



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

NADEAU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:

Peter A. Gallo, Esq.

Counsel for Respondent:

Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. On 19 March 2019, the Applicant filed the application in which he contests the decision of 10 December 2018 to terminate his continuing appointment as an Investigator at the P-4 level with the Office of Internal Oversight Services (“OIOS”).
2. On 18 April 2019, the Respondent filed his reply in which he contends that the application is without merit, arguing that the contested decision was lawful.

Consideration

The Applicant’s right to obtain legal representation before the Dispute Tribunal

3. The Applicant states as follows in the application, “On 16 May 2018, despite knowledge of the Applicant’s medical advice; [name redacted, Ms. W] informed the Ombudsman & Mediation Service that OIOS opposed the presence of legal counsel during mediation of the cases pending before [the Dispute Tribunal]”. The Respondent makes no submissions in his reply on this matter.
4. The Tribunal observes that the right to counsel of one’s own choice, at least in criminal cases, is enshrined in art. 14.3(b) of the International Covenant on Civil and Political Rights and also in many national constitutions. In line herewith, as regards cases before the Dispute Tribunal, art. 12.1 of the Rules of Procedure of the Dispute Tribunal stipulates that, “A party ... may designate counsel from the Office of Staff Legal Assistance or counsel authorized to practice law in a national jurisdiction”.
5. Effectively denying an applicant before the Dispute Tribunal the right to be represented by a counsel of her/his own choice would therefore constitute a severe obstruction to her/his access to justice. If proven correct, such denial could amount to an abuse of process in accordance with art. 6 of the Dispute Tribunal’s Statute for which cost may be awarded, and even result in a referral to the Secretary-General for

possible action to enforce accountability under art. 10.8 of this Statute. The Tribunal observes that insofar as a case is pending before it, the right to counsel persists even if the proceedings are suspended for informal negotiations.

6. Consequently, the Respondent is to confirm that the Applicant has not, and will not, be denied his right to counsel of his own choice at any stage of in the current proceedings.

The issue of the present case

7. The Tribunal notes that it is the consistent jurisprudence of the Appeals Tribunal that an applicant must identify an administrative decision capable of being reviewed (see, for instance, the Appeals Tribunal in *Planas* 2010-UNAT-049, *Reid* 2014-UNAT-419 and *Haydar* 2018-UNAT-821). At the same time, the Appeals Tribunal has allowed the Dispute Tribunal to define the administrative decision(s) and issue(s) under review by taking into account the entire application and all the various submissions made therein (see, for instance, *Hassanin* 2017-UNAT-759, *Zachariah* 2017-UNAT-764, *Smith* 2017-UNAT-768, *Fasanella* 2017-UNAT-765, *Cardwell* 2018-UNAT-876 and *Farzin* 2019-UNAT-917). However, an applicant cannot reopen an old separate issue in a new case (see, for instance, *Santos* 2014-UNAT-415, para. 27, and *Luvia* 2014-UNAT-417, para. 28).

8. In the application, as the only decision under review, the Applicant identifies the decision to terminate his continuing appointment and all the requested remedies relate only to this decision. This is also confirmed in the Applicant's request for management evaluation dated 19 December 2018 in which he only identifies this as the disputed decision and not any decisions relating the performance appraisal process. However, when arguing that this termination decision was unlawful, the Applicant contends that it was based on a flawed performance appraisal process and makes various submissions in this regard.

9. The Tribunal notes that albeit interrelated, the decision to terminate the Applicant is an entirely different and independent decision from any decision taken in the context of the performance appraisal process. For instance, the respective decisions are governed by different legal provisions and administrative issuances and therefore also defined by different sets of facts. Accordingly, as the Applicant has not challenged any decisions concerning the performance appraisal in the present case, the Tribunal cannot undertake a judicial review of any such decisions in this context. The sole issue of the present case is therefore whether the decision to terminate the Applicant's continuing appointment was lawful.

Case management

10. For the fair and expeditious disposal of the case and to do justice to the parties in accordance with art. 19 of the Rules of Procedure of the Dispute Tribunal,

IT IS ORDERED THAT:

11. By **4:00 p.m. on Monday, 19 August 2019**, the Respondent is to confirm that he has not, and will not, interfere with the Applicant's right to counsel of his own choice;

12. By **4:00 p.m. on Tuesday, 3 September 2019**, the parties are to file a jointly signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the

end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

c. A list of any additional written evidence, which a party requests to produce, or request the opposing party to produce, and stating the relevance thereof;

d. Whether the parties request a hearing for witnesses to provide testimony to support any disputed facts and, if so:

i. Provide a list of the witnesses that each party proposes to call;
and

ii. Provide a brief statement or summary of the disputed fact(s) to be addressed by each witness;

e. If the parties would be willing to enter into negotiations on resolving the case amicably either through the assistance of the Office of the Ombudsman and Mediation Services or *inter partes*.

(Signed)

Judge Joelle Adda

Dated this 15th day of July 2019