



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Isaac Endeley

N'DAW

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**  
**ON CASE MANAGEMENT**

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**Counsel for Applicant:**

Kalaycia Clarke, OSLA

**Counsel for Respondent:**

Yun Hwa Ko, UNFPA

André Luiz Pereira de Oliveira, UNFPA

## **Introduction**

1. By Order No. 069 (NY/2023) dated 14 August 2023, the Tribunal granted in part the Applicant's request for disclosure of documents and instructed the Respondent to file: (a) all correspondence between UNFPA and *The New Humanitarian* concerning the Applicant's case; and (b) any correspondence between UNFPA and Oxfam concerning the Applicant's case.

2. After requesting and receiving an extension of the deadline, the Respondent complied with the instruction on 20 September 2023. However, the Respondent also requested the Tribunal's leave to file some of the documents contained in the submissions on an *ex parte* basis because they contain confidential information.

3. On 22 September 2023, the Applicant filed a response to the Respondent's submissions objecting to the *ex parte* filings and requesting the disclosure of all the documents contained in those filings. The Applicant also stated that she "will respond at the appropriate time during the course of these proceedings to the legal arguments raised by the Respondent" in his submissions of 20 September 2023.

## **Considerations**

### *Applicable legal framework*

4. The Tribunal wishes to clarify at the outset that this case does not concern disciplinary action, but termination under staff regulation 9.3 and staff rule 9.6 concerning facts anterior to an appointment. These provisions, which set out the circumstances under which the Secretary-General may lawfully terminate the appointment of a staff member, explicitly contemplate the possibility of termination on the grounds of facts anterior to the appointment that call into question the suitability of a staff member under the standards established in the Charter of the United Nations.

5. The relevant provisions in effect at the time of the events read as follows:

**Regulation 9.3**

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

...

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

**Rule 9.6**

...

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

...

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;

6. While the Tribunal is not required, or expected, to carry out its own investigation or to make a finding on the guilt or innocence of the Applicant, it must examine whether the Administration applied the above-cited provisions on facts anterior in a procedurally correct manner, arriving at a decision that was not affected by improper considerations and was, in all the circumstances, a permissible option for a reasonable decision-maker to have reached.

7. The Tribunal also recalls the Dispute Tribunal's judgments in *Kamugisha* UNDT/2017/021 and *Songa Kilauri* UNDT/2021/107, where it was established that

in cases involving termination for facts anterior, the following three cumulative conditions must be met for the Tribunal to satisfy itself that the Administration had acted as a reasonable decision-maker: (a) was the applicant afforded due process; (b) was there sufficient evidence to support a factual finding that the applicant had engaged in the alleged conduct, and (c) were these facts directly relevant to an assessment of the applicant's suitability under the standards established in the Charter of the United Nations and was it reasonable to conclude that, had these facts been known at the time of the appointment, they should have precluded the appointment.

8. The Tribunal will therefore apply the above criteria in reviewing the facts and circumstances on which the contested decision was based.

*Ex parte filings*

9. The Tribunal has carefully reviewed the documents filed *ex parte* by the Respondent in order to verify their confidentiality and relevance to the case at hand. As the Appeals Tribunal stated in *Bertucci* 2011-UNAT-121, para. 2,

... [...] In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case. The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

10. Under art. 18 of the Dispute Tribunal's Rules of Procedure, the Tribunal "shall determine the admissibility of any evidence".

11. Following review of the relevant documents, the Tribunal considers that they do not present any new or relevant information beyond what is already contained in the record and shared with the Applicant. The Tribunal also finds that the contents of the *ex parte* documents are not relevant for the adjudication of this case. As such, the documents filed *ex parte* are not admitted into evidence pursuant to art. 18 of the Dispute Tribunal's Rules of Procedure. Accordingly, those documents

will be removed from the case file, and the Tribunal will not take them into consideration in adjudicating this case.

*Other matters*

12. The Tribunal further recalls that the Applicant had asked for a hearing. However, the Tribunal finds that given the facts and circumstances of this case, there is no need for a hearing. In due course, the Tribunal will proceed to adjudicate the case based on the papers before it.

13. Regarding the Applicant's statement that she "will respond at the appropriate time" to the legal arguments raised by the Respondent in his submissions of 20 September 2023, the Tribunal considers that since the documents filed *ex parte* will be removed from the case file, the Applicant can now submit her response.

14. 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.

15. In light of the above,

IT IS ORDERED THAT:

16. The documents filed on an *ex parte* basis by the Respondent on 20 September 2023 shall be removed from the case file and will not be taken into consideration in the adjudication of this case.

17. By **4:00 p.m. on Friday, 3 November 2023**, the Applicant is to file a response, if any, to the Respondent's submission of 20 September 2023. The response shall not be longer than five pages using font Times New Roman, font size 12, with 1.5 line spacing.

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

*(Signed)*

Judge Joelle Adda

Dated this 20<sup>th</sup> day of October 2023

Entered in the Register on this 20<sup>th</sup> day of October 2023

*(Signed)*

Isaac Endeley, Registrar, New York