UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/052
Order No.: 82 (GVA/2020)
Date: 27 July 2020
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON CASE MANAGEMENT AND
APPLICANT'S MOTION
TO BE ADDED AS CO-COUNSEL**

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Jérôme Blanchard, LAPS/UNOG

Introduction

1. By Order No. 73 (GVA/2020) of 24 June 2020, the Tribunal resumed proceedings in this case and ordered filings from the parties with respect to the Applicant's motion to be added as Co-Counsel and the re-opening of the hearing on the merits.

2. In response to the above Order, the parties filed submissions on 1 and 3 July 2020.

Consideration

3. Having examined the parties' submissions, the Tribunal has to decide on the following matters:

a. Whether the hearing on the merits should be re-opened and, thus, if further witnesses should be called to testify and/or the Respondent should be ordered to produce additional evidence;

b. Whether Judge Rowan Downing (former UNDT Judge) should be called to testify in relation to the Applicant's allegation of breach of her fair trial rights; and

c. The Applicant's 27 May 2020 motion to be added as Co-Counsel.

Re-opening of the hearing on the merits

4. In her 3 July 2020 submission, the Applicant objects to the reopening of the hearing and argues the following:

a. She does not see the need for a re-opening of the hearing as "sufficient evidence" has been heard for a ruling to be made;

b. She does not accept a "*de novo*" review of her complaint as the issue before the Tribunal is only that no proper investigation was conducted;

c. She has clearly set out the basis of her application in paras. 2-9 of her application, and she wants the Tribunal to remand the matter for investigation based on the following alleged failures:

i. Conflict of interest of one panel member;

ii. Failure to interview relevant witnesses (mainly Mr. Vanian);

iii. Documents provided by witnesses were not attached to the final report; and

iv. Important issues were not duly investigated (such as the alleged manipulation of the recruitment for post 40485).

5. It appears from the Applicant's submission that she seeks that the Tribunal limit its scope of judicial review to the alleged failures of the investigation process without going into a review of the substantive matters held in her complaint for harassment and abuse of authority.

6. After a careful analysis of the Applicant's application and of all the documents attached to it, including her request for management evaluation, the Tribunal finds it pertinent to recall what the Applicant has clearly identified as being the contested decision(s):

a. Ongoing workplace harassment linked to her undertaking a protected activity, namely reporting and objecting to wrongdoing by management, which includes the decision to conclude an investigation of harassment only with management actions aimed at "reminding the implicated managers to ensure the proper and timely application of the performance management framework";

b. Violation of her privacy rights and defamation of character: This includes the decision to state that the Applicant's claims had been found to be "unsubstantiated" in a press release distributed to every UN staff member working on human rights, the world media, and almost 2 million direct followers of OHCHR on social media.

7. In her management evaluation request the Applicant identified the contested decision as follows:

> 1. The applicant seeks management evaluation of the administrative decision of the High Commissioner for Human Rights ("the High Commissioner"), communicated to her by a letter dated 30 December 2016 (Annex 1) but in fact sent on 5 January 2017 (Annex 2) to close her complaint of harassment by Mr. Mac Darrow and Mr. Craig Mokhiber with only "managerial actions aimed at reminding the implicated managers to ensure the proper and timely application of the performance management framework envisioned in ST/AI/2010/5.
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> 2. The applicant further seeks management evaluation of the related administrative decision of the High Commissioner of 2 February 2017 to publicly comment on the applicant's complaint of harassment, and falsely state that "the claims made by the staff member were found to be unsubstantiated" when in fact according to the letter dated 30 December 2016 but sent on 5 January 2017, the panel found the overwhelming majority of the applicant's claims to be substantiated.

8. In relation to the scope of judicial review, this Tribunal is mindful that what is at stake is a judicial review as provided for in Article 2.1(a) of its Statute. However, the duty of the judge is to interpret the application in conformity with the factual grounds of the case, the legal framework and the remedies requested. In relation to remedies, the Applicant does not limit herself to requesting the rescission of the contested decisions and the remand of the matter for a new investigation. She actually goes further and asks for the following:

> a. Deletion and formal retraction of the press release and a clear statement that the information regarding her was false, to be distributed in the same manner and to the same persons as the initial press release, i.e., by email sent to all UN staff members in the field of human rights and the media, by deletion of social media posts (of both OHCHR and individual communications staff) and posting of the retraction;
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> b. Removal of false and prejudicial information from her performance evaluation report for the period 2015- 2016;

c. Reversal of her blacklisting and to be afforded fair consideration for posts;

d. Halting the retaliation against her, notably by renewing her fixed-term contract under the same conditions as apply to other staff of OHCHR holding fixed-term contracts, i.e., renewal for five years in January 2018, based on "meeting expectations" performance ratings in her previous two performance evaluations;

e. A new investigation of her complaint of harassment by a genuinely independent panel free of conflicts of interest; and

f. Compensation for moral damages, including significant health impacts, and for the impact of her blacklisting on her career development and chances of promotion.

9. Bearing this in mind, the Tribunal does not see it possible to decide on the merits of the Applicant's case without a re-opening of the hearing and calling witnesses to testify. The Tribunal recalls the holding in *Belkhabbaz* UNDT/2018/016:

> 80. According to art. 2.1(a) of its Statute, the Tribunal is competent to examine the lawfulness of administrative decisions exclusively. The administrative decision presently under scrutiny is the decision to take no further action, that is, disciplinary action, after an investigation following the Applicant's complaint against her former supervisor for prohibited conduct under ST/SGB/2008/5. The manner in which the investigation was performed, although specifically challenged by the Applicant, does not in itself constitute an appealable decision.
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> 81. Nonetheless, the Tribunal's review is not limited to the ultimate decision to take no further action. The Tribunal may enter into an examination of the propriety of the procedural steps that preceded and informed the decision eventually made, inasmuch as they may have impacted the final outcome. Accordingly, although the conduct of the investigation is not a reviewable decision, in assessing the legality of the decision to take no further action, it is pertinent to examine different aspects concerning the handling of the Applicant's complaint, on the one hand, and the investigation that ensued, on the other hand.

> 82. The scope of the judicial review in harassment and abuse of authority cases is thus restricted to how the Administration responded to the complaint in question (*Luvai* 2014-UNAT-417, para. 64). The Tribunal must focus on whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process further to it, as set out primarily in ST/SGB/2008/5. The scope of the judicial review so outlined is supported by the wording of sec. 5.20 of ST/SGB/2008/5 (emphasis added):
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> > Where an aggrieved individual or alleged offender has grounds to believe that the *procedure followed in respect of the allegations of prohibited conduct was improper*, he or she may appeal pursuant to chapter XI of the Staff Rules.
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> 83. Before commencing this exercise, the Tribunal must recall that it is not vested with the authority to conduct a fresh investigation on the initial harassment allegations (*Messinger* 2011-UNAT-123, *Luvai* 2014-UNAT-417). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own judgment for that of the Secretary-General (see, e.g., *Sanwidi* 2010-UNAT-084). However, the Tribunal may draw its own conclusions from the evidence collected by the fact-finding panel (*Mashhour* 2014-UNAT-483; *Dawas* 2016-UNAT-612, para. 24).
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> 84. In view of the foregoing, the Tribunal will first examine the alleged procedural errors in the appointment of the panel and the conduct of its investigation, before turning to examine the alleged errors in the making of the contested decision itself.
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> …
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> 95. Notwithstanding the above finding it is necessary and appropriate in this case to determine all matters advanced by the Applicant.

10. Nonetheless, it appears from the Applicant's 3 July 2020 submission that she wants to restrict her case to the alleged flaws of the investigation procedure. On the other hand, the Respondent does not want to call any witnesses of his own.

11. It is worth underlining that this Tribunal is a hybrid jurisdiction where elements of common law and civil law must be combined in a harmonious way to grant justice to the parties. In common law, proceedings tend to be more

adversarial whereas in civil law the judge plays a more inter active role and can call witnesses if he/she is not satisfied with the evidence provided by the parties.

12. Having said this, the Tribunal does not intend to impose on the parties a hearing they do not wish to attend. The Tribunal will therefore adjudicate the case based on the evidence already produced, the applicable law and the burden of proof, giving the parties the opportunity to file closing submissions in connection with issues set by the Tribunal in the operative part of this Order. It follows that it is no longer necessary to examine whether additional evidence and/or witnesses are necessary, including the summoning of former UNDT Judge Rowan Downing, or the Applicant's motion to be added as Co-Counsel. The Tribunal nevertheless finds it pertinent to address the Applicant's requests concerning calling former UNDT Judge Rowan Downing and acting as Co-Counsel.

Motion to call Judge Rowan Downing as a witness

13. The Applicant supports her request to call former UNDT Judge Rowan Downing to testify on the ground that his testimony is relevant to show that her fair trial rights have been breached. This, she argues, derives from what she characterizes as the Respondent's "interference" in the "removal" of said Judge's mandate and "the circumstances surrounding the removal of that mandate".

14. If there were to be a new hearing, the Tribunal would not grant the Applicant's motion because it finds that it is irrelevant for the merits of the case. Fair trial rights do not grant the parties the right to choose the judge. They rather ensure access to justice in an independent Court of Law, which is the case here.

15. This Tribunal has granted the Applicant all her due process rights in conformity with the applicable internal laws and does not see any relevance in calling to testify a former judge whose mandate *expired* as confirmed by the Appeals Tribunal in *Reilly* 2019-UNAT-975.

Applicant's motion to be added as Co-Counsel

16. Arguing essentially that her OSLA Counsel faces "a structural conflict of interest in seeking to adduce the evidence of [former UNDT] Judge Downing", the Applicant requested to be added as Co-Counsel in her case.

17. First, the Tribunal notes that Legal Representation is governed by art. 12 of its Rules of Procedure, which provides that

> 1. A party may present his or her case to the Dispute Tribunal in person, or may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction.
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> 2. A party may also be represented by a staff member or a former staff member of the United Nations or one of the specialized agencies.

18. The Tribunal's Practice Direction No. 2 echoes the above language:

> **Introduction**
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> 1. The purpose of this Practice Direction is to assist the parties in understanding the Dispute Tribunal's procedures concerning legal representation. See, in particular, art. 12 of the Rules of Procedure of the Tribunal.
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> 2. The information contained in this Practice Direction is subject to the Dispute Tribunal's Statute and Rules of Procedure, or any direction given by a Judge in a particular case.
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> **Legal representation of applicant and respondent**
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> 3. A party may present his or her case to the Tribunal in person, or may designate counsel as per art. 12 of Rules of Procedure of the Tribunal. All acts and submissions undertaken by designated counsel in the course of the case shall be considered as acts and submissions of the designating party.

19. Consequently, it is clear that before the Tribunal, applicants can be self-represented *or* represented by Counsel. There is no provision providing for an applicant represented by Counsel to act as Co-Counsel, a modality also known as "hybrid defence". As such, it is a procedural matter that pursuant to art. 36 of the Tribunals Rules of Procedure "shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7of its [S]tatute".

20. Under art. 19 of its Rules of Procedure, the Tribunal has to ensure "fair and expeditious disposal of a case". Concerning fairness, the Tribunal found above that eliciting evidence from former UNDT Judge Rowan Downing is not relevant to the Applicant's case. The Applicant has also underlined that her intervention as Co-Counsel would be limited to arguing and offering evidence to show that not allowing Judge Downing to conclude the adjudication of her case violated her fair trial rights. This issue, as can be seen in the operative part of this Order, is not one that the parties are called to address in their closing submissions.

21. Furthermore, the Applicant has had the opportunity to pursue her allegations through submissions. They have been considered, twice, in the context of requests for recusal of the undersigned Judge and, albeit tangentially, by the Appeals Tribunal's in *Reilly*.

22. With respect to expeditiousness, the Tribunal has to be mindful of conducting an efficient administration of justice. This entails ensuring orderly trials, preventing unnecessary delays and being vigilant of an efficient use of the Tribunal's already scare resources. To this end, the proceedings in the current case are to focus now in the above-mentioned closing submissions and there are no elements warranting to grant the Applicant's motion to be added as Co-Counsel.

Conclusion

23. In view of the foregoing, IT IS ORDERED THAT:

a. The Applicant's motion to be added as Co-Counsel is rejected; and

b. By **Thursday, 27 August 2020 COB Geneva time** the parties shall produce final closing submissions limited to the legal and factual issues as presented by the Applicant in her latest submission, namely:

i. The alleged conflict of interest of the panel members;

ii. The alleged lack of her consideration for and manipulation of the recruitment process for post 40485;

iii. Identification of the documents allegedly presented by witnesses that were not attached to the investigation report and their relevance for the investigation; and

iv. The alleged failure to ask relevant questions to witnesses.

(*Signed*)
Judge Teresa Bravo
Dated this 27th day of July 2020

Entered in the Register on this 27th day of July 2020
(*Signed*)
René M. Vargas M., Registrar, Geneva