UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2024/042
Order No.: 165 (NBI/2024)
Date: 17 December 2024
Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

CHIMSORO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON RESPONDENT'S MOTION FOR VICTIM PROTECTIVE MEASURES AND FOR LEAVE TO FILE ADDITIONAL EVIDENCE

Counsel for Applicant:
Rodney Mkweza
Ron Mponda

Counsel for Respondent:
Elizabeth Brown, UNHCR
Louis Lapicerella, UNHCR

Introduction

1. During a Case Management Discussion on 7 November 2024, the Respondent raised the issue of "protective measures" he wishes to be implemented in this case. The Tribunal indicated that the Respondent should file a written motion setting forth: the specific measures that he wishes to be implemented and the basis for such measures.

2. On 14 November, the Respondent filed his Motion for Victim Protective Measures and For Leave to File Additional Evidence. On 24 November 2024, the Applicant filed his Response to the Respondent's motion. Thus, the motion is ripe for ruling.

Motion for Victim Protective Measures

3. First, the Respondent requests that "the hearing be conducted *in camer*a in order to protect the privacy of the Complainant in this case." The Applicant does not object to this request. Accordingly, the hearing shall be conducted *in camera*.

4. Next, the Respondent requests "the Tribunal to ensure that the Applicant is not visible or audible to the Complainant during her testimony." The reason given is "to avoid any revictimization or triggering of the Complainant and allow her to focus on giving testimony without distraction."

5. The Applicant has no objection to "not be[ing] audible to the Complainant since he is represented". Accordingly, the request that the Applicant not be audible during the Complainant' testimony is granted.

6. However, the Applicant "strongly objects to this rather draconian and extreme measure [shielding of his face from the Complainant] whose legal premise has not been articulated in the Respondent's motion." He objects to the Respondent's use of the phrase "revictimization" since it assumes that the allegation has been proven, thus displacing the presumption of innocence. He also objects to the reference to "triggering" because it is unclear and, to the extent that it means "reliving the

circumstances surrounding the allegation", it is "premised on prejudicial assumptions."

7. The Tribunal notes that none of the cases cited by the Respondent contain any in-depth analysis of this issue. Indeed, thee orders in those cases do not even reflect whether there was even any objection to the requested measure. As such they hardly amount to persuasive authority on the issue.

8. The Statute of the Dispute Tribunal provides that, in conducting a judicial review of a disciplinary decision, "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 ..." *Id*. art. 9.4.

9. In addition, "when termination is a possible outcome", the evidentiary standard, as set by the Appeals Tribunal, is that the Administration must establish the alleged misconduct by "clear and convincing evidence", which means that "the truth of the facts asserted is highly probable." *Negussie* 2020-UNAT- 1033, para. 45. UNAT clarified that clear and convincing evidence can either be "direct evidence of events" or may "be of evidential inferences that can be properly drawn from other direct evidence." *Id.*

10. The Tribunal rejects the Applicant's objection to the use of words like "revictimization" or "triggering". Although a surface reading of these words might lead some to assume that an initial "victimization" has occurred, the Tribunal does not read them as such in this legal context. Instead, the Tribunal treats these words as indicating that, if in fact the Applicant victimized the Applicant as alleged, she may suffer additional trauma by the way in which she is treated by and before the court (or tribunal). To be clear, the Tribunal will apply the presumption of innocence in analysing the evidence in this case and will require the Respondent to prove by clear and convincing evidence that the alleged misconduct occurred.

11. The Applicant also points out that the Respondent's motion, and the record as a whole, contain "no apparent security interests or other exceptional

circumstances" to justify this request. This is correct and somewhat disappointing to the Tribunal.

12. Broad allegations of a need to "avoid revictimization or triggering of the Complainant" seemed based on an assumption that all victims are alike, which decades of judicial experience tell the undersigned is not true. Ideally, the Tribunal would have preferred particularized evidence to support the request, for **this Complainant**, such as was presented in *Applicant* UNDT/2022/048, paras. 48 - 62. Nonetheless, given the impending hearing date, the Tribunal will analyze the issue based on the current record.

13. The Respondent's request to prevent the Applicant from being visible to the Complainant while she testifies is, in a broad sense, a limitation on the Applicant's right to confront his accuser. As the Appeals Tribunal noted over a decade ago, the general principle of confrontation is well-established in criminal jurisprudence around the world. However, "'[d]isciplinary cases are not criminal'… Thus, due process does not always require that a staff member defending a disciplinary action for summary dismissal has the rights to confront and cross-examine his accusers." *Applicant* 2013-UNAT-302, para. 33, quoting *Molari* 2011-UNAT-164, para 30.

14. The Appeals Tribunal further noted that the former United Nations Administrative Tribunal "consistently maintained the right of Applicants to see all evidence against them and their right to cross-examine witnesses". *Applicant* , para. 34, quoting Former United Nations Administrative Tribunal Judgment No. 654, *Hourani* (1994), para. VI.

15. The Appeals Tribunal also observed that the Administrative Tribunal of the International Labour Organization ("ILOAT") described the general principle as follows:

> An internal appellate body is the primary fact-finding body in the internal appeals process. It is the body that sees and hears the witnesses and must assess the reliability of the evidence adduced. A full appreciation of the evidence can only occur in circumstances where individuals whose interests may have been adversely affected have an opportunity not only to be present to hear the evidence but

> also to test the evidence through cross-examination. *Applicant,* para. 35, quoting ILOAT Judgment No. 3108 (2012), para. 9.

16. The Appeals Tribunal examined the issue more recently in *Fararjeh* 2021- UNAT-1136. There it determined that

> due process does not always require that a staff member defending a disciplinary action of separation has the right to confront and cross-examine his accusers … In this instance, the Appellant's request to "face his accusers" must give way to the need to protect vulnerable witnesses from the emotional distress the confrontation would entail as long as the Appellant was afforded the fair and legitimate opportunity to defend his position. *Id*., para. 43 and cases cited therein.

17. Last year, the Appeals Tribunal applied these principles in reversing the Dispute Tribunal for affirming the Applicant's dismissal for alleged sexual harassment, abuse and exploitation. *Shumba* 2023-UNAT-1384. The Appeals Tribunal found that the failure to hold a hearing denied the Applicant

> the ability to question the Complainant on her version of events, to question the witnesses and elicit from them evidence which could have supported his own version, and to cast doubt upon the credibility and reliability of their version by confronting them with a different perspective of the probabilities. *Id.* at para. 80.

18. Noticeably absent from all these discussions is a specific right to confrontation by being seen while the accuser is giving testimony. Instead, when read together, these cases establish that an Applicant's right of confrontation consists of the right to know the evidence against him and to have an opportunity to challenge that evidence.

19. To be clear, the Applicant in this case will be accorded the right to hear the Complainant's testimony and be present during that testimony. He will also be granted an opportunity to test that evidence through cross-examination of the accuser by his counsel. The Applicant does not claim that he will suffer any specific harm from having his face not visible to the Complainant while she testifies (other than the possible inferences which he raises, and which the Tribunal has assured him will not be applied in his case). As such, the Tribunal concludes that requiring

that the Applicant not be visible to the Complainant during her testimony does not deprive him of the due process to which he is entitled.

20. Third, the Respondent also requests that a specific named person "be present during the Complainant's testimony in order to provide emotional support." Again, there is no specific basis provided for this request beyond the general claim that this has been allowed in other cases of alleged sexual misconduct.

21. The Applicant objects to this request because he "has challenged the role played by this specific individual during the investigation process, including the possibility of coaching the Complainant." Specifically, the Applicant points to the Complainant's interview transcript in which she said there were some things "that, you know, I didn't think about. It was only when I was talking to [the proposed support person] that kind of came to me in retrospect." However, the Applicant does not object to having a different person provide peer support for the Complainant during her testimony.

22. Under the particular circumstances of this case, the Tribunal finds that having the proposed person present to provide emotional support during the Complainant's testimony would be inappropriate. Admittedly, this person played a role in the Complainant's recollection/recounting of the facts of the incident(s), raising the possibility of coaching. The Complainant is certainly free to have another person of her choosing present to provide emotional support, so long it is neither the proposed person nor someone who is expected to testify regarding the facts at issue.

23. Fourth, the Respondent requests that "the anonymity of the Complainant and witnesses be preserved in the final judgment." The Applicant does not object to the Complainant being anonymous but does as to other witnesses "without any veritable reasons furnished as to why anonymization is sought." He also argues that "as a general premise, the anonymization of a Complainant's identity is actually buttressed by the concurrent anonymization of the staff member charged with misconduct."

24. Both parties cite to alleged "general practice" of the Dispute and Appeals Tribunals. It is true that in *Soum* UNDT/2024/059, para. 20, a judge in Geneva

referred to "a well-established practice of the Dispute Tribunal to protect the privacy and identity of witnesses and others in its judgments." However, a judgment issued the previous week by a judge in Nairobi which identified witnesses by name, *Kiingi* UNDT/2024/057, and the subsequent denial of a post-judgment motion to redact these names, *Kiingi* Order No. 138 (NBI/2004), indicates there is no well-established practice.

25. Similarly, the Appeals Tribunal judgment in *AAE* 2023-UNAT-1332 contains an unusual dissent from three of the seven judges wherein it is observed that

> [i]t is unclear whether Article 10(9) of the Appeals Tribunal Statute (protection of personal data in published judgments) is intended to extend to the anonymization of staff members' names in judgments, or whether the UNAT retains a residual discretion where good cause not to do so may rebut that presumption.

This all leads the undersigned to conclude that there is not yet a well-established practice amongst all the judges regarding anonymization of witnesses.

26. What is clear from the jurisprudence is that the Tribunal must balance the need for accountability with the need to protect personal data according to the circumstances of each case. "In so doing, it is the general practice of this judge to avoid using names, other than the parties, to protect the anonymity of innocent persons somehow involved in the case." *ATR* UNDT/2024/100, para. 14. Accordingly, the Respondent's motion for anonymity of the Complainant and witnesses will be granted.

27. The Applicant did not expressly request anonymity for himself, although he cites to two cases in which the applicant's name was kept confidential and refers to "the principle of the presumption of innocence." According to the jurisprudence "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability." *Buff* 2016-UNAT-639, para. 21. Given this routine practice, and the lack of an explicit request, a decision on anonymizing the Applicant in this case will be deferred until the judgment is drafted. Of course, the analysis will be different

depending on whether the Respondent has proven by clear and convincing evidence that the Applicant committed the alleged acts of misconduct.

Motion For Leave to File Additional Evidence

28. Finally, the Respondent moved to introduce additional evidence in the form of an affidavit regarding the existence of closed-circuit television ("CCTV") footage during the period in question. The Respondent submits the affidavit to address the Applicant's claim that the investigation was inadequate since there was no examination of the CCTV recording to see if it supported or contradicted the Complainant's statements. The affidavit is from a Field Security Officer at the UNHCR compound in Mogadishu who states that the CCTV footage "is kept for a period of 30 days, after which it is overwritten on the server."

29. The Applicant objects to this affidavit on the grounds that it "is in fact of little help in resolving the issues in this case." The Tribunal tends to agree with the Applicant regarding the proposed affidavit.

30. The affiant says that he joined the Mogadishu compound on 5 September 2023, but he asserts that "the situation was the same in January 2023." Although hearsay is admissible, this affidavit begs the obvious question: "how do you know what the situation was eight months before you arrived?" If it is the affiant's assumption, then the affidavit has no value at all. If affiant knows because someone told him, then why don't we hear from that person or someone else who has personal knowledge of the situation in January 2023?

31. The Applicant suggests two possibilities in this regard: that the affiant be called to give evidence at the hearing and/or that the Applicant be granted "leave to call an Expert to deal with the CCTV aspect of this case." As to the former, it does not seem productive, unless the affiant has actual knowledge of the CCTV facts as they existed during the relevant period. Thus, the Respondent will be granted leave to call a different witness with such personal knowledge if he wishes.

32. As to the latter, the Applicant will also be granted leave to call an expert witness to testify regarding the CCTV issues in this case. Accordingly, both parties

shall name the appropriate witness, and provide a summary of their testimony, on or before 31 December 2024.

33. In light of the above, IT IS ORDERED THAT:

a. The hearing in this case will take place on **15 and 16 January 2024**.

b. The hearing will be held *in camera.*

c. The Registry shall ensure that the Applicant will not be visible or audible to the Complainant during her testimony.

d. The request for the specific person proposed to be present to provide emotional support to the Complainant during the hearing is denied. The Complainant may have another person of her choosing present to provide emotional support, as long it is neither the proposed person nor someone who is expected to testify regarding the facts at issue.

e. The Respondent's motion for anonymity of the Complainant and witnesses is granted.

f. The Respondent is granted leave to call a witness with personal knowledge of the CCTV footage mentioned above.

g. The Applicant is also granted leave to call an expert witness to testify regarding the CCTV issues in this case.

h. Accordingly, both parties shall name the appropriate witness, and provide a summary of their testimony, on or before **31 December 2024**.

(Signed)
Judge Sean Wallace
Dated this 17th day of December 2024

Entered in the Register on this 17th day of December 2024
(Signed)
Wanda L. Carter, Registrar, Nairobi