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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/075
UNDT/GVA/2014/076
UNDT/GVA/2014/079
UNDT/GVA/2014/080
Order No.: 015 (NBI/2016)
Date: 2 Febr

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Introduction

1. The Applicant is a staff member of the United Nations Population Fund (“UNFPA”). She filed a number of Applications with the United Nations Dispute Tribunal (UNDT) Geneva Registry. The following cases were closed by judgments delivered by Judge Thomas Laker: Case Nos. UNDT/GVA/2014/009 (Judgment No. UNDT/2014/139); UNDT/GVA/2014/010 (Judgment No. UNDT/2014/032); UNDT/GVA/2014/083 (Judgment No. UNDT/2015/060); UNDT/GVA/2015/122 (Judgment No. UNDT/2015/039); UNDT/GVA/2015/002 (Judgment No. UNDT/2015/061), UNDT/GVA/2015/005 (Judgment No. UNDT/2015/062); and UNDT/GVA/2015/073 (Judgment No. UNDT/2015/063). All of these Applications, except for the one in Case Nos. UNDT/GVA/2014/009, were rejected by Judge Laker.¹

2. The following cases are still pending before UNDT Geneva: Case Nos. UNDT/GVA/2014/028; UNDT/GVA/2014/075; UNDT/GVA/2014/076; UNDT/GVA/2014/079 and UNDT/GVA/2014/080.

The Motion for transfer

3. On 30 June 2015, the Applicant filed a Motion with the UNDT Geneva Registry for a transfer of her cases pending in Geneva to UNDT Nairobi or to assign another judge in Geneva to hear her cases in lieu of Judge Laker who has been and is handling her cases.

4. The Applicant alleges that Judge Laker has not acted fairly and objectively towards her in the conduct of her cases and has only protected the Respondent’s interests. Specifically, the Applicant alleges that in Case No. UNDT/GVA/2014/009:

¹ The Applicant has appealed all the judgments except for Judgment Nos. UNDT/2014/139 and UNDT/2014/032.

He then suggested that the parties consider the option of mediation whilst pointing out to the Respondent's Counsel the adverse consequences on the Organization if certain matters are disclosed in the course of a public hearing. The Applicant was not justified in making the allegations she did as a result of what transpired at the CMD.

The Merits Hearing

11. In the course of the merits hearing on 20 November 2014, Judge Laker made a long statement on the issues in the case. He explained to the parties that a distinction had to be made between the competence of the decision-maker and the reasons for the decision. After a long explanation Judge Laker concluded that if the decision-maker was incompetent that would be the end of the matter.

12. Judge Laker also made some observations on the award of moral damages.

13.

Considerations

16. Whether a judge is dealing with a CMD or a hearing on the merits he/she must act scrupulously within the legal parameters provided by statute and the rules and regulations of his/her mandate and in compliance with ethical standards. These standards would encompass personal conduct as prescribed by section 6(e) of the Code of Conduct (“Code”) for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal² that reads: “When conducting judicial proceedings, judges must act courteously to legal representatives, parties, witnesses, Tribunal staff, judicial colleagues and the public, and require them to act courteously”.

17. The judge should also be scrupulously impartial. This concept which lies at the very core of an independent and transparent judiciary requires the judge not to say any word or act in any way that would be perceived as bias. The word “perceived” is used deliberately as impartiality is much more a question of perception. A judge may be subjectively impartial but if objectively he is perceived as not being so the whole concept of impartiality is destroyed. The Code makes that clear in its sections 1(a) and (b) and sections 2 (a) and (b). Sections 1(a) and (b) provide:

Independence

(a) Judges must uphold the independence and integrity of the internal justice system of the United Nations and must act independently in the performance of their duties, free of any inappropriate influences, inducements, pressures or threats from any party or quarter;

(b) In order to protect the institutional independence of the Tribunals, Judges must take all reasonable steps to ensure that no person, party, institution or State interferes, directly or indirectly, with the Tribunals.

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18. Sections 2 (a) and (b) state:

Impartiality

(a) Judges must act without fear, favour, or bias in all matters that they adjudicate;

(b) Judges must ensure that their conduct at all times maintains the confidence of all in the impartiality of the Tribunals.

19. Case management is provided by article 19 of the UNDT Rules of Procedure and it reads:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

20. Article 19 gives greaET Q q BT 130(e190(gr)-7(e)3(3906F1 10.08 Tf 47J ET Q q BT

22. During a hearing on the merits the role of the judge is more limited as to his intervention than in the course of a CMD. At a hearing the parties should have an opportunity of putting their case, subject to the overall control of the judge and subject to the applicable rules of procedure and evidence and decorum. The judge is however not precluded from asking questions by way of clarification or making observations so long as the judge does not betray any preconceived conclusion or judgment in favour of or against any party.

23. The exchange of views during the CMD does not indicate that Judge Laker stated anything which would have put him in a situation where his independence or impartiality would be imperiled in relation to the cases of the Applicant. On the contrary the judge explained the procedure to the Applicant and even suggested to her and the Respondent to try and come to an amicable settlement in the case.

24. In regard to the merits hearing, it appears that before the parties had an opportunity to present their respective cases Judge Laker made a number of observations and expressed his views on the issues before him. Presumably Judge Laker who had all the pleadings and filings in front of him felt that he was in a position to express his conclusions without first seeking the views of the parties at the hearing on set Qatipn3T8iND0Th99.36 273.12 Tm [(h)19(e)3(a)3(r)-27(i85(0(s)9(s)8 0 Tf()-116(NDT(a)3(t

to conclusions or draw inferences from the facts of a case without first hearing the parties. The essence of a hearing is to allow the parties to present their case and not communicate conclusions to them without first hearing them.

26. The crux of the present matter however is whether by what Judge Laker stated he would be perceived as not being independent.

27. In *Campos* UNDT/2009/005 it was held: “It is well settled that impartiality is determined according to two tests, subjective and objective”.

28. With respect to the objective test, the European Court of Human Rights observed that it must be determined whether, quite apart from the judge's personal conduct; there are ascertainable facts which may raise doubts as to his impartiality³. The test to be adopted in regard to a situation or allegation of potential or actual bias is “the question of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”⁴.

29. The question is also what a fair minded observer would conclude on the conduct of a judge. On this issue reference is made to the case of *Gillies*⁵ where the Privy Council held:

[t]he fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.

³ Hauschildt v Denmark, Series A No. 154, Application No. 10486/3, European Court of Human Rights

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

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi