UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/039/ JAB/2008/080 & UNDT/NY/2009/117
Order No.:	42 (NY/2010)
Date:	8 March 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON DISOBEDIANCE OF ORDER

Counsel for applicant:
Francois Loriot

Counsel for respondent:
Susan Maddox, ALU
Adele Grant, ALU

Introduction

1. In Order No. 40 (NY/2010) of 3 March 2010, I ordered the respondent to produce to the Tribunal, pursuant to art 9.1 of the Statute of the Dispute Tribunal and art 18.2 of its Rules of Procedure, by close of business Friday, 5 March 2010, the documents considered by the Selection Committee, the records of the deliberations of the Committee and any communication by it to the Secretary-General together with the documents prepared by officials in the EOSG relating to the appointment of the ASG/DESA.

2. On 7 March 2010 the respondent filed a submission, stating that it declined to produce the documents requested, for reasons set out in its previous submissions.

3. At the hearing of the matter on 8 March 2010, I gave the *ex tempore* ruling which follows, though I have added the references to the decisions of the UN Administrative Tribunal.

Ruling

4. To disobey an order of the Tribunal is undoubtedly contempt. Whether it is so described matters not. A deliberate decision to disobey is a direct attack upon the jurisdiction of the Tribunal and its power to undertake the responsibilities with which it has been entrusted in its Statute by the General Assembly.

5. The Tribunal will not accept the legitimacy of disobedience of its orders. In *Durand* UNAT (2005) 1204, the Administrative Tribunal said –

> At the outset, before the Tribunal can adjudicate each of the substantive issues set forth above, it is compelled to turn its attention to the Respondent's conduct in this matter with respect to the production of documents. On 3 June 2004, the Tribunal issued its first request for a copy of the BOI report, as well as any other relevant reports or documents, relating to the decedent's death. The Tribunal requested receipt of such documents on or before 14 June. Thereafter, the Respondent requested an extension of time to respond, and the Tribunal granted that request, but the Respondent failed to produce the

requested documents, claiming privilege on the basis that the United Nations'

> "consistent policy has been not to release such reports to staff members or other outside individuals. This is an important policy for ensuring that the Organization receives all information relevant to the inquiry and is able to reach candid conclusions; failure to respect this policy would likely chill sources of such information and the candour of such conclusions."

The Tribunal rejected the stated claim for privilege, on the basis that "[a] policy of nondisclosure effectively only encourages self-serving statements or assertions the veracity of which cannot be challenged or proved. In practice such a policy generally is not conducive to establishing the truth."

V. Thereafter ensued an attenuated correspondence between the Tribunal and the Respondent, relating to the requested documents. The Respondent eventually produced some of the requested documents but maintained his position that the reports he produced were only reviewable by the Tribunal on the condition that the Tribunal was not permitted to disclose the contents of such reports. The Respondent never produced the Annexes to those reports, despite a further request by the Tribunal.

VI. Article 17 of the Rules of the Tribunal authorizes the Tribunal to "at any stage of the proceedings call for the production of documents or of such other evidence as may be required". Thus, the Tribunal was within its explicit statutory authority when it requested that the Respondent produce the BOI report and other related reports. It is also a well-settled tenet of jurisprudence of international administrative tribunals, including the Asian Development Bank Administrative Tribunal (ADBAT), that in cases of claimed privilege, it is the Tribunal, and not the party claiming privilege, which must decide the legality of the claim and which must determine whether evidence is to be provided to the opposing party. (See *Bares*, Decision No. 5 (1995), 1 ADBAT Reports 53.)

VII. The Respondent's contentions with regard to the claim of privilege in this matter are flawed. The Respondent generally asserts two reasons in support of his claim for privilege: (1) that keeping such documents confidential is vital to discovering the truth, and (2) that some documents are always kept confidential vis-à-vis Member States, and therefore reports are submitted to Member States without the

annexes attached thereto. On both counts, the Respondent's reliance is erroneous. The Tribunal, in its letter to the Respondent dated 30 June 2004, had previously rejected the Respondent's claim for privilege on this basis, stating that hiding the truth in matters such as this, without offering an additional valid basis for privilege, is not designed to provide candid answers to important questions or to obtain the truth. Additionally, the Respondent's arguments that BOI reports are only provided to Member States without the supporting documentation, is wholly irrelevant to the Tribunal. As the Tribunal noted in its letter to the Respondent dated 23 July 2004,

> "the Guidelines Concerning Boards of Inquiry dated 26 April 1995 … are not inconsistent with the Tribunal's request for the Board of Inquiry report and the other documents requested in its previous letters. We note that the Guidelines deal with production of internal documents of the Organization to outside entities. As the Respondent is well aware, the UNAT is a subsidiary organ of the General Assembly, and thus, cannot be considered as an outside entity. Moreover, the Guidelines provide for a specific exception to the stated policy 'in the interest of justice', which is the current circumstance."

VIII. While the Tribunal does not dispute the Respondent's right to make a claim of privilege based on any reason it chooses, it is the Tribunal which is vested with the ultimate authority to decide whether the claim has merit and should be granted, or whether the circumstances are such that the requested privilege cannot stand. In the instant case, the Tribunal had previously rejected the Respondent's claim for privilege, on the basis asserted in the Respondent's Answer. The Respondent has not asserted any other basis upon which the Tribunal could uphold the privilege. The Respondent acts without legal authority and in violation of article 17, then, when he refuses to produce documents except on the condition he imposes; namely, that the reports be kept confidential and not disclosed to the Applicants.

IX. The Tribunal is disturbed by the Respondent's conduct. It cannot condone an act by the Respondent designed to keep in the dark the circumstances of one of its staff member's death. The Respondent's actions demonstrate an attempt to control the judicial process by deciding the extent to which the Tribunal can review and consider evidence in seeking to do justice. The Tribunal will not acknowledge the right of the Respondent to seek to impose conditions as the basis on which evidence is offered. The Tribunal will continue properly to decide whether a privilege applies and to what extent.

> X. Of perhaps more importance to the Applicants and the remaining heirs to the decedent's estate, however, than the Respondent's chilling effect on the pursuit of justice, is the effect such concealment has had. By withholding relevant and potentially enlightening information from the family members, the Respondent deprives them of ever learning the circumstances surrounding their loved one's death and of knowing what she was thinking and feeling in the moments before she died. Thus, for the family, closure may never be had.
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> XI. Given the Respondent's conduct and refusal to provide the information requested to the Tribunal, except subject to certain legally unacceptable conditions, the Tribunal finds that it cannot consider at all the reports submitted by the Respondent in reaching its decision in this matter. Therefore, the Tribunal has no choice but to decide the case based only on the evidence properly before it.

6. In *Alves* (2005) UNAT 1245, the Members of the Administrative Tribunal added the following note to the principal judgment—

> STATEMENT BY MR. FLOGAITIS AND MR. GOH
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> We would like to add the following statement to the above Judgement:
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> I. On 7 July 2005, the Respondent submitted to the Tribunal a number of documents, following a request for additional information and documentation deemed by the Tribunal to be pertinent to this case.
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> II. In his cover letter of the same date, the Respondent stipulated that, in order to respect confidentiality, he was transmitting these documents "on the strict condition that they are not released to the Applicant".
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> III. The Tribunal recalls the provisions of article 17 of the Rules of the Tribunal, contained in Chapter V, entitled "Additional documentation during the proceedings", which states as follows: "The Tribunal may at any stage of the proceedings call for the production of documents or of such other evidence as may be required".
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> IV. The Tribunal understands, and is sensitive to, the duty of the Administration to protect third party interests or interests of the Organization in judicial proceedings. However, at the same time, it finds unacceptable the fact that the Respondent provides requested documentation on the condition of confidentiality. The Tribunal is *duty-bound* to render justice and nothing can prevent it from doing so.

> V. Moreover, it is a well-established rule of administrative law, deriving directly from the Rule of Law, that when the Tribunal requests the Respondent to produce documents, he should comply. Naturally, the Respondent may express his preference that such documents are not released to an applicant, because of concerns with regard to confidentiality, or because a document is classified. However, it is for the Tribunal, after careful consideration of such a document, to decide whether or not to release it to the other party. This is the reason for the inclusion of article 17 in the Rules, that is, to grant the Tribunal the power to search anywhere the truth might be hidden.
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> VI. In the instant case, the Tribunal does not accept and will not abide by the condition imposed. However, the Tribunal is aware of and will respect and balance any need for confidentiality against the need for disclosure to ensure justice to parties before it. In this, the Tribunal is, and will always remain, the sole judge. The Tribunal requested the production of the documentation in question as a necessary step in establishing the facts, pursuant to the provisions of article 17.
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> VII. Moreover, the Tribunal finds that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless he or she has full access to the file. Being prevented from having full access may jeopardize the person's rights and interests. The Respondent may argue that disclosure of a file would not respect confidentiality, but this must be balanced with the right of an applicant to defend him or herself. Otherwise, a violation of due process rights may occur.

7. These judgments do not deal with the wider issue of the powers of the Tribunal to deal with the willful disobedience of its orders but they state in unequivocal terms the legal obligation of the parties to obey its orders. The requirement to do so is not only essential to the integrity of the administration of justice but also a right of the applicant to a fair hearing.

8. This problem has been considered in the common law and the position is clear. Time does not permit me to discuss the relevant cases. But they do not represent any peculiarity of the common law, merely the consequences of the courts controlling their own procedures in the face of contempt—here the willful

disobedience of an order of the court—by exercising its necessarily inherent power to vindicate the integrity of its jurisdiction. In my view, a party who has willfully disobeyed a direct order of the Tribunal is not entitled to appear in the Tribunal to advance its case, nor to call any evidence whilst that party remains disobedient and until that disobedience has been purged.

9. Counsel on behalf of the Secretary-General was invited to make submissions, firstly as to the appropriate sanction that should be applied to a party in willful disobedience of an order of the Tribunal, and declined to do so. Counsel was also given an opportunity to make a submission on the view that I expressed above as to the consequences of such disobedience in a proceeding before the Tribunal. Counsel did not do so.

10. The third question is this: why should the respondent be entitled to appear in any proceedings before the Tribunal whilst it is in willful disobedience of an order of the Tribunal? Counsel for the respondent submitted that it should suffer its exclusion only in this case. I decided to reserve the question for the present, but I cannot think that the respondent can be permitted to say, in effect, that it cares about outcomes in different cases differently and only complies with orders where it wants to defend a case. I do not think the Tribunal can be subjected to such a process. But, for now, until my order is complied with, I will not hear the respondent. The applicant is entitled to proceed, on the basis that none of the respondent's material will be considered.

(*Signed*)

Judge Adams

Dated this 8th day of March 2010