



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/075
UNDT/GVA/2014/076
UNDT/GVA/2014/079
UNDT/GVA/2014/080
Order No.: 015 (NBI/2016)
Date: 2 February 2016
Original: English

Before: President Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON A MOTION FOR
RECUSAL**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Federica Midiri, UNFPA

Case No.

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Introduction

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”). She filed a number of Applications with the United Nations Dispute Tribunal (UNDT) Geneva Registry. The following cases were closed by judgments delivered by Judge Thomas Laker: Case Nos. UNDT/GVA/2014/009 (Judgment No. UNDT/2014/139); UNDT/GVA/2014/010 (Judgment No. UNDT/2014/032); UNDT/GVA/2014/083 (Judgment No. UNDT/2015/060); UNDT/GVA/2015/122 (Judgment No. UNDT/2015/039); UNDT/GVA/2015/002 (Judgment No. UNDT/2015/061), UNDT/GVA/2015/005 (Judgment No. UNDT/2015/062); and UNDT/GVA/2015/073 (Judgment No. UNDT/2015/063). All of these Applications, except for the one in Case Nos. UNDT/GVA/2014/009, were rejected by Judge Laker.¹

2. The following cases are still pending before UNDT Geneva: Case Nos. UNDT/GVA/2014/028; UNDT/GVA/2014/075; UNDT/GVA/2014/076; UNDT/GVA/2014/079 and UNDT/GVA/2014/080.

The Motion for transfer

3. On 30 June 2015, the Applicant filed a Motion with the UNDT Geneva Registry for a transfer of her cases pending in Geneva to UNDT Nairobi or to assign another judge in Geneva to hear her cases in lieu of Judge Laker who has been and is handling her cases.

4. The Applicant alleges that Judge Laker has not acted fairly and objectively towards her in the conduct of her cases and has only protected the Respondent’s interests. Specifically, the Applicant alleges that in Case No. UNDT/GVA/2014/009:

¹ The Applicant has appealed all the judgments except for Judgment Nos. UNDT/2014/139 and UNDT/2014/032.

Judge Mr. Laker was doing strange comments to UNFPA Legal Assistant about my lawyer, while I later documented in my further cases that both me and the lawyers who out of desire to help me rarely and absolutely free of charge were giving me some limited advices or clarifying the most simple legal matters to me. I also find that repeated comments of Mr. Laker about that I ostensibly disturbed the Organization were absolutely inappropriate, as I am just trying to achieve fairness toward myself and I do not have really any other way out.

5. On 3 July 2015, Judge Laker issued Order No. 137 (GVA/2015) referring the Applicant's motion to the UNDT President, Judge Vinod Boolell, for determination. Order No. 137 also suspended the four cases that are the subject of the Applicant's Motion pending the UNDT President's determination.

Is the 30 June 2015 Motion for a transfer or a recusal?

6. Before dealing with the merits of the Application, the President would wish to clarify the purport of the motion of the Applicant. What the Applicant is seeking is a transfer of her cases to Nairobi. In other words she is moving for a change of venue by invoking several reasons. The issue of change of venue is dealt with in article 6 of the Rules of Procedure of the Tribunal which reads:

Filing of cases

1. An application shall be filed at a Registry of the Dispute Tribunal, taking into account geographical proximity and any other relevant material considerations.

2. The Dispute Tribunal shall assign cases to the appropriate Registry. A party may apply for a change of venue.

7. In the case of *Mezoui* 2011-UNAT-101, the United Nations Appeals Tribunal (UNAT) observed: "The determining venue must be left to the UNDT. Moreover, the UNDT is one Tribunal operating in three duty stations. The choice of the venue is, at least in large part, a question of management of the Dispute Tribunal".

8. Invariably, and the President takes judicial notice of this fact, cases have been transferred for a number of reasons at the behest of a judge or of a party so that the cases in question may be dealt with fairly and expeditiously. Such instances may occur where a party is located in closer proximity to a duty station; or where a case has been remanded for rehearing by UNAT, this being done in the spirit of fairness and transparency; or the judges of a particular duty station decline to hear a case on account of a perceived/possible conflict of interest. Of course these are only instances and the list cannot be limited or closed. Such instances however are rare as a transfer cannot become the norm in the internal justice system. It must be emphasized that a transfer cannot and should not be requested or even granted just because a party is not happy with a judge as such a request would be tantamount to forum shopping and may bring the justice system into disrepute.

9. Given the tenor of the allegations, the President decided that the request was more in the nature of a recusal instead of a change of venue. Accordingly, pursuant to art. 28.2 of the UNDT Rules of Procedure, the President sought the comments of Judge Laker and same was received. Judge Laker also made available to the President audio recordings of the Case Management Discussion (CMD) held on 1 April 2014 and a Merits Hearing held on 20 November 2014 relating to Case No. UNDT/GVA/2014/009.

The Case Management Discussion

10. In the course of the CMD held on 1 April 2014, Judge Laker discussed the facts of the Application with the parties and even told the Applicant that for a proper understanding of the issues the Tribunal should have the Reply of the Respondent. Judge Laker also pointed out to the Applicant that she had not referred certain matters to the Management Evaluation Unit. When the Applicant stated that she needed to seek legal advice Judge Laker rightly told her that he could not give her legal advice.

He then suggested that the parties consider the option of mediation whilst pointing out to the Respondent's Counsel the adverse consequences on the Organization if certain matters are disclosed in the course of a public hearing. The Applicant was not justified in making the allegations she did as a result of what transpired at the CMD.

The Merits Hearing

11. In the course of the merits hearing on 20 November 2014, Judge Laker made a long statement on the issues in the case. He explained to the parties that a distinction had to be made between the competence of the decision-maker and the reasons for the decision. After a long explanation Judge Laker concluded that if the decision-maker was incompetent that would be the end of the matter.

12. Judge Laker also made some observations on the award of moral damages.

13. Finally, the judge suggested to the parties whether they would be willing to have the matter mediated. He was careful to mention to the parties that he was not exercising any pressure on them.

14. The Applicant raised an issue regarding counsel. She suggested that the Respondent should change counsel. Judge Laker explained to her that the right to choose counsel rests with a party to a case.

15. The Applicant expressed some concerns about witnesses she might call being retaliated against. Judge Laker responded that this issue has been dealt with previously by the Tribunal and that "there will be means if needed to secure these witnesses".

Considerations

16. Whether a judge is dealing with a CMD or a hearing on the merits he/she must act scrupulously within the legal parameters provided by statute and the rules and regulations of his/her mandate and in compliance with ethical standards. These standards would encompass personal conduct as prescribed by section 6(e) of the Code of Conduct (“Code”) for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal² that reads: “When conducting judicial proceedings, judges must act courteously to legal representatives, parties, witnesses, Tribunal staff, judicial colleagues and the public, and require them to act courteously”.

17. The judge should also be scrupulously impartial. This concept which lies at the very core of an independent and transparent judiciary requires the judge not to say any word or act in any way that would be perceived as bias. The word “perceived” is used deliberately as impartiality is much more a question of perception. A judge may be subjectively impartial but if objectively he is perceived as not being so the whole concept of impartiality is destroyed. The Code makes that clear in its sections 1(a) and (b) and sections 2 (a) and (b). Sections 1(a) and (b) provide:

Independence

(a) Judges must uphold the independence and integrity of the internal justice system of the United Nations and must act independently in the performance of their duties, free of any inappropriate influences, inducements, pressures or threats from any party or quarter;

(b) In order to protect the institutional independence of the Tribunals, Judges must take all reasonable steps to ensure that no person, party, institution or State interferes, directly or indirectly, with the Tribunals.

² GA Resolution 66/106.

18. Sections 2 (a) and (b) state:

Impartiality

(a) Judges must act without fear, favour, or bias in all matters that they adjudicate;

(b) Judges must ensure that their conduct at all times maintains the confidence of all in the impartiality of the Tribunals.

19. Case management is provided by article 19 of the UNDT Rules of Procedure and it reads:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

20. Article 19 gives great leeway to a judge handling a case either on his/her volition or at the request of a party to ensure that all possible measures are taken for a fair determination of a case. To that end it stands to reason that the judge becomes an active participant during a CMD.

21. A CMD is by its nature an opportunity for the parties to identify the issue in dispute. The role of the judge is not merely passive in the course of such an exercise. The judge is bound to ask questions, make observations, clarify issues, suggest to the parties whether there is a chance of an out of court settlement and maintain the decorum of the proceedings. A litigant who appears before a judge in the course of a CMD should not labour under the impression or be allowed to hold the belief that a judge at the CMD is just a mere passive decoration sitting on a mantelpiece in a drawing room of a mansion. If the role of the judge is reduced to that then the very process of the CMD loses its significance.

22. During a hearing on the merits the role of the judge is more limited as to his intervention than in the course of a CMD. At a hearing the parties should have an opportunity of putting their case, subject to the overall control of the judge and subject to the applicable rules of procedure and evidence and decorum. The judge is however not precluded from asking questions by way of clarification or making observations so long as the judge does not betray any preconceived conclusion or judgment in favour of or against any party.

23. The exchange of views during the CMD does not indicate that Judge Laker stated anything which would have put him in a situation where his independence or impartiality would be imperiled in relation to the cases of the Applicant. On the contrary the judge explained the procedure to the Applicant and even suggested to her and the Respondent to try and come to an amicable settlement in the case.

24. In regard to the merits hearing, it appears that before the parties had an opportunity to present their respective cases Judge Laker made a number of observations and expressed his views on the issues before him. Presumably Judge Laker who had all the pleadings and filings in front of him felt that he was in a position to express his conclusions without first seeking the views of the parties at the hearing. The UNDT has, as a matter of practice, adopted a blend of the civil and common law procedures in regard to: the more active role of the judge; the admissibility of evidence; written pleadings and submissions; and deciding cases from the pleadings without a hearing. At the end of the day whatever the degree to which the civil law system or the common law approach is applicable what is paramount is the fairness of the proceedings. A satisfactory balance should be struck between fairness and fact finding.

25. Whilst it is quite appropriate for a judge to make observations on a case he/she is handling, the question may arise as to whether the judge is entitled to come

to conclusions or draw inferences from the facts of a case without first hearing the parties. The essence of a hearing is to allow the parties to present their case and not communicate conclusions to them without first hearing them.

26. The crux of the present matter however is whether by what Judge Laker stated he would be perceived as not being independent.

27. In *Campos* UNDT/2009/005 it was held: “It is well settled that impartiality is determined according to two tests, subjective and objective”.

28. With respect to the objective test, the European Court of Human Rights observed that it must be determined whether, quite apart from the judge's personal conduct; there are ascertainable facts which may raise doubts as to his impartiality³. The test to be adopted in regard to a situation or allegation of potential or actual bias is “the question of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”⁴.

29. The question is also what a fair minded observer would conclude on the conduct of a judge. On this issue reference is made to the case of *Gillies*⁵ where the Privy Council held:

[t]he fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.

³ Hauschildt v Denmark, Series A No. 154, Application No. 10486/3, European Court of Human Rights (1990) 12 EHRR 266, 24 May 1989. Page.21, para 48.

⁴ Lesage v The Mauritius Commercial Bank Ltd, Privy Council Appeal 0027 of 2011 (2012) UKPC 41

⁵ Gillies v Secretary of State for Work and Pensions (Scotland) [2006] UKHL 2, [2006] 1 All ER 731, para 17.

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30. Would a fair-minded observer in full possession of all the facts and circumstances conclude that because Judge Laker made certain observations during the merits hearing referred to above there would be a real possibility that he would be biased in subsequent cases brought by the same applicant? On the objective test, all that the Applicant is averring is that because Judge Laker made some observations in the handling of her case this makes him unfit to deal with her pending cases as he would be lacking in impartiality. The President does not agree. There is nothing in the observations made by Judge Laker that indicates that he would be biased in the handling of the subsequent cases of the Applicant. As the Tribunal held in the case of *Gehr*⁶: “Judges judge cases brought by individuals and their findings are based on the facts and evidence contained in the application and the interpretation of relevant law”.

31. The Tribunal notes that there is no issue under the subjective test as the Applicant has not presented any evidence or arguments that Judge Laker would act with personal bias in dealing with his case. At any rate the personal impartiality and integrity of a judge must be presumed until there is clear proof to the contrary⁷.

Decision

32. The Motion is rejected.

(Signed)

President Vinod Boolell

Dated this 2nd day of February 2016

⁶ Order No. 092(NBI/2013).

⁷ Hauschildt v Denmark, judgment of 24 May 1989, Series A No. 154.

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Entered in the Register on this 2nd day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi