



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON THE APPLICANT'S
MOTION CONCERNING
COMPLAINANT'S TESTIMONY
AND SUMMON**

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 for 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 the complainant (“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 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.
5. On 7 January 2022, the Tribunal ordered the Respondent to substantiate with medical evidence, by 11 January 2022, how the Applicant’s presence in the virtual courtroom would cause V01 distress.
6. 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.
7. 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.
8. On 13 January 2022, the Respondent filed an *ex parte* submission regarding V01’s medical evidence and testimony with five *ex parte* annexes, confirming that V01 would not be testifying at the oral hearing, even if the Tribunal granted the Respondent’s request concerning her referred to in para. 3 above; however, V01 expressed her willingness to respond to any questions presented to her in writing.
9. On 14 January 2022, the Applicant filed a motion for disclosure.

10. By Order No. 3 (GVA/2022) of 14 January 2022, the Tribunal instructed, *inter alia*:

- a. The Geneva Registry to lift the *ex parte* status of the Respondent's 13 January 2022 main submission and of its annex 5; and
- b. The Respondent to redact annexes 2 and 3 to his 13 January 2022 submission and to refile them on an under seal basis.

11. On 17 January 2022, the Applicant filed a motion concerning V01 requesting the Tribunal:

- a. To provide him with the unredacted versions of the documents submitted by the Respondent or to have them redacted by the Tribunal;
- b. To summon V01, reminding her of her obligation to testify and of the possible consequences of her refusal to do so, including being considered in contempt of court and potentially being referred for accountability;
- c. Should V01 not appear as summoned, to expunge her complaint, interview record and all evidence provided by her from the record and to decide the case on the remainder of the evidence; and
- d. In the alternative, to draw an adverse inference from V01's refusal to testify.

Consideration

12. Having reviewed the Applicant's motion, considering the circumstances of the case, and for the fair and expeditious disposal of the case, the Tribunal finds it appropriate to reject the Applicant's requests listed in paras. 11.a, c and d above at this stage of the proceedings, except for his request to summon V01 pursuant to art. 19 of its Rules of Procedure.

Whether V01's appearance at the hearing is required

13. In support of his request to summon V01, the Applicant submits that V01's testimony is crucial for the adjudication of the case at hand because the contested decision is overwhelmingly based on her complaint and interview with the investigators.

14. In this respect, the Tribunal recalls that art. 17 of its Rules of Procedure provides in its relevant part that:

1. The parties may call witnesses and experts to testify. The opposing party may cross-examine witnesses and experts. The Dispute Tribunal may examine witnesses and experts called by either party and may call other witnesses or experts it deems necessary. The Dispute Tribunal may make an order requiring the presence of any person or the production of any document.

...

6. The Dispute Tribunal shall decide whether the personal appearance of a witness or expert is required at oral proceedings and determine the appropriate means for satisfying the requirement for personal appearance. Evidence may be taken by video link, telephone or other electronic means.

15. The Tribunal further recalls that it is well-established that the Tribunal "ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a decision as to whether the onus to establish the misconduct [...] has been discharged on the evidence adduced (see *Mbaigolmem* 2018-UNAT-819, para. 29).

16. Having reviewed the submissions on record, the Tribunal considers that the testimony of V01, whose statements were heavily relied upon by the Respondent in the making of the contested decision, is crucial for a fair determination of the case at hand. 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 essential for it to be able to observe V01's demeanour during her testimony to properly assess her evidence.

17. As to V01's proposal to answer questions in writing, the Tribunal finds that it cannot be accepted given that her testimony is intended to address highly contentious factual issues in the case. If V01 were to provide written answers without appearing at the hearing, the Applicant would be deprived of his right to cross-examine the witness, through his Counsel, as per art. 17.1 of the Tribunal's Rules of Procedure. Moreover, it would restrict the Tribunal's ability to assess V01's credibility.

18. Accordingly, the Tribunal finds that V01's appearance at the hearing is required.

Whether V01 is subjected to an impossibly difficult situation

19. The Tribunal recalls that "as a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established". However, "due process does not *always* require that a staff member defending a disciplinary action [...] has the rights to confront and cross-examine his accusers" (emphasis in original). This is because there are "cases in which it is impossible, or inadvisable, for such confrontation occur" (see *Applicant* 2013-UNAT-302, paras. 33 and 36).

20. In determining whether a witness is subjected to an impossibly difficult situation, the Appeals Tribunal cited *Hourani* where "the former Administrative Tribunal weighed the right of the accused staff member against justified 'precautionary measures to protect witnesses' 'likely to be suborned or subjected to threats and physical harm' and concluded that cross-examination was not an absolute right" (see *Applicant* 2013-UNAT-302, para. 36; Former Administrative Tribunal Judgement No. 654, *Hourani* (1994), para. VI).

21. In the present case, V01 is concerned about 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. By Order No. 7 (GVA/2022) of 20 January 2022, the Tribunal further addressed V01's concern by instructing the

Applicant to turn off his camera during V01's testimony and to cross-examine V01 only through his Counsel.

22. Therefore, the Tribunal considers that V01's situation is not comparable to the circumstances in *Hourani* that would prevent her from appearing at the hearing.

23. Accordingly, the Tribunal finds that there is no impossibly difficult situation that would justify V01's non-appearance at the hearing.

Possible consequence of V01's failure to appear at the hearing

24. The Tribunal is highly concerned by V01's reluctance to appear before the Tribunal despite its binding orders.

25. In this respect, the Tribunal wishes to highlight its power to summon witnesses and emphasizes that a staff member is under an obligation to appear as witness before the Tribunal (see *Branglidor* UNDT/2021/004, para. 48). Moreover, the Tribunal recalls that "[w]ilful disobedience of the Tribunal's orders is contempt and is a direct attack upon the jurisdiction of the Tribunal and its power to undertake the responsibilities with which it has been entrusted in its Statute by the General Assembly" (see *Applicant* UNDT/2012/114, para. 72).

26. Accordingly, the Tribunal alerts V01 that failure to appear at the hearing may result in her being held in contempt of court and being referred for accountability, in addition to the Tribunal drawing adverse inference(s) from her refusal to testify.

Conclusion

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

a. V01 shall appear to give evidence at the hearing on **Tuesday, 25 January 2022, at 2.30 p.m. (Geneva time)**, pursuant to Order No. 1 (GVA/2022) of 6 January 2022;

b. The Respondent shall use his best endeavours to ensure the availability of the above summoned witness for the hearing; and

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c. The Applicant's other requests listed in paras. 11.a, c and d above are rejected at this stage of the proceedings.

(Signed)

Judge Teresa Bravo

Dated this 20th day of January 2022

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

(Signed)

René M. Vargas M., Registrar, Geneva