UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2010/090
Order No.:	263 (NY/2010)
Date:	14 October 2010
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON RECEIVABILITY AND EXTENSION OF TIME

Counsel for applicant:
François Loriot

Counsel for respondent:
Melissa Bullen, ALS/OHRM, UN Secretariat

Introduction

1. On 13 September 2010 the applicant filed a request for a waiver and extension of time to file an application contesting his dismissal from service based on the findings of the Office of Internal Oversight Service ("OIOS"). The decision to dismiss the applicant was notified to him on 28 April 2010. OIOS found that the applicant had knowingly submitted inaccurate claims for rental subsidy allowance and knowingly received from the Organisation rental subsidy allowances to which he was not entitled.

2. Pursuant to art. 8 of the Statute of the Tribunal, the applicant's appeal against the decision to dismiss him should have been filed on or before 28 July 2010. In his request dated 13 September 2010, the applicant requested the Tribunal to waive the time limits for filing his application and sought an additional extension of time of 30 days from the date the Tribunal renders the application receivable. The applicant filed six annexes, including copies of hand-written notes from his physicians. In the request he contended that his health situation negatively affected his ability to comply with the time limits as follows:

> 11. On January 2010, [the applicant] sought the assistance of OSLA [Office of Staff Legal Assistance] to defend himself. After a few weeks of review by OSLA, [the applicant] found no counsel ready, available, willing and able to take his case at OSLA. [The applicant] was told that his case was of too great legal complexity, but that on its first analysis, OSLA suggested it would be simpler for [the applicant] to go alone in a plea bargaining deal with OHRM [Office of Human Resources Management].
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> 12. In November 2009, [the applicant] began suffering of serious symptoms of distress, fatigue and depression, and became unable to defend himself properly, without counsel.
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> …
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> 14. On 28 April 2010, while [the applicant] was on sick leave and searching for a counsel outside of OSLA, he was notified of the OHRM dismissal decision; this sudden decision was a

> complete shock for him which compounded his distressed state of mind.
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> 15. In May 2010, [the applicant] was repatriated to France, at his own expenditure and in the most difficult family context, becoming extremely ill and in a state a total disability.
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> 16. In June 2010, [the applicant] consulted with his physician, Dr. [H], who diagnosed a severe depression (annex 2), and prescribed him medications and full rest in view of his complete disability.
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> 17. On 27 August 2010, his physician diagnosed a continuing mild depression, a slight health improvement, and partial disability which allowed [the applicant] to start undertaking measures to defend himself against the misconduct charges (annex 3 and 4).
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> 18. On 28 August [the applicant] consulted the undersigned attorney for legal advice and assistance.
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> 19. In view of [the applicant's] serious mental and physical disability suffered from November [2009] to August 2010, which constitute exceptional circumstances hampering [the applicant's] ability to properly defend his case and to seek competent legal assistance, it was agreed to request under article 7.5 of UNDT's rules of procedure a waiver and extension of time-limits, in order to file his Application before the Tribunal.
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> 20. More medical evidence is available; [the applicant] and his physicians are available to testify before a UNDT judge, confidentially, on his health and total temporary disability situation, and on the exceptional circumstances he suffered from November 2009 until now.

3. On 30 September 2010 the respondent filed a response objecting to the applicant's request, submitting that the applicant had failed to establish the existence of "exceptional circumstances" precluding him from filing his appeal on time. The respondent submitted that lack of counsel is not an exceptional circumstance (*Kita* UNDT/2010/025) and that even applicants who suffer from ill health are not relieved from their duty of diligence. According to the respondent, the jurisprudence of the former UN Administrative Tribunal made it clear that in order to reach the threshold of "exceptional", an applicant's condition must be "acute" or "incapacitating", "immediately precarious or acute", "unconscious or

completely incapacitated" such that the applicant is physically unable to file an application in a timely fashion. The respondent submitted that nothing in the applicant's medical reports supports a conclusion that he was physically unable to act in a timely fashion in relation to his appeal. The respondent submitted that according to the applicant's supervisor, the applicant was satisfactorily performing his functions until his separation on 28 April 2010 and that the applicant was not on sick that day, contrary to his claims. The respondent also proffered that prior to April 2010 the applicant was able to respond to the allegations against him and displayed an awareness of the importance of deadlines within the process.

4. The office of counsel for the respondent also communicated directly with OSLA with regard to the applicant's representations concerning his communications with OSLA. The Chief of the Administrative Law Section ("ALS") of OHRM wrote to the Chief of OSLA requesting "comments" and stating that ALS may "revert to [him] for any clarification". Specifically, the memorandum of the Chief of ALS, dated 21 September 2010, stated:

> 2. We would be pleased if you could provide comments in relation to the Applicant's submission that "[i]n January 2010, [the applicant] sought the assistance of OSLA to defend himself. After a few weeks of review by OSLA, [the applicant] found no counsel ready, available, willing and able to take his case at OSLA. [The applicant] was told that his case was of too great legal complexity, but that on its first analysis, OSLA suggested it would be simpler for [the applicant] to go alone in a plea bargaining deal with OHRM."
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> 3. Pursuant to an Order from the UNDT, the Respondent's Reply must be filed by 30 September 2010. In order for the Respondent to have sufficient time to consider his position, and to review the comments and revert to you for any clarification, we would appreciate receiving your response by COB 28 September 2010.

5. In response to this memorandum, the Chief of OSLA sent the following email to OHRM:

> I refer to the enclosed memo [from the Chief of ALS] concerning [the applicant]. His reference to communications with OSLA is not an accurate representation nor does it reflect the advice properly given to him. Should the Tribunal wish to have further details we will assist in any way we can, but in order to preserve solicitor-client privilege we cannot say more at this time in response to your query.

6. Relying, in part, on this exchange of correspondent with OSLA, the respondent concluded his submission to the Tribunal dated 30 September 2010 as follows:

> In sum, the Applicant does not have an unblemished record due to his lack of action. His behaviour can hardly be said to have exhibited vigilance in relation to his rights before this [T]ribunal, particularly when compared to his demonstrated capability in this regard throughout the disciplinary process, notwithstanding his alleged "impairment." The Applicant has produced no convincing evidence of the existence of "exceptional circumstances" such as to justify a waiver or extension of the applicable time-limits.

7. On 1 October 2010 the applicant filed a submission objecting to the respondent's communications with OSLA concerning the applicant's case and stating that "[c]ommunications between Applicant and his previous potential counsel at OSLA were always meant and considered to be confidential". The applicant further stated:

> 6. The Respondent's counsel decision to unilaterally by-pass the Tribunal and the Applicant, and to seek privileged information between a former counsel and his client was an act totally unbecoming on the part of attorneys representing the United Nations.
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> 7. The Applicant and his counsel respectfully request that the ALS/OHRM authors of this attempt to breach privilege and confidential attorney-client communications be sanctioned by the Tribunal. This behaviour by ALS representatives is a violation of ethical standards, of OSLA' statute and in sheer contradiction with

> the same client-attorney privilege they invoked for themselves in the *Bertucci* case, where they refused to disclose to Judge Adams the source of their information.
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> 8. The Applicant respectfully requests that the Tribunal strikes paragraph 30 and annex R.4 from the UNDT records, and to order the Respondent to decide once and for all whether it seeks a Medical Commission or not on [the applicant's] health situation, failing which the Respondent will be deemed to accept the medical evidence on what was [the applicant's] medical situation after his dismissal from service.

8. On 6 October 2010 the respondent sought leave to file a submission in response to the applicant's motion dated 1 October 2010. In this submission, filed before leave was granted, the respondent stated that counsel did not seek privileged information from the applicant's former counsel, that the purpose of the communication with OSLA was to confirm factual matters disclosed by the applicant himself, and that no information as to the nature or substance of any legal advice given to the applicant was sought or revealed. The respondent further stated that there is no provision in the Tribunal's Statute or Rules of Procedure on a "Medical Commission" requested by the applicant and that it is the role of the Tribunal, and only the Tribunal, to make evidentiary findings. The respondent submitted that no further medical evidence was necessary in light of the inferences that may be drawn from the facts and parties' submissions.

Consideration

9. The applicant filed his request for a waiver and extension of time to file his application on 13 September 2010, or 47 calendar days after the deadline of 28 July 2010, which is not an inordinately long time. The pertinent period for the purpose of determining whether the deadline for appeal should be waived is the period *following* 28 April 2010—the date the decision was notified to the applicant—as time began to run the following day. Therefore, for the purpose of determining whether this application is receivable, it is of no relevance whether the applicant's health allowed him to defend his case prior to 28 April 2010.

10. With regard to the relevant period, the applicant submitted, *inter alia*, four notes from three doctors, dated 15 June, 27 August, and 9 and 11 September 2010. The notes stated, *inter alia*, that the applicant was "unable to work for two and [a] half months" (note of 15 June 2010), "impaired in his ability to function from April [to] August 2010" (note of 9 September 2010), "suffering from complete temporary disability" and "in a major state of depression, which seriously handicapped his daily life and his intellect" (note of 11 September 2010). The respondent did not challenge the authenticity or veracity of the notes and of the information provided in them, choosing instead to concentrate on the applicant's situation prior to April 2010. I see no reasons not to accept the accuracy of the applicant's submission as to his health in the last several months and the notes provided in support.

11. As the Dispute Tribunal stated in *Morsy* UNDT/2009/036, *Rosca* UNDT/2009/052, and *Avina* UNDT/2010/054, the reasons outlined in a request for waiver of time limits must show circumstances which are out of the ordinary, quite unusual, special, or uncommon; they need not be unique, unprecedented or beyond the applicant's control. Having considered the totality of the applicant's particular situation and explanations, particularly his unrebutted contention that he was mentally incapacitated during the relevant period, and also considering the respondent's objections, the Dispute Tribunal finds this to be an exceptional case with exceptional reasons justifying an extension of time. Therefore, the Tribunal finds that the application is receivable and will grant a limited extension of time.

12. In several judgments of the Dispute Tribunal a different, stricter test derived from the jurisprudence of the former UN Administrative Tribunal has been applied, namely that the circumstances must be beyond the applicant's control (see, e.g., *Samardzic et al.* UNDT/2010/019 and *Barned* UNDT/2010/083). Even if such stricter test were to be applied, the applicant's situation would justify a finding of exceptional circumstances within art. 8.3 of the Statute of the Dispute Tribunal.

13. With respect to the applicant's motion to strike out part of the respondent's submission dated 30 September 2010 and to sanction counsel for the respondent, the Tribunal makes the following observations. The extent and the nature of the applicant's communications with OSLA in January 2010 are of no relevance to the issue presently before the Tribunal as these communications took place before the time for the appeal began to run. Therefore for the purposes of this ruling, I have ignored all references to such communications and the respondent counsel's correspondence and the "information" thereby secured.

14. However, it is of course a general rule of professional practice and conduct that lawyers should keep in confidence information relating to representation of their clients (and former clients) except so far as disclosure is required or permitted by law. Counsel for the opposing side, too, has a corresponding duty not to solicit any information or to take action that may reasonably be expected to lead to a disclosure of confidential information concerning legal advice and representation. Furthermore, it is highly irregular for counsel to approach a party's former counsel for any information, thus bypassing counsel of record, and I do not accept counsel for the respondent's suggestion that this action was necessary to disprove a fact in issue. Although OSLA did not in the final event disclose any specific information concerning the nature of the legal advice given to the applicant, the communications between the office of counsel for the respondent and the office of the applicant's former counsel are a matter of concern to the Tribunal. 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. In light of the circumstances of this case—that no specific information about the legal advice provided to the applicant was disclosed by OSLA, and that the nature of the applicant's communications with OSLA and of the advice provided to him at that

time are of no relevance to the Tribunal's ruling on receivability—I do not propose at this stage to address these issues further but I shall do so at the appropriate time when both counsel appear before me.

Observation on submissions

15. On 6 October 2010, without seeking leave of the Tribunal, the applicant's counsel sent a communication entitled "Addendum/Corrigendum to the Applicant's Motion Dated 01 September 2010 and Filed on 01 October 2010", attaching several emails. There was no application for leave to file these additional papers or to amend the applicant's request, simply an instruction to the Registry "to inform Her Honour that we wish to adduce as an Addendum … two emails". As no leave was requested or granted to file these papers, they are not properly before me. Parties are reminded that there is no automatic right to file continuous submissions, pleadings and communications with the Tribunal other than those provided for in the Rules of Procedure and ordered or allowed by the Tribunal (see *Abubakr* UNDT/2009/079, *Mezoui* 2010-UNAT-043, *Wasserstrom* 2010-UNAT-060). The general rule is that leave must be sought prior to the filing of any further submissions or additional documents. Both parties should bear in mind that the filing of submissions without seeking prior leave of the Tribunal may be a factor in considering whether there has been an abuse of process, including in relation to determining awards of legal costs.

16. The above communication from the applicant's counsel also contained a criticism of the applicant's former counsel and, in due course and upon further separate direction, the Tribunal will require an explanation on the propriety of the submission and its relevancy to the issues before the Tribunal.

17. The following observation should also be made. It is logical that there would be no point in granting an extension of time in even the most exceptional of cases if there was absolutely no prospect of success on the merits. Such

assessment may be made in some cases by taking a peek at the merits—provided there is sufficient information before the Tribunal—or may be evident from the applicability (or non-applicability) of a particular regulation or rule. No doubt an unmeritorious claim may be mulcted in costs as an abuse of process in the final analysis. In the instant case, there is presently insufficient information before the Tribunal for any such assessment to be made.

18. There is one final matter. Counsel for the applicant requested that the applicant's name be removed from any "related … UNDT websites" and there was no objection from the respondent. In view of the reasons provided by the applicant in his request and my determination that this Order be published, I have decided that the name of the applicant should be omitted from the Order.

IT IS ORDERED THAT —

1. The request for a waiver and extension of time to file an application is hereby granted.

2. The applicant shall file his application by **5:00 p.m. (New York time), Wednesday, 27 October 2010.**

3. Other matters raised in this Order shall be dealt with in due course upon the direction of the Tribunal.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 14th day of October 2010