



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/044/
JAB/2008/087
Order No.: 61 (NY/2010)
Date: 1 April 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

WASSERSTROM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON APPLICATION FOR
ADJOURNMENT AND STAY PENDING
APPEAL**

Counsel for applicant:
Mary Dorman

Counsel for respondent:
Susan Maddox, ALS

Introduction

1. On 3 February 2010 I decided that the Dispute Tribunal had jurisdiction to consider the applicant's application in respect of a decision made by the Ethics Office and ordered production of certain documents to the Tribunal and on 17 March 2010 I repeated and clarified the order for production (Orders Nos. 19 and 52 (NY/2010) respectively). The respondent has now appealed against these orders to the UN Appeals Tribunal and seeks both a stay of the orders and an adjournment of the proceedings, pending determination of the appeal.

Submissions

2. The respondent submits that, as the appeal "addresses the fundamental issue of whether the Dispute Tribunal has jurisdiction" to proceed in the case, "it cannot proceed in such a manner as to pre-judge or lead to a decision of the very question before the Appeals Tribunal". It is also submitted that continuing to hear the case "would interfere with the jurisdiction of the Appeals Tribunal to decide whether or not the Dispute Tribunal has exceeded its jurisdiction". Accordingly, it is contended, "the Dispute Tribunal does not have subject matter jurisdiction over the ... action pending the outcome of the respondent's appeal".

3. On behalf of the applicant, counsel submits that the respondent has not complied with the order for production of the documents (including the investigation report) and should not be able to seek orders in effect relieving it of its obligation to do so. It is also submitted that the respondent is guilty of contempt and the attorney's fees incurred by this conduct should be ordered to be paid.

4. In response to the applicant's arguments, the respondent notes that "the Appeals Tribunal has recently indicated that it would accept an appeal of the Tribunal's decision which was not a final judgment". I do not understand this submission or its factual basis. I assume it is a reference to filing an appeal in the Registry of the Appeals Tribunal. For obvious reasons, this determines nothing.

Discussion

5. It will have been noted that the respondent submits, in effect, that the Dispute Tribunal has no discretion as to whether to grant the adjournment and the stay sought, since, in effect, it has no jurisdiction to continue with the case given the appeals. This argument has no merit. There is no preemption of the jurisdiction of the Appeals Tribunal to determine the appeals in whatever way that Tribunal thinks right. Nor is there any question of pre-judgment. The Dispute Tribunal must necessarily proceed upon its view of the law pursuant to its duty to determine cases brought before it. There can be no doubt that the Dispute Tribunal must, in an appropriate case, make decisions as to whether it has jurisdiction to consider an application. In short, it has jurisdiction to determine if it has jurisdiction—art 2.6 of the Dispute Tribunal’s Statute states this in no uncertain terms. Once it has decided that it must go on to try the case, the mere fact that a party has lodged an appeal cannot, in principle, bring its jurisdiction to do so to an end. There is nothing in either the Dispute Tribunal or the Appeals Tribunal statutes that suggests such a surprising conclusion and counsel for the respondent does not identify or attempt to rely on any such provision. The decision of the Appeals Tribunal one way or the other on the validity of the appeal or its outcome should not be assumed; certainly not by the Dispute Tribunal. It follows that it is not arguable that the Dispute Tribunal does not have jurisdiction to come to a final judgment upon the substance of the case.

6. It is obvious that if, as a matter of law, the Appeals Tribunal does not have jurisdiction to consider a preliminary or interlocutory judgment, then it would be wrong to adjourn proceedings in the Dispute Tribunal for the purpose, in that event, of permitting the Appeals Tribunal to reject the appeal. This would be a simple waste of time; indeed, an abuse of process. In another case I have held that interlocutory judgments of the Dispute Tribunal cannot be appealed and it is not necessary to repeat those reasons here: see *Bertucci* Order No. 59 (NY/2010).

7. At the same time, the Dispute Tribunal has undoubted power to control its own proceedings, including adjournments and staying its own orders. In this case,

the only consideration favouring an adjournment pending appeal appears to me to be that the question whether the Appeals Tribunal has jurisdiction in respect of interlocutory appeals (however described) as distinct from final appeals has not yet been determined by the Appeals Tribunal and it is desirable that this question be resolved as soon as possible, not least because it affects the useful scope of preliminary decision-making in light of the risk of extensive delays able to be triggered, in effect, at the say-so of a disgruntled litigant. Militating against an adjournment and stay are the limited chances of success and the likely delay before the matter will be tried, on the assumption that the Appeals Tribunal concludes both that it has jurisdiction to entertain the appeal and that the Dispute Tribunal's decision on its own jurisdiction was correct.

8. Since the respondent seeks the stay, it will need to enquire of the registry of the Appeals Tribunal about an anticipated time frame and make some application to that Tribunal for expedited hearing. I do not make any suggestion as to what the Appeals Tribunal might decide about this but, if no expedition is available, the delay involved in determining any appeal, assuming the appeal to be available, might lead to the conclusion that, rather than the matter going into hibernation, as it were, for many months, the Dispute Tribunal should simply get on with it and complete the case in the meantime.

9. The actual scope of the trial, should it proceed, is uncertain. The submission of counsel for the applicant suggests, however, that it would not be insubstantial. Nor is it clear how much still needs to be done to prepare for trial. No sensible assessment of this can be made until the report is—in whatever form—disclosed to the applicant.

Conclusion

10. If a redacted copy of the investigation report is not provided by the respondent to the applicant by close of business 6 April 2010, I will redact a copy as best I am

able and provide it. The unredacted notes must also be filed with the Tribunal by this date.

11. The issues identified above have not been addressed by either party and I am not disposed to deal with them without the *considered* assistance of counsel. Accordingly I direct by close of business 9 April 2010 the provision of written submissions on the circumstances both for and against granting an adjournment, including the expected scope of the trial if it were to proceed, and, from the respondent, the delay that is likely before the appeal comes on for hearing. I reserve consideration on the question of costs.

(Signed)

Judge Adams

Dated this 1st day of April 2010