



Before: President Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

MEZOUÏ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON A REQUEST FOR RECUSAL

Counsel for applicant:
Self-represented

Counsel for respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. This Order disposes of the applicant's request for recusal of Judge Jean-François Cousin, to whom her case—which is about a non-promotion—is assigned.

Facts

2. By letter dated 14 July 2009, the applicant submitted to the Dispute Tribunal an incomplete application. In her letter, which was addressed to the President of the Tribunal and to the New York full-time Judge, she requested, among other things, (i) the recusal of the New York Registrar in view of the latter's role as representative of the Administration when the applicant's case was before the Joint Appeals Board, and (ii) the disclosure of "the documents and minutes of the deliberations of the Senior Review Group regarding her application" for promotion to a D-2 post.

3. By letter dated 20 August 2009, the New York Registrar informed the applicant that a Judge had reviewed her case and considered that it was appropriate for it to be heard in Geneva. The parties were given until 27 August 2009 to file objections against the proposed change of venue.

4. No objections having been filed, Judge Coral Shaw ordered the transfer of the case from the New York Registry to the Geneva Registry of the Dispute Tribunal by Order No. 98 dated 28 August 2009.

5. In Geneva, the case was assigned to Judge Cousin.

6. On 2 October 2009, Judge Cousin issued Judgment UNDT/2009/026, in which he rejected the application as time-barred. Without entering into the merits of the case, Judge Cousin considered indeed that the applicant had not complied with article 8 of the Dispute Tribunal's statute, which requires that an application be filed within 90 days of the applicant's receipt of the response by management to his or her submission.

7. On 27 October 2009, the applicant requested a revision of Judgment UNDT/2009/026. On 10 December 2009, Judge Cousin issued Judgment UNDT/2009/087, rejecting the request for revision.

8. The applicant then filed an appeal against both the above-mentioned judgments. On 1 July 2010, the United Nations Appeals Tribunal rendered its Judgment 2010-UNAT-043 whereby it reversed Judgment UNDT/2009/026 and remanded the case to the Dispute Tribunal for a hearing on the merits, noting that:

This case is limited to its specific facts, and we emphasize that this court has been strictly enforcing, and will continue to strictly enforce, the various time limits. The old system was perhaps too generous in extending or waiving time—we will not be. But this case was directly in the path of the changeover, and we grant some leeway here.

9. By Order No. 71 (GVA/2010) dated 31 August 2010, Judge Cousin took several actions, including: (i) he reopened the case; (ii) he transmitted to the applicant a copy of the Senior Review Group's memorandum dated 11 May 2006 recommending another candidate than the applicant for promotion, which was available in the JAB file transferred to the Dispute Tribunal, but had never been shared with the applicant, and (iii) he requested the applicant to complete her application in accordance with article 8 of the Tribunal's rules of procedure by no later than 1 October 2010.

10. On 1 September 2010, the applicant addressed to the President of the Dispute Tribunal a request for recusal of Judge Cousin in her case, together with a motion for change of venue from Geneva to New York.

11. On 3 September 2010, the Tribunal transmitted to the respondent the above-mentioned request for recusal and motion for change of venue, for comments by no later than 13 September 2010.

12. On 13 September 2010, the respondent submitted his response, which was copied to the applicant. He argued, in the main, that the applicant had failed to establish that Judge Cousin had any conflict of interest that may impair or give the appearance of impairing his ability to independently and impartially adjudicate this case. He thus requested that the applicant's request for recusal be rejected.

13. On 14 September 2010, the President sought and obtained comments from Judge Cousin on the applicant's request for recusal.

Applicant's contentions

14. The applicant's contentions are :
- a. Article 27 of the Dispute Tribunal's rules of procedure defines a conflict of interest as a situation in which a judge has served previously, "which is the case here where Judge Cousin has erroneously rendered [two] adverse UNDT judgments against [her]";
 - b. Judge Cousin's judgments against her have been "overruled" by the Appeals Tribunal;
 - c. Judge Cousin "has not apologized for rejecting [her] arguments and for ignoring all the previous UNDT jurisprudence on receivability";
 - d. "The hasty and erroneous judgments rendered against [her] by Judge Cousin create an appearance of bias and *chose jugée* which are not conducive to an impartial and objective adjudication on the substance of [her] case";
 - e. By Order No. 71 (GVA/2010), Judge Cousin disclosed "a deeply manipulated [Senior Review Group] document of 11 May 2006, without ruling neither on its authenticity, nor on how, when and by whom it was produced", thus depriving her of her right to full disclosure. This "leaves again the perception that the Tribunal readily accepts, at face value, anything produced by the respondent";
 - f. "Trust and confidence is required between the parties and with the presiding judge. It is no more present in this case."

Considerations

15. Article 4.9 of the Dispute Tribunal's statute stipulates:

... Where a party requests [the] recusal [of a judge], the decision shall be taken by the President of the Dispute Tribunal.

16. Article 27 of the Tribunal's rules of procedure defines "conflict of interest" as follows:

1. The term "conflict of interest" means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. 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 as an adviser, counsel, expert or witness;

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

17. Finally, article 28.2 of the rules of procedures requires that:

2. 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...

18. None of the situations mentioned in the above-quoted article 27.2 arise in the present case.

19. Contrary to the applicant's understanding of article 27.2 (b) of the Tribunal's rules of procedure, it is not enough for a judge to have previously served in any matter involving an applicant to give rise to a conflict of interest. According to the clear wording of this provision, a conflict of interest may arise where a case involves a matter in which the judge has previously served "in *another capacity*, including as an adviser, counsel, expert or witness" (emphasis added). Judge Cousin, however, has never served in any other capacity than as a judge in any matter involving the applicant. Therefore, no conflict of interest may be claimed on the basis of the above-cited article.

20. The applicant does not put forward “any other circumstances that would make it appear to a reasonable and impartial observer that [Judge Cousin]’s participation in the adjudication of [her case] would be inappropriate”, as article 27.2 (c) of the rules of procedure puts it. Nor does she mention “any factor[s] that may impair or reasonably give the appearance of impairing the ability of [Judge Cousin] to independently and impartially adjudicate [her] case”, as required by article 27.1. By no means may a conflict of interest, either real or perceived, arise from the fact that Judge Cousin rendered two judgments in this matter rejecting the applicant’s submissions.

21. Judgment UNDT/2009/026 deals exclusively with the receivability of the application against the decision to select another candidate for promotion. Not a single word is spent on the merits of the case. According to the clear distinction between issues of receivability and those related to the merits of a case, no assumptions may be drawn from a judge’s stand on the irreceivability of an application regarding his or her views or potential considerations with respect to the merits. If a judge considers an application to be irreceivable for procedural reasons, e.g. the application is time-barred, the application must be dismissed. In other words, an application that is not receivable pursuant to article 8 of the Tribunal’s statute must and will be dismissed even if it is well-founded on the merits.

22. Judgment UNDT/2009/087 also deals exclusively with issues of receivability, this time concerning an application for revision pursuant to article 29 of the Dispute Tribunal’s rules of procedure. It does not contain any allusions to the merits of the case either.

23. Finally, by deciding to transmit to the applicant a copy of the Senior Review Group’s memorandum dated 11 May 2006, Judge Cousin merely granted the applicant’s request for disclosure—which she also submitted to the Joint Appeals Board and lastly the Appeals Tribunal. It is unclear how such a decision could have deprived the applicant of her alleged “right to full disclosure”. Nor does this decision “leaves”, as the applicant puts it, “the perception that the Tribunal readily accepts, at face value, anything produced by the respondent”. Disclosure of a document to a party who requested it does not have any bearing

on the judge's assessment of the credibility and relevance of that document. Overall, Order No. 71 (GVA/2010) contains no evidence of the existence of any factor that may impair or reasonably give the appearance of impairing Judge Cousin's ability to independently and impartially adjudicate the instant case.

24. Since there are no reasons to grant the request for recusal, it is not for the President of the Dispute Tribunal to decide on the applicant's motion for change of venue, which was filed pursuant to article 6 of the Tribunal's rules of procedure. Such decisions are normally taken by the Judge to whom the case was assigned in consultation with the Judges at the duty station where the transfer is sought.

Conclusion

25. In view of the foregoing, the request for recusal is rejected.

(Signed)

President Thomas Laker

Dated this 17th day of September 2010

Entered in the Register on this 17th day of September 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva