



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/052

Judgment No.: UNDT/2014/127

Date: 21 October 2014

Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

STAEDTLER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Saidou N'Dow, UN-Habitat

Introduction

1. The Applicant, a former staff member of the United Nations Human Settlement Programme (UN-Habitat), contests the decisions of the Office of Staff Legal Assistance (“OSLA”) of 5 November 2013 declining him legal representation.

Procedural background

2. The application was filed on 30 December 2013 at the Nairobi Registry of the Tribunal; it was served on the Administrative Law Section (“ALS”) of the Office of Human Resources Management on 7 January 2014, with a deadline of 6 February 2014 for submission of the Respondent’s reply.

3. ALS rejected service of the application arguing that the Secretary-General was represented by Counsel at UN-Habitat in cases brought by former or current staff members of UN-Habitat.

4. On 8 January 2014, the Nairobi Registry served the application on UN-Habitat.

5. By motion filed on 5 February 2014, UN-Habitat sought the Tribunal’s directions as to who the proper Respondent should be.

6. On 14 March 2014, the Tribunal held that the application was correctly served on ALS on 7 January 2014.

7. On 3 April 2014, the Respondent, by way of counsel for UN-Habitat, filed the Respondent’s reply following which on 14 April 2014, the Tribunal ruled that the Respondent’s submission of 3 April 2014 was not receivable, as it had been filed out of time without seeking the Tribunal’s prior permission.

8. On 15 April 2014, the Respondent filed a motion seeking the Tribunal’s permission to take part in the proceedings. The Respondent expressed his sincere apologies for his procedural error and late filing of the reply, which he stated were

due to extensive consultations to identify the entity who should represent the Secretary-General in the present case.

9. On 16 April 2014, the Tribunal acknowledged receipt of the Respondent's submission and granted the Applicant until 25 April 2014 to file a response to the Respondent's motion. The Applicant responded on 24 April 2014, requesting the Tribunal to reject the Respondent's motion and to strike the Respondent's submission of 3 April 2014 from the record.

10. On 12 June 2014, the Nairobi Registry wrote to the parties, seeking their views on a transfer of the case to Geneva. In the absence of a reply from both parties the Tribunal ordered that the case be transferred to the Geneva Registry of the Tribunal where it was registered under Case No. UNDT/GVA/2014/052 and assigned to the undersigned Judge.

11. By Order No. 116 (GVA/2014) of 6 August 2014, the Tribunal granted permission to the Respondent to take part in the proceedings and accepted the Respondent's reply as an official part of the Tribunal's record. It further ordered the parties, *inter alia*, to file jointly a concise, chronological statement of agreed facts.

12. On 8 August 2014, the Applicant filed a motion requesting that the Tribunal reconsider its justification for rescinding its initial ruling and permission to respond to the Respondent's reply should the Tribunal uphold Order No. 116 (GVA/2014).

13. On 13 August 2014, the Respondent replied that the Applicant's request should be denied and submitted that his filing was frivolous and vexatious.

14. On 18 August 2014, the Applicant filed a motion for guidance to Order No. 116 (GVA/2014), to which the Respondent responded the same day. In their submissions, both parties stressed, *inter alia*, that they were not able to reach agreement on a joint statement of agreed facts as requested by the Tribunal.

15. On 19 August 2014, the Tribunal ordered, *inter alia*, that the Applicant's motion for reconsideration and for permission to respond to the Respondent's reply be rejected and that the matter be decided on the papers.

16. By motion dated 20 August 2014, the Applicant requested guidance from the Tribunal as to how he was to comply with Order No. 116 (GVA/2014) concerning "[identification of] the remedies he is seeking from the Tribunal in this case and the legal and factual basis for those remedies".

17. On 21 August 2014, the parties were ordered to comply with outstanding orders of Order No. 116 (GVA/2014).

18. The Respondent responded that he did not intend to submit additional documents and that he was amenable to the matter being determined on the papers.

19. The Applicant informed the Tribunal that he did not intend to submit additional relevant documents and that he did not request an oral hearing of the case; he also identified the legal remedies he was seeking.

Facts

20. The full factual background of this application concerning events that occurred during the Applicant's employment between 13 September 2011 and 31 December 2012 are contained in judgments *Staedtler* UNDT/2014/057, UNDT/2013/179 and UNDT/2014/058. The following facts are relevant to the present application.

2012

21. The Applicant first contacted OSLA on 14 October 2012 following discussions with the United Nations Ombudsman in Nairobi. He provided OSLA with an overview of his contractual situation, and referred, *inter alia*, to what he qualified as discovery of gross violations of United Nations procurement and management rules and regulations, his withdrawal from Libya and the "termination of his contract". He attached various documents to his email and sent

an additional email the next day. OSLA acknowledged receipt of the emails on 15 October 2012.

22. Between 15 October and 6 December 2012, the Applicant made several more requests to OSLA for legal advice and updates relating to the above matters. Some of the advice he sought related to clarifying legal issues as a basis for discussions he was having with the Ombudsman.

23. During the above period, OSLA representatives provided substantive legal advice to the Applicant on each issue, including the decision not to renew his contract as from 31 December 2012. They also had a number of phone conversations with him.

24. On 6 December 2012, OSLA wrote to the Applicant advising him that following an analysis of his situation no cause of action against UN-Habitat—with a reasonable prospect of success—could be identified. This determination also included his request for filing a suspension of action to challenge the decision not to renew his contract.

25. OSLA informed the Applicant that it was unable to assist him should he wish to pursue his proposed challenges. It also conveyed to the Applicant that representation by OSLA was not a prerequisite for either a request to file a request for management evaluation or an application to the UNDT, and that he could either represent himself or instruct private counsel at his own expense.

2013

26. On 20 May 2013, the Applicant filed an application before the Tribunal challenging:

- a. his performance evaluation for the period 2011-12, specifically “the decision of the Management Evaluation that the issue of the Second Reporting Officer’s comments in the Applicant’s E-PAS” is time barred;
- b. the decision not to allow him to provide comments on his mid-term review of the cycle 2012-13;

c. the decisions of the Ethics Office that the Applicant's reports were not a protected act pursuant to ST/SGB/2005/21, and that he was not subject to retaliation for making the reports; and

d. UN-Habitat decision not to renew his fixed-term contract beyond 31 December 2012.

27. The application was registered under Case No. UNDT/NBI/2013/21 and re-assigned to the undersigned Judge on 13 October 2013 ("case 1").

28. On 30 August 2013, the Applicant filed an application before the Tribunal, registered under Case No. UNDT/NBI/2013/061, against the decisions:

a. not to disclose the documentation of the process leading to and supporting the administrative decision not to include him in a professional roster;

b. not to disclose the membership of the Central Review Body; and

c. not to include him in a professional roster.

29. This case was re-assigned to the undersigned Judge on 28 October 2013 ("case 2").

30. On 31 October 2013, the Tribunal issued Case Management Orders No. 235 (NBI/2013) in case 2 and No. 240 (NBI/2013) in case 1, "for the fair and expeditious management of the case[s]" and to advise the Applicant to seek legal counsel for the conduct of both cases. In its orders, the Tribunal stated that "Information on legal assistance is available at [OSLA website]" and it also served the orders to OSLA to facilitate the process.

31. On the same day, the Applicant sent the two orders to OSLA. He asked whether OSLA "[was] now prepared to provide [him] with fair and comprehensive legal representation in the best interests of [him] as former staff member." He referred to the exchanges with OSLA in 2012 which he described as "questionable history" and requested that "an experienced OSLA staff member who had not yet been involved in his case" be appointed.

32. On 4 November 2013, a Legal Officer who had not dealt with the Applicant's case in 2012, asked him to provide OSLA with the applications and replies in the two cases along with all attachments, submissions filed by the parties and orders of the Tribunal. He said that he had reviewed the approximately 50 documents and 200 pages provided by the Applicant to OSLA in 2012, but needed these further documents to properly assess his request. The Applicant sent him the two relevant UNDT case files.

33. On 5 November 2013, the Legal Officer wrote to the Applicant having completed his review of the documentation in both files. He advised him that OSLA agreement to represent a staff member is subject to determining whether a case has a reasonable prospect of success with their representation. If OSLA determines that it does not, then any such representation is deemed to not be of assistance, and, therefore, declined.

34. The OSLA Legal Officer confirmed to the Applicant that OSLA concluded that representation would not be of assistance, and shared with the Applicant a detailed assessment of the two cases.

35. The OSLA Legal Officer also stated that the assessment had been done independently of that undertaken in 2012 by two other OSLA Legal Officers and that it had been reviewed by the Chief, OSLA. He said that OSLA did not foreclose the possibility of focused advice with respect to particular legal, procedural or evidentiary matters, but that it was unable to represent the Applicant at this time.

36. Finally, noting that the Applicant may have been awaiting for OSLA review to begin the steps required in the Case Management Orders, the OSLA Legal Officer suggested to the Applicant to consider seeking an extension of time from the Tribunal to comply with those orders. In closing, the OSLA Legal Officer stated to the Applicant that he "would be happy to speak to [him] to discuss any of these issues".

37. On the same day, the Applicant responded with his analysis with respect to the two cases, and had a phone conversation with the OSLA Legal Officer on 7 November 2013.

38. Several email exchanges ensued between the Applicant and the OSLA Legal Officer, in which the latter provided the Applicant with general information and case law on four areas of law relevant to the Applicant's cases.

39. On 12 November 2013, the Applicant said that he felt more "elaborated suggestions" were needed in his case and asked whether OSLA was willing to represent him in case 2.

40. The OSLA Legal Officer responded on the same day, reiterating that OSLA had declined assistance twice in case 1 and could not participate in combined cases. He noted that case 2 itself was "tenuous".

41. By email of 13 November 2013, the Applicant again requested more elaborated suggestions for his legal arguments in case 2. The OSLA Legal Officer responded on the same day that he could only respond to specific, legal or procedural questions.

42. Further email exchanges ensued in which the Applicant continued his requests for advice. The OSLA Legal Officer responded on 13 November 2013 by reiterating that "the offer stands to provide 'focused advice with respect to particular legal, procedural or evidentiary matters'".

43. On 22 November 2013 (case 2) and 25 November 2013 (case 1), respectively, the Applicant advised the Tribunal of OSLA rejection of his request for legal representation in both cases, and asked it to instruct the Registry to remove OSLA from the distribution list linked to his two cases.

44. On 3 December 2013, the Applicant submitted a request for management evaluation of OSLA decisions of 5 November 2013 to decline legal representation in cases 1 and 2. He filed the present application on 30 December 2013.

45. In a preliminary Judgment on receivability concerning case 2, *Staedtler* UNDT/2013/179 of 24 December 2013, the Tribunal found that the application in respect to one of two posts was not receivable. It found that the application concerning the remaining post was receivable. The undersigned Judge rejected case 2 on the merits, by Judgment *Staedtler* UNDT/2014/058 of 30 May 2014.

46. By Judgment *Staedtler* UNDT/2014/057 of 30 May 2014 on case 1, the undersigned Judge found that:

- a. the Applicant's claim relating to his performance evaluation for the period 2011-2012, and "the decision of the Management Evaluation that the issue of the Second reporting Officer's comments in the Applicant's E-PAS" was not receivable;
- b. the Applicant's claim on the decision not to allow him to provide comments on his midpoint review of the cycle 2012-2013 was moot and was to be dismissed;
- c. the Applicant's challenge to the Ethics Office finding that his reports were not a protected act pursuant to ST/SGB/2005/21 was to be dismissed; and
- d. the Applicant's claim in respect of UN-Habitat's decision not to renew his fixed-term contract beyond 31 December 2012 was not receivable.

47. The undersigned Judge therefore dismissed in its entirety the application concerning case 1. This judgment has been appealed to the Appeals Tribunal.

Parties' submissions

48. The Applicant's principal contentions are:

- a. His request for management evaluation and his application are directed against the two OSLA decisions of 5 November 2013 and not against its decision of 6 December 2012;

- b. The contested decision with respect to both cases was substantively irregular since the Organization failed to provide him with valid supporting reason to decline representation;
- c. OSLA admissions, including its offer to give “focused advice with respect to particular or evidentiary matters”, show that the decisions not to represent the Applicant were not justifiable on the basis of “any prima facie lack of merits” of his cases;
- d. OSLA misrepresented facts and corresponding case law and set a “mysterious threshold for the requisite merits of a case as prerequisite for OSLA to provide legal representation”; Orders No. 240 (NBI/2013) and No. 235 (NBI/2013) indicate that the Tribunal was of the view that the Applicant was in need for professional legal representation and that it found sufficient merits to both his cases; to consider otherwise would imply that the Orders constituted “a deliberate act of wasting OSLA resources”;
- e. OSLA decision to take on a case or not must be made on the basis of facts and sound judgment and OSLA has no discretionary authority in this respect;
- f. The chronology shows that OSLA assessment of 5 November 2013 was not made with due diligence, hence lacked good faith and constitutes a violation of his rights to fair dealing and respect for his dignity; in fact, OSLA did not properly consider the issues that had arisen since he had last consulted it in 2012;
- g. The decision with respect to case 1 constitutes an abuse of authority, and was based on personal prejudice and bias since, in 2013, OSLA wanted to defend the decision it had made in November 2012; already the refusal of legal representation in 2012 constituted an act of abuse of authority; both the rejection of legal representation in 2012 and 2013 are “part of the institutional retaliation campaign” he was subjected to after he reported prohibited activities in the Libya programme;

h. With respect to case 2, the decision was biased since OSLA “was guided by its own interest at stake concerning case [1]”, for which it had previously declined assistance, which was a questionable decision; further, with respect to case 2, OSLA argument that it would not be in the Applicant’s interest to be represented by OSLA since it declined representation in case 1 cannot stand since he had told OSLA on 5 December 2013 that he had already informed the Tribunal in December 2012 about OSLA rejection to represent him in the latter case;

i. The irregularities damaged his career and caused him severe emotional damage, requiring compensation; the fact that he, as a person without legal training, had no professional legal representation had an impact on his finding new employment;

j. He requests adequate compensation in case of a negative or partially negative judgement in both cases, as a result of OSLA denial to represent him.

49. The Respondent’s principal contentions are:

a. The application, as far as it is directed against the decision of 6 December 2012, is time-barred; that decision constituted a correct exercise of discretion on the part of OSLA; the Respondent does not contest the receivability of the application as far as it is directed against the decisions of 5 November 2013;

b. The burden of proof that the decision was substantively irregular, biased, constituted an abuse of authority and was an unlawful exercise of discretion lies on the Applicant;

c. OSLA carefully examined the Applicant’s cases and concluded that they had little chances of success; he was given the opportunity to respond to OSLA assessment and he was given appropriate reasons on why OSLA decided not to represent him;

- d. In some of his communications with OSLA, the Applicant himself expressed his thanks and satisfaction with the advice received; his request for legal advice was given full and careful consideration by several Legal Officers and the Chief, OSLA, who all found that the cases lacked merit; therefore, the decision was justified;
- e. Though it declined to represent him, OSLA continued to provide the Applicant with further assistance and focused advice with respect to his cases through lengthy communications in writing and phone conversations; this defeats any allegation of bad faith or improper motive and shows, on the contrary, that OSLA went beyond its duty;
- f. The jurisprudence confirmed that OSLA disposes of broad discretion in deciding on whether it represents a client or not; while not unfettered, the discretion was not abused in the case at hand;
- g. OSLA has only a duty of assistance and staff members a right to it, which does not imply an obligation or a right to legal representation before the Tribunal;
- h. The application should be rejected in its entirety.

Consideration

Receivability

50. A decision by OSLA not to represent a client falls within the jurisdiction of the Tribunal. It is an administrative decision subject to review because the services provided by OSLA and the manner in which the representation is implemented can have an impact on a staff member's terms of appointment (*Worsley* 2012-UNAT-199). Although the Respondent submitted that insofar as the application relates to decisions in 2012 it is time barred, it is clear from the Applicant's submission that although he regards the OSLA 2012 decision to be flawed, the present application is exclusively directed against the decision of 5 November 2013 and not any earlier decision in 2012.

51. The Tribunal finds that the application is not time-barred and is receivable.

Merits

52. The right to legal assistance to staff members provided for in staff rule 11.4(d) includes the ability conferred by art. 12 of the Tribunal's Rules of Procedure for counsel from OSLA to present a case to the Tribunal. This ability to present a case, however, does not mean that a staff member has a right to be represented in written pleadings or hearings at the Tribunal by OSLA.

53. This was stated in *Worsley* UNDT-2011-024 as follows:

46. ... [t]his right is enshrined in staff rule 11.4(d). It establishes that “[a] staff member shall have the assistance of counsel through the Office of Staff Legal Assistance if he or she so wishes ... in the presentation of his or her case

47. It may be observed that, in contrast with a clear affirmation of the right for staff members to receive “assistance” by OSLA, these provisions do not recognize a right to be represented by it. This idea is comforted by reading General Assembly resolutions 62/228 and 63/253, for these key resolutions, in describing the Office's *raison d'être* and mandate consistently refer to legal “assistance” but omit any mention of “representation”.

65. This principle was reiterated by the Appeals Tribunal in *Worsley* 2012-UNAT-199, as follows: “[w]e affirm the UNDT Judgment that the right of staff members to receive assistance by OSLA does not amount to a right to representation”. The Appeals Tribunal also added that the discretionary power of OSLA not to represent a person is not unfettered.

54. The Tribunal rejects the Applicant's contention that OSLA has no discretionary authority. It has the discretion to decide if it should represent a client or not. However, there are limits to that discretion as noted by the Appeals Tribunal. These are the usual limits attached to the exercise of discretion in administrative law; the discretion must not be exercised in an arbitrary manner, it must not be motivated by extraneous considerations. As the Appeals Tribunal held in *Asaad* 2010-UNAT-021, referring to Judgment *Hamad* No. 952 (2000) of the former Administrative Tribunal:

[t]he Administration's discretionary authority is not unfettered ... the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration ... [and] its decisions must not be based on erroneous, fallacious or improper motivation.

55. The Applicant's cases were considered by two OSLA Legal Officers and reviewed by the Chief, OSLA, during 2012 before they became the subject of formal applications to the Tribunal.

56. OSLA gave a considerable amount of advice to the Applicant while he was engaged in discussions through the Ombudsman and still a staff member facing separation. It gave the Applicant's cases considerable attention. Several Legal Officers looked into the cases and decided that OSLA would not represent him. These interactions form the background to what occurred in 2013. Before the contested decision was taken in November 2013 a full review of the cases was undertaken at the express request of the Applicant by a Legal Officer who had not been previously involved in the case. He reviewed all the material supplied by the Applicant before the decision was made.

57. Following the contested decision, OSLA explicitly stressed that it would remain at the disposal of the Applicant to provide him focused advice on specific legal questions. As such, it never closed its door to the Applicant and continued to provide specific assistance to him.

58. OSLA reasons for its decisions not to represent the Applicant were that case 1 had little chances of success and that case 2 was tenuous. In particular, it did not want to represent the Applicant in these "combined cases" (i.e. represent him in one but not in the other).

59. In exercising its discretion to decide whether to represent the Applicant in the two cases before the Tribunal, OSLA made a careful consideration of all the issues and provided valid reasons why it would not.

60. The Applicant, who has the burden of proof, has not provided any evidence that OSLA made a manifest error of law or fact or that in the exercise of its

discretion, OSLA acted arbitrarily or that the decisions were based on extraneous reasons or bias.

61. In fact the decisions of OSLA have been vindicated by the subsequent judgments of the Tribunal on the two cases in question.

62. Finally the contested decisions by OSLA did not negatively impact on the Applicant's submissions in terms of their timeliness. By 5 November 2013, both had already been through management evaluation and had been filed with the Tribunal.

63. The Tribunal finds that in all its dealings with the Applicant, OSLA provided him with legal assistance. Its refusal to provide legal representation was reasoned and appropriate and did not breach any lawful obligations of OSLA.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Coral Shaw

Dated this 21st day of October 2014

Entered in the Register on this 21st day of October 2014

(Signed)

René M. Vargas M., Registrar, Geneva