registry of his intention to file a formal Motion to Strike.
  - c) The Applicant submitted preliminary comments on the Respondent's request to strike his additional submissions and documents.
  - d) The Respondent filed a Motion to Strike the additional submissions and documents that were filed by the Applicant subsequent to the hearing.
  - e) The Applicant was given the opportunity to provide comments on the Respondent's motion to strike by 1200 hours on 10 June 2011.
7. On 10 May 2011, the Applicant submitted his comments on the motion to strike.

### **Respondent's submissions**

8. The Respondent requests that the Tribunal immediately strike out from the record in this case: (i) all filings submitted by the Applicant on or after 8 June 2011, which includes all argumentative text contained in his emails; and (ii) all documents related to settlement negotiation between the parties.

9. In support of his motion to strike, the Respondent submits that:

- a) The Rules of Procedure of the Dispute Tribunal (“the Rules of Procedure”) do not provide for filings in addition to an application and a reply.
- b) The Applicant has abused the judicial process by filing inappropriate submissions by email without any guidance from the Tribunal and that this has resulted in the non-expeditious disposal of the application for suspension of action;
- c) The Applicant was given an opportunity by the Tribunal during the oral hearing to provide his comments on the Respondent’s submissions, which he did.
- d) The Applicant, who was not granted leave by the Tribunal, has proceeded to place inaccurate and misleading statements on the record;
- e) The Applicant inappropriately submitted the settlement proposal from MEU, which is a confidential and privileged document; and
- f) The Tribunal did not request any further assistance from the Applicant while it reviews his application for suspension of action.

**Applicant's submissions**

10. The Applicant requests that the motion to



the reply and to make additional submissions subsequent to a hearing. However, in the Tribunal's view, these possibilities exist only in those cases where either the Tribunal orders such submissions or a party has applied or sought leave/permission of the Tribunal to do so and the Tribunal has granted leave/permission for the party to proceed. Thus, before a party may proceed to file any additional submissions on his or her own initiative, two elements must be satisfied. One, there must be an application by the party seeking leave to file the additional documents and two, permission must be granted by the Tribunal. Consequently, a party may proceed to file additional submissions only if permission is granted by the Tribunal. The additional submissions should not be attached to or form part of the request or application for leave to file.

13. In the current case, the Applicant filed an application for suspension of action on 31 May 2011. On 3 June 2011, he submitted a 7-page "supporting narrative" that elaborated on and slightly amended his 31 May 2011 application. He did not seek leave of the Tribunal to file this document.

14. On 6 June 2011, the Respondent submitted his reply and on the same day, the Tribunal directed him to provide additional documentation and clarifications by 16:30 hours on 7 June 2011. The Respondent complied. Later that day, the Registry informed the parties that the Tribunal had decided to hold a hearing. At 16:22 hours on 7 June 2011, the Applicant provided a telephone number for the hearing and informed the Registry that he was going to send to the Tribunal "in the next half hour evidence that the appointment of [Mr. S. K.] OiC of RIITD was submitted to the MEU for evaluation. I will send the letter of acknowledgement from the MEU as well as the email forwarding the request to Ms. Angela Kane, USG/DM with copy to the MEU." The Registry acknowledged receipt of his email at 16:44 hours.

15. At 17:16 hours on 7 June 2011, the Applicant submitted not only his request for management evaluation but also a lengthy response to the Respondent's reply. The Tribunal notes that the Applicant's email of 16:22 hours made no mention of his

submitting a response to the Respondent's reply. He subsequently submitted said response without seeking permission to do so.

16. On 8 June 2011, the Tribunal held an oral hearing on the application for suspension of action. Subsequent to the hearing, the Applicant sent the Registry an email to which he attached a written response to the submissions made by the Respondent at the hearing. He explained that he was submitting a written response because he was unable to respond at the hearing "due to lack of time". Additionally, he attached the terms of settlement that MEU had offered him in an effort to mediate his claims in what is now Case No. UNDT/NBI/2011/008, which is pending before the Tribunal.

17. On 9 June 2011, the Applicant submitted additional documents along with an explanation. On the same day, the Respondent sent an email to the Registry requesting that the Tribunal strike the additional submissions and documents filed by the Applicant subsequent to the hearing. An hour later, the Applicant communicated the following to the Registry via email:

"Dear Registry,

This is a response to email – reproduced hereunder – from counsel to Respondent.

While awaiting Respondent's motion to strike, I would like to submit as follows:

a. The Tribunal did rule at the end of yesterday's hearing that it will not admit additional/supporting documents. Indeed, the Tribunal specifically requested counsel for Respondent to submit additional documents (I believe by close of day yesterday). My assumption is that that leave extends to Applicant too – according to the equality of arms principle.

b. There are many instances – as a quick read of the Tribunal's decisions will show – that Respondent has submitted additional documents to the Tribunal after the close of hearing.

c. I asked leave of Tribunal to submit detailed responses to the averments of counsel to Respondent at yesterday's hearing – which lack of time as decided by the Tribunal – did not allow me to.



d. None of the additional documents that I have submitted is confidential. The OiC announcements were sent to all ECA staff members and posted on iSeek, the UN intranet. I found most of them on iSeek. Respondent's counsel can find them if he visits the ECA intranet through iSeek.

submit additional documents and comments is simply erroneous. The Tribunal's instructions at the hearing were unequivocal and did not leave room for assumptions.

21. Further, the Applicant's assertion that he asked leave of the Tribunal to submit detailed responses to the submissions made by the Respondent at the hearing is derisory in light of the fact that his request for a rejoinder was part and parcel of his written response of 8 June 2011. The manner in which he decided to present his request and rejoinder did not give the Tribunal the option of deciding whether or not to grant his request for rejoinder. In effect, he made a request and then took it upon himself in the next paragraph to grant his own request.

22. The Tribunal is also flummoxed and quite affronted by the Applicant's assertion in his email that he was unable to make submissions at the hearing because the Tribunal "decided" there was not time for him to do so. He subsequently reinforced this inaccurate depiction of events by stating in his response that "[a]t the end of the questioning of counsel for Respondent, the bench gave me the opportunity to response (sic) while also informing me that 'we have run out of the time allotted for the hearing'. And as I began to respond to the counsel's submission, there was a brief interruption. But more importantly, I could not fully respond to all the averments of counsel for Respondent during his questioning by the bench because of the bench's concern about time."

23. While the Tribunal may, under article 18.5 of the Rules of Procedure, "limit oral testimony as it deems appropriate", this was not what happened in the present matter. The Tribunal did not make any "decision" or ruling that there was not enough time for, unde Tribu[(to91 Tw -17.6lc17.6w)T[2Rul31 D[725 T8.315 -1 Tw 16.68 0 T46[(is w)758(a)-6(d

hearing and he took advantage of this opportunity to make submissions. During the Applicant's submissions, the Tribunal sought clarification from him briefly on a premise he had presented. After the clarification had been sought, the Applicant was allowed to continue with his submission and the Respondent was subsequently allowed to provide a brief response. It is noteworthy that apart from the Registry informing the parties of the time the hearing would commence, no actual time allocation was provided for its duration. The Applicant's assertion that "the bench gave me the opportunity to response (sic) **while also informing** (*emphasis added*) me that 'we have run out of the time allotted for the hearing'" is not only inaccurate but also mischievous.

24. Since the Applicant filed his application for suspension of action, the Tribunal, in the interest of justice, has allowed him a good amount of latitude by not rejecting his multiple filings. It is apparent that the Applicant has taken the Tribunal's permissiveness to be a lack of vigilance. He is flooding the Tribunal with submissions that have not been called for. The Tribunal cannot and will not condone such behavior as it tends to serve as an impediment to justice.

In light of the foregoing;

**IT IS HEREBY ORDERED THAT:**

25. The Respondent's motion to strike is granted.

26. All additional filings submitted by the Applicant on or after 8 June 2011 are stricken from the records of this current case.

27. The Respondent's request to respond to the Applicant's additional submissions filed with the Registry on or after 8 June 2011 is rejected.

*(Signed)*

Judge Vinod Boolell

Dated this 10<sup>th</sup> day of June 2011

Entered in the Register on this 10<sup>th</sup> day of June 2011

*(Signed)*

Jean-Pelé Fomété, Registrar, Nairobi