



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON
RESPONDENT'S SUBMISSION
REGARDING WITNESS TESTIMONY**

Counsel for Applicant:

Marcos Zunino, OSLA
Ana Giulia Stella, OSLA

Counsel for Respondent:

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

Introduction

1. By Order No. 176 (GVA/2021) of 7 December 2021, the Tribunal instructed the parties, *inter alia*, to file their respective list of witnesses by 17 December 2021 while ensuring their availability at a hearing to be held from 24 to 27 January 2022.
2. On 16 December 2021, the Respondent informed the Tribunal that he would like to call V01 as his sole witness for the oral hearing and confirmed her availability.
3. On 5 January 2022, the Respondent requested that the Tribunal allow V01 to testify without the Applicant being present during her testimony.
4. On 6 January 2022, the Tribunal ordered the Applicant to respond to the Respondent's request concerning V01 by 11 January 2022.
5. On the same day, the Tribunal issued Order No. 1 (GVA/2022) notifying the parties of a tentative schedule for a hearing on the merits, which included the appearance of V01.
6. By email dated 6 January 2022, the Applicant requested an extension of time to respond to the Respondent's request concerning V01.
7. On 7 January 2022, the Tribunal ordered:
 - a. The Respondent to substantiate with medical evidence, by 11 January 2022, how the Applicant's presence in the virtual courtroom would cause V01 distress; and
 - b. The Applicant to respond to the Respondent's request concerning V01 by 14 January 2022.
8. On 11 January 2022, the Respondent requested a two-day extension to provide the medical evidence regarding V01's testimony as V01 could not obtain the certificate earlier.

9. By email dated 12 January 2022, the Tribunal granted the Respondent the requested extension and instructed him to file the required medical evidence by 13 January 2022.

10. On 13 January 2022, the Respondent filed an *ex parte* submission regarding V01's medical evidence and testimony with five *ex parte* annexes:

- a. Annex 1: V01's medical assessment of 1 December 2022 (document in German);
- b. Annex 2: Unofficial English Translation of Annex 1 above;
- c. Annex 3: V01's letter to the undersigned Judge;
- d. Annex 4: Correspondence between V01 and the Respondent; and
- e. Annex 5: Ms. López's out-of-office notification.

11. On 14 January 2022, the Applicant filed a motion for disclosure and extension of time to respond to the Respondent's request concerning V01 referred to in para. 3 above.

12. By Order No. 3 (GVA/2022) of 14 January 2022, the Tribunal:

- a. Instructed the Geneva Registry to lift the *ex parte* status of the Respondent's 13 January 2022 main submission and of its annex 5;
- b. Ordered the Respondent to redact annexes 2 and 3 to his submission and refile them on an under seal basis; and
- c. Instructed the Applicant to file his response to the Respondent's request concerning V01 referred to in para. 3 above by 18 January 2022.

13. On 17 January 2022, the Applicant filed his response to the Respondent's request concerning V01 referred to in para. 3 above.

Consideration

14. In support of his request, the Respondent submits that the exclusion of the Applicant from observing V01's testimony during the upcoming oral hearing is in the interest of justice because the mere thought of testifying in the presence of the Applicant causes V01 distress. The medical evidence provided by V01 shows that "[i]n the case of a direct encounter with the accused, a reactivation of the trauma or the psychological symptoms [...] cannot be ruled out".

15. The Applicant opposes the Respondent's request. He submits that being excluded from part of the hearing, specifically during the testimony of V01, would infringe on his fair trial rights, undermine the principle of equality of arms and impede his defence.

16. In this respect, the Tribunal recalls that any judicial determination "must weigh the competing interests of the parties, the exigencies of the case, and notions of due process and fair trial" (*Morin* UNDT/2011/069, para. 33). In the present case, the Tribunal must weigh V01's fear of potential trauma from a direct encounter with the Applicant and the Applicant's right to due process and a fair trial.

The Applicant's right to due process and a fair trial

17. The Tribunal notes that a staff member's rights to due process and a fair trial derives from, *inter alia*, the preamble to General Assembly resolution 66/106 (Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal), which reads in its relevant part that:

Whereas the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations,

Whereas this right is endorsed and elaborated upon in a range of important international human rights instruments, including the International Covenant on Civil and Political Rights,

Whereas the General Assembly, in paragraph 4 of its resolution 61/261 of 4 April 2007, decided to establish an independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike[.]

18. In this respect, the Tribunal's Rules of Procedure specifically provide in its relevant part the following:

Article 16 Hearing

...

4. The parties or their duly designated representatives must be present at the hearing either in person or, where unavailable, by video link, telephone or other electronic means.

Article 17 Oral evidence

1. The parties may call witnesses and experts to testify. The opposing party may cross-examine witnesses and experts.

...

5. Any party may object to the testimony of a given witness or expert, stating reasons for such objection. The Dispute Tribunal shall decide on the matter. Its decision shall be final.

19. It follows that an applicant has a right to be present during the oral hearing. Restricting such right in the proceedings may have a practical impact on an applicant's ability to defend her/his case.

20. In the present situation, V01's allegations against the Applicant formed a critical basis for the disciplinary sanction imposed on him. Given that there were no other eyewitnesses to most of the incidents described by V01 and that the Applicant disputes V01's account, the Tribunal considers it crucial for the Applicant to be able to observe V01's demeanour and body language, at the hearing (see, e.g., *Karkara* Order No. 115 (NY/2020), para. 10).

V01's fear of a direct encounter with the Applicant

21. The Tribunal notes that V01 is afraid of potential trauma from a direct encounter with the Applicant. However, a direct encounter with the Applicant is not envisaged in the present case. As per Order No. 176 (GVA/2021), the hearing will be held remotely, via the online platform Microsoft Teams. Therefore, V01 and the Applicant will not be physically in the same space.

22. To further address V01's concern, the Tribunal finds it appropriate to instruct the Applicant to turn off his camera during V01's testimony. Moreover, since the Applicant is represented by Counsel, any cross-examination of V01 shall be conducted by said Counsel, not by the Applicant.

23. While the Tribunal understands V01's reluctance and anxiety about a direct encounter with the Applicant, considering the above-described factors, the Tribunal finds that the Applicant's rights to due process and a fair trial would be disproportionately impacted if he were not allowed to be present during V01's testimony.

Conclusion

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

- a. The Respondent's request that the Tribunal allow V01 to testify without the Applicant being present during her testimony is denied;
- b. The Applicant shall turn off his camera during V01's testimony; and
- c. Any cross-examination of V01 shall be conducted by the Applicant's Counsel, not by the Applicant.

(Signed)

Judge Teresa Bravo

Dated this 20th day of January 2022

Case No. UNDT/GVA/2020/035

Order No. 7 (GVA/2022)

Entered in the Register on this 20th day of January 2022

(Signed)

René M. Vargas M., Registrar, Geneva