



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/096
Order No.: 059 (NY/2022)
Date: 29 June 2022
Original: English

Before: Judge Alexander W. Hunter, Jr.
Registry: New York
Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Omar Josef Shehabi, OSLA
Jason Biafore, OSLA

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Introduction

1. By Order No. 056 (NY/2022) dated 17 June 2022, the Tribunal ordered Counsel for the Applicant to file his comments to the Respondent's 15 June 2022 motion for disclosure of hearing records by 21 June 2022.
2. Upon the request for an extension of time, Counsel for the Applicant filed his comments on 24 June 2022.

Consideration

3. In the 15 June 2022 motion, the Respondent stated as follows (reference to footnotes omitted):

A. INTRODUCTION

... The Respondent requests the Dispute Tribunal's permission to disclose the video and audio recordings of the hearing of this matter held on 7, 8, and 18 May 2020 to the Individual Residual Mechanism for Criminal Tribunals (IRMCT) fact-finding panel (Panel) to aid in execution of Dispute Tribunal Judgment No. UNDT/2020/094 and Appeals Tribunal Judgment No. 2021-UNAT-1137.

B. SUBMISSIONS

... The Appeals Tribunal held that IRMCT is required to re-open the Applicant's complaint of prohibited conduct. To that end, the IRMCT has reconvened the Panel to reconsider the complaint.

... The Panel has requested access to the record of the sworn testimony before the Dispute Tribunal to assist it in determining whether the complaint of prohibited conduct is substantiated. The record of the hearing contains potentially relevant evidence that was not previously available to the Panel, including the testimony of several individuals who did not previously provide statements to the Panel. They include a Legal Officer who was close to the Applicant at the time of the events, the former IRMCT Registrar, the Alternative Focal Point for Women, and the former Medical Director of the then-Division of Medical Services (DMS). Both the former Registrar and the former Medical Director have since separated from the Organization.

... Both Tribunals considered the former Medical Director's opinion to be relevant to whether the conduct of the subject of the complaint was consistent with professional standards. Given that the former Medical Director is no longer available, her hearing testimony is the most reliable statement from which the Panel may establish facts upon which the responsible official can determine whether there was prohibited conduct of a sexual nature.

... The disclosure of the record of the hearing would not prejudice either of the parties. Further, it is in interest of justice and efficiency. The use of the hearing record would prevent potential disputes as to the evidence before the Panel and would assist the Panel in expeditiously conducting its review of the complaint. The Panel intends to use the record of the hearing to determine whether it is necessary to conduct additional fact-finding to avoid the unnecessary duplication of an established evidentiary record.

C. RELIEF

... On 19 and 27 May 2020, the Tribunal provided the parties [with] partial audio and video recordings of the proceedings to prepare closing submissions. Based on the foregoing, the Respondent requests that the Dispute Tribunal provide the parties with the full recordings and any transcripts of the hearing testimony and to grant the Respondent's request for further disclosure of the hearing records limited to the IRMCT fact-finding panel.

4. In Counsel for the Applicant's response of 24 June 2022, he opposes Respondent's motion for disclosure of hearing records, arguing as follows (references to footnotes and highlights omitted):

... It is not a normal occurrence, and has not been [the Dispute Tribunal's] practice that a request for disclosure of a hearing record is granted without a "reasoned written request" providing sufficient justification. As this Honourable Tribunal rightly considers in its Order 056 (NY/2022), interests such as confidentiality of witnesses and protection of their identities should weigh heavy in the balance against granting such requests. This is especially so when considering highly sensitive cases involving complaints of sexual misconduct, as in the instant matter, and moreover, when taking a victim-centered approach to handling such cases. Counsel for the respondent has confirmed that its correspondence with the Registry leading to Judge Hunter's instructions, and ultimately to respondent's motion filed today, were *ex parte*, for reasons that are unclear to me.

... The normal standard found within the Tribunal’s jurisprudence, is assessing whether the facts as recorded in the Judgment are sufficient, and otherwise confirming the absence of any overwhelming difficulty in their comprehension. Indeed, [the Appeals Tribunal] has gone so far as to hold that disclosure of hearing records may be granted where such disclosure is “critical” to the preparation of subsequent proceedings. In addition, relevance may be an appropriate factor to consider when specific records are requested on a “central issue in contention.”

...

... Rather than requesting a limited disclosure, the Respondent seeks the entire hearing record. Thus, it is not suitably or permissibly tailored to records of specific relevance. Notably, the Respondent argues that the former Medical Director, for example, is no longer available to be interviewed, as a basis to support disclosure of the entire record. In addition, the Respondent merely suggests that the record contains “potentially relevant evidence” without indicating any specificity whatsoever as to what records are in fact relevant, let alone needed to comply with [the Appeals Tribunal’s] remand Order or how they will be used to ensure such compliance. The Respondent’s request is overly broad, lacks specificity and should be denied accordingly

... In [the Appeals Tribunal’s judgment in *Appellant 2021-UNAT-1137*, para. 60], the matter was remanded to [IRMCT] for a fresh decision in accordance with the principles outlined therein. Principally, [the Appeals Tribunal] vacated the underlying [Dispute Tribunal] decision on the basis that:

“[b]oth the Panel and the Registrar therefore misconceived the nature of the enquiry they were required to conduct and failed to assess the evidence and determine the conduct based on the appropriate definition of sexual harassment.”

As such, it is clear from the remand Order that the Panel is to apply the correct legal standard to its existing evidentiary record, and not commence a *de novo* investigation whereby the hearing record can be obtained and incorporated thereto. Rather, [the Appeals Tribunal] was clear in its reasoning that the Panel erred in how it assessed the evidence that had been gathered and that it already had at hand, not that the evidence was insufficient, tainted, or otherwise compromised such that the Panel was incapable of reaching a lawful conclusion based on [the] application of the correct legal standard. The Respondent fails to address this defect in its motion for disclosure. Accordingly, the motion should be denied.

5. The Tribunal takes note that, as also stated in Order No. 056 (NY/2022), case records are generally confidential under Practice Direction No. 6 on records. Also, the hearing in the present case was closed for the public, and subsequently on 19 May 2020, the Respondent signed a confidentiality undertaking regarding the recordings by which he was instructed that “the recordings may not be shared with any third parties or used for any other purpose than preparation of the parties’ closing submissions”.

6. The Tribunal further observes that the hearing was closed to the public for the purpose of protecting the identity of the witnesses and the confidentiality of their testimonies in a case concerning a highly sensitive matter. The Tribunal did so in order to allow the witnesses to freely state their testimonies without fearing any repercussions. That the witness testimonies were to be held confidential were reconfirmed by the Respondent when signing the confidentiality undertaking (the Applicant signed a similar one).

7. Whereas the Tribunal understands the IRMCT Panel’s interest in access to the hearing recordings in light of *Appellant* 2021-UNAT-1137, the interest in protecting the identities of the witnesses and the confidentiality of their testimonies therefore prevails.

8. In light of the above,

IT IS ORDERED THAT:

9. The Respondent's 15 June 2022 motion for disclosure of hearing records is dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 29th day of June 2022