



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Ana Giulia Stella, OSLA

Counsel for Respondent:

Albert Angeles, ALD/OHR, UN Secretariat

Lucienne Pierre, ALD/OHR, UN Secretariat

Introduction

1. By Order No. 038 (NY/2022) dated 6 April 2022, the Tribunal instructed the parties that hearing is to be held on 10 and 11 May 2022. The Applicant would call the following witnesses in examination-in-chief: the Applicant, the Applicant's wife, BB and CC, whereas the Respondent would call the following witnesses in examination-in-chief: AA, AA's mother, and AA's father. Subsequent to the examination-in-chief, the other party would be granted the opportunity to cross-examine each witness. Both parties were ordered to confirm the availability of them and their witnesses by 14 April 2022.

2. By email from the Registry of 13 April 2022, upon the request of the Applicant, the Tribunal decided to change the hearing dates to 9 and 10 May 2022.

3. On 14 April 2022, the Applicant filed his submission as per Order No. 038 (NY/2022) in which he confirmed the availability of the Applicant, the Applicant's wife and CC. The Applicant also noted that BB would not be available to attend the hearing on 9 and 10 May 2022 for which reason he instead requested to submit a written testimony.

4. On 14 April 2022, the Respondent filed his submission as per Order No. 038 (NY/2022) in which he confirmed the availability of AA, AA's mother and AA's father at the given hearing dates. The Respondent further requested that the hearing be held in camera due to the sensitive nature of the case. The Respondent finally objects to the Applicant's wife, BB and CC testifying as witnesses at the hearing.

5. On 19 April 2022, the Applicant filed a submission responding to the Respondent's objection against the Applicant's wife, BB and CC testifying as witnesses.

Consideration

The admissibility of the Applicant's wife, BB and CC as witnesses

6. The Respondent's submissions objecting to hearing these persons as witnesses in the present case are the following:

... Testimony from the Applicant's wife, BB and CC do not form part of the evidentiary record upon which the contested decision was made, and as such, their testimony is not relevant to the question of whether the facts are established, whether the facts amount to misconduct, and whether the disciplinary measure imposed was proportional. [The Office of Internal Oversight Services, "OIOS"] did not interview the Applicant's wife, BB and CC; [the decision-maker] did not consider any evidence from the Applicant's wife, BB and CC in imposing a disciplinary measure on the Applicant; and evidence from the Applicant's wife, BB and CC is not germane to the question of whether the misconduct at issue in this matter took place [redacted for privacy reasons].

... During the investigation and disciplinary processes which preceded the contested decision, the Applicant did not identify his wife, BB and CC as witnesses with information relevant to the alleged misconduct. Given these circumstances, only witnesses whose statements formed part of the evidentiary record established by OIOS and considered by [the decision-maker] should be permitted to testify at any hearing in this matter, such that the Tribunal may perform judicial review as to whether the facts on the record before [the decision-maker] were established and amounted to misconduct.

7. The Tribunal observes that the Appeals Tribunal held that the Dispute Tribunal should not hear witnesses regarding facts outside the factual issue at stake (see *Haidar* 2021-UNAT-1076). At the same time, the Appeals Tribunal has held that while the Dispute Tribunal is not to conduct a *de novo* appeal on the correctness of an investigative panel's findings of prohibited conduct, it is to appraise its rationality (see *Belkhabbaz* 2018-UNAT-873).

8. Accordingly, part of the judicial test is inevitably to assess whether the investigative panel heard all relevant witnesses because it is "incumbent on [the

Dispute Tribunal] to direct the process to ensure that ... missing evidence is adduced before it” (see para. 28 of *Mbaigolmem* 2018-UNAT-819). As the Tribunal cannot rule out the relevancy of the proposed testimonies of the Applicant’s wife, BB and CC in the present case, it therefore finds that it is “safer” to hear them (see para. 29 of *Mbaigolmem*).

The testimony of the Applicant’s wife

9. After consulting with the interpretation services, the Tribunal was informed that there is no appropriate available interpretation services on 9 and 10 May 2022. The hearing of the Applicant’s wife is therefore postponed until 16 May 2022.

BB’s testimony

10. The Tribunal notes that under the consistent jurisprudence of the Appeals Tribunal, the Dispute Tribunal has broad discretion to determine the admissibility/weight of evidence (see, for instance, the leading cases of *Abbassi* 2011-UNAT-110 and *Messinger* 2011-UNAT-123). Also, while cross-examination is not a definite right in case the witness cannot be produced, the Appeals Tribunal has emphasized that “[a]s a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established” (see para. 33 of *Applicant* 2013-UNAT-302).

11. While the Tribunal could therefore, in principle, allow a written testimony from BB, its evidentiary value would need to be compared with that of BB giving a witness testimony in front of the Tribunal where the Respondent would also have the opportunity to cross-examine him. The hearing of BB is therefore also postponed until 16 May 2022. If not available on this date, the Applicant may instead file a written testimony from him.

In camera hearing

12. The Tribunal notes that the Applicant has not objected to holding the hearing *in camera* (meaning without access to the public). Also considering the private and sensitive nature of the present case, the Tribunal grants leave to the Respondent's request to do so.

13. In light of the above,

IT IS ORDERED THAT:

14. The hearing is to be held without the access of the public on 9, 10 and 16 May 2022;

15. The witnesses are scheduled to give testimonies as follows:

a. Monday, 9 May 2022 (via Teams from the offices of the Dispute Tribunal in New York),

i. From 9:30 a.m. to 12:30 p.m.—the Applicant;

ii. From 1:00 p.m. to 2:00 p.m.—CC;

iii. From 2:00 p.m. to 4:00 p.m.—AA;

b. Tuesday, 10 May 2022 (via Teams from the offices of the Dispute Tribunal in New York),

i. From 9:30 a.m. to 11:30 a.m.—AA's mother;

ii. From 12:00 p.m. to 2:00 p.m.—AA's father;

c. Monday, 16 May 2022,

i. From 9:00 a.m. to 11:00 a.m.—the Applicant's wife (via Zoom from Conference Room 9 in the Secretariat building);

- ii. From 12:00 p.m. to 1:00 p.m.—BB (via Teams from the offices of the Dispute Tribunal in New York).

16. By **4:00 p.m. on Friday, 29 April 2022**, each party is to file a paginated bundle of the documents to which they seek to refer during the questioning of the witnesses.

17. Other practicalities will be handled by the Registry in communication with the parties.

(Signed)

Judge Joelle Adda

Dated this 20th day of April 2022