



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/009
Order No.: 022 (NY/2023)
Date: 28 March 2023
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Bettina Gerber, LPAS/UNOG

Introduction

1. By application dated 14 February 2022, the Applicant contests the decision not to select him for the position of Senior Human Rights Officer/Coordinator at the P-5 level with the Office of the High Commissioner for Human Rights (“OHCHR”) in Panama City.
2. The Respondent filed his reply to the application on 21 March 2022, with three of the annexes (A3, A5 and A7) submitted on an *ex parte* basis.
3. Also on 21 March 2022, the Applicant filed a motion for access to the three *ex parte* annexes to the Respondent’s reply.
4. On 15 August 2022, the Applicant filed a “consolidated submission” to present evidence regarding damages accruing since the filing of his application; to proffer evidence in support of his motion for an oral hearing; to move the Tribunal to compel the production of evidence and information that he deemed relevant to the adjudication of this case; and to be granted anonymity.
5. Following the Tribunal’s Order No. 017 (NY/2023), on 8 March 2023 the Respondent filed a response to the Applicant’s consolidated submission.

Considerations

6. Pursuant to art. 19 of the Rules of Procedure of the Dispute Tribunal, the Tribunal may at any time issue an order or give any direction which appears to be appropriate for the fair and expeditious disposal of a case and to do justice to the parties.

On the motion for access to the annexes to the Respondent’s reply filed ex parte

7. After careful consideration of the issues raised in the application, and having examined the Applicant’s motion for disclosure of further evidence as well as the documents submitted *ex parte* by the Respondent, the Tribunal finds it appropriate to make available to the Applicant those documents filed *ex parte* by the Respondent that are relevant to shed light on the procedural steps of the selection process at stake.

8. Three of the annexes to the Respondent's reply (A3, A5, and A7) were filed *ex parte* but without any justification for the status of the filing. In this regard, the Tribunal notes that *ex parte* evidence produced by one party cannot sustain a finding of fact or law against the other party.¹ Since all three documents are relevant to the core issues in this case, the Tribunal is inclined to grant the Applicant's motion for access to the annexes.

9. However, in order to protect the personal details of third parties not involved in the instant proceedings, the Tribunal will instruct the Respondent to redact the names of the other candidates that appear in the Recommendation Memorandum (A3) as well as in the Comparative Analysis Report (A5) and the names of other third parties in the e-mail from the Central Review Board (A7) and thereafter to share the annexes with the Applicant on under seal basis.

On the motion for anonymity and protection of personal data

10. The Applicant requests the Tribunal to identify him only as "Applicant" and to redact all personally identifiable information, in all orders and the judgment in this case. In support of this motion, the Applicant points out that he has already been investigated by the Administration, as possible misconduct, for the non-disclosure on his PHP of "a decade-old allegation of sexual misconduct which was found to be wholly unsubstantiated, but which nevertheless caused him substantial personal and professional harm."

11. In this connection, the Tribunal notes that transparency and accountability are overarching principles of the United Nations, and indeed their application promotes the reputation of the Organization. Any deviation from these principles can only be granted on an exceptional basis in light of compelling grounds.

12. Article 26 of the Rules of Procedure of the Dispute Tribunal mandates the publication of the Tribunal's judgments on its website but requires the protection of personal data. The Tribunal is also aware that the Appeals Tribunal has affirmed that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and

¹ *Toson*, 2022-UNAT-1249, para. 44.

accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.”²

13. However, in the instant case, the Tribunal considers that as serious allegations that remain unproven are mentioned in the pleadings, there are compelling grounds to grant the Applicant’s request for anonymity.

14. The reasons for anonymization are to protect the presumption of innocence of the Applicant and to avoid allegations made against him from being disclosed in the public domain, although no facts regarding these allegations have been established and the allegations were found to be unsubstantiated.

15. For these reasons, the Tribunal decides to grant the Applicant’s request for anonymity.

On the motion for an oral hearing

16. The Applicant submits that a hearing with the participation of all officials involved in the hiring process is appropriate in this case. The Respondent opposes the motion for a hearing.

17. Since the Tribunal considers that an oral hearing may be necessary in this case in order to obtain more evidence and hear the main protagonists,³ it would like to give the Respondent the opportunity to comment on the list of witnesses proposed by the Applicant and to propose his own witnesses, if any, in the event that the Tribunal ultimately decides to hold a hearing.

18. Accordingly, before deciding which witnesses are the most relevant for adjudicating the case, the Tribunal orders the Respondent to comment on the list of witnesses proposed by the Applicant and to propose his own witnesses, if any.

² *Buff*, 2016-UNAT-639, para. 21.

³ *Belsito*, 2020-UNAT-1013, para. 49.

On the motion to submit evidence regarding damages accruing post-application

19. The Tribunal finds that it is premature to consider this motion at this stage of the proceedings. The matter will be decided at a later stage.

On the motion for order of production of evidence and information

20. The Applicant requests the Tribunal to order the Respondent to produce three specific types of evidence. The Tribunal will consider each type in turn.

Minutes, notes and/or other records of the meeting or meetings in which OHCHR officials discussed the recruitment for the position, and specifically the candidates found suitable and recommended by the assessment panel.

21. The Tribunal recalls the Appeals Tribunal’s “advice” in *Belsito* to the effect that “it seems prudent and necessary to request the Secretary-General to submit before the UNDT all documents related to the ... selection process.”⁴ While the instant case is not exactly the same as *Belsito*, the Tribunal considers that the relevant documents necessary to assess the legality of the selection process are among those provided by the Respondent in his reply on 21 March 2022, including those filed *ex parte*, and to which the Tribunal has already granted the Applicant access above. Moreover, with regard to the requested minutes, notes and other records of the meetings, the Respondent indicated in his rejoinder on 8 March 2023 that “no such records exist.” Therefore, this specific request is denied.

Notes, memoranda, emails and/or other records of any conversation between the OHCHR Chief of Human Resources and a certain OHCHR staff member, regarding concerns or allegations of mismanagement, unsatisfactory conduct and/or prohibited conduct on the part of the Applicant.

22. The Tribunal considers that this specific request is too broad and, despite the Applicant’s assurances to the contrary, it is impossible to escape the conclusion that he is embarking on a “fishing expedition.”⁵ In addition, as the Respondent rightly points out, “such information, if it exists, would have been received under an understanding of confidentiality for the complainant.” Accordingly, this specific request is denied.

⁴ *Belsito*, 2020-UNAT-1013, para. 50.

⁵ Applicant’s “consolidated submission”, para. 38.

A list of all occasions over the past five years in which OHCHR has decided not to select the hiring manager's first-ranked candidate, including a statement of reasons for each such decision.

23. As each non-selection case is different from the others and turns on its own unique set of facts, the Tribunal does not believe these documents would be relevant for the adjudication of the case at hand. However, since the Respondent has indicated that he “stands ready to provide such information if the Tribunal deems relevant,” the Tribunal is inclined to grant this specific request.

24. In addition to the request for the production of evidence, the Applicant also moves for the production of information. Specifically, he requests the Tribunal to order the Respondent to identify, by name and title, all OHCHR officials who participated in the meeting or meetings at which the recruitment for the position, and specifically the candidates found suitable and recommended for the position by the assessment panel, were discussed.

25. The Applicant also requests to know the date on which OHCHR first learned of Ms. VK's concerns or allegations of mismanagement, potential unsatisfactory conduct and/or prohibited conduct on the part of the Applicant.

26. The Respondent does not appear to address the requests indicated in paras. 24 and 25 above in his rejoinder of 8 March 2023. Therefore, the Tribunal decides that it is appropriate to grant the requests and to order the Respondent to produce the relevant information.

IT IS ORDERED THAT:

27. **By 3:00 p.m. on 25 April 2023,**

28. The Respondent shall redact Annexes A3, A5 and A7 to his reply, as appropriate, and make them available to the Applicant on an under seal basis.

29. The Applicant shall not disclose, use, show, convey, disseminate, copy, reproduce or in any way communicate such documents or the information contained

therein to anyone, for any purpose – except for the filing of an appeal with the United Nations Appeals Tribunal – without prior authorization by the Tribunal.

30. The Applicant’s request for anonymity in these proceedings is granted.

31. The Respondent shall submit his comments regarding the list of witnesses proposed by the Applicant and propose his own witnesses, if any.

32. The Applicant’s motion to submit evidence regarding damages accruing since the filing of his application will be decided at a later stage.

33. The Applicant’s request for the production of evidence is granted in part and the Respondent is ordered to disclose to the Applicant a list of all occasions over the past five years in which OHCHR has decided not to select the hiring manager’s first-ranked candidate, including a statement of reasons for each such decision.

34. The Applicant’s request for the production of information is granted and the Respondent is ordered to identify, by name and title, all OHCHR officials who participated in the meeting or meetings at which the recruitment for the position, and specifically the candidates found suitable and recommended for the position by the assessment panel, were discussed. The Respondent is also ordered to state the date on which OHCHR first learned of Ms. VK’s concerns or allegations of mismanagement, potential unsatisfactory conduct and/or prohibited conduct on the part of the Applicant.

(Signed)

Judge Joelle Adda

Dated this 28th day of March 2023