



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/030
Order No.: 069 (NY/2023)
Date: 14 August 2023
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

N'DAW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON CASE MANAGEMENT

Counsel for Applicant:

Kalaycia Clarke, OSLA

Counsel for Respondent:

Yun Hwa Ko, UNFPA

André Luiz Pereira de Oliveira, UNFPA

Introduction

1. Via Order No. 012 (NY/2023) dated 17 February 2023, the Duty Judge granted the Applicant's motion for leave to file a rejoinder to the Respondent's reply. The Applicant was instructed to respond with a specific focus on para. 22 and Annex R/3 of the reply, and to indicate whether she wished to adduce any further evidence. The Duty Judge also stated that the Applicant's motion for disclosure, her motion to admit evidence of harm, and her request for a hearing would be ruled upon once the case was assigned to a Judge.

2. The Applicant complied with the instruction and filed her rejoinder on 2 March 2023. In the rejoinder, the Applicant "reiterates the request for remedies requested in her application filed on 2 June 2022". These included requests for the Tribunal to "order the disclosure of: (a) all correspondence between [the United Nations Population Fund, "UNFPA"] and The New Humanitarian [newspaper] concerning her case; (b) all UNFPA internal correspondence concerning her case; [and] (c) any correspondence between UNFPA and Oxfam concerning her case". The Applicant also states in the rejoinder that whether she wishes to adduce further evidence will depend on the Tribunal's rulings regarding her earlier motion for disclosure and motion to admit evidence of harm.

3. The case was assigned to the undersigned Judge on 19 July 2023.

Considerations

4. The Tribunal recalls that under the jurisprudence of the Appeals Tribunal, in conducting a judicial review of a disciplinary case, the Dispute Tribunal is required to examine i) whether the facts on which the disciplinary measure is based have been established; ii) whether the established facts amount to misconduct; iii) whether the sanction is proportionate to the offence; and iv) whether the staff member's due process rights were respected. When termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable (see para. 51 of *Karkara* 2021-UNAT-1172, and similarly in, for instance, *Modey-Ebi* 2021-UNAT-1177,

para. 34, *Khamis* 2021-UNAT-1178, para. 80, *Wakid* 2022-UNAT-1194, para. 58, *Nsabimana* 2022-UNAT-1254, para. 62, and *Bamba* 2022-UNAT-1259, para. 37). The Appeals Tribunal has further stated that clear and convincing proof “requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable” (see *Molari* 2011-UNAT-164, para. 30). In this regard, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred” (see para. 32 of *Turkey* 2019-UNAT-955).

5. 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.

6. Having examined the parties’ submissions, the Tribunal notes that the Applicant claims that her due process rights were not respected throughout the disciplinary process and that she was not afforded the opportunity to provide her own version of the facts in response to the allegations against her. The Applicant also asserts that the Respondent “has introduced evidence which [the Applicant] was not privy to, and therefore did not have an opportunity to respond to”. In that regard, the Tribunal finds that in order for it to have a better understanding of the case, all relevant materials will need to be submitted by the parties. Accordingly, the Tribunal will order the Respondent to produce some of the materials requested by the Applicant to facilitate its adjudication of the case. However, the Tribunal also finds that the Applicant has not established the relevance of other requested materials, such as the internal communications of UNFPA. Therefore, the Tribunal is not inclined to grant that aspect of the request at this time.

7. In light of the above,

IT IS ORDERED THAT:

8. The Applicant’s request for an order of disclosure of evidence is granted in part.

9. By **4:00 p.m. on Tuesday, 5 September 2023**, the Respondent is to file:
- a. All correspondence between UNFPA and The New Humanitarian concerning the Applicant's case;
 - b. Any correspondence between UNFPA and Oxfam concerning the Applicant's case.
10. The medical report provided by the Applicant on 10 June 2022 as evidence of moral harm is hereby admitted and the Tribunal will decide at a later date what weight to accord to it.
11. Upon receipt of the above-referred submissions, the Tribunal will issue the relevant instructions for further case management.

(Signed)

Judge Joelle Adda

Dated this 14th day of August 2023

Entered in the Register on this 14th day of August 2023

(Signed)

Isaac Endeley, Registrar, New York