UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2024/026
Order No.:	021 (NY/2025)
Date:	14 February 2025
Original:	English

Before: Judge Solomon Areda Waktolla

Registry: New York

Registrar: Isaac Endeley

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Sètondji Roland Adjovi, Etudes Vihodé Ltée

Counsel for Respondent:
Jacob B. van de Velden, DAS/ALD/OHR, UN Secretariat
Maria Romanova, DAS/ALD/OHR, UN Secretariat

Introduction

1. On 10 February 2025, Counsel for the Applicant and Counsel for the Respondent participated in a Case Management Discussion ("CMD") in accordance with Order No. 017 (NY/2025) dated 5 February 2025.

Consideration

The issues of the present case and the Tribunal's limited scope of review of disciplinary cases

2. At the CMD, the parties confirmed the agreement with the outline of the basic issues of the present case and the Tribunal's limited scope of review of disciplinary cases as set out by the Duty Judge in Order No. 093 (NY/2024) dated 16 September 2024.

Jointly-signed statement of agreed and disputed facts

3. In Order No. 093 (NY/2024), the Duty Judge ordered the parties to file consolidated lists of agreed and disputed facts by 7 October 2024. Upon the Applicant's 6 October 2024 request for a postponement of this deadline and the Respondent's 31 October 2024 query regarding the scope of these list, on 26 November 2024, the Duty Judge suspended the order until further notice when the case was assigned to a Judge.

4. At the CMD, Counsel for the Applicant questioned the necessity for the ordered consolidated lists of agreed and disputed facts, noting that they were costly to produce for his client and that the practice on ordering such lists varied between the different Judges of the Dispute Tribunal. Counsel for the Respondent explained that he had submitted a preliminary list of facts, which had been based on those facts of the contested decision, to Counsel for the Applicant for him to state which facts he

wished to dispute. Rather than doing so, Counsel for the Applicant had instead countered by submitting a 67-page list of his own facts to Counsel for the Respondent.

5. The Tribunal stated that, given the parties' numerous factual submissions and to ensure the efficient progress of the proceedings, in particular if calling witnesses, it would require consolidated lists of agreed and disputed facts to be submitted to narrow down the factual issues and disputes. It further noted that it would revert with more detailed guidance thereon.

6. Concerning the Respondent's 31 October 2024 query regarding the scope of the consolidated lists of agreed and disputed facts, the Tribunal notes that, as such, art. 9.4 of its Statute makes no limitation as to what factual submissions the parties may make before the Dispute Tribunal, but rather states that "the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence".

7. In the present case, the Applicant submits that the factual background of the contested decision, including the investigation report, was incorrect and incomplete in that not all relevant witnesses were called during the investigation, not all relevant questions were asked to those witnesses who were indeed called, and the credibility of some of these witnesses was questionable.

8. Regarding the Tribunal's limited judicial review, in the Appeals Tribunal's seminal judgment of *Sanwidi* 2010-UNAT-084, it held that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered" (see para. 40). It therefore falls within the Tribunal's authority to consider the objections stated by the Applicant to the factual background of the contested decision.

9. The Tribunal notes that in the Applicant's amended application dated 22 July 2024 ("the application"), he lists a number of facts and further makes some additional

factual allegations in the appended annex 15. In the reply, the Respondent also sets out a long factual chronology.

10. Accordingly, with the factual submissions already before the Tribunal as point of departure, the Tribunal will order the parties to exchange their respective lists of relevant facts as Microsoft Word documents, and based thereon, list those of the opponent's facts with which they agree in one new Word document and those with which they disagree in another new Word document. Subsequently, they are to share these documents with each other, after which Counsel for the Respondent is to consolidate the relevant lists of agreed and disputed facts into a single document. After consultation and agreement with Counsel for the Applicant, the jointly-signed statement of agreed and disputed facts is to be submitted to the Tribunal.

A hearing to call witnesses

11. In Order No. 093 (NY/2024), the Duty Judge ordered the Applicant to submit "written statements for each of his proposed witnesses setting out what disputed fact(s) each of these witnesses is to give testimony about, also by making reference to the relevant paragraph in the consolidated list of disputed facts". On 7 October 2024, the Applicant requested a postponement of this deadline, which the Duty Judge ultimately suspended until further notice on 26 November 2024 for the assigned Judge to eventually consider the matter.

12. At the CMD, Counsel for the Applicant expressed no objection against providing written statements regarding his witnesses as per Order No. 093 (NY/2024), which Counsel for the Respondent also found would be very useful.

13. Consequently, the Tribunal will order the Applicant to submit these written statements specifying what the individual witnesses are to testify about, after the filing of the jointly signed statement of agreed and disputed facts, and subsequently, the Respondent will be provided the opportunity to comment thereon.

14. Regarding the Respondent possibly calling any witnesses, his Counsel stated that he did not wish to do so but instead intended to cross-examine all the Applicant's witnesses. The Tribunal will, nevertheless, allow the Respondent to reserve his right to call any additional witnesses and will also instruct him, as relevant, to assist the Applicant with coordinating and ensuring the appearance of all relevant witnesses after the Tribunal has determined who is to be heard and when.

15. As for the timing of the hearing, the Tribunal noted that it would need to be held before the end of the Judge's current deployment and preferably in the beginning of April 2025. Both parties expressed their availability to participate in a hearing in the period of 3 to 11 April 2025.

Production of additional written evidence

16. In the application, the Applicant requests that "as per article 18 of [the Dispute Tribunal's] Rules of [P]rocedure, the Tribunal instructs the Respondent to provide written proof that [the Under-Secretary-General for the Department of Management Strategy, Policy and Compliance, "the USG/DMSPC"] actually took the actions and made the decisions communicated in the 22 March 2024 sanction letter. A one line "Recommendation Approved" email from [the USG/DMSPC] to a non-descript email subject line heading is not acceptable proof". The Applicant further requests "any original email from [the Assistant Secretary-General for Human Resources, "ASG/OHRM"] or her office to show when the case was submitted to [the USG/DMSPC] and what it contained. Consequently, the Applicant respectfully requests that the Tribunal orders the production of the full email chain".

17. In the reply, the Respondent submits that the Applicant's "speculation should be rejected in view of the presumption of regularity" and that "[i]n fact, the Applicant appears to even acknowledge that the USG/DMSPC actually approved the recommendation to sanction him".

18. The Tribunal notes that under art. 18.2 of the Dispute Tribunal's Rules of Procedure, the Dispute Tribunal "may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings".

19. The Tribunal further observes that, under the presumption of regularity, it is first for the Respondent to demonstrate with a minimal showing that a contested decision is lawful after which, if the Respondent accomplished this, the Applicant is to rebut this showing with clear and convincing evidence for his case to prevail (see, for instance, the Appeals Tribunal in *Rolland* 2011-UNAT-122, para. 26 and in many subsequent cases).

20. In this regard, the parties agree that one of the basic issues of the case is whether the USG/DMSPC lawfully exercised her discretion when making the contested decision (see Order. No. 093 (NY/2024), para. 10). The question of the USG/DMSPC having actually made the contested decision is therefore also before the Tribunal. Any other written evidence, in addition to the email exchange already on file between the ASG/OHRM and the USG/DMSPC of 21 and 22 March 2024 (annex 6 to the reply), of the USG/DMSPC having taken the contested decision would rest solely in the hands of the Respondent. In *Wamara Tibenderana* UNDT/2025/005, to which the Counsel for the Respondent referred at the CMD, a similar request was apparently made. In response thereto, "To remove all doubt on this issue, the Respondent has submitted email correspondence between the ASG/OHRM and the USG/DMSPC regarding this case. In that correspondence, the ASG/OHRM attaches her recommendation to impose a disciplinary sanction on the Applicant, along with a "detailed analysis in the body to the recommendation." In response, the USG/DMSPC writes "Recommendation approved" (see para. 29) .

21. In conclusion, under the presumption of regularity, in order to minimally show that the USG/DMSPC actually made the contested decision, the Respondent

must therefore provide all additional relevant documentation, if any. If the Respondent does not possess any such further documentation, the Tribunal will decide on this issue on the record already before it in its final judgment.

Anonymity

22. In the application, the Applicant requested "for this case to be anonymized given his own personal circumstances and the nature of the allegations". At the CMD, Counsel for the Applicant reiterated the request of his client, also explaining that because of his client's admitted extramarital relationship with the alleged victim, publicity of the case would be hurtful to his wife and child, as well as to other implicated individuals, including the alleged victim and her husband.

23. In the reply, the Respondent objected to the Applicant's anonymity request. He submitted that the Dispute Tribunal (Judge Sun), "in a comparable case, denied such a similar request (*see* Order [No.] 30 (GVA/2024), [C]ase No. UNDT/GVA/2023/008 (*De Jaegere*)) for reasons of transparency and accountability". That "case also involved sexual harassment" and the "applicant equally referred to the interests of the victim and his daughter".

24. The Respondent further stated in the reply that in Order No. 30 (GVA/2024), the Tribunal "rightly stated that granting anonymity under this argument would set a dangerous precedent to the principles of transparency and accountability, whereby any staff member who has children will be entitled to anonymity". With "respect to any linkage between the Applicant's name and the victim's identity, the Tribunal added that it did not 'believe that the mere mention of the Applicant's last name in these proceedings will be enough to identify her' and the victim's name is habitually anonymized, and measures to protect her identity can be taken in case there is a hearing".

25. Finally, in the reply, the Respondent contended that the "General Assembly recently reaffirmed the principle of transparency to ensure a strong culture of accountability throughout the Secretariat in its resolutions 76/242 and 77/260 of 24

December 2021 and 30 December 2022 respectively". In Order No. 30 (GVA/2024), this led the Tribunal to indicate that, "A deviation from these principles in the internal justice system by means of anonymization requires that an applicant meets a high threshold", and "[l]ike in *De Jaegere*, that threshold is not met in this case".

26. At the CMD, the Respondent restated his objection against anonymity. He observed that the Applicant's submissions regarding the impact on the Applicant's family situation were new, just as he rejected any interest of the alleged victim in anonymity. He further referred to the Dispute Tribunal's judgment in *Wamara Tibenderana* in which the Tribunal had denied the applicant's request for anonymity in a similar case.

27. The Tribunal observes that the Appeals Tribunal in *AAE* 2023-UNAT-1332 set out the current standard for anonymization of judgments issued by the Dispute and Appeals Tribunals. Therein, the Appeals Tribunal held that (see para. 155 and 156, references to footnotes omitted):

> … Absent any order directing otherwise, the usual or standard position has been that the names of the parties are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability and that names should be redacted "in only the most sensitive of cases". The Appeals Tribunal has also previously held that "personal embarrassment and discomfort are not sufficient grounds" for redaction. However, there continues to be concerns raised regarding the privacy of individuals contained in judgments which are increasingly published and accessible online. In our digital age, such publication ensures that individuals' personal details are available online, worldwide, and in perpetuity. There are increasing calls for the privacy of individuals and parties to be protected in judgments.
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> … The Majority of the Appeals Tribunal Judges agree that good cause has been shown in these circumstances as an exception to the general and established principle that parties' names should be included in the Judgment. The circumstances that support the exception include that: albeit extremely serious, the evidence is that this was a single act of established misconduct as opposed to a known pattern of misconduct, and that the Appellant otherwise had a long and

> unblemished career having worked in the Organization since 1992, there is no evidence that the Appellant will re-offend or needs to be deterred in the future, and the gravity of a finding of sexual assault or rape would undoubtedly have a negative impact on his family, who are blameless in this matter. We are also mindful that, in accordance with our jurisprudence, we have not decided this case on the basis of the criminal standard of beyond a reasonable doubt. Further, transparency and general deterrence can be achieved by way of the detailed reasons and outcomes of our judgments. In these circumstances, publication of the Appellant's name would be for more punitive purposes than for transparency. Therefore, after balancing the competing interests, we find that these circumstances support the anonymization of the Appellant's name in the Appeals Tribunal Judgment, and, notwithstanding our concerns about how the Dispute Tribunal proceeded in the issuance of Order No. 166, we affirm the anonymization of the Appellant in [the Dispute Tribunal's] judgments and orders.

28. The Tribunal notes that similar to *AAE*, the present case involves matters, including the admitted extramarital relationship between the Applicant and the alleged victim, that might have a negative impact that goes beyond "personal embarrassment and discomfort" and could raise serious concerns regarding "the privacy of individuals", in particular the blameless family of the Applicant. Thus, the final judgment may likely make extensive references to this extramarital relationship, which, in principle, could remain indefinitely on the Dispute Tribunal's website and therefore in the public sphere. Also as in *AAE*, "there is no evidence that the Appellant will re-offend or needs to be deterred in the future", and publication of the Applicant's name "would be for more punitive purposes than for transparency". The Applicant's appointment has already been terminated through the contested decision, and should the Tribunal uphold this decision, the publication of the name would rather be for "naming and shaming" of the Applicant in the public. Should the application, on the other hand, be granted, the Applicant's and victim's family name and reputation will unjustly be tainted in public as long as the final judgment is accessible on the website of the Dispute Tribunal.

29. With regard to the Respondent's reference to the cases of *De Jaegere* and *Wamara Tibenderana*¸ the Tribunal notes that each case turns on its own facts. Different from these two cases, the question of an admitted extramarital affair is at the core of the present case. Further, the Tribunal notes that in any event, the determinations of the Dispute Tribunal of these two other cases are only of persuasive value to the undersigned Judge (see, in line herewith, the Appeals Tribunal in *Igbinedion* 2014-UNAT-410).

30. Accordingly, the Tribunal will grant the Applicant's request for anonymity of any published written decisions of the Tribunal, noting that all other judicial decisions form part of the confidential casefile (see Practice Direction No. 5 on records of the Dispute Tribunal dated 27 April 2012).

31. At the CMD, the Applicant further requested that any hearing be held behind closed doors without public access (*in camera*). The Respondent noted that if the alleged victim is called, then for her protection, the Applicant should not be present during her testimony.

32. The Tribunal notes that as a point of departure hearings are public unless there are exceptional circumstances in accordance with art. 16.6 of its Rules of Procedure. Also, this is a decision different from anonymization of published judicial decisions, which, unlike the hearing will remain in the public sphere as long as they are publicly available on the Dispute Tribunal's website or elsewhere. Any decision of closing the entire or parts of the hearing will be made by the Tribunal when deciding on the witnesses to appear before the Tribunal in the forthcoming order scheduling the hearing. The parties are therefore to make their submissions thereon. Regarding the protection of certain witnesses, if the hearing of the relevant witness is undertaken virtually via MS Teams, then the Tribunal can simply order the Applicant's camera to be turned off during the witness's testimony so the witness will not have to see and be confronted by him.

33. In light of the above,

IT IS ORDERED THAT:

34. By **4:00 p.m. on Wednesday, 19 February 2025**, the Respondent is to file all additional written documentation other than annex 6 of the reply, if any, concerning the USG/DMSPC having made the contested decision.

35. By **4:00 p.m. on Wednesday, 26 February 2025**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

36. By **4:00 p.m. on Wednesday, 5 March 2025**, the Applicant is to submit written statements for each of his proposed witnesses setting out what disputed fact(s) each of these witnesses is to give testimony about, also by making reference to the relevant paragraph in the consolidated list of disputed facts. If appropriate, this written statement may also be adopted as the examination-in-chief at a potential hearing if the party leading the witness should wish to do so. For each proposed witness, the Applicant is also to indicate whether his or her testimony should be held behind closed door (*in camera*) and also provide reasons for the request.

37. By **4:00 p.m. on Wednesday, 12 March 2025,** the Respondent is to provide his comments on the Applicant's 4 March 2025 submissions.

38. A hearing is tentatively scheduled to be held during the period of 3 to 11 April 2025.

(*Signed*)

Judge Solomon Areda Waktolla

Dated this 14th day of February 2025

Entered in the Register on this 14th day of February 2025

(Signed)
Isaac Endeley, Registrar, New York