



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

LARKIN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 28 March 2010 and registered under case No. UNDT/GVA/2010/078, the Applicant contested the decision by the Chief, Office of Staff Legal Assistance (“OSLA”), Office of Administration of Justice, UN Secretariat, not to disclose a conflict of interest, of which the Applicant claims he became aware in November 2009.

Facts

2. The Applicant entered service at the United Nations in September 2006, as Finance Assistant at the London Branch Office of the United Nations High Commissioner for Refugees (“UNHCR”) on the basis of a fixed-term appointment at the G-6 level, which was extended twice, in December 2006 and March 2007. In April 2007, the Applicant was granted a six-month probationary appointment as Administrative and Finance Assistant. This contract was renewed once until 30 November 2007, after which date the Applicant was separated from service.

3. The Applicant formally contested the non-renewal of his appointment and other related decisions. The four resulting cases were decided upon by Judgments UNDT/2010/108 and UNDT/2010/109, dated 22 and 23 June 2010 respectively.

4. On 22 July 2009, the Applicant contacted OSLA seeking assistance in pursuing his action before the Tribunal. A Legal Officer of OSLA was assigned to one of his cases on 30 July 2009. She prepared a draft application that she submitted to the Applicant, who objected to it by email dated 8 September 2009, and requested that she be replaced by another counsel.

5. On the same day, the Chief, OSLA, phoned the Applicant to discuss the situation. Following that conversation, the Chief, OSLA, emailed him a consent form. The Applicant returned the same signed on 17 September 2009.

6. On 5 October 2009, the OSLA Legal Officer entrusted with advising the Applicant wrote to him: “[The Chief, OSLA,] who is a former UNHCR employee would, with your consent, be willing to approach UNHCR to negotiate and settle some of the issues. Kindly let us know if you are amenable to this suggestion.”

The extended deadline for filing the application relating to the relevant case was 6 October 2009.

7. In the following days, the Chief, OSLA, tried to contact the Applicant, via email and by phone, to follow up on the above proposal. On 19 November 2009, the above-mentioned OSLA Legal Officer wrote to the Applicant requesting him to contact OSLA and noting that should he fail to do so, it would be assumed he no longer required assistance by OSLA and the latter would withdraw as counsel.

8. On 4 December 2009, the Applicant responded complaining in strong terms about the work of OSLA in representing him. He put forward that the submission prepared by OSLA regarding the first of his cases was unsatisfactory and complained that the Chief, OSLA, had told him that if he did not agree, OSLA would refuse to act for him. He further stated that, as for his second case, their “decision to abandon the case [was] a calculated sabotage”. He added that OSLA had refused for no plausible reasons to act in another case of his. Moreover, the Applicant accused the Chief, OSLA, of having “concealed his relationship with UNHCR when he phoned [him] regarding the first case”.

9. On 18 December 2009, the Applicant sent a request for management evaluation to the Management Evaluation Unit (“MEU”), UN Secretariat, concerning “the manner in which the Office of Staff Legal Assistance dealt with [the Applicant’s] case against UNHCR”. By letter dated 28 December 2009, MEU responded that, being a UNHCR staff member, the Applicant should address his request to the High Commissioner for Refugees, and that MEU had no jurisdiction to evaluate the matter in any event.

10. The Applicant filed his application with the New York Registry of the United Nations Dispute Tribunal (“UNDT”) on 28 March 2010. The application was forwarded on the following day to the Geneva Registry of the Tribunal.

11. The Respondent’s reply thereon was filed on 29 April 2010. Further exchanges took place subsequently.

12. An oral hearing on the present case was held on 19 November 2010.

Parties' contentions

13. The Applicant's principal contentions are:

- a. In response to the receivability issues raised by the Respondent,
 - i. The Tribunal has made clear in *Worsley* Order No. 79 (GVA/2010) that OSLA, despite enjoying independence in the day-to-day exercise of its functions, is not really distinct from the Secretary-General;
 - ii. Based on Judgment No. 1875, *in re Natarajan (No. 2)* (1999), of the International Labour Organization Administrative Tribunal, it does not need to be an administrative decision what causes damage to the Applicant to trigger the Organization's liability. It suffices that harm is inflicted to the staff member.
- b. As regards the merits of the case,
 - i. Legal counsel have a duty to disclose conflicts of interest. The Chief, OSLA, decided not to do so. The Applicant has no recollection of the Chief, OSLA, having told him that he previously served with UNHCR;
 - ii. The service provided to the Applicant by OSLA was so "abysmally bad" that its degree of commitment must be questioned. Among other things, his counsel was not aware that he was presenting three cases instead of one, she ignored on a number of occasions his instructions and requests, she was not diligent regarding the deadlines and the Applicant was forced to approve an application which was not to his satisfaction, being threatened to no longer be represented one hour before the deadline for filing one of the applications;
 - iii. The Chief, OSLA, sent a letter to UNHCR "begging for their assistance" a few days before his phone conversation with the Applicant, which he only found out late in November 2009. This is

worse than the non-disclosure of the prior employment of the Chief, OSLA;

iv. Regarding the Respondent's contention of abuse of procedure, the Applicant's allegation of professional impropriety against OSLA officials before the Tribunal has merit and justification. "The conflict of interest is obvious and the disastrous provision of legal advice can be blamed on the lack of commitment arising from the conflict".

14. Based on the foregoing, the Applicant requests:
 - a. Compensation for the damage done to his cases;
 - b. Compensation for the stress and distress inflicted on him;
 - c. An order requiring a solemn undertaking from OSLA that it will not pass to UNHCR information that the Applicant gave on the understanding that it was privileged and confidential.

15. The Respondent's principal contentions are:
 - a. Regarding receivability,
 - i. OSLA is operationally independent, as per relevant sections of ST/SGB/2010/3, which means that it is not part of the hierarchical structure of the Administration in the exercise of its core functions. Claims cannot be brought against the Secretary-General for actions and omissions over which he has not control;
 - ii. OSLA activity consists in providing legal assistance; it does not take administrative decisions. Given the nature of its mandate, it acts as an intermediary and not as a decision-making instance. Claims for prejudicial and injurious conduct that does not arise from an administrative decision are outside the Tribunal's jurisdiction as defined in article 2.1(a) of the Statute;

iii. In this instance, the Applicant characterizes the conduct he contests as an implied decision not to inform him of a potential conflict of interest. “Properly characterized, this is not an administrative decision, but instead an alleged course of conduct, where OSLA is said to have acted improperly by representing him while harboring a potential conflict of interest”;

iv. As recognized in *Syed* UNDT/2009/93, the Applicant had a right to request assistance from OSLA. It is furthermore accepted that OSLA had a duty to act in good faith. However, the foregoing is not determinative of whether he may bring action before the Tribunal. The determinative issue is whether the Applicant is able to identify an individual administrative decision directly affecting his rights;

v. The application does not fall within article 2.1(a) of the Tribunal’s Statute, which sets out the subject-matter jurisdiction of UNDT as including “administrative decisions determinative of rights set forth in the contracts and terms of appointment of staff members”. “It does not incorporate a general jurisdiction over ‘prejudicial injurious conduct’”. The application is thus not receivable.

b. On the merits,

i. The factual allegations in the application are denied. The Applicant was fully informed of the status of the Chief, OSLA;

ii. There is no conflict of interest arising as a consequence of the prior status of the Chief, OSLA, nor should there be perception of such a conflict. The Chief, OSLA, is mandated to maintain independence from the Administration. “The very nature of the Organization requires that the individuals act within discrete departments and working groups and fulfil the mandates of those departments or working groups”;

iii. Article 10.6 of the Tribunal's Statute reads: "Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against the party." A bold allegation of professional impropriety made in an application to UNDT against a UN official, with no supporting evidence, may be considered an abuse of process. Accordingly, it may be appropriate for the Tribunal to award costs against the Applicant.

16. In light of the above, the Respondent requests the Tribunal that the application be dismissed.

Considerations

17. A number of admissibility issues arise with regard to the present application. First, the Respondent claims that OSLA actions and omissions are not attributable to the Secretary-General, who is the sole possible respondent before UNDT. Owing to its independence within the Organization, the Secretary-General is unable to dictate or reverse the conduct of OSLA, nor may he hold OSLA officers accountable therefor. Nevertheless, the Tribunal has already made clear, for bodies endowed with an independent status in general and for OSLA in particular, that such bodies are integrated in the structure of the Organization and, whilst they may not receive instructions from their chain of command in performing the tasks entrusted to them, they are not entirely detached from the Secretary-General's authority (see *Worsley* UNDT/2011/024, *Kunanayakam* UNDT/2011/006, *Comerford-Verzoo* UNDT/2011/005, *Worsley* Order No. 79 (GVA/2010)). In particular, in *Worsley* UNDT/2011/024 the Tribunal found that:

OSLA enjoys functional or operational independence, in the sense that it does not receive instructions from its hierarchy when providing advice to staff members or representing their interests, while remaining administratively subject to the Secretary-General.

18. Having held, therefore, that OSLA decisions may be contested before the Tribunal in principle, the second question is whether the decision at issue can be regarded as an *administrative* decision. The scope of the Tribunal's material

jurisdiction is strictly limited to reviewing administrative decisions, in accordance with article 2.1 of the UNDT Statute, which provides that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... to appeal an *administrative decision* that is alleged to be in non-compliance with the terms of appointment or the contract of employment ... (Emphasis added)

19. In addition, the *travaux préparatoires* of the UNDT Statute show that it had been initially proposed that the Tribunal's competence extend to "prejudicial or injurious conduct" (see A/61/205 and A/62/294). This proposal thus was purposefully turned down by the General Assembly.

20. In sum, the Tribunal is not competent to examine the legality of acts other than administrative decisions. Redress for breaches resulting from different actions or conducts would need to be sought through other avenues as appropriate.

21. The relevant case law has defined "administrative decision" for the purpose of formal contestation of same, as follows:

An "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. (UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003), endorsed *inter alia* in *Tabari* 2010-UNAT-030 and *Schook* 2010-UNAT-013, and *Planas* UNDT/2009/086, *Larkin* UNDT/2010/108, *Elasoud* UNDT/2010/111, *Buscaglia* UNDT/2010/112)

22. In the present case, whereas the request for management evaluation of 18 December 2009 vaguely refers to "the manner in which the Office of Staff Legal Assistance dealt with [the Applicant's] case against UNHCR", which may by no means qualify as a decision, the application precisely indicates that it intends to challenge the "decision by [the] Office of Staff Legal Assistance not to disclose a conflict of interest". To be sure, the Applicant, when specifically questioned thereon by the Tribunal, confirmed at the oral hearing that the impugned decision was that not to disclose the conflict of interest resulting from the fact that the Chief, OSLA, entertained close links with UNHCR, where he had served prior to holding his current position.

23. It is more than doubtful that this kind of omission is a decision producing direct legal consequences, as required by the well-established definition quoted above.

24. Third, assuming that the above-described omission may be construed as an administrative decision, for the application to be receivable, the applicable time limits must have been complied with. Pursuant to staff rule 11.2, paragraphs (a) and (c), a staff member wishing to contest an administrative decision must as a first step submit a request for management evaluation within 60 calendar days from the date on which the staff member received notification of it. The Applicant did not send his request for management evaluation until 18 December 2009, even though he had received an email on 5 October 2009 stating that the Chief, OSLA, was a former UNHCR employee; this means that his request was made some two weeks after the expiration of the relevant deadline and, hence, the application is time-barred. Although the Applicant asserts that he did not become aware of the nature of the relationship of the Chief, OSLA, with UNHCR management until 22 November 2009, when he alleges to have learnt by external sources that “not only was [the Chief, OSLA] on friendly terms with [the Applicant’s] opponents [but] he had actually been pleading with them to voluntarily support his office”, the fact remains that the Applicant became aware of the connection between the Chief, OSLA, and UNHCR on 5 October 2009. Since the Applicant learned about this—in his mind—crucial fact already in October, it is of no relevance at what point he developed the idea that this connection might amount to a conflict of interest.

25. It has to be recalled that the mandatory time limits for contestation run from the moment the concerned staff member has knowledge of the decision in question and that the said time limits are meant to be applied strictly (see e.g., *Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069, *Samardzic et al.* UNDT/2010/019). Against this background, even if the requirement of an “administrative decision” was met, the present application has to be declared as irreceivable *ratione temporis*.

26. While the application fails on receivability, it also has no merits in any event. The alleged conflict of interest does not exist. For a lawyer, it is nothing unusual to fulfil different roles within his or her professional career. The fact that

the Chief, OSLA, has worked for UNHCR before does not necessarily mean that he will be disqualified from handling cases of clients who are contesting UNHCR decisions. Of course, where, in a specific case, a lawyer has already acted for a party, this person, after having changed sides, may not act as lawyer for the other side on the same case without a conflict of interest.

27. With respect to further complaints about the fact that OSLA waited until the day before the already extended deadline for filing one of the applications to inform him that his counsel did not intend to do so, the decision not to pursue a case falls in principle within the sphere of discretion of OSLA (see *Worsley* UNDT/2011/024). In this case, nonetheless, the Applicant was informed thereof scarcely one day before the relevant deadline expired. This way of proceeding triggers the question of whether it is in keeping with OSLA duty, as enunciated in *Worsley* UNDT/2011/024, to communicate to the concerned client within a reasonable timeframe its decision on whether to grant him or her further assistance.

28. After careful study of the circumstances surrounding this case, it stands that the Applicant had at his disposal the submissions and material prepared by his previous counsel at earlier stages of the procedure. In addition, he had a good knowledge of the applicable rules and procedures and the application was intended in any case to be presented in his mother tongue. In light of the circumstances, the Applicant was in a position to lodge his application by himself and to properly go through the procedure. As a matter of fact, he did file his application on time and submitted all arguments he deemed useful; eventually, no actual harm resulted for the Applicant from this situation.

29. Hence, taking into account all these considerations, the Tribunal finds that the Applicant has not suffered a breach of his rights under the Staff Regulations and Rules. However, in this instance OSLA acted at the edge of what is permissible. It came dangerously close to breaching its essential duties.

30. The Tribunal rejects the Respondent's request for costs to be awarded against the Applicant, considering that the condition spelled out in article 10.6 of the Statute—i.e., that the party must have manifestly abused the proceedings before the Tribunal—is not fulfilled. In the present case, the Applicant does not

cross the line of criticizing the course of conduct of the author of the decision at issue. Some extent of criticism is almost indissociable of contestation; therefore, it may not be qualified as an abuse of the procedures that were put in place specifically as formal channels of contestation.

Conclusion

31. In view of the foregoing, the Tribunal DECIDES:

The application is hereby rejected.

(Signed)

Judge Thomas Laker

Dated this 2nd day of February 2011

Entered in the Register on this 2nd day of February 2011

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva