UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/024
Order No.: 33 (NBI/2016)
Date: 26 February 2016
Original: English

Before: President Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MONARAWILA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR RECUSAL

Counsel for Applicant:
Ibrahima Faye

Counsel for Respondent:
Alan Gutman, ALS/OHRM
Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant has a matter, Case No. UNDT/NY/2015/024, pending in New York before Judge Goolam Meeran.

2. By a Motion dated 16 September 2015, the Applicant prayed for the recusal of Judge Meeran pursuant to articles 27 and 28 of the Rules of Procedure of the United Nations Dispute Tribunal (UNDT).

The Motion for Recusal

3. The following information has been taken from the Applicant's Motion for Recusal.

4. The Tribunal, by Order No. 149 (NY/2015) dated 20 July 2015, ordered the parties to attend a case management discussion (CMD) on Thursday, 23 July 2015. The Applicant and her Counsel, Mr. Ibrahim Faye, were in attendance as well as Ms. Elizabeth Gall, Counsel for the Respondent.

5. According to the Applicant, Judge Meeran stated in his opening remarks that: (i) her case could have been thrown out easily or held amongst other pending cases that would be untouched for a few years owing to the work load of the Court; (ii) that he had other more important meritorious cases to review; and (ii) went on to analyse the Applicant's "body language" to assess her determination to go through the entire process "win or lose" (in the Judge's own words) alongside other comments.

6. These observations in the view of the Applicant were an attempt "to indirectly encourage both [her] and her Counsel to exit this judicial system".

7. By Order No.169 (NY/2015), Judge Meeran rescheduled the CMD for 29 July 2015 at the request of the Respondent.

8. The CMD held on 29 July 2015 was attended by the Applicant and Mr. Faye, Ms. Gall accompanied by Ms. Carol Boykin and Mr. Ernest Hunt, both from the Investment Management Division of the United Nations Joint Staff Pension Fund (IMD/UNJSPF) as well as Mr. Phillip David (Legal Officer, IMD/UNJSPF) who was not invited but allowed to attend the CMD. The Judge did not question Mr. David's presence. Ms. Carol Boykin and Mr. Ernest Hunt were not in attendance at the CMD on 23 July 2015.

9. Judge Meeran issued Order No.171 (NY/2015) on 30 July 2015 ordering a stay of proceedings for 30 days to enable the parties to pursue possible alternate dispute resolution and with a request for the Applicant to file a submission indicating whether she wished the Tribunal to proceed to reach a determination on the merits of the case if informal resolution did not succeed.

10. The Applicant complied with a submission particularizing the several discrete claims indicating the dates when each of them occurred and identifying the decision makers and submitting the remedy she was seeking.

11. On receipt of the Applicant's submission, Judge Meeran issued Order No. 199 (NY/20l5) dated 27 August 2015 to assist the parties in clarifying the issues in dispute; review developments to date and agree on a way forward to achieve either alternative dispute resolution or, failing that, a judicial determination of the case.

12. In the same Order, Judge Meeran also stated that the “Tribunal will then review the case file and decide whether any further information is required and whether the case can be decided on the basis of the documents on file or whether a hearing on the merits is necessary”.

13. Judge Meeran issued Order No. 215 (NY/20l5) dated 4 September 2015 informing the parties inter-alia that:

> The Tribunal is of the view that this case can be decided on the basis of the documents already filed, and the responses from the parties to this order.
>
> By 5:00 p.m. on Friday, 11 September 2015, the Respondent is to file a submission, not exceeding three pages, stating whether it is his case that the issues raised by the Applicant have, in effect, been settled by reassigning her to new duties and responsibilities and, if so, to state the date of the said reassignment, giving sufficient particulars thereof. The Respondent is also to explain what other steps, if any, were taken prior to the reassignment to deal with the Applicant's complaints about an excessive workload given her medical condition.
>
> By 5:00 p.m. on Thursday, 17 September 2015, the Applicant is to provide comments on the Respondent's response to para. 4 of this order.
>
> On reviewing the parties' responses to this order, the Tribunal will, if necessary, schedule a case management discussion ("CMD") for 11:00 a.m. on Monday, 21 September 2015. The parties are to keep this date free. The Tribunal will notify the parties on 18 September 2015 if the CMD is to go ahead.

14. Upon receipt of the Respondent's response dated 11 September 2015 to Order No. 215 (NY/20l5), Judge Meeran issued Order No. 229 (NY/20l5) without waiting for the Applicant's reply scheduled for 17 September 2015 as ordered in Order No. 215 (NY/20l5).

15. The Applicant submits that Order No.229 (NY/20I5) did not give her any opportunity to challenge, confirm or otherwise refute the Respondent's various assertions in his submission of 11 September 2015 thus giving an unfair advantage to the Respondent with a second opportunity to elaborate against the Applicant; in addition to reducing the Applicant's submission to two pages instead of the originally granted three page submissions.

16. Judge Meeran went on unilaterally siding with the submission of the Respondent without hearing first the Applicant's response as previously ordered.

17. Despite it being ordered by Judge Meeran that the Respondent's Reply was not to exceed three pages, the Respondent was allowed to submit nearly ten pages.

18. The Applicant's request is:

> Given the manner in which Case No. UNDT/NY/2015/024 has been handled thus far, it is the Applicant's view that Judge Meeran's ability to make a fully independent and impartial decision with respect to the Application on merits has been compromised.
>
> Observing the manner in which Judge Goolam Meeran has issued a number of orders following the Case Management discussion, the Applicant has reasonable belief of appearance of impairment of Judge Goolam Meeran's ability to independently and impartially adjudicate this case.

19. On 4 December 2015, the President of the UNDT requested that Judge Meeran provide his comments pursuant to art. 28.2 of the UNDT Rules of Procedure.

Judge Meeran's response

20. In his response Judge Meeran justified the presence of Ms. Boykin and Mr. Hunt at the CMD on 29 July 2015 as follows:

> It is correct that by Order 149 I requested the presence of Ms. Boykin and Mr. Hunt. It seemed to me on the basis of the Application and Reply that it would be beneficial for them to be present to assist the Tribunal notwithstanding the fact that Ms. Boykin was a new manager who was not directly involved as a decision maker in relation to a number of events that predated her arrival. The fact that she was not so involved could, in my view, enable her to take a constructive view as to any prospect of a resolution. The respondent indicated at paragraphs 4 and 19 of the Reply that a resolution had been explored with her working under the direct supervision of Mr. Hunt, hence the order that he be in attendance at the CMD. In the event neither Ms. Boykin nor Mr. Hunt could attend and the CMD was rescheduled. However before doing so I explored the issues to gauge whether it would be appropriate to encourage the parties to engage in constructive discussions towards a resolution

21. In regard to the observations he made about the fate of the case, the backlog of the Tribunal and the body language of the Applicant the Judge explained that:

> I pointed out that the Respondents had raised issues of receivability which the Applicant would have to deal with and that in cases of this

> kind the Tribunal had two options. The case could be determined on the documents in which event, in the absence of an effective rebuttal, it could be dismissed. However, I did not wish to throw the case out without further exploration of the issues and also to see if indeed there could be a resolution. I explained that the Tribunal had a huge backlog and that if the case took its place in the queue it would be perhaps a year or so before it would be dealt with. I commented that my observations of the applicant and her body language have confirmed my view that it would not be appropriate for this case to be delayed, that the continuing distress to the Applicant should be avoided. I observed that before the Applicant made a decision to proceed to a judicial determination regardless as to whether she won or lost she should reflect on what would be in her best interest and I counselled against shutting the door to discussions which the respondent appeared willing to engage in.
>
> I considered it my duty to convene another CMD given the fundamental difference between the parties. The Respondent submitted that an oral agreement had been reached to settle the dispute. The Applicant wished to proceed with the claim.

22. On the presence of Mr. David at the CMD on 29 July 2015, Judge Meeran explained that he did query his presence and agreed that "he may be present in an advisory capacity to Ms. Boykin".

23. In relation to the allegation that Judge Meeran did not follow-up with the parties on the outcome of the alternative dispute resolution discussions and the reasons for failure to achieve a positive outcome, Judge Meeran observed that it is not appropriate for a judge to enquire as to the reasons why the settlement discussions failed to achieve a positive outcome.

24. Judge Meeran further explained that: "It was necessary, in light of the Respondents response to order 215 to issue another order. There was no order denying the Applicant the opportunity of responding to order 215".

25. Judge Meeran agrees that the Respondent exceeded the limit of three pages imposed on him but he explained that failure by the Respondent to abide by the restriction is a matter to be dealt with, if appropriate, when the merits of the case are

considered. He indicated that the Tribunal would have to decide whether to strike out the excess pages or exceptionally grant leave to receive the additional pages provided that there is no prejudice to the Applicant.

Considerations

26. The present request for recusal brings in sharp focus how litigants misconceive the purport of a CMD and the role of a judge at such a CMD. A CMD is held in private with a judge sitting alone. If a litigant believes that at a CMD a judge should just stay passive then that litigant is mistaken. In the case of *Nielsen*[1] it was held:

> A litigant who appears before a judge in the course of a CMD should not labour under the impression or be allowed to hold the belief that a judge at the CMD is just a mere passive decoration sitting on a mantelpiece in a drawing room of a mansion. If the role of the judge is reduced to that then the very process of the CMD loses its significance.

27. Article 19 of the Rules of Procedure of the UNDT, which is titled "Case Management" reads:

> The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

28. This Article vests a judge with the power either on his own initiative or on the application of a party to issue any order or any direction which the judge considers appropriate when he/she is conducting a CMD. This power is given to the judge to take decisions in the interest of justice. A judge handling a CMD does not require the permission or consent of a litigant to issue any order or direction so long as that litigant or counsel or both have been afforded an opportunity to make representations to the judge according to existing statutory rules and procedures.

[1] Order No. 015 (NBI/2016).

29. While art. 19 sets out in general terms what a judge can do in the interest of justice in practical terms the article is silent on the concrete procedures or measures that a judge should follow or take, as the case may be, to achieve the aim of a CMD. This is so because a CMD may mean different things to litigants.

30. In essence a CMD allows a judge to pursue all available legal means in order to achieve the aim prescribed in art. 19 so that cases are handled with maximum efficiency.

31. The primary aim of a CMD is for the judge and the parties to identify the issues to be determined in the case. Whilst pleadings set out the case of parties more often than not pleadings may also blur the real issues in a case. Identifying the issues in a case cannot and will not be achieved without the active participation of the judge. The judge is bound to ask questions from counsel and/or the litigants and this may at times involve vigorous questioning or suggestions coming from the judge.

32. A CMD is also an opportunity for the judge to make appropriate suggestions or give directions on discovery of evidence as provided by articles 18.1 and 18.2 of the UNDT Rules of Procedure.

33. The CMD is also an opportunity to consider procedural aspects such as whether a hearing is required or particular evidence should be gathered.

34. Equally important is the opportunity in the course of a CMD to explore the avenues for mediation and amicable settlement. In the employment sphere, minimal confrontation and litigation leads to a more conducive and healthy working environment. Mediation or amicable settlement is an important feature of the internal justice system of the Organization. The President would here recall what the Tribunal stated in *Pirakku* UNDT/2014/093:

> It is obvious that meaningful consultations towards the resolution of a dispute, when deliberated on in good faith, would serve the interest of management and the staff member. It would engender a collegial work

> environment and remove the antagonism and friction that usually results from workplace disputes. Treating litigation as the absolute last resort allows for the efficient use of the Tribunal's (tight) resources and for proceedings to be conducted expeditiously.

35. The informal system of administration of justice has been at the forefront of a number of General Assembly resolutions. At its 67th session held in December 2013 the General Assembly resolved as follows[2]:

> Informal system
>
> 21. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;
>
> 22. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, and in this regard requests the Secretary-General to recommend to the General Assembly at its sixty-eighth session additional measures to encourage recourse to informal resolution of disputes and to avoid unnecessary litigation;
>
> 23. Encourages the Secretary-General to ensure that management responds to requests of the Office of the United Nations Ombudsman and Mediation Services in a timely manner;
>
> 24. Stresses the importance of developing a culture of dialogue and amicable resolution of disputes through the informal system, and requests the Secretary-General to propose, at the main part of the sixty-eighth session of the General Assembly, measures to encourage informal dispute resolution.

36. The General Assembly reiterated this at its 69th session in resolution 69/203 where it:

> 14. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;
>
> 15. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, without prejudice to the basic right of staff

[2] General Assembly Resolution A/RES/67/241 [on the report of the Fifth Committee (A/67/669)]

> members to access the formal system of justice and encourages recourse to the informal resolution of disputes.

37. In the same resolution the General Assembly recalled:

> [T]he emphasis placed by the General Assembly on the resolution of disputes, and requests the Secretary-General to report on the practice of proactive case management by the judges of the United Nations Dispute Tribunal in the promotion and successful settlement of disputes within the formal system in his next report.

38. In the conduct of a CMD or a hearing on the merits the judge must act fairly, impartially and courteously. The President will here endorse what was said in *Nielsen* Order No. 015 (NBI/2016):

> Whether a judge is dealing with a CMD or a hearing on the merits he/she must act scrupulously within the legal parameters provided by statute and the rules and regulations of his/her mandate and in compliance with ethical standards. These standards would encompass personal conduct as prescribed by section 6(e) of the Code of Conduct ("Code") for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal that reads: "When conducting judicial proceedings, judges must act courteously to legal representatives, parties, witnesses, Tribunal staff, judicial colleagues and the public, and require them to act courteously".
>
> The judge should also be scrupulously impartial. This concept which lies at the very core of an independent and transparent judiciary requires the judge not to say any word or act in any way that would be perceived as bias. The word "perceived" is used deliberately as impartiality is much more a question of perception. A judge may be subjectively impartial but if objectively he is perceived as not being so the whole concept of impartiality is destroyed. The Code makes that clear in its sections 1(a) and (b) and sections 2 (a) and (b). Sections 1(a) and (b) provide:
>
> > **Independence**
> >
> > (a) Judges must uphold the independence and integrity of the internal justice system of the United Nations and must act independently in the performance of their duties, free of any

> inappropriate influences, inducements, pressures or threats from any party or quarter;
>
> (b) In order to protect the institutional independence of the Tribunals, Judges must take all reasonable steps to ensure that no person, party, institution or State interferes, directly or indirectly, with the Tribunals.

Sections 2 (a) and (b) state:

> **Impartiality**
>
> (a) Judges must act without fear, favour, or bias in all matters that they adjudicate;
>
> (b) Judges must ensure that their conduct at all times maintains the confidence of all in the impartiality of the Tribunals.

39. It is clear from the allegations made by the Applicant and the observations and explanations of Judge Meeran that the Applicant and her Counsel have misunderstood the purpose of a CMD. What Judge Meeran did at the CMD was to explain the status of her case to the Applicant. The reference to the backlog of cases and the case of the Applicant having to wait for its turn given the docket of the UNDT New York Registry could have been avoided but no sinister motive should be ascribed to that statement. The message the Judge was trying to convey, when the overall context of the CMD is considered, was that if there was no amicable resolution the case might have to wait a while for its turn on the docket.

40. It is the considered view of the President that when Judge Meeran brought up the possibility of the case being dismissed on grounds of receivability, he should have explained that, pursuant to article 9 of the UNDT Rules of Procedure, he has the authority to issue a summary judgment.

41. The Applicant cannot be blamed, if from her perspective Judge Meeran gave the impression that the case would be thrown out. The Judge however explained that he "did not wish to throw the case out without further exploration of the issues and

also to see if indeed there could be a resolution". It is indeed the primary task of a judge to explore the issues in any case before coming to a decision. The President will here refer to the following extract from *The Elements of Case Management: A Pocket Guide for Judges*[3]*, second edition by Judge William W Schwarzer and Alan Hirsch*:

> Detecting the underlying issues in dispute sometimes requires vigorous questioning of the attorneys by the judge to get beyond the pleadings. Parties may raise assorted causes of action or defenses that create the impression of a complex lawsuit when, upon probing, it turns out that the entire case hinges on a straightforward factual or legal dispute—or **no triable issue at all** (emphasis added).

42. In *Campos* UNDT/2009/005, the Tribunal, following international jurisprudence, held: "It is well settled that impartiality is determined according to two tests, subjective and objective".

43. The issue in the present request is what a reasonable and fair minded observer would make of the statement of a judge who states at a CMD that a case may be dismissed. On this issue reference can be made to the case of *Gillies*[4] where the Privy Council held:

> The 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.

44. Would a fair-minded observer present at the CMD, who heard Judge Meeran telling the Applicant that her case may be dismissed, conclude there would be a real possibility that the judge would be biased in determining the merits of the case? On the objective test, all that the Applicant is averring is that because Judge Meeran made such a statement in the handling of her case at the CMD this would make him

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

unfit to deal with her case. "The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased[5]." In the view of the President the all-important words from that extract are "real possibility".

45. Taken in isolation and out of context the statement of Judge Meeran about dismissing the case appears unseemly. But the President also acknowledges that in the course of a CMD where exchange of views take place, at times strongly, under the supervision and guidance of the judge, views need to expressed by the judge however unpalatable they may appear to be to a litigant. This is supported by the following:

> Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them[6].

46. The President is not prepared to hold, on the basis of that sole statement, that this would produce the appearance of bias on the part of Judge Meeran. The statement must be considered in combination with the overall process of the CMD that involved a number of orders and more than one CMD session. In that connection the President will endorse the following reasoning:

> No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances

[5] *Lesage v The Mauritius Commercial Bank Ltd*, Privy Council Appeal 0027 of 2011 (2012) UKPC 41
[6] *Johnson v Johnson* [2000] HCA 48; 201 CLR 488, paragraph 13.

> of the particular case. The hypothetical observer is no more entitled to make snap judgments than the person under observation[7].

47. Judge Meeran remained mindful of the interest of the Applicant when he considered her distress and thought that the case should be dealt with swiftly. He even went further and was attempting to convince the parties to come to an amicable settlement. Surely this is not the mindset of a judge who would not be acting impartially if the case was heard on the merits. Judge Meeran's position can:

> […] therefore be contrasted with the position of a judge, who may have, for example, engaged in intensive case management before a trial, and has come to believe himself or herself so well educated about the proceedings, and the respective positions of the parties, as to be able to make predictions about the outcome on the impressions so far formed, a real danger which may lie in intensive case management undertaken by a judge who is to conduct the trial.[8]

48. The Tribunal notes that there is no issue under the subjective test as the Applicant has not presented any evidence or arguments that Judge Meeran would act with personal bias in dealing with his case. At any rate the personal impartiality and integrity of a judge must be presumed until there is clear proof to the contrary[9].

Decision

49. The Motion for recusal is rejected.

[7] Ibid, paragraph 14.
[8] Ibid, paragraph 82.
[9] *Hauschildt v Denmark*, Judgment of 24 May 1989, Series A No. 154.

(Signed)

President Vinod Boolell

Dated this 26th day of February 2016

Entered in the Register on this 26th day of February 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi