



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

Nicola Esti Caon, DAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 082 (NY/2022) dated 9 September 2022, the Tribunal ordered the parties as follows (emphasis in original):

... By **4:00 p.m. on Monday, 19 September 2022**, the Applicant is to state all the names of the individuals whom she wishes to cross-examine;

... By **4:00 p.m. on Monday, 26 September 2022**, the Respondent is to provide his submissions on (a) the Applicant's disclosure requests and (b) all the named individuals whom the Applicant wishes to cross-examine;

... By **4:00 p.m. on Monday, 10 October 2022**, the Applicant is to file her observations on the Respondent's 26 September 2022 submission.

2. The parties duly filed their submissions.

Consideration

Applicant's disclosure requests

3. In the Applicant's 16 September 2022 submission, she submits that "disclosure sought may influence the witnesses the Applicant will seek to have called". 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.

4. With reference to Order No. 058 (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”.

5. The Applicant explains in her 22 July 2022 submission that “[a] large and important element of the Applicant’s case relates to the unusual and procedurally irregular manner by which the investigation against her was launched”. She further noted that “[n]o formal complaint of harassment and abuse of authority was ever entered against her, instead the Executive Office coordinated a number of statements to be provided to [EC, name redacted for privacy reasons] who then appears to have presented these to [the Under-Secretary-General of the Applicant’s department (“the USG”), name redacted for privacy reasons] who ordered an investigation”.

6. The Applicant restated, in essence, these contentions in her 10 October 2022 submission. Therein, the Applicant further argues that particularly the USG but also EC were in a conflict of interest when handling investigation against the Applicant as they essentially intended to conspire against the Applicant to provoke her separation from service. FG was also implicated as both a complainant and a witness. Also, the Applicant contends that there is no documentary evidence that shows how the USG received any complaints against the Applicant or how she “came to instruct a Panel to investigate a raft of allegations”. Instead, the Applicant submits that EC, one of the complainants, was involved in “instructing individuals to write down allegations, thus he appeared to have triggered complaints”. Also, the USG did not refer any of the complaints to OIOS as per the relevant rules, namely ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process). In conclusion, “the process to which [the Applicant] was subjected was neither independent nor impartial”.

7. In light of these submissions, the Tribunal recognizes that the Applicant cannot provide fully detailed information regarding her disclosure requests (such as, for instance, title of documentation, method of communication, date, and/or author)

because she simply has no way to know about this. A certain leeway must therefore be given to the Applicant when intending to identify the relevant documentation.

8. In the Applicant's 10 October 2022 submission, she listed and summarized her disclosure requests as the following (all names redacted for privacy reasons):

- a. Unredacted reports to the Office of Internal Oversight Services against the Applicant for alleged misconduct ("OIOS") of 22 November 2019;
- b. Documents communicating "[the Applicant] misc" from NB, "Notes" by MD to EC, and email memo or other document memorializing onward communication to the USG;
- c. Means of onward communication from EC to the USG of "My responsibilities as Personal Assistant to [the Applicant]" from AJ, "Confidential—SCD Front Office experience" from JJ, and note to file from EC and FG on 16 September 2019;
- d. Disclosure relating to how testimonies [about the Applicant's conduct] were collected [and] how they were communicated to the USG;
- e. Full documentary record regarding how these various documents came into the possession of the Executive Office and how the USG's various decisions of 24 March 2020—to request access to the Applicant's ICT (information and communication technology) resources, to place the Applicant on Administrative Leave with Pay and to instruct a Panel to investigate—were triggered;
- f. All documentation relating to the selection of the Panel members;
- g. Folder entitled "EC" containing email exchanges on a number of issues;

h. Electronic versions of emails allegedly sent by AJ to the Executive Office, including attachments;

i. Communications by which the Panel's report was submitted on 30 June 2020, a copy of the original version of the report, any document or communication subsequently taking place with the Panel including concerning required revision of their report and their response to any such communication.

9. The Respondent objects to all the Applicant's disclosure requests. He submits they are "disproportional to the needs of the case and ... not relevant", "cast in the most general terms and constitute an impermissible 'fishing expedition'". Furthermore, the requests are only relevant with regard to the Applicant's submissions on alleged lack of due process during the investigation. In this regard, the requests pertain to actions taken before the investigation was launched, and while the Appeals Tribunal has "recognized that limited due process rights exist during the investigation phase and fuller due process rights exist during a disciplinary process, there has been no recognition of a right to due process prior to the initiation of an investigation".

10. The Respondent argues that the contested decision was "taken based upon evidence adduced by an independent investigation Panel" and that the "Panel's evidence was independently assessed, as part of the disciplinary process, by the Office of Human Resources ('OHR')". The Applicant's claims regarding "actions taken prior to the initiation of an investigation are disputed". However, "even accepting, arguendo, the Applicant's claims, the independence of the Panel investigation and subsequent OHR review severed any thread connecting any alleged/disputed pre-investigation irregularities to the contested decision". The Applicant has "not alleged any particular deficiencies in the Panel Investigation Report on which the contested decision was based", and the "record, as it stood before the decision-maker at the time of the contested decision, and as now available before the Tribunal, is complete".

11. The Respondent contends that “whether a staff member received due process in a disciplinary matter is whether the staff member was adequately apprised of the allegations of misconduct and had a reasonable opportunity to make representations before the contested decision was taken”. The Applicant’s requested disclosures “are irrelevant to that essential question and have no probative value with respect to the facts in dispute in this case”.

12. The Respondent avers that the Dispute Tribunal’s “power to order discovery is subject to the principles of relevance and the probative value of the documents sought to be discovered”. The “essential question with respect to whether a staff member received due process in a disciplinary matter is whether the staff member was adequately apprised of the allegations of misconduct and had a reasonable opportunity to make representations before the contested decision was taken”. The Applicant’s requested “disclosures are irrelevant to that essential question and have no probative value with respect to the facts in dispute in this case”.

13. The Tribunal notes that under art. 4.1 of ST/AI.2017/1, staff members have a duty to report misconduct. In the present case, it appears that two such reports were made against the Applicant anonymously to OIOS in accordance with art. 4.3. At the same time, from art. 4.2 follows that “information about unsatisfactory conduct” may not only be received from staff members, but also from “any other source”. Such information may then lead to the opening of an investigation either by (a) OIOS or (b) the responsible official, if OIOS determines that the “matter is better handled” by her or him (see art. 5.3 and, in general, sec. 5).

14. It follows from the investigation report that the investigation in the present case was launched by the USG, who was the responsible office pursuant to art. 2.1(v) of ST/AI/2017/1, after OIOS had forwarded the two anonymous reports to the USG in accordance with ST/AI/2017/1. At the same time, the Executive Office of the USG’s department had also received some complaints against the Applicant, including from

NB, MD, AJ and JJ. This led the USG to appoint an investigation panel comprised of LD and NG (names redacted for privacy reasons), who were retired former United Nations staff members. These facts appear to be undisputed by the parties.

15. As indicated by the Respondent, the Tribunal agrees that different due process rights apply during the various phases of the investigative process. The Tribunal, however, finds that as per sec. 4 of ST/AI/2017/1, this investigative process already begins with OIOS and/or the responsible official receiving information regarding possible unsatisfactory conduct concerning a staff member and not only after the formal launch of the investigation (see sec. 6 and onwards of ST/AI/2017/1). Already at this stage, minimum procedural standards would apply, such as, for instance, that any information on possible unsatisfactory conduct is to be considered by the OIOS or the responsible official on a fair, objective and unbiased basis. Under art. 4.2, the relevant information can either stem from (a) a report from a staff member or (b) another source.

16. This, however, does not mean that a detected procedural irregularity necessarily will render the investigation unlawful. This is only so insofar as the procedural irregularity is 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).

17. In the present case, the Tribunal does not have the full picture of certain circumstances surrounding the initial phase of the investigative process concerning which the Applicant seeks evidence: What were the interests and actions of (a) the USG, who also served as the responsible official as per ST/AI/2017/1, and (b) EC, who allegedly assisted her in this role? Did the USG’s interests and actions, and EC’s efforts in assisting her, implicate her capacity to serve as the responsible official under ST/AI/2017/1? What effect, if any, did this have on the investigative process?

18. As said, this does not mean that—even if the involvement of the USG and/or EC is deemed irregular—this will be relevant to the determination to the present case and possibly impact the lawfulness of the contested decision. In addition, as also stated by the Respondent, procedural safeguards are built into the investigative process to preserve its integrity, in particular by requiring the appointment of an independent, impartial and competent investigative panel (as relevant to the responsible official, see arts. 6.3 – 6.6 of ST/AI/2017/1), and later in the possible disciplinary process, by allocating the decision-making authority with another department (typically, OHR). A detected procedural irregularity prior to the investigation may therefore be cured by the investigative panel and/or during the disciplinary process.

19. Nevertheless, for the Tribunal to make this assessment, it needs to know about the circumstances surrounding the initial phase of the investigative process. Accordingly, the Tribunal will grant the disclosure requests (see also the Appeals Tribunal in *Applicant* 2022-UNAT-1210).

20. Regarding the two anonymous reports to OIOS concerning the Applicant, the Tribunal acknowledges that it is of paramount importance that a staff member can trust that her/his anonymity will be preserved when making an anonymous report to OIOS. This, however, must be counterbalanced by the interest of justice in a given case. An anonymous complaint could, for instance, have been made in bad faith to inappropriately plot against a staff member and frame her or him for misconduct. Even if so, for the reasons state above, such an improper complaint might not render an investigative process unlawful or contribute thereto. In the present case, the Tribunal will, therefore, instruct the Respondent to submit the unredacted reports to OIOS *ex parte* after which it will determine whether they are to be shared with the Applicant, and if so, in a redacted form to preserve the anonymity of the complainants.

Applicant's request for admission of document into evidence

21. In the Applicant's 16 September 2022 submission, she requests the Tribunal to admit into evidence "annex R/12 filed by the Administration in [Case No.] UNDT/NY/2022/001". She explains that "[t]his document only recently came into the Applicant's possession as the result of disclosure by the Respondent in that case] and submits that "[t]he document represents relevant evidence in this case as it sheds some light on the procedure leading to [the USG's] decision to investigate the Applicant"]".

22. The Respondent objects to the Applicant's request. He contends that "[i]t is highly irregular and, in common law countries, not permitted for a party to 'use' a document disclosed in one proceeding in a different proceeding". That is, "absent the express consent of a party, until and unless a document disclosed by a party becomes part of the public domain, the opposing party may not use that document for a collateral purpose without permission from the relevant court". The document was "drafted by [the Assistant Secretary-General (name redacted for privacy reasons)] for the purposes of responding to inquiries from the Management Evaluation Unit regarding the Applicant's challenge to OIOS's decision not to initiate an investigation into her allegations of misconduct", and "[t]he material is not relevant to the current proceedings and issues to be determined by the Tribunal, i.e., whether it was a lawful exercise of discretion to impose against the Applicant the disciplinary measure of demotion with deferment for one year of eligibility for consideration for promotion".

23. The Tribunal notes that there is nothing in the Dispute Tribunal's Statute and Rules of Procedure, or otherwise in the legal framework governing its functions and procedures, that impedes it from admitting into evidence a document that an applicant has discovered in another case that s/he has pending before the Tribunal. Neither has the Appeals Tribunal stated any such exclusionary prohibition. Rather, in the interest of justice, the Appeals Tribunal has limited the inadmissibility of evidence only to a few particular situations (see *Asghar* 2020-UNAT-982, para. 43):

... Where evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice. It is only evidence gravely prejudicial, the admissibility of which is unconvincing, or whose probative value in relation to the principal issue is inconsequential, that should be excluded on the grounds of fairness ...

24. In the present case, as the Tribunal cannot rule out that the relevant document can be of relevance, it therefore sees no reason for not admitting it into evidence.

IT IS ORDERED THAT:

25. Annex R/12 filed by the Administration in the Applicant's Case No. UNDT/NY/2022/001 is admitted into the evidence;

26. By **4:00 p.m. on Wednesday, 2 November 2022**, the Respondent is to produce all relevant documentation in his possession in response to the Applicant's request for disclosure. The reports to OIOS regarding the Applicant are to be filed on an *ex parte* basis;

27. The Tribunal will thereafter issue its further case management orders.

(Signed)

Judge Joelle Adda

Dated this 26th day of October 2022