UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/106
Judgment No.: UNDT/2018/097
Date: 2 October 2018
Original: English

Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MINDUA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. By application submitted via email on 22 November 2017 and filed through the Tribunal's eFiling Portal on 24 November 2017, the Applicant, a former *ad litem* judge at the International Tribunal for the former Yugoslavia ("ICTY"), challenges the decision of the Registrar, ICTY, not to pay him for his part–time service at the ICTY after he was appointed as a judge at the International Criminal Court ("ICC").

2. The application was served on the Respondent with a deadline for reply until 29 December 2017.

3. By motion of 5 December 2017, the Responded sought leave to file a reply limited to the issue of receivability and for the Dispute Tribunal to determine it as a preliminary matter.

4. By Order No. 244 (GVA/2017) of 11 December 2017, the Tribunal granted the Respondent's request and allowed the Applicant to file a response to the Respondent's reply.

5. The Applicant filed a response to the Respondent's reply on 15 December 2017.

Facts

6. The Applicant was elected by the General Assembly as an *ad litem* judge of the ICTY on 24 August 2005 and took office on 25 April 2006.

7. In 2014, he was elected as a judge before the ICC and he took oath on 15 March 2015.

8. From 15 March 2015 to 30 April 2016, the Applicant remained as a full time judge at the ICTY. He was at the time sitting on the trial case of *Prosecutor v. Goran Hadžić* ("*Hadžić"*) and his salary was being paid by the ICTY.

9. As he was also working on a part time basis at the ICC during that period, the Applicant was compensated EUR1,666.67 per month by the ICC in accordance with para. 9 of the Conditions of service and compensation of the judges of the ICC (ICC-ASP/2/10).

10. From 1 May 2016 onwards and upon request from the President of the ICC, the Applicant became a full-time judge at the ICC, and thus started to receive his full salary.

11. The Applicant nevertheless remained a member of the *Hadžić* trial bench at the ICTY until 22 July 2016, date at which the trial phase officially concluded following the death of the accused. During that period, the Applicant continued to perform his tasks such as reviewing reports from the medical officers, reviewing the accused's provisional release, processing parties' submissions, participating in the daily life of the Tribunal and attending plenary sessions. The Applicant did not receive any compensation from the ICTY for the period between 1 May 2016 and 22 July 2016.

12. By memorandum of 18 July 2016 addressed to the Registrar, ICTY, the Applicant enquired about various matters regarding his administrative situation and requested compensation for the work he had been performing from 1 May through 22 July 2016 at the ICTY in the amount of EUR2,209.89 per month.

13. On 29 August 2016, the Applicant followed-up on the matter through an email to the Assistant to the Registrar, ICTY.

14. By memorandum of 29 August 2016, the Registrar, ICTY, informed the Applicant that the ICTY Conditions of Service, which were promulgated by the General Assembly, do not provide "any basis to create an allowance to supplement the salary [the Applicant] received while being compensated under the ICC Conditions of Service during the overlap of ICTY and ICC terms of office between May and July 2016".

15. On 30 August 2016, the Applicant met with the Registrar, ICTY, and it was agreed that the Registrar would arrange to meet with the Chef de Cabinet of the President of the ICC within the next few weeks to discuss the matter.

16. On 31 October 2016, the Applicant sent an email to the Registrar, ICTY, asking whether the meeting had taken place and a decision on his request had been made.

17. By email of 30 December 2016, the Registrar, ICTY, confirmed the content of a meeting he had with the Applicant on 21 December 2016, namely that he had met with the Chef de Cabinet of the President of the ICC, and that the position expressed in his memorandum of 29 August 2016 stood. This email, however, was sent to the Applicant's ICTY email address, which he no longer used, and was resent to him on 19 May 2017, at his request.

18. On 7 July 2017, the Applicant submitted a request for management evaluation, which was rejected on 25 August 2017.

Parties' submissions

19. The Applicant's principal contentions are:

On receivability

a. The application is receivable because ICTY judges can be considered as staff members for the purpose of the Dispute Tribunal's Statute;

b. The Dispute Tribunal has been established to provide the United Nations with a "system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process";

c. Following the Respondent's formalistic approach would leave the ICTY judges with no legal avenues to enforce their rights; In a similar situation involving an application by judges of the ICC, the International Labour Organisation Administrative Tribunal ("ILOAT") asserted jurisdiction to avoid that the judges be left without any judicial recourse (see ILOAT Judgment No. 3359);

On the merits

d. The Applicant has not been compensated for the work he performed as a part-time judge at the ICTY for the period between 1 May 2017 and 22 July 2017; and

e. Even though his particular situation is not specifically contemplated in the rules, the Applicant is entitled to a compensation of EUR2,209.89 per month for the above-mentioned work by reference to the conditions of service of *ad hoc* judges of the International Court of Justice ("ICJ"), given that the conditions of service applicable to the Applicant's case are the ones applicable to ICJ judges pursuant to art. 13 *bis* (3) and 13 *quarter* (1) of the ICTY Statute and that the ICJ *ad hoc* judges are in a similar situation as the Applicant.

20. The Respondent's principal contentions on the receivability of the application are:

a. *Ad litem* judges from the ICTY are not appointed under the staff regulations; They are elected by the General Assembly, do not receive letters of appointment under the Staff Regulations and are not subject to the authority of the Secretary-General;

b. The Applicant is not a staff member within the meaning of art. 3.1 of the Dispute Tribunal's Statute and he is not eligible to file an application before the Tribunal;

c. The Applicant's reliance on the ILOAT case is misplaced as that Tribunal held that it had jurisdiction to hear a case brought by judges of the ICC based on art. II (5) of its Statute, which gives standing to "officials" of any International Organization who has recognised the jurisdiction of the ILOAT. By contrast, the UNDT jurisdiction is limited to United Nations staff members.

Consideration

21. The Tribunal's competence *ratione personae* is defined in art. 3.1 of its Statute, which provides that applications before it may be filed by:

> (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; or
>
> (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
>
> (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

22. The question at issue is whether the Applicant is a former staff member of the United Nations within the meaning of the Tribunal's Statute.

23. In this connection, art. 97 of the Charter of the United Nations provides that "[t]he Secretariat shall comprise a Secretary-General and such staff as the Organization may require". Article 101(1) of the Charter further provides that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly".

24. Pursuant to staff regulation 1.2(c), "[s]taff members are subject to the authority of the Secretary-General". They are issued a letter of appointment by the Secretary-General or by an official in the name of the Secretary-General under staff regulation 4.1.

25. In the case at hand, the Applicant is a former *ad litem* judge of the ICTY. He was elected by the General Assembly pursuant to art. 13 *ter* of the ICTY Statute and shall be independent (see art. 12 of the ICTY Statute). His conditions of service shall be those of the judges of the ICJ and thus be fixed by the General Assembly (see art. 13 *bis* and 13 *quater* of the ICTY Statute and art. 32 of the Statue of the ICJ). Unlike staff members, the Applicant was not appointed by the Secretary-General and he is not subject to his authority. His conditions of service are not set by the regulations adopted by the General Assembly applicable to staff members. The Applicant, as an *ad litem* judge of the ICTY, is considered to be a "non-Secretariat United Nations official" (see, *e.g.*, General Assembly resolution 61/262 of 4 April 2007).

26. It follows that the Applicant cannot be considered as a former United Nations staff member within the meaning of art. 3.1 of the Dispute Tribunal's Statute.

27. The Tribunal notes that the ILOAT similarly reached the conclusion that judges of the ICC, who are also elected by the General Assembly, were not staff members within the meaning of the ICC Regulations (see ILOAT Judgment No. 3359 at para. 13). However, the ILOAT had another avenue to provide for effective recourse to these judges in view of its Statute, which does not limit its jurisdiction to staff members but also includes officials of Organizations who have recognised the jurisdiction of the Tribunal for this purpose (see art. II (5) of the ILOAT Statute).

28. Unfortunately, the jurisdiction of the UNDT is defined more narrowly, leaving a number of individuals working for the Organization without access to the internal justice system. This includes judges but also consultants, gratis personnel and interns.

29. The right to access to justice, and its subsidiary right of access to court, are recognised by art. 10 of the Universal Declaration of Human Rights, which provides that "all persons are entitled in full equity to a fair and public hearing by an independent and impartial tribunal". It is also enshrined in art. 14(1) of the International Covenant on Civil and Political Rights.

30. These provisions on the right of access to justice have become accepted norms of customary international law that are binding not only on United Nations member states but also upon the Organization.

31. The lack of internal recourse for judges to settle their disputes with the Organization is particularly problematic in view of the Organization's jurisdictional immunity enshrined in the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations. It raises an issue of compliance of the Organization with sec. 29 of said Convention, which demands that "the United Nations shall make provisions for appropriate modes of settlement of … [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party".

32. The right to have access to justice in the context of International Organizations that benefit from immunity of jurisdiction was also reinforced by the European Court for Human Rights ("ECHR") in both Judgements *Beer and Regan* v. *Germany* (Application No. 28934/95) and *Waite and Kennedy v. Germany* (Application No. 16083/94). In its case law, the ECHR stated that International Organizations have to guarantee their staff members access to courts due to the prominent place held in democratic societies by the right to a fair trial guaranteed under art. 6(1) of the European Convention on Human Rights. It held in *Waite and Kennedy* that:

> 68. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.

33. Whilst being fully cognizant of the Applicant's right to access to justice, the Tribunal is forced to apply its Statute, which prevents it from asserting jurisdiction over the application. The Tribunal cannot go beyond its Statute to create a legal avenue for the Applicant and can only stress that the absence of a specific legal instrument that contemplates access to justice for judges is a serious *lacuna* that needs a quick intervention from the internal legislator.

34. As the Applicant does not fall under any of the categories of potential applicants described in art. 3.1 of the Dispute Tribunal's Statute, he has no legal standing before this Tribunal.

35. It follows that the application is not receivable *ratione personae*.

Conclusion

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

The application is rejected.

(*Signed*)
Judge Teresa Bravo
Dated this 2nd day of October 2018

Entered in the Register on this 2nd day of October 2018

(*Signed*)

René M. Vargas M., Registrar, Geneva