



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Sètondji Roland Adjovi
Anthony K. Wilson

Counsel for Respondent:

Steven Dietrich, ALD/OHR/DMSPC, UN Secretariat
Miryoung An, ALD/OHR/DMSPC, UN Secretariat

Introduction

1. The Applicant, a former Head of the Donor Coordination Section, P-4, at the United Nations Assistance Mission in Afghanistan (“UNAMA”), contests the decision dated 8 May 2023 to impose on him the disciplinary measure of demotion by one grade with deferment for three years of consideration for eligibility for promotion, pursuant to staff rule 10.2(a)(ii), and the decision requiring him to commence gender sensitivity/awareness training (the “contested decision”).
2. On 5 August 2023, the Applicant filed the instant application against the contested decision. With the application, the Applicant also submitted a motion for anonymity and a request to exceed the page limit.
3. On 13 September 2023, the Respondent filed his reply arguing for the lawfulness of the contested decision, the rejection of the Applicant’s motion for anonymity, and also seeking authorization to exceed the page limit.
4. On 16 September 2023, the Applicant filed a motion seeking leave to file a rejoinder.
5. On 19 September 2023, the Respondent opposed the Applicant’s motion and requested to be granted the opportunity to comment on the Applicant’s rejoinder should his motion be granted.
6. By Order No. 150 (GVA/2023) of 10 November 2023, the Tribunal granted the parties’ motion to exceed the page limit, rejected the Applicant’s motion for anonymity, ordered the Applicant to file a rejoinder by 24 November 2023, and the Respondent to comment on said rejoinder by 8 December 2023.
7. On 11 November 2023, the Applicant filed a motion seeking a two-week extension of time to file a rejoinder.
8. By Order No. 157 (GVA/2023) of 15 November 2023, the Tribunal granted the Applicant’s motion for an extension of time to file a rejoinder, which he did on 6 December 2023. On 20 December 2023, the Respondent filed his comments on it.

9. By Order No. 32 (GVA/2024) of 12 April 2024, the Tribunal convoked the parties to a case management discussion (“CMD”), which was held virtually in Microsoft Teams on 24 April 2024.

10. By email of 15 April 2024, the Applicant informed the Tribunal that he retained legal representation and filed the respective authorization form.

11. By Order No. 39 (GVA/2024), the Tribunal instructed the parties to identify any potentially relevant witnesses for a formal hearing on the merits explaining the relevance of their testimony for the determination of the issues under dispute, and confirming their availability to virtually attend a hearing between 10 and 13 June 2024. With respect to the Applicant’s request for anonymity raised at the CMD, the Applicant was reminded that the matter of anonymity was decided by Order No. 150 (GVA/2023), and that it would not be revisited unless new circumstances arise.

12. On 8 May 2024, the parties filed their respective submission pursuant to Order No. 39 (GVA/2024).

13. On 10 May 2024, the Respondent filed a motion for leave to respond to the Applicant’s requests dated 8 May 2024. The following day, the Applicant responded to the Respondent’s motion.

Consideration

The submissions of 8 May 2024

14. In response to Order No. 39 (GVA/2024), the Applicant proposed and justified the following eleven witnesses for the upcoming hearing on the merits:

- a. The OIOS investigator;
- b. V01;
- c. Mr. TG;
- d. Ms. JYS;

- e. Ms. NJ;
- f. Ms. DD;
- g. Mr. AT;
- h. Ms. LT;
- i. Mr. MG;
- j. Ms. NS; and
- k. Ms. DL.

15. Furthermore, the Applicant requested the Tribunal to revisit its decision with respect to anonymity, which will be dealt with separately below.

16. In turn, the Respondent proposed that the Tribunal hear from V01, Ms. JYS, and Mr. TG. With respect to V01, the Respondent requested that the Tribunal make the following accommodations to safeguard her anonymity and well-being: (i) that her testimony be held *in camera*; (ii) that V01's anonymity be preserved throughout the proceedings and in the judgment; and (iii) that the Applicant not be virtually present during V01's testimony.

The requests of 10 and 11 May 2024

17. On 10 May 2024, the Respondent filed a motion for leave to respond to the Applicant's submission. *Inter alia*, the Respondent submits that only the three common witnesses identified in para. 16 above would assist the Tribunal in its judicial review of this case. He also argues that the Applicant failed to demonstrate the relevance of the evidence from the other individuals on the list, and their proposed testimony falls outside the scope of the current exercise of judicial review as they bear no clear link to the disputed facts.

18. Subsequently, the Applicant requested that the Respondent's motion be rejected or, if entertained by the Tribunal, that he be granted an opportunity to respond to it.

Hearing on the merits

19. Having examined the aforementioned parties' submissions, the Tribunal considers itself fully briefed and sees no need to further debate regarding the proposed list of witnesses.

20. Art. 16.2 of the Tribunal's Rules of Procedure provides that "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". Art. 17.1 provides that "[t]he 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 any 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".

21. Art. 9.4 of the Tribunal's Statute provides that: "[i]n hearing an application to appeal an administrative decision imposing a disciplinary measure, the Dispute Tribunal shall pass judgment on the application by conducting a judicial review. In conducting a judicial review, the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence".

22. In view of the foregoing, the Tribunal finds it appropriate, for a fair and expeditious disposal of the case, to hold a hearing on the merits.

23. In this regard, the Tribunal assessed the relevance of the testimonies proposed by the parties, and decides that only the following witnesses are indeed connected or relevant to the current proceedings:

- a. V01;
- b. Mr. TG; and

c. Ms. JYS,

24. The Tribunal does not find the testimonies of Ms. NJ and Ms. DD necessary for the determination of the disputed facts.

25. With respect to the OIOS investigator, the Tribunal is not convinced that her testimony is relevant for the determination of the facts under dispute. The alleged violations of due process have been extensively described by the Applicant in annex 7 to his application, and the Tribunal considers that the matter may very well be decided based on the written record.

26. With respect to the other five witnesses proposed by the Applicant, the Tribunal notes that they were either not heard by the investigation, or do not have direct or indirect knowledge of the facts under dispute. The Applicant intends to only question V01's character or conduct in relation to others, which is neither relevant to, nor the subject of this judicial review. As a result, their testimony would bring no value for the disposition of this case.

27. With respect to V01, as has been the past practice, the Tribunal sees no detriment to the proceedings in granting the Respondent's request vis-à-vis protecting her anonymity and well-being. Consequently, the Tribunal decides that:

- a. V01's testimony will be held *in camera*;
- b. V01 will not be named during the proceedings and Judgment; and
- c. The Applicant will not be virtually present during V01's testimony.

28. Finally, even though neither party formally listed him, the Tribunal considers the Applicant's testimony essential for these proceedings as well.

Tentative schedule

29. Both parties confirmed their availability to virtually attend a hearing between 10 and 13 June 2024, starting at 2 p.m. (GVA time).

30. Based on this information, the tentative schedule of the hearing, which may be subject to change, is as follows:

Monday, 10 June 2024 (all times are Geneva time)

2 p.m.	Parties' opening statements
3 p.m.	V01. Examination-in-Chief by the Respondent, and cross-examination by the Applicant.
5 p.m.	Mr. TG. Examination-in-Chief by the Respondent, and cross-examination by the Applicant.

Tuesday, 11 June 2024

2 p.m.	Ms. JYS, Examination-in-Chief by the Respondent, and cross-examination by the Applicant.
3 p.m.	The Applicant. Examination-in-Chief by the Applicant's Counsel, and cross-examination by the Respondent.
5 p.m.	Closing submissions.

Agreed hearing bundle

31. Pursuant to Order No. 39 (GVA/2024), the parties shall produce an agreed bundle of documents/evidence on which they intend to rely at the upcoming hearing on the merits. The documents in the bundle should be listed in chronological order and indexed, and the bundle should be properly paginated. Such bundle shall be restricted to the issues proposed to be discussed at the hearing, and used to examine and cross-examine the witnesses.

Motion for anonymity

32. In his submission of 8 May 2024, the Applicant requested that the Tribunal revisit the matter of anonymity in his case based on two grounds: (i) that the refusal to grant anonymity was made by the Duty Judge and it is open to the assigned Judge to revisit the matter; and (ii) that current circumstances warrant a further consideration of the matter.

33. With respect to the latter, the Applicant further provided that he included a more detailed account of his security concerns in his rejoinder, which was filed after

the rejection of his request for anonymity by Order No. 150 (GVA/2023) and, thus, never considered by the undersigned Judge. Furthermore, he claims that the low standard of proof in this case, which is preponderance of evidence, does not require for well-established facts based on clear and convincing evidence. A public proceeding would put the Applicant in great personal and reputational risk in a case where the facts are not established as clear and convincing.

34. Having reviewed the Applicant's submission, the Tribunal does not agree that a decision made by the Duty Judge is constantly open for entertainment until decided by the assigned Judge to a case. That would undermine the role of the Duty Judge and render precarious the principle of legal certainty.

35. Regarding the Applicant's argument vis-à-vis the standard of proof, the Tribunal is equally not convinced. The principles of transparency and accountability enshrined in the internal justice system do not allow for anonymity to be granted in one type of case versus another. On the contrary, the principles apply to the entire internal justice system regardless of the facts under dispute, the charges of misconduct or the disciplinary measure applied, unless exceptional circumstances guide the Tribunal differently.

36. Concerning exceptional circumstances, the jurisprudence of the United Nations Appeals Tribunal has been clear in that the principle of publicity can only be departed from where the applicant shows "greater need than any other litigant for confidentiality" (*Pirnea* 2014-UNAT-456, para. 20).

37. However, the Tribunal is persuaded by one of the Applicant's points. Indeed, the previous decision in Order No. 150 (GVA/2023) did not consider the additional details contained in the Applicant's subsequent rejoinder about the security risks that he is facing. In this respect, the Tribunal will be lenient with the Applicant, who was self-represented at the time of the application, and accept the details and arguments introduced at a later stage.

38. It is noteworthy that the Applicant continues to work at the duty station where the incidents under dispute took place, and engages with local staff and members of government. It is a place where local cultural reality requires a greater deal of discretion due to the risk of physical harm, and the Tribunal is convinced that the Applicant has indeed met the threshold of exceptional circumstances warranting anonymization of his name.

Conclusion

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

- a. The parties' requests for further submission on the list of proposed witnesses is rejected;
- b. An oral hearing will be virtually held on **10 and 11 June 2024** via Microsoft Teams;
- c. V01's testimony will be held *in camera* and without the Applicant's virtual presence;
- d. The parties are notified of the tentative schedule of appearances at the hearing as per para. 30 above;
- e. The parties are instructed to provide their contact details, including the witnesses' (email and phone number), no later than **Friday, 24 May 2024**;
- f. The parties shall file a joint submission with an agreed hearing bundle of documents attached to it by **Wednesday, 5 June 2024**; and
- g. The Applicant's motion for anonymity is granted. His name shall be anonymized in all previous and future Orders and Judgment.

(Signed)

Judge Sun Xiangzhuang

Dated this 17th day of May 2024

Case No. UNDT/GVA/2023/039

Order No. 54 (GVA/2024)

Entered in the Register on this 17th day of May 2024

(Signed)

René M. Vargas M., Registrar, Geneva