



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel, Registrar

GALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Paul Harris, PC

Counsel for Respondent:

ALS/OHRM, UN Secretariat

Introduction

1. The application in this case (and in Case No. UNDT/NY/2015/014) was served on the Respondent, *i.e.* the Administrative Law Section (“ALS”) in the Office of Human Resources Management (“OHRM”) in New York on 12 March 2015, granting the Respondent 30 calendar days from the date of receipt of the application, namely until 13 April 2015, to submit his reply pursuant to art. 10 of the Dispute Tribunal’s Rules of Procedure.

2. On 24 March 2015, the Tribunal received an e-mail from ALS/OHRM, informing that ALS will not act as Respondent’s Counsel in this case, but that instead Ms. Stéphanie Cochard and Ms. Kara Nottingham, in the Legal Unit in the Human Resources Management Service (“HRLU”) in the United Nations Office in Geneva (“UNOG”), would represent the Respondent in these proceedings. There was no explanation or application for leave from the Tribunal for the substitution of Counsel located in Geneva in place of Counsel for the Respondent present in New York, although the email was copied to the Applicant’s Counsel.

3. As a change of representation by Counsel in Geneva for a case registered in New York has logistical and other implications, the Tribunal ordered, by Order No. 51 (NY/2015) dated 30 March 2015, that the Respondent files a reasoned request for the substitution of Counsel in Geneva in place of Counsel from New York. The Tribunal also requested that the Applicant files a reasoned submission stating whether he consents to such request. The Tribunal further granted an extension of time for the filing of the reply until Monday, 27 April 2015. The order was served on the Applicant and his attorney of record on the same date.

4. On 6 April 2015, the Respondent filed a reasoned submission stating, *inter alia*, that “the choice of counsel is [...] not subject to the consent of the Applicant or the adjudication of the Dispute Tribunal”. The Respondent also contended that the substitution of Counsel was due to matters of confidentiality and privilege and

that “[a]ny logistical implications that may arise as a result of such an arrangement are addressed by counsel for either party as a matter of course, in collaboration with the Registry concerned”. In the meantime, the Respondent’s Counsel in Geneva, unbeknownst to the Registry and the Duty Judge seized of the matter in New York, had secured access to the Court Case Management System (“CCMS”) via the Registry in Geneva for purposes of assumption of agency as Counsel.

5. On 6 April 2015, the Applicant filed a submission opposing withdrawal by ALS Counsel on suspicion of ulterior motives, and stating *inter alia*, that ALS Counsel had a professional and ethical duty to be candid in proceedings and to make full disclosure, but respecting at the same time their “professional dilemma” where “their instructions conflicted with the professional obligations to the Tribunal”. The Tribunal noted that this submission was signed by the Applicant alone and not his Counsel of record, and that these submissions emanated from the Applicant’s personal email.

6. By Order No. 62 (NY/2015) dated 10 April 2015, pursuant to art. 19 of the Dispute Tribunal’s Rules of Procedure and for a fair disposal of the case in the interests of justice, the Tribunal ordered the Applicant to confirm his current and future location for purposes of all further proceedings in this case, as well as to indicate whether he is still represented by his Counsel of record. The Tribunal also directed that the Respondent be granted an extension of time to file a reply by Tuesday, 26 May 2015, subject to any further extensions the Tribunal may grant, or to any further orders the Tribunal may make.

7. On 15 April 2015, Mr. Paul Harris, Senior Counsel, of London, United Kingdom filed a response to Order No. 62 (NY/2015) confirming his retention as Applicant’s Counsel of record and representation on behalf of the Applicant at the hearing of this matter. The submission also confirmed that the Applicant was now in the United Kingdom, but that he still maintained his apartment in New York for the foreseeable future in order to pursue his pending matters before the Dispute Tribunal.

Considerations

8. In the response to Order No. 51 (NY/2015), the Respondent contends that in terms of the Dispute Tribunal's Practice Direction on Legal Representation either party may, as long as the Tribunal is 'notified', designate counsel of their choice and change counsel at any time during the proceedings. The Respondent further declares (not respectfully submits), that the matter is therefore not subject to adjudication by the Tribunal, nor to the consent of the Applicant in so doing. Counsel for the Respondent argues that there is no provision in the Dispute Tribunal's Statute or Rules of Procedure that suggests anything to the contrary. Furthermore, the Respondent contends that there is no bar to representation by counsel in Geneva for a case filed in New York since "[a]ny logistical implications that may arise as a result of such an arrangement are addressed by counsel for either party as a matter of course, in collaboration with the Registry concerned".

9. Paragraph 3 of the Practice Direction No. 2 (Practice Direction on Legal Representation) dated 27 April 2012 states that "a party may present his or her case to the Tribunal in person, or may designate counsel as per art. 12 of the Rules of Procedure of the Tribunal". Article 12 (Representation) of the Dispute Tribunal's Rules of Procedure deals only with representation of the applicant party and states:

1. A party may present his or her case to the Dispute Tribunal in person, or may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction.

2. A party may also be represented by a staff member or a former staff member of the United Nations or one of the specialized agencies.

10. Paragraphs 4 and 5 of Practice Direction No. 2 state that "the parties" shall inform the Tribunal of the name and contact details of counsel, and that a party may change counsel at any time during the proceedings whereupon the Tribunal shall be notified immediately. Even if a generic construction is given so that the direction on change of counsel (paras. 4 and 5) may apply to either party, so that parties may therefore change counsel by simply notifying the Tribunal, Counsel has

a professional and ethical duty to act respectfully, with full disclosure and in good faith. Practice Direction No. 2 stipulates that in the absence of a code of conduct, counsel authorised to practice law in a national jurisdiction shall be subject to the rules of their national bar association (para. 8). In many jurisdictions, leave of the court is required for the withdrawal of counsel and substitution of new counsel depending on the circumstances. It is not unreasonable to expect that this professional and ethical duty extends to giving the reasons necessitating a change in counsel, particularly if counsel concerned are situated in a different duty station than that where the application is filed.

11. Furthermore Practice Direction No. 2 states that the information contained therein is subject to the Dispute Tribunal's Statute and Rules of Procedure, "or any direction given by a judge in a particular case" (para. 2). In this instance, the Tribunal directed a reasoned submission on the necessity for a change of counsel, as the appointment of counsel outside the Registry where the case is filed is not without consequence. Amongst others, the Tribunal has to weigh the impact on the ability of the parties to pursue the matter without undue financial or other constraints, to consider equality of arms, logistical implications, judicial economy, and to assuage any perception of forum shopping if a change of venue is necessitated, and so on. The Tribunal, as well as Counsel for the parties, has the responsibility to ensure the efficiency and cost-effectiveness of the system of justice.

12. The Respondent also contends that the location of Counsel is no bar to representation at any duty station, citing instances with approximate case numbers whereby cases pending in Nairobi and Geneva, have representation at headquarters in New York. This may well be so, but it is apparent from recent Orders made by the Dispute Tribunal in those locations, that this is not without consequence on the speed and efficacy of proceedings (*Survo* Order No. 80 (GVA/2015), *Ncube* Order No. 113 (NBI/2015)). The Tribunal appreciates that there may, of course, be systemic issues regarding adequacy of resources at ALS in the representation of the Respondent at any given time. The General Assembly, in setting up the new

internal justice system, envisaged an adequately resourced system of justice, and any resource and other justice delivery issues should be raised with the appropriate authorities.

13. Furthermore, decentralization was one of the primary objectives of the new system of administration of justice, and an applicant is enjoined to file at the appropriate registry of the Dispute Tribunal, “taking into account geographical proximity and any other relevant material considerations” (art. 6 of the Rules of Procedure). To that end, and principally for efficiency, cost effectiveness and logistical purposes, the Dispute Tribunal’s Judges at Plenary decided on a redistribution of the Asia and Pacific cases, from New York to Geneva with effect from 1 July 2014. The Respondent contends that any logistical implications that may arise if counsel is remotely located are addressed by counsel in collaboration with the Registry concerned. However, matters such as for instance the scheduling of the hearing, the availability of witnesses, and sitting times, (which may necessitate technical support staff working overtime), are matters for the Judge to decide. Similarly, where a party applies for a change of venue, such motion is taken under judicial consideration, and particularly when the other party opposes such a change.

14. The Applicant contends that, as of now, he will be prosecuting his case in New York for which purposes he currently maintains his apartment in the city. It is not evident whether his counsel would be travelled to New York from London. Having parties, witnesses and counsel in different locations would no doubt impact upon the sitting times of the Tribunal. However, in this instance, whilst objecting to the withdrawal of Mr. Stephen Margetts and Ms. Lim Baro as Counsel for the Respondent, the Applicant suggests that said Counsel may have been privy to information which the Respondent does not wish to be disclosed, so that their removal “would prevent them from being put in a position where their instructions conflicted with their professional obligations to the Tribunal”. The Applicant also acknowledges the “professional dilemma” of the Counsel for the Respondent as staff members and also as officers of the court in this particular situation. To this end,

the Respondent submits that due to matters of confidentiality and privilege, ALS Counsel have to withdraw and HRLU Counsel be designated as Counsel for the Respondent in this case. This of course does not explain why alternative ALS Counsel in New York are unavailable. However in weighing up all the circumstances in this case, the Tribunal accepts the designation, in good faith, of Ms. Cochard and Ms. Nottingham as Respondent's counsel of record and directs that they be granted access by the Registry in New York to the filings in this case, subject to the caveat that any additional costs incurred by the Applicant in the future as a result of inefficient sitting times and proceedings may well become an issue if the matter proceeds to trial.

IT IS ORDERED THAT:

15. Ms. Cochard and Ms. Nottingham, as Counsel for the Respondent of record, are to be granted access to all filings in this case by the New York Registry of the Dispute Tribunal.

16. Pursuant to Order No. 62 (NY/2015) dated 10 April 2015, the Respondent is to file a reply by **5:00 p.m. on Tuesday, 26 May 2015.**

(Signed)

Judge Ebrahim-Carstens

Dated this 23rd day of April 2015