



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MIHYAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Ana Giulia Stella, OSLA
Mario Hainboeck, OSLA

Counsel for Respondent:

Isavella Maria Vasilogeorgi, AAS/ALD/OHR, UN Secretariat
Santiago Steta Perea, AAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 13 (GVA/2023) of 27 February 2023, the Tribunal:
 - a. Ordered, *inter alia*, the Applicant to file a rejoinder by 8 March 2023, and
 - b. Invited the Respondent to file his comments thereon, if any, by 17 March 2023.
2. On 8 March 2023, the Applicant filed his rejoinder pursuant to the above-mentioned Order.
3. On the same day, the Applicant filed, on an *ex parte* basis, a motion for leave to submit evidence of damage with three annexes related to his “mental distress and health damages directly caused by the disciplinary process against him, and sanction imposed”.

Consideration

4. In his motion, the Applicant requests permission to file evidence on an *ex parte* basis to “protect his medical records confidentiality” and asks the Tribunal to consider it for the adjudication of the case. Alternatively, the Applicant “authorizes a disclosure of [the] motion and its annexes limited to the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”) for the purposes of using this evidence in the proceedings”.
5. The evidence in question is annexed to the motion and marked as annexes 15, 16 and 17. It consists mostly of medical reports/exams/recommendations, and of email communications related to the Applicant’s medical status/clearance and exchanges on stress counselling sessions.

Motion to adduce additional evidence

6. In support of his motion to adduce additional evidence, the Applicant submits that the evidence is relevant and pertinent to the adjudication of the instant case. Specifically, the Applicant argues that the evidence supports his claim for damages arising from the impugned decision, and that because of the disciplinary measure, he suffered adverse consequences on his mental health, well-being, and he is experiencing different heart conditions.

7. The Tribunal recalls that pursuant to art. 18.1 of its Rules of Procedure, it shall determine the admissibility of any evidence and, under art. 18.5, it may exclude evidence it considers irrelevant, frivolous, or lacking probative value.

8. Having reviewed the evidence that the Applicant seeks to include in the case record, the Tribunal finds that there are no grounds to exclude it and will admit it. However, the Tribunal will decide during its deliberation what weight to attach to it.

9. Accordingly, the Tribunal finds it appropriate to grant the Applicant's motion to adduce additional evidence.

Ex parte filings

10. In relation to the Applicant's *ex parte* filings, 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.

11. The Tribunal further recalls that consideration of *ex parte* filings “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).

12. The Tribunal first underlines that the parties’ filings before it are not available to the public. Second, all parties’ motions should be available to the non-filing party upon their initial submission. It follows that the Applicant’s motion itself should not have been filed *ex parte*. Nevertheless, considering that the motion contains sensitive medical information, the Tribunal finds it appropriate to instruct the Registry to change the confidentiality setting of the motion in the Tribunal’s e-Filing system from “*ex parte*” to “under seal”.

13. Turning to the evidence contained in the annexes to the motion, the Tribunal notes that the Applicant authorized its disclosure in his motion. Considering that the evidence concerns sensitive medical information, the Tribunal finds it appropriate to instruct the Registry to change the confidentiality setting of the annexes from “*ex parte*” to “under seal”.

14. As a result of the above instructions on confidentiality, the Tribunal reminds the Respondent that under seal documents shall not to be disclosed, used, showed, conveyed, disseminated, copied, reproduced or in any way communicated without its prior authorization, except for the filing of an appeal with the United Nations Appeals Tribunal.

15. The Tribunal notes, however, that in his motion the Applicant explicitly consented to the disclosure of the annexes to DHMOSH. The Tribunal thus authorizes the Respondent to share the annexes in question with DHMOSH should he find it necessary to seek its guidance to adequately address the evidence that the Applicant adduces.

Extension of time for the Respondent to file his comments

16. The Tribunal notes that the Respondent is to file his comments on the Applicant's rejoinder on 17 March 2023 pursuant to Order No. 13 (GVA/2023).

17. Considering that together with the rejoinder, the Applicant filed a motion to adduce additional evidence, which the Tribunal has granted, the Tribunal finds it in the interest of justice to give the Respondent three extra working days to address the additional evidence in his forthcoming submission.

Conclusion

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

- a. The Applicant's motion to adduce additional evidence is granted. Accordingly, annexes 15, 16 and 17 to the motion are admitted as evidence into the case record;
- b. By **Friday, 10 March 2023**, the Geneva Registry shall change the confidentiality setting of the Applicant's motion to adduce additional evidence and its annexes from "*ex parte*" to "under seal"; and
- c. By **Wednesday, 22 March 2023**, the Respondent may file his comments, if any, on the Applicant's rejoinder and the additional evidence he adduced.

(Signed)

Judge Teresa Bravo

Dated this 10th day of March 2023

Case No. UNDT/GVA/2023/002

Order No. 21 (GVA/2023)

Entered in the Register on this 10th day of March 2023

(Signed)

René M. Vargas M., Registrar, Geneva