UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/035
Judgment No.: UNDT/2011/204
Date: 30 November 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ONANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

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

Introduction

1. The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) in April 1999 as a French Court Reporter. He worked in that capacity until May 2007 when the Chief of Section recommended that his contract should not be renewed. After some discussions within the section, the Applicant was moved to the Judicial Records and Archives Unit (JRAU) in August 2007. From a budgetary and administrative standpoint, the Applicant however continued to encumber his post with the French Court Reporters Unit even though he performed functions in JRAU.

Procedural history

2. The ICTR, which was established on 8 November 1994 by Security Council Resolution 955, is an *ad hoc* Tribunal with a special and finite mandate. Security Council Resolutions 1503 and 1534 directed the ICTR to initiate a completion strategy which entailed, *inter alia*, a progressive reduction of the Organization's human resources capacity in line with its declining workload. In this regard, the Registrar of the ICTR established an *ad hoc* Staff Retention Task Force on 16 July 2007. That Task Force was to establish criteria which would ensure that the down-sizing or draw-down of staffing levels was "done in the most transparent, consultative and objective manner."

3. Evidence submitted to the Tribunal shows that on 2 April 2008, the Applicant was evaluated by a Staff Retention Committee using a set of criteria established for that purpose. Evidence also showed that the Applicant was evaluated as a Court Reporter and was graded at the bottom of a list of French Court Reporters. It was therefore recommended that his contract not be renewed beyond 31 December 2008.

4. Following an increase in workload at the ICTR, approval was granted by the General Assembly in June 2008 for supplementary funds. The effect of this approval was that the posts which were slated for abolishment in December 2008 and later in June 2009 as part of the completion strategy of the ICTR were allowed to continue as

General Temporary Assistance (GTA) appointments up to September 2009. The position for French Court Reporter encumbered by the Applicant was among those slated for abolition.

5. On 1 April 2009, the Applicant had his contract renewed for a period of six months through to 30 September 2009. Two months later, in June 2009, the Applicant was notified that his contract would not be renewed. He filed an Application for suspension of action of the decision not to renew his contract before the United Nations Dispute Tribunal (UNDT). That Application was granted.

6. The substantive Application was filed on 13 November 2009. The Applicant alleged a lack of due process on the part of the Respondent. It was his case that the reason behind the non-renewal remained unclear and was based on improper motives. He sought a renewal of his contract and damages.

7. The Respondent contended that due process had been followed in the decision not to renew the Applicant's contract and that the said decision was the result of a clear and objective process.

8. On 30 July 2010, the Tribunal issued Judgment No. UNDT/2010/136 in which it was held, *inter alia*, that the Administration's decision not to renew the Applicant's fixed-term appointment beyond 30 September 2009 was not prompted by any improper motive, arbitrariness or other extraneous factors. The Applicant had not proved his assertion that the staff retention guidelines were not followed in arriving at the decision to abolish his post in the Court Reporting Unit. Therefore, the Applicant's due process rights were not violated in the decision not to retain him pursuant to the closing strategy of the ICTR.

9. On 30 July 2010, the Registry of the UNDT in Nairobi transmitted the UNDT Judgment to the Secretary-General, and the Applicant's counsel on record, the Office of Staff Legal Assistance (OSLA).

10. On 9 November 2010, the Applicant filed an appeal to the United Nations Appeals Tribunal (UNAT) against the UNDT Judgment. The Secretary-General filed an Answer on 23 December 2010. The Applicant submitted that his appeal was receivable, even if it was filed after the mandatory 45-day limit because he had not received the UNDT Judgment from the UNDT Registry or from his Counsel. He further claimed that his Counsel at the time had failed to share information with him about the UNDT Judgment or the recourse procedure. On the merits, he further reiterated his argument on the non-renewal of his contract and the lack of due process.

11. On 8 July 2011, the UNAT issued Judgment No. 2011-UNAT-157 in which it held that the appeal was not receivable as it was time-barred because it was not filed within 45 calendar days of the receipt of the Judgment as required. The UNAT had found that the Applicant was perfectly aware since 5 August 2010, of the need to file his appeal before the end of 19 September 2010. The Tribunal further held that there was no doubt that the Applicant was aware of the content of the UNDT Judgment, posted on the UNDT website as early as 2 August 2010.

12. On 9 March 2011, the Applicant sought management evaluation of the decision not to communicate to him Judgment No. UNDT/2010/136 by the OSLA ("the impugned decision"). On 25 April 2011, Management Evaluation Unit (MEU) replied by stating that:

> [t]he Secretary-General has taken the position that he cannot be held liable for acts or omissions by OSLA, a unit of the Office of Administration of Justice, an independent entity, in connection with the performance of its operational mandate…Therefore the recommendations or determination made by such an independent entity do not constitute administrative decisions. In light of the foregoing, the Management Evaluation Unit has no jurisdiction to evaluate the subject matter of [the Applicant's] request.

13. The Applicant subsequently filed the present Application on 21 July 2011. It was served on the Respondent on the same date. The Respondent submitted that

> In order to reply to the Application, the Respondent has sought comments from OSLA. However, OSLA is concerned that in providing comments it will breach the principle of lawyer-client privilege, particularly in light of Order 263 (NY/2010) which provides *inter alia*:
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> > Counsel must bear in mind that even in instances when information about legal representation, sought from the other party's former counsel, may be of relevance to the case—and these instances will be rather limited—such enquiries must be directed to the Tribunal for determination as to propriety, permissibility, appropriateness, and relevancy.

14. On 1 August 2011, the Respondent filed a request for clarification and extension of time. The Respondent sought clarification as to whether the following conclusions were correct:

> 4. The Respondent submits that it is appropriate for OSLA to provide comments and doing so would not breach the principle of lawyer-client privilege. Specifically, the Respondent submits that the present case differs from the circumstances in the case concerning Order 263 in the following important respects:
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> > (i) The Applicant has waived privilege by disclosing the details of his legal representation by OSLA. Consequently, comments from OSLA could not amount to a breach of privilege.
> >
> > (ii) In the present case, the Applicant has put the representation provided by OSLA in issue. Comments from OSLA are required to defend his claim. In these circumstances it is essential that OSLA would be permitted to provide comments to the Respondent.

15. Furthermore, the Respondent requested clarification as to whether OSLA could provide comments in relation to the Applicant's submissions. Since the need for clarification had precluded OSLA from providing comments to the Respondent, he requested an extension of time to file the reply.

16. On 8 August 2011, the Tribunal directed the Parties to submit their full submissions on the issues backed by supporting documentation, if any, by or before 15 August 2011.

17. On 12 August 2011, the Applicant filed his observations to the Respondent's request for clarification and extension of time. Applicant submitted that:

a. The Respondent has not provided precise and sufficient justification in his request for confidentiality nor to the nature of that information;

b. There is no information concerning any matter under privilege as the question is simply whether or not Counsel had communicated the Judgment to the Applicant;

c. The Respondent has additionally not provided any exceptional circumstances for the request for an extension of time.

18. On 17 August 2011, the Tribunal issued Order No. 099 (NBI/2011) requesting OSLA to inform the Tribunal as a matter of fact and, without disclosure of details, regarding any communication that might have taken place between the Applicant and OSLA lawyers as to whether the Applicant had made a request to have a copy of Judgment UNDT/2010/136.

Applicant's submissions

19. The Applicant's submissions can be summarized as follows:

20. The MEU does not contest the failure to communicate the UNDT Judgment but rather evaded responsibility to assess the matter by arguing that OSLA is an independent entity as well as the fact that the contested decision does not qualify as an administrative decision when it concluded that it had no jurisdiction.

21. The Applicant further states that, despite his awareness of the Judgment on the UNDT website, the fact that he has to date not received the said Judgment constitutes an obstruction to justice and a denial of justice.

22. Counsel, being aware of the time limits for submissions of an appeal as per art.11.5 of the Statute of the Tribunal as well as art. 7.1(a) of the Rules of Procedure of the Appeals Tribunal chose instead not to transmit the UNDT Judgment to the Applicant. This decision was taken unilaterally by Counsel negatively impacting on the Applicant solely.

23. As a result of the failure to communicate the Judgment to the Applicant, the UNAT was unable to adjudicate the matter on the merits and consequently formed an opinion based on incomplete and inaccurate knowledge of the dispute.

24. Furthermore, Counsel did not faithfully serve the interests of the Applicant in protecting his rights. Counsel's functions were therefore performed in disregard of the judicial rules, ethics and professionalism. Counsel is also required to inform the Applicant on all facets and events regarding his or her case, forming part of Counsel's ethical and professional obligations. This was not done as Counsel failed to communicate the Judgment to the Applicant causing him to pursue no other course of action than to appeal to the UNAT.

25. The Applicant further avers that he unjustifiably lost his employment after eleven years with the ICTR without having even benefitted from the conversion of his contract to a permanent appointment with the United Nations.

26. The Applicant therefore requests the Tribunal to find in his favor and therefore reinstate him and/or direct the payment of compensation in proportion to the damage he has suffered and for the loss of his employment.

Issues

27. The Tribunal formulates the following issues for consideration in this case:

a. Whether the contested decision raised by the Applicant constitutes an administrative decision and if not whether it impacted in any way on the contract of employment of the Applicant;

b. Service of Judgment No. UNDT/2010/136 and the general rule as to service of Judgment;

c. Client/Lawyer Privilege.

Consideration

Whether the contested decision constitutes an administrative decision

28. The Applicant contests the non-communication of Judgment No. UNDT/2010/136 by OSLA and submits that his ability and right to Appeal to the UNAT in a timely manner was defeated. MEU held that the Secretary-General cannot be held liable for acts or omissions taken by OSLA as it is an independent entity and therefore do not constitute administrative decisions for the purposes of staff rule 11.2(a). Does the non-communication by OSLA of the UNDT Judgment to the Applicant constitute an administrative decision?

29. The first issue is whether OSLA's actions or omissions can be deemed those of the Secretary-General and therefore the Administration. As a matter of course, the Tribunal has held that "for bodies endowed with an independent status in general and for OSLA in particular…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."[1]

30. ST/SGB/2010/3 (Organization and terms of reference of the Office of Administration of Justice) states that "[OSLA] is headed by a Chief who, without prejudice to his or her responsibility to provide assistance to staff members in an independent and impartial manner, is *accountable to the Executive Director*" (Emphasis added) who in turn reports to the Secretary-General with regard to the work of the Office of Administration of Justice (OAJ).[2] The argument therefore that the Secretary-General cannot be held liable for OSLA's acts or omissions is without

[1] *Larkin* UNDT/2011/028 at para 17. This was also found in *Worsley* UNDT/2011/024 where it was held in para 25 that "notwithstanding its special status, OSLA belongs to the UN Secretariat and, in fact, to the 'core UN administrative machinery'. As such it 'might hardly be regarded as a party distinct from the Secretary-General." Also in *Kunanayakam* UNDT/2011/006 and *Comerford-Verzuu* UNDT/2011/005 where it was found that the Secretary-General remained administratively accountable for the acts of the Office of Internal Oversight Services (OIOS).
[2] Section 3.1 of ST/SGB/2010/3 (Organization and terms of reference of the Office of Administration of Justice).

merit as it is clear that the said entity is part and parcel of the Secretary-General's authority. 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 interest, while remaining administratively subject to the Secretary-General."[3] Therefore OSLA's decisions may be challenged to the extent that they are strictly administrative decisions and are not related to the giving of advice to litigants or the conduct of cases before the UNDT. It must be noted however that the scope and jurisdiction of the Tribunal is not limited to the author of the decision but most importantly to its nature.

31. Article 2.1 of the Statute of the UNDT provides that the Tribunal is "competent to hear and pass judgment on an application…to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment." The former UN Administrative Tribunal held in Judgment No. 1157 *Andronov* (2003) at para V that " administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences."[4] In *Teferra*[5] this Tribunal stated the following:

> Given the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken.[6]

32. The direct consequences therefore stemming from such administrative decision, as per art. 2.1 of the Statute of the UNDT would as a matter of course relate to the Applicant's terms of appointment or his contract of employment. The Applicant therefore bears the onus to show that (1) the contested decision was firstly taken by Administration; (2) that it was taken unilaterally and was of individual

[3] *Worsley* UNDT/2011/024 at para 28.
[4] This was upheld in former UN Administrative Tribunal Judgment No 1487 at para XX.
[5] Judgment No. UNDT/2009/090. Confirmed in *D'Hellencourt* UNDT/2010/018.
[6] In the case of *Andati-Amwayi* Judgment No. UNDT/2010/010, the Tribunal made reference to the case of Teferera at para 40.

application; and that (3) it directly impacted on his appointment or contract of employment.

33. As stated above, OSLA is an integral part of the Secretariat of the United Nations and that its decisions are taken under the umbrella of the Secretary-General.

34. The Tribunal concludes that the decision not to communicate a copy of the judgment was an administrative decision within the meaning to Article 2.1 of the Statute of the Tribunal. For a successful challenge of a decision by the administration, an applicant must not only establish the administrative nature of the decision but also that it directly impacts on his/her appointment or contract of employment.

35. The Applicant avers that the contested decision had impacted adversely on his contract in that he was unable to file a timely appeal against the first instance judgment. In fact, his appeal, in Judgment No. 2011-UNAT-157, was time-barred and the Appeals Tribunal found no need to examine his case on the merits. The Applicant therefore argues that as a result of the present contested decision, the non-renewal of his fixed-term appointment remained in force, as was held in Judgment No. UNDT/2010/136. He was unable to appeal and consequently had remained unemployed without any form of recourse available to him.

36. In order to establish that the administrative decision impacts on the contract of employment or terms of employment, there must exist a direct causal link between the decision and the resulting effect on his appointment. The burden of proof lies on the Applicant to demonstrate clearly that the non-communication of the UNDT Judgment and his inability to appeal to the UNAT in a timely manner resulted in the loss of his employment. The non-communication of the Judgment to the Applicant must be the direct cause in the chain of the events that led to the loss, without any intervening factor that would break that chain.

37. The UNDT refers to UNAT Judgment 2011-UNAT-157 at para 13 and 14 states:

> 13. In an e-mail dated 2 August 2010, [the Applicant] asked his Counsel…of OSLA, for an update on his application before the UNDT. About an hour later, [the Applicant] e-mailed [Counsel] to inform her that he had found the UNDT Judgment posted on the UNDT website. In that e-mail, [the Applicant] asked [Counsel] for advice on how to proceed.
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> 14. On 3 August 2010, [Counsel] informed [the Applicant] of the issuance of the UNDT Judgment which was not in his favor and encouraged [the Applicant] to accept the Judgment. [The Applicant] disagreed. On 5 August 2010, he e-mailed [Counsel] expressing his wish to appeal the Judgment and asking her for assistance. On 5 August 2010, [Counsel] stated to [the Applicant] that although he had every right to appeal, neither she nor OSLA would be in a position to assist him in appealing.

38. The UNAT has already found that the Applicant was aware of the Judgment which was not in his favor as early as 2 August 2010 and 3 August 2010 when he was told, also, that OSLA would not assist him in appealing the Judgment. The UNAT Judgment further stipulated that "[the Applicant] was perfectly aware, since 5 August 2010, of the need to file his appeal without OSLA's assistance before the end of 19 September 2010" which he failed to do.

39. The Applicant's awareness of the Judgment constitutes that intervening factor that breaks the *causal* nexus between the non-communication of the Judgment and the impact on his employment. Once he became aware of the judgment it was for him to take steps to file his appeal in a timely manner.

40. Though the Tribunal finds that the contested decision is an administrative one, it holds that such a decision had no direct impact on the contract of employment or the terms of his appointment of the Applicant. To the extent that this Tribunal finds that a decision of OSLA, not related to advice or litigation, is an administrative decision, a practical and ethical issue arises namely whether it would be appropriate for OSLA to be represented by the Administrative Law Section (ALS) of the Office of Human Resources Management (OHRM) of the Secretariat. To allow representation of the Respondent by ALS where the cause of action is related to OSLA would appear to be an incestuous situation that the Organization should seriously consider.

Service of Judgment No. UNDT/2010/136

41. As a rule, a Judgment is served on the Parties by a court of law. The word parties are not defined in the Statute or Rules of Procedure of the Tribunal. The parties as a rule would be the Applicant/Plaintiff and Defendant/Respondent. In the present case, the Judgment was served on 30 July 2010 on Counsel for the Applicant and Counsel for the Respondent following the practice then prevailing. In the case of the Respondent who is party to a case, service on his counsel would be sufficient as Counsel, who operates in a team that is well structured, organized and managed would have no difficulty or impediment in advising the Respondent of any course of action that a Judgment against him requires and to take the necessary steps in that direction.

42. The situation is different in the case of a staff member. The staff member is the party in this case and not counsel or any other representative. A staff member who is unrepresented would be informed of the Judgment. A staff member who is represented should equally be informed of a judgment even though a copy of the judgment is served on his/her counsel or representative. In the present case, the judgment was served on counsel for the Applicant in, no doubt, the genuine and sincere belief that it would be brought to the attention of the Applicant.

43. Unfortunately this was not so in this case. It was following the Applicant's enquiry into the status of his case, on 3 August 2010, that Counsel for the Applicant informed him that the Judgment was not in his favor and he was encouraged to accept the ruling of the UNDT an advice the Applicant disagreed with. He expressed his wish that he wanted to pursue an appeal on 5 August 2010, approximately 40 plus days before the deadline for filing an appeal to the UNAT.

44. A case is not determined until the deadline for an appeal is reached or an appeal is filed and determined. To be in a position to appeal a judgment given by a first instance tribunal, a party must be made aware of it. It is the fundamental right of

a person to have access to a court of law and to pursue all remedies legitimately open to him or to her. This, a party can only do, if he or she is made aware of decisions taken in his or her case.

45. The evidence shows in fact, that the Applicant became aware of the Judgment and its contents as early as 5 August 2010. But he failed to take the necessary steps to prosecute this appeal within the prescribed delay. It cannot be said, notwithstanding the fact that he wasn't served a copy of the judgment, that he was not aware of it and therefore suffered prejudice.

Privilege

46. When the Respondent was communicated the Application, he sought clarification from OSLA as to whether in fact the Applicant did request a copy of the Judgment. OSLA's answer was that this was privileged in view of the relationship of lawyer/client.

47. The Tribunal disagrees. What the Respondent was seeking was not any information about the substance of any advice or information exchanged between counsel and the Applicant in pursuance of advice or litigation. What Respondent was seeking was factual information whether there was any request to obtain the judgment. The general rule in matters of privilege, affecting the client/lawyer relationship is that any information or communication that passes between them by way of an advice or with a view to litigation would be privileged.

48. In this connection the Tribunal refers to the following:

> The essence of the privilege is that the client may avoid disclosure of his instructions to his lawyer and of his lawyer's advice to him: the lawyer may still be compelled to give evidence of facts directly perceived by him, even though his perception of them only occurred in the course of an interview with his client. Thus he may be required to admit the fact of having met his

> client and to give evidence about the physical or mental condition of his client or about his handwriting.[7]

49. In the present case, to reveal as a fact whether the applicant did make a request to get a copy of the Judgment could not be said to be protected by the client/lawyer privilege.

Findings and Conclusion

50. In view of the foregoing;

51. The Applicant's case is clearly an abuse of the process of the court and is completely devoid of merits.

52. The Application is therefore REJECTED in its entirety.

(*Signed*)

Judge Vinod Boolell

Dated this 30th day of November 2011

Entered in the Register on this 30th day of November 2011

(*Signed*)

Jean-Pelé Fomété, Registrar, Nairobi

[7] Keane, Adrian "The Modern Law of Evidence" Third Edition, Butterworths & Co. Publishers (1994) at page 458-459.