



UNITED NATIONS DISPUTE T7

Case No.: UNDT/GVA/2009/60

Order No.: 86 (GVA/2010)

Date: 30 November 2010

Introduction

1. This Order disposes of the Applicant's second request for recusal of Judge Jean-François Cousin, to whom her case is assigned.

Facts

2. By letter dated 14 July 2009, the Applicant submitted to the Dispute Tribunal an incomplete application. In her letter, she requested, among other things, the recusal of the New York Registrar in view of the latter's role as representative of the Administration when the Applicant's case was before the Joint Appeals Board ("JAB").

3.

9. By Order No. 71 (GVA/2010) dated 31 August 2010, Judge Cousin took several actions, including re-opening the case and requesting the Applicant to complete her application in accordance with article 8 of the Tribunal's rules of procedure by no later than 1 October 2010.

10. On 1 September 2010, the Applicant addressed to the President of the Dispute Tribunal, Judge Thomas Laker, a first request for recusal of Judge Cousin, together with a motion for change of venue from Geneva to New York.

11. By Order No. 72 (GVA/2010) dated 17 September 2010, the President rejected the Applicant's first request for recusal on the grounds that it was without merit and referred the matter to Judge Cousin to decide on the motion for change of venue.

12. By Order No. 73 (GVA/2010) dated 21 September 2010, Judge Cousin rejected the Applicant's motion for change of venue and extended the time limit for her to complete her application from 1 to 15 October 2010.

13. By email dated 15 October 2010 (Friday), the Applicant's newly designated Counsel submitted to the New York Registry of the Tribunal—without informing the Geneva Registry where the i n f o r

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Respondent to submit his reply to the application within 30 days of receipt of the Order. In his Order, Judge Cousin noted that by addressing the above-mentioned emails of 15 and 17 October 2010 to two different Registries, Counsel for the Applicant had attempted to mislead the Tribunal and had acted in disregard of Order No. 72 rejecting the request for recusal and Order No. 73 rejecting the request for change of venue. More specifically, paragraph 11 of Order No. 80 reads as follows:

11. Il ressort des faits ci-dessus relatés qu'en adressant les courriers électroniques susmentionnés [i.e. of 15 and 17 October 2010] à deux greffes différents d'un même Tribunal, tout en ayant connaissance de l'ordonnance n° 73 (GVA/2010) en date du 21 septembre 2010 du juge en charge de l'affaire refusant le changement du lieu où l'affaire sera jugée, le conseil de la requérante a tenté de tromper le Tribunal et de faire obstacle, par des artifices nécessairement voués à l'échec, d'une part à l'ordonnance du juge susmentionnée, d'autre part à l'ordonnance n° 72 (GVA/2010) en date du 17 septembre 2010 prise par le Président du Tribunal refusant de récuser le juge saisi de l'affaire. Il y a donc lieu pour le Tribunal de rappeler au conseil de la requérante que de telles manœuvres sont inacceptables et qu'elles sont susceptibles de nuire à la sérénité indispensable pour rendre la justice et donc à la cause qu'il est chargé de défendre.

16. By email dated 24 November 2010, Counsel for the Applicant addressed to the President of the Dispute Tribunal an “*ex parte* motion ... on conflicts of interest, recusal and substitution of attorneys” in which he requested among other things the recusal of Judge Cousin.

17. On the same day, 24 November 2010, pursuant to article 28 of the Tribunal's rules of procedure, the President sought Judge Cousin's comments on the Applicant's second request for recusal. Judge Cousin submitted his comments to the President on 26 November 2010.

Applicant's contentions

18. The Applicant's contentions are :

a. “The hostile language used in Order No. 80 has irremediably compromised the serenity and outcome of this case, creates a conflict of interest which calls for a recusal and may lead to a substitution of the

Applicant's attorney". Such language "points to a bias in favo[u]r of the Respondent". "The accusations of 'cheating' and 'obstructing' in Order No. 71 [sic] are unwarranted and abusive. The Counsel's procedures were legitimate, filed in accordance with the mandate received and all in compliance with the UNDT/ROPs". "With the harsh and hostile language used in Order No. 80, without any prior due process, it is respectfully submitted that no more 'serenity' can prevail in the case management and final judgment, unless another judge is appointed";

b. "[T]he UNDT/GVA judge has placed himself in an ethical conflict of interest, by disregarding the major rules of judicial conduct applicable at UNDT (A/65/86), whereby he must: 'Act courteously and respect the dignity of others' (art. 4h & 6e); Comply with the rule of *audi alteram partem* (art. 6a.i); 'Publish reasons for their decision' (art. 6a.iii); Provide open and transparent justice (art. 5)";

c. "[T]he Applicant requested from UNDT/GVA a stay of proceedings pending a final UNAT judgement. Instead, the UNDT/GVA judge reacted harshly on 25 October 2010 with his Order No. 80, and rejected a stay of UNDT proceedings";

d. Counsel for the Applicant "requests the right to '*audi alteram partem*', to be informed of the particulars of any of the 'obstruction' and 'cheating' accusations, and to defend himself".

19. Should the President reject the request for recusal, Counsel for the Applicant requests, among other things, a stay of proceedings and that a UNDT three-judge panel excluding the President (i) rule on the request for recusal "on the basis of the apparent conflicts of interest created by the language of Order No. 80" and (ii) invite Counsel for the Applicant "to defend himself ... against

Considerations

20. At the outset, it should be clarified that this Order will not deal with any issues that have already been addressed in the Tribunal's Order No. 72 (GVA/2010) rejecting the first request for recusal.

21. Article 4.9 of the Dispute Tribunal's statute stipulates:

... Where a party requests [the] recusal [of a judge], the decision shall be taken by the President of the Dispute Tribunal.

22. Article 27 of the Tribunal's rules of procedure defines "conflict of interest" as follows:

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.

23. Finally, article 28.2 of the rules of procedures requires that:

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.

24. None of the situations mentioned in the above-quoted article 27 arise in the present case.

25. The Applicant claims that the language used in Order 80 (GVA/2010) by Judge Cousin has created a conflict of interest. However, upon reviewing the Order in question, the Tribunal has not found "any ... circumstances that would make it appear to a reasonable and impartial observer that [Judge Cousin]'s participation in the adjudication of the matter would be inappropriate", as article

27.2 (c) of the rules of procedure puts it. Nor has it identified “any factor[s] that may impair or reasonably give the appearance of impairing the ability of [Judge Cousin] to independently and impartially adjudicate [the Applicant’s] case”, as required by article 27.1.

26. As already indicated in Order No. 80 (GVA/2010) and in the “Facts” above, it must be stressed that by email dated 15 October 2010, the Applicant’s newly designated Counsel submitted to the New York Registry of the Tribunal—without informing the Geneva Registry where the case is registered and without quoting the case number attributed to the matter by the Geneva Registry—the full application “in order for the Respondent to prepare its Answer within the 30-day timeframe”. Counsel for the Applicant explained in his email that he was submitting the application to the New York Registry “for reasons of geographical proximity and in accordance with UNDT’s RoPs”. In so doing, Counsel for the Applicant clearly disregarded the Tribunal’s Order No. 73 (GVA/2010) rejecting the Applicant’s request for change of venue.

27. Furthermore, by requesting the New York Registry on the one hand to proceed with the application (email dated 15 October 2010) and the Geneva Registry on the other hand to suspend the proceedings (email dated 17 October 2010), Counsel for the Applicant did attempt to mislead the Tribunal and thus engaged in unacceptable manoeuvres.

28. Such manoeuvres justified that the Tribunal call Counsel for the Applicant to order, which it did in Order No. 80 in an entirely proper way. The courtesy and respect for the dignity of others expected of judges should not preclude them from being critical of a party’s counsel when appropriate.

29. In his “45 years of professional services as an attorney ... with an unblemished record of integrity before all Courts”, as he puts it, Counsel for the Applicant should have learned that it is his professional duty to comply with court orders, instead of trying to circumvent them.

30. The Applicant also seeks the referral of her request for recusal of Judge Cousin to a three-judge panel. In this respect, the Tribunal notes that article 28.2 of its rules of procedure only provides for such a referral when the recusal of the President is requested.

31. The Tribunal further notes that the Applicant's second request for recusal of Judge Cousin was filed on an *ex parte*