



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/035  
UNDT/NY/2015/062  
Order No.: 237 (NY/2016)  
Date: 10 October 2016  
Original: English

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**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** New York

**Registrar:** Hafida Lahiouel

AUDA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON SUSPENSION OF PROCEEDINGS**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## Introduction

1. The Applicant, a former Principal Officer at the D-1 level in the Department of General Assembly and Conference Management (“DGACM”), has two separate but related applications. The applications relate to a complaint submitted by him on 19 April 2012 to the then Under-Secretary-General, DGACM (“USG/DGACM”), alleging that the then Assistant Secretary-General, DGACM, had engaged in prohibited conduct under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The two applications can be summarized as follows:

a. On 8 June 2015, the Applicant filed an application contesting the decision of an initial fact-finding panel to “delay, withhold, and not submit its report on the investigation and the records of the investigation”. This case was registered under Case No. UNDT/NY/2015/035 (“Case No. 2015/035”);

b. On 20 November 2015, the Applicant filed an application contesting the 8 September 2015 decision of the then USG/DGACM, based on the report of a second fact-finding panel, to close his complaint under ST/SGB/2008/5 without taking any further action. This case was registered under Case No. UNDT/NY/2015/062 (“Case No. 2015/062”).

2. On 8 July 2015, the Respondent filed a reply to the application in Case No. 2015/035, submitting that it is not receivable *ratione materiae* or, in the alternative, moot. On 21 August 2015, the Applicant filed a response to the Respondent’s reply in Case No. 2015/035, addressing the receivability points raised by the Respondent.

3. On 21 December 2015, the Respondent filed a reply to the application in Case No. 2015/062.

### **Procedural history**

#### *Case assignment*

4. On 1 July 2016, Cases No. 2015/035 and No. 2015/062 were assigned to the undersigned Judge.

#### *Orders No. 168 (NY/2016) and No. 169 (NY/2016) of 12 July 2016*

5. On 12 July 2016, the Tribunal issued Order No. 168 (NY/2016) and Order No. 169 (NY/2016) in Case No. 2015/035 and Case No. 2015/062, respectively. The orders were identical in content. The parties were ordered to respond to a number of issues listed in the order, including whether they agreed to attempt informal resolution of the matters and whether the two cases should be consolidated through an order for combined proceedings.

#### *Joint submission of 20 July 2016*

6. On 20 July 2016, the parties filed jointly-signed statements in both Case No. 2015/035 and Case No. 2015/062. The jointly-signed statements read:

The parties conferred on 19 July 2016. The parties agreed to attempt informal resolution of Case No. 2015/035 and Case No. 2015/062. The parties, however, were unable to agree on the modalities for attempting informal resolution, or a request for suspension of the proceedings.

*Orders No. 177 (NY/2016) and No. 178 (NY/2016) of 21 July 2016*

7. On 21 July 2016, the Tribunal issued Order No. 177 (NY/2016) and Order No. 178 (NY/2016), directing the parties to file a jointly-signed statement in relation to each case, responding to the remaining issues as identified in Orders No. 168 (NY/2016) and 169 (NY/2016).

*Joint submission of 28 July 2016*

8. On 28 July 2016, the parties filed their jointly-signed statements submitting, *inter alia*, that they were in agreement that the two cases should be consolidated through an order for combined proceedings, and proposing that the cases be heard on 14 and 16 September 2016.

*Order No. 213 (NY/2016) of 8 September 2016*

9. By Order No. 213 (NY/2016) dated 8 September 2016, the Tribunal consolidated the two cases into a combined proceeding. The Tribunal noted that the proposed hearing dates were not available. Noting that the Applicant has another matter pending before the Tribunal (Case No. UNDT/NY/2016/028), in which the parties agreed to suspend the proceedings pending informal discussions, the Tribunal ordered the parties to file a joint submission stating whether they agree to attempt informal resolution of the two present cases, failing which they were to propose agreed dates for a two-day hearing on the merits between 3 October 2016 and 6 October 2016.

*Joint submission of 14 September 2016*

10. On 14 September 2016, the parties filed a joint submission stating:

... The Respondent is available for a hearing on the merits to be held on Wednesday, 5 October 2016 and Thursday, 6 October 2016.

... The Applicant is available for a hearing on the merits to be held on Thursday, 6 October 2016, Friday, 7 October 2016 and throughout the week of Monday, 10 October 2016.

11. Accordingly, based on the joint submission of 14 September 2016, the only date on which both parties were available in the first half of October was Thursday, 6 October 2016.

*Applicant's motion of 14 September 2016*

12. On the same day, 14 September 2016, the Applicant filed a motion identifying seven individuals as witnesses he would like to call at the hearing on the merits. He requested the Tribunal to “call/make an order for the witnesses listed to appear for the hearing” and to release the full report of the Second Fact-Finding Panel, including all annexes.

*Case management discussion of 27 September 2016*

13. On 27 September 2016, the Tribunal held a case management discussion (“CMD”) in relation to these two cases. The Applicant and Counsel for the Respondent attended the CMD in person. Referring to the Applicant’s motion dated 14 September 2016 concerning his proposed list of witnesses, the Tribunal noted at the CMD that some of these proposed witnesses were listed by the Applicant for the purpose of providing oral evidence on the settlement-related discussions that took place between him and the Administration, including the Management Evaluation Unit. The Tribunal noted that such discussions were not a matter for adjudication as they have no probative value in relation to the substantive issues before the Tribunal (see Order No. 225 (NY/2016) dated 28 September 2016,

summarizing the discussion at the CMD). The Tribunal also reminded the parties that, in these types of cases, the Tribunal is not expected to conduct a *de novo* review and is not to assume the functions of an investigative body (cf. *Messinger* 2011-UNAT-123).

*Applicant's motion of 27 September 2016*

14. On 27 September 2016, after the CMD, the Applicant filed a motion requesting the Tribunal to find that the Second Fact-Finding Panel's investigation was "fraught with significant procedural irregularities" because the Panel had not been properly constituted and to remand the case to Department of General Assembly and Conference Management ("DGACM") for a new fact-finding investigation.

*Order No. 225 (NY/2016) of 28 September 2016*

15. By Order No. 225 (NY/2016) dated 28 September 2016, the Tribunal addressed the issues raised at the CMD held on 27 September 2016. The Tribunal directed the Respondent to disclose to the Applicant an unredacted copy of the Second Fact-Finding Panel's report, with the annexes, also in unredacted form. The Tribunal scheduled the hearing on the merits for a one-day hearing on 6 October 2016, as this was the only date available to both parties as per their joint submission of 14 September 2016. The Tribunal also directed the parties to file further submissions in preparation for the hearing, including a joint list of agreed-upon witnesses. At paras. 6 and 9, the Tribunal stated with regard to the scheduling of the hearing and witnesses:

... In their joint submission dated 14 September 2016, the parties indicated that the only date on which both parties were available in the first half of October was Thursday, 6 October

2016. Accordingly, the hearing will take place on that day. The parties shall ensure the attendance of their witnesses.

...

... In view of the above, the parties will be directed to file a joint submission with an agreed order of witnesses, bearing in mind that this case is set for a one-day hearing on 6 October 2016. In order to ensure that the hearing is carried out in the most efficient manner, the parties will also file, prior to the hearing, a signed statement of evidence from each witness with the witness's declaration as to its veracity. At the hearing, the witnesses will be invited to adopt their statements under oath and will then be cross-examined by the opposing party on their evidence.

*Respondent's response of 28 September 2016*

16. On 28 September 2016, the Respondent replied to the Applicant's motion of 27 September 2016, producing, on an *ex parte* basis, a copy of the Office of Human Resources Management ("OHRM") roster with the names of rostered investigators and their personal contact information. The roster was dated "as of 3 October 2014" and included the names of both members of the Second Fact-Finding Panel, indicating that they were both trained in investigations.

*Order No. 226 (NY/2016) of 28 September 2016*

17. By Order No. 226 (NY/2016) dated 28 September 2016, the Tribunal rejected the Applicant's motion dated 27 September 2016. The Tribunal directed the parties that no further motions shall be filed without its leave.

*Respondent's filing of 29 September 2016*

18. On 29 September 2016, the Respondent filed an unredacted copy of the Second Fact-Finding Panel's report, with annexes, pursuant to Order No. 225 (NY/2016).

*Applicant's motion of 30 September 2016*

19. On 30 September 2016, the Applicant filed a motion seeking leave to request "the release of the copy of the OHRM roster submitted by the Respondent on an *ex parte* basis, without the personal contact information."

*Order No. 230 (NY/2016) of 30 September 2016*

20. By Order No. 230 (NY/2016) dated 30 September 2016, the Tribunal granted the Applicant's motion of 30 September 2016, directing the Respondent to disclose to the Applicant (by filing through the eFiling portal) a redacted copy of the OHRM roster.

*Respondent's filing of 3 October 2016*

21. On 3 October 2016, the Respondent filed a redacted copy of the OHRM roster. The Respondent re-filed the document on 4 October 2016, due to technical issues with the file submitted on 3 October 2016.

*Applicant's motion of 3 October 2016*

22. On 3 October 2016, the Applicant filed a motion stating that the Respondent failed to comply with Order No. 226 in that "the correct interpretation of Order No. 226 (NY/2016) entails all persons on the roster involved in the Second Panel at the stage of constitution of the Panel, not only those appointed to serve on the Panel." The Applicant requests the



Tribunal to “order the release of the redacted copy of the OHRM roster, including, at the least, the names and other information relevant to the placement on the roster of all staff members of [DGACM], as well as all others on the roster, including consultants, who had been considered or should have been considered during the constitution of the Panel.”

*Order No. 232 (NY/2016) of 4 October 2016*

23. By Order No. 232 (NY/2016) dated 4 October 2016, the Tribunal dismissed the Applicant’s motion of 3 October 2016, finding that the terms of Orders No. 226 (NY/2016) and No. 230 (NY/2016), concerning the disclosure of the OHRM roster, were fully complied with.

*Joint submission of 4 October 2016*

24. On 4 October 2016, the parties filed a joint submission pursuant to Order No. 225 (NY/2016). The parties did not provided an agreed-upon list of witnesses as required by Order No. 225 (NY/2016). Instead, the Respondent identified three witnesses and attached signed statements of the evidence that they will present. The Applicant, however, stated that he had previously requested seven witnesses (three of whom—Ms. Novicki (chair of the First Fact-Finding Panel), Ms. Loregnard (Special Assistant to the Under-Secretary-General, DGACM), and Mr. Ssekandi (member of the Second Fact-Finding Panel)—were the same individuals called by the Respondent) and that his request remained pending. The Applicant provided no signed statements of evidence in relation to any of the persons identified by him.

*Applicant's motion of 5 October 2016*

25. On 5 October 2016, the Applicant filed a motion stating that his “motion to the Dispute Tribunal [of 14 September 2016] to call the two other members of the fact-finding panels and the responsible official [i.e., Mr. Gettu, former Under-Secretary-General, DGACM] as witnesses during the hearing is still pending with the Tribunal.” He requested the Tribunal to postpone the hearing scheduled for 6 October 2016, stating that the parties had previously agreed to hold a two-day hearing.

*Respondent's response of 5 October 2016*

26. On 5 October 2016, the Respondent filed a response to the Applicant's motion of 5 October 2016. The Respondent submitted that there was no need for a two-day hearing and that “a hearing of half a day is sufficient to hear the testimony of the witnesses identified by the Respondent in the Joint Submission dated 4 October 2016.” The Respondent requested to maintain the allocation of one full day (6 October 2016) for the hearing on the merits. The Respondent also objected to the Applicant's motion to call additional witnesses.

*Order No. 233 (NY/2016) of 5 October 2016*

27. By Order No. 233 (NY/2016) dated 5 October 2016, the Tribunal denied the Applicant's motion to postpone the hearing scheduled for 6 October 2016, noting that the two cases had been scheduled by Order No. 225 (NY/2016), dated 28 September 2016, with no objections from the parties. The Tribunal noted that the Applicant did not file any signed statements of evidence. The Tribunal directed that the following persons testify at the hearing on 6 October 2016: (i) Ms. Novicki; (ii) Ms. Loregnard; and (iii) Mr. Ssekandi. The Tribunal considered and rejected the

Applicant's request for three additional witnesses, for reasons articulated in Order No. 233 (NY/2016).

*Motion for recusal*

28. At 5:29 p.m. on 5 October 2016, after receipt of Order No. 233 (NY/2016), the Applicant filed a "Request to the President of the Dispute Tribunal for Recusal of the Case Judge." The Applicant stated, *inter alia*:

... During the case management discussion on 27 September 2016, the Case Judge informed the parties in attendance that his last day with the Dispute Tribunal in New York would be 14 October 2016, and that if the Case was not concluded by then, it could possibly be reassigned to another Judge in the Dispute Tribunal in New York.

... It is clear that the Case Judge desires and is intent on concluding the proceedings and issuing a judgment before his departure. Yet, the imminent departure of the Judge presents a clear conflict of interest that is bound to lead to rush to judgment rather than fair and expeditious disposal of justice and censors the Applicant's rights of due process of law.

...

... For the reasons set out above, the Applicant regrettably requests the recusal of the Case Judge in the present proceedings and reassignment of Cases No. UNDT/NY/2015/035 and No. UNDT/NY/2015/035 to another Judge in the Dispute Tribunal in New York.

29. At 5:50 p.m. on 5 October 2016, the Registry informed the parties by email as follows:

On instructions of Judge Hunter, in view of the Applicant's "Request to the President of the Dispute Tribunal for Recusal of the Case Judge," filed at 5:30 p.m. on 5 October 2016, the hearing scheduled for 6 October 2016 is cancelled.

## **Suspension of proceedings**

30. Article 28 to the Rules of Procedure states

### **Article 28 Recusal**

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.

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.

3. The Registrar shall communicate the decision to the parties concerned.

31. Article 27 of the Rules of Procedure defines a conflict of interest as follows:

### **Article 27 Conflict of interest**

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.

32. Article 28 of the Rules of Procedure requires requests for recusal to be considered by the President of the Dispute Tribunal. The proceedings in the present case shall therefore be suspended pending the decision of the President of the Dispute Tribunal on the Applicant's request for recusal.

IT IS ORDERED THAT:

33. The present proceedings are suspended pending the decision of the President of the Dispute Tribunal on the Applicant's request for recusal.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 10<sup>th</sup> day of October 2016