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Case No.: UNDT/GVA/2010/097

Judgment No.: UNDT/2011/024

Date: 27 January 2011



## Introduction

1. By application filed with the United Nations Dispute Tribunal (“UNDT”) on 13 July 2010, the Applicant contests the decision by the Chief, Office of Staff Legal Assistance (“OSLA”), to refuse to provide legal assistance to her, as communicated by email dated 24 February 2010.

## Facts

2. The Applicant entered service at the United Nations on 10 July 1994. She currently works as Text-Processing Clerk, Conference Services Department, United Nations Office at Geneva, at the G-4 level, step 11. She works part-time due to a disability caused by two brain strokes suffered in 1994 and 2000.

3. The Applicant first contacted OSLA in summer 2009, seeking assistance to bring through grievances against the Organization. At that time, the Office of the Ombudsman was dealing with the Applicant’s case, but no amicable solution was eventually reached.

4. The New York office of OSLA assigned an officer to assist the Applicant. Subsequently, in February 2010, the task of assisting the Applicant was reassigned to the recently appointed OSLA officer based in Geneva.

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dates, times and examples of the alleged behaviour and what form they took. She added that what the Geneva OSLA officer interpreted as “abusive” or “uncooperative” behaviour were in fact due to her disability, referring in this regard to a medical report dated 30 January 2006.

7. On 29 March 2010, the Applicant wrote to the Geneva OSLA officer asking to be provided as soon as possible with the work he had done on her case. She wrote again on 8 April 2010 requesting an answer thereto.

8. By email dated 9 April 2010, the Chief, OSLA, responded that it had been

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Administration of the United Nations, the decision was unilateral, aimed at the Applicant in particular and it carries direct legal consequences;

iii. The fact that OSLA is operationally independent does not mean that it is not accountable to anybody. Section 7.1 of ST/SGB/2010/3 provides that “[t]he Office of Staff Legal Assistance is headed by a Chief who ... is accountable to the Executive Director” of the Office of Administration of Justice, whereas the latter himself reports to the Secretary-General, as per section 3.1. Therefore, there is a hierarchical relation between the Secretary-General and OSLA;

iv. The decision by OSLA not to provide assistance to staff members is an administrative decision which can be brought before UNDT;

b. Regarding the merits,

i. By virtue of General Assembly resolution 62/228, which establishes OSLA, staff members have a right to request legal counsel from OSLA and this office is obliged to give legal advice;

ii. The contested decision amounts to discrimination of a disabled person. OSLA discriminated against her as it did not make the necessary allowances to her disability, in particular by making it possible for her to deal verbally with OSLA staff, since she is print-disabled;

iii. The “threats” mentioned are insufficient to have the client-lawyer relationship break down. In addition, the “threat” of reporting the Geneva OSLA officer to the Bar Council was simply putting into application what he had personally told her she could do if she felt he was not dealing with her properly. Furthermore, she only said that after OSLA refused to deal with her;



OSLA provides assistance to staff members, it does not take administrative decisions;

ii. OSLA is operationally independent. Worsley Order No. 79 (GVA/2010) recognizes that OSLA possesses an independent status in terms of “functional autonomy required to properly discharge its duties”. The foregoing flows from sections 2, 3 and 7 of ST/SGB/2010/3 (Organization and Terms of Reference of the Office of Administration of Justice). Based on these provisions, “OSLA is twice removed from the Secretary-General: [i]n the performance of its function, OSLA acts independently of the Executive Director[, OAJ]; and the Executive Director[, OAJ] acts independently from the Secretary-General”;

iii. In providing that staff members may pursue appeals against “the Secretary-General as the Chief Administrative Officer of the United Nations”, article 2.1(a) of the Tribunal’s Statute limits the latter’s subject-matter jurisdiction to claims that can be brought against the Secretary-General as the chief administrator. Hence, where the Secretary-General has no authority over a decision in his administrative capacity, he cannot be held liable for those decisions, as held by the Tribunal in Koda UNDT/2010/110;

iv. The nature of OAJ and OSLA mandate necessitates independence from the Secretary-General. Were the Secretary-General to exercise authority over the actions of OSLA, his instructions would compromise the capacity of OSLA to deliver its mandate. Holding the Secretary-General liable for actions by OSLA would place him in a conflict between his obligation to respect the independence of OSLA and his responsibility to minimize the Organization’s liability. The status of OSLA may be compared with the status of the Registry;

v. As per paragraphs 12 and 13 of General Assembly resolution 62/228, the mandate of OSLA is to provide “assistance







allegations falls on the Applicant. However, there is no evidence which would allow concluding that the contested decision was based on the Applicant's disability or any other extraneous grounds;

vi. OSLA provided the Applicant with legal assistance during the period from July 2009 to February 2010. Every effort was made both by the Chief, OSLA, and by the Legal Officer, OSLA, based in Geneva to accommodate the Applicant in view of her disability. They made all appropriate enquiries on her behalf and acted entirely properly at all times. The Applicant was dealt with in good faith and her case was even given priority, to the detriment of other cases;

vii. The Applicant's behaviour made a further assistance by OSLA impossible: first, the Applicant rejected OSLA assistance for the second time in February 2010, for no sensible reason and despite OSLA officer's working arduously on her case; second, she threatened the Chief, OSLA, to go to the United Kingdom Mission and the media to complain about him and to report the Geneva

pursuant to article 2” of the Statute. In turn, article 2.1(a) of the Statute defines the scope of the Tribunal’s jurisdiction *ratione materiae* as follows:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual

the Secretary-General regarding the work of the Office. (Emphasis added)

28. Lastly, paragraph 16 of General Assembly resolution 62/228, by which OSLA was established, requests the Secretary-General “to establish a code of conduct regulating the activity of internal and external individuals providing legal assistance to ensure their independence and impartiality”.

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having intervened directly in the decision-making process which led to the contested decision.

32. Furthermore, as a matter of principle, limiting judicial review only to decisions which were or could have lawfully been made by the Secretary-General would entail leaving entire areas of the Administration's activity out of any meaningful control of legality. This appears hardly compatible with a legal order which, like that of the United Nations, postulates the principles of rule of law and access to justice (see *Comerford-Verzuu* UNDT/2011/005 and *Kunanayakam* UNDT/2011/006). Additionally, it seems logical to assume that, had the General Assembly intended to exempt certain sectors of the Organization from scrutiny under the new internal justice system, it would have done so clearly and explicitly.

33. The Respondent's contention that the decision presently under review does not constitute an appealable administrative decision within the meaning of article 2.1(a) of the UNDT Statute, but rather a course of

Having concluded that OSLA is an organ of the UN Secretariat, there may be no doubt that the decision at hand emanates from the UN Administration.

37. Second, it is undisputed that the act at issue did not take the form of an agreement, nor did it involve any kind of participation by the Applicant. It came from the Administration's side alone and it must thus be

44. In conclusion, the decision at issue in the present application is an administrative decision for the purpose of article 2.1(a) of the UNDT Statute. Accordingly, it falls within the Tribunal's jurisdiction to verify the lawfulness of such decision.

45. Turning to the merits of the application, the starting point to ascertain whether the contested decision is in breach of the Applicant's terms of appointment is determining the content and limits of the right to benefit from the assistance of OSLA.

46. As previously mentioned, this right is enshrined in staff rule 11.4(d). It establishes that "[a] staff member shall have the assistance of counsel through the Office of Staff Legal Assistance if he or she so wishes ... in the presentation of his or her case ...".

47. It may be observed that, in contrast with a clear affirmation of the right for staff members to receive "assistance" by OSLA, these provisions do not recognize a right to be represented by it. This idea is comforted by reading General Assembly resolutions 62/228 and 63/253, for these key resolutions, in describing the Office's raison d'être and mandate consistently refer to legal "assistance" but omit any mention of "representation".

48. It may therefore be reasonably inferred that the duty incumbent on OSLA to grant legal assistance does not go as far as to include an obligation to represent staff members willing to instigate procedures before UNDT.

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neither before UNDT nor before the Appeals Tribunal, and, likewise, that other



repeatedly held, the onus probandi of such an allegation lies with the applicant who puts it forward (see e.g., Bye UNDT/2009/083, Allen UNDT/2010/009). The Applicant simply maintains that OSLA failed to make the necessary concessions in view of her disability. However, her representation of the facts is not supported by any evidence. Even had she adduced some convincing evidence that OSLA had deployed no efforts to accommodate her impairment, this mere fact would not suffice in itself to demonstrate that the Applicant's disability was the cause behind the decision by the Chief, OSLA, to discontinue the assistance afforded to her.

54. Also, no other indication of arbitrariness, formal irregularity, error of fact or manifest error of appreciation transpires from the facts of the case. As far as the Tribunal may see from the case file, OSLA did not treat the Applicant in an unprofessional or incorrect manner. Besides, regarding the factual circumstances as described by the Respondent, the exchanges between OSLA and the Applicant show that a breakdown in mutual trust had truly occurred. The Applicant herself

Conclusion

57. In view of the foregoing, the Tribunal DECIDES:

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 27<sup>th</sup> day of January 2011

Entered in the Register on this 27<sup>th</sup> day of January 2011

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva