



**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

BHARATY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**DECISION ON THE APPLICANT'S  
MOTION FOR DISCLOSURE**

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**Counsel for the Applicant:**  
Julia Lee, OSLA

**Counsel for the Respondent:**  
Nusrat Chagtai, ALS/OHRM

## **Introduction**

1. At the time of the application, the Applicant was an Associate HIV/AIDS Officer with the United Nations Interim Force in Lebanon (UNIFIL). She served on a fixed term appointment and was based in Naqoura.

## **Procedural History**

2. On 19 July 2017, the Applicant filed an application challenging the Respondent's decision to not renew her contract.

3. The Respondent filed his reply to the application on 21 August 2017.

4. On 4 September 2018, the Tribunal issued Order No. 130 (NBO/2018) setting this matter down for a case management discussion (CMD).

5. The CMD took place, as scheduled, on 19 September 2018. Following the discussion, the parties were given deadlines within which to file a Motion for Disclosure and response thereto.

6. The Applicant filed the subject motion on 21 September 2018.

7. The Respondent replied to this motion on 28 September 2018.

## **Submissions**

### *Applicant*

8. The Applicant requests the Tribunal to order the Respondent to produce the following documents:

- a) The UNIFIL Special Investigations Unit's (SIU) Report on the Applicant;
  - b) Documents and information related to the security assessment of the Applicant.
- The Respondent referred to these reports in correspondence to the Applicant dated 29 November 2016, 12 February 2017 and 19 May 2017.

- c) Documents and information related to the decision to send the Applicant on a Temporary Duty Assignment (TDA) with the United Nations Office to the African Union (UNOAU). Specifically, the Applicant would like to know what post she was assigned to, what budget funded the post and what the terms of reference for the assignment were.
- d) Documents and information related to UNIFIL's efforts to assist the Applicant after she was declared *persona non grata* by the host country. Annexes G and F to the application make reference to the putative efforts made by the mission to assist the Applicant.
- e) Communication between UNIFIL and the Lebanese authorities pertaining to the Applicant. Annexes R2 and R5 to the Respondent's reply make reference to communication between the Mission and the Lebanese authorities.
- f) Information regarding local and foreign staff members of UNIFIL who are alleged to have denounced and complained about the Applicant to the Lebanese authorities. Annexes R2 and R3 to the Respondent's reply make reference to these complaints.
- g) Communication between UNIFIL and United Nations Headquarters regarding the Applicant, as referred to in Annexes R4 and R5 to the Respondent's reply.

9. All the documents being sought by the Applicant are referred to by the Respondent in his submissions to justify his decision(s) leading up to the Applicant's separation from service.

10. The Applicant contends that disclosure of these documents will assist in the determination of whether the Respondent fulfilled its duties and obligations towards the Applicant and whether the non-renewal of her contract was justified under the circumstances.

*Respondent*

11. The Respondent objects to the disclosure of:

- a) The UNIFIL SIU Report;
- b) Communications between UNIFIL and the Lebanese authorities regarding the Applicant; and
- c) Information pertaining to national and international staff who are alleged to have denounced and complained about the Applicant to the Lebanese authorities.

12. The Respondent submits that these documents are not relevant, not probative and are generally overbroad requests for information to determine whether the impugned decision was lawfully made.

13. The Respondent also submits that the Applicant has no right to obtain the investigation report given that no disciplinary measures were taken against her.

14. The Respondent, however, has produced documents that he deems to be relevant in response to the motion.

### **Considerations**

15. Pursuant to Article 9(1) of the Dispute Tribunal's Statute and Articles 18(2) and 19 of the Dispute Tribunal's Rules of Procedure, "the Tribunal has discretionary authority in case management and the production of evidence in the interest of justice".<sup>1</sup> In the exercise of that discretion the primary consideration is relevance. If a document is not relevant, the Tribunal has no need to consider it and there is no basis for its disclosure. Relevance is determined by the issues in the case, which at this stage are determined by the pleadings. The Tribunal is entitled to order the production of any document relevant to that end.<sup>2</sup>

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<sup>1</sup> *Calvani* 2010-UNAT-032, paras. 8 and 9.

<sup>2</sup> *Id.*; see also *Koda*, UNDT/2009/024, para. 9.

*Documents and/or information relevant to determining whether Lebanon's allegations against the Applicant and its reasons to demand her expulsion are justified*

16. The Respondent objects to disclosure of:

- i. The UNIFIL SIU Report.<sup>3</sup>
- ii. Any documents and information related to the communications between UNIFIL and the Lebanese authorities regarding the Applicant.<sup>4</sup>
- iii. Information regarding the local and foreign staff members of UNIFIL, who allegedly denounced and complained about the Applicant to the Lebanese Air Force (LAF).<sup>5</sup>

17. These documents are irrelevant in determining whether the non-renewal of the Applicant's appointment was lawful. The Applicant does not dispute that the Lebanese Government requested her removal from the country nor assert that UNIFIL could have done more to prevent that action. Rather, she seeks this information to "determine whether Lebanon's allegations against the Applicant and its reasons to demand her expulsion are justified."<sup>6</sup> Whether the Applicant or UNIFIL believe that the Lebanese government's request was justified is irrelevant. The host country had the right to request the Applicant's removal.<sup>7</sup> UNIFIL made efforts to convince the government not to take action and requested that they reconsider their request once made.<sup>8</sup> There was nothing more to be done. The scope of the Organization's duty is to be determined in relation to what is possible and reasonable under the circumstances.<sup>9</sup>

18. The Applicant has no right to obtain the investigation report where there were no disciplinary measures taken against her.<sup>10</sup> The Applicant claims that she is not aware of what she was alleged to have done. However, as she acknowledges in the

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<sup>3</sup> Motion, paras. 3.a.i-ii.

<sup>4</sup> Motion, paras. e.1-ii.

<sup>5</sup> Motion, paras. f.i-iv.

<sup>6</sup> Motion, para. 3.a.ii, e.ii, f.iii.

<sup>7</sup> See *Tal*, Order No.: 109 (NBI/2017); *Trudi*, UNDT/2015/046; *Hassouna*, UNDT/2014/094.

<sup>8</sup> Respondent's Reply, R5, para. 4.

<sup>9</sup> *Tal*, Order No. 109 (NBI/2017), paras. 54-55; *Trudi*, Order No. 109 (NBI/2017), paras. 33-38.

<sup>10</sup> *Elobaid*, 2018-UNAT-822, paras. 21-30.

application, she was informed of the subject of the investigation and as part of it, she provided a written statement.<sup>11</sup> There was no finding of misconduct as a result of the investigation. Notwithstanding the Respondent's objection, he produced the Applicant's statement in which she acknowledges that she posted photographs on Facebook from her visit to Israel, that she commended Israeli hospitals, and that the coordinator of the institute where she did the training was her Facebook friend. [R6] These were among the reasons provided by the LAF for her expulsion.<sup>12</sup> Whether these reasons were justified is irrelevant to the contested decision. Without the consent of the national authorities, it is impossible for a staff member to perform their contract.<sup>13</sup>

19. The Applicant has no right to obtain information about the investigation of other staff members whom she speculates provided information to the authorities. Notwithstanding the Respondent's objection to this request, he submits that there is no evidence that other staff members provided information to the LAF. The LAF informed UNIFIL that "the competent services have been following up the staff member's behavior for some time and were able to make a clear assessment in that regard."<sup>14</sup>

20. The Respondent objects to the request for "any and all documents and information related to the communications between UNIFIL and UNHQ regarding the Applicant."<sup>15</sup> The requested information is irrelevant since it is sought to determine whether the LAF's decision was justified.

21. As the Applicant has stated:

This information is relevant to examine whether UNIFIL acted reasonably and sufficiently to alleviate the predicament of the Applicant after Lebanon demanded her expulsion from its territory.<sup>16</sup>

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<sup>11</sup> Application, paras. 2-5.

<sup>12</sup> Respondent's Reply, Annex R2.

<sup>13</sup> *Trudi*, UNDT/2018/019, paras. 33, 37 and 38.

<sup>14</sup> Respondent's Reply, R5.

<sup>15</sup> Motion, paras. g.i-ii.

<sup>16</sup> Motion, para. g ii.

22. This request is also overly broad.<sup>17</sup> Notwithstanding the Respondent's objection, he discloses additional correspondence from the LAF to UNIFIL dated 17 January 2017, and the requested Code Cable of 24 February 2017 from UNIFIL to UNHQ.<sup>18</sup> [R7, R8] UNIFIL has been unable to locate any letter dated 15 November 2016. In any event, it appears from the Applicant's signed statement that she was shown this correspondence.<sup>19</sup>

*Documents and information related to the security assessment of the Applicant*

23. The Applicant states that this request is relevant "as the impoverished security status of the Applicant is the reason UNIFIL provided to justify her departure from Lebanon."<sup>20</sup> The LAF ordered the Applicant's departure, not UNIFIL.<sup>21</sup> As evident from further LAF correspondence to UNIFIL from January 2017, the matter was becoming more pressing.<sup>22</sup> In accordance with its duty to ensure the Applicant's safety, a further security assessment was conducted in February 2017. This concluded that the risk to the Applicant was "high to very high."<sup>23</sup> In response to this request, the Respondent discloses:

- i. The 10 February 2017 security assessment report which shows that UNIFIL Security Section assessed the Applicant's risk as "high to very high" and recommended that she be transferred to another duty station outside of Lebanon. [R9]
- ii. The 12 January 2017 declaration of Ms. Lenciano regarding an incident on 11 January 2017. [R10]

*Documents related to the Applicant's TDA to the UNOAU*

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<sup>17</sup> Nadeau Order No. 185 (NY/2-18), para. 25, citing *Rangel*, UNAT Order No. 256 (2016).

<sup>18</sup> Respondent's Annexes R7 and 8.

<sup>19</sup> R6, pp.1-2.

<sup>20</sup> Motion, para. 3.b.ii.

<sup>21</sup> Respondent's Reply, Annex R5.

<sup>22</sup> R7.

<sup>23</sup> 10 February 2017 security assessment report.

24. The requested information is irrelevant. The request should be considered in light of the pleadings. The Applicant has never complained about her temporary assignment to UNOAU. She never contested that decision at the time and the application contains no allegations in this regard. The Applicant accepted the temporary assignment and raised no objections at the time. She remained on a UNIFIL post while serving with the UNOAU and her assignment was funded by UNIFIL.

*Documents related to UNIFIL's efforts to assist the Applicant after she was declared persona non grata by Lebanon*

25. Pursuant to UNIFIL's request, the Applicant's *persona non grata* status was lifted by the Lebanese authorities.<sup>24</sup> Lebanon nevertheless demanded that the Applicant leave the country. The Administration then took steps to honour its contract with the Applicant. It provided her with work at the same grade and level until the expiration of her appointment and exceptionally sought approval for the extension of the TDA Prior to the expiration of the Applicant's appointment, UNIFIL and the Department of Field Support (DFS) in New York, made efforts to follow up on positions for which she had applied. In this regard, the Respondent discloses additional correspondence in Annex R12 which is attached to the Respondent's reply to this motion.

## **ORDER**

26. The aforesaid constitutes the decision and Order of the Tribunal.

27. The parties are also **reminded** that this Tribunal is awaiting their responses to paragraph 5(ii) of Order No. 130 (NBI/2018) on whether they are amenable to the adjudication of this matter on the basis of their written submissions.

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<sup>24</sup> R8, para. 2; R5, para. 4.



*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 19<sup>th</sup> day of October 2018

Entered in the Register on this 19<sup>th</sup> day of October 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi