



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/001

Order No.: 096 (NY/2022)

Date: 26 October 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

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Robbie Leighton, OSLA

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

Introduction

1. By Order No. 081 (NY/2022) dated 9 September 2022, the Tribunal ordered the Applicant to file her final comments on the Respondent's submissions concerning her 5 January 2022 motion for disclosure by 10 October 2022.

2. The Applicant duly filed her submission.

Consideration

3. In the Applicant's 10 October 2022 submission, she submits that she finds "difficulty in identifying witnesses prior to access to disclosure of documents sought, this because of the opaque nature of the process by which the Applicant's complaints were processed". Accordingly, the Applicant seeks "to reserve the right to amend her witness request upon receipt of disclosure sought".

4. In terms of case management, the Tribunal will therefore handle the issue of the Applicant's disclosure requests before proceeding with the question of a hearing and possible witnesses.

5. In the Applicant's 5 January 2022 motion for disclosure, she submits that it is "a matter of contention as to whether the Applicant's complaint regarding [EC, name redacted for privacy reasons] having requested the Applicant's [personal assistant, AJ (name redacted for privacy reasons)], to harvest information from her Outlook account without her knowledge or permission and to forward that to [EC] for purposes to her detriment [as she] was subject to investigation or to a preliminary assessment". The Office of Internal Oversight Services ("OIOS") and the Management Evaluation Unit ("MEU") "conten[d] that the matter was investigated". However, during interview investigators "specifically informed [AJ] that he was not subject to investigation but that they were conducting a preliminary review". They appear "not to have informed

[AJ] he was subject to investigation as require[d] if he were and did not require him to swear to the truth of his statements in interview”.

6. The Applicant argues that “OIOS decisions as to whether to investigate a complaint or otherwise go through a predication process which documents the decision whether to investigate or not and the reasons for that decision”. Given “the ambiguity as to whether the matter was investigated, and the relevance of the issue to the extent to which OIOS have provided an independent treatment of the Applicant’s complaints, the Applicant respectfully seeks disclosure of the documents created in the predication process which should indicate the date upon which a decision to either investigate or not investigate was taken”.

7. Based thereon, the Applicant seeks disclosure of:

- a. “[T]he notice to [AJ] that he was subject to investigation and the closure report created by OIOS”;
- b. “[A] screenshot of the OIOS case log indicating the documents created during this investigation.

8. The Applicant argues that these “documents will provide clear evidence as to whether the matter was investigated [and also] as to the actual reasoning employed in decisions not to interview either [EC] or the Applicant when treating this complaint, why [AJ] was interviewed other than as a subject and why no finding of misconduct was made”. This information is “required to properly evaluate the purported justifications for the matter not proceedings”.

9. The Applicant further submits that “[t]hroughout their assessment the MEU advance[d] justification for the contested decision which is not present in the OIOS memo nor in their reported comments to the MEU”. By “indicating conclusions they consider were available to OIOS but which were not, in fact, the basis for their decision,

the MEU effectively exercise the discretion accruing to OIOS”. The Applicant “deems inappropriate for the MEU to hypothesize about possible justifications OIOS might have had for their decision, instead it should be addressed on the basis of the reasoning that motivated it”. For instance, “the MEU claim the absence of an earlier complaint regarding [EC] shouting at her in a meeting justified non-investigation as OIOS could conclude the complaint resulted from dissatisfaction with [EC’s] role in the investigation into the Applicant”. This conclusion is “absent from OIOS’s memo or comments to the MEU and is disproved by the Applicant’s contemporaneous memo to [the Under-Secretary-General of the Applicant’s department (“the USG”, name redacted for privacy reasons)] regarding exactly this incident. The MEU “claim OIOS made a conclusion that complaints were not made in good faith, however, this assessment is absent from the OIOS memo and absent from their comments to the MEU”, and also “entirely unsubstantiated by the MEU”.

10. In light thereof, the Applicant requests further disclosure of:

a. “[T]he documents created during the predication process which memorializing the decision not to investigate the Applicant’s complaints” regarding the USG and EC. The Applicant states that “[t]his is necessary to parse the actual reasoning for the decision and the hypothetical justifications advanced by the MEU” and “clarify the reasoning for OIOS’s dual decisions not to investigate complaints” against the USG and EC;

b. “[T]he actual documents removed from her account by [AJ] and shared with [EC]”. The Applicant indicates that “despite repeated requests”, she has “never been informed of what documents and information were removed”. Also, “[d]espite having requested [AJ] access [to] these emails in real time during his interview OIOS did not request that he forward them to investigators to allow them access to this information (though they did request potentially exculpatory evidence be forwarded to them)”. The Applicant comments

thereupon that “[k]nowledge of the actual information taken and shared is required in order to assess [AJ’s] account as to why he undertook removed and forwarded this information and the extent to which he might be deemed to have acted in good faith as alleged by the Administration”.

11. The Respondent objects to all the Applicant’s disclosure requests, which he identifies as the following:

- a. “Documents created in the predication process which would indicate the date upon which a decision to either investigate or not investigate was taken”;
- b. “Notice to [AJ] that he was subject to investigation”;
- c. “The closure report created by OIOS”;
- d. “A screenshot of the OIOS case log indicating the documents created during this investigation”;
- e. “Documents created during the predication process which memorialize the decision not to investigate the Applicant’s complaints regarding [the USG] and [EC] predicate the other matters for investigation”;
- f. “The closure report in relation to misuse of [information technology, “IT”] resources;
- g. “Actual documents removed from her account by [AJ] and shared with [EZ]”.

12. The Respondents submits that the Applicant “does not cite any legal authority setting forth that she is entitled to any of these disclosures”, which “is because she cannot”. ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) “governs the relevant administrative processes, and does not grant any staff

member the right to any of the disclosures the Applicant requests”. The Applicant “should not be permitted to use the instant litigation to gain access to privileged work product information regarding OIOS’s deliberative processes; information to which she is not entitled to under the [United Nations] Regulations and Rules”.

13. The Respondent contends that “[t]o the extent the Applicant’s disclosure requests are an effort to understand the reason the contested decision was made, such reasons were provided to her in the memo from OIOS dated 9 July 2021” and the “reasons for the contested decision” were “also set forth” in the reply. In addition to “the 9 July 2021 memo and the Respondent’s Reply”, the Respondent annexes “a 16 August 2021 memorandum from OIOS to MEU, in response to the Applicant’s request for management evaluation of the contested decisions”.

14. The Respondent argues that “[w]ith respect to the portions of the Applicant’s requests seeking “notice to [AJ] that he was subject to investigation ... ‘the closure report created by OIOS’ and ‘the closure report in relation to misuse of IT resources’ ... OIOS conducted a preliminary assessment pursuant to Section 5.5 of ST/AI/2017/1, and following such assessment decided to close the Applicant’s complaints, as set forth in the contested decision (9 July 2021 memo from OIOS to the Applicant)”. There “was no investigation”. The extent “the Applicant seeks disclosure of documents relating to an investigation, such requests are inapposite” and reference is made to AJ’s 19 May 2021 interview in which he was advised that OIOS was “not conducting a full investigation” but an “assessment of allegations received ... related to possible unlawful access to” the Applicant’s IT resources.

15. With reference to Order No. 057 (NY/2022) dated 29 June 2022, the Tribunal recalls 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”. The Tribunal therefore instructed the parties that any disclosure requests should “specifically refer to the relevant documentation and clearly indicate what disputed fact the relevant evidence is intended to corroborate”.

16. The OIOS memorandum dated 16 August 2021 was addressed to the Management Evaluation Unit and authored by an Assistant Secretary-General of OIOS (“the ASG”). It is stated in the memorandum that it “refers to the request for management evaluation” by the Applicant. Therein, with regard to the reasoning for OIOS’s rejection to proceed with the Applicant’s complaints for regarding alleged unsatisfactory conduct against various United Nations colleagues, the ASG stated that “[i]n short, I determined that the allegations were either vague, or did not rise to the level of misconduct, or were not made in good faith, or would not result in a disciplinary outcome”.

17. In the reply, the Respondent submits that the reasoning for the rejection of the complaints was that “OIOS reasonably concluded that the Applicant’s allegations were not made in good faith; could not amount to misconduct; and that opening an investigation into the Applicant’s allegations against the USG/DGC was unlikely to reveal sufficient evidence to further pursue the matter as a disciplinary case”. No reference is, however, made to the OIOS’s 16 August 2021 memorandum.

18. The Tribunal notes that as much as these provided reasons are substantively alike, none of them were produced at the time of the contested rejections. Rather, the reasons were tailored by OIOS or the Respondent to either the management evaluation process or the current judicial proceedings. Whereas the Administration under the jurisprudence of the Appeals Tribunal is not obliged to provide a reasoning for a contested decision before the management evaluation phase (see *Pirnea* 2013-UNAT-311, para. 34), the reasons were all made *ex post facto* and no records of reasons that are concurrent with any of the impugned decisions have been filed in evidence.

19. In order to assess the coherency of the provided reasons, it would therefore be relevant for the Tribunal to review any documentation by which OIOS possibly memorialized these contested decisions and their reasoning at the time when they were taken or, at least, earlier than the management evaluation process (in line herewith, see the Appeals Tribunal in *Respondent* 2021-UNAT-1097, paras. 44-46). Also, the Tribunal does not have the full picture of all circumstances surrounding the contested rejections, including the interview of AJ.

20. This does not mean that—even if OIOS committed any procedural mistakes—these will be relevant to the determination to the present case and possibly impact the lawfulness of the contested decision. A procedural irregularity may be cured later in process and can also only render a contested decision unlawful insofar as it determined to be “substantial” (see the Appeals Tribunal in para. 34 of *Thiombiano* 2020-UNAT-978 and, similarly, in para. 33 of *Sall* 2018-UNAT-889).

21. Nevertheless, for the Tribunal to make this assessment, it will need to know more about the circumstances surrounding the decision-making process (see also the Appeals Tribunal in *Applicant* 2022-UNAT-1210). Accordingly, the Tribunal will grant the disclosure requests.

22. In light of the above,

IT IS ORDERED THAT:

23. By **4:00 p.m. on Wednesday, 2 November 2022**, the Respondent is to produce all relevant documentation in its possession in response to the Applicant's requests for disclosure.

(Signed)

Judge Joelle Adda

Dated this 26th day of October 2022