



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Camila Nkwenti Fuomene, UNEP

Isabel Martinez, UNEP

Introduction

1. In Order No. 79 (NY/2021) of 27 August 2021, the Tribunal directed the Respondent to submit the investigation report relied on by the Ethics Office to come to its determination that no retaliation had been committed against the Applicant, along with the communications between the Office of Internal Oversight Services (“OIOS”) and the Ethics Office in regard to said investigation. The Tribunal allowed the Respondent to redact these documents before their disclosure to the Applicant in order to preserve the information of individuals not involved in this litigation.

2. On 13 September 2021, the Respondent filed *ex parte* versions of the requested documents along with an *ex parte* submission requesting the Tribunal not to disclose the documents to the Applicant.

Consideration

3. In his *ex parte* submission, the Respondent states that the disclosure to the Applicant of internal confidential correspondence between OIOS and the Ethics Office would be unprecedented and could impede the free flow of communication between them and breach the confidentiality that these two offices are required to uphold in their processes.

4. The Respondent argues that under ST/SGB/2017/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations), the Ethics Office is required to cooperate with requests for information from the Tribunal. The Ethics Office has been requested to provide information on the protection of retaliation policy along with its own memoranda but points out that its internal documents have never been provided to applicants.

5. He states that the OIOS report should not be shared with the Applicant unredacted to safeguard the working environment of the concerned office.

6. The Respondent adds that the Ethics Office had expressed concerns that disclosing internal correspondence to the Applicant would create an adverse effect on witnesses agreeing to come forward during investigations on retaliation complaints, who might fear being retaliated against, should the outcome of the investigation be favorable to the Applicant. The Ethics Office explained that this is the reason why investigation reports are normally only made available to subjects of misconduct investigations in the context of disciplinary proceedings, but that such disclosure is not mandated by ST/SGB/201/7/2/Rev.1.

7. The Tribunal is fully aware of the need to protect the confidentiality of individuals cooperating with internal investigations and audits in the United Nations system. However, this need for confidentiality must be balanced with an applicant's right to due process under the adversarial internal justice system of the Organization.

8. To determine whether the Applicant's due process rights are safeguarded in this case, the Tribunal reviewed the documents already in the Applicant's possession along with the confidential documents disclosed *ex parte* to the Tribunal. The Tribunal is satisfied that, in particular, the Ethics Office's memorandum to the Applicant of 19 November 2020 sufficiently details both the findings of the OIOS investigation and the manner in which it was conducted such to allow the Applicant sufficient information to form her appeal.

9. The Tribunal therefore concludes that maintaining both the OIOS investigation report and the internal correspondence between OIOS and the Ethics Office *ex parte* does not violate the Applicant's due process rights.

10. The Applicant may submit the rejoinder granted in Order No. 79 (NY/2021) based on the information already available to her.

11. The Tribunal further notes that the Respondent requests a case management hearing in order to provide further clarification with respect to the confidentiality of the newly submitted documents. Given that the Tribunal grants the Respondent's request not to disclose these documents to the Applicant, there is no further need for a case management discussion on this issue.

12. The Tribunal also notes that the Respondent requests the correction of typographical errors in Order No. 79 (NY/2021). The Tribunal takes note of this observation and will ensure that the concerned information is accurately reflected in the ensuing judgment.

13. In light thereof,

IT IS ORDERED THAT:

14. The Respondent's request for confidentiality of the documents submitted *ex parte* on 13 September 2021 is granted and said documents will remain *ex parte* in the case file;

15. The deadline for the submission of the Applicant's rejoinder set in Order No. 79 (NY/2021) is vacated. The Applicant may file this submission by **4:00 p.m. on Monday, 27 September 2021**.

16. The Tribunal will thereafter issue any further instructions on case management.

(Signed)

Judge Joelle Adda

Dated this 14th day of September 2021