



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Santiago Villalpando

YISMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR
CONFIDENTIALITY**

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Thomas Elftmann, UNDP

Notice: This Order has been formatted for publication purposes.

Introduction

1. On 11 February 2011 the Applicant, a staff member of the Multi-Donor Trust Fund Office of the United Nations Development Programme (“UNDP”), filed an application contesting the disciplinary measure of separation from service with notice and termination indemnity.

2. The contested decision was based on the findings of an investigation conducted during December 2009 and January 2010 by the Office of Audit and Investigations of UNDP, which established, *inter alia*, that the Applicant had submitted falsified information to the New York City Housing Development Corporation. The Applicant seeks rescission of the contested decision and reinstatement to her original post with full restoration of her employment benefits.

3. The contested decision was communicated to the Applicant by a letter dated 1 December 2010 from the Associate Administrator of UNDP and received by the Applicant on 5 December 2010. In a submission filed pursuant to Order No. 43 (NY/2011), the Respondent stated that the Applicant will be separated from service on 9 March 2011.

4. On 11 February 2011 the Applicant also filed a separate motion entitled “Motion for Confidentiality and Request for Expedited Hearing”. This motion contained two requests: (i) that the matter be heard on an expedited basis; and (ii) that any hearings be closed to the public and that the Applicant’s name be omitted from any rulings. Pursuant to Order No. 43 (NY/2011), on 18 February 2011 the Respondent filed a submission requesting the Tribunal to reject the Applicant’s request to keep her identity confidential in the course of the proceedings.

5. On 22 February 2011 the Applicant filed and served a separate application seeking the Tribunal to grant temporary relief until it renders a final judgment in her case. The Respondent’s reply to this application was filed on 25 February 2011. On 1 March 2011 the Tribunal held a hearing on the application for temporary relief. At

this hearing, the parties also made oral submissions with respect to the Applicant's motion for confidentiality, which is the subject of this Order.

Applicant's submissions

6. The Applicant submits that the public nature of the hearings and the use of her name in judicial rulings would result in severe prejudice to her professional and personal reputation, making it more difficult for her to seek alternative employment outside of the United Nations. The Applicant argues that, even if her case were to prevail before the Tribunal, if her identity is not kept confidential her personal and professional reputation in her office would be severely prejudiced as a result of the proceedings before the Tribunal. She contends that, if her co-workers become aware of Applicant's involvement in this case, it will cause permanent and irreparable damage to her. It would also compromise the principle of presumption of innocence of the Applicant if an external investigation or judicial proceedings were to take place. The application submitted by the Applicant raises personal and confidential information including medical reports concerning the Applicant and members of her family, which must be protected from public disclosure.

Respondent's submissions

7. The Respondent submits that there are no exceptional circumstances to justify the maintenance of confidentiality in the proceedings. It is a general principle of the proceedings before the Tribunal that the identity of applicants should be disclosed to ensure that the proceedings are open and transparent, a principle which has been followed in cases involving the imposition of disciplinary measures. The Respondent contends that the present case could be distinguished from the exceptional circumstances found to exist in the few cases in which requests for confidentiality were granted by the Tribunal. The Respondent's position is that this is because, unlike in those cases, the Applicant's case does not concern claims arising from her personal medical status or duties of a sensitive or confidential nature. The

Respondent argues that any confidential evidence or personal information, such as medical reports, can be adequately achieved through specific protective measures that may be ordered by the Tribunal in respect of that particular evidence.

Consideration

8. Transparency is a key element of the new system of administration of justice, as is evident from, amongst other things, the preamble to resolution 63/253, adopted on 24 December 2008, by which the General Assembly adopted the Tribunal's Statute. Transparency in judicial proceedings, however, must be balanced against the necessity to do justice in individual cases, including by granting certain measures of confidentiality in respect of a party's identity where it is found to be justified. Several specific provisions of the Statute, as well as the Rules of Procedure, grant the Tribunal the power to balance the potentially competing goals of transparency and confidentiality in particular cases. For example, under art. 9.3 of the Statute, "[t]he oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed". Under art. 11.6 of the Statute, "[t]he judgments of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal".

9. For obvious reasons related to the good administration of justice, both the Tribunal and the Respondent need to be aware of the identity of an applicant and have full access to the documentation supporting an application, during the conduct of the judicial proceedings. The Tribunal highlights, however, that the parties' written pleadings before the Tribunal are generally not available to the public and that the Tribunal's case records are kept confidential and secure in its Registry. The parties and their counsel are also expected to ensure that all written pleadings and documentation relating to a case are not disclosed to third parties.

10. It became evident to the Tribunal at the hearing on the application for temporary relief, held on 1 March 2011, that the facts in this case are common cause

and the only legal issue requiring adjudication is whether the disciplinary measure imposed on the Applicant is proportionate to her misconduct. The Tribunal finds that the Applicant has failed to persuade the Tribunal that her case is of such a nature as to overcome the guiding principle of transparency in judicial proceedings and published rulings before the Tribunal. As was correctly pointed out by the Respondent, this matter does not concern claims arising from a medical condition suffered by the Applicant or work duties of a confidential nature. Neither does it concern other types of sensitive claims, in which confidentiality has previously been granted.

11. Even though the Tribunal is mindful that each case must be decided on a case-by-case basis, it is also alive to the fact that the granting of confidentiality in cases of this nature, without sufficient reasons given to satisfy the Tribunal that confidentiality is justified, has the potential to not only invite requests of this kind in every matter concerning disciplinary proceedings, but to negate a key element of the new system of administration of justice—its transparency. Accordingly, having carefully considered the Applicant’s request for confidentiality, the Tribunal has decided to reject it.

IT IS ORDERED THAT—

12. The Applicant’s motion for confidentiality is rejected.

(Signed)

Judge Ebrahim-Carstens

Dated this 1st day of March 2011