UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/047
Order No.: 144 (GVA/2014)
Date: 4 September 2014
Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

Applicant

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CONFIDENTIALITY AND PRODUCTION OF EVIDENCE

Counsel for Applicant:
Charles Ongweso, Ongweso and Co. Advocates

Counsel for Respondent:
Susan Maddox, ALS/OHRM
Cristiano Papile, ALS/OHRM
Katya Melluish, UNON

Introduction

1. On 13 December 2013, the Applicant, a Medical Officer at the Joint Medical Services ("JMS") of the United Nations Office in Nairobi ("UNON"), filed an application with the Dispute Tribunal in which she contests the 31 May 2013 decision of the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") on her complaint of "misconduct" on the part of the Chief, JMS, UNON, and the Chief, Human Resources Management, UNON, pursuant to ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority). The 31 May 2013 memorandum from the ASG/OHRM advised the Applicant of the outcome of the investigation made into her allegations of prohibited conduct and gave her a comprehensive 25-page summary of the fact-finding investigation report. The report as such was not shared with the Applicant.

2. On 5 February 2014, the Respondent submitted his reply to the application, with Annex S1, namely the report of the fact-finding panel, filed *ex parte*. The report referred to a number of annexes, including witnesses statements, and emails which were not attached to the report as filed by the Respondent.

3. On 18 July 2014, the Applicant was informed of the *ex parte* filing made by the Respondent.

4. By case management Order No. 120 (GVA/2014) of 12 August 2014, the Tribunal ordered the parties to provide *inter alia,* by 27 August 2014, a joint statement of agreed facts and issues to be determined by the Tribunal.

5. In an email addressed on 26 August 2014 to the Respondent and to the support desk of the Tribunal's eFiling portal, the Applicant submitted that he was unable to respond to the draft agreed issues from Counsel for Respondent "as [he] [had] not received or read the ex-parte submission they filed to enable [him] advise [his] client accordingly".

6. By Order No. 136 (GVA/2014) of 27 August 2014, following a request from the parties, the Tribunal granted an extension of time by 8 September 2014

to comply with the orders stated in Order No. 120 (GVA/2014). The Tribunal also requested the Respondent, to state whether he objected to the release of the *ex parte* Annex S1 to the Applicant, and the reasons for such an objection, if any. The Respondent did so on 28 August 2014, objecting to the disclosure of the report to the Applicant on the grounds that:

a. Disclosure would "effectively eviscerate the provisions of ST/SGB/2008/5", which only entitles the Applicant to receive a summary of the fact-finding report;

b. The contents of the report are not relevant to the case given that the review to be conducted by the Tribunal is procedural rather than substantive;

c. There are no extraordinary circumstances to warrant the disclosure;

d. Disclosure is not necessary in the interests of fairness as the Applicant was provided with a thorough summary of the fact-finding report; and

e. Disclosure could create the risk of "further straining work relationships within the [JMS UNON]".

Consideration

Preliminary issue

7. As a preliminary point, the Tribunal queries why the Respondent has attached the full report to its reply if it does not consider that it is relevant to the case. By filing it to the Tribunal, but at the same time objecting to its disclosure, the Respondent is effectively inviting the Tribunal to take the full report into account without giving the Applicant the opportunity of seeing it in full.

8. The Tribunal has read the report for the purposes of this application and solely to determine if it should be disclosed to the Applicant.

9. In *Calvani* 2010-UNAT-032, the Appeals Tribunal held that based on art.9.1 of the Dispute Tribunal's Statute and arts. 18.2 and 19 of the Dispute Tribunal's

Rules of Procedure, "the Tribunal has discretionary authority in case management and the production of evidence in the interest of justice".

10. In the exercise of that discretion the primary consideration is relevance. If a document is not relevant, the Tribunal has no need to consider it and there is no basis for its disclosure. If the full report is relevant to the disposition of the case, then in fairness it should be disclosed to the Applicant. As stated in *Bertucci* 2011-UNAT-121, "the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it".

11. Relevance is determined by the issues in the case, which at this stage are determined by the pleadings.

12. In her application, the Applicant alleges a number of procedural flaws in the investigation. In summary, these are:

a. The investigation took place at a time when she was suffering intense stress and retaliation and was afraid to go to the UN complex. Witnesses were intimidated by seeing the alleged retaliation;

b. The person handling the investigation had a conflict of interest;

c. Her complaint was disclosed to the alleged harasser before it was acknowledged and as a result her contract was unlawfully terminated;

d. Inconsistent with her complaint, the panel included a person as a second alleged offender;

e. The panel asked staff members to respond to allegations against them before interviewing her;

f. It took six months to make a final decision;

g. Relevant legal instruments were not considered, nor were relevant documents, while irrelevant documents were. Disproportionate weight was given to e-mails exchanged between her and the alleged offenders; and

h. The Applicant was not given an opportunity to respond to the alleged offenders' response to her allegations.

13. These allegations are all directed at the investigation procedure leading to the ultimate decision in this case. The report describes the methodology of the investigation, including matters taken into consideration at the fact-finding stage.

14. The requirement in sec. 5.18(a) of ST/SGB/2008/5 that the aggrieved individual should be given a summary of the findings and conclusions of the investigation, does not prohibit a complainant from ever seeing the report. It certainly does not preclude the disclosure of the full report for the purposes of determining a case before the Tribunal so long as it is relevant to the issues.

15. Any disclosure of such reports is controlled by the Tribunal according to well-established principles. The concern of the Respondent that disclosure would "effectively eviscerate the provisions of ST/SGB/2008/5" is overstated. In any event there is no suggestion that the Applicant made her application to the Tribunal in order to obtain a copy of the full report.

16. The Tribunal does not accept the Respondent's submission in reliance on *Adorna* UNDT/2010/205 that there must be extraordinary circumstances to warrant the release of an investigation report. The *Adorna* case was a substantive application for the release of a full report to the Applicant, not an application for disclosure for the purposes of preparing for a hearing of a case before the Tribunal. *Adorna* is distinguishable on its facts. In the context of the exercise of the Tribunal's discretionary powers to order production of documents for the purpose of a fair hearing, the test of extraordinary circumstances sets a threshold that is too high.

17. The Tribunal finds that the fact-finding investigation report is relevant to the issues in the instant case and that its disclosure to the Applicant is necessary in the interests of fairness and equality of arms.

18. The witnesses statements referred to in the "List of Exhibits" mentioned at the beginning of the report, and which were not shared with the Tribunal, are not

to be disclosed as they relate to the substance of the complaint rather than to the procedure and are not relevant.

19. The emails referred to in the body of the report and in the "List of Exhibits", which have not already been disclosed in the application or the reply, shall be disclosed in full to the Tribunal, which will then decide to which extent they should be shared with the Applicant.

20. Similarly, all emails referred to in the memorandum dated 31 May 2013 from the ASG/OHRM to the Applicant that have not already been disclosed in the application or the reply shall be disclosed to the Tribunal which will then decide to which extent they should be shared with the Applicant.

21. The disclosure of these emails will be subject to confidentiality considerations where appropriate.

Confidentiality

22. Article 18.4 of the Dispute Tribunal's Rules of Procedure reads:

> The Dispute Tribunal may at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

23. The Appeals Tribunal held in *Bertucci* 2011-UNAT-121:

> In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case. The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file.

24. The Tribunal notes the Respondent's submission that the release of the report may strain work relations in JMS/UNON. This concern may be met by appropriate orders. This includes the redaction, from the document to be disclosed to the Applicant, of the names of all individuals who were not mentioned by their

full name in the summary of the report as mentioned in the memorandum dated 31 May 2013 from the ASG/OHRM to the Applicant.

25. The Tribunal is aware that the parties may require more time to comply with the orders which follow and to consider the documents which are produced. For this reason the deadline set in Order No. 136 (GVA/2014) to comply with the orders in Order No. 120 (GVA/2014) is extended until 19 September 2014.

Conclusion

26. In view of the foregoing, it is ORDERED that:

a. The Applicant be provided with the document filed *ex parte* by the Respondent, as redacted by the Tribunal (see para. 24 above);

b. The Applicant keep the *ex parte* document confidential, and, in particular, shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate it to anyone;

c. The Respondent file *ex parte* the documents mentioned above under paras. 19 and 20 by **Monday, 8 September 2014**;

d. The orders stated in Order No. 120 (GVA/2014), namely the submission of the joint statement of facts, be complied with by **Friday, 19 September 2014.**

(Signed)

Judge Coral Shaw

Dated this 4th day of September 2014

Entered in the Register on this 4th day of September 2014

(Signed)

René M. Vargas M., Registrar, Geneva