



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-234

**Villamoran
(Respondent/Applicant)**

v.

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

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Kamaljit Singh Garewal
Judge Luis María Simón

Judgment No.: 2011-UNAT-160

Date: 3 October 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Katya Melliush

Counsel for Appellant/Respondent: Wambui Mwangi

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions, such as decisions on matters of evidence, procedure, and trial conduct, will not be receivable. An interlocutory appeal is only receivable in cases where the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) has clearly exceeded its jurisdiction or competence.¹

2. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the Rules of Procedure of the UNDT (UNDT Rules) have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

3. The Appeals Tribunal finds that the UNDT's Order of a preliminary suspension of the implementation of two administrative decisions for a period of five days, pending its consideration of the suspension request under Article 13 of the UNDT Rules, was properly based on Articles 19 and 36 of the UNDT Rules. The UNDT did not exceed its competence in making the impugned Order. The appeal is therefore not receivable.

4. The Appeals Tribunal further emphasizes that Article 8(6) of the Rules of Procedure of the Appeals Tribunal does not apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction in rendering an interlocutory order and the Administration cannot refrain from executing

¹ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

Facts and Procedure

5. On 19 January 2007, Teresita Villamorán (Villamorán) joined the Organization as a Human Resources Officer at the P-3 level with the Department of Field Support (DFS). Her appointment was extended on multiple occasions, until 8 July 2009, when she was placed on a one-year fixed-term appointment, which was subsequently also extended several times until 7 July 2011.

6. On 18 January 2011, the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM), issued a memorandum on the contractual reform of the United Nations, which *inter alia* stated:

3. ... I would like to remind everyone of the transitional measure implemented on 1 July 2009 for staff members, not endorsed [by a central review body], on fixed-term appointment with more than one year of cumulative service with the Organization as of 30 June 2009 (ex-11-monthers). As you will recall, those staff members were allowed to be given a new fixed-term appointment at the expiration of their appointment after 1 July 2009 for a maximum period of 2 years, during which period they could apply and be selected through the selection system, including review by a central review body.

4. As of 1 July 2011, the staff members subject to the above transitional measure, who were not successful in securing a post through the staff selection system, will start reaching the maximum of two years under fixed-term appointment. Consequently, at the expiration date of their fixed-term appointment, after 1 July 2011, they will be separated from the Organization. They can be re-appointed to a temporary appointment in accordance to the conditions set forth in ST/AI/2010/4. **No exception** to the two-year transitional period will be granted.²

7. According to Villamorán, at a town hall meeting held on 25 May 2011, Villamorán and others present were informed by the Administrative Officer of the Field Personnel Division, DFS, that all staff members whose appointments were ending and who had not

² Emphasis in original.

been regularized through a competitive selection process would be extended under a temporary appointment with no break in service.

8. At that time, Villamorán had applied for several vacancies and was placed on a roster of candidates pre-approved by the CRB, but she had not been regularized through a competitive selection process.

9. Villamorán submits that, after the town hall meeting, the managers in her department confirmed the information that she had received from the Administrative Officer during the town hall meeting.

10. By memorandum dated 26 May 2011, the Director of the Field Personnel Division, DFS, requested the Executive Office of DFS and the Department of Peacekeeping Operations (DPKO) to extend Villamorán's appointment from 8 July 2011 to 7 January 2012, without a break in service, under a temporary appointment.

11. On 3 June 2011, Villamorán sent an email to the Senior Human Resources Officer, Executive Office, DPKO/DFS, asking what would happen to her entitlements under the separation and reappointment on a temporary basis with no break in service.

12. On 8 June 2011, the Executive Office of DPKO/DFS confirmed to Villamorán that, inter alia, she should exercise her home leave given an expectation of an extension of six months. Villamorán thereafter arranged her home leave travel to take place from 18 June 2011 to 8 July 2011, including purchasing an airplane ticket.

13. However, on 16 June 2011, two days prior to her scheduled departure, Villamorán was advised by the Executive Office of DPKO/DFS that, pursuant to advice provided to the Executive Office by OHRM, she would not be able to exercise her home leave and that she would have to take a break in service of 31 days.

14. By memorandum to "All Executive Officers" dated 17 June 2011, the ASG/OHRM issued a memorandum, stating, inter alia, that "[s]taff members who were granted fixed-term appointments subject to the transitional measures, may be considered for temporary appointments under [several] conditions", including the condition that "a minimum 31-day break-in-service should be given between the staff members' fixed-term

appointment and their new temporary appointment”. The memorandum also stated that “[n]o exceptions apply”.

15. According to Villamoran, despite having requested a copy of the memorandum of 17 June 2011 from her Executive Office, she did not receive it prior to the commencement of the proceedings before the UNDT. She was only able to access the document as a result of it being included as an annex to the Secretary-General’s reply to her application for suspension of action.

16. By letter dated 21 June 2011, the Executive Officer of DPKO/DFS informed Villamoran that “[b]y its resolution 63/250, the General Assembly approved a new contractual framework and provided for a new set of Staff Rules effective 1 July 2009. Staff members who served under a [f]ixed-term appointment without selection through a CRB process prior to 1 July 2009 were ‘transitional’ to a new appointment governed by the new staff rules and regulations, and their appointments were limited to a two-year maximum period, beginning on the date of their last reappointment”. The letter further stated that Villamoran’s “transitional [f]ixed-[t]erm [a]ppointment [would] expire on 7 July 2011, and in line with the Transitional Measures, no further extension can be granted beyond that date”. It further stated that “staff members, who were granted fixed-term appointments subject to the transitional measures, may be considered for temporary appointments after a minimum 31-day break-in-service”.

17. According to Villamoran, she received the letter of 21 June 2011 on 23 June 2011 and filed a request for management evaluation on the same day.

18. On 5 July 2011, Villamoran filed an application with the UNDT, requesting the suspension of two administrative decisions: (i) the decision to place her on a temporary appointment after the expiration of her fixed-term contract on 7 July 2011; and (ii) the decision to require her to take a break in service of 31 days prior to her placement on a temporary appointment.

19. On 7 July 2011, the Dispute Tribunal issued Order No. 171 (NY/2011) in the case of *Villamoran v. Secretary-General of the United Nations*. The UNDT noted that “[i]n view of the fact that 7 July 2011 is the last working day before the Applicant’s separation, [it] directed at the hearing, before 5 p.m. (close of business in New York), that the

implementation of the contested decisions be suspended until further order”. It determined that “[i]n view of the complex issues in the present case, further submissions are required for the fair and expeditious disposal of the application and to do justice to the parties”; and that “given that the contested administrative decisions are due to be implemented [that day], it is appropriate, in the special circumstances of the present case, to order the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action”.

20. The UNDT also noted that under Article 13 of the UNDT Rules, the Tribunal has five days from the service of an application on the respondent to consider an application for interim measures; that the application was served on the respondent on 5 July; and that the UNDT therefore had until 12 July 2011 to complete its consideration of the application. The UNDT ordered the suspension of the implementation of the contested administrative decisions until 12 July 2011. It further ordered the filing of additional specified written submissions, and that an additional hearing be held on 11 July 2011.

21. By Judgment No. UNDT/2011/126 dated 12 July 2011, the UNDT dismissed Villamoran’s request for a suspension of the decision to place her on a temporary appointment upon the expiry of her fixed-term appointment on 7 July 2011. But it granted the request for a suspension of the decision requiring Villamoran to take a 31-day break in service prior to her placement on the temporary appointment, pending management evaluation.

22. The Secretary-General appeals Order No. 171 (NY/2011).

Submissions

Secretary-General's Appeal

23. The Secretary-General submits that the appeal is receivable pursuant to Article 2(1) of the Statute of the Appeals Tribunal. He submits that the UNDT exceeded its competence in ordering the suspension of two contested decisions without making any finding as to whether the requirements of a suspension of action under Article 2(2) of the UNDT Statute and Article 13(1) of the UNDT Rules were satisfied; and by ordering the suspension of the implementation of the two contested decisions on legally unsustainable grounds.

24. The Secretary-General submits that, notwithstanding the UNDT's conclusions in its subsequent Judgment, the appeal of the Order is not moot. The actions of the UNDT in this case and other recent cases may be construed as creating a precedent that permits the UNDT to suspend administrative decisions for periods ranging from five days to one month even when there has been no examination of whether the criteria for the suspension of action have been fulfilled. In the present case, the UNDT found in its Judgment that Villamoran's request for a suspension of the decision to place Villamoran on a temporary appointment upon the expiry of her fixed-term appointment was without merit. However, it only made this determination after the Organization had already executed the Order and was liable to pay Villamoran for five days on a fixed-term appointment beyond the expiry of her appointment.

25. The Secretary-General submits that the implementation of General Assembly resolution 63/250 affects hundreds of staff members all of whose fixed-term appointments granted under the transitional arrangements will be expiring in 2011 at the end of the transitional period. He submits that allowing such a practice to stand frustrates the Administration's implementation of the human resources management reform detailed in resolution 63/250 and may potentially result in substantial losses for the Organization. He submits that ordering the Organization to incur any financial expenses in cases where the UNDT has undertaken no examination of the criteria for suspension of an administrative decision is not an appropriate use of public funds.

26. The Secretary-General submits that the UNDT erred by basing the Order for the suspension of the implementation of the two contested decisions on Articles 19 and 36 of the UNDT Rules. Both Articles 19 and 36 are limited to procedural circumstances that may arise in the course of the UNDT's management of the case, and are not related to injunctive relief.

27. Furthermore, the Secretary-General submits that the UNDT suspended the contested decisions to give the Secretary-General time to respond to the application for a suspension of action. The Secretary-General submits that the last minute submission of an application for suspension of action does not provide a legally sustainable basis to grant such a suspension. In this regard, he notes that Villamoran had ample knowledge of the contested decisions and failed to make a timely application to the UNDT.

28. The Secretary-General emphasizes that although DFS honoured the Order pending completion of management evaluation, such action should not be construed as the Secretary-General's acceptance or acquiescence in the lawfulness of the Order. He states that such execution was undertaken as it remained unclear whether there was a legal obligation to comply with an order that was under appeal. The Secretary-General requests guidance on whether the Administration is entitled to refrain from executing an order if it has filed an appeal of the order on the basis that the UNDT exceeded its jurisdiction in issuing such order.

29. The Secretary-General requests that the Appeals Tribunal set aside the UNDT Order suspending the two contested decisions for five days, until 12 July 2011.

Villamoran's Answer

30. Villamoran submits that the appeal is not receivable since it is against an order of suspension of action and an appeal against such orders is clearly prohibited by the UNDT Statute and Rules. Noting the jurisprudence of the Appeals Tribunal, Villamoran submits that the UNDT has not exceeded its jurisdiction and that therefore the appeal should not be received.

31. Villamoran submits that even if the appeal were receivable, the Dispute Tribunal did not exceed its jurisdiction in granting interim relief in the present case. The UNDT,

in accordance with the jurisprudence of the Appeals Tribunal, has inherent jurisdiction to take decisions to safeguard the integrity of the internal justice system.

32. Villamorán submits that the Secretary-General's contention that the Organization undergoes considerable expense in complying with the UNDT's suspension of action orders such as the one in the current case is irrelevant and should not form part of the Appeals Tribunal's considerations.

33. Finally, Villamorán submits that the appeal against an order rendered by the UNDT should not entitle the Secretary-General to refrain from executing it, if he appeals the order on the basis that the UNDT exceeded its jurisdiction in issuing it.

Considerations

34. The Appeals Tribunal needs to establish whether it has competence under Article 2 of its Statute to hear the present interlocutory appeal. Article 2 *inter alia* provides that the Appeals Tribunal is "1. ... competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) Exceeded its jurisdiction or competence".

35. The Statute of the Appeals Tribunal does not clarify whether the Appeals Tribunal may hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings may also be considered a judgment subject to appeal.

36. The Appeals Tribunal has consistently emphasized that appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct. An interlocutory appeal is only receivable in cases where the UNDT has clearly exceeded its jurisdiction or competence.³

³ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062; *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011; *Onana v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005.

37. In the present case, the Secretary-General submits that the UNDT exceeded its competence in ordering the suspension of the two contested decisions on the basis of Articles 19 and 36 of its Rules and without making a finding as to whether the requirements of a suspension of action under Article 2(2) of the UNDT Statute and Article 13(1) of the UNDT Rules were satisfied. The Secretary-General submits that Articles 19 and 36 of the UNDT Rules do not apply to injunctive relief.

38. Under Article 2(2) of the UNDT Statute and Article 13(1) of the UNDT Rules, the Dispute Tribunal shall order a suspension of action 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.

39. Article 7 of the UNDT Statute *inter alia* stipulates:

1. Subject to the provisions of the present statute, the Dispute Tribunal shall establish its own rules of procedure, which shall be subject to approval by the General Assembly.
2. The rules of procedure of the Dispute Tribunal shall include provisions concerning:
 - ...
 - (j) Suspension of implementation of contested administrative decisions;
 - ...
 - (l) Other matters relating to the functioning of the Dispute Tribunal.

40. Article 19 of the UNDT Rules provides that “[t]he 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”. Article 36(1) of the UNDT Rules provides that “[a]ll matters that are not expressly provided for in the rules of procedure

shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute”.

41. The UNDT determined in the impugned Order that “further submissions [were] required for the fair and expeditious disposal of the application and to do justice to the parties”; and that “given that the contested administrative decisions [were] due to be implemented [that day], it [was] appropriate, in the special circumstances of the present case, to order the suspension of the implementation of the contested decisions pending the final determination of the present application for suspension of action”. It noted that under Article 13 of the UNDT Rules, it had five days from the service of an application on the respondent to consider an application for interim measures. The UNDT accordingly ordered the suspension of the implementation of the contested administrative decisions for five days until 12 July 2011.

42. We find no error in the UNDT’s approach. While the Secretary-General correctly contends that Article 36 of the UNDT Rules is limited to addressing matters that are not expressly provided for in the UNDT Rules and that Article 13 of the UNDT Rules expressly provides for the suspension of a contested administrative decision, it does not follow from these contentions that the UNDT cannot rely on Article 36 to ensure that the provisions of the Statute and the Rules are given full effect.

43. Where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the UNDT Rules have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules meaningless in cases where the implementation of the contested administrative decision is imminent.

44. The Secretary-General contends that “[t]he last minute submission of an application for a suspension of action does not provide a legally sustainable basis to grant such a suspension, as was the approach of the Dispute Tribunal in the present case”. While we agree that the UNDT should have explicitly addressed this matter, a review of the record reveals that the decision to impose a break in service following the expiration

of Villamoran's fixed-term appointment was notified to her only on 23 June 2011. She made her request for management evaluation the same day and filed her request for suspension one week later, on 1 July 2011. The UNDT Registry informed her that she had used the wrong form and Villamoran refiled her submission, using the correct form, on 5 July 2011, two days prior to the date the decision would be implemented. In light of the foregoing, we do not find that the urgency was self-created.

45. With respect to the second decision, the decision to place Villamoran on a temporary appointment following the expiration of her fixed-term appointment, we agree with the Secretary-General that the urgency was indeed self-created. We, however, do not find that the UNDT committed an error in this respect. The two decisions were closely interrelated and the UNDT did not err in suspending both of them for a preliminary period of five days.

46. It follows from the above that the UNDT's decision to order a preliminary suspension of five days pending its consideration of the suspension request under Article 13 of the UNDT Rules was properly based on Articles 19 and 36 of the UNDT Rules. We find that the UNDT did not exceed its jurisdiction in rendering the impugned Order. The interlocutory appeal is therefore not receivable.

47. In addition, the Secretary-General seeks guidance on the question of whether an order rendered by the UNDT requires execution in cases where the order is being appealed. He emphasizes that although DFS honoured the Order pending completion of management evaluation, such action should not be construed as the Secretary-General's acceptance or acquiescence in the lawfulness of the Order. He states that such execution was undertaken as it remained unclear whether there is a legal obligation to comply with an order that is under appeal.

48. Article 8(6) of the Rules of Procedure of the Appeals Tribunal provides that "[t]he filing of an appeal shall suspend the execution of the judgement contested". This provision however does not apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

Judgment

49. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 3rd day of October 2011 in Buenos Aires, Argentina; Chandigarh, India; and Montevideo, Uruguay.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 3rd day of October 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar