



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

DUYSENHANOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Bettina Gerber, LPAS, UNOG

Introduction

1. By application filed on 16 December 2021, the Applicant, a staff member with the United Nations Office for Outer Space Affairs (“UNOOSA”) contests the decision to close her complaint against the Director of UNOOSA for harassment and abuse of authority with only managerial action.
2. On 17 December 2021, the application was served on the Respondent who was expected to file his reply by 17 January 2022.
3. On 21 December 2021, the Respondent filed a motion for extension of two weeks to file his reply.
4. By Order No. 184 (GVA/2021) of 22 December 2021, the Tribunal granted the above-mentioned motion.
5. On 28 January 2022, the Respondent filed another motion for extension of time until 7 February 2022 to file his reply, which was granted by the Tribunal on the same day.
6. On 7 February 2022, the Respondent filed his reply with an *ex parte* annex, i.e., Annex 20: “Investigation report on prohibited conduct by a staff member at the United Nations Office for Outer Space Affairs (ID Case No. 1022/19)” (hereafter, “investigation report”).

Consideration

7. In her application, the Applicant requests the Tribunal to order the disclosure of the following documents:
 - a. The transcript of her interview with the United Nations Office of Internal Oversight Services (“OIOS”);
 - b. The investigation report;

c. Various drafts related to the review and revision of the initial investigative reports (hereafter, various drafts); and

d. The communication concerning the referral of the Applicant's complaint between OIOS and Chef de Cabinet ("CdC") of the Executive Office of the Secretary-General ("EOSG").

8. The Respondent objected to the disclosure of the above-mentioned documents although he filed the investigation report on an *ex parte* basis.

The transcript of the Applicant's OIOS interview

9. The Applicant submits that the disclosure of the transcript of her OIOS interview is required to allow her to properly assess the complaint OIOS was to investigate.

10. However, as both parties noted, witnesses are generally not requested to comment on or correct the transcripts of their OIOS interviews. Also, the case record shows that the Applicant participated in an audio-recorded interview and that under OIOS policy, witnesses will not be entitled to copies of audio recorded interviews and transcripts.

11. Moreover, it is within the investigation panel's discretion to assess the relevance of the evidence and determine its weight. In any event, the Applicant's interview records have been reflected in the investigation report, which is to be disclosed to her in line with the Tribunal's finding in para. 21 below.

12. Accordingly, the Tribunal finds it not appropriate to order the Respondent to disclose to the Applicant the transcript of her OIOS interview.

Various drafts

13. The Applicant requests the Tribunal to order the disclosure of "various drafts" to review the alleged inordinate delay to treat her complaint. To support her request, she specifically argues that OIOS posit as an excuse for inordinate delay the need for review and revision of the initial investigative report over a period of five months.

14. Noting that various drafts are internal working documents that may contain sensitive information, the Tribunal finds it not appropriate to order the Respondent to disclose it to the Applicant.

Communication concerning referral of the complaint

15. The Applicant requests the Tribunal to order the disclosure of the communication concerning referral of the complaint because it could not see a mechanism by which such referral could have taken place.

16. The Respondent submits that the Administration acknowledged that the referral at issue was not in line with the then applicable ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), and that it was an error that was corrected following the referral of the Applicant's second complaint.

17. Accordingly, the Tribunal does not find it necessary to order the Respondent to disclose to the Applicant the communication in question.

Ex parte investigation report

18. Having reviewed the investigation report filed on an *ex parte* basis, the Tribunal finds it relevant for the Applicant's case.

19. In this respect, the Appeals Tribunal ruled in *Bertucci* 2011- UNAT-121 as follows:

46. [...] this Tribunal agrees with the International Labour Organization Administrative Tribunal (ILOAT) that "it is for the party making [the] claim [of confidentiality] to establish the grounds upon which the claim is based" (Judgment No. 2315 (2004), para. 28) and that "the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. Under normal circumstances, such evidence cannot be withheld on the grounds of confidentiality" (Judgment No. 2229 (2003), para. 3 (b)).

47. The documents relating to the process that led to the contested administrative decision are part of the case file. They must therefore, in principle, come under the Tribunal's control, unless they are covered by a right to confidentiality by virtue of the internal law of the United Nations.

48. The exceptions to this principle, if they exist, must be interpreted strictly. In its resolution 63/253, the General Assembly chose to establish a new administration of justice system that was "transparent" and "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". This is an overriding objective that prevails over claims of confidentiality that are not sufficiently specific and justified.

20. The Tribunal further recalls that consideration of *ex parte* evidence "breaches the fundamental legal principle of natural justice known as *audi alteram partem*, the obligation on a decision-maker, literally, to 'hear the other party' and includes the right of each party to a fair hearing and to respond to evidence against them" (see *Banaj* 2022-UNAT-1202, para. 61).

21. Therefore, the Tribunal finds it in the interest of justice to disclose the investigation report to the Applicant.

22. Considering that the investigation report contains information concerning third persons, the Tribunal finds it appropriate to instruct the Respondent to redact it and refile it on an *under seal* basis.

23. Upon receipt of the Respondent's filing, the Applicant will be given an opportunity to submit a rejoinder.

Conclusion

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

a. By **Tuesday, 21 February 2023**, the Respondent shall redact the investigation report and refile its redacted version on an *under seal* basis;

b. The Applicant's request to disclose other documents listed in para. 7 above is rejected; and

c. By **Monday, 6 March 2023**, the Applicant may file a rejoinder.

25. The Applicant shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate the disclosed investigation report—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by this Tribunal.

(Signed)

Judge Teresa Bravo

Dated this 17th day of February 2023

Entered in the Register on this 17th day of February 2023

(Signed)

René M. Vargas M., Registrar, Geneva