



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

PUMPYANSKAYA

V.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Lucienne Pierre, AAS/ALD/OHR, UN Secretariat
Nicola Esti Caon, AAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 103 (NY/2022) dated 11 November 2022, the Tribunal ordered:
 - a. The Respondent, *inter alia*, to file the relevant document(s) as per his 9 November 2022 submission and to update his 2 November 2022 submission on the Applicant's disclosure requests; and
 - b. The Applicant to update her 9 November 2022 submission regarding the Respondent's compliance with her disclosure requests.
2. On 23 November 2022, the Respondent filed his submission as per Order No. 103 (NY/2022) and submitted Annexes R12B and R13.
3. On 30 November 2022, the Applicant filed a motion for joinder and, on 7 December 2022, the Respondent filed his opposition to said motion.
4. On 9 December 2022, the Applicant filed her updated submission as per Order No. 103 (NY/2022).

Consideration

The disclosure of the unredacted complaints of 22 November 2019

5. In his updated submission, the Respondent informs the Tribunal, *inter alia*, that he is unable to comply with its order for the *ex parte* disclosure of an unredacted version of the documents bearing the name of the anonymous complainants because he does not have such documents in his possession. The Respondent indicates that due to the operational independence of the Office of Internal Oversight Services ("OIOS"), he does not have the authority to compel OIOS to release the requested documents.

6. According to the Respondent, OIOS considers as central to its mandate the requirement that the identity of staff members who have submitted reports of unsatisfactory conduct to OIOS not be disclosed without the staff member's consent.

In support of his argument, the Respondent produces Annexes R8 and R13.

7. In her submission, the Applicant maintains her request for the disclosure of the unredacted complaints. She states, *inter alia*, that by "claiming that the Respondent is not in possession of the unredacted complaints, the Secretary-General is arguing that OIOS is a party separate from the Secretary-General", which has no basis in law.

8. The Tribunal has reviewed Annexes R8 and R13 and considers them relevant for the adjudication of the present case. In particular, the Tribunal notes that in the memorandum dated 31 October 2022 produced as Annex R8, the Director of the Investigations Division, OIOS, explained that OIOS received two reports: the first report was anonymous, and the second report contained information that identified the complainant. The identity of the complainant in the second report was redacted from the document and both reports were provided to the Tribunal.

9. The Tribunal further notes that the redacted OIOS report at issue concerns an allegation of misrepresentation on the Applicant's Personal History Profile, which was not part of the grounds on which the disciplinary measure was ultimately imposed on the Applicant. Consequently, the Respondent's inability to provide an unredacted version of said report does not affect the adjudication of the present matter.

10. The Tribunal agrees with the Respondent in that there is, in general, no need to disclose the identity of staff members who have submitted reports of unsatisfactory conduct to OIOS without the staff member's consent. Having reviewed the evidence on record, the Tribunal considers that it is not essential for it to know the name of the complainants before OIOS in this particular case. What is relevant for the Tribunal is the content of the reports themselves, which have already been shared with the

Tribunal. Consequently, the Applicant's motion for the disclosure of the unredacted version of the complaint reports is denied.

The disclosure of documents produced ex parte by the Respondent

11. The Tribunal notes that several exchanges have taken place in relation to the Applicant's motion for disclosure of evidence, and the parties have had ample opportunity to submit their views in this respect.

12. In para. 8 of Order No. 097 (NY/2022), the Tribunal noted that, in summary, the Applicant sought disclosure of:

- a. Unredacted reports to OIOS against the Applicant for alleged misconduct 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 to 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 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; and
- 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.

13. As a result of the Applicant’s request, the Respondent produced Annex R12 filed in Case No. UNDT/NY/2022/001, which has already been admitted into the evidence in the instant case by Order No. 097 (NY/2022). The Respondent subsequently produced Annexes R8, R9, R10, R11, R12B and R13. Of these annexes, only Annex R10 was filed *ex parte*.

14. The Respondent submits that exceptional circumstances exist warranting steps by the Tribunal to preserve the confidentiality of the material in Annex R10. He asserts, *inter alia*, that the material consists of confidential legal advice provided by ALD to the USG/DGC and the Investigative Panel on the exercise of their official duties. He argues that such advice is protected by a legal professional privilege, which constitutes a legitimate reason for the Tribunal to preserve its confidentiality.

15. The Applicant challenges the Respondent’s argument concerning the alleged privileged nature of the documents in Annex R10, and requests that the remaining documents disclosed *ex parte* be released to her and that she be given the opportunity to provide comments thereon.

16. Regarding the right to the confidentiality of evidence, the Appeals Tribunal ruled on confidentiality principles in *Bertucci* 2011-UNAT-121 (see paras. 46 to 51). Guided

by them and having reviewed the documents at Annex R10 filed *ex parte*, the Tribunal notes that their content is relevant to the Applicant's case. To the extent that these documents were not previously available to the Applicant, the Tribunal finds it appropriate to disclose them to her.

17. The Tribunal considers that in line with *Bertucci*, the alleged professional privilege does neither override the transparency of the system nor the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members, and the accountability of managers and staff members alike.

18. Having said the above and considering that the documents in Annex R10 contain information concerning third persons, the Tribunal directs the Respondent to provide a redacted version. The redacted version will be reviewed by the Tribunal and shared with the Applicant on an under seal basis.

The Applicant's motion for joinder

19. The Applicant requests the Tribunal to join the present case with Case No. UNDT/NY/2022/001 as she considers that there is a degree of overlap in terms of subject matter. She claims that by joining the cases, the evidence from one case would be considered in the other, and the Tribunal would then be able to make appropriate determinations on the relevance of the evidence produced.

20. The Respondent opposes the Applicant's motion on the basis that the Applicant challenges two distinct administrative decisions in separate cases, which require the Tribunal to apply two different standards of review.

21. While the present case and Case No. UNDT/NY/2022/001 have been assigned to the same Judge for judicial efficiency, the Tribunal considers that it is not in the interest of justice or judicial efficiency to join the two cases as they refer to two different decisions requiring adjudication of different questions of fact and law. Consequently, it decides to reject the Applicant's motion.

22. The Tribunal notes that, in the alternative, the Applicant requests leave to file as evidence, the attachments to Mr. Jarus' emails to Mr. Calzada that were disclosed as Annex R9 in the present case into the evidence record of Case No. UNDT/NY/2022/001. However, since the Tribunal has already decided on this issue by Order No. 006 (NY/2023), the Applicant's request is moot.

The oral hearing

23. Based on the information on record, the Tribunal considers it appropriate to hold the oral hearing *in camera* to protect the identity of the witnesses to be called.

24. The Tribunal will determine the modalities of the hearing in view of the witnesses to be called and the issues to be addressed, particularly in connection with testimonies that may be relevant to the Applicant's both matters, namely Cases No. UNDT/NY/2022/001 and UNDT/NY/2022/003.

25. The hearing will tentatively take place on either the week of 6 March or that of 13 March 2023 depending on the availability of the parties and the witnesses to be called.

26. In preparation for the hearing, the Tribunal deems it appropriate to invite the parties to update their list of witnesses to be called, if any.

27. In light of the above,

IT IS ORDERED THAT:

28. The Applicant's request to order the Respondent to produce the unredacted version of the complaint reports of 22 November 2019 is rejected.

29. **By 3 p.m. on Monday, 13 February 2023**, the Respondent is to produce a redacted version of the documents in Annex R10 as indicated in para. 18 above, which will be shared with the Applicant on an under seal basis.

30. The Applicant's motion for joinder is rejected.

31. The Applicant's request for leave to file as evidence Annex R9 of the present case into Case No. UNDT/NY/2022/001 is moot.

32. **By 3 p.m. on Friday, 17 February 2023**, each party is to provide the Tribunal with an updated list of witness(es) to be called for the hearing, indicating what disputed fact(s) each of these witnesses is 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 the hearing if the party leading the witness should wish to do so;

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

(Signed)

Judge Joelle Adda

Dated this 8th day of February 2023