



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

UNITED NATIONS ADMINISTRATIVE JUDGE

Case File: 004/07-09-2009-ECCC/OCIJ
Before: Judge Agnieszka KLONOWIECKA-MILART
Greffier: Sheila PAYLAN
Date: 27 October 2015
Language: English
Classification: PUBLIC

DECISION ON FEES DISPUTE

International Co-Lawyer for AO An
Göran SLUITER

UNAKRT Coordinator
Knut ROSANDHAUG

Chief of Defence Support Section
Isaac ENDELEY

1. **I, Agnieszka KLONOWIECKA-MILART**, Judge of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“ECCC”), nominated on 8 September 2015 by the Coordinator of the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT Coordinator”) as the United Nations Administrative Judge (“UNAJ”) pursuant to a request by Göran SLUITER, International Co-Lawyer for AO An (also known as TA An), a Charged Person in Case 004,¹ regarding a fees dispute with the Isaac ENDELEY, Chief of the Defence Support Section (“DSS”),² am seized of the “Appeal to the United Nations Administrative Judge Regarding Fee Dispute” submitted on 18 September 2015 (“Appeal”),³ to which Mr. ENDELEY responded on 28 September 2015.⁴

BACKGROUND

2. In the Appeal, Mr. SLUITER submits that DSS confirmed in April 2015 that a total of 150 hours could be claimed between the Co-Lawyers (both Mr. SLUITER and Mr. Richard ROGERS) starting from March 2015. DSS also confirmed that unused hours from January and February 2015, could be “carried over” to be used in addition to the basic 150 hours claimable per month for legal services.⁵

3. After a series of exchanges on the matter, two fee claims exceeding 150 hours per month were submitted and approved by DSS.⁶

4. By 21 July 2015, Mr. SLUITER has still not received payment of outstanding fees which had been approved.⁷ He was informed by DSS that payment could not be processed as the new UMOJA system was unable to compute a request for payment exceeding the usual 150 hours per month.⁸ He was further informed that the Human Resources and Finance Sections of the ECCC were trying to solve the problem by overriding the programmed instructions in the UMOJA system, and that he would be notified as soon as this was done.⁹ In addition, he was notified that henceforth, no further allowance would be made to carry over unused hours from previous months, and that only 150 hours maximum per month would be claimable.¹⁰

¹ On 27 March 2015, the International Co-Investigating Judge of the ECCC charged AO An with the following alleged crimes: premeditated homicide, as a violation of the 1956 Cambodian Penal Code, allegedly committed at Kok Pring execution site, Tuol Beng security centre and Wat Au Trakuon security centre; and the Crimes against Humanity of murder, extermination, persecution on political and religious grounds, imprisonment, and other inhumane acts (namely inhumane conditions of detention) at Kok Pring execution site, Tuol Beng security centre and Wat Au Trakuon security centre.

² Letter from the UNAKRT Coordinator to Judge KLONOWIECKA-MILART, dated 8 September 2015; Letter from Göran SLUITER to the UNAKRT Coordinator entitled “Re: Request for Appointment of an Administrative Judge to hear a ‘fees dispute’”, dated 4 September 2015.

³ The Appeal is submitted as confidential, but I note nothing therein that warrants such classification. The present decision is therefore issued publicly.

⁴ Response to Appeal Regarding Fee Dispute, 28 September 2015 (“Response”).

⁵ Appeal, para. 5.

⁶ Appeal, paras 6-8.

⁷ Appeal, para. 9.

⁸ Appeal, para. 9.

⁹ Appeal, para. 9.

¹⁰ Appeal, para. 9.

5. On 11 August 2015, Mr. SLUITER was informed that his outstanding fees totaling for the months of May and June 2015 would not be processed.¹¹ This left a total of 46.75 hours worked, amounting to \$4,577.76, unpaid.¹²

6. In protest, Mr. SLUITER wrote to Mr. ENDELEY stating that his fees claimed had been already been approved and that the absolute limit on 150 hours were only to take effect from July 2015.¹³ Mr. ENDELEY responded that it was DSS that was refusing payment, but rather the other relevant sections that were unable to implement DSS's recommendations.¹⁴

7. On 12 August 2015, Mr. SLUITER received revised fee decisions for the months of May and June 2015, reducing the previously approved amount of remunerable hours worked down to 4.5 hours and 40 hours respectively.

8. On 24 August 2015, Mr. SLUITER requested a review of the fee decisions, both of which were denied on 1 September 2015.¹⁵

ADMISSIBILITY

9. Mr. SLUITER brings the present dispute pursuant to Article 11.2 and 11.3 of the ECCC Legal Services Contract ("LSC"),¹⁶ which read as follows:

Request for review of fee disputes. If any dispute, controversy or claim arises out of the payment of a fee under paragraph 9 of this Contract, the Contracting Co-Lawyer may request the Head of DSS to review a fee claim decision within 14 days of receiving the decision from the DSS. Any request for review shall be made in writing, shall state why the fee claim decision was incorrect, and shall be accompanied by any documents that support the request for review. The Head of DSS shall endeavor to make a decision on the request for review within 14 days of receiving it.

Judicial appeal of fee claim decision. In the event that the Head of the DSS decides to maintain the original fee claim decision, in whole or in part, the Contracting Co-Lawyer has the right to appeal such a decision, in whole or in part, to the international judge nominated by the Coordinator of UNAKRT as the UN Administrative Judge, referred to in paragraph 11.1 above, within 7 days of receiving the review decision on the Head of the DSS.

10. A review of these provisions shows that, as a preliminary matter, the dispute between MR. SLUITER and Mr. ENDELEY fits the requisite timelines and subject matter jurisdiction under which such claims may be made. The dispute is therefore properly before me, and the Appeal is accordingly admissible.

¹¹ Appeal, para. 11.

¹² Appeal, para. 11.

¹³ Appeal, para. 12.

¹⁴ Appeal, para. 13.

¹⁵ Appeal, paras 14-16

¹⁶ Appeal, paras 17, 20.

MERITS

11. In his Response, Mr. ENDELEY does not dispute the statement of the facts as described by Mr. SLUITER; in fact, he confirms that claims for unused hours carried over into subsequent months had previously been approved by DSS and “processed by the relevant offices”.¹⁷ Upon implementation of the new UMOJA system, however, it seems such processing became more difficult, if not impossible, through the automated system.

12. Mr. ENDELEY indicates that he entered into lengthy negotiations with the Human Resources and Finance Sections of the ECCC to rectify the matter, as the May and June fees decisions had already been approved.

13. In his Response, Mr. ENDELEY indicates that “[t]he position of the Office of the Administration is that the idea of Defence lawyers ‘rolling over’ the unused hours from previous months and claiming them in subsequent months has never been endorsed or authorized by the Administration and runs counter to basic accounting principles.”¹⁸ The record shows, however, that claims to this effect were approved by DSS and processed by the Office of Administration for the months of April and May 2015.

14. Upon review of the documents submitted by the parties, I consider Mr. ENDELEY’s approval for services exceeding 150 hours per month to have been erroneous. Article 6.2 of the LSC requires Mr. SLUITER to abide by, among other things, the DSS Administrative Regulations, which in turn specifies that Co-Lawyers will be paid in accordance with the ECCC Legal Assistance Scheme (“LAS”).¹⁹ Article E4 of the LAS specifies that “[t]he maximum number of hours that each Co-Lawyer can be paid under the LAS per month is normally 150 hours or 20 days. If, in extenuating circumstances, more than one International or Cambodian Co-Lawyer is assigned to represent a client, the number of hours will not be increased. The Co-Lawyers concerned may share the work load as they wish, but only up to the same cap on the number of hours.”

15. Noting that the LAS applicable at the time when Mr. SLUITER signed the LSC declared flexibility as one of its structural features,²⁰ the monthly limit and no overtime, however, have always been included as express specific clauses.²¹ The monthly limit clause is there for a reason, namely, to allow systematic monitoring of work and related expenditures, as well as to curb claims for work that by its nature is difficult to quantify while reflecting with a reasonable approximation a maximum expected during a period of one month from a person working offsite (and usually having another occupation). Adherence to the limit is also expressed by Article E-4 of the LAS, according to which it is not increased even when the work is shared by more than one lawyer. As such, hours not worked and not claimed in certain months are not “outstanding”, as per Mr. SLUITER’s

¹⁷ Response, paras 10-11.

¹⁸ Response, para. 15.

¹⁹ Amended December 2014.

²⁰ The LSC was signed in November 2012. *See* Appeal, Appendix 1. The LAS applicable at the time was the version as amended in February 2009. It has since been amended in December 2014. The 2009 LAS has a specific clause at Article A-1 stating: “*Flexibility*. The payment scheme must be able to change depending on the way in which the ECCC operates, particularly given unknown elements such as the investigative stage, the pre-trial chamber and the role of civil parties, which are unknown in international criminal law.” The 2014 LAS does not include this provision.

²¹ *See* LAS (2009 and 2014), Articles B-5 and E-4.

Appeal;²² rather, they are, according to the contract, not due. An interpretation allowing a rollover of hours from one month to another, absent any positive provision licensing such rollover, is against the contract and would belie the purpose of having a monthly limit, with the only limit remaining being the annual budget. Contracts that take into account the nature of the work requiring greater flexibility in reflecting the actual distribution of workload are expected to expressly mitigate the application of the limit, by introducing a number or percentage of hours that could be rolled over, or altering the period to which the limit attaches altogether.

16. Nothing in the LSC, the LAS, the DSS Administrative Regulations, or any other document submitted by Mr. SLUITER or Mr. ENDELEY suggest an exception to the 150 hour per month cap by way of rolling over unused hours into subsequent months. Neither DSS nor Mr. ENDELEY entered into the LSC with Mr. SLUITER, but rather the UNAKRT Coordinator represented by Mr. Hamayoon MUBTAKIR, the Head of the Human Resources Management Section.²³ There is therefore no legal basis for Mr. ENDELEY's decision to have approved the original fee claims in the first place. I consider that Mr. ENDELEY acted in good faith and did everything in his capacity to honour the payments he approved for Mr. SLUITER's legal services. Nevertheless, after realizing his mistake upon consultation with the Office of Administration, he took appropriate and necessary action to revise the erroneous fee claim in question. As such, although Mr. SLUITER may understandably be displeased with having been misinformed, Mr. ENDELEY's erroneous approval of fees claims for hours exceeding 150 hours per month is not binding upon the entity which issued the contract, that is the UNAKRT Coordinator.

17. In light of the foregoing, I hereby **DENY** the Appeal in its entirety.

Phnom Penh, 27 October 2015
United Nations Administrative Judge



Judge Agnieszka KLONOWIECKA-MILART

²² Appeal, paras 3, 37, 44-45.

²³ See Appeal, Appendix 1.