



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/035
UNDT/NY/2015/062
Order No.: 5 (NY/2017)
Date: 11 January 2017
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 Nos. 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, the Applicant filed a motion for recusal of Judge Hunter, Jr. pursuant to art. 28.2 of the Tribunal's Rules of Procedure, which was rejected by Order No. 267 (NY/2016) of 2 December 2016 issued by the UNDT President.

4. By Order No. 273 (NY/2016) of 6 December 2016, the Tribunal ordered the parties to attend a hearing in both cases on Thursday, 12 January 2017, at 9.30 a.m. (NY time), and potentially on Friday, 13 January 2017.

5. By motion dated 5 January 2017, the Applicant requested, *inter alia*, postponement of the scheduled hearing, on the grounds that he had been called as a juror before the New York Supreme Court on Monday 9 January 2017, and that the jury service had already previously been postponed twice. He also requested that two additional witnesses be called at the hearing.

6. By Order No. 2 (NY/2017) of 9 January 2017, the Tribunal requested further information as to whether the Applicant had been instructed to serve as a juror on 12 and 13 January 2017. It further decided to deny the Applicant's request that two additional witnesses be called.

7. On 10 January 2017, at 4.34 p.m. (New York time), the Applicant filed a request for recusal of Judge Hunter, Jr. pursuant to art. 28.2 of the Tribunal's Rules of Procedure. The New York Registry promptly forwarded the request to the Geneva Registry, on the same day.

8. By letter dated 11 January 2017, the undersigned, in his capacity as President of the Dispute Tribunal, asked Judge Hunter, Jr. to submit his urgent written comments on the Applicant's request for recusal, before 10 a.m. (New York time), on the same day, which he did.

Applicant's submission

9. In the motion for recusal, the Applicant referred to Order No. 256 (NY/2016), by which Judge Greceanu recused herself from Case No. UNDT/NY/2016/028. The Applicant stated the following:

37. That is, in the view of Judge Greceanu, a reasonable perception of a conflict of interest has arisen from the Dispute Tribunal Judgment No. UNDT/2016/106 which was rendered by the Case Judge in the present proceedings in a different case involving the New York Registry, even if Case No. UNDT/NY/2016/028 of Judge Greceanu does not involve the Registry in any way and that Paragraph 10 in Judgment No. UNDT/2016/106 cited by Judge Greceanu [in] Order No. 256 (NY/2016) was subsequently deleted from the second Corrigendum UNDT/2016/106/Corr.2 issued on 22 August 2016. Whereas the Case Judge in the present proceedings has asserted in Judgment No. UNDT/2016/106 that no conflict of interest existed, the Judgment in the view of Judge Greceanu has given rise to conflict of interest on her part.

38. It is common cause that the values and principles adopted by the General Assembly to establish the standards for conduct of the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, and to provide guidance to those judges, apply the same in similar situations. There could not be a perception of conflict of interest and no such perception by Tribunal Judges in similar situations. In the present proceedings, the perception of conflict of interest is even markedly more evident given that the Case Judge, unlike Judge Greceanu, is the same in Case No. UNDT/NY/2016/036 and in the present proceedings and both involve the Registry.

39. Initially, the Case Judge in the present proceedings has reasoned in Order No. 233 (NY/2016) that the Applicant had not explained why [both] members of the interview panels would be needed, as if there was need to explain why one of the panel members would likely be needed or have information more than the other. Subsequently, without evidence or reason, the present

Judge in Order No. 2 (NY/2017) figured out that the testimony of both members of the panel would be cumulative, and even so it would still be desirable to call the former Principal Registrar as a witness. These are not merely procedural decisions that can be appealed with the United Nations Appeals Tribunal, but are symptomatic of conflict of interest.

10. He therefore requested the recusal of Judge Hunter, Jr. in the present proceedings, and the reassignment of Cases Nos. UNDT/NY/2015/035 and UNDT/NY/2015/062 to another Judge in the Dispute Tribunal in New York.

Judge Hunter, Jr.'s response

11. After recalling the procedural history to these cases, Judge Hunter, Jr. noted that the Applicant had filed two consecutive motions on 10 January 2017, one advising that he had not been called as a juror on 12 and 13 January 2017 and the other seeking the Judge's recusal, mainly on the grounds that he had denied the Applicant's request to call two additional witnesses. In this respect, Judge Hunter, Jr., stated the following:

It is unclear how the fact that not calling as proposed witnesses, Mr. [G.] and Ms. [S.], the latter whose evidence is deemed cumulative and whom incidentally is the former Principal Registrar in the Office of Administration of Justice, constitutes a conflict of interest that would preclude me from hearing the cases. As you are aware, I have had no personal or professional interaction with the former Principal Registrar. I also observe that a Principal Registrar does not work on Tribunal cases nor assist Judges in the day to day work of the Tribunal. The reasons for rejecting Mr. [G.] as a witness were laid out in Order No. 233 of 5 October 2016. The Applicant opted to object to this matter at the 11th hour. There is nothing in my conduct of the proceedings in these two cases that could result in apparent or actual conflict of interest.

12. He therefore requested that the motion be rejected and that the Applicant be informed that the hearing shall proceed as scheduled.

Consideration

13. 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.

14. Article 27 (Conflict of interest) of said rule 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.

15. The Tribunal has carefully examined the Applicant’s request, and has also taken into account the case history as far as it was relevant for the determination of the Applicant’s request for recusal of Judge Hunter, Jr., of 10 January 2017.

16. It notes that the main reason provided by the Applicant is Judge Hunter, Jr.’s decisions with respect to the calling of particular witnesses, as contained in Orders Nos. 233 (NY/2016) and 2 (NY/2017). The Tribunal disagrees with the Applicant’s view that “[t]hese are not merely procedural decisions that can be appealed with the United Nations Appeals Tribunal, but are symptomatic of

conflict of interest”. The Tribunal finds that while the Applicant may be in disagreement with these case management decisions by Judge Hunter, Jr., they are not susceptible to demonstrate any conflict of interest on behalf of the latter pursuant to the terms of the above-referenced provisions of the Tribunal’s Rules of Procedure. In this respect, the Tribunal recalls what it stated in Order No. 267 (NY/2016), namely that “[p]rocedural decisions during case management ... 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”.

17. The Tribunal further notes that the decision by Judge Greceanu to recuse herself from Case No. UNDT/NY/2016/028—as contained in Order No. 256 (NY/2016)—was a personal one, and is of no assistance or relevance for the cases at hand. It is the Tribunal’s view that Judge Greceanu’s self-recusal does not in any way assist in determining if a conflict of interest existed in the cases at hand, or in any other case, as per the definition contained in art. 27 of the Tribunal’s Rules of Procedure.

18. Having carefully reviewed the matter, the Tribunal is not satisfied that there is any ground whatsoever to grant the Applicant’s request for recusal.

19. Further, the Tribunal wishes to underline that it was inappropriate for the Applicant to have filed the present request for recusal only on 10 January 2017, almost at close of business, while the matter had been set down for a hearing in the morning of 12 January 2017. It is noted that the matters complained of had been well known to the Applicant for some time. In the future, such conduct may be regarded as an illegitimate attempt by the Applicant to interfere with the smooth running of the Tribunal’s proceedings and of the administration of justice, and may be found to be vexatious.

Decision

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

21. The hearing scheduled for tomorrow, **Thursday, 12 January 2017, 9.30 a.m.** (New York time) is maintained.

(Signed)

Judge Rowan Downing

Dated this 11th day of January 2017

Entered in the Register on this 11th day of January 2017

(Signed)

René M. Vargas M., Registrar, Geneva