UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/29
Judgment No.: UNDT/2009/005
Date: 12 August 2009
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

CAMPOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self Represented

Counsel for Respondent:

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

1. THE APPLICATION

1.1 The Applicant has been in the employment of the United Nations (UN) since 1979 with a few breaks. He is now a Senior Interpreter at the P-5 level. On 11 April 2008 he was elected Executive Secretary of the Staff Coordinating Council at the United Nations Office at Geneva until 27 April 2009. Since then the Applicant returned to his regular functions.

1.2 The Applicant filed an application before the Geneva Joint Appeals Board (JAB) to challenge the decision of the Secretary-General not to nominate him as a representative of the staff on the Internal Justice Council (IJC). With the coming into effect of the new internal justice system on 1 July 2009 the case was transferred to the United Nations Dispute Tribunal (UNDT) Geneva, pursuant to General Assembly Resolution 63/253 and the Secretary-General's Bulletin on 'Transitional Measures Related to the Introduction of the New System of Administration of Justice'.[1] Before the case was heard by the Geneva UNDT, the Applicant, by a letter dated 21 July 2009, objected to the hearing on the ground of a conflict of interest pursuant to Article 27.2 (c) of the UNDT's Rules of Procedure. The matter was submitted to the President of the UNDT pursuant to Article 28.2 of the Rules of Procedure on 27 July 2009.

1.3 The Applicant contends that he should have been appointed to sit on the IJC and that, by appointing Ms. Jenny [...] as staff representative to sit on the IJC, the Secretary-General did not accept the recommendation made by "*the overwhelming majority of staff represented by the UNSU, UNDP, UNOPS, UNFPA, UNHCR, UNFSU and UNOG staff association.*" He claims that the decision not to appoint him to the IJC Council amounted to interference by the UN management in the selection of the staff representative of the IJC. That interference has, according to him, "*tainted the independence and the impartiality of the new UN system of justice.*" In support of this submission the Applicant states,

> "*[t]he fact is that the Dispute Tribunal judges who have been selected with the participation of Ms. [...] have had a "professional relationship" with her and clearly*

[1] ST/SGB/2009/11. (See also Article 7 of the Statute of the Tribunal).

> *have a prima facie vested interest in the dismissal of my appeal. This circumstance "would make it appear to a reasonable and impartial observer that their participation in the adjudication of the matter would be inappropriate" as stated in article 27.2 (c) of the UNDT Rules of Procedure. The same applies, of course, to the UNAT judges selected by the illegally constituted IJC.*"

He also requests the recusal of all the Judges of the Dispute Tribunal as well as of those of the United Nations Appeals Tribunal (UNAT).

2. COMMENTS FROM JUDGE JEAN-FRANCOIS COUSIN

2.1 Judge Cousin of the UNDT Geneva to whom the case was assigned offered the following comments pursuant to Article 28.2 of the UNDT Rules of Procedure.

(a) The Judges were not appointed by the IJC but were elected by the General Assembly.
(b) The independence of the Judges is guaranteed by the General Assembly.
(c) The election of the Judges cannot be questioned by the UNDT as the UNDT is not conferred such a power by the Statute of the UNDT.
(d) The case of the Applicant was transferred to the UNDT Geneva pursuant to a General Assembly Resolution.
(e) The recusal of all the UNDT Judges cannot be envisaged since there would be no other Tribunal to determine the Applicant's case and the end result would be a denial of justice.

3. THE BACKGROUND TO THE ESTABLISHMENT OF THE IJC

3.1 The core principle that guided the stakeholders involved in the reform of the administration of justice within the UN was the need to,

> "*…establish a new, independent, transparent, professionalized, adequately resourced and decentralised system of justice consistent with the relevant rules of*

international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike."[2]

3.2 The Redesign Panel established by the General Assembly[3] found, in its report presented to the General Assembly[4], that,

"*…the United Nations internal justice system is outmoded, dysfunctional and ineffective and that it lacks independence*…"

and emphasised that,

"*Effective Reform of the United Nations cannot happen without an efficient, independent and well resourced internal justice system that will safeguard the rights of staff members and ensure the effective accountability of managers and staff members.*"

The Redesign Panel also commented that the now defunct internal administration of justice was neither professional nor independent and failed to meet many basic standards of due process established in international human rights instruments.

3.3 To give effect to the need to establish the new system of the administration of justice the General Assembly decided to establish the IJC[5] stressing that the establishment of this body

"*…can help to ensure independence, professionalism and accountability in the system of administration of justice.*"[6]

[2] General Assembly Resolutions A/Res/62/253 and A/Res/62/228.
[3] General Assembly Resolution A/Res/59/283.
[4] Redesign Panel Report, A/RES/61/205, 28 July 2006.
[5] General Assembly Resolution 62/228.
[6] General Assembly Resolution 62/228, Paragraph A. 35.

The General Assembly also decided,

> *"…to establish by 1 March 2008 a five-member Internal Justice Council consisting of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and chaired by a distinguished jurist chosen by consensus by the four other members.*" [7]

4. THE MANDATE OF THE INTERNAL JUSTICE COUNCIL

4.1 The specific tasks assigned to the IJC on the selection of Judges for the UNDT and the UNAT are set out as follows in General Assembly Resolution 62/228:

(a) Liaise with the Office of Human Resources Management on issues related to the search for suitable candidates for the positions of Judges, including by conducting interviews as necessary;

(b) Provide its views and recommendations to the General Assembly on two or three candidates for each vacancy in the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, with due regard to geographical distribution;

(c) Draft a code of conduct for the Judges, for consideration by the General Assembly; and

(d) Provide its views on the implementation of the system of administration of justice to the General Assembly.

4.2 In an Information Circular, the Under-Secretary-General for Management informed members of staff about the mandate and the composition of the IJC.[8]

[7] General Assembly Resolution 62/228, Paragraph A. 36.
[8] ST/IC/2008/32, 23 June 2008.

5. APPOINTMENT OF MEMBERS OF THE INTERNAL JUSTICE COUNCIL

5.1 The members of the IJC were appointed by the Secretary-General. The distinguished external jurist members were: Mr. Sinha Basnayake (Sri Lanka, nominated by management); Mr. Geoffrey Robertson QC (United Kingdom, elected by staff); Other members are Ms. Maria Vicien-Milburn (Argentina), the then Director of the General Legal Division of the Office of Legal Affairs as the management representative; and Ms. [...] (Australia), the Senior Legal Officer in the International Trade Law Division, Office of Legal Affairs, as the staff representative. These four members recommended to the Secretary-General the appointment as Chair of the Council, Justice Kate O'Regan of the Constitutional Court of South Africa.[9]

6. LEGAL PRINCIPLES

6.1 The right to an impartial and independent Tribunal

6.1.1 Any person whose rights have to be determined is entitled to a fair hearing in public before an independent and impartial tribunal. This principle is embodied in a number of international instruments on human rights.

6.1.2 For example, Article 10 of the Universal Declaration of Human Rights states that,

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations...*"

Article 6.1 of the European Convention on Human Rights recognizes that,

> "*…in the determination of his civil rights and obligations or of any civil charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...*"

[9] See also Report issued by the IJC, General Assembly A/63/489, 16 October 2008.

Article 14 of the International Covenant on Civil and Political Rights provides that,

> "*All persons are equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent impartial tribunal…*"

6.2 The test of impartiality

6.2.1 It is well settled that impartiality is determined according to two tests, subjective and objective. The European Court of Human Rights held that,

> "*…the existence of impartiality for the purpose of Article 6-1 must be determined according to a subjective test, that is on the basis of the personal conviction of the judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect*".[10]

6.2.2 On the objective test the European Court observed,

> *"Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public."*[11]

The European Court further stated that,

[10] *Saraiva v Portugal*, Judgment by European Court of Human Rights of 22 April 1994, Series A, No. 286-B, p.38, paragraph 33.
[11] *Hauschildt v Denmark*, Judgment by European Court of Human Rights of 24 May 1989, Series A, No. 154, p.21, paragraph 48.

"*…what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified.*"[12]

6.2.3 Impartiality and the appointment of Judges

One of the key components of impartiality and independence is the manner of the appointment of Judges. Reference is made to a pronouncement of the European Court of Human Rights on its interpretation of Article 6.1 of the European Convention on Human Rights. Article 6.1 was drafted in almost similar terms as Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights.

"*In determining whether a body can be considered independent the Court has had regard to the manner of appointment of its members and the duration of their term of office and the question whether the body presents an appearance of independence"*.[13]

6.3 Conflict of Interest

6.3.1 Conflict of interest is defined in the UNDT Rules of Procedure as meaning,

"*…any factor which may impair or reasonably give the appearance of impairing the ability of a Judge to independently and impartially adjudicate a case assigned to a Judge*". (Article 27.1, Rules of Procedure).

Article 27.2 of the Rules sets out the circumstances where a conflict of interest can arise:

[12] *Nortier v The Netherlands*, Judgment by European Court of Human Rights of 23 August 1993, paragraph 33.
[13] *Campbell and Fell v the United Kingdom*, Judgment by European Court of Human Rights of 28 June 1984, Series A, No. 80, p.40, paragraph 78.

"A conflict of interest arises where a case assigned to a Judge involves any of the following:

(a) A person with whom the Judge has a personal, familiar or professional relationship;

(b) A matter in which the Judge has previously served in another capacity, including adviser, counsel, expert or witness; or

(c) Any other circumstances which would make it appear to a reasonable and impartial observer that the Judge's participation in adjudication of the matter would be inappropriate."

6.3.2 Article 28.2 of the Rules provides, *inter alia*:

"A party may make a reasoned request for the recusal of a Judge, on the grounds of a conflict of interest, to the President of the Dispute Tribunal who, after seeking comments from the Judge, shall decide on the request and shall inform the party of the decision in writing."

6.3.3 It stands to reason from the wording of Article 28.2 that the circumstances must be such that the Judge finds himself in a situation of conflict as defined by Article 27.1 in regard to the case assigned to him.

7. FINDINGS OF THE TRIBUNAL

7.1 On the selection of the Judges by the IJC with the participation of Ms. [...]

7.1.1 The mandate of the IJC was only to make recommendations on suitable candidates for the position of Judges at both Tribunals. This appears clearly in the report issued by the IJC on 16 October 2008:

> *"The Redesign Panel regarded the independence of the new judges as a key prerequisite for the new system. To ensure the independence of the judges, it suggested the establishment of an Internal Justice Council, which would, inter alia, compile a list of not fewer than three persons eligible to be appointed to each judicial position."* [14]

7.1.2 In its report referred to above, the IJC considered it was urgent to identify suitable candidates to serve as Judges in the new administration of justice. In performing that task the IJC stood guided by the following:

> "*Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall be of high moral character, have respectively 10 and 15 years of judicial experience in the field of administrative law or its equivalent within their national jurisdiction, and serve strictly in their personal capacity.*"[15]

7.1.3 The Judges of the UNDT and UNAT were not appointed by the IJC whose mandate was to identify suitable candidates for recommendation to the General Assembly. The Judges were elected by the General Assembly on 2 March 2009 and that process involved the participation of nearly 190 Member States of the United Nations. When the General Assembly elected the Judges, the latter were certainly not expected to be subservient to any member of the IJC. Nor can it be seriously suggested that this election established any sort of relationship, professional or otherwise, with one or more of the members of the IJC. If the General Assembly had any misgivings on the selection and recommendation made by the IJC it would no doubt have reacted to such a situation. It should be noted that the General Assembly laid great emphasis on the independence of the Judges in the several resolutions it

[14] See Report issued by the IJC, General Assembly A/63/489, on 16 October 2008.
[15] *Ibid*, paragraph 41 of General Assembly Resolution 62/228, in which the Assembly endorsed the qualifications for the Judges, as set out in paragraphs 58 and 67 of the report of the Secretary-General (A/62/294) and its decision 62/519 and the conclusions of the Sixth Committee (A/C.5/62/11, annex, appendix I, paragraph 12), which the Assembly noted in its decision 62/519.

adopted and reiterated that principle in the Statute of the UNDT. [16]It is only the General Assembly that can remove a Judge for misconduct and incapacity.[17] That represents an absolute guarantee of the independence of the Judges.

7.2 On the lack of impartiality of the Judges of the UNDT and those of UNAT

7.2.1 The Applicant's averment of lack of impartiality is based on the fact that the Judges of the UNDT and those of UNAT were selected by the IJC with the participation of Ms. [...] and as such the Judges would necessarily find against him. The Applicant made general accusations of potential bias but has not given any precision on how this bias on the part of the Judges would arise except for the averment of an alleged professional relationship that would exist between the Judges and Ms. [...]. These misgivings of the Applicant on the impartiality and independence of the UNDT and UNAT cannot and should not be treated as objectively justified on the facts presented to the Tribunal.

7.2.2 Under the subjective test, there is not an iota of evidence or proof that the UNDT Geneva Judge or ultimately the UNAT Judges would act with personal bias in dealing with his case. In any event, the personal impartiality of a Judge must be presumed until there is proof to the contrary and in the present case there is no such proof, as stated in judgment *Hauschildt v Denmark*, of 24 May 1989.[18] There is nothing in the averments of the Applicant that could give rise to a legitimate fear that the Judge or Judges who would be handling his appeal would not satisfy the objective test either. The Applicant has not demonstrated that the UNDT Geneva was not likely to be impartial towards him. He has utterly failed to establish or prove that the UNDT Judges in Geneva would already have made up their mind regarding his appeal. His apprehensions belong to the realm of mere speculation.

[16] A Judge of the Dispute Tribunal shall serve in his or her personal capacity and enjoy full independence: Article 4.8 of the Statute.
[17] Article 4.10 of the Statute.
[18] *Hauschildt v Denmark*, Judgment of the European Court of Human Rights, 24 May 1989, Series A No. 154, p.21, paragraph 47.

7.2.3 The Tribunal is therefore of the view that in the circumstances the impartiality of the UNDT, Geneva and the UNAT Judges is not capable to be open to doubt and that the Applicant's misgivings are totally unjustified and do not meet the requirements on conflict of interest set out in Article 27.2 of the Rules of Procedure of the UNDT.

7.3 On the wholesale recusal of the Judges

7.3.1 The wholesale recusal of the Judges would in actual fact result in the annihilation of the UNDT and UNAT. The Tribunal has no such power. Only the General Assembly has the power to remove one or more of the Judges for misconduct or incapacity.[19] In addition the recusal of all the Judges of the UNDT and UNAT would result in a denial of justice to the Applicant as the only body vested with power to determine his case is the UNDT with an appeal to the UNAT. The Tribunal cannot countenance such a situation and cannot be a party to denying justice to a party.

8. CONCLUSION

8.1 For the reasons stated above the application is **rejected**.

Judge Vinod Boolell

Dated this 12th day of August 2009

Entered in the Register on this 12th day of August 2009

Jean-Pelé Fomété, Registrar, UNDT, Nairobi

[19] Article 4.10 of the Statute.