



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/090
UNDT/GVA/2012/024
UNDT/GVA/2012/029
UNDT/GVA/2012/066
UNDT/GVA/2013/006
Order No.: 092 (NBI/2013)
Date: 2 May 2013
Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Officer-in-Charge

GEHR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR RECUSAL

Counsel for Applicant:
Self-represented

Counsel for Respondent:
UNOG/HRMS
UNODC

Introduction

1. On 4 November 2012, the Applicant filed an *ex parte* Motion for Recusal under article 28.2 of the Tribunal's Rules of Procedure requesting the recusal of Judge Thomas Laker from cases that are pending before UNDT Geneva and registered as UNDT/GVA/2011/090, UNDT/GVA/2012/024, UNDT/GVA/2012/029, UNDT/GVA/2012/066 and UNDT/GVA/2013/006.

2. One of the cases the Applicant filed, registered as UNDT/GVA/2011/004, was heard by Judge Laker with a Judgment issued on 14 December 2011¹. In that case, the Applicant challenged a number of decisions taken in relation to his performance appraisal for the period from 1 April 2009 to 31 March 2010. One of his contentions was the decision of the Administration not to allow him to rebut his performance appraisal. The Tribunal found that the claim of the Applicant regarding said denial was moot after a consideration of the evidence and submissions of parties.

3. The Applicant appealed and in a Judgment issued on 1 November 2012,² the UNAT held as follows on that issue:

We are of the view that in rendering [the Applicant's] complaint about the rebuttal issue moot in light of the subsequent reversal of the decision of 24 November 2010, the UNDT Judge failed to give sufficient weight to a central issue, namely the denial to [the Applicant], for a period of time, of the right to engage in a rebuttal process (should he wish to do so) in the context of the performance appraisal evaluation the Administration provided to him on 19 November 2010. This Tribunal recognizes the fundamental right of an employee to be heard in the context of a performance evaluation process. Irrespective of whether the appraisal is conducted inside or outside of ST/AI/2002/3, an employee has a fundamental right to put his/her case, in response to an employer's assessment of his/her

¹ UNDT/2011/211.

² 2012-UNAT-253 para 59.

performance. The Administration itself recognises such a fundamental right as it is provided for at paragraph 15 of ST/AI/2002/3. The right to have a rebuttal process is not mere procedural courtesy but a substantive right which all employees are entitled to invoke.

Applicant's submissions

4. The Applicant submits that in the light of the above finding from UNAT, Judge Laker ignored a fundamental legal principle and would therefore be unable to hear and determine the cases pending before him in an independent and impartial manner. He adds that given that the Judge overlooked or ignored a fundamental legal principle, there would be a risk that justice would not be done and that would be detrimental to the notion of justice. Thus, given the nature of the cases still pending before Judge Laker, he should be recused.

Judge Laker's response

5. On 5 November 2012, the incumbent president of the UNDT requested that Judge Laker provide his comments pursuant to art. 28.2 of the UNDT Rules of Procedure. In his response, dated 19 November 2012, Judge Laker stated that it was abundantly clear that the Applicant had based his motion for recusal on the finding of the UNAT. But he was not in a position to assess why and how the Appeals Tribunal decision, as enunciated by the Applicant in his recusal request, could impair or reasonably give the appearance of impairing his ability as a Judge to independently and impartially adjudicate the other cases pending before him.

6. The learned Judge added that most of the points put forward by the Applicant in his appeal were dismissed by the UNAT. The UNAT found that he had erred on only one point and that does not mean that he would no longer be able to independently and impartially adjudicate the Applicant's cases.

7. Judge Laker also pointed out that out of the 13 UNDT Judgments rendered in the Applicant's cases, he ruled partly in his favour in two cases (see Judgments UNDT/2011/178 and UNDT/2012/095, which were not appealed by either party) and that, out of the three appeals filed by the Applicant, the Appeals Tribunal affirmed two UNDT Judgments (see Judgments 2012-UNAT-234 and 2012- UNAT-236).

Legal Framework

8. Article 27.1 of the Tribunal's Rules of Procedure (the Rules) defines conflict of interest as:

[A]ny 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.

9. Pursuant to art. 27.2 of the Rules, a conflict of interest may arise in the following situations:

- (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.

10. For the purposes of the present matter art. 27.2 (c) is relevant.

11. Article 28.2 of the Rules reads as follows:

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.

Considerations

12. For the Tribunal to grant a motion for recusal, the circumstances must be such that the Judge against whom the recusal request lies finds himself in a situation of conflict as defined by art. 27 of the Rules. This means that the Applicant's right to a fair hearing before an impartial Tribunal will be breached if a recusal is not granted.

13. In *Campos* UNDT/2009/005, the Tribunal held that:

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.

14. With respect to the objective test, the European Court of Human Rights observed that 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.³ As regards the subjective test it is well settled that the personal impartiality of a judge is to be presumed until there is proof to the contrary.

15. The test of impartiality or bias was also canvassed by the Privy Council in a recent case⁴ that went on appeal from the Supreme Court of Mauritius. In this case, counsel for the defendant informed the Court that he needed some more time to prepare for what was going to be a crucial part of the case for the defendant. The Court refused the request and the Privy Council ruled that counsel should have been given the chance to express his reasons for needing more time than the Court was prepared to allow. The Privy Council then looked at the test to be considered in regard to a situation or allegation of potential or actual bias, which is: "the question of

³ *Hauschildt v Denmark*, Series A No. 154, Application No. 10486/3, European Court of Human Rights (1990) 12 EHRR 266, 24 May 1989. Page.21, para 48

⁴ *Lesage v The Mauritius Commercial Bank Ltd*, Privy Council Appeal 0027 of 2011 (2012) UKPC 41

whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”⁵

16. On the question of the state of knowledge that the fair-minded observer should be presumed to have, the Privy Council referred to Lord Hope in *Gillies*⁶ where he stated that:

[t]he fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.⁷

17. Would a fair minded observer in full possession of all the facts and circumstances conclude that because Judge Laker was reversed by the UNAT in one case there would be a real possibility that he would be biased in subsequent cases brought by the same applicant? The Tribunal notes that the personal impartiality and integrity of a judge must be presumed until there is clear proof to the contrary⁸. There is no issue under the subjective test as the Applicant has not presented any evidence or arguments that Judge Laker would act with personal bias in dealing with his case.

18. On the objective test, all that the Applicant is averring is that because Judge Laker’s finding on a specific point was reversed by UNAT this makes him unfit to deal with his pending cases as he would be lacking in impartiality. This argument is indeed a very specious one. If each time a judge is reversed or corrected on an evaluation of evidence or inferences drawn therefrom or on an interpretation of a law he/she has to disqualify himself/herself from serving then the whole justice system, as we know it in democratic societies, would surely crumble. Judges do not judge

⁵ *Ibid* at para 46 and *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

⁶ *Gillies v Secretary of State for Work and Pensions* (Scotland) [2006] UKHL 2, [2006] 1 All ER 731, para 17.

⁷ See also *Lesage v The Mauritius Commercial Bank Ltd* at para 49.

⁸ *Hauschildt v Denmark*, judgment of 24 May 1989, Series A No. 154.

individuals in civil cases. Judges judge cases brought by individuals and their findings are based on the facts and evidence contained in the application and the interpretation of relevant law.

19. Additionally, the Tribunal has sought further details on the nature of the cases pending before Judge Laker. Two of these cases relate to the ePAS of the Applicant. The question therefore arises whether by ruling in a previous case that the issue of the ePAS was moot, a finding with which the UNAT judges did not agree, Judge Laker should be disqualified to hear the cases. The short answer to this is to be found in the Judgment of the UNAT⁹ itself where after reversing the finding of Judge Laker on the ePAS issue three judges found that the Applicant's submissions on the allegation of bias against Judge Laker was without merit.

20. The Tribunal concludes therefore that the Applicant has failed to establish or prove that Judge Laker would not accord him a fair hearing.

Decision

21. The Application for the recusal of Judge Laker is rejected.

(Signed)

Judge Vinod Boolell

Dated this 2nd day of May 2013

Entered in the Register on this 2nd day of May 2013

(Signed)

Abena Kwakye-Berko, Officer-in-Charge, Nairobi Registry

⁹ 2012-UNAT-253