



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-204



**Larkin
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Kamaljit Singh Garewal Judge Luis María Simón
Judgment No.:	2011-UNAT-135
Date:	8 July 2011
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Wambui Mwangi

This Judgment has been corrected in accordance with Article 26 of the Rules of Procedure of the United Nations Appeals Tribunal.

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. It is our view that the services provided by the Office of Staff Legal Assistance (OSLA) and the way the representation is implemented can have an impact on a staff member's terms of appointment and therefore can fall within the jurisdiction of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), without interfering with the professional independence of counsel.

2. Article 2(1) of the UNDT Statute stipulates that the UNDT "shall be competent to hear and pass judgement on an application filed by an individual...against... (a)...an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". It also establishes that "[t]he terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

3. In the instant case, Brian Larkin (Larkin) requested management evaluation of the decision taken by the Chief of OSLA not to disclose a potential conflict of interest in Larkin's case. We find that this decision could have an impact on Larkin's terms of employment and therefore constitutes an administrative decision subject to review by the UNDT.

4. For the foregoing reasons, the UNDT erred in law in finding Larkin's application not receivable. We reverse the UNDT Judgment and remand the case to the UNDT for a trial on the merits.

Facts and Procedure

5. Larkin joined the Branch Office of the United Nations High Commissioner for Refugees (UNHCR) in London as a Finance Assistant at the G-6 level on a fixed-term appointment in September 2006. Larkin's appointment was extended twice, in December 2006 and March 2007. In April 2007, Larkin was granted a six-month probationary appointment as Administrative and Financial Assistant. This appointment was extended once until 30 November 2007, after which date Larkin was separated from service.

6. On 22 July 2009, Larkin sought OSLA's assistance in contesting the decision not to renew his appointment and other related decisions. On 30 July 2009, OSLA assigned Larkin counsel to assist with the preparation of his application to the UNDT. Counsel prepared a draft application that she sent to Larkin who objected to the draft and requested alternative counsel. Brian Gorlick (Gorlick), Chief of OSLA, contacted Larkin on the same day to discuss the situation, and subsequently sent Larkin a consent form, which Larkin signed and returned on 17 September 2009.

7. On 5 October 2009, counsel for Larkin wrote to him, advising that with his consent, Gorlick, a former UNHCR staff member, would be willing to approach UNHCR on Larkin's behalf "to negotiate and settle some of the issues". The extended time limit for filing the application was 6 October 2009. OSLA repeatedly attempted to contact Larkin in the coming days and finally, on 19 November 2009, wrote to advise Larkin that in the event that he failed to contact OSLA, it would be assumed that he no longer required OSLA's assistance and counsel assigned to him would withdraw from the case.

8. On 4 December 2009, Larkin contacted OSLA to complain about the representation he had received in the preparation of his submissions to the UNDT in his two other cases and that OSLA had "no plausible reasons" to refuse to act in another case of his. He further asserted that Gorlick had "concealed his relationship with UNHCR when he phoned [the Appellant] regarding the first case".

9. On 18 December 2009, Larkin e-mailed the Management Evaluation Unit (MEU) seeking management evaluation of the "manner in which [OSLA] dealt with [his] case against UNHCR". By letter dated 28 December 2009, the Chief of the MEU informed Larkin that the MEU had no jurisdiction to evaluate his request since Larkin was a UNHCR staff member. He advised Larkin that he should address his request to the High Commissioner for Refugees. On 28 March 2010, Larkin filed an application with the UNDT contesting Gorlick's decision not to disclose a conflict of interest.

10. On 2 February 2011, the UNDT issued Judgment No. UNDT/2011/028, in which it rejected Larkin's application. The Judgment ruled that the alleged omission forming the basis of Larkin's application was not an administrative decision subject to review by the UNDT. The UNDT held that, in any event, the request for management evaluation

was time-barred, and therefore not receivable; and that even assuming that the application was receivable, it would fail on the merits.

11. On 21 March 2011, Larkin appealed the UNDT Judgment. On 6 May 2011, the Secretary-General submitted an answer to the appeal. Upon Larkin's request, the Appeals Tribunal held a hearing in his case on 1 July 2011 in Geneva, Switzerland. Both parties attended the hearing.

Submissions

Larkin's Appeal

12. Larkin submits that the UNDT erred by concluding that the time limit for requesting a management evaluation started to run from 5 October 2009 and that his application was therefore time-barred. He submits that the UNDT erred in rejecting his application on receivability. Larkin alleges that the UNDT committed several errors in law and fact, and in procedure. He requests the Appeals Tribunal to quash Judgment No. UNDT/2011/028 in its entirety.

Secretary-General's Answer

13. The Secretary-General responds that the UNDT correctly concluded that Larkin's application was not receivable, as he failed to file a request for management evaluation in a timely manner. Further, the UNDT correctly concluded that Larkin's application was not receivable, as it did not challenge an administrative decision. In the Secretary-General's view, Larkin has established no errors of law or fact, or procedure, warranting a reversal of the UNDT's decision that his application was not receivable.

Considerations

14. The UNDT correctly found that "OSLA 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, while remaining administratively subject to the Secretary-General".¹

¹ *Larkin v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/028, para. 17.

15. OSLA counsel provide services to staff members of the Organization while being staff members themselves and therefore being paid by the Organization. OSLA was created by, and functions within, the Organization. It is therefore subject to the Organization's Charter and cannot be beyond accountability. Under Section 7.1 of the Secretary-General's Bulletin ST/SGB/2010/3 "Organization and terms of reference of the Office of Administration of Justice", the Chief of OSLA is accountable to the Executive Director of the Office of Administration of Justice.

16. Article 2(1) of the UNDT Statute stipulates that the UNDT "shall be competent to hear and pass judgement on an application filed by an individual...against... (a)...an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". It also establishes that "[t]he terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

17. The Secretary-General has adopted multiple administrative issuances for the safeguard of the right of staff to due process which all fall within Article 2(1)(a) of the UNDT Statute.

18. Article 2(1)(a) of the UNDT Statute covers the pertinent Regulations, Rules, and administrative issuances adopted by the Secretary-General. Transparency and accountability must be observed when applying the Organization's law. This does not hinder OSLA's functional independence.

19. The Code of Conduct of OSLA, adopted in March 2010, establishes in Article 4 that in advising their clients, counsel "shall ... consider all laws, regulations, jurisprudence and other legal provisions related thereto". Article 9 addresses conflict of interest.

20. Larkin confirmed at the oral hearing that the impugned decision was the decision taken by the Chief of OSLA not to disclose the alleged conflict of interest between Gorlick and UNHCR.

21. It is our view that 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 and therefore can fall within the jurisdiction of the UNDT, without interfering with the professional independence of counsel.

22. Larkin requested management evaluation on 18 December 2009 after receiving an email on 5 October 2009 stating that the Chief of OSLA was a former UNHCR employee. While Larkin submitted his request for management evaluation outside the 60-day time limit provided for in Rule 11.2 of the Staff Rules, the MEU, in its letter to Larkin, did not address the question of whether or not it considered his request timely, but rejected it on the sole basis that the MEU had no jurisdiction to evaluate his request since Larkin was a UNHCR staff member. While, under Article 8(3) of the UNDT Statute, the UNDT “shall not suspend or waive the deadlines for management evaluation”, the MEU has the power to waive its own time limits. In the present case, we have no indication of whether or not the MEU would have waived the time limits in the circumstances of this case. A refusal by the MEU to consider a request for management evaluation on the basis that the MEU found it not receivable *ratione personae*, must be reviewable by the UNDT and this Court.

23. In the instant case, Larkin requested management evaluation of an administrative decision which could have an impact on his terms of employment and he claimed that the MEU refused to carry out management evaluation in his case.

24. For the foregoing reasons, the UNDT erred in law in finding Larkin’s application not receivable.

Judgment

25. The Appeals Tribunal reverses the UNDT Judgment and remands the case to the UNDT for a trial on the merits.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar