UNITED NATIONS DISPUTE TRIBUNAL

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| Case No.: | UNDT/NY/2022/001 |
| Order No.: | 057 (NY/2022) |
| Date: | 29 June 2022 |
| Original: | English |

**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Morten Albert Michelsen, Officer-in-Charge

PUMPYANSKAYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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**ORDER**

**ON CASE MANAGEMENT**

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**Counsel for Applicant:**
Robbie Leighton, OSLA

**Counsel for Respondent:**
Lucienne Pierre, AAS/ALD/OHR, UN Secretariat

## Introduction

1. On 5 January 2022, the Applicant filed the application in which she contests the "[d]ecision to close complaints of harassment and abuse of authority without proper investigation, possible other decision to close a complaint following investigation". Appended to the application, the Applicant submitted a motion for disclosure of certain written documentation.

2. On 4 February 2022, the Respondent duly filed the reply in which he submits that the application is without merit.

## Consideration

*The issues of the present case*

3. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

4. In the application, the Applicant refers to three inter-related but distinct decisions that she wishes to challenge. These are the decisions of 9 July 2021 to close the Applicant's complaints of misconduct against: (a) the Under-Secretary-General of the Department of Global Communications ("DGC"); (b) the Executive Officer of DGC; and (c) an Administrative Assistant in DGC, who worked as the Applicant's Personal Assistant.

5. Accordingly, the basic issues of the present case can be defined as follows:

a. Did the Office of Internal Oversight Services lawfully exercise its discretion when deciding not to proceed with the Applicant's complaints of misconduct?

b. If not, to what remedies, if any, is the Applicant entitled?

*The Tribunal's limited scope of review*

6. The Appeals Tribunal has generally held that the Administration enjoys a "broad discretion in disciplinary matters; a discretion with which [the Appeals Tribunal] will not lightly interfere" (see *Ladu* 2019-UNAT-956, para. 40). This discretion, however, is not unfettered. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "when judging the validity of the exercise of discretionary authority, … the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

7. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a 'merit-based review, but a judicial review'" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

8. Among the circumstances to consider when assessing the Administration's exercise of its discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness,

arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

*Case management*

Agreed and disputed facts

9. When studying the parties' submissions on facts, it is not clear to the Tribunal on what facts they actually agree and disagree. In this regard, the Appeals Tribunal has held that the Dispute Tribunal is not to make its own factual findings if the parties have agreed on certain facts (see *Ogorodnikov* 2015-UNAT-549, para. 28). The Tribunal also notes that the very purpose of producing evidence—written or oral—is to substantiate the specific relevant facts on which the parties disagree. Accordingly, there is, in essence, only a need for evidence if a fact is relevant and disputed (in line herewith, see *Abdellaoui* 2019-UNAT-929, para. 29, and *El-Awar* 2019-UNAT-931, para. 27).

10. The Tribunal will therefore order the parties to produce a consolidated list of agreed and disagreed facts to be able to understand the factual issues at stake.

Evidence

11. To start with, the Tribunal notes that evidence is only relevant in the judicial review of the Applicant's claim regarding whether the facts have lawfully been established—the disciplinary findings on misconduct and proportionality are legal rather than factual determinations.

12. Regarding written evidence, the Tribunal takes notes of the Applicant's 5 January 2022 motion for disclosure to which the Respondent has not provided his comments. The Respondent is therefore to address this matter, and if he does not agree

to disclose the relevant documentation, then he is to state his arguments therefor. The parties are further to inform the Tribunal if any of them wish additional written documentation to be produced.

13. As for oral evidence, the Tribunal notes none of the parties have requested a hearing in their initial submissions. In this regard, arts. 16.1 and 2 of the Rules of Procedure provide that "[t]he judge hearing a case may hold oral hearings" and that "[a] hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". It therefore follows that it is for the assigned judge to a case to determine whether a hearing is necessary, but also that this case is not an appeal against an administrative decision imposing a disciplinary measure is not a disciplinary case like the present one, this shall normally be done.

14. Accordingly, given the nature of the issues of the case and the extensive written documentation on record, the Tribunal is inclined to hold that oral evidence is not necessary. If no oral evidence needs to be produced, the Tribunal will accordingly request each of the parties to indicate whether they find that an oral hearing is necessary and indicate the purported objective therewith (see, also *Nadasan* 2019-UNAT-918, para. 39, as affirmed in *Ganbold* 2019-UNAT-976, para. 28). This could, for instance, be for the parties to present their legal contentions directly to the assigned Judge, although it is noted that the parties would, in any case, also need to file written closing statements summarizing all their submissions.

15. If any of the parties requests the production of additional evidence, they are to specifically refer to the relevant documentation/witness and clearly indicate what disputed fact the relevant evidence is intended to corroborate. In this regard, the Tribunal notes that the Appeals Tribunal has prohibited a so-called "fishing expedition", whereby one party requests the other party to produce evidence in "the most general terms" (see, for instance, *Rangel* Order No. 256 (2016)). A party

requesting certain evidence must therefore be able to provide a certain degree of specificity to her/his request.

16. In light of the above,

IT IS ORDERED THAT:

17. By **4:00 p.m. on Monday, 25 July 2022**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

18. By **4:00 p.m. on Monday, 25 July 2022**, each party is to submit whether they request to adduce any additional evidence, and if so, state:

a. What additional documentation they request to be disclosed, also indicating what fact(s) this is intended to substantiate, and the Respondent is specifically to address the Applicant's 5 January 2022 motion for disclosure; and/or

b. The identity of the witness(es), who the party wishes to call, and what disputed fact(s) each of these witnesses are to give testimony about, also setting

out the proposed witness's testimony in writing. This written witness statement may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so.

19. Upon receipt of the above-referred submissions, the Tribunal will issue the relevant instructions for further case management.

*(Signed)*
Judge Joelle Adda
Dated this 29th day of June 2022