

Translated from French

UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Kasmani
(Respondent/Applicant)

v.

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

JUDGMENT
[No. 2010-UNAT-011]

Before: Judge Jean Courtial, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Case No.: 2009-015

Date: 30 March 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Katya Melliush
Counsel for Appellant/Respondent: Phyllis Hwang

Judge Jean Courtial, Presiding Judge

Synopsis

1. The United Nations Appeals Tribunal has received an appeal submitted by the Secretary-General of the United Nations on 16 December 2009 against judgment No. 2009/63 in which the United Nations Dispute Tribunal ordered the suspension of action to execute the decision not to renew Mr. Kasmani's appointment until the decision on the merits of the application he had submitted was reached. The Appeals Tribunal considers that the application of the Secretary-General is receivable and that there are grounds to maintain that the Dispute Tribunal, by having ordered the suspension of the execution of the contested administrative decision beyond the date on which the management evaluation was completed, had exceeded the limits of the jurisdiction conferred on it by article 2, paragraph 2, of its Statute and that the contested decision on jurisdiction should be reversed.

Facts and procedure

2. Mr. Kasmani was recruited by the United Nations Office at Nairobi (UNON) on 4 June 2009 on a three-month fixed-term contract as a Procurement Assistant within the Procurement, Travel and Shipping Section. He was informed in an e-mail from the Human Resources Management Services of UNON on 25 August 2009 that his contract would not be renewed and would therefore end on 3 September 2009. On 28 August 2009, Mr. Kasmani requested a management evaluation of that decision and filed a motion for suspension of action in respect of the decision, which the Dispute Tribunal granted on 3 September 2009. UNON then gave Mr. Kasmani an extension of his contract, first until 3 October 2009 and later until 3 November 2009. On 9 and 15 October 2009, Mr. Kasmani was informed by UNON that his contract would not be renewed and that he would be given compensation equivalent to three months' net base salary. When informed by the Applicant of the motion for suspension of the decision not to renew his contract, the Dispute Tribunal upheld that request in the contested judgment by ordering the suspension of action on the decision until the decision on the merits of the application submitted by Mr. Kasmani had been reached.

Submissions

The Appellant

3. The Secretary-General contends first that his appeal is receivable, notwithstanding the provisions of article 2, paragraph 2, of the Statute of the Dispute Tribunal, which states that the decision rendered by the Dispute Tribunal on a motion for suspension of action on a contested administrative decision during the pendency of a management evaluation shall not be subject to appeal. The appellant/applicant states that the Tribunal itself called the decision for suspension a "judgment", and that any judgment may be appealed in accordance with the provisions of article 2, paragraph 1, of the Statute of the United Nations Appeals Tribunal. The appellant/applicant maintains that a distinction should be made as to whether the Dispute Tribunal had ruled within the scope of application of the provisions of article 2, paragraph 2, of its Statute or whether it had exceeded its competence by taking a decision that does not fall within the scope of those provisions. In the present case, according to the appellant, the Dispute Tribunal issued a ruling that, under cover a decision taken under article 2, paragraph 2, of its

Statute, does not constitute a decision for suspension of action on an administrative decision under management evaluation. No provision of the Statute or of the Rules of Procedure, including article 36 cited in the contested decision, give competence to the Dispute Tribunal to order the suspension of the decision until the judgment on the merits of the application submitted by Mr. Kasmani is determined. In the view of the Secretary-General, the appeal is receivable based on the violation by the Dispute Tribunal of the rules governing its competence.

The Respondent

4. The Respondent maintains that the appeal is not receivable because of the clear provisions of article 2, paragraph 2, of the Statute of the Dispute Tribunal. To view it otherwise would amount to encouraging unnecessary litigation. When the judge orders an unfounded interim measure, its effects can be reversed and the situation redressed in a satisfactory manner when the final decision on the merits of the case is rendered, and if the decision on the merits is unsatisfactory, then an appeal can be filed. The Respondent maintains that the Appellant has used the appeals process in an abusive and groundless manner. The Respondent also notes that a second management evaluation was in progress on the date on which the contested judgment was rendered.

Considerations

5. The order being appealed was issued by the Dispute Tribunal/Nairobi based on article 13, paragraph 1, and article 36 of the Rules of Procedure of that Tribunal. Article 13, paragraph 1, of the Rules of Procedure implements the provisions of article 2, paragraph 2, of the Statute of the Tribunal, stating that “the Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.” Article 36 of the Rules of Procedure gives the Dispute Tribunal, by virtue of the powers conferred on it by article 7 of its Statute, competence to deal with all matters that are not expressly provided for in the rules of procedure.

6. The main issue raised by the appeal is how much weight should be given to the exception to the general principle of law of the right of parties to appeal the decisions rendered by the Dispute Tribunal.

7. The Appeals Tribunal notes that General Assembly resolution 63/253 states in paragraph 28 “that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes”. The Statute of the Appeals Tribunal approved in this resolution establishes in its article 2 a general principle of law, the right of parties to file an appeal against the “judgments” rendered by the Dispute Tribunal. This article provides in particular that the Appeals Tribunal is “(...) competent to hear and pass judgement 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 ...”. Article 2, paragraph 2, provides that “an appeal may be filed by either party (...) to a judgment of the Dispute Tribunal ...”.

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8. The Appeals Tribunal notes that the exclusion of the right to appeal a decision on the suspension of action on an administrative decision constitutes an exception to the general principle of law of the right of appeal and should therefore be interpreted strictly. It thus follows that this exception can be applied only to jurisdictional decisions ordering the suspension of implementation of an administrative decision when a management evaluation is ongoing. On the other hand, the Appeals Tribunal finds that any jurisdictional decision, however it may be described by the Dispute Tribunal (judgment, order or other) which, as in the present case, orders the suspension of the implementation of the contested administrative decision beyond the date on which the management evaluation is completed, cannot be considered as falling within the scope of the exception to the right of appeal as defined in the aforementioned provisions of article 2, paragraph 2, of the Statute and article 13 of the Rules of Procedure of the Dispute Tribunal.

9. Article 36 of the Rules of Procedure does not allow the Dispute Tribunal to violate article 2, paragraph 2, of the Statute.

10. It therefore falls to the Appeals Tribunal, which wishes to give full effect to the principle affirmed in paragraph 28 of General Assembly resolution 63/253, to determine, when dealing with an appeal against a jurisdictional decision of the Dispute Tribunal rendered on the basis of article 2, paragraph 2, of the Statute and article 13 of the Rules of Procedure, whether, and only whether, the Dispute Tribunal has respected the limits of the competence conferred on it by those provisions. Were the Appeals Tribunal to decide that the Dispute Tribunal had not exceeded its jurisdiction or competence, the appeal would be considered non-receivable; were the Appeals Tribunal to decide that the Dispute Tribunal did exceed its competence, the appeal would be found receivable and well founded.

11. In the present case, the contested jurisdictional decision orders the suspension of action on the decision not to renew Mr. Kasmani's contract not just until the completion of the management evaluation but until the judgment on the merits of his application. In view of the foregoing, and without any need to consider whether the second management evaluation was properly initiated, the Secretary-General is receivable and has grounds to maintain that the Dispute Tribunal exceeded the limits of its competence under article 2, paragraph 2, of the Statute and that the contested jurisdictional decision must be annulled.

Judgment

12. The Appeals Tribunal therefore annuls judgment No. 2009/63 of the United Nations Dispute Tribunal.

(Signed) Judge Courtial
Presiding

(Signed) Judge Adinyira

(Signed) Judge Garewal

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

Original: French

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

(Signed) Weicheng Lin, Registrar, UNAT