UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/035
Judgment No.: UNDT/2016/118
Date: 30 August 2016
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

REID

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Didier Sepho

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 21 July 2016, the Applicant contests the failure of his former Counsel from the Office of Staff Legal Assistance ("OSLA") to file a timeous application on the merits in proceedings that resulted in Judgment No. UNDT/2016/011 (*Reid*), rendered on 18 February 2016 in relation to Cases No. UNDT/NY/2015/023 and UNDT/NY/2015/030.

2. The Applicant submits that the application is receivable as the failure of his former OSLA Counsel to file a timeous application before the Tribunal is an appealable administrative decision. He submits that, whilst the Chief of OSLA is independent and impartial with regard to the legal assistance provided to staff members in pursuing their appeals, he or she is accountable to the Executive Director of the Office of Administration of Justice ("OAJ"), who reports to the Secretary-General. Therefore, a decision from OSLA is imputable to the Administration. The Applicant contends that his former OSLA Counsel's failure to file a timeous application breached the latter's duty to observe a high standard of diligence. The failure to file a timeous application had a direct impact on the Applicant's contract of employment and deprived him of his due process rights. The Applicant submits that he does not seek to challenge the receivability of his initial application; rather, he seeks compensation for the harm caused by the former Counsel's alleged malpractice. He also seeks moral damages.

3. On 5 August 2016, the Respondent filed a motion for summary judgment, submitting, *inter alia*, that the application is manifestly inadmissible as the Applicant has not identified an administrative decision of the Secretary-General that is in non-compliance with the Applicant's terms of appointment.

This is because OSLA is operationally independent of the Secretary-General in the provision of legal assistance to staff members.

4. On 22 August 2016, the Respondent filed his reply to the application. The Respondent reiterates that the application is not receivable as the actions of OSLA do not constitute an administrative decision of the Secretary-General, and, therefore, pursuant to art. 2 of its Statute, the Tribunal is not competent to consider the application. The Respondent further submits that the application is time-barred as the Applicant did not submit a request for management evaluation of the contested actions of his OSLA Counsel within the 60-day time limit established by staff rule 11.2(c). The Respondent further submits that, should the Tribunal find the application receivable, it has no merit. The Applicant is responsible for ensuring that he is aware of the applicable filing procedures, and the retention of counsel does not absolve the Applicant from his responsibilities. Secondly, the Guiding Principles of Conduct for OLSA Affiliated Counsel in the United Nations are not part of the Applicant's terms of appointment. Thirdly, the Applicant's claim for compensation is baseless. He has not discharged his burden of proving that the Tribunal would have granted his application in the previous case on its merits, had it not been for the alleged unlawful decision.

5. On 29 August 2016, the Applicant filed a response to the Respondent's motion for summary judgment. He submits that, while decisions made by OSLA counsel following the exercise of professional judgment are not administrative decisions, in the present case OSLA did not exercise professional judgment because there was no conflicting rule with regard to the timeous filing of the application on the merits. Thus, OSLA's failure to file a timeous application on the merits was a "strict administrative decision" that is "attributable to the Secretary-General". The Applicant further submits that he also became aware of OSLA's failure on 18 February 2016, when Judgment No. UNDT/2016/011

was rendered, and therefore his request for management evaluation and subsequent application in the present case were timeous.

Background

6. On 8 March 2013, an incident took place between the Applicant, a Security Officer who was manning a UN security entry point, and another staff member, which resulted in an investigation. The Applicant was found to have "acted in an unwarranted hostile manner towards the staff member". The matter was referred for subsequent action by the Office of Human Resources Management ("OHRM").

7. On 14 August 2013, the Applicant retained the services of OSLA and signed the "Consent Form for Legal Representation by OSLA".

8. By letter dated 23 December 2013, the Assistant Secretary-General, OHRM ("ASG/OHRM") informed the Applicant that, after her review of the investigation report and the Applicant's comments, she had decided not to impose a disciplinary sanction on him. The ASG/OHRM stated, however, that the case would be referred back to Department of Safety and Security ("DSS") for "consideration as to whether administrative measures or other action may be appropriate".

9. On 30 October 2014, the Chief of DSS issued the Applicant with a written reprimand.

10. On 23 December 2014, OSLA, on behalf of the Applicant, requested management evaluation of the decision "to impose reprimand" on the Applicant.

11. On 13 April 2015, the Applicant, through OSLA Counsel, filed an application contesting the decision to issue the reprimand, which was assigned Case No. UNDT/NY/2015/023.

12. On 22 May 2015, the Applicant filed a motion for a waiver of time and to refile the application, to address the Respondent's contention that the first case was not receivable. It was registered under Case No. UNDT/NY/2015/030.

13. On 18 February 2016, the Tribunal rendered *Reid* UNDT/2016/011, finding that the Applicant's claims were time-barred and dismissing Cases No. UNDT/NY/2015/023 and No. UNDT/NY/2015/030.

14. On 18 April 2016, the Applicant, through his new non-OSLA Counsel, filed a management evaluation request regarding the former OSLA Counsel's failure to file a timeous application.

15. On 21 July 2016, the Applicant filed the present application.

16. On the same day, the New York Registry transmitted the application to the Respondent, informing the Respondent that his reply was due 22 August 2016.

Consideration

Motion for summary judgment

17. Although the Respondent has raised issues of receivability, it is contended that the application may be summarily dismissed under art. 9 of the Rules of Procedure.

18. Article 9 of the Tribunal's Rules of Procedure provides that a party may move for summary judgment when there is no dispute as to the material facts of

the case and a party is entitled to judgment as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgment is appropriate.

19. The appropriateness of an application for summary judgment was discussed in *Cooke* UNDT/2011/216, wherein the Tribunal indicated that if the receivability of a case is being challenged, the Tribunal cannot determine the facts of the application on the merits or even consider whether such facts are common cause or contested, highlighting that summary judgment is a judgment on the merits and a party cannot ask for it if the full facts have not been pleaded. The Tribunal found the appropriate procedure would be to deal with the matter as a receivability issue. (*Cooke* UNDT/2011/216 was subsequently vacated in *Cooke* 2012-UNAT-275, in which the Appeals Tribunal found that the application was not receivable, but made no pronouncements regarding the Dispute Tribunal's observations regarding the nature of a summary judgment.)

20. The contextualization of an application for summary judgment, whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in various jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims, and is not a procedure normally used for disposal of matters on receivability or admissibility. Whatever nomenclature is given to the process is, to my mind, not material, as the Tribunal has dealt with matters summarily by striking out or dismissal on the grounds of vexatiousness, frivolity, abuse of process, manifest inadmissibility, failure to disclose cause of action, and so on.

21. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, that the Dispute Tribunal and the Appeals Tribunal review their procedures in regard to the dismissal of "manifestly inadmissible cases". It is a matter of record that the Dispute Tribunal, even prior to the aforesaid resolution 66/237, entertained and continues to deal with matters of admissibility or receivability on a priority basis in appropriate cases, and also renders summary judgments in appropriate cases under art. 9 of the Rules of Procedure. However, any application for dismissal of cases that appear manifestly inadmissible or devoid of merit have to be dealt with on a case-by-case basis bearing in mind the wise words of Megarry J in *John v. Rees* [1970] Ch 345 at 402 (U.K.):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

22. In all the above circumstances, although the issue of receivability may not be suitable for a summary judgement under art. 9 of the Rules of Procedure, the Tribunal finds it appropriate for the fair and expeditious disposal of the case and to do justice to the parties to consider the issue of receivability as a separate preliminary matter on the papers filed before the Tribunal.

Receivability

23. Article 2.1(a) of the Dispute Tribunal's Statute provides that the Tribunal has jurisdiction over cases filed "against the Secretary-General … [t]o appeal

an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

24. As the General Assembly decided in its resolution 63/253, "the role of professional legal staff in the Office of Staff Legal Assistance shall be to assist staff members and their volunteer representatives in processing claims through the formal system of administration of justice".

25. OSLA is administratively part of the OAJ. The Chief of OSLA reports to the Executive Director of the OAJ, who, in turn, reports to the Secretary-General, "without prejudice to the independence of the OAJ" (ST/SGB/2010/3 (Organization and terms of reference of the Office of Administration of Justice), secs. 1, 2.1, 3.1, 7.1).

26. However, as the Dispute Tribunal stated in *Worsley* UNDT/2011/024 (affirmed in *Worsley* 2012-UNAT-199), while OSLA reports administratively to the Executive Director of the OAJ and therefore to the Secretary-General, it 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.

27. The Dispute Tribunal and the Appeals Tribunal have found that services provided by OSLA and the way the representation is carried out may have an impact on a staff member's terms of appointment and therefore may be subject to an appeal. However, both Tribunals have found that OSLA decisions may fall within the jurisdiction of the Dispute Tribunal "without interfering with the professional independence of counsel" (*Larkin* 2011-UNAT-135) and 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 [Tribunal]" (*Onana* UNDT/2011/204 (not appealed)).

28. OSLA counsel enjoy functional or operational independence and, when providing legal advice to staff members or representing their interests, are neither under the control of, nor receive instructions from, the Administration (i.e., from the Secretary-General). It follows that legal advice provided by OSLA in the context of proceedings before the Tribunal cannot be attributed to the Secretary-General (*Worsley* UNDT/2011/024; *Onana* UNDT/2011/204; *Worsley* 2012-UNAT-199). If the Tribunal were to find otherwise, it would necessarily mean that OSLA counsel are making legal arguments and submissions under the direction of, on behalf of, and attributable to the Secretary-General and not their clients. This would be an unacceptable breach of the basic tenets of professional conduct and client representation and would undermine the very institution of independent professional legal assistance provided to staff in the context of the administration of justice at the United Nations.

29. The Applicant contests the failure of his former OSLA Counsel to file a timeous application on the merits, apparently notified to the Applicant following the receivability findings in *Reid* UNDT/2016/011. The filing of the application in the Applicant's prior proceedings was part and parcel of the independent legal advice, arguments, and theory of the case advanced by the Applicant represented by OSLA at the time. Therefore, the Tribunal finds that the filing—which was, in the end, found by the Tribunal to be belated—and the accompanying legal arguments advanced by OSLA Counsel on behalf of the Applicant in the context of those proceedings do not constitute an administrative decision attributable to the Secretary-General and subject to appeal before the Tribunal.

30. The Applicant states in his application that "[t]he duty to file a timely application on the merits is not dependent upon a lawyer's professional judgement" because it "is an imperative rule that the OSLA-appointed legal counsel had to comply with in order to guarantee his client's right to due process". The Applicant submits that OSLA counsel are bound to follow and observe the Organization's law including issuances for the safeguard of the rights of staff to due process.

31. This argument is ingenious but, in this case and context, unpersuasive. The missing of deadlines or failure to comply with statutory requirements may, in certain situations, amount to lack of due diligence or negligence by counsel, which may constitute professional misconduct that could be the subject of a complaint. However, delays in the filing of an application may be attributable to a myriad of factors, including those that may be reflected in privileged and confidential considerations and discussions between counsel and his client. Cases involving issues of receivability, including time bar, can raise various factual issues and legal arguments that may sway the Tribunal's determination either way.

32. In particular, in the context of the prior proceedings, OSLA argued on behalf of the Applicant that he was misled by the MEU's consideration of the matter and the erroneous iteration of when time started to run, thus creating exceptional circumstances. OSLA also contended on behalf of the Applicant that the issues that arose were profoundly ambiguous and subject to legitimate legal argument. Indeed, in the context of *Reid* UNDT/2016/011, the Applicant (represented by OSLA) raised a new nuanced point not previously determined by the Dispute or Appeals Tribunals. It was highlighted at para. 48 of *Reid* UNDT/2016/011 (emphasis added):

> 48. The Applicant also contends that the issue as to whether management evaluation was required for such cases is profoundly ambiguous and could be subject to legitimate legal argument, seeing as the MEU arrived at a different interpretation to that now submitted by the Respondent. The Tribunal notes that whilst the Appeals Tribunal has considered cases concerning non-disciplinary issues (including the issuance of a reprimand) which had been submitted for management evaluation, *no definitive finding has previously arisen or been made on this particular point* (see, for example, *Applicant* 2013-UNAT-381; *Gebremariam* 2015-UNAT-584). *Indeed, in* Applicant, *the Appeals Tribunal found that the Dispute Tribunal exceeded its jurisdiction in deciding on the merits of the Applicant's application when the matter of a reprimand, along with other non-disciplinary issues, had not been submitted for management evaluation.*

33. The Tribunal does not consider that OSLA simply failed to automatically apply an "imperative rule" and therefore "did not exercise professional judgment". OSLA Counsel, acting on behalf of the Applicant, raised reasonable arguments on a previously undetermined issue of law, as reflected in particular in para. 48 of *Reid* UNDT/2016/011. The Tribunal gave serious consideration to these matters in a 24-page judgment. There is no indication that the legal representation provided to the Applicant was based on anything but the best interests of the client, and it involved a certain degree of professional judgment on behalf of the Applicant's former Counsel. Although it was regrettable for the Applicant that the application was dismissed, it is an inherent part of any litigation that some claims may be dismissed or not accepted by the Tribunal, particularly where the law is not settled.

Conclusion

34. The Tribunal finds that the belated filing and the accompanying legal advice and arguments advanced by OSLA Counsel on behalf of the Applicant in the context of the prior proceedings, which led to the receivability findings in

Reid UNDT/2016/011, do not constitute an administrative decision subject to appeal before the Tribunal.

35. The application is therefore dismissed as not receivable.

(Signed)

Judge Ebrahim-Carstens

Dated this 30th day of August 2016

Entered in the Register on this 30th day of August 2016

(Signed)

Hafida Lahiouel, Registrar, New York