

Translated from French

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

Case No. 2011-236

Rawat
(Appellee/Applicant)
v.
United Nations Secretary-General
(Appellant/Respondent)

JUDGMENT

Before: Judge Jean Courtial, Presiding
Judge Kamaljit Singh Garewal
Judge Inés Weinberg de la Roca

Judgment No. 2012-UNAT-223
Date: 29 June 2012
Registrar: Weicheng Lin

Counsel for the Appellee/Applicant: Katya Melliush
Counsel for the Appellant/Respondent: Wambui Mwangi

Judge Jean Courtial, Presiding.

Summary

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) is seized of an appeal filed on 15 July 2011 by the United Nations Secretary-General against Order No. 067 (NBI/2011) issued by the United Nations Dispute Tribunal (UNDT) in Nairobi on 30 June 2011. Mr. Jagmohan Singh Rawat produced his brief in reply on 25 August 2011.

2. This tribunal has consistently held the view that, as a general rule, only appeals against judgments dealing with matters of substance are receivable. Appeals against decisions taken in the course of proceedings are not receivable save in the exceptional cases where the UNDT has clearly exceeded its competence. It has become established in the jurisprudence of the Appeals Tribunal that the UNDT clearly exceeds its competence where it takes decisions on matters outside the area of jurisdiction conferred on it by its Statute and the competence inherent in any tribunal called upon to dispense justice in a system of administration of justice governed by law and respect of the rights of those within its jurisdiction.

3. The UNDT ordered a suspension of action on the decision not to extend the appointment of the official. Implementation of the administrative decision was imminent, and there was no fault or delay on the part of the applicant. The decision would have become effective during the period of management evaluation and before the end of the five-day period provided for in article 13 of the UNDT Rules of Procedure. However, conversely to the *Villamorán* precedent, the UNDT failed to comply with the five-working-day limit without giving any reasons whatever for so doing, and in so doing it took a decision which clearly overstepped the limits of its jurisdictional power. The appeal against the contested judgment is receivable and founded. The order is rescinded.

Facts and procedure

4. Mr. Rawat joined the staff of the International Criminal Tribunal for Rwanda (ICTR) in September 2007 as a telecommunications technician in Kigali (Rwanda). His post was abolished on 31 December 2008 in pursuance of the strategy of completion of the work of the ICTR but re-established until 30 June 2011 with resources allocated for temporary staff.

5. On 26 May 2011 the ICTR informed Mr. Rawat by a memorandum that his fixed-term appointment would not be extended beyond 30 June 2011 and that his services would be terminated on the expiry of his contract.

6. On 21 June 2011 Mr. Rawat wrote to the Management Evaluation Unit requesting a review of the administrative decision not to extend his contract beyond 30 June 2011. He submitted an application to the UNDT for suspension of action on the decision. On 30 June 2011 the UNDT issued Order No. 067 (NBI/2011). The Tribunal deemed an oral hearing necessary and ordered a suspension of action on the contested decision until 8 July 2011 (the date on which the hearing was to take place). Consequently the ICTR extended Mr. Rawat's appointment until 8 July 2011.

7. On 8 July 2011 the UNDT issued Order No. 074 (NBI/2011), following a hearing held on the same day, dismissing the application filed by Mr. Rawat seeking a suspension of action on the administrative decision concerning him.

Submissions

The Secretary-General

8. The Secretary-General requests the Appeals Tribunal to consider the appeal receivable and rule that the UNDT exceeded its competence in ordering a suspension of action on the decision not to extend the appointment of Mr. Rawat.

9. The Secretary-General observes that the Appeals Tribunal has declared receivable an appeal against an interlocutory order in which the UNDT exceeded its competence. He asserts that in this specific case the UNDT, in ordering a suspension of action on the decision not to extend the appointment of Mr. Rawat without giving any reasons for its order based on law or fact, did exceed its competence.

10. The Secretary-General also asserts that the appeal against the order is not pointless, since there is a danger that the measures ordered in this and other recent cases may be interpreted as creating a precedent enabling the UNDT to suspend administrative decisions for periods ranging from one week to one month without even verifying that the requirements for a suspension of action are satisfied.

11. In this particular case the UNDT denied the application for suspension of the administrative decision, whereas the Organization had already complied with the first order and paid the applicant eight days' salary after his appointment had expired.

12. The Secretary-General holds that ordering the Organization to undertake financial expenditure where the UNDT has refrained from considering whether suspension of a decision not to extend an appointment is based on valid criteria does not constitute judicious use of public resources. The Appeals Tribunal is requested to rule on whether the Administration is entitled to refrain from executing an order where it considers in good faith that the Tribunal has exceeded its competence and has appealed the order.

Mr. Rawat

13. Mr. Rawat argues that the fact the UNDT did not state its reasons in the order does not mean that it failed to take into consideration the criteria mentioned in article 2 of its Statute. Likewise, the fact that the UNDT did not include any indications on the subject in the order does not mean that the latter constituted an abuse of power. The Statute does not require the Tribunal to state its reasons when it orders interim measures. The UNDT reached its conclusions after giving due consideration to the submissions, and it is reasonable to assume that it considered the three criteria mentioned in article 2 as fulfilled.

14. Article 19 of the Rules of Procedure of the UNDT authorizes it to take decisions regarding case management. The Tribunal clearly issued the order in question to permit appropriate evaluation of an application for the suspension of an administrative decision and give the parties an opportunity to state their cases before

it and call witnesses. In issuing the order the Tribunal had not exceeded its competence.

15. As regards the Secretary-General's submission that an order to the Organization to incur financial expenditure, where the UNDT refrains from considering whether suspension of a decision not to extend an appointment is based on valid criteria, will give rise to injudicious use of public resources, Mr. Rawat affirms that the expenditure incurred by the Organization is irrelevant, since the appeal is concerned with the question of whether the UNDT has exceeded its competence, that being the only circumstance providing valid grounds for an appeal of an order for interim measures.

16. Mr. Rawat argues that the courts enjoy an implicit competence. Although the Statute expressly provides that interlocutory orders or orders providing for interim measures are not subject to appeal, the Appeals Tribunal has on a number of occasions deemed appeals against orders suspending administrative decisions receivable when the UNDT has exceeded its competence. By analogy, the UNDT sought to fill a gap which could otherwise have given rise to an injustice. If the UNDT receives a request for the suspension of an administrative measure but is unable for lack of time to consider it in detail before the date of cessation of service, it must be admitted to have an implicit competence to order a suspension of action on the measure. In the light of the practical impossibility of settling the matter with the requisite diligence, the rights of the parties will thus be protected pending a reasoned decision on the application for suspension.

17. The appeal of the Secretary-General is therefore not receivable, since the matter at issue is an order suspending an administrative measure. Appeals of this type are receivable only if the UNDT has exceeded its competence.

18. Mr. Rawat contests the submission of the Secretary-General that the latter should have the power to refrain from executing an order where he considers in good faith that the Tribunal has exceeded its competence and has appealed against the order.

Considerations

19. This tribunal has consistently held the view that as a general rule only appeals against judgments dealing with matters of substance are receivable. Appeals against decisions taken in the course of proceedings are not receivable save in the exceptional cases where the UNDT has clearly exceeded its competence.¹

20. It has become established in the jurisprudence of the Appeals Tribunal that the UNDT clearly exceeds its competence where it takes decisions on matters outside the area of jurisdiction conferred on it by its Statute and the competence inherent in any tribunal called upon to dispense justice in a system of administration of justice governed by law and respect of the rights of those within its jurisdiction.

21. Consequently, in previous cases where the UNDT has ordered suspension of action on an administrative decision beyond the end of the management evaluation in violation of the limitation of its competence as defined in article 2(2) of its

¹ *Bertucci v. United Nations Secretary-General*, Judgment No. 2010-UNAT-062 (whole Tribunal), Judge Boyko dissenting.

Statute, the Appeals Tribunal has ruled that an appeal against such a decision is receivable and founded.²

22. On the other hand, the Appeals Tribunal has considered that the UNDT enjoys wide powers of appreciation in all matters relating to case management and that it must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for the dispensation of justice.³ For this reason, and in accordance with the provisions of articles 2(2) and 10(2) of the UNDT Statute, appeals against decisions taken in the course of proceedings and relating to procedure, the establishment of proof or the production of documents, or ordering interim measures, are non-receivable, even where the judge of first instance has committed an error of law or fact relating to the application of the conditions to which the grant of a suspension of action is subject or a procedural error.

23. In the present case the Tribunal notes that the decision to suspend action on the contested administrative decision was taken during the management evaluation in accordance with article 2(2) of the Statute of the tribunal of first instance.

24. But the Tribunal also notes that the hearing which ended the period of suspension took place on the ninth working day following the date on which the application for suspension was served on the respondent (27 June 2011, the date mentioned in the contested order), that is to say, four days after the expiry of the period during which, under the provisions of article 13(3) of its Rules of Procedure, the UNDT was required to give a ruling on the request for an interim measure.

25. In the case of *Villamoran v. United Nations Secretary-General*⁴ this tribunal held that where execution of an administrative decision is imminent, through no fault or delay on the part of the applicant, and takes place before the expiry of the five-day period provided for in article 13 of the Rules of Procedure of the UNDT, and if the UNDT is not in a position to take a decision under article 2(2) of its Statute (i.e., because it needs further information or time to reflect on the matter), it must have the discretion to grant a suspension for those five days. To find otherwise would render article 2(2) of the UNDT Statute and article 13 of its Rules of Procedure meaningless in cases where implementation of the administrative decision is imminent.

26. In the present case execution of the administrative order was imminent, and there was no fault or delay on the part of the applicant. The order became effective during the period of management evaluation and before the end of the five-day period provided for in article 13 of the Rules of Procedure. However, in contrast to the *Villamoran* precedent, the UNDT failed to comply with the five-working-day limit without giving any reasons whatever for so doing, and in so doing it clearly exceeded its competence. It took a decision outside the area of jurisdiction conferred on it by its Statute and the competence inherent in any tribunal called upon to

² *Todonki v. United Nations Secretary-General*, Judgment No. 2010-UNAT-005; *Onana v. United Nations Secretary-General*, Judgment No. 2010-UNAT-008; *Kasmani v. United Nations Secretary-General*, Judgment No.2010-UNAT-011; *Igbenedion v. United Nations Secretary-General*, Judgment No. 2011-UNAT-159.

³ *Bertucci v. United Nations Secretary-General*, Judgment No. 2010-UNAT-062 (whole Tribunal), Judge Boyko dissenting.

⁴ *Villamoran v. United Nations Secretary-General*, Judgment No. 2011-UNAT-160.

dispense justice in a system of administration of justice governed by law and respect of the rights of those within its jurisdiction.

27. It follows from the preceding considerations that the UNDT clearly exceeded its competence and that the appeal against the contested order is receivable and founded.

28. There is no need to rule on the question of whether execution of a jurisdictional decision of the UNDT⁵ is imperative if it is appealed. In the United Nations system of administration of justice the Appeals Tribunal was established to pass judgment on existing disputes, but not to give interpretations of the law where there are no cases before it. Suffice it to say, in the interests of justice, that the Tribunal considered this matter in the *Villamorán* precedent.

Judgment

29. Order No. 067 (NBI/2011) is rescinded.

Original and Authoritative Version: French

Done this 29th day of June 2012 in Geneva, Switzerland.

(Signed) Judge Courtial, Presiding

(Signed) Judge Garewal

(Signed) Judge Weinberg de la Rosa

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed) Weicheng Lin, Registrar

⁵ *Warintarawat v. United Nations Secretary-General*, Judgment No. 2012-UNAT-208.