Before: President Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MONARAWILA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON A MOTION FOR
RECUSAL

Counsel for Applicant:
Ibrahima Faye

Counsel for Respondent:
Alan Gutman, ALS/OHRM
Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant has a matter, Case No. UNDT/NY/2015/024, pending in New York before Judge Goolam Meeran.

2. By a Motion dated 16 September 2015, the Applicant prayed for the recusal of Judge Meeran pursuant to articles 27 and 28 of the Rules of Procedure of the United Nations Dispute Tribunal (UNDT).

The Motion for Recusal

3. The following information has been taken from the Applicant's Motion for Recusal.

4. The Tribunal, by Order No. 149 (NY/2015) dated 20 July 2015, ordered the parties to attend a case management discussion (CMD) on Thursday, 23 July 2015. The Applicant and her Counsel, Mr. Ibrahim Faye, were in attendance as well as Ms. Elizabeth Gall, Counsel for the Respondent.

5. According to the Applicant, Judge Meeran stated in his opening remarks that (i) her case could have been thrown out easily or held amongst other pending cases that would be untouched for a few years owing to the work load of the Court; (ii) that he had other more important meritorious cases to review; and (ii) went on to analyse the Applicant's "body language" to assess her determination to go through the entire process "win or lose" (in the Judge's own words) alongside other comments.

6. These observations in the view of the Applicant were an attempt "to indirectly encourage both [her] and her Counsel to exit this judicial system".

7. By Order No. 169 (NY/2015), Judge Meeran rescheduled the CMD for 29 July 2015 at the request of the Respondent.

8. The CMD held on 29 July 2015 was attended by the Applicant and Mr. Faye, Ms. Gall accompanied by Ms. Carol Boykin and Mr. Ernest Hunt, both from the Investment Management Division of the United Nations Joint Staff Pension Fund (IMD/UNJSPF) as well as Mr. Phillip David (Legal Officer, IMD/UNJSPF) who was not invited but allowed to attend the CMD. The Judge did not question Mr. David's presence. Ms. Carol Boykin and Mr. Ernest Hunt were not in attendance at the CMD on 23 July 2015.

9. Judge Meeran issued Order No. 171 (NY/2015) on 30 July 2015 ordering a stay of proceedings for 30 days to enable the parties to pursue possible alternate dispute resolution and with a re

The Tribunal is of the view that this case can be decided on the basis of the documents already filed, and the responses from the parties to this order.

By 5:00 p.m. on Friday, 11 September 2015, the Respondent is to file a submission, not exceeding three pages, stating whether it is his case that the issues raised by the Applicant have, in effect, been settled by reassigning her to new duties and responsibilities and, if so, to state the date of the said reassignment, giving sufficient particulars thereof. The Respondent is also to explain what other steps, if any, were taken prior to the reassignment to deal with the Applicant's complaints about an excessive workload given her medical condition.

By 5:00 p.m. on Thursday, 17 September 2015, the Applicant is to provide comments on the Respondent's response to para 4 of this order.

On reviewing the parties' responses to this order, the Tribunal will, if necessary, schedule a case management discussion ("CMD") for 11:00 a.m. on Monday, 21 September 2015. The parties are to keep this date free. The Tribunal will notify the parties on 18 September 2015 if the CMD is to go ahead.

14. Upon receipt of the Respondent's response dated 11 September 2015 [illegible] Order No. 215 (NY/2015), Judge Meeran issued Order No. 229 (NY/2015) without waiting for the Applicant's reply scheduled for 17 September 2015 as ordered in Order No. 215 (NY/2015).

15. The Applicant submits that Order No. 229 (NY/2015) did not give her any opportunity to challenge, confirm or otherwise refute the Respond

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18. The Applicant's request is:

> Given the manner in which Case No. UNDT/NY/2015/024 has been handled thus far, it is the Applicant's view that Judge Meer's inability

kind the Tribunal had two options. The case could be determined on

consideredHe indicated that the Tribunal would have to decide whether to strike out the excess pages or exceptionally grant leave to receive the additional pages provided that there is no prejudice to the Applicant.

Considerations

26. The present request for recusal brings in sharp focus how litigants misconceive the purport of a CMD and the role of a judge at such a CMD. A CMD is held in privatewith a judge sitting alone. If a litigant believes that at a CMD a judge should just stay passive then that litigant is mistaken. In the case of Nielsen[1] it was held:

> A litigant who appears before a judge in the course of a CMD should not labour under the impression or be allowed to do so in the belief that a

29. While art. 19 sets out in general terms what a judge can do in the interest of justice in practical terms that article is silent on the concrete procedures or measures that a judge should follow or take, as the case may be, to achieve the aim of a CMD. This is so because a CMD may mean different things to litigants.

30. In essence a CMD allows a judge to pursue all available legal means in order to achieve the aim prescribed in art. 19 so that cases are handled with maximum efficiency.

31. The primary aim of a CMD is for the judge and the parties to identify the issues to be determined in the case. Whilst pleadings set out the case of parties more often than not pleadings may also blur the real issues in a case. Identifying the issues in a case cannot and will not be achieved without the active participation of the judge. The judge is bound to ask questions from counsel or the litigants and this may at times involve vigorous questioning or suggestions coming from the judge.

32. A CMD is also an opportunity for the judge to make appropriate suggestions or give directions on discovery of evidence as provided by arts. 18.1 and 18.2 of the UNDT Rules of Procedure.

33. The CMD is also an opportunity to consider procedural aspects such as whether a hearing is required or particular evidence should be gathered.

34. Equally important is the opportunity in the course of a CMD to explore the avenues for mediation and amicable settlement. In the employment sphere, minimal confrontation and litigation leads to a more conducive and healthy working environment. Mediation or amicable settlement is an important feature of the internal justice system of the Organization. The President would do well to recall what the Tribunal stated in *Pirakku* UNDT/2014/093:

> It is obvious that meaningful consultations towards the resolution o] TJ ET Q q Tm [(I)-7(t

> environment and remove the antagonism and friction that usually results from workplace disputes. Treating litigation as the absolute last resort allows for the efficient use of the Tribunal's (tight) resources and for proceedings to be conducted expeditiously.

35. The informal system of administration of justice has been at the forefront of a number of General Assembly resolutions. At its 67th session held in December 2013 the General Assembly resolved as follows[2]:

> Informal system
>
> 21. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;
>
> 22. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, and in this regard requests the Secretary-General to recommend to the General Assembly at its sixty-eighth session additional measures to encourage recourse to informal resolution of disputes and to avoid unnecessary litigation;
>
> 23. Encourages the Secretary-General to ensure that management responds to requests of the Office of the United Nations Ombudsman and Mediation Services in a timely manner;
>
> 24. Stresses the importance of developing a culture of dialogue and amicable resolution of disputes through the informal system, and requests the Secretary-General to propose, at the main part of the sixty-eighth session of the General Assembly, measures to encourage informal dispute resolution.

36. The General Assembly reiterated this at its 69th session in resolution 69/203 where it:

> 14. Recognizes that the informal system of administration of justice is an efficient and effective option for staff who seek redress of grievances and for managers to participate in;
>
> 15. Reaffirms that the informal resolution of conflict is a crucial element of the system of administration of justice, emphasizes that all possible use should be made of the informal system in order to avoid unnecessary litigation, without prejudice to the basic right of staff

[2] General Assembly Resolution A/RES/67/241 [on the report of the Fifth Committee (A/67/669)]

members of access the formal system of justice and encourages recourse to the informal resolution of disputes.

37. In the same resolution the General Assembly recalled:

[T]

inappropriate influences, inducements, pressures or threats

also to see if indeed there could be a resolution. This is indeed the primary task of a judge to explore the issues in any case before coming to a decision. The President will here refer to the following extract from The Elements of Case Management: A Pocket Guide for Judges[3]

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unfit to deal with her case. "The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased[5]." In the view of the President the all important words from that extract are "real possibility".

45. Taken in isolation and out of context the statement of Judge Meeran about dismissing the case appears unseemly. But the President also acknowledges that in the course of a CMD where exchange of views take place, at times strongly, under the supervision and guidance of the judge, views need to expressed by the judge however unpalatable they may appear to be to a litigant. This is supported by the following:

> Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them[6].

46. The President is not prepared to hold on the basis of that sole statement, that this would produce the appearance of bias on the part of Judge Meeran. The statement must be considered in combination with the overall process of the CMD that involved a number of orders and more than one CMD session. In that connection the President will endorse the following reasoning:

> No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement. It depends upon the circumstances

[5] Lesage v The Mauritius Commercial Bank, Ltd, Privy Council Appeal 0027 of 2011 (2012) UKPC 41
[6] Johnson v Johnson [2000] HCA 48; 201 CLR 488, paragraph 13.