UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/020
Order No.: 113 (GVA/2017)
Date: 16 May 2017
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

LLORET ALCANIZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON RECUSAL

Counsel for Applicant:
Daniel Trup, OSLA
Natalie Dyjakon, OSLA

Counsel for Respondent:
Stéphanie Cochard, HRLU/UNOG
Kara Nottingham, HRLU/UNOG

Introduction

1. By application filed on 19 April 2017, the Applicant, an Information Systems Officer (P-3) at the United Nations Office at Geneva, challenges the decision "to reduce [her] contracted salary and the manner of the implementation of the Unified Salary Scale".

2. The application was served to the Respondent on 21 April 2017, who has until 22 May 2017 to submit his reply.

3. On 9 May 2017, the present case was assigned to the undersigned Judge.

4. By Order No. 110 (GVA/2017) of 10 May 2017, the undersigned Judge informed the parties that he was considering the possibility of recusing himself from hearing the application given that he is personally affected by the new Unified Salary Scale. He also informed the parties that, as the President of the Tribunal, he saw the same difficulty in reassigning the present case to any of the other Judges of the Dispute Tribunal, as they are similarly affected.

5. On 12 May 2017, the undersigned Judge held a case management discussion in the matter, with the participation of Counsel for both parties. Both parties took notice of the undersigned Judge's declaration of a conflict of interest, but expressed their views that Judges of the Dispute Tribunal may only have an indirect personal interest in the case insofar as their individual situation may be different from that of the Applicant. They both insisted that the application be heard and determined by the Dispute Tribunal irrespective of any conflict of interest and specifically waived their right to seek recusal of the undersigned Judge.

Consideration

Preliminary remark

6. The undersigned Judge notes that he is not seized of any motion for his recusal. Rather, the parties have both waived their right to seek his recusal. That

noted, the undersigned Judge agrees with the following holding of the European Court of Human Rights in *Harabin* v. *Slovakia* (Application no. 58688/11, Judgment, 20 November 2012, at para. 131):

> The litigants' standpoint is important but not decisive; what is decisive is whether any misgivings in that respect can be held to be objectively justified. In that respect even appearances may be of a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

7. In addition, the undersigned Judge considers that the parties' waiver in the circumstances of the present case is of limited value, as it may be seen as having been made under a form of duress to avoid that their dispute remains unresolved by a tribunal, as is more amply discussed below.

8. It follows that the undersigned Judge is under a duty to consider *ex officio* his recusal from the case, irrespective of the position adopted by the parties.

Existence of a conflict of interest

9. The application challenges 1) the decision to reduce the Applicant's gross salary following the introduction of the new Unified Salary Scale for the Professional and higher categories on 1 January 2017; 2) the discriminatory nature of the Transitional Allowance in respect of the Applicant's first dependent child, which will be reduced as compared with other categories of staff members and 3) the Administration's failure to take all reasonable steps to reduce the Applicant's hardship as a result of her first dependent child turning 21 years of age and the consequential loss of the Transitional Allowance.

10. As a result of these measures, the Applicant claims that she incurred an immediate reduction in her gross salary, and that she will see her pay drop further in February 2018 with the ending of the transitional allowance following her first dependent child turning 21. The gist of the Applicant's case is that the

Administration acted unlawfully in converting a portion of her salary, which is an acquired right, into a separate and distinct dependency allowance.

11. Pursuant to art. 2(e) of the Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, adopted by the General Assembly under resolution A/RES/66/106, "[j]udges must disclose to the parties in good time any matter that could reasonably be perceived to give rise to an application for recusal in a particular matter".

12. It follows that the undersigned Judge has a duty to declare that he is personally affected by the introduction of the Unified Salary Scale, which constitutes the basis of the decision the Applicant challenges. He made this declaration to the parties during the case management discussion on 12 May 2017 and hereby formally puts it on record.

13. The Judges serving on the Dispute Tribunal are not staff members of the Organization, but the General Assembly decided, upon recommendation from the Secretary-General, that they shall be compensated in the same way, with salaries and allowances equivalent to the D-2 level (see para. 83 of A/63/214, Administration of justice at the United Nations, Report of the Secretary-General, and para. 30 of A/RES/63/253, General Assembly Resolution on the Administration of justice at the United Nations). As a result, the undersigned Judge's conditions of service are not independent from the staff salary system, and they are subject to the same modifications as those affecting staff members.

14. If the judges of the Dispute Tribunal had their conditions of service determined independently, not having their remuneration linked to that of staff members, this matter would not have arisen. It is noted that independence is not for the benefit of the judges of the Dispute Tribunal, but rather for the benefit of those they serve. As Dickson CJ of the Supreme Court of Canada noted in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 30 "[t]he role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."

15. Although he is not in the exact same situation as the Applicant, the undersigned Judge has, to some extent, a personal pecuniary interest in the present case. In particular, the implementation of the new Unified Salary Scale from 1 January 2017 led to a reduction of his gross salary and negatively impacted on his remuneration package, effectively calculated on the basis of a D-2 salary. This situation places the undersigned Judge in a position of conflict of interest as defined in art. 27(1) of the Dispute Tribunal's Rules of procedure given that it "may impair or reasonably give the appearance of impairing [his] ability to independently and impartially adjudicate a case assigned to him".

16. There can be no doubt that the undersigned Judge's conflict of interest in the present case would normally call for his recusal under art. 9 of the Dispute Tribunal's Statute, which provides that "[a] judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case". The right to an impartial adjudication of a case is one of the basic principles of procedural fairness. However, as the current President of the Tribunal, the undersigned Judge cannot ignore the consequences that his recusal would entail in the particular circumstances of this case.

Consequences of a recusal

17. The procedure for the recusal of judges is set forth in art. 28 of the Dispute Tribunal's Rules of Procedure, which provides that:

> 1. A judge of the Dispute Tribunal who has or appears to have a conflict of interest as defined in article 27 of the rules of procedure shall recuse himself or herself from the case and shall so inform the President.
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> 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. A request for recusal of the President shall be referred to a three-judge panel for decision.
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> 3. The Registrar shall communicate the decision to the parties concerned.

18. It follows that when a Judge recuses himself/herself, the President of the Tribunal decides whether the case should be reassigned to another Judge.

19. The difficulty in the instant case is that all the other Judges of the Dispute Tribunal face the same situation of conflict of interest as the undersigned Judge, given that their remuneration is established in the same way. They are all, in one way or another, affected by the implementation of the Unified Salary Scale. This serious and most unusual situation is not foreseen in the applicable rules.

20. The undersigned Judge examined, with the assistance of the parties, whether there was any possibility of removing the existing conflict of interest, notably by suspending the proceedings until the General Assembly takes the appropriate measures to ensure that Judges are no longer affected by modifications to the conditions of service of staff members against which challenges may be brought before them and, as such, provide the necessary guarantee of impartiality. This approach was opposed by both parties and, indeed, does not appear appropriate for two main reasons.

21. Firstly, the results would be highly uncertain given that the Dispute Tribunal has no power to compel the General Assembly in any way to modify the conditions of service of the Judges of the Dispute Tribunal to ensure that they are independent of the staff members' remuneration scale. Secondly, a review of the conditions of service of the Judges of the Dispute Tribunal by the General Assembly would necessarily involve a lengthy process, which may cause prejudice to the Applicant who has asked for, and is entitled to, an expeditious resolution of her application given its considerable financial implications for her and other staff members.

22. In these circumstances, the undersigned Judge concludes that the Dispute Tribunal, as a whole, is not in a position to provide the Applicant the guarantees of independence and impartiality to which she is entitled under art. 19 of the Universal Declaration of Human Rights and art. 14(1) of the International Covenant on Civil and Political Rights for the determination of her application.

23. That said, the Applicant is also entitled to have her application determined by a competent tribunal, pursuant to the same provisions.

24. The former Administrative Tribunal of the United Nations stressed in *Andronov* (Judgment n° 1157, 2003) the importance for the Organization to provide staff members with effective recourse against decisions they consider not in compliance with their terms of appointment, stating that:

> The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

25. Likewise, the International Labour Organization Administrative Tribunal repeatedly held that judicial review of decisions of international organizations is "an important safeguard of staff rights and social harmony in an international organisation" and "an indispensable means of preventing dispute from going outside the organisation" (Judgment 1317, para. 31, reiterated in Judgment 2671, para. 11).

26. In the present case, the Dispute Tribunal is the sole competent authority to determine the application at first instance. The application can only be adjudicated through the United Nations internal system of administration of justice given the immunity of jurisdiction of the Organization arising out of the Convention on the Privileges and Immunities of the United Nations, unless the Organization waives its immunity. This internal system of administration of justice comprises two levels of adjudication, the Dispute Tribunal as a first instance jurisdiction and the Appeals Tribunal, as an appellate jurisdiction.

27. The possibility of referring the case directly to the Appeals Tribunal, given that Judges of that Tribunal would not have the same conflict of interest, has been considered. Judges of the Appeals Tribunal are not affected by the new Unified

Salary Scale as they are paid an honorarium for each decision rendered (see para. 83 of A/63/214, Administration of justice at the United Nations, Report of the Secretary-General, and para. 30 of A/RES/63/253, General Assembly Resolution on the Administration of justice at the United Nations). However, both parties voiced their opposition to being deprived of a first instance recourse, to which they are entitled by law. It is also questionable whether an application filed directly to the Appeals Tribunal, without a first instance judgement, would be receivable in the light of the Appeals Tribunal's jurisdiction to hear "appeal[s] filed against … judgment[s] rendered by the United Nations Dispute Tribunal" and the limited scope of its appellate review, as set out in art. 2 of its Statute:

> 1. The Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:
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> (a) Exceeded its jurisdiction or competence;
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> (b) Failed to exercise jurisdiction vested in it;
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> (c) Erred on a question of law;
>
> (d) Committed an error in procedure, such as to affect the decision of the case; or
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> (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

28. Therefore, referring the case to the Appeals Tribunal, assuming that this Tribunal would have jurisdiction to do so, would not safeguard the Applicant's right to have her application determined by a competent tribunal. Instead, it appears that the possibility of an appellate recourse would be best used as a mechanism of control to mitigate the fact that the Dispute Tribunal does not offer, in the present circumstances, the requisite guarantees of at least perceived impartiality.

29. In view of the foregoing, the undersigned Judge cannot but conclude that all members of the Dispute Tribunal are affected by a conflict of interest due to their remuneration being linked to that of the Unified Salary Scale, and that there is no

other competent tribunal to hear the application at this stage. This situation forces the undersigned Judge to consider applying the doctrine of necessity, which enables a judge, who would otherwise be disqualified, to hear and determine a case where failure to do so may result in an injustice through an inability to adjudicate the matter.

Doctrine of necessity

30. The Bangalore Principles of Judicial Conduct, which followed the Bangalore Draft Code of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity in 2001, as revised at the Round Table Meeting of Chief Justices held in The Hague in November 2002, provide in art. 2.5 that "disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice".

31. The contours of this exception are further defined in the Commentary on the Bangalore Principles of Judicial Conduct, adopted in March 2007, by the Judicial Group on Strengthening Judicial Integrity:

> 100. Extraordinary circumstances may require departure from the principle [of disqualification] discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Such cases will, of course, be rare and special. However, they may arise from time to time in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to other judges.

32. The application of the doctrine of necessity can be traced back to 1430, when the judges of the English Court of Common Pleas were not disqualified from judging an action against all of them, because there was no other court in which the case could be brought (*Year Book*, 8 Hen. 6, 19b; *Rolle's Abridgment* (1668), at p. 93). This rule is now widely recognised, as can be shown

from its inclusion in the Bangalore Principles, and has been applied by the highest courts of several common law jurisdictions, including the House of Lords in the United Kingdom (*Dimes v. Grand Junction Canal (Proprietors of)*, (1852) 3 H.L.C. 759, 10 E.R. 301), the High Court of Australia (*Laws v. Australian Broadcasting Tribunal*, (1998) 93 A.L.R. 435), the Supreme Court of the United States (*United States v. Will*, (1980) 449 U.S. 200), the Supreme Court of Canada (*Re Provincial Court Judges*, [1998] 1 S.C.R. 3) and the Supreme Court of India (*Election Commission of India and Another v. Swamy and Another,* (1996) 4 SCC 104). More importantly, from an international systemic point of view, it has also been acknowledged by the European Court of Human Rights in *Harabin* v. *Slovakia* (Application no. 58688/11, Judgment, 20 November 2012, para. 139), although the Court found that it was not necessary in this case to consider whether its application conformed with art. 6 of the European Convention of Human Rights.

33. The doctrine of necessity finds its source in the rule of law and it "is applied to prevent a failure of justice", as observed by the Smith, Woolf and Jowell in the *Judicial Review of Administrative Action* (5th ed. 1995) at p. 544. The Supreme Court of Canada explained that "the doctrine of necessity recognizes the importance of finality and continuity in the administration of justice and sanctions a limited degree of unfairness toward [the litigants]", and acknowledged that "in some situations a judge who is not impartial and independent is preferable to no judge at all" (*Re Provincial Court Judges*, [1998] 1 S.C.R. 3, at paras. 7 and 4, respectively).

34. There can be no doubt that the doctrine of necessity is an exception of last resort, which should be applied with great circumspection as it would otherwise undermine the guarantee of an impartial and independent tribunal (see, e.g., *Harabin* v. *Slovakia* (Application no. 58688/11, Judgment, 20 November 2012; *Re Provincial Court Judges*, [1998] 1 S.C.R. 3, at para. 7). As the High Court of Australia held in *Laws v. Australian Broadcasting Tribunal*, (1998) 93 A.L.R. 435, (at p. 454):

> There are … two prima facie qualifications of the rule. First, the rule will not apply in circumstances where its application would involve a positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule does apply, it applies only to the extent that necessity justifies.

35. Furthermore, the doctrine would only apply if the cause of the disqualification is involuntary (R.R.S. Tracey, "Disqualified Adjudicators: The Doctrine of Necessity in Public Law", [1982] *Public Law* 628, at p. 641).

36. The undersigned Judge is of the view that the afore-mentioned pre-conditions to applying the doctrine of necessity are met in the present case. Firstly, the cause of the Judges' conflict of interest is beyond their control and not voluntary. Secondly, the application of the doctrine of necessity would not create a positive and substantial injustice, given that it involves the adjudication of a dispute between the parties for which both of them are seeking resolution before this Tribunal, as opposed, for instance, to a criminal sanction that would be imposed by the State against an accused person. It is clear in the circumstances of this case that if the doctrine of necessity is not applied, no adjudication of the dispute placed before the Tribunal will be possible, thus defeating a primary right of the parties. Most importantly, as a check upon any perceived loss of one of the principles of procedural fairness, the parties will be entitled to seek recourse to the Appeals Tribunal thereby allowing judicial scrutiny over any judgment reached by the undersigned Judge and his handling of the case. Thirdly, the undersigned Judge, and the parties themselves, have not identified any other available option to do justice for the parties.

37. In view of the above, the undersigned Judge finds that he is obliged to hear and pass judgment on the present application to avoid a miscarriage of justice.

Conclusion

38. The undersigned Judge hereby decides to remain seized of the case.

(*Signed*)
Judge Rowan Downing
Dated this 16th day of May 2017

Entered in the Register on this 16th day of May 2017
(*Signed*)
René M. Vargas M., Registrar, Geneva