



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/035
UNDT/NY/2015/062
Order No.: 267 (NY/2016)
Date: 2 December 2016
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER
ON MOTION FOR RECUSAL**

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant filed two applications with the New York Registry of the Dispute Tribunal, which were registered under Cases No. UNDT/NY/2015/035 and UNDT/NY/2015/062.

2. On 1 July 2016, both cases were assigned to Judge Alexander W. Hunter, Jr., who, after consultation with the parties, decided to consolidate them into a combined proceeding.

3. On 5 October 2016, and after some case management, including a case management discussion held on 27 September 2016, the Applicant filed a motion for recusal of Judge Hunter, Jr. pursuant to art. 28.2 of the Tribunal's Rules of Procedure.

4. By Order No. 237 (NY/2016) of 10 October 2016, the Tribunal ordered that the proceedings in the two above-mentioned cases be suspended, pending the decision of the President of the Dispute Tribunal on the Applicant's request for recusal.

5. By letter dated 12 October 2016, the undersigned, in his capacity as President of the Dispute Tribunal, asked Judge Hunter, Jr. to submit his written comments on the Applicant's request for recusal, which he did on 14 October 2016.

Applicant's submission

6. In the motion for recusal, the Applicant noted that Judge Hunter, Jr. had informed the parties, at the case management discussion on 27 September 2016, that his last day with the New York Registry would be 14 October 2016, and that if the case was not concluded by then, it could possibly be reassigned to another New York Judge of the Dispute Tribunal. The Applicant further stated that:

29. 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 censures the Applicant's rights of due process of law.

30. The Applicant notes in this regard that his request to the Dispute Tribunal to call the two other members of the fact-finding Panels and the responsible official as witnesses during the hearing has remained pending with the Tribunal since 28 July, before denying it in Order 233 (NY/2016) late in the afternoon on the day before the hearing. Further, the agreement between the parties on holding a two day hearing on the merits, which was abdicated by the Dispute Tribunal in its Order No. 225 (NY/2016) on the misunderstanding that the parties indicated in their joint submission dated 14 September 2016 that the only date on which both parties were available in the first half of October was Thursday, 6 October 2016, is a matter of record. Thus, neither the Respondent's reversal of a mutually signed and submitted agreement pursuant to a Tribunal Order nor for that matter the Tribunal's reason for ordering and upholding a one day of hearing justifies abdicating the parties' agreement on record. Further, it is obligatory to call all witnesses rather than have one witness testify on behalf of all others. They, however, are revealing of the conflict arisen on part of the Case Judge due to his desire to issue a judgment before his imminent departure, as well as infringe upon the Applicant's rights of due process of law.

31. The Applicant is fully intent on abiding by the agreement of the two parties, as he believes it is in his best interest and will allow him the opportunity to argue his case and illicit the necessary evidence from the witnesses to refute the Respondent's submission.

32. 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.

Judge Hunter, Jr.’s response

7. In his comments dated 14 October 2016, Judge Hunter, Jr. noted that the Applicant had filed his request for postponement of the hearing only one day prior to it, namely on 5 October 2016. He further stressed that there had been a reasonable prospect of concluding the hearing on 6 October 2016, and that if additional matters had arisen at the hearing, necessary arrangements would have been made to extend it. He stressed also that “although the current period of [his] deployment end[ed] on 14 October 2016, this [did] not preclude [him] from disposing of these two cases during [his] next deployment cycle”.

Consideration

8. The Tribunal’s Rules of Procedure provide in art. 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.

9. Article 27 (Conflict of interest) of said ruled further provides:

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.

10. In submitting that Judge Hunter, Jr. has a conflict of interest, the Applicant's main argument is that his "imminent departure [...] is bound to lead to rush to judgment rather than fair and expeditious disposal of justice and censures the Applicant's rights of due process of law". He supports his argument by referring to some procedural decisions taken by Judge Hunter, Jr. during case management.

11. The Tribunal has closely looked at the definition of conflict of interest provided by art. 27 of its Rules of Procedure and notes that the Applicant does not allege that the present case falls under art. 27.2 (b) or (c), which provide concrete examples of conflict of interest, namely cases involving "[a] person with whom the judge has a personal, familiar or professional relationship" or "[a] matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness".

12. It further finds that the fact that a Judge's deployment to a certain Registry comes to an end does not constitute a "[circumstance] 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" (art. 27.2(c)). Neither can it be considered as a 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" (art. 27.1).

13. In this respect, the Tribunal notes that the Applicant is concerned about procedural decisions taken by Judge Hunter, Jr.—allegedly “due to his desire to issue a judgment before his imminent departure”—and finds that the Applicant can raise them, if he considers it to be appropriate, in an appeal, if any, with the United Nations Appeals Tribunal. Procedural decisions during case management, such as the ones referred to by the Applicant, cannot serve as an argument to contest Judge Hunter, Jr.’s impartiality or independence, or otherwise lead to the perception by a reasonable and impartial observer that his participation in the adjudication of the matter would be inappropriate.

14. The Tribunal further notes that while it has three Registries, it is one single Tribunal, with one jurisdiction. Therefore, while Judges are assigned to a certain Registry, it does not preclude them from working on cases from another Registry. For the Tribunal’s permanent or ad litem Judges, this will usually occur upon transfer of cases from one Registry to another.

15. With respect to its half-time Judges, like Judge Hunter, Jr., their particularity lies in the fact that as practice has evolved, they are being deployed, for two terms per year, to one or two Registries of the Tribunal. While it would be ideal to have them finish cases started at one Registry during their term there, nothing precludes them from concluding during their next deployment, wherever that may be, the adjudication of cases assigned to them and still pending at the end of a deployment. Indeed, there have been several instances in which half-time Judges finalized cases started during deployment to one particular Registry while deployed to another Registry. In light of it being one Tribunal, this is simply a matter of logistics, and not of jurisdiction.

16. Such logistical considerations cannot be construed as a factor which “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”. Neither do they make the participation of Judge Hunter, Jr. in the adjudication of the present matter inappropriate. Indeed, the independence and impartiality of Judge Hunter, Jr. do not depend on such practical constraints.

Decision

17. The motion for the recusal of Judge Hunter, Jr. is rejected.

(Signed)

Judge Rowan Downing

Dated this 2nd day of December 2016

Entered in the Register on this 2nd day of December 2016

(Signed)

René M. Vargas M., Registrar, Geneva