



Before: Judge Francis Belle

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Miryoung An, DAS/ALD/OHR, UN Secretariat

Halil Göksan, DAS/ALD/OHR, UN Secretariat

Introduction

1. By Order No. 124 (NY/2024) dated 17 December 2024, the Tribunal provided the following orders (emphasis in the original):

... By **4:00 p.m. on Monday, 30 December 2024**, the Respondent is to file his objections to the Applicant's disclosure requests.

... By **4:00 p.m. on Monday, 30 December 2024**, the Applicant is to file a response to the Respondent's 4 June 2024 submissions regarding the scope of the allegations.

... By **4:00 p.m. on Thursday, 9 January 2025**, the Applicant is to file his response to the Respondent's 30 December 2024 objections to his disclosure requests.

... By **4:00 p.m. on Thursday, 9 January 2025**, the Respondent is to file his response to the Applicant's 30 December 2024 submissions regarding the scope of the allegations.

... By **4:00 p.m. on Thursday, 9 January 2025**, the parties are to file a jointly signed submission in which they propose dates for hearing the Applicant's testimony on either 17, 20, 24 or 27 January, starting at 10 a.m. (New York time).

2. The parties duly filed their submissions as per Order No. 124 (NY/2024).

Consideration

The scope of the allegations

3. From the parties' submissions regarding the scope of allegations, it appears that they disagree on this. As both parties have now had the opportunity to state their respective arguments, the Tribunal will leave the matter to be determined in the final judgment. It further notes that the parties are also to summarise their submissions in their written closing statements, which they will be ordered to submit subsequent to the hearing.

Additional written documentation

4. The Applicant has requested, in his 27 June 2024 submission, that the Respondent disclose the productions of (a) "[t]he special review/ audit report carried out in March 2020 by [the Office of Internal Oversight Services,

“OIOS”/Audit”, and (b) “[t]he Second (Special Review 2)”. He explains in his 9 January 2025 submission that the relevant documents “were generally supportive of the Applicant and his colleagues in their efforts to report possible misconduct” and “have been sup[p]ressed by the Respondent”.

5. The Applicant further contends that:

... The first findings (Special Review 1) involved an investigation requested by the Secretary-General into the allegations brought by [the Representative of the Secretary-General, “RSG”, name redacted for privacy reasons] on 16/17 November 2019 of underperformance of the portfolios managed by the Applicant and two of his colleagues/co-complainants. The circumstances are directly relevant to the reason why the Applicant was in communication with his colleagues over how to defend themselves against the unfair and retaliatory actions the Respondent has continuously refused to recognize or address. This Report is critical to understanding the difficult working atmosphere following the Applicant’s complaint to OIOS over the mismanagement of investments which is relevant to the context of virtually all the disputed facts, notably paragraphs 1,2,5,6, 24-31 and 35 and whether they constitute acts of misconduct.

... The second findings (Special Review 2) were in direct response to the Applicant’s and his colleagues’ letter to the Secretary-General of 13 March 2020 [reference to annex omitted] and addresses the substance of their complaints against the former RSG and in particular on the credibility of these complaints over the threat to the Fund’s assets. It is directly relevant to the charge that the Applicant engaged in or supported collaborative efforts to disclose sensitive information, using his personal email address and discussed official [Office of Investment Management, “OIM”] matters with the designated staff representative all of which led to this unprecedented joint effort at safeguarding the investments of the Pension Fund. There are significant disputes over whether the Applicant was the victim of retaliation warranting his actions, including the exchanges with colleagues and the remedial action warranted to address the findings. All the alleged misconduct cited by the Respondent as isolated acts of misconduct are part of the protected activity these reports legitimize. The outcome of this review is relevant to all the disputed facts, in particular, paragraphs 2 to 14, 15, 16, and 47-56.

6. The Respondent’s contentions may be summarised as follows:

a. In “requesting the production of Special Review 1 and Special Review 2, the Applicant refers to some paragraphs of the Disputed Facts in

the Joint Submission of 27 June 2024”; though, he “does not dispute the accuracy of the communications but contests their relevancy to the finding of misconduct”.

b. The Applicant fails “to illustrate how the Special Review 1 and Special Review 2 would change the interpretation or the plain reading of the communications (which are mostly quoted verbatim in the Disputed Facts)”. No “legal or factual basis has been given by the Applicant to link Special Review 1 and Special Review 2 to the present matter which concerns the Applicant’s participation in collaborative efforts to disclose without authorization sensitive information relating to the OIM to the media, blogs and Permanent Missions, and drafting possible questions to be asked of the OIM leadership in an attempt to further his position on official OIM matters, including his personal desire to remove [the Complainant] from her post at the OIM”. Special Review 1 and Special Review 2 have “no link whatsoever to the Applicant’s deleting WhatsApp from his official [United Nations] iPhone before submitting it to OIOS for its authorized investigation”.

c. The Applicant’s “request is tainted with vagueness” as he “refers to general terms such as ‘the context for the communications’, ‘extraordinary circumstances facing the OIM’, ‘the Applicant and his colleagues in courageously acting as whistleblowers’”. Based on the Applicant’s description, “the Special Review 1 concerns the issue of under-performance of the investment portfolios managed by the Applicant and unidentified others”, which does not concern his “misconduct for which the contested decision was made”. The Special Review 2 is “described to relate to the letter to the Secretary-General of 13 March 2020, which is a group complaint filed by the Applicant and others against the former RSG [name redacted for privacy reasons]”. As such, the Special Review 2 is “not about the Applicant’s misconduct”. The Applicant’s request lacks “the minimum level of clarity to demonstrate how those two Special Reviews—which were for entirely different matters from the Applicant’s misconduct—would assist in the judicial review of the contested decision concerning his misconduct”.

d. The “matters addressed by Special Review 1 and Special Review 2 are separate from the Applicant’s misconduct in issue”. Whether “indeed the portfolios managed by the Applicant or others had under-performed before July 2019, or how the complaint filed by the Applicant against the former RSG was reviewed has no bearing on the Applicant’s accountability for his own conduct. Both Special Review 1 and Special Review 2 are outside the scope of the judicial review in the present case”.

e. The “Special Review 1 and Special Review 2 had been requested by other applicants in other related cases in Cases Nos UNDT/NY/2023/024 and UNDT/NY/2023/038.

f. In those cases, the Respondent was not able to produce the Special Review 1 and Special Review 2 to the Dispute Tribunal due to OIOS’ decision not to disclose them based on its mandates set out in the General Assembly resolutions 48/218B, 54/244, 59/272, 67/258 and 74/181”. “OIOS exercises operational independence as provided for in section A of General Assembly Resolution 48/218 B₂ of 29 July 1994 and General Assembly resolution 54/244₃ of 23 December 1999”. The General Assembly has “explicitly stated that the Respondent does not possess exclusive authority over the USG/OIOS”. For example, “the General Assembly has mandated that the Secretary-General ‘shall appoint the [Under-Secretary-General, “USG”]/OIOS after consulting with Member States and obtaining the General Assembly’s approval’”. Similarly, the General Assembly has “mandated that the Secretary-General may terminate the USG/OIOS ‘only for cause and with the approval of the General Assembly’”. These provisions emphasize OIOS’s independence in fulfilling its mandate. The “operational independence of OIOS has been recognized by the Appeals Tribunal, which held that the Secretary-General may be involved in matters of administration concerning OIOS, such as budget and oversight functions; however, when it comes to decisions on and the content of individual reports, the Secretary-General has no power to impose any demands or exert influence on OIOS”. OIOS’ “operational independence and authority to carry out any action it considers necessary to fulfil its responsibilities extend

to independence regarding the disclosure of its work products”. “Specifically, with respect to OIOS reports, the General Assembly in its resolution 59/272, granted OIOS discretion to modify or withhold a report when access to the report would be inappropriate for reasons of confidentiality”, with specific reference to para. 2.

g. In the two related cases, “under the operational independence granted by the General Assembly, the USG/OIOS determined that the OIOS documents, including Special Review 1 and Special Review 2, are ‘privileged internal working documents’ and their disclosure would ‘significantly impede the discharge of mandated OIOS internal oversight functions’”. OIOS “consequently decided not to disclose them to the Dispute Tribunal”, and the Respondent “could not produce them to the Dispute Tribunal”. The Dispute Tribunal “concluded the proceedings without the production of Special Review 1 and Special Review 2”.

7. The Tribunal notes that—at this stage of the proceedings and without seeing any of the documents—it cannot rule out whether they might be relevant to the adjudication of the present case. Also, it sees no legal impediment to the Respondent, as the Chief Administrative Officer of the Organization under art. 97 of the United Nations Charter, instructing OIOS, a department of its Secretariat, to produce certain documentation for a case before the Dispute Tribunal. If the Respondent has concerns about the confidentiality of the relevant documents, they can be filed *ex parte* after which the Tribunal will assess their relevance and also whether the *ex parte* restriction should be maintained. If disclosed to the Applicant, the Respondent could file the documents in a redacted form.

8. Accordingly, the Tribunal will order the Respondent to file the relevant documents in evidence. If the Respondent does not do so, the Tribunal may, as appropriate, draw negative inferences, which, in the affirmative case, will be reflected in the final judgment (see, for instance, the Appeals Tribunal in *Zhao, Zhuang and Xie* 2015-UNAT-536, para. 49).

Hearing

9. The Tribunal notes that the parties agree to 24 January 2025 as the date for the hearing to call the Applicant to testify as a witness. Counsel for the Applicant will lead the witness in examination-in-chief after which the Respondent will have the opportunity to cross-examine him. At the end, the parties will be allowed final questions. Each party will be allowed 1 hour and 30 minutes to the respective questioning.

10. In light of the above,

IT IS ORDERED THAT:

11. By **4:00 p.m. on Tuesday, 21 January 2025**, the Respondent is to file the documents requested by the Applicant in his 27 June 2024 submission.

12. From **9:30 a.m. to 12:45 a.m. on Friday, 24 January 2025**, a hearing is to be held at which the Applicant is to provide his testimony. Counsel for the Applicant will lead the witness in examination-in-chief after which Counsel for the Respondent will have the opportunity to cross-examine him. Each party will be granted 1 hour and 30 minutes to question the witness.

(Signed)

Judge Francis Belle

Dated this 16th day of January 2025

Entered in the Register on this 16th day of January 2025

(Signed)

Isaac Endeley, Registrar, New York