



Before: Judge Francis Belle

Registry: New York

Registrar: Pallavi Sekhri, Officer-in-Charge

DRAGNEA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Michael Horn, Archer & Greiner, PC

Counsel for Respondent:

Yehuda Goor, AAS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 17 November 2021, the Applicant, a staff member of the United Nations Department for Safety and Security (“UNDSS”), contests:
 - a. The issuance to her of a notice of reprimand (“Notice”);
 - b. The placement of said notice in her file;
 - c. Her placement under a performance improvement plan (“PIP”); and
 - d. The outcome of the Management Evaluation Unit’s (“MEU”) review of the above decisions.
2. In her application, the Applicant requested, *inter alia*,
 - a. an order for production of all evidence including a copy of all reports, CCTV recordings and telephone recordings in connection with the 29 March 2021 incident supporting the issuance of the Notice; and
 - b. an oral hearing.
3. On 26 November 2021, the Respondent filed a motion requesting the Tribunal to determine receivability as a preliminary matter and suspend the deadline for the Respondent’s reply.
4. By email dated 29 November 2021, the Tribunal granted the Respondent’s request to suspend the deadline for his reply.
5. On 2 December 2021 and 10 December 2021, the Applicant filed her opposition and supplemental opposition to the Respondent’s motion to have receivability determined as a preliminary matter.
6. On 1 July 2022, the present case was assigned to the undersigned Judge.

7. By Order No. 61 (NY/2022) of 14 July 2022, the Tribunal granted in part the Respondent's motion to have receivability determined as a preliminary matter, on grounds that it does not have jurisdiction to consider appeals against the outcome of a review of the administrative decision by MEU and thus this aspect of the application is manifestly not receivable.

8. The Tribunal further instructed the Respondent to file his reply to the application, which he did on 15 August 2022.

9. By Order No. 76 (NY/2022) of 17 August 2022, the Tribunal instructed the Respondent to file the following materials on an *ex parte* basis:

a. The investigation report (including its annexes) into the incident of 29 March 2021; and

b. The CCTV recordings of the incident of 29 March 2021.

10. On 18 August 2022, the Respondent filed the above-mentioned materials on an *ex parte* basis.

11. By Order No. 77 (NY/2022) of 23 August 2022, the Tribunal rejected the Applicant's request for an oral hearing and instructed the Respondent to redact the investigation report and its annexes and refile them on an under-seal basis, excepting the excerpts of CCTV recordings and third parties' statements. The Tribunal further ordered the Applicant to file a rejoinder by 1 September 2022 and invited the Respondent to file his response to the Applicant's rejoinder by 9 September 2022.

12. On 31 August 2022, the Applicant filed her rejoinder.

13. On 9 September 2022, the Respondent filed his response to the Applicant's rejoinder.

14. Having reviewed the parties' submissions, the Tribunal decided to convoke the parties to a case management discussion ("CMD"), which took place, as scheduled, on 19 September 2022, with a view to explore the possibilities of referral of the case to mediation.

15. During the CMD, the Applicant expressed his consent to mediate the case whereas the Respondent's Counsel informed the Tribunal that he would have to seek approval from his senior management about entering into mediation. Moreover, the Respondent's Counsel again requested the Tribunal to determine receivability as a preliminary matter.

16. By Order No. 84 (NY/2022) of 20 September 2022, the Tribunal instructed the Respondent to inform the Tribunal about his position on whether he would like to engage in mediation of the case by 26 September 2022.

17. By Judgment *Dragnea* UNDT/2022/088, dated 23 September 2022, the Tribunal decided that the challenge against the decisions to issue the Applicant the Notice and to place it in her personnel file was receivable, and that the one against the decision to place the Applicant on a PIP was not receivable.

18. On 25 September 2022, the Respondent informed the Tribunal of his agreement to mediate the present case.

19. By Order No. 88 (NY/2022) of 28 September 2022, the Tribunal referred the present case to the Mediation Division, Office of the United Nations Ombudsman and Mediation Services, and suspended the proceedings before it until 28 November 2022.

20. By email dated 28 November 2022, the Mediation Division informed the Tribunal that the parties had jointly requested an extension of time for mediation until 26 January 2023.

21. By Order No. 107 (NY/2022) of 5 December 2022, the Tribunal ordered that the proceedings before it in this matter be further suspended during the mediation process until 26 January 2023.

22. By email dated 5 January 2023, the Mediation Division informed the Tribunal that the parties had not been able to resolve the present matter.

Consideration

Ex parte CCTV recordings

23. By Order No. 77 (NY/2022) of 23 August 2022, the Tribunal found appropriate not to disclose the CCTV recordings and its excerpts annexed to the investigation report on the grounds that they contain highly confidential security information.

24. Nevertheless, having noticed, *inter alia*, the potential relevance of the CCTV recordings and its excerpts to the present case, the Tribunal decided to refer the matter to mediation by Order No. 88 (NY/2022). Unfortunately, the mediation process failed.

25. The Tribunal further recalls that consideration of *ex parte* evidence “breaches the fundamental legal principle of natural justice known as *audi alteram partem*, the obligation on a decision-maker, literally, to ‘hear the other party’ and includes the right of each party to a fair hearing and to respond to evidence against them” (see *Banaj* 2022-UNAT-1202, para. 61).

26. Considering the above, the Tribunal finds it appropriate to instruct the Respondent to file a redacted portion of CCTV recordings supporting the Administration’s findings that the Applicant:

- a. Acted in a highly aggressive manner repeatedly confronting and pointing her finger at the relieving officer; and
- b. Grabbed the cell phone from the relieving officer’s hand and threw it onto the belt of the X-ray machine.

Closing submissions

27. Having reviewed the parties’ submissions to date, the Tribunal finds it in the interest of justice to instruct the parties to file their respective written closing submission.

28. Noting that the remaining core issue before it is the lawfulness of the Administration's issuance to the Applicant of a notice of reprimand, and the placement of said notice in her file, the Tribunal recalls the Appeals Tribunal's findings in *Yasin* 2019-UNAT-915, at para. 47, that:

Although the reprimand is not a disciplinary measure but an administrative one, because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of **reliable facts**, established to the **requisite standard of proof**, namely that of "preponderance of evidence", and be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised (emphasis added).

29. Accordingly, the parties are instructed to address in their closing submission, *inter alia*, the following issues:

- a. Whether the facts on which the reprimand was based have been established to the requisite standard; and
- b. Whether the Applicant's due process rights were respected.

Conclusion

30. Pursuant to art. 19 of the Tribunal's Rules of Procedure, for a fair and expeditious disposal of the case, and to do justice to the parties, it is ORDERED THAT:

- a. By **Tuesday, 10 January 2023 (COB New York time)**, the Respondent shall file redacted CCTV recordings pursuant to para. 26 above;
- b. The Applicant shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate the disclosed video recordings—except for the filing of an appeal with the United Nations Appeals Tribunal—without prior authorization by this Tribunal; and

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c. By **Monday, 16 January 2023**, the parties file their respective written closing submission.

(Signed)

Judge Francis Belle

Dated this 9th day of January 2023