



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Onana
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

[No. 2010-UNAT-008]

Before: Judge Inés Weinberg de Roca, Presiding
Judge Jean Courtial
Judge Mark P. Painter

Case No.: 2009-009

Date: 30 March 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Katya Melliush

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding Judge.

Synopsis

1. The United Nations Appeals Tribunal (UNAT or Appeals Tribunal) annuls a decision of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) to suspend the implementation of an administrative decision not to renew a contract pending the final determination of the case in substance.

Facts and Procedure

2. Pius Onana (Onana) is a staff member of the United Nations International Criminal Tribunal for Rwanda (ICTR). His post was abolished as of 31 December 2008. However, following an increase in workload, the General Assembly approved the extension of the posts slated for abolition, on the basis of General Temporary Assistance appointments. But Onana was informed on 26 June 2009 that his fixed-term appointment would not be renewed after its expiry on 30 September 2009.

3. On 28 August 2009, Onana filed a request for management evaluation. On 22 September 2009, Onana applied to the Dispute Tribunal for suspension of the implementation of the decision not to renew his appointment. On 13 October 2009, the UNDT issued the impugned decision. It ordered “the suspension of the Respondent’s decision not to renew [Onana’s] appointment until the substantive application is heard and determined”. Moreover, it ordered that Onana “file his substantive application within 15 days of the service of this reasoned ruling on him”.

4. On 30 November 2009, the Secretary-General filed an appeal against the Impugned Decision.

Submissions

Secretary-General’s Appeal

5. The Secretary-General submits that the appeal is receivable, because it was filed in a timely manner in accordance with Article 7(1) of UNAT’s Statute and Article 29(b) of UNAT’s Rules of Procedure.

6. Article 2(1) of UNAT's Statute provides that UNAT "shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal". UNAT's Statute does not clarify whether UNAT may only review a judgment on the merits or whether an interlocutory decision may also be considered a judgment and therefore subject to an appeal. The Secretary-General submits that the UNDT Statute specifically provides that certain types of interlocutory decisions may not be subject to appeal and that such prohibitions would not be necessary if the term "judgment" in Article 2(1) of UNAT's Statute was understood to only encompass a judgment on the merits and to exclude interlocutory decisions.

7. The Secretary-General acknowledges that Article 2(2) of the UNDT Statute prohibits appeals of judgments suspending the implementation of an administrative decision pending management evaluation. The UNDT may order the suspension of the implementation of a contested administrative decision if it determines that the contested decision "appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage". The Secretary-General submits that where the Dispute Tribunal has issued a judgment within the parameters of Article 2(2) of its Statute, the prohibition on appeal set forth in this provision would preclude a party from filing an appeal to challenge the Dispute Tribunal's determination as to whether the relevant criteria were fulfilled. However, the prohibition on appeal must not apply where the Dispute Tribunal issues an order that purports to be based on Article 2(2) of the UNDT Statute, but, in fact, exceeds the UNDT's authority under such article or under the Statute in general. The Secretary-General submits that construing this provision otherwise would empower the Dispute Tribunal to shield all of its judgments from scrutiny by the Appeals Tribunal by simply invoking Article 2(2) of the UNDT Statute when issuing its judgments.

8. Pursuant to Article 2(1) of the Statute, an appeal may be filed against a judgment of the Dispute Tribunal where the Dispute Tribunal has *inter alia* "[e]xceeded its jurisdiction or competence" or "[e]rred on a question of law". The Secretary-General alleges that both of these grounds constitute the basis for appealing the two orders set out in the Impugned Decision.

9. The Secretary-General submits that in making the impugned decision, the UNDT exceeded its competence in two respects.

10. First, the UNDT exceeded its competence by suspending the implementation of the contested administrative decision until the UNDT issued a judgment on the merits of the application. Article 2(2) of the UNDT Statute and Rule 13.1 of the UNDT Rules of Procedure only authorize the UNDT to order suspension of the implementation of a contested administrative decision “during the pendency of the management evaluation”. The Secretary-General submits that the management evaluation was expected and was communicated to Onana on 12 October 2009. UNDT had therefore no authority under Article 2(2) to order a suspension of the contested administrative decision beyond 12 October 2009.

11. Secondly, the Secretary-General submits that even assuming that Onana had filed an application with the UNDT requesting the suspension of the contested decision on 13 October 2009, the UNDT would have had no authority to order a suspension of the contested decision. Article 10(2) of the UNDT Statute states that administrative decisions relating to appointment, promotion or termination may not be suspended by the UNDT. Because the contested decision involves the non-renewal of a fixed-term appointment, the UNDT could not have suspended the decision during the proceedings on the merits before it.

12. The Secretary-General claims that the UNDT exceeded its competence in ordering Onana to file his substantive application within 15 days of the service of the judgment. It maintains that a decision whether or not to file an application with the UNDT lies within an applicant’s discretion and should not be ordered by the UNDT.

Onana’s Answer

13. Onana responds that OLA’s appeal is not receivable because UNDT’s Statute clearly prohibits appeals against interlocutory orders made under Articles 2(2) and 10(2).

14. On the merits, Onana argues that to preclude the UNDT from ordering the suspension of the implementation of the contested decision beyond the completion of management evaluation, would run counter to the rationale underlying Article 2(2) of UNDT’s Statute. He contends that Article 2(2) of the Dispute Tribunal’s Statute does not limit the power of the Dispute Tribunal to suspend implementation of contested administrative decisions “until the management evaluation has been completed”. Rather, Article 2(2) provides that the UNDT is competent to hear and pass judgment on an application by an individual requesting the UNDT to suspend the implementation of a contested decision *filed* “during the pendency of the management evaluation”. The terms

of Article 2(2) merely reflect that the UNDT may issue an order suspending the implementation of the contested decision without imposing any limitation on the duration of the order.

15. Onana further argues that if the Dispute Tribunal had no power to suspend the implementation of a contested decision beyond the completion of management evaluation under Article 2(2), it would effectively render obsolete Article 10(2) of the UNDT Statute, if at the completion of the management evaluation, the Administration can proceed to implement the decision.

16. In response to OLA's contention that the limitations of Article 10(2) of UNDT's Statute apply in the present case, Onana submits that Article 10(2) merely precludes the Dispute Tribunal from ordering suspension of action in cases of "appointment, promotion and termination". The present case, namely the non-extension of a contract, does not fall under these limitations.

17. Onana finally challenges OLA's contention that the UNDT exceeded its competence in ordering him to file his substantive application within a limited time. He avers that this order was clearly issued to expedite proceedings and did not preclude him from deciding whether or not to file a substantive application.

Considerations

18. The Appeals Tribunal noted in *The Secretary-General v. Tadonki* and *The Secretary-General v. Kasmani* that paragraph 28 of General Assembly resolution 63/253 affirms that "the United Nations Dispute Tribunal and the United Nations Appeal sTribunal shall not have any powers beyond those conferred under their respective statutes". Article 2 of the Statute of the Appeals Tribunal as set out in Annex II to that resolution establishes, as a general principle, the right of the parties to appeal the "judgments" rendered by the Dispute Tribunal. That article provides that the Appeal Tribunal is "1. ... competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) Exceeded its jurisdiction or competence; ... 2. An appeal may be filed by either party ... to a judgment of the Dispute Tribunal".

19 The Appeals Tribunal is of the view that the exclusion of the right to appeal a decision to suspend the execution of an administrative decision constitutes an exception to the general principle of the right to appeal and must therefore be narrowly interpreted. As a result, this exception applies only to jurisdictional decisions ordering the suspension of an administrative decision pending a management evaluation. The Appeals Tribunal therefore considers that no jurisdictional decision, no matter how it is named by the Dispute Tribunal, which, as in the present case, orders the suspension of a contested administrative decision for a period beyond the date on which the management evaluation is completed, can be considered as falling within the scope of the exception to the right to appeal as outlined in the aforementioned provisions of Article 2 (2) of the UNAT Statute, and of Article 13 of the Rules of Procedure of the Dispute Tribunal.

20. Article 36 of the UNDT Rules of Procedure does not allow the Dispute Tribunal to violate the provisions of Article 2 (2) of its Statute.

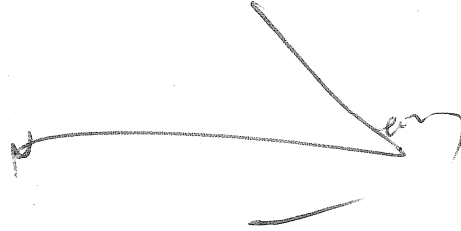
21. In order to give full effect to paragraph 28 of General Assembly resolution 63/253, when dealing with an appeal against a jurisdictional decision of the Dispute Tribunal rendered on the basis of article 2 (2) of its Statute and article 13 of its Rules of Procedure, the Appeals Tribunal needs to decide, whether the Dispute Tribunal has respected the limitations of its scope of jurisdiction under those provisions. In a situation in which the Appeals Tribunal is led to observe that the Dispute Tribunal has exceeded its competence, the appeal will be judged receivable.

22. In the present case the contested decision orders the suspension of the decision not only until the completion of the management evaluation but until the judgment on the merits of the case has been rendered. In view of the foregoing, the appeal is receivable and the Appeals Tribunal decides that the Dispute Tribunal exceeded the limits of its jurisdiction or competence under article 2 (2) of its Statute.

23. In light of the above there is no need for the Dispute Tribunal to shorten the time limits for Onana's application on the merits.

Judgment

24. The contested decision is annulled.



Judge Weinberg de Roca, Presiding



Judge Courtial



Judge Painter

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT